

United States Senate

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

Committee on Homeland Security and Governmental Affairs

Carl Levin, Chairman

Tom Coburn, Ranking Minority Member

WALL STREET AND THE FINANCIAL CRISIS: Anatomy of a Financial Collapse

**MAJORITY AND MINORITY
STAFF REPORT**

**PERMANENT SUBCOMMITTEE
ON INVESTIGATIONS**

UNITED STATES SENATE



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WALL STREET AND THE FINANCIAL CRISIS: Anatomy of a Financial Collapse

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Wall Street and The Financial Crisis: Anatomy of a Financial Collapse

April 13, 2011

In the fall of 2008, America suffered a devastating economic collapse. Once valuable securities lost most or all of their value, debt markets froze, stock markets plunged, and storied financial firms went under. Millions of Americans lost their jobs; millions of families lost their homes; and good businesses shut down. These events cast the United States into an economic recession so deep that the country has yet to fully recover.

This Report is the product of a two-year, bipartisan investigation by the U.S. Senate Permanent Subcommittee on Investigations into the origins of the 2008 financial crisis. The goals of this investigation were to construct a public record of the facts in order to deepen the understanding of what happened; identify some of the root causes of the crisis; and provide a factual foundation for the ongoing effort to fortify the country against the recurrence of a similar crisis in the future.

Using internal documents, communications, and interviews, the Report attempts to provide the clearest picture yet of what took place inside the walls of some of the financial institutions and regulatory agencies that contributed to the crisis. The investigation found that the crisis was not a natural disaster, but the result of high risk, complex financial products; undisclosed conflicts of interest; and the failure of regulators, the credit rating agencies, and the market itself to rein in the excesses of Wall Street.

While this Report does not attempt to examine every key moment, or analyze every important cause of the crisis, it provides new, detailed, and compelling evidence of what happened. In so doing, we hope the Report leads to solutions that prevent it from happening again.

I. EXECUTIVE SUMMARY

A. Subcommittee Investigation

In November 2008, the Permanent Subcommittee on Investigations initiated its investigation into some of the key causes of the financial crisis. Since then, the Subcommittee has engaged in a wide-ranging inquiry, issuing subpoenas, conducting over 150 interviews and depositions, and consulting with dozens of government, academic, and private sector experts. The Subcommittee has accumulated and reviewed tens of millions of pages of documents, including court pleadings, filings with the Securities and Exchange Commission, trustee reports, prospectuses for public and private offerings, corporate board and committee minutes, mortgage transactions and analyses, memoranda, marketing materials, correspondence, and email. The Subcommittee has also reviewed documents prepared by or sent to or from banking and

securities regulators, including bank examination reports, reviews of securities firms, enforcement actions, analyses, memoranda, correspondence, and email.

In April 2010, the Subcommittee held four hearings examining four root causes of the financial crisis. Using case studies detailed in thousands of pages of documents released at the hearings, the Subcommittee presented and examined evidence showing how high risk lending by U.S. financial institutions; regulatory failures; inflated credit ratings; and high risk, poor quality financial products designed and sold by some investment banks, contributed to the financial crisis. This Report expands on those hearings and the case studies they featured. The case studies are Washington Mutual Bank, the largest bank failure in U.S. history; the federal Office of Thrift Supervision which oversaw Washington Mutual's demise; Moody's and Standard & Poor's, the country's two largest credit rating agencies; and Goldman Sachs and Deutsche Bank, two leaders in the design, marketing, and sale of mortgage related securities. This Report devotes a chapter to how each of the four causative factors, as illustrated by the case studies, fueled the 2008 financial crisis, providing findings of fact, analysis of the issues, and recommendations for next steps.

B. Overview

(1) High Risk Lending: Case Study of Washington Mutual Bank

The first chapter focuses on how high risk mortgage lending contributed to the financial crisis, using as a case study Washington Mutual Bank (WaMu). At the time of its failure, WaMu was the nation's largest thrift and sixth largest bank, with \$300 billion in assets, \$188 billion in deposits, 2,300 branches in 15 states, and over 43,000 employees. Beginning in 2004, it embarked upon a lending strategy to pursue higher profits by emphasizing high risk loans. By 2006, WaMu's high risk loans began incurring high rates of delinquency and default, and in 2007, its mortgage backed securities began incurring ratings downgrades and losses. Also in 2007, the bank itself began incurring losses due to a portfolio that contained poor quality and fraudulent loans and securities. Its stock price dropped as shareholders lost confidence, and depositors began withdrawing funds, eventually causing a liquidity crisis at the bank. On September 25, 2008, WaMu was seized by its regulator, the Office of Thrift Supervision, placed in receivership with the Federal Deposit Insurance Corporation (FDIC), and sold to JPMorgan Chase for \$1.9 billion. Had the sale not gone through, WaMu's failure might have exhausted the entire \$45 billion Deposit Insurance Fund.

This case study focuses on how one bank's search for increased growth and profit led to the origination and securitization of hundreds of billions of dollars in high risk, poor quality mortgages that ultimately plummeted in value, hurting investors, the bank, and the U.S. financial system. WaMu had held itself out as a prudent lender, but in reality, the bank turned increasingly to higher risk loans. Over a four-year period, those higher risk loans grew from 19% of WaMu's loan originations in 2003, to 55% in 2006, while its lower risk, fixed rate loans fell from 64% to 25% of its originations. At the same time, WaMu increased its securitization of

subprime loans sixfold, primarily through its subprime lender, Long Beach Mortgage Corporation, increasing such loans from nearly \$4.5 billion in 2003, to \$29 billion in 2006. From 2000 to 2007, WaMu and Long Beach together securitized at least \$77 billion in subprime loans.

WaMu also originated an increasing number of its flagship product, Option Adjustable Rate Mortgages (Option ARMs), which created high risk, negatively amortizing mortgages and, from 2003 to 2007, represented as much as half of all of WaMu's loan originations. In 2006 alone, Washington Mutual originated more than \$42.6 billion in Option ARM loans and sold or securitized at least \$115 billion to investors, including sales to the Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac). In addition, WaMu greatly increased its origination and securitization of high risk home equity loan products. By 2007, home equity loans made up \$63.5 billion or 27% of its home loan portfolio, a 130% increase from 2003.

At the same time that WaMu was implementing its high risk lending strategy, WaMu and Long Beach engaged in a host of shoddy lending practices that produced billions of dollars in high risk, poor quality mortgages and mortgage-backed securities. Those practices included qualifying high risk borrowers for larger loans than they could afford; steering borrowers from conventional mortgages to higher risk loan products; accepting loan applications without verifying the borrower's income; using loans with low, short term "teaser" rates that could lead to payment shock when higher interest rates took effect later on; promoting negatively amortizing loans in which many borrowers increased rather than paid down their debt; and authorizing loans with multiple layers of risk. In addition, WaMu and Long Beach failed to enforce compliance with their own lending standards; allowed excessive loan error and exception rates; exercised weak oversight over the third party mortgage brokers who supplied half or more of their loans; and tolerated the issuance of loans with fraudulent or erroneous borrower information. They also designed compensation incentives that rewarded loan personnel for issuing a large volume of higher risk loans, valuing speed and volume over loan quality.

As a result, WaMu, and particularly its Long Beach subsidiary, became known by industry insiders for its failed mortgages and poorly performing RMBS securities. Among sophisticated investors, its securitizations were understood to be some of the worst performing in the marketplace. Inside the bank, WaMu's President Steve Rotella described Long Beach as "terrible" and "a mess," with default rates that were "ugly." WaMu's high risk lending operation was also problem-plagued. WaMu management was provided with compelling evidence of deficient lending practices in internal emails, audit reports, and reviews. Internal reviews of two high volume WaMu loan centers, for example, described "extensive fraud" by employees who "willfully" circumvented bank policies. A WaMu review of internal controls to stop fraudulent loans from being sold to investors described them as "ineffective." On at least one occasion, senior managers knowingly sold delinquency-prone loans to investors. Aside from Long Beach, WaMu's President described WaMu's prime home loan business as the "worst managed business" he had seen in his career.

Documents obtained by the Subcommittee reveal that WaMu launched its high risk lending strategy primarily because higher risk loans and mortgage backed securities could be sold for higher prices on Wall Street. They garnered higher prices, because higher risk meant the securities paid a higher coupon rate than other comparably rated securities, and investors paid a higher price to buy them. Selling or securitizing the loans also removed them from WaMu's books and appeared to insulate the bank from risk.

The Subcommittee investigation indicates that unacceptable lending and securitization practices were not restricted to Washington Mutual, but were present at a host of financial institutions that originated, sold, and securitized billions of dollars in high risk, poor quality home loans that inundated U.S. financial markets. Many of the resulting securities ultimately plummeted in value, leaving banks and investors with huge losses that helped send the economy into a downward spiral. These lenders were not the victims of the financial crisis; the high risk loans they issued were the fuel that ignited the financial crisis.

(2) Regulatory Failures: Case Study of the Office of Thrift Supervision

The next chapter focuses on the failure of the Office of Thrift Supervision (OTS) to stop the unsafe and unsound practices that led to the demise of Washington Mutual, one of the nation's largest banks. Over a five year period from 2004 to 2008, OTS identified over 500 serious deficiencies at WaMu, yet failed to take action to force the bank to improve its lending operations and even impeded oversight by the bank's backup regulator, the FDIC.

Washington Mutual Bank was the largest thrift under the supervision of OTS and was among the eight largest financial institutions insured by the FDIC. Until 2006, WaMu was a profitable bank, but in 2007, many of its high risk home loans began experiencing increased rates of delinquency, default, and loss. After the market for subprime mortgage backed securities collapsed in July 2007, Washington Mutual was unable to sell or securitize its subprime loans and its loan portfolio fell in value. In September 2007, WaMu's stock price plummeted against the backdrop of its losses and a worsening financial crisis. From 2007 to 2008, WaMu's depositors withdrew a total of over \$26 billion in deposits from the bank, triggering a liquidity crisis, followed by the bank's closure.

OTS records show that, during the five years prior to WaMu's collapse, OTS examiners repeatedly identified significant problems with Washington Mutual's lending practices, risk management, asset quality, and appraisal practices, and requested corrective action. Year after year, WaMu promised to correct the identified problems, but never did. OTS failed to respond with meaningful enforcement action, such as by downgrading WaMu's rating for safety and soundness, requiring a public plan with deadlines for corrective actions, or imposing civil fines for inaction. To the contrary, until shortly before the thrift's failure in 2008, OTS continually rated WaMu as financially sound.

The agency's failure to restrain WaMu's unsafe lending practices stemmed in part from an OTS regulatory culture that viewed its thrifts as "constituents," relied on bank management to

correct identified problems with minimal regulatory intervention, and expressed reluctance to interfere with even unsound lending and securitization practices. OTS displayed an unusual amount of deference to WaMu's management, choosing to rely on the bank to police itself in its use of safe and sound practices. The reasoning appeared to be that if OTS examiners simply identified the problems at the bank, OTS could then rely on WaMu's assurances that problems would be corrected, with little need for tough enforcement actions. It was a regulatory approach with disastrous results.

Despite identifying over 500 serious deficiencies in five years, OTS did not once, from 2004 to 2008, take a public enforcement action against Washington Mutual to correct its lending practices, nor did it lower the bank's rating for safety and soundness. Only in 2008, as the bank incurred mounting losses, did OTS finally take two informal, nonpublic enforcement actions, requiring WaMu to agree to a "Board Resolution" in March and a "Memorandum of Understanding" in September, neither of which imposed sufficient changes to prevent the bank's failure. OTS officials resisted calls by the FDIC, the bank's backup regulator, for stronger measures and even impeded FDIC oversight efforts by at times denying FDIC examiners office space and access to bank records. Tensions between the two agencies remained high until the end. Two weeks before the bank was seized, the FDIC Chairman contacted WaMu directly to inform it that the FDIC was likely to have a ratings disagreement with OTS and downgrade the bank's safety and soundness rating, and informed the OTS Director about that communication, prompting him to complain about the FDIC Chairman's "audacity."

Hindered by a culture of deference to management, demoralized examiners, and agency infighting, OTS officials allowed the bank's short term profits to excuse its risky practices and failed to evaluate the bank's actions in the context of the U.S. financial system as a whole. Its narrow regulatory focus prevented OTS from analyzing or acknowledging until it was too late that WaMu's practices could harm the broader economy.

OTS' failure to restrain Washington Mutual's unsafe lending practices allowed high risk loans at the bank to proliferate, negatively impacting investors across the United States and around the world. Similar regulatory failings by other agencies involving other lenders repeated the problem on a broad scale. The result was a mortgage market saturated with risky loans, and financial institutions that were supposed to hold predominantly safe investments but instead held portfolios rife with high risk, poor quality mortgages. When those loans began defaulting in record numbers and mortgage related securities plummeted in value, financial institutions around the globe suffered hundreds of billions of dollars in losses, triggering an economic disaster. The regulatory failures that set the stage for those losses were a proximate cause of the financial crisis.

(3) Inflated Credit Ratings: Case Study of Moody's and Standard & Poor's

The next chapter examines how inflated credit ratings contributed to the financial crisis by masking the true risk of many mortgage related securities. Using case studies involving Moody's Investors Service, Inc. (Moody's) and Standard & Poor's Financial Services LLC

(S&P), the nation's two largest credit rating agencies, the Subcommittee identified multiple problems responsible for the inaccurate ratings, including conflicts of interest that placed achieving market share and increased revenues ahead of ensuring accurate ratings.

Between 2004 and 2007, Moody's and S&P issued credit ratings for tens of thousands of U.S. residential mortgage backed securities (RMBS) and collateralized debt obligations (CDOs). Taking in increasing revenue from Wall Street firms, Moody's and S&P issued AAA and other investment grade credit ratings for the vast majority of those RMBS and CDO securities, deeming them safe investments even though many relied on high risk home loans.¹ In late 2006, high risk mortgages began incurring delinquencies and defaults at an alarming rate. Despite signs of a deteriorating mortgage market, Moody's and S&P continued for six months to issue investment grade ratings for numerous RMBS and CDO securities.

Then, in July 2007, as mortgage delinquencies intensified and RMBS and CDO securities began incurring losses, both companies abruptly reversed course and began downgrading at record numbers hundreds and then thousands of their RMBS and CDO ratings, some less than a year old. Investors like banks, pension funds, and insurance companies, who are by rule barred from owning low rated securities, were forced to sell off their downgraded RMBS and CDO holdings, because they had lost their investment grade status. RMBS and CDO securities held by financial firms lost much of their value, and new securitizations were unable to find investors. The subprime RMBS market initially froze and then collapsed, leaving investors and financial firms around the world holding unmarketable subprime RMBS securities plummeting in value. A few months later, the CDO market collapsed as well.

Traditionally, investments holding AAA ratings have had a less than 1% probability of incurring defaults. But in 2007, the vast majority of RMBS and CDO securities with AAA ratings incurred substantial losses; some failed outright. Analysts have determined that over 90% of the AAA ratings given to subprime RMBS securities originated in 2006 and 2007 were later downgraded by the credit rating agencies to junk status. In the case of Long Beach, 75 out of 75 AAA rated Long Beach securities issued in 2006, were later downgraded to junk status, defaulted, or withdrawn. Investors and financial institutions holding the AAA rated securities lost significant value. Those widespread losses led, in turn, to a loss of investor confidence in the value of the AAA rating, in the holdings of major U.S. financial institutions, and even in the viability of U.S. financial markets.

Inaccurate AAA credit ratings introduced risk into the U.S. financial system and constituted a key cause of the financial crisis. In addition, the July mass downgrades, which were unprecedented in number and scope, precipitated the collapse of the RMBS and CDO secondary markets, and perhaps more than any other single event triggered the beginning of the financial crisis.

¹ S&P issues ratings using the "AAA" designation; Moody's equivalent rating is "Aaa." For ease of reference, this Report will refer to both ratings as "AAA."

The Subcommittee's investigation uncovered a host of factors responsible for the inaccurate credit ratings issued by Moody's and S&P. One significant cause was the inherent conflict of interest arising from the system used to pay for credit ratings. Credit rating agencies were paid by the Wall Street firms that sought their ratings and profited from the financial products being rated. Under this "issuer pays" model, the rating agencies were dependent upon those Wall Street firms to bring them business, and were vulnerable to threats that the firms would take their business elsewhere if they did not get the ratings they wanted. The ratings agencies weakened their standards as each competed to provide the most favorable rating to win business and greater market share. The result was a race to the bottom.

Additional factors responsible for the inaccurate ratings include rating models that failed to include relevant mortgage performance data, unclear and subjective criteria used to produce ratings, a failure to apply updated rating models to existing rated transactions, and a failure to provide adequate staffing to perform rating and surveillance services, despite record revenues. Compounding these problems were federal regulations that required the purchase of investment grade securities by banks and others, which created pressure on the credit rating agencies to issue investment grade ratings. While these federal regulations were intended to help investors stay away from unsafe securities, they had the opposite effect when the AAA ratings proved inaccurate.

Evidence gathered by the Subcommittee shows that the credit rating agencies were aware of problems in the mortgage market, including an unsustainable rise in housing prices, the high risk nature of the loans being issued, lax lending standards, and rampant mortgage fraud. Instead of using this information to temper their ratings, the firms continued to issue a high volume of investment grade ratings for mortgage backed securities. If the credit rating agencies had issued ratings that accurately reflected the increasing risk in the RMBS and CDO markets and appropriately adjusted existing ratings in those markets, they might have discouraged investors from purchasing high risk RMBS and CDO securities, and slowed the pace of securitizations.

It was not in the short term economic interest of either Moody's or S&P, however, to provide accurate credit ratings for high risk RMBS and CDO securities, because doing so would have hurt their own revenues. Instead, the credit rating agencies' profits became increasingly reliant on the fees generated by issuing a large volume of structured finance ratings. In the end, Moody's and S&P provided AAA ratings to tens of thousands of high risk RMBS and CDO securities and then, when those products began to incur losses, issued mass downgrades that shocked the financial markets, hammered the value of the mortgage related securities, and helped trigger the financial crisis.

(4) Investment Bank Abuses: Case Study of Goldman Sachs and Deutsche Bank

The final chapter examines how investment banks contributed to the financial crisis, using as case studies Goldman Sachs and Deutsche Bank, two leading participants in the U.S. mortgage market.

Investment banks can play an important role in the U.S. economy, helping to channel the nation's wealth into productive activities that create jobs and increase economic growth. But in the years leading up to the financial crisis, large investment banks designed and promoted complex financial instruments, often referred to as structured finance products, that were at the heart of the crisis. They included RMBS and CDO securities, credit default swaps (CDS), and CDS contracts linked to the ABX Index. These complex, high risk financial products were engineered, sold, and traded by the major U.S. investment banks.

From 2004 to 2008, U.S. financial institutions issued nearly \$2.5 trillion in RMBS and over \$1.4 trillion in CDO securities, backed primarily by mortgage related products. Investment banks typically charged fees of \$1 to \$8 million to act as the underwriter of an RMBS securitization, and \$5 to \$10 million to act as the placement agent for a CDO securitization. Those fees contributed substantial revenues to the investment banks, which established internal structured finance groups, as well as a variety of RMBS and CDO origination and trading desks within those groups, to handle mortgage related securitizations. Investment banks sold RMBS and CDO securities to investors around the world, and helped develop a secondary market where RMBS and CDO securities could be traded. The investment banks' trading desks participated in those secondary markets, buying and selling RMBS and CDO securities either on behalf of their clients or in connection with their own proprietary transactions.

The financial products developed by investment banks allowed investors to profit, not only from the success of an RMBS or CDO securitization, but also from its failure. CDS contracts, for example, allowed counterparties to wager on the rise or fall in the value of a specific RMBS security or on a collection of RMBS and other assets contained or referenced in a CDO. Major investment banks developed standardized CDS contracts that could also be traded on a secondary market. In addition, they established the ABX Index which allowed counterparties to wager on the rise or fall in the value of a basket of subprime RMBS securities, which could be used to reflect the status of the subprime mortgage market as a whole. The investment banks sometimes matched up parties who wanted to take opposite sides in a transaction and other times took one or the other side of the transaction to accommodate a client. At still other times, investment banks used these financial instruments to make their own proprietary wagers. In extreme cases, some investment banks set up structured finance transactions which enabled them to profit at the expense of their clients.

Two case studies, involving Goldman Sachs and Deutsche Bank, illustrate a variety of troubling practices that raise conflicts of interest and other concerns involving RMBS, CDO, CDS, and ABX related financial instruments that contributed to the financial crisis.

The Goldman Sachs case study focuses on how it used net short positions to benefit from the downturn in the mortgage market, and designed, marketed, and sold CDOs in ways that created conflicts of interest with the firm's clients and at times led to the bank's profiting from the same products that caused substantial losses for its clients.

From 2004 to 2008, Goldman was a major player in the U.S. mortgage market. In 2006 and 2007 alone, it designed and underwrote 93 RMBS and 27 mortgage related CDO securitizations totaling about \$100 billion, bought and sold RMBS and CDO securities on behalf of its clients, and amassed its own multi-billion-dollar proprietary mortgage related holdings. In December 2006, however, when it saw evidence that the high risk mortgages underlying many RMBS and CDO securities were incurring accelerated rates of delinquency and default, Goldman quietly and abruptly reversed course.

Over the next two months, it rapidly sold off or wrote down the bulk of its existing subprime RMBS and CDO inventory, and began building a short position that would allow it to profit from the decline of the mortgage market. Throughout 2007, Goldman twice built up and cashed in sizeable mortgage related short positions. At its peak, Goldman's net short position totaled \$13.9 billion. Overall in 2007, its net short position produced record profits totaling \$3.7 billion for Goldman's Structured Products Group, which when combined with other mortgage losses, produced record net revenues of \$1.2 billion for the Mortgage Department as a whole.

Throughout 2007, Goldman sold RMBS and CDO securities to its clients without disclosing its own net short position against the subprime market or its purchase of CDS contracts to gain from the loss in value of some of the very securities it was selling to its clients.

The case study examines in detail four CDOs that Goldman constructed and sold called Hudson 1, Anderson, Timberwolf, and Abacus 2007-AC1. In some cases, Goldman transferred risky assets from its own inventory into these CDOs; in others, it included poor quality assets that were likely to lose value or not perform. In three of the CDOs, Hudson, Anderson and Timberwolf, Goldman took a substantial portion of the short side of the CDO, essentially betting that the assets within the CDO would fall in value or not perform. Goldman's short position was in direct opposition to the clients to whom it was selling the CDO securities, yet it failed to disclose the size and nature of its short position while marketing the securities. While Goldman sometimes included obscure language in its marketing materials about the possibility of its taking a short position on the CDO securities it was selling, Goldman did not disclose to potential investors when it had already determined to take or had already taken short investments that would pay off if the particular security it was selling, or RMBS and CDO securities in general, performed poorly. In the case of Hudson 1, for example, Goldman took 100% of the short side of the \$2 billion CDO, betting against the assets referenced in the CDO, and sold the Hudson securities to investors without disclosing its short position. When the securities lost value, Goldman made a \$1.7 billion gain at the direct expense of the clients to whom it had sold the securities.

In the case of Anderson, Goldman selected a large number of poorly performing assets for the CDO, took 40% of the short position, and then marketed Anderson securities to its clients. When a client asked how Goldman "got comfortable" with the New Century loans in the CDO, Goldman personnel tried to dispel concerns about the loans, and did not disclose the firm's own negative view of them or its short position in the CDO.

In the case of Timberwolf, Goldman sold the securities to its clients even as it knew the securities were falling in value. In some cases, Goldman knowingly sold Timberwolf securities to clients at prices above its own book values and, within days or weeks of the sale, marked down the value of the sold securities, causing its clients to incur quick losses and requiring some to post higher margin or cash collateral. Timberwolf securities lost 80% of their value within five months of being issued and today are worthless. Goldman took 36% of the short position in the CDO and made money from that investment, but ultimately lost money when it could not sell all of the Timberwolf securities.

In the case of Abacus, Goldman did not take the short position, but allowed a hedge fund, Paulson & Co. Inc., that planned on shorting the CDO to play a major but hidden role in selecting its assets. Goldman marketed Abacus securities to its clients, knowing the CDO was designed to lose value and without disclosing the hedge fund's asset selection role or investment objective to potential investors. Three long investors together lost about \$1 billion from their Abacus investments, while the Paulson hedge fund profited by about the same amount. Today, the Abacus securities are worthless.

In the Hudson and Timberwolf CDOs, Goldman also used its role as the collateral put provider or liquidation agent to advance its financial interest to the detriment of the clients to whom it sold the CDO securities.

The Deutsche Bank case study describes how the bank's top global CDO trader, Greg Lippmann, repeatedly warned and advised his Deutsche Bank colleagues and some of his clients seeking to buy short positions about the poor quality of the RMBS securities underlying many CDOs, described some of those securities as "crap" and "pigs," and predicted the assets and the CDO securities would lose value. At one point, Mr. Lippmann was asked to buy a specific CDO security and responded that it "rarely trades," but he "would take it and try to dupe someone" into buying it. He also at times referred to the industry's ongoing CDO marketing efforts as a "CDO machine" or "ponzi scheme." Deutsche Bank's senior management disagreed with his negative views, and used the bank's own funds to make large proprietary investments in mortgage related securities that, in 2007, had a notional or face value of \$128 billion and a market value of more than \$25 billion. Despite its positive view of the housing market, the bank allowed Mr. Lippmann to develop a large proprietary short position for the bank in the RMBS market, which from 2005 to 2007, totaled \$5 billion. The bank cashed in the short position from 2007 to 2008, generating a profit of \$1.5 billion, which Mr. Lippmann claims is more money on a single position than any other trade had ever made for Deutsche Bank in its history. Despite that gain, due to its large long holdings, Deutsche Bank lost nearly \$4.5 billion from its mortgage related proprietary investments.

The Subcommittee also examined a \$1.1 billion CDO underwritten by Deutsche Bank known as Gemstone CDO VII Ltd. (Gemstone 7), which issued securities in March 2007. It was one of 47 CDOs totaling \$32 billion that Deutsche Bank underwrote from 2004 to 2008. Deutsche Bank made \$4.7 million in fees from Gemstone 7, while the collateral manager, a hedge fund called HBK Capital Management, was slated to receive \$3.3 million. Gemstone 7 concentrated risk by including within a single financial instrument 115 RMBS securities whose

financial success depended upon thousands of high risk, poor quality subprime loans. Many of those RMBS securities carried BBB, BBB-, or even BB credit ratings, making them among the highest risk RMBS securities sold to the public. Nearly a third of the RMBS securities contained subprime loans originated by Fremont, Long Beach, and New Century, lenders well known within the industry for issuing poor quality loans. Deutsche Bank also sold securities directly from its own inventory to the CDO. Deutsche Bank's CDO trading desk knew that many of these RMBS securities were likely to lose value, but did not object to their inclusion in Gemstone 7, even securities which Mr. Lippmann was calling "crap" or "pigs." Despite the poor quality of the underlying assets, Gemstone's top three tranches received AAA ratings. Deutsche Bank ultimately sold about \$700 million in Gemstone securities, without disclosing to potential investors that its global head trader of CDOs had extremely negative views of a third of the assets in the CDO or that the bank's internal valuations showed that the assets had lost over \$19 million in value since their purchase. Within months of being issued, the Gemstone 7 securities lost value; by November 2007, they began undergoing credit rating downgrades; and by July 2008, they became nearly worthless.

Both Goldman Sachs and Deutsche Bank underwrote securities using loans from subprime lenders known for issuing high risk, poor quality mortgages, and sold risky securities to investors across the United States and around the world. They also enabled the lenders to acquire new funds to originate still more high risk, poor quality loans. Both sold CDO securities without full disclosure of the negative views of some of their employees regarding the underlying assets and, in the case of Goldman, without full disclosure that it was shorting the very CDO securities it was marketing, raising questions about whether Goldman complied with its obligations to issue suitable investment recommendations and disclose material adverse interests.

The case studies also illustrate how these two investment banks continued to market new CDOs in 2007, even as U.S. mortgage delinquencies intensified, RMBS securities lost value, the U.S. mortgage market as a whole deteriorated, and investors lost confidence. Both kept producing and selling high risk, poor quality structured finance products in a negative market, in part because stopping the "CDO machine" would have meant less income for structured finance units, smaller executive bonuses, and even the disappearance of CDO desks and personnel, which is what finally happened. The two case studies also illustrate how certain complex structured finance products, such as synthetic CDOs and naked credit default swaps, amplified market risk by allowing investors with no ownership interest in the reference obligations to place unlimited side bets on their performance. Finally, the two case studies demonstrate how proprietary trading led to dramatic losses in the case of Deutsche Bank and undisclosed conflicts of interest in the case of Goldman Sachs.

Investment banks were the driving force behind the structured finance products that provided a steady stream of funding for lenders originating high risk, poor quality loans and that magnified risk throughout the U.S. financial system. The investment banks that engineered, sold, traded, and profited from mortgage related structured finance products were a major cause of the financial crisis.

C. Recommendations

The four causative factors examined in this Report are interconnected. Lenders introduced new levels of risk into the U.S. financial system by selling and securitizing complex home loans with high risk features and poor underwriting. The credit rating agencies labeled the resulting securities as safe investments, facilitating their purchase by institutional investors around the world. Federal banking regulators failed to ensure safe and sound lending practices and risk management, and stood on the sidelines as large financial institutions active in U.S. financial markets purchased billions of dollars in mortgage related securities containing high risk, poor quality mortgages. Investment banks magnified the risk to the system by engineering and promoting risky mortgage related structured finance products, and enabling investors to use naked credit default swaps and synthetic instruments to bet on the failure rather than the success of U.S. financial instruments. Some investment banks also ignored the conflicts of interest created by their products, placed their financial interests before those of their clients, and even bet against the very securities they were recommending and marketing to their clients. Together these factors produced a mortgage market saturated with high risk, poor quality mortgages and securities that, when they began incurring losses, caused financial institutions around the world to lose billions of dollars, produced rampant unemployment and foreclosures, and ruptured faith in U.S. capital markets.

Nearly three years later, the U.S. economy has yet to recover from the damage caused by the 2008 financial crisis. This Report is intended to help analysts, market participants, policymakers, and the public gain a deeper understanding of the origins of the crisis and take the steps needed to prevent excessive risk taking and conflicts of interest from causing similar damage in the future. Each of the four chapters in this Report examining a key aspect of the financial crisis begins with specific findings of fact, details the evidence gathered by the Subcommittee, and ends with recommendations. For ease of reference, all of the recommendations are reprinted here. For more information about each recommendation, please see the relevant chapter.

Recommendations on High Risk Lending

- 1. Ensure “Qualified Mortgages” Are Low Risk.** Federal regulators should use their regulatory authority to ensure that all mortgages deemed to be “qualified residential mortgages” have a low risk of delinquency or default.
- 2. Require Meaningful Risk Retention.** Federal regulators should issue a strong risk retention requirement under Section 941 by requiring the retention of not less than a 5% credit risk in each, or a representative sample of, an asset backed securitization’s tranches, and by barring a hedging offset for a reasonable but limited period of time.
- 3. Safeguard Against High Risk Products.** Federal banking regulators should safeguard taxpayer dollars by requiring banks with high risk structured finance products, including complex products with little or no reliable performance data, to meet conservative loss reserve, liquidity, and capital requirements.

4. **Require Greater Reserves for Negative Amortization Loans.** Federal banking regulators should use their regulatory authority to require banks issuing negatively amortizing loans that allow borrowers to defer payments of interest and principal, to maintain more conservative loss, liquidity, and capital reserves.
5. **Safeguard Bank Investment Portfolios.** Federal banking regulators should use the Section 620 banking activities study to identify high risk structured finance products and impose a reasonable limit on the amount of such high risk products that can be included in a bank's investment portfolio.

Recommendations on Regulatory Failures

1. **Complete OTS Dismantling.** The Office of the Comptroller of the Currency (OCC) should complete the dismantling of the Office of Thrift Supervision (OTS), despite attempts by some OTS officials to preserve the agency's identity and influence within the OCC.
2. **Strengthen Enforcement.** Federal banking regulators should conduct a review of their major financial institutions to identify those with ongoing, serious deficiencies, and review their enforcement approach to those institutions to eliminate any policy of deference to bank management, inflated CAMELS ratings, or use of short term profits to excuse high risk activities.
3. **Strengthen CAMELS Ratings.** Federal banking regulators should undertake a comprehensive review of the CAMELS ratings system to produce ratings that signal whether an institution is expected operate in a safe and sound manner over a specified period of time, asset quality ratings that reflect embedded risks rather than short term profits, management ratings that reflect any ongoing failure to correct identified deficiencies, and composite ratings that discourage systemic risks.
4. **Evaluate Impacts of High Risk Lending.** The Financial Stability Oversight Council should undertake a study to identify high risk lending practices at financial institutions, and evaluate the nature and significance of the impacts that these practices may have on U.S. financial systems as a whole.

Recommendations on Inflated Credit Ratings

1. **Rank Credit Rating Agencies by Accuracy.** The SEC should use its regulatory authority to rank the Nationally Recognized Statistical Rating Organizations in terms of performance, in particular the accuracy of their ratings.
2. **Help Investors Hold CRAs Accountable.** The SEC should use its regulatory authority to facilitate the ability of investors to hold credit rating agencies accountable in civil lawsuits for inflated credit ratings, when a credit rating agency knowingly or recklessly fails to conduct a reasonable investigation of the rated security.

3. **Strengthen CRA Operations.** The SEC should use its inspection, examination, and regulatory authority to ensure credit rating agencies institute internal controls, credit rating methodologies, and employee conflict of interest safeguards that advance rating accuracy.
4. **Ensure CRAs Recognize Risk.** The SEC should use its inspection, examination, and regulatory authority to ensure credit rating agencies assign higher risk to financial instruments whose performance cannot be reliably predicted due to their novelty or complexity, or that rely on assets from parties with a record for issuing poor quality assets.
5. **Strengthen Disclosure.** The SEC should exercise its authority under the new Section 78o-7(s) of Title 15 to ensure that the credit rating agencies complete the required new ratings forms by the end of the year and that the new forms provide comprehensible, consistent, and useful ratings information to investors, including by testing the proposed forms with actual investors.
6. **Reduce Ratings Reliance.** Federal regulators should reduce the federal government's reliance on privately issued credit ratings.

Recommendations on Investment Bank Abuses

1. **Review Structured Finance Transactions.** Federal regulators should review the RMBS, CDO, CDS, and ABX activities described in this Report to identify any violations of law and to examine ways to strengthen existing regulatory prohibitions against abusive practices involving structured finance products.
2. **Narrow Proprietary Trading Exceptions.** To ensure a meaningful ban on proprietary trading under Section 619, any exceptions to that ban, such as for market-making or risk-mitigating hedging activities, should be strictly limited in the implementing regulations to activities that serve clients or reduce risk.
3. **Design Strong Conflict of Interest Prohibitions.** Regulators implementing the conflict of interest prohibitions in Sections 619 and 621 should consider the types of conflicts of interest in the Goldman Sachs case study, as identified in Chapter VI(C)(6) of this Report.
4. **Study Bank Use of Structured Finance.** Regulators conducting the banking activities study under Section 620 should consider the role of federally insured banks in designing, marketing, and investing in structured finance products with risks that cannot be reliably measured and naked credit default swaps or synthetic financial instruments.

II. BACKGROUND

Understanding the recent financial crisis requires examining how U.S. financial markets have changed in fundamental ways over the past 15 years. The following provides a brief historical overview of some of those changes; explains some of the new financial products and trading strategies in the mortgage area; and provides background on credit ratings, investment banks, government sponsored enterprises, and financial regulators. It also provides a brief timeline of key events in the financial crisis. Two recurrent themes are the increasing amount of risk and conflicts of interest in U.S. financial markets.

A. Rise of Too-Big-To-Fail U.S. Financial Institutions

Until relatively recently, federal and state laws limited federally-chartered banks from branching across state lines.² Instead, as late as the 1990s, U.S. banking consisted primarily of thousands of modest-sized banks tied to local communities. Since 1990, the United States has witnessed the number of regional and local banks and thrifts shrink from just over 15,000 to approximately 8,000 by 2009,³ while at the same time nearly 13,000 regional and local credit unions have been reduced to 7,500.⁴ This broad-based approach meant that when a bank suffered losses, the United States could quickly close its doors, protect its depositors, and avoid significant damage to the U.S. banking system or economy. Decentralized banking also promoted competition, diffused credit in the marketplace, and prevented undue concentrations of financial power.

In the mid 1990s, the United States initiated substantial changes to the banking industry, some of which relaxed the rules under which banks operated, while others imposed new regulations, and still others encouraged increased risk-taking. In 1994, for the first time, Congress explicitly authorized interstate banking, which allowed federally-chartered banks to open branches nationwide more easily than before.⁵ In 1999, Congress repealed the Glass-Steagall Act of 1933, which had generally required banks, investment banks, securities firms, and insurance companies to operate separately,⁶ and instead allowed them to openly merge operations.⁷ The same law also eliminated the Glass-Steagall prohibition on banks engaging in

² See McFadden Act of 1927, P.L. 69-639 (prohibiting national banks from owning branches in multiple states); Bank Holding Company Act of 1956, P.L. 84-511 (prohibiting banking company companies from owning branches in multiple states). See also “Going Interstate: A New Dawn for U.S. Banking,” The Regional Economist, a publication of the Federal Reserve Bank of St. Louis (7/1994).

³ See U.S. Census Bureau, “Statistical Abstract of the United States 2011,” at 735, <http://www.census.gov/compendia/statab/2011/tables/11s1175.pdf>.

⁴ 1/3/2011 chart, “Insurance Fund Ten-Year Trends,” supplied by the National Credit Union Administration (showing that, as of 12/31/1993, the United States had 12,317 federal and state credit unions). Data provided by the National Credit Union Administration, 1/3/11.

⁵ Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, P.L. 103-328 (repealing statutory prohibitions on interstate banking).

⁶ Glass-Steagall Act of 1933, also known as the Banking Act, P.L. 73-66.

⁷ Gramm-Leach-Bliley Act of 1999, also known as the Financial Services Modernization Act, P.L. 106-102. Some banks had already begun to engage in securities and insurance activities, with the most prominent example at the time being Citicorp’s 1998 merger with the Travelers insurance group.

proprietary trading⁸ and exempted investment bank holding companies from direct federal regulation.⁹ In 2000, Congress enacted the Commodity Futures Modernization Act which barred federal regulation of swaps and the trillion-dollar swap markets, and which allowed U.S. banks, broker-dealers, and other financial institutions to develop, market, and trade these unregulated financial products, including credit default swaps, foreign currency swaps, interest rate swaps, energy swaps, total return swaps, and more.¹⁰

In 2002, the Treasury Department, along with other federal bank regulatory agencies, altered the way capital reserves were calculated for banks, and encouraged the retention of securitized mortgages with investment grade credit ratings by allowing banks to hold less capital in reserve for them than if the individual mortgages were held directly on the banks' books.¹¹ In 2004, the SEC relaxed the capital requirements for large broker-dealers, allowing them to grow even larger, often with borrowed funds.¹² In 2005, when the SEC attempted to assert more control over the growing hedge fund industry, by requiring certain hedge funds to register with the agency, a federal Court of Appeals issued a 2006 opinion that invalidated the SEC regulation.¹³

These and other steps paved the way, over the course of little more than the last decade, for a relatively small number of U.S. banks and broker-dealers to become giant financial conglomerates involved in collecting deposits; financing loans; trading equities, swaps and commodities; and issuing, underwriting, and marketing billions of dollars in stock, debt instruments, insurance policies, and derivatives. As these financial institutions grew in size and complexity, and began playing an increasingly important role in the U.S. economy, policymakers began to ask whether the failure of one of these financial institutions could damage not only the U.S. financial system, but the U.S. economy as a whole. In a little over ten years, the creation of too-big-to-fail financial institutions had become a reality in the United States.¹⁴

⁸ Glass-Steagall Act, Section 16.

⁹ Gramm-Leach-Bliley Act of 1999, also known as the Financial Services Modernization Act, P.L. 106-102. See also prepared statement of SEC Chairman Christopher Cox, "Role of Federal Regulators: Lessons from the Credit Crisis for the Future of Regulation," October 23, 2008 House Committee on Oversight and Government Reform Hearing, ("It was a fateful mistake in the Gramm-Leach-Bliley Act that neither the SEC nor any regulator was given the statutory authority to regulate investment bank holding companies other than on a voluntary basis.").

¹⁰ The 2000 Commodity Futures Modernization Act (CFMA) was enacted as a title of the Consolidated Appropriations Act of 2001, P.L. 106-554.

¹¹ See 66 Fed. Reg. 59614 (Nov. 29, 2001), <http://www.federalregister.gov/articles/2001/11/29/01-29179/risk-based-capital-guidelines-capital-adequacy-guidelines-capital-maintenance-capital-treatment-of>.

¹² See "Alternative Net Capital Requirements for Broker-Dealers That Are Part of Consolidated Supervised Entities," RIN 3235-AI96, 17 CFR Parts 200 and 240 (8/20/2004) ("amended the net capital rule under the Securities Exchange Act of 1934 to establish a voluntary alternative method of computing net capital for certain broker-dealers"). The Consolidated Supervised Entities (CSE) program, which provided SEC oversight of investment bank holding companies that joined the CSE program on a voluntarily basis, was established by the SEC in 2004, and terminated by the SEC in 2008, after the financial crisis. The alternative net capital rules for broker-dealers were terminated at the same time.

¹³ *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006).

¹⁴ The financial crisis has not reversed this trend; it has accelerated it. By the end of 2008, Bank of America had purchased Countrywide and Merrill Lynch; Wells Fargo had acquired Wachovia Bank; and JPMorgan Chase had

Over the last ten years, some U.S. financial institutions have not only grown larger and more complex, but have also engaged in higher risk activities. The last decade has witnessed an explosion of so-called “innovative” financial products with embedded risks that are difficult to analyze and predict, including collateralized debt obligations, credit default swaps, exchange traded funds, commodity and swap indices, and more. Financial engineering produced these financial instruments which typically had little or no performance record to use for risk management purposes. Some U.S. financial institutions became major participants in the development of these financial products, designing, selling, and trading them in U.S. and global markets.

In addition, most major U.S. financial institutions began devoting increasing resources to so-called “proprietary trading,” in which the firm’s personnel used the firm’s capital to gain investment returns for the firm itself rather than for its clients. Traditionally, U.S. banks, broker-dealers, and investment banks had offered investment advice and services to their clients, and did well when their clients did well. Over the last ten years, however, some firms began referring to their clients, not as customers, but as counterparties. In addition, some firms at times developed and used financial products in transactions in which the firm did well only when its clients, or counterparties, lost money. Some U.S. banks also sponsored affiliated hedge funds, provided them with billions of dollars in client and bank funds, and allowed the hedge funds to make high risk investments on the bank’s behalf, seeking greater returns.

By 2005, as U.S. financial institutions reached unprecedented size and made increasing use of complex, high risk financial products, government oversight and regulation was increasingly incoherent and misguided.

B. High Risk Mortgage Lending

The U.S. mortgage market reflected many of the trends affecting the U.S. financial system as a whole. Prior to the early 1970s, families wishing to buy a home typically went to a local bank or mortgage company, applied for a loan and, after providing detailed financial information and a down payment, qualified for a 30-year fixed rate mortgage. The local bank or mortgage company then typically kept that mortgage until the homeowner paid it off, earning its profit from the interest rates and fees paid by the borrower.

Lenders were required to keep a certain amount of capital for each loan they issued, which effectively limited the number of loans one bank could have on its books. To increase their capital, some lenders began selling the loans on their books to other financial institutions that wanted to service the loans over time, and then used the profits to make new loans to prospective borrowers. Lenders began to make money, not from holding onto the loans they originated and collecting mortgage payments over the years, but from the relatively short term fees associated with originating and selling the loans.

purchased Washington Mutual and Bear Stearns, creating the largest banks in U.S. history. By early 2009, each controlled more than 10% of all U.S. deposits. See, e.g., “Banks ‘Too Big To Fail’ Have Grown Even Bigger: Behemoths Born of the Bailout Reduce Consumer Choice, Tempt Corporate Moral Hazard,” *Washington Post* (8/28/2009). Those banks plus Citigroup also issued one out of every two mortgages and two out of every three credit cards. *Id.*

By 2003, many lenders began using higher risk lending strategies involving the origination and sale of complex mortgages that differed substantially from the traditional 30-year fixed rate home loan. The following describes some of the securitization practices and higher risk mortgage products that came to dominate the mortgage market in the years leading up to the financial crisis.

Securitization. To make home loans sales more efficient and profitable, banks began making increasing use of a mechanism now called “securitization.” In a securitization, a financial institution bundles a large number of home loans into a loan pool, and calculates the amount of mortgage payments that will be paid into that pool by the borrowers. The securitizer then forms a shell corporation or trust, often offshore, to hold the loan pool and use the mortgage revenue stream to support the creation of bonds that make payments to investors over time. Those bonds, which are registered with the SEC, are called residential mortgage backed securities (RMBS) and are typically sold in a public offering to investors. Investors typically make a payment up front, and then hold onto the RMBS securities which repay the principal plus interest over time. The amount of money paid periodically to the RMBS holders is often referred to as the RMBS “coupon rate.”

For years, securitization worked well. Borrowers paid their 30-year, fixed rate mortgages with few defaults, and mortgage backed securities built up a reputation as a safe investment. Lenders earned fees for bundling the home loans into pools and either selling the pools or securitizing them into mortgage backed securities. Investment banks also earned fees from working with the lenders to assemble the pools, design the mortgage backed securities, obtain credit ratings for them, and sell the resulting securities to investors. Investors like pension funds, insurance companies, municipalities, university endowments, and hedge funds earned a reasonable rate of return on the RMBS securities they purchased.

Due to the 2002 Treasury rule that reduced capital reserves for securitized mortgages, RMBS holdings also became increasingly attractive to banks, which could determine how much capital they needed to hold based on the credit ratings their RMBS securities received from the credit ratings agencies. According to economist Arnold Kling, among other problems, the 2002 rule “created opportunities for banks to lower their ratio of capital to assets through structured financing” and “created the incentive for rating agencies to provide overly optimistic assessment of the risk in mortgage pools.”¹⁵

High Risk Mortgages. The resulting increased demand for mortgage backed securities, joined with Wall Street’s growing appetite for securitization fees, prompted lenders to issue mortgages not only to well qualified borrowers, but also higher risk borrowers. Higher risk borrowers were often referred to as “subprime” borrowers to distinguish them from the more creditworthy “prime” borrowers who traditionally qualified for home loans. Some lenders began

¹⁵ “Not What They Had In Mind: A History of Policies that Produced the Financial Crisis of 2008,” September 2009, Mercatus Center, [http://mercatus.org/sites/default/files/publication/NotWhatTheyHadInMind\(1\).pdf](http://mercatus.org/sites/default/files/publication/NotWhatTheyHadInMind(1).pdf).

to specialize in issuing loans to subprime borrowers and became known as subprime lenders.¹⁶ Subprime loans provided new fuel for the securitization engines on Wall Street.

Federal law does not define subprime loans or subprime borrowers, but in 2001, guidance issued by federal banking regulators defined subprime borrowers as those with certain credit risk characteristics, including one or more of the following: (1) two or more 30-day delinquencies in the last 12 months, or one or more 60-day delinquencies in the last 24 months; (2) a judgment or foreclosure in the prior 24 months; (3) a bankruptcy in the last five years; (4) a relatively high default probability as evidenced by, for example, a credit score below 660 on the FICO scale; or (5) a debt service-to-income ratio of 50% or more.¹⁷ Some financial institutions reduced that definition to any borrower with a credit score below 660 or even 620 on the FICO scale;¹⁸ while still others failed to institute any explicit definition of a subprime borrower or loan.¹⁹ Credit scores are an underwriting tool used by lenders to evaluate the likelihood that a particular individual will repay his or her debts. FICO credit scores, developed by the Fair Isaac Corporation, are the most widely used credit scores in U.S. financial markets and provide scores ranging from 300 to 850, with the higher scores indicating greater creditworthiness.²⁰

High risk loans were not confined, however, to those issued to subprime borrowers. Some lenders engaged in a host of risky lending practices that allowed them to quickly generate a large volume of high risk loans to both subprime and prime borrowers. Those practices, for example, required little or no verification of borrower income, required borrowers to provide little or no down payments, and used loans in which the borrower was not required to pay down the loan amount, and instead incurred added debt over time, known as “negative amortization” loans. Some lenders offered a low initial “teaser rate,” followed by a higher interest rate that

¹⁶ A Federal Reserve Bank of New York research paper identifies the top ten subprime loan originators in 2006 as HSBC, New Century, Countrywide, Citigroup, WMC Mortgage, Fremont, Ameriquist Mortgage, Option One, Wells Fargo, and First Franklin. It identifies the top ten originators of subprime mortgage backed securities as Countrywide, New Century, Option One, Fremont, Washington Mutual, First Franklin, Residential Funding Corp., Lehman Brothers, WMC Mortgage, and Ameriquist. “Understanding the Securitization of Subprime Mortgage Credit,” by Adam Ashcraft and Til Schuermann, Federal Reserve Bank of New York Staff Report No. 318, (3/2008) at 4.

¹⁷ Interagency “Expanded Guidance for Subprime Lending Programs, (1/31/2001) at 3. See also “Understanding the Securitization of Subprime Mortgage Credit,” by Adam Ashcraft and Til Schuermann, Federal Reserve Bank of New York Staff Report No. 318, (3/2008) at 14.

¹⁸ See, e.g., 1/2005 “Definition of Higher Risk Lending,” chart from Washington Mutual Board of Directors Finance Committee Discussion, JPM_WM00302979, Hearing Exhibit 4/13-2a; 4/2010 “Evaluation of Federal Regulatory Oversight of Washington Mutual Bank,” report prepared by the Offices of Inspector General at the Department of the Treasury and Federal Deposit Insurance Corporation, at 8, Hearing Exhibit 4/16-82.

¹⁹ See, e.g., Countrywide Financial Corporation, as described in SEC v. Mozilo, Case No. CV09-03994 (USDC CD Calif.), Complaint (June 4, 2009), at ¶¶ 20-21.

²⁰ To develop FICO scores, Fair Isaac uses proprietary mathematical models that draw upon databases of actual credit information to identify factors that can reliably be used to predict whether an individual will repay outstanding debt. Key factors in the FICO score include an individual’s overall level of debt, payment history, types of credit extensions, and use of available credit lines. See “What’s in Your FICO Score,” Fair Isaac Corporation, <http://www.myfico.com/CreditEducation/WhatsInYourScore.aspx>. Other types of credit scores have also been developed, including the VantageScore developed jointly by the three major credit bureaus, Equifax Inc., Experian Group Ltd., and TransUnion LLC, but the FICO score remains the most widely used credit score in U.S. financial markets.

took effect after a specified event or period of time, to enable borrowers with less income to make the initial, smaller loan payments. Some qualified borrowers according to whether they could afford to pay the lower initial rate, rather than the higher rate that took effect later, expanding the number of borrowers who could qualify for the loans. Some lenders deliberately issued loans that made economic sense for borrowers only if the borrowers could refinance the loan within a few years to retain the teaser rate, or sell the home to cover the loan costs. Some lenders also issued loans that depended upon the mortgaged home to increase in value over time, and cover the loan costs if the borrower defaulted. Still another risky practice engaged in by some lenders was to ignore signs of loan fraud and to issue and securitize loans suspected of containing fraudulent borrower information.

These practices were used to qualify borrowers for larger loans than they could have otherwise obtained. When borrowers took out larger loans, the mortgage broker typically profited from higher fees and commissions; the lender profited from higher fees and a better price for the loan on the secondary market; and Wall Street firms profited from a larger revenue stream to support bigger pools of mortgage backed securities.

The securitization of higher risk loans led to increased profits, but also injected greater risks into U.S. mortgage markets. Some U.S. lenders, like Washington Mutual and Countrywide, made wholesale shifts in their loan programs, reducing their sale of low risk, 30-year, fixed rate mortgages and increasing their sale of higher risk loans.²¹ Because higher risk loans required borrowers to pay higher fees and a higher rate of interest, they produced greater initial profits for lenders than lower risk loans. In addition, Wall Street firms were willing to pay more for the higher risk loans, because once securitized, the AAA securities relying on those loans typically paid investors a higher rate of return than other AAA investments, due to the higher risk involved. As a result, investors were willing to pay more, and mortgaged backed securities relying on higher risk loans typically fetched a better price than those relying on lower risk loans. Lenders also incurred little risk from issuing the higher risk loans, since they quickly sold the loans and kept the risk off their books.

After 2000, the number of high risk loans increased rapidly, from about \$125 billion in dollar value or 12% of all U.S. loan originations in 2000, to about \$1 trillion in dollar value or 34% of all loan originations in 2006.²² Altogether from 2000 to 2007, U.S. lenders originated about 14.5 million high risk loans.²³ The majority of those loans, 59%, were used to refinance

²¹ See, e.g., “Shift to Higher Margin Products,” chart from Washington Mutual Board of Directors meeting, at JPM_WM00690894, Hearing Exhibit 4/13-3 (featuring discussion of the larger “gain on sale” produced by higher risk home loans); “WaMu Product Originations and Purchases By Percentage - 2003-2007,” chart prepared by the Subcommittee, Hearing Exhibit 4/13-1i (showing how higher risk loans grew from about 19% to about 55% of WaMu’s loan originations); SEC v. Mozilo, Case No. CV09-03994 (USDC CD Calif.), Complaint (June 4, 2009), at ¶¶ 17-19 (alleging that higher risk loans doubled at Countrywide, increasing from about 31% to about 64% of its loan originations).

²² 8/2010 “Nonprime Mortgages: Analysis of Loan Performance, Factors Associated with Defaults, and Data Sources,” Government Accountability Office (GAO), Report No. GAO-10-805 at 1. These figures include subprime loans, Alt A, and option payment loans, but not home equity loans, which means the totals for high risk loans are understated.

²³ Id. at 5.

an existing loan, rather than buy a new home.²⁴ In addition, according to research performed by GAO, many of these borrowers:

“refinanced their mortgages at a higher amount than the loan balance to convert their home equity into money for personal use (known as ‘cash-out refinancing’). Of the subprime mortgages originated from 2000 through 2007, 55 percent were for cash-out refinancing, 9 percent were for no-cash-out refinancing, and 36 percent were for a home purchase.”²⁵

Some lenders became known inside the industry for issuing high risk, poor quality loans, yet during the years leading up to the financial crisis were able to securitize and sell their home loans with few problems. Subprime lenders like Long Beach Mortgage Corporation, New Century Financial Corporation, and Fremont Loan & Investment, for example, were known for issuing poor quality subprime loans.²⁶ Despite their reputations for poor quality loans, leading investment banks continued to do business with them and helped them sell or securitize hundreds of billions of dollars in home mortgages.

These three lenders and others issued a variety of nontraditional, high risk loans whose subsequent delinquencies and defaults later contributed to the financial crisis. They included hybrid adjustable rate mortgages, pick-a-payment or option ARM loans, interest-only loans, home equity loans, and Alt A and stated income loans. Although some of these loans had been in existence for years, they had previously been restricted to a relatively small group of borrowers who were generally able to repay their debts. In the years leading up to the financial crisis, however, lenders issued these higher risk loans to a wide variety of borrowers, including subprime borrowers, who often used them to purchase more expensive homes than they would have been able to buy using traditional fixed rate, 30-year loans.

Hybrid ARMs. One common high risk loan used by lenders in the years leading up to the financial crisis was the short term hybrid adjustable rate mortgage (Hybrid ARM), which was offered primarily to subprime borrowers. From 2000 to 2007, about 70% of subprime loans were Hybrid ARMs.²⁷ Hybrid ARMs were often referred to “2/28,” “3/27,” or “5/25” loans. These 30-year mortgages typically had a low fixed teaser rate, which then reset to a higher floating interest rate, after two years for the 2/28, three years for the 3/27, or five years for the 5/25. The initial loan payment was typically calculated by assuming the initial low, fixed interest rate would be used to pay down the loan. In some cases, the loan used payments that initially covered only the interest due on the loan and not any principal; these loans were called “interest only” loans. After the fixed period for the teaser rate expired, the monthly payment was typically recalculated using the higher floating rate to pay off the remaining principal and interest owing over the course of the remaining loan period. The resulting monthly payment was much

²⁴ 7/28/2009 “Characteristics and Performance of Nonprime Mortgages,” GAO, Report No. GAO-09-848R at 24, Table 3.

²⁵ Id. at 7.

²⁶ For more information about Long Beach, see Chapter III of this Report. For more information about New Century and Fremont, see section (D)(2)(c)-(d) of Chapter IV.

²⁷ 8/2010 “Nonprime Mortgages: Analysis of Loan Performance, Factors Associated with Defaults, and Data Sources,” GAO, Report No. GAO-10-805 at 5, 11.

larger and sometimes caused borrowers to experience “payment shock” and default on their loans. To avoid the higher interest rate and the larger loan payment, many of the borrowers routinely refinanced their loans; when those borrowers were unable to refinance, many were unable to afford the higher mortgage payment and defaulted.

Pick-A-Payment or Option ARMs. Another common high risk loan, offered to both prime and subprime borrowers during the years leading up to the financial crisis, was known as the “pick-a-payment” or “option adjustable rate mortgage” (Option ARM). According to a 2009 GAO report:

“[P]ayment-option ARMs were once specialized products for financially sophisticated borrowers but ultimately became more widespread. According to federal banking regulators and a range of industry participants, as home prices increased rapidly in some areas of the country, lenders began marketing payment-option ARMs as affordability products and made them available to less-creditworthy and lower-income borrowers.”²⁸

Option ARMs typically allowed the borrower to pay an initial low teaser rate, sometimes as low as a 1% annual rate for the first month, and then imposed a much higher interest rate linked to an index, while also giving the borrower a choice each month of how much to pay down the outstanding loan balance. These loans were called “pick-a-payment” or “option” ARMs, because borrowers were typically allowed to choose among four alternatives: (1) paying the fully amortizing amount needed to pay off the loan in 30 years; (2) paying an even higher amount to pay off the loan in 15 years; (3) paying only the interest owed that month and no principal; or (4) making a “minimum” payment that covered only a portion of the interest owed and none of the principal. If the minimum payment option were selected, the unpaid interest would be added to the loan principal. If, each month, the borrower made only the minimum payment, the loan principal would increase rather than decrease over time, creating a negatively amortizing loan.

Typically, after five years or when the loan principal reached a designated threshold, such as 110%, 115%, or 125% of the original loan amount, the loan would “recast.” The borrower would then be required to make the fully amortizing payment needed to pay off the remaining loan amount within the remaining loan period. The new monthly payment amount was typically much greater, causing payment shock and increasing loan defaults. For example, a borrower taking out a \$400,000 loan, with a teaser rate of 1.5% and subsequent interest rate of 6%, might have a minimum payment of \$1,333. If the borrower then made only the minimum payments until the loan recast, the new payment using the 6% rate would be \$2,786, an increase of more than 100%. What began as a 30-year loan for \$400,000 became a 25-year loan for \$432,000. To avoid having the loan recast, option ARM borrowers typically sought to refinance their loans. At some lenders, a significant portion of their option ARM business consisted of refinancing existing loans.

Home Equity Loans. A third type of high risk loan that became popular during the years leading up to the financial crisis was the home equity loan (HEL). HELs provided loans

²⁸7/28/2009 “Characteristics and Performance of Nonprime Mortgages,” GAO, Report No. GAO-09-848R at 12-13.

secured by the borrower's equity in his or her home, which served as the loan collateral. HELs typically provided a lump sum loan amount that had to be repaid over a fixed period of time, such as 5, 10, or 30 years, using a fixed interest rate, although adjustable rates could also be used. A related loan, the Home Equity Line of Credit (HELOC), created a revolving line of credit, secured by the borrower's home, that the borrower could use at will, to take out and repay various levels of debt over time, typically using an adjustable rate of interest. Both HELs and HELOCs created liens against the borrower's house which, in the event of a default, could be sold to repay any outstanding loan amounts.

During the years leading up to the financial crisis, lenders provided HELs and HELOCs to both prime and subprime borrowers. They were typically high risk loans, because most were issued to borrowers who already had a mortgage on their homes and held only a limited amount of equity. The HEL or HELOC was typically able to establish only a "second lien" or "second mortgage" on the property. If the borrower later defaulted and the home sold, the sale proceeds would be used to pay off the primary mortgage first, and only then the HEL or HELOC. Often, the sale proceeds were insufficient to repay the HEL or HELOC loan. In addition, some lenders created home loan programs in which a HEL was issued as a "piggyback loan" to the primary home mortgage to finance all or part of the borrower's down payment.²⁹ Taken together, the HEL and the mortgage often provided the borrower with financing equal to 85%, 90%, or even 100% of the property's value.³⁰ The resulting high loan-to-value ratio, and the lack of borrower equity in the home, meant that, if the borrower defaulted and the home had to be sold, the sale proceeds were unlikely to be sufficient to repay both loans.

Alt A Loans. Another type of common loan during the years leading up to the financial crisis was the "Alt A" loan. Alt A loans were issued to borrowers with relatively good credit histories, but with aggressive underwriting that increased the risk of the loan.³¹ For example, Alt A loans often allowed borrowers to obtain 100% financing of their homes, to have an unusually high debt-to-income ratio, or submit limited or even no documentation to establish their income levels. Alt A loans were sometimes referred to as "low doc" or "no doc" loans. They were originally developed for self employed individuals who could not easily establish their income by producing traditional W-2 tax return forms or pay stubs, and so were allowed to submit "alternative" documentation to establish their income or assets, such as bank statements.³² The reasoning was that other underwriting criteria could be used to ensure that Alt A loans would be repaid, such as selecting only borrowers with a high credit score or with a property appraisal showing the home had substantial value in excess of the loan amount. According to GAO, from 2000 to 2006, the percentage of Alt A loans with less than full documentation of the borrower's income or assets rose from about 60% to 80%.³³

²⁹ 7/28/2009 "Characteristics and Performance of Nonprime Mortgages," GAO, Report No. GAO-09-848R at 9.

³⁰ Id. GAO determined that, in 2000, only about 2.4% of subprime loans had a combined loan-to-value ratio, including both first and second home liens, of 100%, but by 2006, the percentage had climbed tenfold to 29.3%.

³¹ Id. at 1. GAO treated both low documentation loans and Option ARMs as Alt A loans. This Report considers Option ARMs as a separate loan category.

³² See id. at 14.

³³ Id.

Stated Income Loans. Stated income loans were a more extreme form of low doc Alt A loans, in that they imposed no documentation requirements and required little effort by the lender to verify the borrower's income. These loans allowed borrowers simply to "state" their income, with no verification by the lender of the borrower's income or assets other than to consider the income's "reasonableness." They were sometimes called "NINA" loans, because "No Income" and "No Assets" of the borrower were verified by the lender. They were also referred to as "liar loans," since borrowers could lie about their incomes, and the lender would make little effort to substantiate the claimed income. Many lenders believed they could simply rely on the other underwriting tools, such as the borrower's credit score and the property appraisal, to ensure the loans would be repaid. Once rare and reserved only for wealthier borrowers, stated income loans became commonplace in the years leading up to the financial crisis. For example, at Washington Mutual Bank, one of the case studies in this Report, by the end of 2007, stated income loans made up 50% of its subprime loans, 73% of its Option ARMs, and 90% of its home equity loans.³⁴

Nationwide, the percentage of high risk loans issued with low or no documentation of borrower income or assets was less dramatic. According to GAO, for example, from 2000 to 2006, the nationwide percentage of subprime loans with low or no documentation of borrower income or assets grew from about 20% to 38%.³⁵

Volume and Speed. When lenders kept on their books the loans they issued, the creditworthiness of those loans determined whether the lender would turn a profit. Once lenders began to sell or securitize most of their loans, volume and speed, as opposed to creditworthiness, became the keys to a profitable securitization business.

In addition, in the years leading up to the financial crisis, investors that might normally insist on purchasing only high quality securities, purchased billions of dollars in RMBS securities containing poor quality, high risk loans, in part because those securities bore AAA ratings from the credit rating agencies, and in part because the securities offered higher returns compared to other AAA rated investments. Banks also bought investment grade RMBS securities to take advantage of their lower capital requirements. Increasingly, the buyers of RMBS securities began to forego detailed due diligence of the RMBS securities they purchased. Instead, they, like the lenders issuing the mortgages, operated in a mortgage market that came to be dominated by volume and speed, as opposed to credit risk.

Lenders that produced a high volume of loans could sell pools of the loans to Wall Street or to government sponsored entities like Fannie Mae and Freddie Mac. Likewise, they could securitize the loans and work with Wall Street investment banks to sell the securities to investors. These lenders passed on the risk of nonpayment to third parties, and so lost interest in whether the sold loans would, in fact, be repaid. Investment banks that securitized the loans garnered fees for their services and also typically passed on the risk of nonpayment to the investors who

³⁴ 4/2010 "Evaluation of Federal Regulatory Oversight of Washington Mutual Bank," prepared by the Offices of Inspector General at the Department of the Treasury and Federal Deposit Insurance Corporation, at 10, Hearing Exhibit 4/16-82.

³⁵ 7/28/2009 "Characteristics and Performance of Nonprime Mortgages," GAO, Report No. GAO-09-848R at 14.

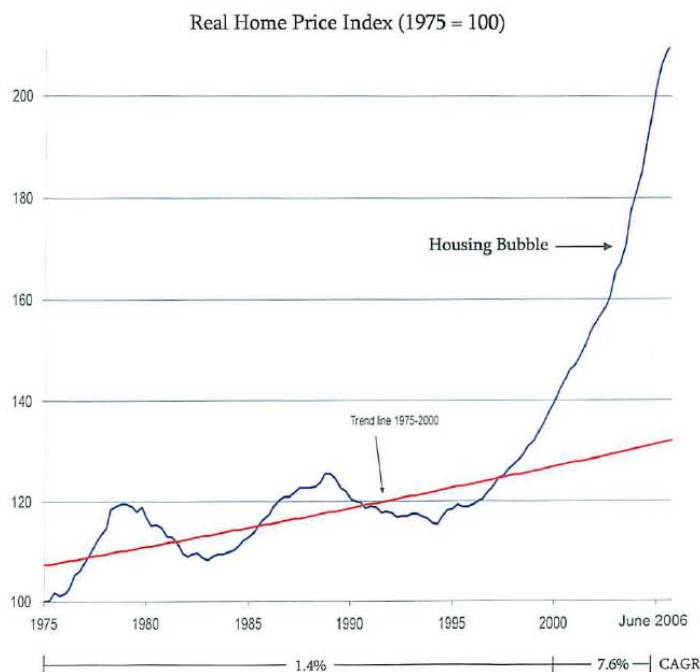
bought the mortgage backed securities. The investment banks were typically interested in loan repayment rates only to the extent needed to ensure defaulting loans did not cause losses to the mortgage backed securities they sold. Even some of the investors who purchased the mortgage backed securities lost interest in their creditworthiness, so long as they could buy “insurance” in the form of credit default swaps that paid off if a mortgage backed security defaulted.

To ensure an ongoing supply of loans for sale, lenders created compensation incentives that encouraged their personnel to quickly produce a high volume of loans. They also encouraged their staffs to issue or purchase higher risk loans, because those loans produced higher sale prices on Wall Street. Loan officers, for example, received more money per loan for originating higher risk loans and for exceeding established loan targets. Loan processing personnel were compensated according to the speed and number of the loans they processed. Loan officers and their sales associates received still more compensation, often called yield spread premiums, if they charged borrowers higher interest rates or points than required in the lender’s rate sheets specifying loan prices, or included prepayment penalties in the loan agreements. The Subcommittee’s investigation found that lenders employed few compensation incentives to encourage loan officers or loan processors to produce high quality, creditworthy loans in line with the lender’s credit requirements.

As long as home prices kept rising, the high risk loans fueling the securitization markets produced few problems. Borrowers who could not make their loan payments could refinance their loans or sell their homes and use the sale proceeds to pay off their mortgages. As this chart shows, over the ten years before the crisis hit, housing prices shot up faster than they had in decades, allowing price increases to mask problems with the high risk loans being issued.³⁶

³⁶ See “Estimation of Housing Bubble: Comparison of Recent Appreciation vs. Historical Trends,” chart prepared by Paulson & Co. Inc., Hearing Exhibit 4/13-1j.

ESTIMATION OF HOUSING BUBBLE: Comparison of Recent Appreciation vs. Historical Trends



Source: Office of Federal Housing Enterprise Oversight, Bureau of Economic Analysis

All material is compiled from sources believed to be reliable, but accuracy cannot be guaranteed. This material may not be distributed to other than the intended recipient. PSI-Paulson & Co. 02-00003

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& CO.
INC.

Borrowers were able to pay for the increasingly expensive homes, in part, because of the exotic, high risk loans and lax loan underwriting practices that allowed them to buy more house than they could really afford.

C. Credit Ratings and Structured Finance

Despite the increasing use of high risk loans to support mortgage related securities, mortgage related securities continued to receive AAA and other investment grade ratings from the credit rating agencies, indicating they were judged to be safe investments. Those credit ratings gave a sense of security to investors and enabled investors like pension funds, insurance companies, university endowments, and municipalities, which were often required to hold safe investments, to continue to purchase mortgage related securities.

Credit Ratings Generally. A credit rating is an assessment of the likelihood that a particular financial instrument, such as a corporate bond or mortgage backed security, may

default or incur losses.³⁷ A high credit rating indicates that a debt instrument is expected to be repaid and so qualifies as a safe investment.

Credit ratings are issued by private firms that have been officially designated by the SEC as Nationally Recognized Statistical Rating Organizations (NRSROs). NRSROs are usually referred to as “credit rating agencies.” While there are ten registered credit rating agencies in the United States, the market is dominated by just three: Moody’s Investors Service, Inc. (Moody’s); Standard & Poor’s Financial Services LLC (S&P); and Fitch Ratings Ltd. (Fitch).³⁸ By some accounts, these firms issue about 98% of the total credit ratings and collect 90% of total credit rating revenue in the United States.³⁹

Credit ratings use a scale of letter grades to indicate credit risk, ranging from AAA to D, with AAA ratings designating the safest investments. Investments with AAA ratings have historically had low default rates. For example, S&P reported that its cumulative RMBS default rate by original rating class (through September 15, 2007) was 0.04% for AAA initial ratings and 1.09% for BBB.⁴⁰ Financial instruments bearing AAA through BBB- ratings are generally referred to as “investment grade,” while those with ratings below BBB- (or Baa3) are referred to as “below investment grade” or sometimes as having “junk” status. Financial instruments that default receive a D rating from Standard & Poor’s, but no rating at all from Moody’s.

Investors often rely on credit ratings to gauge the safety of a particular investment. Some institutional investors design an investment strategy that calls for acquiring assets with specified credit ratings. State and federal law also restricts the amount of below investment grade bonds that certain investors can hold, such as pension funds and insurance companies.⁴¹ Banks are also limited by law in the amount of noninvestment grade bonds they can hold, and are typically required to post additional capital for investments carrying riskier ratings. Because so many federal and state statutes and regulations required financial institutions to hold securities with investment grade ratings, the credit rating agencies were not only guaranteed a steady business, but were encouraged to issue AAA and other investment grade ratings. Issuers of securities and other financial instruments also worked hard to obtain favorable credit ratings to ensure more investors could buy their products.

Although the SEC has generally overseen the credit rating industry for many years, it had no statutory basis to exercise regulatory authority until enactment of the Credit Rating Agency Reform Act in September 2006. Concerned by the inflated credit ratings that had been issued for

³⁷ See 9/3/2009 “Credit Rating Agencies and Their Regulation,” prepared by the Congressional Research Service Report No. R40613 (revised report issued 4/9/2010). For more information about the credit rating process and the credit rating agencies, see Chapter V, below.

³⁸ See 9/25/2008 “Credit Rating Agencies—NRSROs,” SEC, <http://www.sec.gov/answers/nrsro.htm>.

³⁹ See 9/3/2009 “Credit Rating Agencies and Their Regulation,” prepared by the Congressional Research Service Report No. R40613 (revised report issued 4/9/2010).

⁴⁰ Prepared Statement of Vickie A. Tillman, Executive Vice President, Standard & Poor’s Credit Market Services, “The Role of Credit Rating Agencies in the Structured Finance Market,” before the U.S. House of Representatives Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, Cong.Hrg. 110-62 (9/27/2007), S&P SEC-PSI 0001945-71, at 51. (See Chapter V below.) See also 1/2007 “Annual 2006 Global Corporate Default Study and Ratings Transitions,” S&P.

⁴¹ For more detail on these matters, see Chapter V, below.

bonds from Enron Corporation and other troubled corporations, Congress strengthened the SEC's authority over the credit rating industry. Among other provisions, the law established criteria for the NRSRO designation and authorized the SEC to conduct examinations of credit rating agencies. The law also, however, prohibited the SEC from regulating credit rating criteria or methodologies used in credit rating models. In June 2007, the SEC issued implementing regulations, which were essentially too late to affect the ratings already provided for mortgage related securities. One month later, in July 2007, the credit rating agencies issued the first of several mass downgrades of the ratings earlier issued for mortgage related securities.

Structured Finance. In recent years, Wall Street firms have devised increasingly complex financial instruments for sale to investors. These instruments are often referred to as structured finance. Because structured finance products are so complicated and opaque, investors often place particular reliance on credit ratings to determine whether they should buy them.

Among the oldest types of structured finance products are RMBS securities. To create these securities, issuers – often working with investment banks – bundle large numbers of home loans into a loan pool, and calculate the revenue stream coming into the loan pool from the individual mortgages. They then design a “waterfall” that delivers a stream of revenues in sequential order to specified “tranches.” The first tranche is at the top of the waterfall and is typically the first to receive revenues from the mortgage pool. Since that tranche is guaranteed to be paid first, it is the safest investment in the pool. The issuer creates a security, often called a bond, linked to that first tranche. That security typically receives a AAA credit rating since its revenue stream is the most secure.

The security created from the next tranche receives the same or a lower credit rating and so on until the waterfall reaches the “equity” tranche at the bottom. The equity tranche typically receives no rating since it is the last to be paid, and therefore the first to incur losses if mortgages in the loan pool default. Since virtually every mortgage pool has at least some mortgages that default, equity tranches are intended to provide loss protection for the tranches above it. Because equity tranches are riskier, however, they are often assigned and receive a higher rate of interest and can be profitable if losses are minimal. One mortgage pool might produce five to a dozen or more tranches, each of which is used to create a residential mortgage backed security that is rated and then sold to investors.

Cash CDOs. Collateralized debt obligations (CDOs) are another type of structured finance product whose securities receive credit ratings and are sold to investors. CDOs are a more complex financial product that involves the re-securitization of existing income-producing assets. From 2004 through 2007, many CDOs included RMBS securities from multiple mortgage pools. For example, a CDO might contain BBB rated securities from 100 different RMBS securitizations. CDOs can also contain other types of assets, such as commercial mortgage backed securities, corporate bonds, or other CDO securities. These CDOs are often called “cash CDOs,” because they receive cash revenues from the underlying RMBS bonds and other assets. If a CDO is designed so that it contains a specific list of assets that do not change, it is often called a “static” CDO; if the CDO's assets are allowed to change over time, it is often

referred to as a “managed” CDO. Like an RMBS securitization, the CDO arranger calculates the revenue stream coming into the pool of assets, designs a waterfall to divide those incoming revenues among a hierarchy of tranches, and uses each tranche to issue securities that can then be marketed to investors. The most senior tranches of a CDO may receive AAA ratings, even if all of its underlying assets have BBB ratings.

Synthetic CDOs. Some investment banks also created “synthetic CDOs” which mimicked cash CDOs, but did not contain actual mortgages or other assets that produced income. Instead, they simply “referenced” existing assets and then allowed investors to use credit default swaps to place bets on the performance of those referenced assets. Investors who bet that the referenced assets would maintain or increase in value bought the CDO’s securities and, in exchange, received periodic coupon payments to recoup their principal investment plus interest. Investors who bet that the referenced assets would lose value or incur a specified negative credit event purchased one or more credit default swap contracts referencing the CDO’s assets, and paid monthly premiums to the CDO in exchange for obtaining a large lump sum payment if the loss or other negative credit event actually occurred. Investors in synthetic CDOs who bet the referenced assets would maintain or increase in value were said to be on the “long” side, while investors who bet the assets would lose value or fail were said to be on the “short” side. Some investment banks also created “hybrid CDOs” which contained some cash assets as well as credit default swaps referencing other assets. Others created financial instruments called CDO squared or cubed, which contained or referenced tranches from other CDOs.

Like RMBS mortgage pools and cash CDOs, synthetic and hybrid CDOs pooled the payments they received, designed a waterfall assigning portions of the revenues to tranches set up in a certain order, created securities linked to the various tranches, and then sold the CDO securities to investors. Some CDOs employed a “portfolio selection agent” to select the initial assets for the CDO. In addition, some CDOs employed a “collateral manager” to select both the initial and subsequent assets that went into the CDO.

Ratings Used to Market RMBS and CDOs. Wall Street firms helped design RMBS and CDO securities, worked with the credit rating agencies to obtain ratings for the securities, and sold the securities to investors like pension funds, insurance companies, university endowments, municipalities, and hedge funds. Without investment grade ratings, Wall Street firms would have had a more difficult time selling structured finance products to investors, because each investor would have had to perform its own due diligence review of the product. In addition, their sales would have been restricted by federal and state regulations limiting certain institutional investors to the purchase of instruments carrying investment grade credit ratings. Still other regulations conditioned capital reserve requirements on the credit ratings assigned to a bank’s investments. Investment grade credit ratings, thus, purported to simplify the investors’ due diligence review, ensured some investors could make a purchase, reduced banks’ capital calls, and otherwise enhanced the sales of the structured finance products. Here’s how one federal bank regulator’s handbook put it:

“The rating agencies perform a critical role in structured finance — evaluating the credit quality of the transactions. Such agencies are considered credible because they possess

the expertise to evaluate various underlying asset types, and because they do not have a financial interest in a security's cost or yield. Ratings are important because investors generally accept ratings by the major public rating agencies in lieu of conducting a due diligence investigation of the underlying assets and the servicer."⁴²

The more complex and opaque the structured finance instruments became, the more reliant investors were on high credit ratings for the instruments to be marketable.

In addition to making structured finance products easier to sell to investors, Wall Street firms used financial engineering to combine AAA ratings – normally reserved for ultra-safe investments with low rates of return – with high risk assets, such as the AAA tranche from a subprime RMBS paying a relatively high rate of return. Higher rates of return, combined with AAA ratings, made subprime RMBS and related CDOs especially attractive investments.

Record Ratings and Revenues. From 2004 to 2007, Moody's and S&P produced a record number of ratings and a record amount of revenues for rating structured finance products. A 2008 S&P submission to the SEC indicates, for example, that from 2004 to 2007, S&P issued more than 5,500 RMBS ratings and more than 835 mortgage related CDO ratings.⁴³ According to a 2008 Moody's submission to the SEC, from 2004 to 2007, Moody's issued over 4,000 RMBS ratings and over 870 CDO ratings.⁴⁴

Revenues increased dramatically over the same time period. The credit rating agencies charged substantial fees to rate a product. To obtain a rating during the height of the market, for example, S&P generally charged from \$40,000 to \$135,000 to rate tranches of an RMBS and from \$30,000 to \$750,000 to rate the tranches of a CDO.⁴⁵ Surveillance fees generally ranged from \$5,000 to \$50,000 per year for mortgage backed securities.⁴⁶ Over a five-year period, Moody's gross revenues from RMBS and CDO ratings more than tripled, going from over \$61 million in 2002, to over \$260 million in 2006.⁴⁷ S&P's revenue also increased. S&P's gross revenues for RMBS and mortgage related CDO ratings quadrupled, from over \$64 million in

⁴² 11/1997 Comptroller of the Currency Administrator of National Banks Comptroller's Handbook, "Asset Securitization," at 11.

⁴³ 3/14/2008 compliance letter from S&P to SEC, SEC_OCIE_CRA_011218-59, at 20. These numbers represent the RMBS or CDO pools that were presented to S&P which then issued ratings for multiple tranches per RMBS or CDO pool. (See Chapter V below.)

⁴⁴ 3/11/2008 compliance letter from Moody's to SEC, SEC_OCIE_CRA_011212 and SEC_OCIE_CRA_011214. These numbers represent the RMBS or CDO pools that were presented to Moody's which then issued ratings for multiple tranches per RMBS or CDO pool. The data Moody's provided to the SEC on CDOs represented ABS CDOs, some of which may not be mortgage related. However, by 2004, most, but not all, CDOs relied primarily on mortgage related assets such as RMBS securities. Subcommittee interview of Gary Witt, former Managing Director of Moody's RMBS Group (10/29/2009). (See Chapter V below.)

⁴⁵ "U.S. Structured Ratings Fee Schedule Residential Mortgage-backed Financings and Residential Servicer Evaluations," prepared by S&P, S&P-PSI 0000028-35; and "U.S. Structured Ratings Fee Schedule Collateralized Debt Obligations Amended 3/7/2007," prepared by S&P, S&P-PSI 0000036-50. (See Chapter V below.)

⁴⁶ Id.

⁴⁷ 3/11/2008 compliance letter from Moody's to SEC, SEC_OCIE_CRA_011212 and SEC_OCIE_CRA_011214. The 2002 figure does not include gross revenue from CDO ratings as this figure was not readily available due to the transition of Moody's accounting systems. (See Chapter V below.)

2002, to over \$265 million in 2006.⁴⁸ Altogether, revenues from the three leading credit rating agencies more than doubled from nearly \$3 billion in 2002 to over \$6 billion in 2007.⁴⁹

Conflicts of Interest. Credit rating agencies are paid by the issuers seeking ratings for the products they sell. Issuers and the investment banks want high ratings, whether to help market their products or ensure they comply with federal regulations. Because credit rating agencies issue ratings to issuers and investment banks who bring them business, they are subject to an inherent conflict of interest that can create pressure on the credit rating agencies to issue favorable ratings to attract business. The issuers and investment banks engage in “ratings shopping,” choosing the credit rating agency that offers the highest ratings. Ratings shopping weakens rating standards as the rating agencies who provide the most favorable ratings win more business. In September 2007, Moody’s CEO described the problem this way: “What happened in ’04 and ’05 with respect to subordinated tranches is that our competition, Fitch and S&P, went nuts. Everything was investment grade.”⁵⁰ In 2003, the SEC reported that “the potential conflicts of interest faced by credit rating agencies have increased in recent years, particularly given the expansion of large credit rating agencies into ancillary advisory and other businesses, and the continued rise in importance of rating agencies in the U.S. securities markets.”⁵¹

Mass Downgrades. The credit ratings assigned to RMBS and CDO securities are designed to last the lifetime of the securities. Because circumstances can change, however, credit rating agencies conduct ongoing surveillance of each rated financial product to evaluate the rating and determine whether it should be upgraded or downgraded. Prior to the financial crisis, the numbers of downgrades and upgrades for structured finance ratings were substantially lower.⁵² Beginning in July 2007, however, Moody’s and S&P issued hundreds and then thousands of downgrades of RMBS and CDO ratings, the first mass downgrades in U.S. history.

From 2004 through the first half of 2007, Moody’s and S&P provided AAA ratings to a majority of the RMBS and CDO securities issued in the United States, sometimes providing AAA ratings to as much as 95% of a securitization.⁵³ By 2010, analysts had determined that over 90% of the AAA ratings issued to RMBS securities originated in 2006 and 2007 had been downgraded to junk status.⁵⁴

⁴⁸ 3/14/2008 compliance letter from S&P to SEC, SEC_OCIE_CRA_011218-59, at 18-19. (See Chapter V below.)

⁴⁹ “Revenue of the Three Credit Rating Agencies: 2002-2007,” chart prepared by the Subcommittee using data from <http://thismatter.com/money>, Hearing Exhibit 4/23-1g.

⁵⁰ 9/10/2007 Transcript of Raymond McDaniel at Moody’s MD Town Hall Meeting, Hearing Exhibit 4/23-98.

⁵¹ 1/2003 “Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets,” prepared by the SEC, at 40. The report continued: “[C]oncerns had been expressed that a rating agency might be tempted to give a more favorable rating to a large issue because of the large fee, and to encourage the issuer to submit future large issues to the rating agency.” Id. at 40 n.109.

⁵² See, e.g., “3/26/2010 “Fitch Ratings Global Structured Finance 2009 Transition and Default Study,” prepared by Fitch.

⁵³ See “MBS Ratings and the Mortgage Credit Boom,” Federal Reserve Bank of New York Staff Report no. 449, May 2010, at 1.

⁵⁴ See, e.g., “Percent of the Original AAA Universe Currently Rated Below Investment Grade,” chart prepared by BlackRock Solutions, Hearing Exhibit 4/23-1i. See also 3/2008 “Understanding the Securitization of Subprime Mortgage Credit,” Federal Reserve Bank of New York Staff Report no. 318, at 58 and chart 31 (“92 percent of 1st-

Moody's and S&P began downgrading RMBS and CDO products in late 2006, when residential mortgage delinquency rates and losses began increasing. Then, in July 2007, both S&P and Moody's initiated the first of several mass downgrades that shocked the financial markets. On July 10, S&P placed on credit watch the ratings of 612 subprime RMBS with an original value of \$7.35 billion. Later that day, Moody's downgraded 399 subprime RMBS with an original value of \$5.2 billion. Two days later, S&P downgraded 498 of the ratings it had placed on credit watch.

In October 2007, Moody's began downgrading CDOs on a daily basis, downgrading more than 270 CDO securities with an original value of \$10 billion. In December 2007, Moody's downgraded another \$14 billion in CDOs, and placed another \$105 billion on credit watch. Moody's calculated that, overall in 2007, "8725 ratings from 2116 deals were downgraded and 1954 ratings from 732 deals were upgraded,"⁵⁵ which means that it downgraded over four times more ratings than it upgraded. On January 30, 2008, S&P either downgraded or placed on credit watch over 8,200 ratings of subprime RMBS and CDO securities, representing issuance amounts of approximately \$270.1 billion and \$263.9 billion, respectively.⁵⁶

These downgrades created significant turmoil in the securitization markets, as investors were required by regulations to sell off assets that had lost their investment grade status, holdings at financial firms plummeted in value, and new securitizations were unable to find investors. As a result, the subprime RMBS and CDO secondary markets slowed and then collapsed, and financial firms around the world were left holding billions of dollars in suddenly unmarketable RMBS and CDO securities.

D. Investment Banks

Historically, investment banks helped raise capital for business and other endeavors by helping to design, finance, and sell financial products like stocks or bonds. When a corporation needed capital to fund a large construction project, for example, it often hired an investment bank either to help it arrange a bank loan or raise capital by helping to market a new issue of shares or corporate bonds to investors. Investment banks also helped with corporate mergers and acquisitions. Today, investment banks also participate in a wide range of other financial activities, including offering broker-dealer and investment advisory services, and trading derivatives and commodities. Many have also been active in the mortgage market and have worked with lenders or mortgage brokers to package and sell mortgage loans and mortgage backed securities. Investment banks have traditionally performed these services in exchange for fees.

lien subprime deals originated in 2006 as well as ... 91.8 percent of 2nd-lien deals originated in 2006 have been downgraded.").

⁵⁵ 2/2008 "Structured Finance Ratings Transitions, 1983-2007," Credit Policy Special Comment prepared by Moody's, at 4.

⁵⁶ 6/24/2010 supplemental response from S&P to the Subcommittee, Exhibit N, Hearing Exhibit 4/23-108 (1/30/2008 "S&P Takes Action on 6,389 U.S. Subprime RMBS Ratings and 1,953 CDO Ratings," S&P's RatingsDirect). Ratings may appear on CreditWatch when events or deviations from an expected trend occur and additional information is needed to evaluate the rating.

If an investment bank agreed to act as an “underwriter” for the issuance of a new security to the public, it typically bore the risk of those securities on its books until the securities were sold. By law, securities sold to the public generally must be registered with the SEC.⁵⁷ Registration statements explain the purpose of a proposed public offering, an issuer’s operations and management, key financial data, and other important facts to potential investors. Any offering document or prospectus provided to the investing public must also be filed with the SEC. If an issuer decides not to offer a new security to the general public, it can still offer it to investors through a “private placement.”⁵⁸ Investment banks often act as the “placement agent” in these private offerings, helping to design, market and sell the security to selected investors. Solicitation documents in connection with private placements are not required to be filed with the SEC. Under the federal securities laws, however, investment banks that act as an underwriter or placement agent may be liable for any material misrepresentations or omissions of material facts made in connection with a solicitation or sale of a security to an investor.⁵⁹

In the years leading up to the financial crisis, RMBS securities were generally registered with the SEC and sold in public offerings, while CDO securities were generally sold to investors through private placements. Investment banks frequently served as the underwriter or placement agent in those transactions, and typically sold both types of securities to large institutional investors.

In addition to arranging for a public or private offering, some investment banks take on the role of a “market maker,” standing willing and able to buy or sell financial products to their clients or other market participants. To facilitate client orders to buy or sell those products, the investment bank may acquire an inventory of them and make them available for client transactions.⁶⁰ By filling both buy and sell orders, market makers help create a liquid market for the financial products and make it easier and more attractive for clients to buy and sell them. Market makers typically rely on fees in the form of markups in the price of the financial products for their profits.

At the same time, investment banks may decide to buy and sell the financial products for their own account, which is called “proprietary trading.” Investment banks often use the same inventory of financial products to carry out both their market-making and proprietary trading activities. Investment banks that trade for their own account typically rely on changes in the values of the financial products to turn a profit.

Inventories that are used for market making and short term proprietary trading purposes are typically designated as a portfolio of assets “held for sale.” Investment banks also typically maintain an inventory or portfolio of assets that they intend to keep as long term investments.

⁵⁷ Securities Act of 1933, 15 U.S.C. § 77a (1933).

⁵⁸ See, e.g., Securities Act of 1933 §§ 3(b) and 4(2); 17 CFR §230.501 et seq. (Regulation D).

⁵⁹ Securities Act of 1933, §11, 15 U.S.C. § 77k; and Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder.

⁶⁰ For a detailed discussion of market making, see “Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds,” prepared by the Financial Stability Oversight Council, at 28-29 (Jan. 18, 2011) (citing SEC Exchange Act Rel. No. 34-58775 (Oct. 14, 2008)).

This inventory or portfolio of long-term assets is typically designated as “held for investment,” and is not used in day-to-day transactions.

Investment banks that carry out market-making and proprietary trading activities are required—by their banking regulator in the case of banks and bank holding companies⁶¹ and by the SEC in the case of broker-dealers⁶²—to track their investments and maintain sufficient capital to meet their regulatory requirements and financial obligations. These capital requirements typically vary based on how the positions are held and how they are classified. For example, assets that are “held for sale” or are in the “trading account” typically have lower capital requirements than those that are “held for investment,” because of the expected lower risks associated with what are expected to be shorter term holdings.

Many investment banks use complex automated systems to analyze the “Value at Risk” (“VaR”) associated with their holdings. To reduce the VaR attached to their holdings, investment banks employ a variety of methods to offset or “hedge” their risk. These methods can include diversifying their assets, taking a short position on related financial products, purchasing loss protection through insurance or credit default swaps, or taking positions in derivatives whose values move inversely to the value of the assets being hedged.

Shorting the Mortgage Market. Prior to the financial crisis, investors commonly purchased RMBS or CDO securities as long-term investments that produced a steady income. In 2006, however, the high risk mortgages underlying these securities began to incur record levels of delinquencies. Some investors, worried about the value of their holdings, sought to sell their RMBS or CDO securities, but had a difficult time doing so due to the lack of an active market. Some managed to sell their high risk RMBS securities to investment banks assembling cash CDOs.

Some investors, instead of selling their RMBS or CDO securities, purchased “insurance” against a loss by buying a credit default swap (CDS) that would pay off if the specified securities incurred losses or other negative credit events. By 2005, investment banks had standardized CDS contracts for RMBS and CDO securities, making this a practical alternative.

Much like insurance, the buyer of a CDS contract paid a periodic premium to the CDS seller, who guaranteed the referenced security against loss. CDS contracts referencing a single security or corporate bond became known as “single name” CDS contracts. If the referenced security later incurred a loss, the CDS seller had to pay an agreed-upon amount to the CDS buyer to cover the loss. Some investors began to purchase single name CDS contracts, not as a hedge to offset losses from RMBS or CDO securities they owned, but as a way to profit from particular RMBS or CDO securities they predicted would lose money. CDS contracts that paid off on securities that were not owned by the CDS buyer were known as “naked credit default swaps.”

⁶¹ See, e.g., 12 CFR part 3, Appendix A (for the Office of the Comptroller of the Currency), 12 CFR part 208, Appendix A and 12 CFR part 225, Appendix A (for the Federal Reserve Board of Governors) and 12 CFR part 325, Appendix A (for the Federal Deposit Insurance Corporation).

⁶² Securities Exchange Act of 1934, Rule 15c3-1.

Some investors purchased large numbers of these CDS contracts in a concerted strategy to profit from mortgage backed securities they believed would fail.

Some investment banks took the CDS approach a step further. In 2006, a consortium of investment banks led by Goldman Sachs and Deutsche Bank launched the ABX Index, which created five indices that tracked the aggregate performance of a basket of 20 designated subprime RMBS securitizations.⁶³ Borrowing from longstanding practice in commodities markets, investors could buy and sell contracts linked to the value of one of the ABX indices. Each contract consisted of a credit default swap agreement in which the parties could essentially wager on the rise or fall of the index value. According to a Goldman Sachs employee, the ABX Index “introduced a standardized tool that allow[ed] clients to quickly gain exposure to the asset class,” in this case subprime RMBS securities. An investor – or investment bank – taking a short position in an ABX contract was, in effect, placing a bet that the basket of subprime RMBS securities would lose value.

Synthetic CDOs provided still another vehicle for shorting the mortgage market. In this approach, an investment bank created a synthetic CDO that referenced a variety of RMBS securities. One or more investors could take the “short” position by paying premiums to the CDO in exchange for a promise that the CDO would pay a specified amount if the referenced assets incurred a negative credit event, such as a default or credit rating downgrade. If that event took place, the CDO would have to pay an agreed-upon amount to the short investors to cover the loss, removing income from the CDO and causing losses for the long investors. Synthetic CDOs became a way for investors to short multiple specific RMBS securities that they expected would incur losses.

Proprietary Trading. Financial institutions also built increasingly large proprietary holdings of mortgage related assets. Numerous financial firms, including investment banks, bought RMBS and CDO securities, and retained these securities in their investment portfolios. Others retained these securities in their trading accounts to be used as inventory for short term trading activity, market making on behalf of clients, hedging, providing collateral for short term loans, or maintaining lower capital requirements. Deutsche Bank’s RMBS Group in New York, for example, built up a \$102 billion portfolio of RMBS and CDO securities, while the portfolio at an affiliated hedge fund, Winchester Capital, exceeded \$8 billion.⁶⁴ Other financial firms, including Bear Stearns, Citibank, JPMorgan Chase, Lehman Brothers, Merrill Lynch, Morgan Stanley, and UBS also accumulated enormous propriety holdings in mortgage related products. When the value of these holdings dropped, some of these financial institutions lost tens of

⁶³ Each of the five indices tracked a different tranche of securities from the designated 20 subprime RMBS securitizations. One index tracked AAA rated securities from the 20 subprime RMBS securities; the second tracked AA rated securities from the 20 RMBS securitizations; and the remaining indices tracked baskets of A, BBB, and BBB rated RMBS securities. Every six months, a new set of RMBS securitizations was selected for a new ABX index. See 3/2008 “Understanding the Securitization of Subprime Mortgage Credit,” prepared by Federal Reserve Bank of New York, Report No. 318, at 26. Markit Group Ltd. administered the ABX Index which issued indices in 2006 and 2007, but has not issued any new indices since then.

⁶⁴ For more information, see Chapter VI, section discussing Deutsche Bank.

billions of dollars,⁶⁵ and either declared bankruptcy, were sold off,⁶⁶ or were bailed out by U.S. taxpayers seeking to avoid damage to the U.S. economy as a whole.⁶⁷

One investment bank, Goldman Sachs, built a large number of proprietary positions to short the mortgage market.⁶⁸ Goldman Sachs had helped to build an active mortgage market in the United States and had accumulated a huge portfolio of mortgage related products. In late 2006, Goldman Sachs decided to reverse course, using a variety of means to bet against the mortgage market. In some cases, Goldman Sachs took proprietary positions that paid off only when some of its clients lost money on the very securities that Goldman Sachs had sold to them and then shorted. Altogether in 2007, Goldman's mortgage department made \$1.2 billion in net revenues from shorting the mortgage market.⁶⁹ Despite those gains, Goldman Sachs was given a \$10 billion taxpayer bailout under the Troubled Asset Relief Program,⁷⁰ tens of billions of dollars in support through accessing the Federal Reserve's Primary Dealer Credit Facility,⁷¹ and billions more in indirect government support⁷² to ensure its continued existence.

E. Market Oversight

U.S. financial regulators failed to stop financial firms from engaging in high risk, conflict-ridden activities. Those regulatory failures arose, in part, from the fragmented nature of U.S. financial oversight as well as statutory barriers to regulating high risk financial products.

⁶⁵ See, e.g., Goldman Sachs Group, Inc., 2008 Annual Report 27 (2009) (stating that the firm had "long proprietary positions in a number of [its] businesses. These positions are accounted for at fair value, and the declines in the values of assets have had a direct and large negative impact on [its] earnings in fiscal 2008."); see also, Viral V. Acharya and Matthew Richardson, "Causes of the Financial Crisis," 21 *Critical Review* 195, 199-204 (2009) (citing proprietary holdings of asset backed securities as one of the primary drivers of accumulated risks causing the financial crisis); "Prop Trading Losses Ain't Peanuts," *The Street* (1/27/2010), <http://www.thestreet.com/story/10668047/prop-trading-losses-aint-peanuts.html>.

⁶⁶ See, e.g., "Lehman Files for Bankruptcy; Merrill is Sold," *New York Times* (9/14/2008); and discussion in Chapter III of Washington Mutual Bank which was sold to JPMorgan Chase.

⁶⁷ See, e.g., Capital Purchase Program Transactions, under the Troubled Asset Relief Program, U.S. Department of the Treasury, at <http://www.treasury.gov/initiatives/financial-stability/investment-programs/cpp/Pages/capitalpurchaseprogram.aspx>.

⁶⁸ For more information, see Chapter VI, section describing Goldman Sachs.

⁶⁹ Id. Goldman's Structured Product Group Trading Desk earned \$3.7 billion in net revenues, which was offset by losses on other desks within the mortgage department, resulting in the \$1.2 billion in total net revenues.

⁷⁰ See, e.g., Capital Purchase Program Transactions, under the Troubled Asset Relief Program, U.S. Department of the Treasury, available at <http://www.treasury.gov/initiatives/financial-stability/investment-programs/cpp/Pages/capitalpurchaseprogram.aspx> and an example of a transactions report at <http://www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/transactions-report-062309.pdf>.

⁷¹ See data available at http://www.federalreserve.gov/newsevents/reform_pdcf.htm showing Goldman Sachs' use of the Primary Dealer Credit Facility 85 times in 2008.

⁷² See, e.g., prepared statement of Neil Barofsky, Special Inspector General of the Troubled Asset Relief Program, "The Federal Bailout of AIG," before the House Committee on Oversight and Government Reform (1/27/2010), <http://oversight.house.gov/images/stories/Hearings/pdfs/20100127barofsky.pdf> (noting that some firms, including Goldman Sachs, disproportionately benefited from the federal government's bailout of AIG).

Oversight of Lenders. At the end of 2005, the United States had about 8,800 federally insured banks and thrifts,⁷³ plus about 8,700 federally insured credit unions, many of which were in the business of issuing home loans.⁷⁴ On the federal level, these financial institutions were overseen by five agencies: the Federal Reserve which oversaw state-chartered banks that were part of the federal reserve system as well as foreign banks and others; the Office of the Comptroller of the Currency (OCC) which oversaw banks with national charters; the Office of Thrift Supervision (OTS) which oversaw federally-chartered thrifts; the National Credit Union Administration which oversaw federal credit unions; and the Federal Deposit Insurance Corporation (FDIC) which oversaw financial institutions that have federal deposit insurance (hereinafter referred to as “federal bank regulators”).⁷⁵ In addition, state banking regulators oversaw the state-chartered institutions and at times took action to require federally-chartered financial institutions to comply with certain state laws.

The primary responsibility of the federal bank regulators was to ensure the safety and soundness of the financial institutions they oversaw. One key mechanism they used to carry out that responsibility was to conduct examinations on a periodic basis of the financial institutions within their jurisdiction and provide the results in an annual Report of Examination (“ROE”) given to the Board of Directors at each entity. The largest U.S. financial institutions typically operated under a “continuous exam” program, which required federal bank examiners to conduct a series of specialized examinations during the year with the results from all of those examinations included in the annual ROE.

Federal examination activities were typically led by an Examiner in Charge and were organized around a rating system called CAMELS that was used by all federal bank regulators. The CAMELS rating system evaluated a financial institution’s: (C) capital adequacy, (A) asset quality, (M) management, (E) earnings, (L) liquidity, and (S) sensitivity to market risk. CAMELS ratings are on a scale of 1 to 5, in which 1 signifies a safe and secure bank with no cause for supervisory concern, 3 signifies an institution with supervisory concerns in one or more areas, and 5 signifies an unsafe and unsound bank with severe supervisory concerns. In the annual ROE, regulators typically provided a financial institution with a rating for each CAMELS component, as well as an overall composite rating on its safety and soundness.

In addition, the FDIC conducted its own examinations of financial institutions with federal deposit insurance. The FDIC reviews relied heavily on the examination findings and ROEs developed by the primary regulator of the financial institution, but the FDIC assigned its own CAMELS ratings to each institution. In addition, for institutions with assets of \$10 billion or more, the FDIC established a Large Insured Depository Institutions (“LIDI”) Program to assess and report on emerging risks that may pose a threat to the federal Deposit Insurance Fund. Under this program, the FDIC performed an ongoing analysis of emerging risks within each

⁷³ See FDIC Quarterly Banking Profile, 1 (Fourth Quarter 2005) (showing that, as of 12/31/2005, the United States had 8,832 federal and state chartered insured banks and thrifts).

⁷⁴ See 1/3/2011 chart, “Insurance Fund Ten-Year Trends,” supplied by the National Credit Union Administration (showing that, as of 12/31/2005, the United States had 8,695 federal and state credit unions).

⁷⁵ The Dodd-Frank Act has since abolished one of these agencies, the Office of Thrift Supervision, and assigned its duties to the OCC. See Chapter IV.

insured institution and assigned a quarterly risk rating, using a scale of A to E, with A being the best rating and E the worst.

If a regulator became concerned about the safety or soundness of a financial institution, it had a wide range of informal and formal enforcement actions that could be used to require operational changes. Informal actions included requiring the financial institution to issue a safety and soundness plan, memorandum of understanding, Board resolution, or commitment letter pledging to take specific corrective actions by a certain date, or issuing a supervisory letter to the financial institution listing specific “matters requiring attention.” These informal enforcement actions are generally not made public and are not enforceable in court. Formal enforcement actions included a regulator’s issuing a public memorandum of understanding, consent order, or cease and desist order requiring the financial institution to stop an unsafe practice or take an affirmative action to correct identified problems; imposing a civil monetary penalty; suspending or removing personnel from the financial institution; or referring misconduct for criminal prosecution.

A wide range of large and small banks and thrifts were active in the mortgage market. Banks like Bank of America, Citigroup, JPMorgan Chase, and Wells Fargo originated, purchased, and securitized billions of dollars in home loans each year. Thrifts, whose charters typically required them to hold 65% of their assets in mortgage related assets, also originated, purchased, sold, and securitized billions of dollars in home loans, including such major lenders as Countrywide Financial Corporation, IndyMac Bank, and Washington Mutual Bank. Some of these banks and thrifts also had affiliates, such as Long Beach Mortgage Corporation, which specialized in issuing subprime mortgages. Still more lenders operated outside of the regulated banking system, including New Century Financial Corporation and Fremont Loan & Investment, which used such corporate vehicles as industrial loan companies, real estate investment trusts, or publicly traded corporations to carry out their businesses. In addition, the mortgage market was populated with tens of thousands of mortgage brokers that were paid fees for their loans or for bringing qualified borrowers to a lender to execute a home loan.⁷⁶

Oversight of Securities Firms. Another group of financial institutions active in the mortgage market were securities firms, including investment banks, broker-dealers, and investment advisors. These security firms did not originate home loans, but typically helped design, underwrite, market, or trade securities linked to residential mortgages, including the RMBS and CDO securities that were at the heart of the financial crisis. Key firms included Bear Stearns, Goldman Sachs, Lehman Brothers, Merrill Lynch, Morgan Stanley, and the asset management arms of large banks, including Citigroup, Deutsche Bank, and JPMorgan Chase. Some of these firms also had affiliates which specialized in securitizing subprime mortgages.

Securities firms were overseen on the federal level by the Securities and Exchange Commission (SEC) whose mission is to “protect investors, maintain fair, orderly, and efficient

⁷⁶ 1/2009 “Financial Regulation: A Framework for Crafting and Assessing Proposals to Modernize the Outdated U.S. Financial Regulatory System,” prepared by the Government Accountability Office, Report No. GAO-09-216, at 26-27.

markets, and facilitate capital formation.”⁷⁷ The SEC oversees the “key participants in the securities world, including securities exchanges, securities brokers and dealers, investment advisors, and mutual funds,” primarily for the purpose of “promoting the disclosure of important market related information, maintaining fair dealing, and protecting against fraud.”⁷⁸

The securities firms central to the financial crisis were subject to a variety of SEC regulations in their roles as broker-dealers, investment advisors, market makers, underwriters, and placement agents. Most were also subject to oversight by state securities regulators.⁷⁹ The securities firms were required to submit a variety of public filings with the SEC about their operations and in connection with the issuance of new securities. The SEC’s Office of Compliance Inspections and Examinations (OCIE) conducted inspections of broker-dealers, among others, to understand industry practices, encourage compliance, evaluate risk management, and detect violations of the securities laws. In addition, under the voluntary Consolidated Supervised Entities program, the SEC’s Division of Trading and Markets monitored the investment activities of the largest broker-dealers, including Bear Stearns, Goldman Sachs, Lehman Brothers, Merrill Lynch, Morgan Stanley, Citigroup, and JP Morgan Chase, evaluating their capital levels, use of leverage, and risk management.⁸⁰

Like bank regulators, if the SEC became concerned about a particular securities firm, it could choose from a range of informal and formal enforcement actions. Informal actions could include issuing a “deficiency letter” identifying problems and requiring the securities firm to take corrective action by a certain date. Formal enforcement actions, undertaken by the SEC’s Division of Enforcement, could include civil proceedings before an administrative law judge; a civil complaint filed in federal district court; civil fines; an order to suspend or remove personnel from a firm or bar them from the brokerage industry; or a referral for criminal prosecution. Common securities violations included selling unregistered securities, misrepresenting information about a security, unfair dealing, price manipulation, and insider trading.⁸¹

Statutory and Regulatory Barriers. Federal and state financial regulators responsible for oversight of banks, securities firms, and other financial institutions in the years leading to the financial crisis operated under a number of statutory and regulatory constraints.

One key constraint was the sweeping statutory prohibition on the federal regulation of any type of swap, including credit default swaps. This prohibition took effect in 2000, with enactment of the Commodity Futures Modernization Act (CFMA).⁸² The key statutory section explicitly prohibited federal regulators from requiring the registration of swaps as securities; issuing or enforcing any regulations or orders related to swaps; or imposing any recordkeeping

⁷⁷ See SEC website, “About the SEC: What We Do,” www.sec.gov.

⁷⁸ *Id.*

⁷⁹ Some firms active in the U.S. securities and mortgage markets, such as hedge funds, operated without meaningful federal oversight by taking advantage of exemptions in the Investment Company Act of 1940.

⁸⁰ See 9/2008 “SEC’s Oversight of Bear Stearns and Related Entities: The Consolidated Entity Program,” report prepared by Office of the SEC Inspector General, Report No. 446-A.

⁸¹ See SEC website, “About the SEC: What We Do,” www.sec.gov.

⁸² CFMA was included as a title of H.R. 4577, the Consolidated Appropriations Act of 2001, P.L.106-554.

requirements for swaps.⁸³ In addition, the law explicitly prohibited regulation of any “‘interest rate swap,’ including a rate floor, rate cap, rate collar, cross-currency rate swap, basis swap, currency swap, equity index swap, equity swap, debt index swap, debt swap, credit spread, credit default swap, credit swap, weather swap, or commodity swap.”⁸⁴ These prohibitions meant that federal regulators could not even ask U.S. financial institutions to report on their swaps trades or holdings, much less regulate swap dealers or examine how swaps were affecting the mortgage market or other U.S. financial markets.

As a result, the multi-trillion-dollar U.S. swaps markets operated with virtually no disclosure requirements, no restrictions, and no oversight by any federal agency, including the market for credit default swaps which played a prominent role in the financial crisis. On September 23, 2008, in a hearing before the Senate Committee on Banking, Housing, and Urban Affairs, then SEC Chairman Christopher Cox testified that, as a result of the statutory prohibition, the credit default swap market “is completely lacking in transparency,” “is regulated by no one,” and “is ripe for fraud and manipulation.”⁸⁵ In a September 26, 2008 press release, he discussed regulatory gaps impeding his agency and again raised the issue of swaps: “Unfortunately, as I reported to Congress this week, a massive hole remains: the approximately \$60 trillion credit default swap market, which is regulated by no agency of government. Neither the SEC nor any regulator has authority even to require minimum disclosure.”⁸⁶ In 2010, the Dodd-Frank Act removed the CFMA prohibition on regulating swaps.⁸⁷

A second significant obstacle for financial regulators was the patchwork of federal and state laws and regulations applicable to high risk mortgages and mortgage brokers. Federal bank regulators took until October 2006, to provide guidance to federal banks on acceptable lending practices related to high risk home loans.⁸⁸ Even then, the regulators issued voluntary guidance whose standards were not enforceable in court and failed to address such key issues as the acceptability of stated income loans.⁸⁹ In addition, while Congress had authorized the Federal Reserve, in 1994, to issue regulations to prohibit deceptive or abusive mortgage practices – regulations that could have applied across the board to all types of lenders and mortgage brokers – the Federal Reserve failed to issue any until July 2008, after the financial crisis had already hit.⁹⁰

⁸³ CFMA, § 302, creating a new section 2A of the Securities Act of 1933.

⁸⁴ CFMA, § 301, creating a new section 206A of the Gramm-Leach-Bliley Act.

⁸⁵ Statement of SEC Chairman Christopher Cox, “Turmoil in U.S. Credit Markets: Recent Actions Regarding Government Sponsored Entities, Investment Banks and Other Financial Institutions,” before the U.S. Senate Committee on Banking, Housing and Urban Affairs, S.Hrg. 110-1012 (9/23/2008).

⁸⁶ 9/26/2008 SEC press release, “Chairman Cox Announces End of Consolidated Supervised Entities Program,” <http://www.sec.gov/news/press/2008/2008-230.htm>.

⁸⁷ Title VII of the Dodd-Frank Act.

⁸⁸ 10/4/2006 “Interagency Guidance on Nontraditional Mortgage Product Risks,” (NTM Guidance), 71 Fed. Reg. 192 at 58609.

⁸⁹ For more information, see Chapter IV.

⁹⁰ Congress authorized the Federal Reserve to issue the regulations in Section 151 of the Home Ownership and Equity Protection Act of 1994 (HOEPA), P.L. 103-325. The Federal Reserve did not issue any regulations under HOEPA, however, until July 2008, when it amended Regulation Z. The new rules primarily strengthened consumer protections for “higher priced loans,” which included many types of subprime loans. See “New Regulation Z Rules Enhance Protections for Mortgage Borrowers,” Consumer Compliance Outlook (Fourth Quarter 2008) (Among

A third problem, exclusive to state regulators, was a 2005 regulation issued by the OCC to prohibit states from enforcing state consumer protection laws against national banks.⁹¹ After the New York State Attorney General issued subpoenas to several national banks to enforce New York's fair lending laws, a legal battle ensued. In 2009, the Supreme Court invalidated the OCC regulation, and held that states were allowed to enforce state consumer protection laws against national banks.⁹² During the intervening four years, however, state regulators had been effectively unable to enforce state laws prohibiting abusive mortgage practices against federally-chartered banks and thrifts.

Systemic Risk. While bank and securities regulators focused on the safety and soundness of individual financial institutions, no regulator was charged with identifying, preventing, or managing risks that threatened the safety and soundness of the overall U.S. financial system. In the area of high risk mortgage lending, for example, bank regulators allowed banks to issue high risk mortgages as long as it was profitable and the banks quickly sold the high risk loans to get them off their books. Securities regulators allowed investment banks to underwrite, buy, and sell mortgage backed securities relying on high risk mortgages, as long as the securities received high ratings from the credit rating agencies and so were deemed "safe" investments. No regulatory agency focused on what would happen when poor quality mortgages were allowed to saturate U.S. financial markets and contaminate RMBS and CDO securities with high risk loans. In addition, none of the regulators focused on the impact derivatives like credit default swaps might have in exacerbating risk exposures, since they were barred by federal law from regulating or even gathering data about these financial instruments.

F. Government Sponsored Enterprises

Between 1990 and 2004, homeownership rates in the United States increased rapidly from 64% to 69%, the highest level in 50 years.⁹³ While many highly regarded economists and officials argued at the time that this housing boom was the result of healthy economic activity, in retrospect, some federal housing policies encouraged people to purchase homes they were ultimately unable to afford, which helped to inflate the housing bubble.

Fannie Mae and Freddie Mac. Two government sponsored entities (GSE), the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), were chartered by Congress to encourage homeownership primarily by providing a secondary market for home mortgages. They created that secondary market by purchasing loans from lenders, securitizing them, providing a guarantee that they would make up the cost of

other requirements, the rules prohibited lenders "from making loans based on collateral without regard to [the borrower's] repayment ability," required lenders to "verify income and obligations," and imposed "more stringent restrictions on prepayment penalties." The rules also required lenders to "establish escrow accounts for taxes and mortgage related insurance for first-lien loans." In addition, the rules "prohibit[ed] coercion of appraisers, define[d] inappropriate practices for loan servicers, and require[d] early truth in lending disclosures for most mortgages.").

⁹¹ 12 CFR § 7.4000.

⁹² *Cuomo v. Clearing House Association*, Case No. 08-453, 129 S.Ct. 2710 (2009).

⁹³ U.S. Census Bureau, "Table 14. Homeownership Rates by Area: 1960 to 2009," <http://www.census.gov/hhes/www/housing/hvs/annual09/ann09t14.xls>.

any securitized mortgage that defaulted, and selling the resulting mortgage backed securities to investors. Many believed that the securities had the implicit backing of the federal government and viewed them as very safe investments, leading investors around the world to purchase them. The existence of this secondary market encouraged lenders to originate more loans, since they could easily sell them to the GSEs and use the profits to increase their lending.

Over time, however, Fannie Mae and Freddie Mac began to purchase larger quantities of higher risk loans, providing a secondary market for those loans and encouraging their proliferation. Between 2005 and 2007, Fannie Mae alone purchased billions of dollars in high risk home loans, including Option ARM, Alt A, and loans with subprime characteristics. For example, data from Fannie Mae shows that, in mid 2008, 62% of the Option ARM loans on its books had been purchased between 2005 and 2007.⁹⁴ Likewise, 84% of its interest-only loans were purchased in that time frame, as were 57% of those with FICO scores less than 620; 62% of its loans with loan-to-value ratios greater than 90; and 73% of its Alt A loans.⁹⁵ While these loans constituted only a small percentage of Fannie Mae's purchases at the time, they came to account for some of its most significant losses. By the middle of 2009, Fannie Mae reported an unpaid principal balance of \$878 billion for its loans with subprime characteristics, nearly a third of its total portfolio of \$2.7 trillion.⁹⁶

According to economist Arnold Kling, Fannie Mae and Freddie Mac purchased these loans after "lowering their own credit standards in order to maintain a presence in the market and to meet their affordable housing goals."⁹⁷

Throughout their history, Fannie Mae and Freddie Mac were able to bundle the mortgages they purchased into securities that were popular with investors, because many believed the securities carried the implicit support of the federal government. The Congressional Budget Office found the following:

"Because of their [Fannie Mae and Freddie Mac] size and interconnectedness with other financial institutions, they posed substantial systemic risk—the risk that their failure could impose very high costs on the financial system and the economy. The GSEs' market power also allowed them to use their profits partly to benefit their other stakeholders rather than exclusively to benefit mortgage borrowers. The implicit guarantee created an incentive for the GSEs to take excessive risks: Stakeholders would benefit when gambles paid off, but taxpayers would absorb the losses when they did not.

... One way that Fannie Mae and Freddie Mac increased risk was by expanding the volume of mortgages and MBSs held in their portfolios, which exposed them to the risk

⁹⁴ Fannie Mae, 2008 Q2 10-Q Investor Summary, August 8, 2008, http://www.fanniemae.com/media/pdf/newsreleases/2008_Q2_10Q_Investor_Summary.pdf.

⁹⁵ Id.

⁹⁶ Fannie Mae, 2009 Second Quarter Credit Supplement, August 6, 2009, http://www.fanniemae.com/ir/pdf/sec/2009/q2credit_summary.pdf.

⁹⁷ "Not What They Had In Mind: A History of Policies that Produced the Financial Crisis of 2008," September 2009, Mercatus Center, [http://mercatus.org/sites/default/files/publication/NotWhatTheyHadInMind\(1\).pdf](http://mercatus.org/sites/default/files/publication/NotWhatTheyHadInMind(1).pdf).

of losses from changes in interest or prepayment rates. Over the past decade, the two GSEs also increased their exposure to default losses by investing in lower-quality mortgages, such as subprime and Alt-A loans.”⁹⁸

The risks embedded in their mortgage portfolios finally overwhelmed the GSEs in September 2008, and both Fannie Mae and Freddie Mac were taken into conservatorship by the federal government. Since that time, the Treasury Department has spent nearly \$150 billion to support the two GSEs, a total which projections show could rise to as high as \$363 billion.⁹⁹

Ginnie Mae. Additional housing policies that allowed borrowers with less than adequate credit to obtain traditional mortgages included programs at the Federal Housing Administration (FHA) and the Department of Veterans Affairs (VA). Both agencies provided loan guarantees to lenders that originated loans for borrowers that qualified under the agencies’ rules. Many of the loans guaranteed by the FHA and VA, some of which required down payments as low as 3%, were bundled and sold as mortgage backed securities through the Government National Mortgage Association (Ginnie Mae), an additional government sponsored enterprise. Like Fannie Mae and Freddie Mac, Ginnie Mae guaranteed that it would make up for any securitized loan that defaulted, producing another type of mortgage backed security that was popular with investors, many of whom believed that the security carried an implicit federal guarantee.

In the years leading up to the financial crisis, FHA guaranteed millions of home loans worth hundreds of billions of dollars.¹⁰⁰ According to FHA data, as of 2011, nearly 20% of all FHA loans originated in 2008 were seriously delinquent, meaning borrowers had missed three or more payments, while loans originated in 2007 had a serious delinquency rate of over 22%. The 2007 and 2008 loans, which currently make up about 15% of FHA’s active loan portfolio, remain the worst performing in that portfolio. In 2009 and 2010, FHA tightened its underwriting guidelines, and the loans it guaranteed performed substantially better. By early 2011, the serious delinquency rate for all FHA borrowers was about 8.8%, down from over 9.4% the prior year.

G. Administrative and Legislative Actions

In response to the financial crisis, Congress and the Executive Branch have taken a number of actions. Three that have brought significant changes are the Troubled Asset Relief Program, Federal Reserve assistance programs, and the Dodd-Frank Wall Street and Consumer Protection Act.

Troubled Asset Relief Program (TARP). On October 3, 2008, Congress passed and President Bush signed into law the Emergency Economic Stabilization Act of 2008, P.L. 110-

⁹⁸ Congressional Budget Office, “Fannie Mae, Freddie Mac, and the Federal Role in the Secondary Mortgage Market,” December 2010, at x, <http://www.cbo.gov/ftpdocs/120xx/doc12032/12-23-FannieFreddie.pdf>.

⁹⁹ Federal Housing Finance Agency, News Release, “FHFA Releases Projections Showing Range of Potential Draws for Fannie Mae and Freddie Mac,” October 21, 2010, http://fhfa.gov/webfiles/19409/Projections_102110.pdf.

¹⁰⁰ The statistics cited in this paragraph are taken from the U.S. Department of Housing and Urban Development, “FHA Single-Family Mutual Mortgage Insurance Fund Programs, Quarterly Report to Congress, FY 2011 Q1,” March 17, 2011, at 4 and 19, http://www.hud.gov/offices/hsg/rmra/oe/rpts rtc/fharc_q1_2011.pdf.

343. This law, which passed both Houses with bipartisan majorities, established the Troubled Asset Relief Program (TARP) and authorized the expenditure of up to \$700 billion to stop financial institutions from collapsing and further damaging the U.S. economy. Administered by the Department of the Treasury, with support from the Federal Reserve, TARP funds have been used to inject capital into or purchase or insure assets at hundreds of large and small banks.

The largest recipients of TARP funds were AIG, Ally Financial (formerly GMAC Financial Services), Bank of America, Citigroup, Goldman Sachs, JPMorgan Chase, Morgan Stanley, PNC Financial Services, U.S. Bancorp, and Wells Fargo, as well as Chrysler, and General Motors. Most have repaid all or a substantial portion of the TARP funds they received.

Although initially expected to cost U.S. taxpayers more than \$350 billion, the Congressional Budget Office estimated in November 2010, that the final cost of the TARP program will be approximately \$25 billion.¹⁰¹

Federal Reserve Emergency Support Programs. In addition, as the financial crisis began to unfold, the Federal Reserve aggressively expanded its balance sheet from about \$900 billion at the beginning of 2008, to more than \$2.4 trillion in December 2010, to provide support to the U.S. financial system and economy. Using more than a dozen programs, through more than 21,000 individual transactions, the Federal Reserve provided trillions of dollars in assistance to U.S. and foreign financial institutions in an effort to promote liquidity and prevent a financial collapse.¹⁰² In some instances, the Federal Reserve created new programs, such as its Agency Mortgage Backed Securities Purchase Program which purchased more than \$1.25 trillion in mortgages backed by Fannie Mae, Freddie Mac, and Ginnie Mae.¹⁰³ In other instances, it modified and significantly expanded existing programs, such as by lowering the quality of collateral it accepted for access to and increasing lending by the discount window.

Dodd-Frank Act. On July 21, 2010, Congress passed and President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203. This law, which passed both Houses with bipartisan majorities, expanded the authority of regulatory agencies to try to prevent future financial crises. Among other provisions, the law:

- established a Financial Stability Oversight Council, made up of federal financial regulators and others, to identify and respond to emerging financial risks;
- established a Consumer Financial Protection Bureau to strengthen protections of American consumers from abusive financial products and practices;
- restricted proprietary trading and investments in hedge funds by banks and other large financial institutions;

¹⁰¹ 11/2010 “Report on the Troubled Asset Relief Program,” prepared by the Congressional Budget Office, <http://www.cbo.gov/ftpdocs/119xx/doc11980/11-29-TARP.pdf>.

¹⁰² “Usage of Federal Reserve Credit and Liquidity Facilities,” Federal Reserve Board, available at http://www.federalreserve.gov/newsevents/reform_transaction.htm.

¹⁰³ “Agency Mortgage-Backed Securities Purchase Program,” Federal Reserve Board, available at http://www.federalreserve.gov/newsevents/reform_mbs.htm.

- prohibited sponsors of asset backed securities from engaging in transactions that would involve or result in a material conflict of interest with investors in those securities;
- established procedures to require nonbank firms whose failure would threaten U.S. financial stability to divest some holdings or undergo an orderly liquidation;
- strengthened regulation of credit rating agencies;
- strengthened mortgage regulation, including by clamping down on high cost mortgages, requiring securitizers to retain limited liability for securities reliant on high risk mortgages, banning stated income loans, and restricting negative amortization loans;
- required better federal regulation of mortgage brokers;
- directed regulators to require greater capital and liquidity reserves;
- required regulation of derivatives and derivative dealers;
- required registration of certain hedge funds and private equity funds;
- authorized regulators to impose standards of conduct that are the same as those applicable to investment advisers on broker-dealers who provide personalized investment advice to retail customers; and
- abolished the Office of Thrift Supervision.

H. Financial Crisis Timeline

This Report reviews events from the period 2004 to 2008, in an effort to identify and explain four significant causes of the financial crisis. A variety of events could be identified as the start of the crisis. Candidates include the record number of home loan defaults that began in December 2006; the FDIC's March 2007 cease and desist order against Fremont Investment & Loan which exposed the existence of unsafe and unsound subprime lending practices; or the collapse of the Bear Stearns hedge funds in June 2007. Still another candidate is the two-week period in September 2008, when half a dozen major U.S. financial institutions failed, were forcibly sold, or were bailed out by U.S. taxpayers seeking to prevent a collapse of the U.S. economy.

This Report concludes, however, that the most immediate trigger to the financial crisis was the July 2007 decision by Moody's and S&P to downgrade hundreds of RMBS and CDO securities. The firms took this action because, in the words of one S&P senior analyst, the investment grade ratings could not "hold." By acknowledging that RMBS and CDO securities containing high risk, poor quality mortgages were not safe investments and were going to incur losses, the credit rating agencies admitted the emperor had no clothes. Investors stopped buying,

the value of the RMBS and CDO securities fell, and financial institutions around the world were suddenly left with unmarketable securities whose value was plummeting. The financial crisis was on.

Because of the complex nature of the financial crisis, this chapter concludes with a brief timeline of some key events from 2006 through 2008. The succeeding chapters provide more detailed examinations of the roles of high risk lending, federal regulators, credit ratings agencies, and investment banks in causing the financial crisis.

Financial Crisis Timeline¹⁰⁴

December 2006:

Owinit Mortgage Solutions bankruptcy

February 27, 2007:

Freddie Mac announces it will no longer buy the most risky subprime mortgages

March 7, 2007:

FDIC issues cease & desist order against Fremont for unsafe and unsound banking

April 2, 2007:

New Century bankruptcy

June 17, 2007:

Two Bear Stearns subprime hedge funds collapse

July 10 and 12, 2007:

Credit rating agencies issue first mass downgrades of hundreds of RMBS and CDO securities

August 6, 2007:

American Home Mortgage bankruptcy

August 17, 2007:

Federal Reserve: “[M]arket conditions have deteriorated.... downside risks to growth have increased appreciably.”

August 31, 2007:

Ameriquist Mortgage ceases operations

December 12, 2007:

Federal Reserve establishes Term Auction Facility to provide bank funding secured by collateral

January 2008:

ABX Index stops issuing new subprime indices

January 11, 2008:

Countrywide announces sale to Bank of America

January 30, 2008:

S&P downgrades or places on credit watch over 8,000 RMBS/CDO securities

March 24, 2008:

Federal Reserve Bank of New York forms Maiden Lane I to help JPMorgan Chase acquire Bear Stearns

May 29, 2008:

Bear Stearns shareholders approve sale

July 11, 2008:

IndyMac Bank fails and is seized by FDIC

July 15, 2008:

SEC restricts naked short selling of some financial stocks

September 7, 2008:

U.S. takes control of Fannie Mae & Freddie Mac

September 15, 2008:

Lehman Brothers bankruptcy

September 15, 2008

Merrill Lynch announces sale to Bank of America

September 16, 2008:

Federal Reserve offers \$85 billion credit line to AIG; Reserve Primary Money Fund NAV falls below \$1

September 21, 2008:

Goldman Sachs and Morgan Stanley convert to bank holding companies

September 25, 2008:

WaMu fails, seized by FDIC, sold to JPMorgan Chase

October 3, 2008:

Congress and President Bush establish TARP

October 12, 2008:

Wachovia sold to Wells Fargo

October 28, 2008:

U.S. uses TARP to buy \$125 billion in preferred stock at 9 banks

November 25, 2008:

Federal Reserve buys Fannie and Freddie assets

¹⁰⁴ Many of these events are based upon a timeline prepared by the Federal Reserve Bank of St. Louis, “The Financial Crisis: A Timeline of Events and Policy Actions,” <http://timeline.stlouisfed.org/index.cfm?p=timeline>.

III. HIGH RISK LENDING: CASE STUDY OF WASHINGTON MUTUAL BANK

Washington Mutual Bank, known also as WaMu, rose out the ashes of the great Seattle fire to make its first home loan in 1890. By 2004, WaMu had become one of the nation's largest financial institutions and a leading mortgage lender. Its demise just four years later provides a case history that traces not only the rise of high risk lending in the mortgage field, but also how those high risk mortgages led to the failure of a leading bank and contributed to the financial crisis of 2008.

For many years, WaMu was a mid-sized thrift, specializing in home mortgages. In the 1990s, WaMu initiated a period of growth and acquisition, expanding until it became the nation's largest thrift and sixth largest bank, with \$300 billion in assets, \$188 billion in deposits, 2,300 branches in 15 states, and over 43,000 employees. In 2003, its longtime CEO, Kerry Killinger, said he wanted to do for the lending industry what Wal-Mart and others did for their industries, by catering to middle and lower income Americans and helping the less well off buy homes.¹⁰⁵ Soon after, WaMu embarked on a strategy of high risk lending. By 2006, its high risk loans began incurring record rates of delinquency and default, and its securitizations saw ratings downgrades and losses. In 2007, the bank itself began incurring losses. Its shareholders lost confidence, and depositors began withdrawing funds, eventually causing a liquidity crisis. On September 25, 2008, 119 years to the day of its founding, WaMu was seized by its regulator, the Office of Thrift Supervision (OTS), and sold to JPMorgan Chase for \$1.9 billion. Had the sale not gone through, WaMu's failure might have exhausted the \$45 billion Deposit Insurance Fund. Washington Mutual is the largest bank failure in U.S. history.

This case study examines how one bank's strategy for growth and profit led to the origination and securitization of hundreds of billions of dollars in poor quality mortgages that undermined the U.S. financial system. WaMu had held itself out as a prudent lender, but in reality, the bank turned increasingly to higher risk loans. Its fixed rate mortgage originations fell from 64% of its loan originations in 2003, to 25% in 2006, while subprime, Option ARM, and home equity originations jumped from 19% of the originations to 55%. Using primarily loans from its subprime lender, Long Beach Mortgage Corporation, WaMu's subprime securitizations grew sixfold, increasing from about \$4.5 billion in 2003, to \$29 billion in securitizations in 2006. From 2000 to 2007, WaMu and Long Beach together securitized at least \$77 billion in subprime loans. WaMu also increased its origination of Option ARMs, its flagship product, which from 2003 to 2007, represented as much as half of all of WaMu's loan originations. In 2006 alone, Washington Mutual originated more than \$42.6 billion in Option ARM loans and sold or securitized at least \$115 billion, including sales to the Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac). In addition, WaMu dramatically increased its origination and securitization of home equity loan products. By 2007,

¹⁰⁵ "Saying Yes, WaMu Built Empire on Shaky Loans," *New York Times* (12/27/2008) http://www.nytimes.com/2008/12/28/business/28wamu.html?_r=1 (quoting Mr. Killinger: "We hope to do to this industry what Wal-Mart did to theirs, Starbucks did to theirs, Costco did to theirs and Lowe's-Home Depot did to their industry. And I think if we've done our job, five years from now you're not going to call us a bank.").

home equity loans made up \$63.5 billion or 27% of its home loan portfolio, a 130% increase from 2003.

At the same time that WaMu was implementing its High Risk Lending Strategy, WaMu and Long Beach engaged in a host of shoddy lending practices that contributed to a mortgage time bomb. Those practices included qualifying high risk borrowers for larger loans than they could afford; steering borrowers to higher risk loans; accepting loan applications without verifying the borrower's income; using loans with teaser rates that could lead to payment shock when higher interest rates took effect later on; promoting negatively amortizing loans in which many borrowers increased rather than paid down their debt; and authorizing loans with multiple layers of risk. In addition, WaMu and Long Beach failed to enforce compliance with their lending standards; allowed excessive loan error and exception rates; exercised weak oversight over the third party mortgage brokers who supplied half or more of their loans; and tolerated the issuance of loans with fraudulent or erroneous borrower information. They also designed compensation incentives that rewarded loan personnel for issuing a large volume of higher risk loans, valuing speed and volume over loan quality.

WaMu's combination of high risk loans, shoddy lending practices, and weak oversight produced hundreds of billions of dollars of poor quality loans that incurred early payment defaults, high rates of delinquency, and fraud. Long Beach mortgages experienced some of the highest rates of foreclosure in the industry and their securitizations were among the worst performing. Senior WaMu executives described Long Beach as "terrible" and "a mess," with default rates that were "ugly." WaMu's high risk lending operation was also problem-plagued. WaMu management knew of evidence of deficient lending practices, as seen in internal emails, audit reports, and reviews. Internal reviews of WaMu's loan centers, for example, described "extensive fraud" from employees "willfully" circumventing bank policy. An internal review found controls to stop fraudulent loans from being sold to investors were "ineffective." On at least one occasion, senior managers knowingly sold delinquency-prone loans to investors. Aside from Long Beach, WaMu's President Steve Rotella described WaMu's prime home loan business as the "worst managed business" he had seen in his career.

Documents obtained by the Subcommittee reveal that WaMu launched its High Risk Lending Strategy primarily because higher risk loans and mortgage backed securities could be sold for higher prices on Wall Street. They garnered higher prices, because higher risk meant they paid a higher coupon rate than other comparably rated securities, and investors paid a higher price to buy them. Selling or securitizing the loans also removed them from WaMu's books and appeared to insulate the bank from risk.

From 2004 to 2008, WaMu originated a huge number of poor quality mortgages, most of which were then resold to investment banks and other investors hungry for mortgage backed securities. For a period of time, demand for these securities was so great that WaMu formed its own securitization arm on Wall Street. Over a period of five years, WaMu and Long Beach churned out a steady stream of high risk, poor quality loans and mortgage backed securities that later defaulted at record rates. Once a prudent regional mortgage lender, Washington Mutual

tried—and ultimately failed—to use the profits from poor quality loans as a stepping stone to becoming a major Wall Street player.

Washington Mutual was far from the only lender that sold poor quality mortgages and mortgage backed securities that undermined U.S. financial markets. The Subcommittee investigation indicates that Washington Mutual was emblematic of a host of financial institutions that knowingly originated, sold, and securitized billions of dollars in high risk, poor quality home loans. These lenders were not the victims of the financial crisis; the high risk loans they issued became the fuel that ignited the financial crisis.

A. Subcommittee Investigation and Findings of Fact

As part of its investigation into high risk lending and the Washington Mutual case study, the Subcommittee collected millions of pages of documents from Washington Mutual, JPMorgan Chase, OTS, the FDIC, eAppraiseIT, Lenders Service Inc., Moody's, Standard & Poor's, various investment banks, Fannie Mae, Freddie Mac, and others. The documents included email, correspondence, internal memoranda, reports, legal pleadings, financial analysis, prospectuses, and more. The Subcommittee also conducted more than 30 interviews with former WaMu employees and regulatory officials. The Subcommittee also spoke with personnel from the Offices of the Inspector General at the Department of Treasury and the FDIC, who were engaged in a joint review of WaMu's regulatory oversight and the events leading to its demise. In addition, the Subcommittee spoke with nearly a dozen experts on a variety of banking, accounting, regulatory, and legal issues. On April 13, 2010, the Subcommittee held a hearing which took testimony from former WaMu officials and released 86 exhibits.¹⁰⁶

In connection with the hearing, the Subcommittee released a joint memorandum from Chairman Carl Levin and Ranking Member Tom Coburn summarizing the investigation to date into Washington Mutual and the role of high risk home loans in the financial crisis. The memorandum contained the following findings of fact, which this Report reaffirms.

- 1. High Risk Lending Strategy.** Washington Mutual ("WaMu") executives embarked upon a High Risk Lending Strategy and increased sales of high risk home loans to Wall Street, because they projected that high risk home loans, which generally charged higher rates of interest, would be more profitable for the bank than low risk home loans.
- 2. Shoddy Lending Practices.** WaMu and its affiliate, Long Beach Mortgage Company ("Long Beach"), used shoddy lending practices riddled with credit, compliance, and operational deficiencies to make tens of thousands of high risk home loans that too often contained excessive risk, fraudulent information, or errors.

¹⁰⁶ "Wall Street and the Financial Crisis: The Role of High Risk Loans," before the U.S. Senate Permanent Subcommittee on Investigations, S.Hrg. 111-67 (April 13, 2010) (hereinafter "April 13, 2010 Subcommittee Hearing").

3. **Steering Borrowers to High Risk Loans.** WaMu and Long Beach too often steered borrowers into home loans they could not afford, allowing and encouraging them to make low initial payments that would be followed by much higher payments, and presumed that rising home prices would enable those borrowers to refinance their loans or sell their homes before the payments shot up.
4. **Polluting the Financial System.** WaMu and Long Beach securitized over \$77 billion in subprime home loans and billions more in other high risk home loans, used Wall Street firms to sell the securities to investors worldwide, and polluted the financial system with mortgage backed securities which later incurred high rates of delinquency and loss.
5. **Securitizing Delinquency-Prone and Fraudulent Loans.** At times, WaMu selected and securitized loans that it had identified as likely to go delinquent, without disclosing its analysis to investors who bought the securities, and also securitized loans tainted by fraudulent information, without notifying purchasers of the fraud that was discovered.
6. **Destructive Compensation.** WaMu's compensation system rewarded loan officers and loan processors for originating large volumes of high risk loans, paid extra to loan officers who overcharged borrowers or added stiff prepayment penalties, and gave executives millions of dollars even when its High Risk Lending Strategy placed the bank in financial jeopardy.

B. Background

Washington Mutual Bank was a federally chartered thrift whose primary federal regulator was the Office of Thrift Supervision (OTS). As an insured depository institution, it was also overseen by the Federal Deposit Insurance Corporation (FDIC). Washington Mutual was a full service consumer and business bank. This Report focuses only on WaMu's home lending and securitization business. As part of that business, WaMu originated home loans, acquired home loans for investment and securitization, sold pools of loans, and also securitized pools of home loans that it had originated or acquired. It was also a leading servicer of residential mortgages.

(1) Major Business Lines and Key Personnel

From 2004 to 2008, WaMu had four major business lines.¹⁰⁷ The Home Loans Group handled WaMu's home mortgage originations, securitizations, and servicing operations. The Commercial Group handled apartment buildings and other commercial properties. The Retail Banking Group provided retail banking services to consumers and businesses across the country. The Card Services Group handled a credit card business purchased from Provident Financial Corporation.

¹⁰⁷ 9/25/2008 "OTS Fact Sheet on Washington Mutual Bank," Dochow_Darrel-00076154_001.

For most of the five-year period reviewed by the Subcommittee, WaMu was led by its longtime Chairman of the Board and Chief Executive Officer (CEO) Kerry Killinger who joined the bank in 1982, became bank president in 1988, and was appointed CEO in 1990. Mr. Killinger was the moving force behind WaMu's acquisitions and growth strategy during the 1990s, and made the fateful decision to embark upon its High Risk Lending Strategy in 2005. Mr. Killinger stepped down as Chairman of the Board in June 2008, after shareholders opposed having the same person occupy the bank's two top positions. He was dismissed from the bank on September 8, 2008, the same day WaMu was required by its regulator, OTS, to sign a public Memorandum of Understanding to address its lending and securitization deficiencies. Two weeks later the bank failed.

Other key members of the bank's senior management included President Steve Rotella who joined the bank in January 2005; Chief Financial Officer Tom Casey; President of the Home Loans Division David Schneider who joined the bank in July 2005; and General Counsel Faye Chapman. David Beck served as Executive Vice President in charge of the bank's Capital Markets Division, oversaw its securitization efforts, and reported to the head of Home Loans. Anthony Meola headed up the Home Loans Sales effort. Jim Vanasek was WaMu's Chief Credit Officer from 1999 until 2004, and was then appointed its Chief Risk Officer, a new position, from 2004-2005. After Mr. Vanasek's retirement, Ronald Cathcart took his place as Chief Risk Officer, and headed the bank's newly organized Enterprise Risk Management Division, serving in that post from 2005 to 2007.

(2) Loan Origination Channels

WaMu was one of the largest mortgage originators in the United States.¹⁰⁸ It originated and acquired residential mortgages through several methods, which it referred to as loan origination channels. WaMu referred to them as its retail, wholesale, subprime, correspondent, and conduit channels.

Retail Channel. In WaMu's parlance, "retail channel" loans were loans originated by WaMu employees, typically loan officers or sales associates operating out of WaMu branded loan centers. The prospective borrower typically communicated directly with the WaMu loan officer, who was often called a "loan consultant." WaMu considered all retail channel loans to be "prime" loans, regardless of the characteristics of the loan or the creditworthiness of the borrower, and sometimes referred to the retail channel as the "prime" channel. The retail channel originated significant numbers of Option ARM loans, which WaMu treated as prime loans, despite their inherent risks. According to the Inspectors General of the U.S. Treasury Department and the FDIC, who prepared a report on WaMu's failure (hereinafter "IG Report"), "Option ARMs represented as much as half of all loan originations from 2003 to 2007 and approximately \$59 billion, or 47 percent, of the home loans on WaMu's balance sheet at the end

¹⁰⁸ See, e.g., "Mortgage Lender Rankings by Residential Originations," charts prepared by MortgageDaily.com (indicating WaMu was one of the top three issuers of U.S. residential mortgages from 2003 to 2005); "Washington Mutual to Acquire PNC's Residential Mortgage Business," *Business Wire* (10/2/2000), http://findarticles.com/p/articles/mi_m0EIN/is_2000_Oct_2/ai_65635032.

of 2007.”¹⁰⁹ The retail channel was also used to originate substantial numbers of home equity loans and home equity lines of credit.

Wholesale Channel. According to WaMu, its “wholesale channel” loans were loans that the bank acquired from third party mortgage brokers. These brokers, who were not WaMu employees, located borrowers interested in purchasing a home or refinancing an existing mortgage, and explained available loans that could be underwritten by WaMu. The borrower’s primary, and sometimes sole, contact was with the mortgage broker. The mortgage broker would then provide the borrower’s information to a WaMu loan officer who would determine whether the bank would finance the loan. If the bank decided to finance the loan, the broker would receive a commission for its efforts. Third party mortgage brokers typically received little guidance or training from WaMu, aside from receiving daily “rate sheets” explaining the terms of the loans that WaMu was willing to accept and the available commissions. WaMu treated wholesale loans issued under the WaMu brand as prime loans.

Subprime Channel. WaMu also originated wholesale loans through its subprime affiliate and later subsidiary, Long Beach Mortgage Company (“Long Beach”). Long Beach was a purely wholesale lender, and employed no loan officers that worked directly with borrowers. Instead, its account executives developed relationships with third party mortgage brokers who brought prospective loans to the company, and if Long Beach accepted those loans, received a commission for their efforts. WaMu typically referred to Long Beach as its “subprime channel.” Later, in 2007, when the bank decided to eliminate Long Beach as a separate entity, it rebranded Long Beach as its “Wholesale Specialty Lending” channel.

At times, WaMu also acquired subprime loans through “correspondent” or “conduit” channels, which it used to purchase closed loans—loans that had already been financed—from other lenders for investment or securitization. For example, WaMu at times operated a correspondent channel that it referred to as “Specialty Mortgage Finance” and used to purchase subprime loans from other lenders, especially Ameriquest, for inclusion in its investment portfolio. In addition, in 2005, its New York securitization arm, Washington Mutual Capital Corporation, established a “subprime conduit” to purchase closed subprime loans in bulk from other lenders for use in securitizations. At the end of 2006, WaMu reported that its investment portfolio included \$4 billion in subprime loans from Long Beach and about \$16 billion in subprime loans from other parties.¹¹⁰

Other Channels. At times, WaMu also originated or acquired loans in other ways. Its “Consumer Direct” channel, for example, originated loans over the phone or internet; borrowers did not need to meet in person with a WaMu loan officer. In addition, in 2004, Washington Mutual Capital Corporation (WCC) set up a conduit to purchase closed Alt A loans in bulk from

¹⁰⁹ 4/2010 “Evaluation of Federal Regulatory Oversight of Washington Mutual Bank,” report prepared by the Offices of Inspector General at the Department of the Treasury and Federal Deposit Insurance Corporation, Hearing Exhibit 4/16-82 (hereinafter “IG Report”).

¹¹⁰ See 3/1/2007 Washington Mutual Inc. 10-K filing with the SEC, at 56.

other lenders and use them in securitizations. WCC shut down both the Alt A and subprime conduits in April 2008, after it became too difficult to find buyers for new securitizations.¹¹¹

The Treasury and the FDIC IG report examining the failure of WaMu found that, from 2003 to 2007, the bulk of its residential loans—from 48% to 70%—came from third party lenders and brokers.¹¹² That report also determined that, in 2007, WaMu had 14 full-time employees overseeing 34,000 third party brokers doing business with the bank nationwide, and criticized the Bank’s oversight and staffing effort.¹¹³

(3) Long Beach

WaMu had traditionally originated mortgages to well qualified prime borrowers. But in 1999, WaMu bought Long Beach Mortgage Company,¹¹⁴ which was exclusively a subprime lender to borrowers whose credit histories did not support their getting a traditional mortgage.¹¹⁵ Long Beach was located in Anaheim, California, had a network of loan centers across the country, and at its height had as many as 1,000 employees.

Long Beach made loans for the express purpose of securitizing them and profiting from the gain on sale; it did not hold loans for its own investment. It had no loan officers of its own, but relied entirely on third party mortgage brokers bringing proposed subprime loans to its doors. In 2000, the year after it was purchased by WaMu, Long Beach made and securitized approximately \$2.5 billion in home loans. By 2006, its loan operations had increased more than tenfold, and Long Beach securitized nearly \$30 billion in subprime home loans and sold the securities to investors.¹¹⁶

Long Beach’s most common subprime loans were short term, hybrid adjustable rate mortgages, known as “2/28,” “3/27,” or “5/25” loans. These 30-year mortgages typically had a low fixed “teaser” rate, which then reset to a higher floating rate after two years for the 2/28, three years for the 3/27, or five years for the 5/25.¹¹⁷ Long Beach typically qualified borrowers according to whether they could afford to pay the initial, low interest rate rather than the later,

¹¹¹ See 6/11/2007 chart entitled, “Capital Markets Division Growth,” JPM_WM03409858, Hearing Exhibit 4/13-47c.

¹¹² See prepared statement of Treasury IG Eric Thorson, “Wall Street and the Financial Crisis: Role of the Regulators,” before the U.S. Senate Permanent Subcommittee on Investigations, S.Hrg. 111-672 (April 16, 2010) (hereinafter “April 16, 2010 Subcommittee Hearing”), at 5.

¹¹³ 4/2010 IG Report, at 11, Hearing Exhibit 4/16-82.

¹¹⁴ Washington Mutual Inc. actually purchased Long Beach Financial Corporation, the parent of Long Beach Mortgage Corporation, for about \$350 million.

¹¹⁵ 12/21/2005 OTS internal memorandum from OTS examiners to Darrel Dochow, OTSWMS06-007 0001009, Hearing Exhibit 4/16-31 (“LBMC was acquired... as a vehicle for WMI to access the subprime loan market. LBMC’s core business is the origination of subprime mortgage loans through a nationwide network of mortgage brokers.”).

¹¹⁶ “Securitizations of Washington Mutual Subprime Home Loans,” chart prepared by the Subcommittee, Hearing Exhibit 4/13-1c.

¹¹⁷ For more information about these types of loans, see Chapter II.

higher interest rate.¹¹⁸ For “interest-only” loans, monthly loan payments were calculated to cover only the interest due on the loan and not any principal. After the fixed interest rate period expired, the monthly payment was typically recalculated to pay off the entire remaining loan within the remaining loan period at the higher floating rate. Unless borrowers could refinance, the suddenly increased monthly payments caused some borrowers to experience “payment shock” and default on their loans.

From 1999 to 2006, Long Beach operated as a subsidiary of Washington Mutual Inc., the parent of Washington Mutual Bank. Long Beach’s loans repeatedly experienced early payment defaults, high delinquency rates, and losses, and its securitizations were among the worst performing in the market.¹¹⁹ In 2006, in a bid to strengthen Long Beach’s performance, WaMu received permission from its regulator, OTS, to purchase the company from its parent and make it a wholly owned subsidiary of the bank. WaMu installed new management, required the head of Long Beach to report to its Home Loans Division President, and promised OTS that it would improve Long Beach. When Long Beach’s loans continued to perform poorly, in June 2007, WaMu shut down Long Beach as a separate entity, and took over its subprime lending operations, rebranding Long Beach as its “Wholesale Specialty Lending” channel. WaMu continued to issue and securitize subprime loans. After the subprime market essentially shut down a few months later in September 2007, WaMu ended all of its subprime lending.

From 2000 to 2007, Long Beach and WaMu together securitized tens of billions of dollars in subprime loans, creating mortgage backed securities that frequently received AAA or other investment grade credit ratings.¹²⁰ Although AAA securities are supposed to be very safe investments with low default rates of one to two percent, of the 75 Long Beach mortgage backed security tranches rated AAA by Standard and Poor’s in 2006, all 75 have been downgraded to junk status, defaulted, or been withdrawn.¹²¹ In most of the 2006 Long Beach securitizations, the underlying loans have delinquency rates of 50% or more.¹²²

(4) Securitization

Washington Mutual depended on the securitization process to generate profit, manage risk, and obtain capital to originate new loans. Washington Mutual and Long Beach sold or securitized most of the subprime home loans they acquired. Initially, Washington Mutual kept most of its Option ARMs in its proprietary investment portfolio, but eventually began selling or securitizing those loans as well. From 2000 to 2007, Washington Mutual and Long Beach

¹¹⁸ See April 13, 2010 Subcommittee Hearing at 50.

¹¹⁹ See 4/14/2005 email exchange between OTS examiners, “Fitch – LBMC Review,” Hearing Exhibit 4/13-8a (discussing findings by Fitch, a credit rating agency, highlighting poor performance of Long Beach securities).

¹²⁰ “Securitizations of Washington Mutual Subprime Home Loans,” chart prepared by the Subcommittee, Hearing Exhibit 4/13-1c.

¹²¹ See Standard and Poor’s data at www.globalcreditportal.com.

¹²² See, e.g., wamusecurities.com (subscription website maintained by JPMorgan Chase with data on Long Beach and WaMu mortgage backed securities showing, as of March 2011, delinquency rates for particular mortgage backed securities, including LBMLT 2006-1 – 58.44%; LBMLT 2006-6 – 60.06%; and LBMLT 2005-11 – 54.32%).

securitized at least \$77 billion in subprime home loans. Washington Mutual sold or securitized at least \$115 billion of Option ARM loans, as well as billions more of other types of high risk loans, including hybrid adjustable rate mortgages, Alt A, and home equity loans.

When Washington Mutual began securitizing its loans, it was dependent upon investment banks to help underwrite and sell its securitizations. In order to have greater control of the securitization process and to keep securitization underwriting fees in house, rather than paying them to investment banks, WaMu acquired a company able to handle securitizations and renamed it Washington Mutual Capital Corporation (WCC), which became a wholly owned subsidiary of the bank.¹²³ WCC was a registered broker-dealer and began to act as an underwriter of WaMu and Long Beach securitizations.¹²⁴ WCC worked with two other bank subsidiaries, Washington Mutual Mortgage Securities Corp. and Washington Mutual Asset Acceptance Corp., that provided warehousing for WaMu loans before they were securitized. WCC helped to assemble RMBS pools and sell the resulting RMBS securities to investors. At first it worked with other investment banks; later it became the sole underwriter of some WaMu securitizations.

WCC was initially based in Seattle with 30 to 40 employees.¹²⁵ In 2004, it moved its headquarters to Manhattan.¹²⁶ At the height of WCC operations, right before the collapse of the securitization market, WCC had over 200 employees and offices in Seattle, New York, Los Angeles, and Chicago, with the majority of its personnel in New York.¹²⁷ WCC closed its doors in December 2007, after the securitization markets collapsed.

(5) Overview of WaMu's Rise and Fall

Washington Mutual Bank (WaMu) was a wholly owned subsidiary of its parent holding company, Washington Mutual Inc.¹²⁸ From 1996 to 2002, WaMu acquired over a dozen other financial institutions, including American Savings Bank, Great Western Bank, Fleet Mortgage Corporation, Dime Bancorp, PNC Mortgage, and Long Beach, expanding to become the nation's largest thrift and sixth largest bank. WaMu also became one of the largest issuers of home loans in the country. Washington Mutual kept a portion of those loans for its own investment portfolio, and sold the rest either to Wall Street investors, usually after securitizing them, or to Fannie Mae or Freddie Mac. From 2001 to 2007, Washington Mutual sold approximately \$430 billion in loans to Fannie Mae and Freddie Mac, representing nearly a quarter of its loan production during those years.

¹²³ See 6/11/2007 chart entitled, "Capital Markets Division Growth," JPM_WM03409858, Hearing Exhibit 4/13-47c.

¹²⁴ Prepared statement of David Beck, April 13, 2010 Subcommittee Hearing at 2.

¹²⁵ Subcommittee interview of David Beck (3/2/2010).

¹²⁶ Id.

¹²⁷ Id.

¹²⁸ 9/25/2008 "OTS Fact Sheet on Washington Mutual Bank," Dochow_Darrel-00076154_001, at 002. Washington Mutual Inc. also owned a second, much smaller thrift, Washington Mutual Bank, FSB. Id.

In 2006, WaMu took several major actions that reduced the size of its Home Loans Group. It sold \$140 billion in mortgage servicing rights to Wells Fargo; sold a \$22 billion portfolio of home loans and other securities; and reduced its workforce significantly.¹²⁹

In July 2007, after the Bear Stearns hedge funds collapsed and the credit rating agencies downgraded the ratings of hundreds of mortgaged backed securities, including over 40 Long Beach securities, the secondary market for subprime loans dried up. In September 2007, due to the difficulty of finding investors willing to purchase subprime loans or mortgage backed securities, Washington Mutual discontinued its subprime lending. It also became increasingly difficult for Washington Mutual to sell other types of high risk loans and related mortgage backed securities, including its Option ARMs and home equity products. Instead, WaMu retained these loans in its portfolios. By the end of the year, as the value of its loans and mortgage backed securities continued to drop, Washington Mutual began to incur significant losses, reporting a \$1 billion loss in the fourth quarter of 2007, and another \$1 billion loss in the first quarter of 2008.

In February 2008, based upon increasing deterioration in the bank's asset quality, earnings, and liquidity, OTS and the FDIC lowered the bank's safety and soundness rating to a 3 on a scale of 1 to 5, signaling it was a troubled institution.¹³⁰ In March 2008, at the request of OTS and the FDIC, Washington Mutual allowed several potential buyers of the bank to review its financial information.¹³¹ JPMorgan Chase followed with a purchase offer that WaMu declined.¹³² Instead, in April 2008, Washington Mutual's parent holding company raised \$7 billion in new capital and provided \$3 billion of those funds to the bank.¹³³ By June, the bank had shut down its wholesale lending channel.¹³⁴ It also closed over 180 loan centers and terminated 3,000 employees.¹³⁵ In addition, WaMu reduced its dividend to shareholders.¹³⁶

In July 2008, a \$30 billion subprime mortgage lender, IndyMac, failed and was placed into receivership by the government. In response, depositors became concerned about Washington Mutual and withdrew over \$10 billion in deposits, putting pressure on the bank's liquidity. After the bank disclosed a \$3.2 billion loss for the second quarter, its stock price continued to drop, and more deposits left.

¹²⁹ Subcommittee interview of Steve Rotella (2/24/2010). See also 3/1/2007 Washington Mutual Inc. 10-K filing with the SEC, at 1 (Washington Mutual reduced its workforce from 60,789 to 49,824 from December 31, 2005 to December 31, 2006.); "Washington Mutual to cut 2,500 jobs," MarketWatch (2/15/2006), available at <http://www.marketwatch.com/story/washington-mutual-cutting-2500-mortgage-jobs>.

¹³⁰ See 2/27/2008 letter from Kerry Killinger to Washington Mutual Board of Directors, Hearing Exhibit 4/16-41.

¹³¹ Subcommittee interviews of WaMu Chief Financial Officer Tom Casey (2/20/2010); and OTS West Region Office Director Darrel Dochow (3/3/2010); 4/2010 "Washington Mutual Regulators Timeline," prepared by the Subcommittee, Hearing Exhibit 4/16-1j.

¹³² Subcommittee interview of Tom Casey (2/20/2010).

¹³³ 4/2010 "Washington Mutual Regulators Timeline," prepared by the Subcommittee, Hearing Exhibit 4/16-1j.

¹³⁴ See 2/27/2008 letter from Kerry Killinger to Washington Mutual Board of Directors, Hearing Exhibit 4/16-41.

¹³⁵ "Washington Mutual to Take Writedown, Slash Dividend," Bloomberg (12/10/2007), available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aNUz6NmbYZCQ>.

¹³⁶ Id.

On September 8, 2008, Washington Mutual signed a public Memorandum of Understanding that it had negotiated with OTS and the FDIC to address the problems affecting the bank. Longtime CEO Kerry Killinger was forced to leave the bank, accepting a \$15 million severance payment.¹³⁷ Allen Fishman was appointed his replacement.

On September 15, 2008, Lehman Brothers declared bankruptcy. Three days later, on September 18, OTS and the FDIC lowered Washington Mutual's rating to a "4," indicating that a bank failure was a possibility. The credit rating agencies also downgraded the credit ratings of the bank and its parent holding company. Over the span of eight days starting on September 15, nearly \$17 billion in deposits left the bank. At that time, the Deposit Insurance Fund contained about \$45 billion, an amount which could have been exhausted by the failure of a \$300 billion institution like Washington Mutual. As the financial crisis worsened each day, regulatory concerns about the bank's liquidity and viability intensified.

Because of its liquidity problems and poor quality assets, OTS and the FDIC decided to close the bank. Unable to wait for a Friday, the day on which most banks are closed, the agencies acted on a Thursday, September 25, 2008, which was also the 119th anniversary of WaMu's founding. That day, OTS seized Washington Mutual Bank, placed it into receivership, and appointed the FDIC as the receiver. The FDIC facilitated its immediate sale to JPMorgan Chase for \$1.9 billion. The sale eliminated the need to draw upon the Deposit Insurance Fund. WaMu's parent, Washington Mutual, Inc., declared bankruptcy soon after.

C. High Risk Lending Strategy

In 2004, Washington Mutual ramped up high risk home loan originations to borrowers that had not traditionally qualified for them. The following year, Washington Mutual adopted a high risk strategy to issue high risk mortgages, and then mitigate some of that risk by selling or securitizing many of the loans. When housing prices stopped climbing in late 2006, a large number of those risky loans began incurring extraordinary rates of delinquency as did the securities that relied on those loans for cash flow. In 2007, the problems with WaMu's High Risk Lending Strategy worsened, as delinquencies increased, the securitization market dried up, and the bank was unable to find buyers for its high risk loans or related securities.

The formal initiation of WaMu's High Risk Lending Strategy can be dated to January 2005, when a specific proposal was presented to the WaMu Board of Directors for approval.¹³⁸ WaMu adopted this strategy because its executives calculated that high risk home loans were more profitable than low risk loans, not only because the bank could charge borrowers higher interest rates and fees, but also because higher risk loans received higher prices when securitized and sold to investors. They garnered higher prices because, due to their higher risk, the securities paid a higher coupon rate than other comparably rated securities.

¹³⁷ "Washington Mutual CEO Kerry Killinger: \$100 Million in Compensation, 2003-2008," chart prepared by the Subcommittee, Hearing Exhibit 4/13-1h.

¹³⁸ See 1/2005 "Higher Risk Lending Strategy 'Asset Allocation Initiative,'" submitted to Washington Mutual Board of Directors Finance Committee Discussion, JPM_WM00302975-93, Hearing Exhibit 4/13-2a.

Over a five-year period from 2003 to 2008, Washington Mutual Bank shifted its loan originations from primarily traditional 30-year fixed and government backed loans to primarily higher risk home loans. This shift included increased subprime loan activity at Long Beach, more subprime loans purchased through its Specialty Mortgage Finance correspondent channel, and more bulk purchases of subprime loans through its conduit channel for use in securitizations. WaMu also increased its originations and acquisitions of Option ARM, Alt A, and home equity loans. While the shift began earlier, the strategic decision to move toward higher risk loans was not fully articulated to regulators or the Board of Directors until the end of 2004 and the beginning of 2005.¹³⁹

In about three years, from 2005 to 2007, WaMu issued hundreds of billions of higher risk loans, including \$49 billion in subprime loans¹⁴⁰ and \$59 billion in Option ARMs.¹⁴¹ Data compiled by the Treasury and the FDIC Inspectors General showed that, by the end of 2007, Option ARMs constituted about 47% of all home loans on WaMu's balance sheet and home equity loans made up \$63.5 billion or 27% of its home loan portfolio, a 130% increase from 2003.¹⁴² According to an August 2006 internal WaMu presentation on Option ARM credit risk, from 1999 until 2006, Option ARM borrowers selected the minimum monthly payment more than 95% of the time.¹⁴³ The data also showed that at the end of 2007, 84% of the total value of the Option ARMs was negatively amortizing, meaning that the borrowers were going into deeper debt rather than paying off their loan balances.¹⁴⁴ In addition, by the end of 2007, stated income loans—loans in which the bank had not verified the borrower's income—represented 73% of WaMu's Option ARMs, 50% of its subprime loans, and 90% of its home equity loans.¹⁴⁵ WaMu also originated numerous loans with high loan-to-value (LTV) ratios, in which the loan amount exceeded 80% of the value of the underlying property. The Treasury and the FDIC Inspectors General determined, for example, that 44% of WaMu's subprime loans and 35% of its home equity loans had LTV ratios in excess of 80%.¹⁴⁶ Still another problem was that WaMu had high geographic concentrations of its home loans in California and Florida, states that ended up suffering above-average home value depreciation.¹⁴⁷

¹³⁹ See, e.g., 12/21/2004 "Asset Allocation Initiative: Higher Risk Lending Strategy and Increased Credit Risk Management," Washington Mutual Board of Directors Discussion, JPM_WM04107995-8008, Hearing Exhibit 4/13-2b; 1/2005 "Higher Risk Lending Strategy 'Asset Allocation Initiative,'" submitted to Washington Mutual Board of Directors Finance Committee Discussion, JPM_WM00302975-93, Hearing Exhibit 4/13-2a.

¹⁴⁰ "Securitizations of Washington Mutual Subprime Home Loans," chart prepared by the Subcommittee, Hearing Exhibit 4/13-1c.

¹⁴¹ 4/2010 IG Report, at 9, Hearing Exhibit 4/16-82.

¹⁴² *Id.* at 9-10.

¹⁴³ See 8/2006 Washington Mutual internal report, "Option ARM Credit Risk," chart entitled, "Borrower-Selected Payment Behavior," at 7, Hearing Exhibit 4/13-37. The WaMu report also stated: "Almost all Option ARM borrowers select the minimum payment every month with very high persistency, regardless of changes in the interest rates or payment adjustments." *Id.* at 2.

¹⁴⁴ 4/2010 IG Report, at 9, Hearing Exhibit 4/16-82.

¹⁴⁵ *Id.* at 10.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 11.

(1) Strategic Direction

In 2004, WaMu set the stage for its High Risk Lending Strategy by formally adopting aggressive financial targets for the upcoming five-year time period. The new earnings targets created pressure for the bank to shift from its more conservative practices towards practices that carried more risk. Mr. Killinger described those targets in a June 2004 “Strategic Direction” memorandum to WaMu’s Board of Directors: “Our primary financial targets for the next five years will be to achieve an average ROE [Return on Equity] of at least 18%, and average EPS [Earnings Per Share] growth of at least 13%.”¹⁴⁸ In his memorandum to the Board, Mr. Killinger predicted continuing growth opportunities for the bank:

“In a consolidating industry, it is appropriate to continually assess if shareholder value creation is best achieved by selling for a short-term change of control premium or to continue to build long-term value as an independent company. We believe remaining an independent company is appropriate at this time because of substantial growth opportunities we see ahead. We are especially encouraged with growth prospects for our consumer banking group. We would also note that our stock is currently trading at a price which we believe is substantially below the intrinsic value of our unique franchise. This makes it even more important to stay focused on building long-term shareholder value, diligently protecting our shareholders from inadequate unsolicited takeover proposals and maintaining our long held position of remaining an independent company.”¹⁴⁹

Mr. Killinger identified residential nonprime and adjustable rate mortgage loans as one of the primary bank businesses driving balance sheet growth.¹⁵⁰ Mr. Killinger also stated in the memorandum: “Wholesale and correspondent will be nationwide and retooled to deliver higher margin products.”¹⁵¹

(2) Approval of Strategy

After 2002, Washington Mutual stopped acquiring lenders specializing in residential mortgages,¹⁵² and embarked upon a new strategy to push the company’s growth, focused on increasing its issuance and purchase of higher risk home loans. OTS took note of this strategy in WaMu’s 2004 Report on Examination:

¹⁴⁸ 6/1/2004 Washington Mutual memorandum from Kerry Killinger to the Board of Directors, “Strategic Direction,” JPM_WM05385579 at 581.

¹⁴⁹ Id. at 582.

¹⁵⁰ Id.

¹⁵¹ Id. at 585.

¹⁵² The only new lender that Washington Mutual acquired after 2004 was Commercial Capital Bancorp in 2006.

“Management provided us with a copy of the framework for WMI’s 5-year (2005-2009) strategic plan [which] contemplates asset growth of at least 10% a year, with assets increasing to near \$500 billion by 2009.”¹⁵³

OTS directed the bank to spell out its new lending strategy in a written document that had to be presented to and gain approval by the WaMu Board of Directors.¹⁵⁴

In response, in January 2005, WaMu management developed a document entitled, “Higher Risk Lending Strategy” and presented it to its Board of Directors for approval to shift the bank’s focus from originating low risk fixed rate and government backed loans to higher risk subprime, home equity, and Option ARM loans.¹⁵⁵ The Strategy disclosed that WaMu planned to increase both its issuance of higher risk loans and its offering of loans to higher risk borrowers. The explicit reasoning for the shift was the increased profitability of the higher risk loans, measured by actual bank data showing that those loans produced a higher “gain on sale” or profit for the bank compared to lower risk loans. For example, one chart supporting the Strategy showed that selling subprime loans garnered more than eight times the gain on sale as government backed loans.¹⁵⁶

The WaMu submission to the Board noted that, in order for the plan to be successful, WaMu would need to carefully manage its residential mortgage business as well as its credit risk, meaning the risk that borrowers would not repay the higher risk loans.¹⁵⁷ During the Board’s discussion of the strategy, credit officers noted that losses would likely lag by several years.¹⁵⁸ These documents show that WaMu knew that, even if loan losses did not immediately come to pass after initiating the High Risk Lending Strategy, it did not mean the strategy was free of problems.

¹⁵³ See 3/15/2004 OTS Report of Examination, at OTSWMS04-0000001509, Hearing Exhibit 4/16-94 [Sealed Exhibit].

¹⁵⁴ 6/30/2004 OTS Memo to Lawrence Carter from Zalka Ancely, OTSWME04-0000005357 at 61 (“Joint Memo #9 - Subprime Lending Strategy”); 3/15/2004 OTS Report of Examination, at OTSWMS04-0000001483, Hearing Exhibit 4/16-94 [Sealed Exhibit]. See also 1/2005 “Higher Risk Lending Strategy Presentation,” submitted to Washington Mutual Board of Directors, at JPM_WM00302978, Hearing Exhibit 4/13-2a (“As we implement our Strategic Plan, we need to address OTS/FDIC 2004 Safety and Soundness Exam Joint Memos 8 & 9 . . . Joint Memo 9: Develop and present a SubPrime/Higher Risk Lending Strategy to the Board.”).

¹⁵⁵ 1/2005 “Higher Risk Lending Strategy Presentation,” submitted to Washington Mutual Board of Directors, at JPM_WM00302978, Hearing Exhibit 4/13-2a; see also 4/2010 “WaMu Product Originations and Purchases by Percentage – 2003-2007,” chart prepared by the Subcommittee, Hearing Exhibit 4/13-1i.

¹⁵⁶ 4/18/2006 Washington Mutual Home Loans Discussion Board of Directors Meeting, at JPM_WM00690894, Hearing Exhibit 4/13-3 (see chart showing gain on sale for government loans was 13; for 30-year, fixed rate loans was 19; for option loans was 109; for home equity loans was 113; and for subprime loans was 150.).

¹⁵⁷ See 4/18/2006 Washington Mutual Home Loans Discussion Board of Directors Meeting, at JPM_WM00690899, Hearing Exhibit 4/13-3 (acknowledging that the risks of the High Risk Lending Strategy included managing credit risk, implementing lending technology and enacting organizational changes).

¹⁵⁸ 1/18/2005 Washington Mutual Inc. Washington Mutual Bank FA Finance Committee Minutes, JPM_WM06293964; see also 1/2005 “Higher Risk Lending Strategy Presentation,” submitted to Washington Mutual Board of Directors, at JPM_WM00302987, Hearing Exhibit 4/13-2a (“Lags in Effects of Expansion,” chart showing peak loss rates in 2007).

(3) Definition of High Risk Lending

As part of the 2005 presentation to the Board of Directors outlining the strategy, OTS recommended that WaMu define higher risk lending.¹⁵⁹ The January 2005 presentation contained a slide defining “Higher Risk Lending”:

“For the purpose of establishing concentration limits, Higher Risk Lending strategies will be implemented in a ‘phased’ approach. Later in 2005 an expanded definition of Higher Risk Lending—encapsulating multiple risk layering and expanded underwriting criteria—and its corresponding concentration limit—will be presented for Board approval.

“The initial definition is ‘Consumer Loans to Higher Risk Borrowers’, which at 11/30/04 totaled \$32 Billion or 151% of total risk-based capital, comprised of:

-Subprime loans, or all loans originated by Long Beach Mortgage or purchased through our Specialty Mortgage Finance program

-SFR [Single Family Residential] and Consumer Loans to Borrowers with low credit scores at origination.”¹⁶⁰

A footnote on the slide defined “low credit scores” as less than a 620 FICO score for first lien single family residence mortgages, home equity loans, and home equity lines of credit. It defined low credit scores as less than 660 for second lien home equity loans (HEL) and lines of credit (HELOC), and other consumer loans.¹⁶¹

While the January 2005 presentation promised to present a fuller definition of higher risk loans for Board approval at some future date, a more complete definition had already been provided to the Board a few weeks earlier in a December 21, 2004 presentation entitled, “Asset Allocation Initiative: Higher Risk Lending Strategy and Increased Credit Risk Management.”¹⁶² This presentation contained the same basic definition of higher risk borrowers, but also provided a definition of higher risk loans.

Higher risk loans were defined as single family residence mortgages with a loan-to-value (LTV) ratio of equal to or greater than 90% if not credit enhanced, or a combined-loan-to-value

¹⁵⁹ 6/30/2004 OTS Memo to Lawrence Carter from Zalka Ancely (“Joint Memo #8 - Loans to ‘Higher-Risk Borrowers’”), OTSWME04-0000005357 at 61.

¹⁶⁰ 1/2005 “Higher Risk Lending Strategy Presentation,” submitted to Washington Mutual Board of Directors, at JPM_WM00302979, Hearing Exhibit 4/13-2a.

¹⁶¹ Id. at JPM_WM00302979.

¹⁶² 12/21/2004 “Asset Allocation Initiative: Higher Risk Lending Strategy and Increased Credit Risk Management,” Washington Mutual Board of Directors Presentation, at JPM_WM04107995-8008, Hearing Exhibit 4/13-2b.

(CLTV) ratio of 95%. These numbers are a notable departure from the 80% LTV ratio traditionally required for a prime loan.¹⁶³ For home equity loans and lines of credit, WaMu considered a first lien to be high risk if it had a greater than 90% LTV ratio, and considered a second lien to be high risk if had a greater than 80% CLTV ratio.¹⁶⁴

The December 2004 presentation also defined higher risk lending on the basis of expanded underwriting criteria and multiple risk layering:

“Expanded Criteria

- ‘No Income’ loan documentation type
- All Manufactured Housing loans ...

Multiple Risk Layering in SF[R] and 1st lien HEL/HELOC loans

- Higher A- credit score or lacking LTV as strong compensating factor and
- An additional risk factor from at least three of the following:
 - Higher uncertainty about ability to pay or ‘stated income’ documentation type
 - higher uncertainty about willingness to pay or collateral value”¹⁶⁵

This document indicates that WaMu considered a mortgage to be higher risk if it lacked documentation regarding the borrower’s income, described as a “no income” or “stated income” loan.

WaMu held billions of dollars in loans on its balance sheet.¹⁶⁶ Those assets fluctuated in value based on the changes in the interest rate. Fixed rate loans, in particular, incurred significant interest rate risk, because on a 30-year fixed rate mortgage, for example, WaMu agreed to receive interest payments at a certain rate for 30 years, but if the prevailing interest rate went up, WaMu’s cost of money increased and the relative value of the fixed mortgages on its balance sheet went down. WaMu used various strategies to hedge its interest rate risk. One way to incur less interest rate risk was for WaMu to hold loans with variable interest rates, such as Hybrid ARMs typical of WaMu’s subprime lending, or Option ARMs, WaMu’s flagship “prime” product. These adjustable rate mortgages paid interest rates that, after the initial fixed rate period expired, were typically pegged to the Cost of Funds Index (COFI) or the Monthly Treasury Average (MTA), two common measures of prevailing interest rates.

¹⁶³ See, e.g., 10/8/1999 “Interagency Guidance on High LTV Residential Real Estate Lending,” <http://www.federalreserve.gov/boarddocs/srletters/1993/SR9301.htm>, and discussion of high LTV loans in section D(2)(b), below.

¹⁶⁴ 12/21/2004 “Asset Allocation Initiative: Higher Risk Lending Strategy and Increased Credit Risk Management,” Washington Mutual Board of Directors Presentation, JPM_WM04107995-8008 at 7999, Hearing Exhibit 4/13-2b.

¹⁶⁵ Id. This slide lists only the two additional risk factors quoted, despite referring to “at least three of the following.”

¹⁶⁶ See 9/25/2008 “OTS Fact Sheet on Washington Mutual Bank,” Dochow_Darrel-00076154_001 (“Loans held: \$118.9 billion in single-family loans held for investment - this includes \$52.9 billion in payment option ARMs and \$16.05 billion in subprime mortgage loans”).

(4) Gain on Sale

WaMu's internal documents indicate that the primary motivation behind its High Risk Lending Strategy was the superior "gain on sale" profits generated by high risk loans.¹⁶⁷ Washington Mutual management had calculated that higher risk loans were more profitable when sold or securitized. Prior to sale, higher risk loans also produced greater short term profits, because the bank typically charged the borrowers a higher rate of interest and higher fees.

Higher risk home loans placed for sale were more profitable for WaMu, because of the higher price that Wall Street underwriters and investors were willing to pay for them. The profit that WaMu obtained by selling or securitizing a loan was known as the "gain on sale." Gain on sale figures for the loans produced by the bank were analyzed and presented to the WaMu Board of Directors. On April 18, 2006, David Schneider, the President of WaMu Home Loans division, provided the Board of Directors a confidential presentation entitled, "Home Loans Discussion."¹⁶⁸ The third slide in the presentation was entitled, "Home Loans Strategic Positioning," and stated: "Home Loans is accelerating significant business model changes to achieve consistent, long term financial objectives."¹⁶⁹ Beneath this heading the first listed objective was: "Shift from low-margin business to high-margin products,"¹⁷⁰ meaning from less profitable to more profitable loan products. The next slide in the presentation was entitled: "Shift to Higher Margin Products," and elaborated on that objective. The slide listed the actual gain on sale obtained by the bank, in 2005, for each type of loan WaMu offered, providing the "basis points" (bps) that each type of loan fetched on Wall Street:

2005 WaMu Gain on Sale
Margin by Product
 in bps¹⁷¹

Government	13
Fixed	19
Hybrid/ARM	25
Alt A	40
Option ARM	109
Home Equity	113
Subprime	150

¹⁶⁷ 1/18/2005 Washington Mutual Inc. Washington Mutual Bank FA Finance Committee Minutes at JPM_WM06293964; see also 1/2005 "Higher Risk Lending Strategy Presentation," submitted to Washington Mutual Board of Directors, at JPM_WM00302977, Hearing Exhibit 4/13-2a

¹⁶⁸ 4/18/2006 "Home Loans Discussion Board of Directors Meeting," WaMu presentation, JPM_WM00690890-901, Hearing Exhibit 4/13-3.

¹⁶⁹ Id. at 893 [emphasis in original removed].

¹⁷⁰ Id.

¹⁷¹ Id. at 894 [formatting as in the original].

Mr. Schneider told the Subcommittee that the numbers listed on the chart were not projections, but the numbers generated from actual, historical loan data.¹⁷² As the chart makes clear, the least profitable loans for WaMu were government backed and fixed rate loans. Those loans were typically purchased by government sponsored enterprises (GSEs) like Fannie Mae, Freddie Mac, and Ginnie Mae which paid relatively low prices for them. Instead of focusing on those low margin loans, WaMu's management looked to make profits elsewhere, and elected to focus on the most profitable loans, which were the Option ARM, home equity, and subprime loans. In 2005, subprime loans, with 150 basis points, were eight times more profitable than a fixed rate loan at 19 basis points and more than 10 times as profitable as government backed loans.

The gain on sale data WaMu collected drove not only WaMu's decision to focus on higher risk home loans, but also how the bank priced those loans for borrowers. In determining how much it would charge for a loan, the bank calculated first what price the loan would obtain on Wall Street. As Mr. Beck explained in his testimony before the Subcommittee:

"Because WaMu's capital markets organization was engaged in the secondary mortgage market, it had ready access to information regarding how the market priced loan products. Therefore my team helped determine the initial prices at which WaMu could offer loans by beginning with the applicable market prices for private or agency-backed mortgage securities and adding the various costs WaMu incurred in the origination, sale, and servicing of home loans."¹⁷³

(5) Acknowledging Unsustainable Housing Price Increases

In 2004, before WaMu implemented its High Risk Lending Strategy, the Chief Risk Officer Jim Vanasek expressed internally concern about the unsustainable rise in housing prices, loosening lending standards, and the possible consequences. On September 2, 2004, just months before the formal presentation of the High Risk Lending Strategy to the Board of Directors, Mr. Vanasek circulated a prescient memorandum to WaMu's mortgage underwriting and appraisal staff, warning of a bubble in housing prices and encouraging tighter underwriting. The memorandum also captured a sense of the turmoil and pressure at WaMu. Under the subject heading, "Perspective," Mr. Vanasek wrote:

"I want to share just a few thoughts with all of you as we begin the month of September. Clearly you have gone through a difficult period of time with all of the changes in the mortgage area of the bank. Staff cuts and recent defections have only added to the stress. Mark Hillis [a Senior Risk Officer] and I are painfully aware of the toll that this has taken on some of you and have felt it is important to tell you that we recognize it has been and continues to be difficult.

¹⁷² Subcommittee interview of David Schneider (2/16/2010).

¹⁷³ April 13, 2010 Subcommittee Hearing at 53.

“In the midst of all this change and stress, patience is growing thin. We understand that. We also know that loan originators are pushing very hard for deals. But we need to put all of this in perspective.

“At this point in the mortgage cycle with prices having increased far beyond the rate of increase in personal incomes, there clearly comes a time when prices must slow down or perhaps even decline. There have been so many warnings of a Housing Bubble that we all tend now to ignore them because thus far it has not happened. I am not in the business of forecasting, but I have a healthy respect for the underlying data which says ultimately this environment is no longer sustainable. Therefore I would conclude that now is not the time to be pushing appraisal values. If anything we should be a bit more conservative across the board. Kerry Killinger and Bill Longbrake [a Vice Chair of WaMu] have both expressed renewed concern over this issue.

“This is a point where we should be much more careful about exceptions. It is highly questionable as to how strong this economy may be; there is clearly no consensus on Wall Street. If the economy stalls, the combination of low FICOs, high LTVs and inordinate numbers of exceptions will come back to haunt us.”¹⁷⁴

Mr. Vanasek was the senior-most risk officer at WaMu, and had frequent interactions with Mr. Killinger and the Board of Directors. While his concerns may have been heard, they were not heeded.

Mr. Vanasek told the Subcommittee that, because of his predictions of a collapse in the housing market, he earned the derisive nickname “Dr. Doom.”¹⁷⁵ But evidence of a housing bubble was overwhelming by 2005. Over the prior ten years, housing prices had skyrocketed in an unprecedented fashion, as the following chart prepared by Paulson & Co. Inc., based on data from the Bureau of Economic Analysis and the Office of Federal Housing Enterprise Oversight, demonstrates.¹⁷⁶

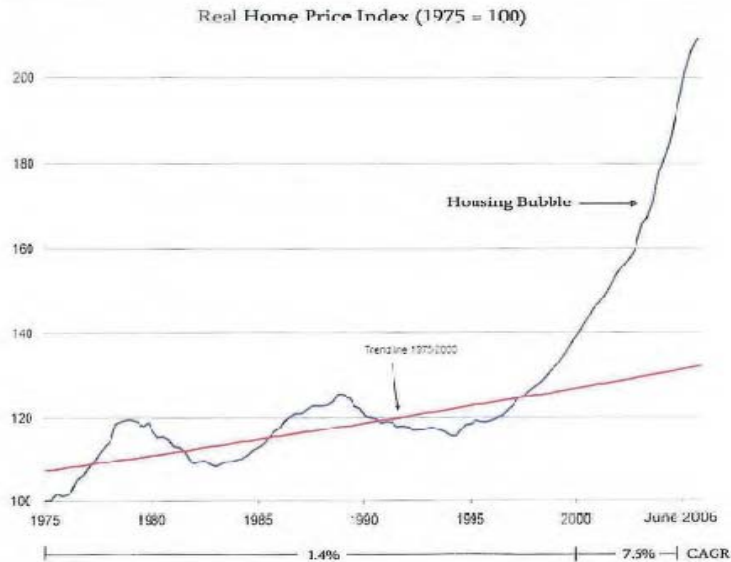
¹⁷⁴ 9/2/2004 Washington Mutual memorandum from Jim Vanasek, “Perspective,” Hearing Exhibit 4/13-78b.

¹⁷⁵ Subcommittee interview of Jim Vanasek (12/18/2009).

¹⁷⁶ “Estimation of Housing Bubble,” PSI-Paulson&Co-02-00003, Hearing Exhibit 4/13-1j.

ESTIMATION OF HOUSING BUBBLE: Comparison of Recent Appreciation vs. Historical Trends

Permanent Subcommittee on Investigations
EXHIBIT #1



Source: Office of Federal Housing Enterprise Oversight, Bureau of Economic Analysis

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PSI-PAULSON-02-00003 INC.

Mr. Vanasek shared his concerns with Mr. Killinger. At the Subcommittee's hearing, Mr. Killinger testified: "Now, beginning in 2005, 2 years before the financial crisis hit, I was publicly and repeatedly warning of the risks of a potential housing downturn."¹⁷⁷ In March 2005, he engaged in an email exchange with Mr. Vanasek, in which both agreed the United States was in the midst of a housing bubble. On March, 10, 2005, Mr. Vanasek emailed Mr. Killinger about many of the issues facing his risk management team, concluding:

"My group is working as hard as I can reasonably ask any group to work and in several cases they are stretched to the absolute limit. Any words of support and appreciation would be very helpful to the morale of the group. These folks have stepped up to fixing any number of issues this year, many not at all of their own making."¹⁷⁸

Mr. Killinger replied:

"Thanks Jim. Overall, it appears we are making some good progress. Hopefully, the Regulators will agree that we are making some progress. I suspect the toughest thing for us will be to navigate through a period of high home prices, increased competitive conditions for reduced underwriting standards, and our need to grow the balance sheet. I

¹⁷⁷ April 13, 2010 Subcommittee Hearing at 85.

¹⁷⁸ 3/2005 WaMu internal email chain, Hearing Exhibit 4/13-78.

have never seen such a high risk housing market as market after market thinks they are unique and for whatever reason are not likely to experience price declines. This typically signifies a bubble.”

Mr. Vanasek agreed:

“I could not agree more. All the classic signs are there and the likely outcome is probably not great. We would all like to think the air can come out of the balloon slowly but history would not lean you in that direction. Over the next month or so I am going to work hard on what I hope can be a lasting mechanism (legacy) for determining how much risk we can afford to take”

Despite Mr. Killinger’s awareness that housing prices were unsustainable, could drop suddenly, and could make it difficult for borrowers to refinance or sell their homes, Mr. Killinger continued to push forward with WaMu’s High Risk Lending Strategy.

(6) Execution of the High Risk Lending Strategy

WaMu formally adopted the High Risk Lending Strategy in January 2005.¹⁷⁹ Over the following two years, management significantly shifted the bank’s loan originations towards riskier loans as called for in the plan, but had to slow down the pace of implementation in the face of worsening market conditions. In retrospect, WaMu executives tried to portray their inability to fully execute the plan as a strategic choice rather than the result of a failed strategy. For example, Mr. Killinger testified at the Subcommittee hearing that the bank’s High Risk Lending Strategy was only contemplated, but not really executed:

“First, we had an adjustment in our strategy that started in about 2004 to gradually increase the amount of home equity, subprime, commercial real estate, and multi-family loans that we could hold on the balance sheet. We had that long-term strategy, but ... we quickly determined that the housing market was increasing in its risk, and we put most of those strategies for expansion on hold.”¹⁸⁰

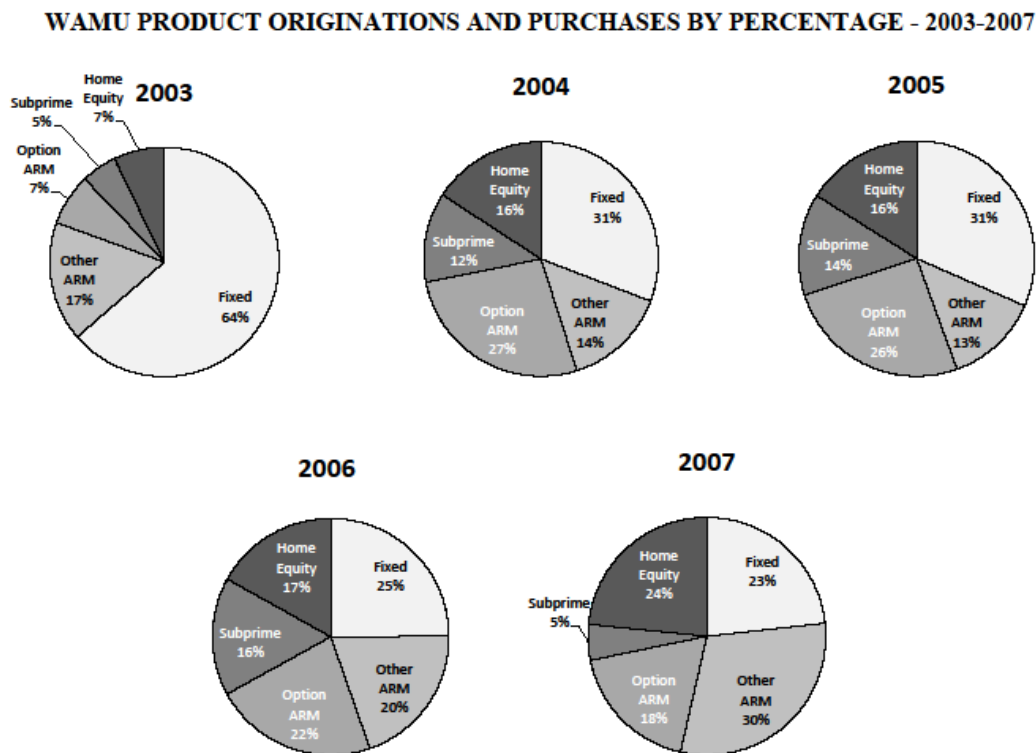
Mr. Killinger’s claim that the High Risk Lending Strategy was put “on hold” is contradicted, however, by WaMu’s SEC filings, its internal documents, and the testimony of other WaMu executives.

Washington Mutual’s SEC filings contain loan origination and acquisition data showing that the bank did implement its High Risk Lending Strategy. Although rising defaults and the 2007 collapse of the subprime secondary market prevented WaMu from fully executing its plans, WaMu dramatically shifted the composition of the loans it originated and purchased, nearly

¹⁷⁹ See 3/13/2006 OTS Report of Examination, at OTSWMS06-008 0001677, Hearing Exhibit 4/16-94 [Sealed Exhibit].

¹⁸⁰ April 13, 2010 Subcommittee Hearing at 88.

doubling the percentage of higher risk home loans from 36% to 67%. The following chart, prepared by the Subcommittee using data from WaMu's SEC filings, demonstrates the shift.¹⁸¹



Source: Washington Mutual Inc. SEC Filings, 2003-2007. Prepared by the U.S. Senate Permanent Subcommittee on Investigations, April 2010

In 2003, 64% of WaMu's mortgage originations and purchases were fixed rate loans, and only 19% were subprime, Option ARM, or home equity loans. In 2004, 31% of WaMu's mortgage originations and purchases were fixed rate loans, and 55% were subprime, Option ARM, or home equity loans. In 2005, 31% of WaMu's mortgage originations and purchases were fixed rate loans, and 56% were subprime, Option ARM, or equity loans. By 2006, only 25% of WaMu's mortgage originations and purchases were fixed rate loans, and 55% were subprime, Option ARM, or home equity loans.¹⁸² Even after market forces began taking their toll in 2007, and WaMu ended all subprime lending in the fall of that year, its higher risk originations and purchases at 47% were double its fixed rate loans at 23%.¹⁸³

¹⁸¹ 4/2010 "WaMu Product Originations and Purchases by Percentage – 2003-2007," chart prepared by the Subcommittee, Hearing Exhibit 4/13-1i.

¹⁸² Id.

¹⁸³ Id.

Mr. Killinger's annual "Strategic Direction" memoranda to the Board in 2005, 2006, and 2007, also contradict his testimony that the strategy of expanding high risk lending was put on hold. On the first page of his 2005 memorandum, Mr. Killinger wrote: "We continue to see excellent long-term growth opportunities for our key business lines of retail banking, mortgage banking, multi-family lending and sub-prime residential lending."¹⁸⁴ Rather than hold back on WaMu's stated strategy of risk expansion, Mr. Killinger told the Board that WaMu should accelerate it:

"In order to reduce the impact of interest rate changes on our business, we have accelerated development of Alt-A, government and sub-prime loan products, as well as hybrid ARMs and other prime products, specifically for delivery through retail, wholesale and correspondent channels."¹⁸⁵

The 2005 strategic direction memorandum also targeted Long Beach for expansion:

"Long Beach is expected to originate \$30 billion of loans this year, growing to \$36 billion in 2006. To facilitate this growth, we plan to increase account managers by 100. We expect Long Beach to have 5% of the sub-prime market in 2005, growing to [a] 6% share in 2006."¹⁸⁶

Despite warning against unsustainable housing prices in March 2005, Mr. Killinger's 2006 "Strategic Direction" memorandum to the Board put even more emphasis on growth than the 2005 memorandum. After reviewing the financial targets set in the five-year plan adopted in 2004, Mr. Killinger wrote: "To achieve these targets, we developed aggressive business plans around the themes of growth, productivity, innovation, risk management and people development."¹⁸⁷ His memorandum expressed no hesitation or qualification as to whether the high risk home lending strategy was still operative in 2006. The memorandum stated:

"Finally, our Home Loan Group should complete its repositioning within the next twelve months and it should then be in position to grow its market share of Option ARM, home equity, sub prime and Alt. A loans. We should be able to increase our share of these categories to over 10%."¹⁸⁸

Contrary to Mr. Killinger's hearing testimony, the 2006 memorandum indicates an expansion of WaMu's high risk home lending, rather than any curtailment:

"We are refining our home loans business model to significantly curtail low margin Government and conventional fixed rate originations and servicing, and to significantly

¹⁸⁴ 6/1/2005 Washington Mutual memorandum from Kerry Killinger to the Board of Directors, "Strategic Direction," JPMC/WM - 0636-49 at 36, Hearing Exhibit 4/13-6c.

¹⁸⁵ Id. at 644.

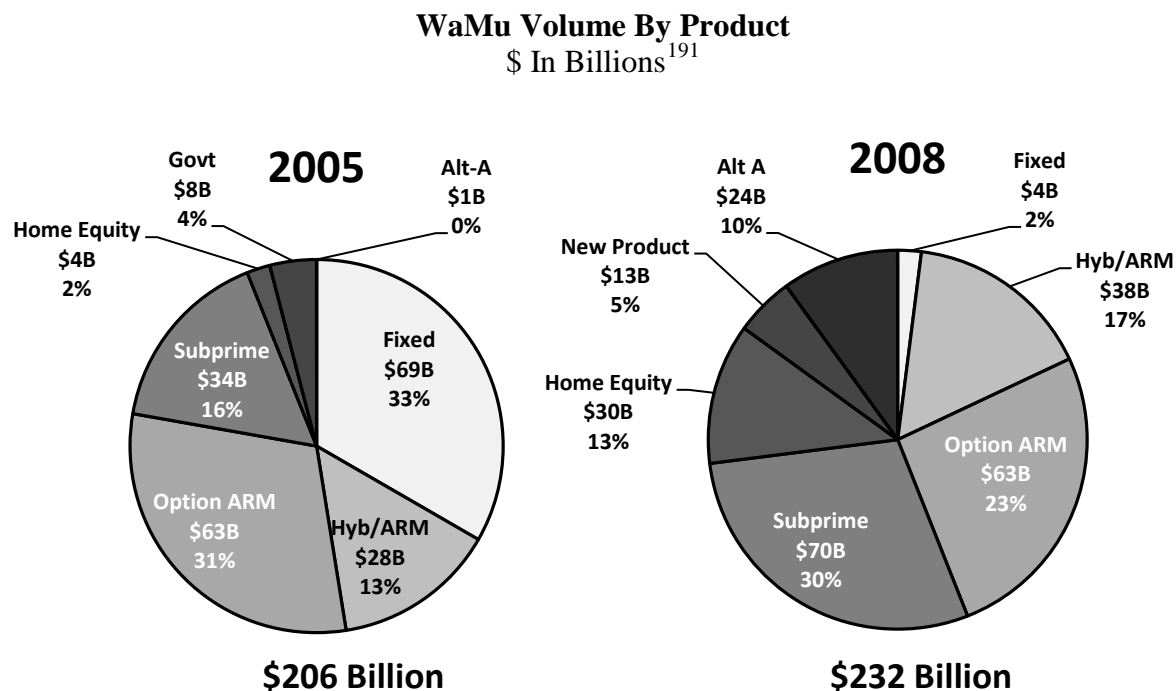
¹⁸⁶ Id. at 646.

¹⁸⁷ 6/6/2006 Washington Mutual memorandum from Kerry Killinger to the Board of Directors, "Strategic Direction," JPM_00808312-324 at 314, Hearing Exhibit 4/13-6d.

¹⁸⁸ Id. at 315 [emphasis in original removed].

increase our origination and servicing of high margin home equity, Alt. A, sub prime and option ARMs. Action steps include merging Longbeach sub prime and the prime business under common management, merging correspondent activities into our correspondent channel, getting out of Government lending, curtailing conventional fixed rate production, expanding distribution of targeted high margin products through all distribution channels and potentially selling MSR's [Mortgage Servicing Rights] of low margin products. We expect these actions to result in significantly higher profitability and lower volatility over time.”¹⁸⁹

The April 16, 2006 “Home Loans Discussion” presentation by Home Loans President David Schneider, discussed above, also confirms WaMu’s ongoing efforts to shift its loan business toward high risk lending. Page four of that presentation, entitled, “Shift to Higher Margin Products,” shows two pie charts under the heading, “WaMu Volume by Product.”¹⁹⁰ One chart depicts loan volume for 2005, and the second chart depicts projected loan volume for 2008:



These charts demonstrate WaMu’s intention to increase its loan originations over three years by almost \$30 billion, focusing on increases in high risk loan products. Subprime originations, for example, were expected to grow from \$34 billion in 2005 to \$70 billion in 2008; Alt A originations were projected to grow from \$1 billion in 2005 to \$24 billion in 2008; and

¹⁸⁹ Id. at 319.

¹⁹⁰ 4/18/2006 “Home Loans Discussion Board of Directors Meeting,” WaMu PowerPoint presentation, JPM_WM00690890-901 at 894, Hearing Exhibit 4/13-3.

¹⁹¹ Id. [formatted for clarity].

Home Equity originations were projected to grow from \$4 billion in 2005 to \$30 billion in 2008. On the other hand, WaMu's low risk originations were expected to be curtailed dramatically. Government backed loan originations, which totaled \$8 billion in 2005, were projected to be eliminated by 2008. Fixed rate loan originations were projected to decline from \$69 billion in 2005 to \$4 billion in 2008.

The 2007 "Strategic Direction" memorandum to the Board is dated June 18, 2007, well after U.S. housing prices had begun to decline, as Mr. Killinger acknowledged:

"For the past two years, we have been predicting the bursting of the housing bubble and the likelihood of a slowing housing market. This scenario has now turned into a reality. Housing prices are declining in many areas of the country and sales are rapidly slowing. This is leading to an increase in delinquencies and loan losses. The sub-prime market was especially rocked as many sub-prime borrowers bought houses at the peak of the cycle and now find their houses are worth less and they are having difficulties refinancing their initial low-rate loans."¹⁹²

While the memorandum's section on home loan strategy no longer focused on overall growth, it continued to push the shift to high risk lending, despite problems in the subprime market:

"Home Loans is a large and important business, but at this point in the cycle, it is unprofitable. The key strategy for 2008 is to execute on the revised strategy adopted in 2006. ... We need to optimize the sub-prime and prime distribution channels with particular emphasis on growing the retail banking, home loan center and consumer direct channels. We also expect to portfolio more of Home Loans' originations in 2008, including the new Mortgage Plus product. We will continue to emphasize higher-risk adjusted return products such as home equity, sub-prime first mortgages, Alt A mortgages and proprietary products such as Mortgage Plus."¹⁹³

The testimony of other WaMu executives further confirms the bank's implementation of its High Risk Lending Strategy. Ronald Cathcart, who joined WaMu in 2006, to become the company's Chief Risk Officer, testified:

"The company's strategic plan to shift its portfolios towards higher margin products was already underway when I arrived at WaMu. Basically, this strategy involved moving away from traditional mortgage lending into alternative lending programs involving adjustable-rate mortgages as well as into subprime products. The strategic shift to

¹⁹² 6/18/2007 Washington Mutual memorandum from Kerry Killinger to the Board of Directors, "Strategic Direction," JPM_WM03227058-67 at 60, Hearing Exhibit 4/13-6a.

¹⁹³ Id. at 66 [emphasis in original removed]. See also 1/2007 Washington Mutual presentation, "Subprime Mortgage Program," JPM_WM02551400, Hearing Exhibit 4/13-5 (informing potential investors in its subprime RMBS securities that: "WaMu is focusing on higher margin products").

higher-margin products resulted in the bank taking on a higher degree of credit risk because there was a greater chance that borrowers would default.”¹⁹⁴

Likewise, Steven Rotella, WaMu’s President and Chief Operating Officer, who began with the bank in January 2005, testified before the Subcommittee:

“In particular, I want to be very clear on the topic of high-risk lending, this Subcommittee’s focus today. High-risk mortgage lending in WaMu’s case, primarily Option ARMs and subprime loans through Long Beach Mortgage, a subsidiary of WaMu, were expanded and accelerated at explosive rates starting in the early 2000s, prior to my hiring in 2005.... In 2004 alone, the year before I joined, Option ARMs were up 124 [percent], and subprime lending was up 52 percent.”¹⁹⁵

In his testimony, Mr. Rotella took credit for curtailing WaMu’s growth and high risk lending.¹⁹⁶ Mr. Rotella’s own emails, however, show that he supported the High Risk Lending Strategy. On October 15, 2005, Mr. Rotella emailed Mr. Killinger about WaMu’s 2006 strategic plan: “I think our focus needs to be on organic growth of home eq, and subprime, and greater utilization of [the Home Loans division] as we know it today to facilitate that at lower acquisition costs and greater efficiency.”¹⁹⁷

Mr. Killinger replied by email the next day: “Regarding Longbeach, I think there is a good opportunity to be a low cost provider and gain significant share when the industry implodes.”¹⁹⁸ Responding to Mr. Rotella’s ideas about the Home Loans division, Mr. Killinger wrote: “It makes sense to leverage the home loans distribution channels with home equity, sub prime, and alt. A.”¹⁹⁹ In this late 2005 email exchange, WaMu’s two senior-most executives contemplate reducing prime lending, not subprime. Mr. Killinger wrote: “If we can’t make a shift in our business model, we might be better off exiting the prime space.”²⁰⁰

Mr. Rotella replied to Mr. Killinger’s email later on October 16, 2005. He continued to emphasize the importance of focusing on high risk lending, referring to his previous experience as a mortgage banker at JPMorgan Chase:

“We did these kinds of analyses all the time at Chase which led us to run as fast as we could into home eq, alt a, subprime (our investment banking brethren stopped us from going too far here). We viewed prime as a source of scale benefits in servicing for the other areas and a conduit of higher margin product and aimed to hold our prime servicing

¹⁹⁴ April 13, 2010 Subcommittee Hearing at 18-19.

¹⁹⁵ Id. at 83.

¹⁹⁶ See id., e.g., at 83-84.

¹⁹⁷ 10/15/2005-10/16/2005 email from Steve Rotella to Kerry Killinger, JPM_WM00665373-75.

¹⁹⁸ Id. at JPM_WM00665374.

¹⁹⁹ Id.

²⁰⁰ Id.

flat to down. I feel strongly that where we need to land is a new home loan unit that includes prime, heq, and subprime. It is a far superior model.”²⁰¹

In July 2008, just two months before the collapse of WaMu, Home Loans President David Schneider prepared an internal presentation entitled, “Home Loans Story, External & Internal Views.”²⁰² The presentation was retrospective, providing timelines of WaMu’s major strategy, policy, and personnel changes. The first substantive page of the presentation bears the heading, “Three fundamental business shifts occurred in Home Loans this millennium which shaped its performance and position in a volatile competitive landscape”:

“2001 to 2005

‘Mono-line’ business model focused on generating high volume of low-margin, prime products

2006

Targeted production franchise toward higher margin products to become a market leader in specific product segments....

2007 & Beyond

Subprime mortgage implosion fuels credit and liquidity crisis and the non-agency secondary market disappears[.]”

Mr. Scheider’s retrospective presentation of the changes that occurred at WaMu is unambiguous: by 2006, WaMu had “targeted production franchise toward higher margin products.”²⁰³ According to the same presentation, that model change also lowered earnings volatility for WaMu by lessening exposure to Mortgage Servicing Rights.²⁰⁴ Later slides provide more detail. A quarterly timeline is presented with the heading: “In an environment of internal and external large-scale change, Home Loans took bold actions to redefine its business into a sustainable model.” In the strategy section for the second quarter of 2006, Mr. Schneider wrote: “New business model, high margin products.”²⁰⁵

Despite warnings by some within its management about the unsustainable housing price bubble, WaMu pursued a High Risk Lending Strategy to generate short term profits from the favorable gain-on-sale margins offered by Wall Street for high risk loans and securitizations, for which the credit rating agencies continued to award AAA ratings. To succeed, the strategy was premised upon borrowers being able to refinance or sell their homes to pay off their loans in the event of a default. Stagnant or declining house prices made refinancing and home sales more difficult.

²⁰¹ Id. at JPM_WM00665373.

²⁰² 7/2008 “Home Loans Story, External & Internal Views,” Washington Mutual PowerPoint presentation, Hearing Exhibit 4/13-80.

²⁰³ Id. at 1.

²⁰⁴ Id.

²⁰⁵ Id. at 4.

Effective implementation of the High Risk Lending Strategy also required robust risk management. But while WaMu was incurring significantly more credit risk than it had in the past, risk managers were marginalized, undermined, and subordinated to WaMu's business units. As a result, when credit risk management was most needed, WaMu found itself lacking in effective risk management and oversight.

D. Shoddy Lending Practices

At the same time they increased their higher risk lending, WaMu and Long Beach engaged in a host of poor lending practices that produced billions of dollars in poor quality loans. Those practices included offering high risk borrowers large loans; steering borrowers to higher risk loans; accepting loan applications without verifying the borrower's income; using loans with low teaser rates to entice borrowers to take out larger loans; promoting negative amortization loans which led to many borrowers increasing rather than paying down their debt over time; and authorizing loans with multiple layers of risk. WaMu and Long Beach also exercised weak oversight over their loan personnel and third party mortgage brokers, and tolerated the issuance of loans with fraudulent or erroneous borrower information.

(1) Long Beach

Throughout the period reviewed by the Subcommittee, from 2004 until its demise in September 2007, Long Beach was plagued with problems. Long Beach was one of the largest subprime lenders in the United States,²⁰⁶ but it did not have any of its own loan officers. Long Beach operated exclusively as a "wholesale lender," meaning all of the loans it issued were obtained from third party mortgage brokers who had brought loans to the company to be financed. Long Beach "account executives" solicited and originated the mortgages that were initiated by mortgage brokers working directly with borrowers. Long Beach account executives were paid according to the volume of loans they originated, with little heed paid to loan quality.

Throughout the period reviewed by the Subcommittee, Long Beach's subprime home loans and mortgage backed securities were among the worst performing in the subprime industry. Its loans repeatedly experienced early payment defaults, its securities had among the highest delinquencies in the market, and its unexpected losses and repurchase demands damaged its parent corporation's financial results. Internal documentation from WaMu shows that senior management at the bank was fully aware of Long Beach's shoddy lending practices, but failed to correct them.

2003 Halt in Securitizations. For a brief period in 2003, Long Beach was required by WaMu lawyers to stop all securitizations until significant performance problems were remedied. While the problems were addressed and securitizations later resumed, many of the issues returned and lingered for several years.

²⁰⁶ See 1/2007 Washington Mutual Presentation, "Subprime Mortgage Program," Hearing Exhibit 4/13-5 (slide showing Long Beach Annual Origination Volume).

The problems with Long Beach's loans and securitizations predated the company's purchase by WaMu in 1999, but continued after the purchase. An internal email at WaMu's primary federal regulator, the Office of Thrift Supervision (OTS), observed the following with respect to Long Beach's mortgage backed securities:

"Performance data for 2003 and 2004 vintages appear to approximate industry average while issues prior to 2003 have horrible performance. LBMC finished in the top 12 worst annualized NCLs [net credit losses] in 1997 and 1999 thru 2003. LBMC nailed down the worst spot at top loser... in 2000 and placed 3rd in 2001."²⁰⁷

In 2003, Long Beach's performance deteriorated to the point that WaMu's legal department put a stop to all Long Beach securitizations until the company improved its operations.²⁰⁸ An internal review of Long Beach's first quarter 2003 lending "concluded that 40% (109 of 271) of loans reviewed were considered unacceptable due to one or more critical errors."²⁰⁹ According to a 2003 joint report issued by regulators from the FDIC and Washington State: "This raised concerns over LBMC's ability to meet the representations and warranty's made to facilitate sales of loan securitizations, and management halted securitization activity."²¹⁰ A Long Beach corporate credit review in August 2003 confirmed that "credit management and portfolio oversight practices were unsatisfactory."²¹¹

As a result of the halt in securitizations, Long Beach had to hold loans on its warehouse balance sheet, which increased by approximately \$1 billion per month and reached nearly \$5 billion by the end of November 2003. Long Beach had to borrow money from WaMu and other creditors to finance the surge.²¹² The joint visitation report noted that unless Long Beach executed a \$3 billion securitization by January 2004, "liquidity will be strained."²¹³ WaMu initiated a review of Long Beach led by its General Counsel Faye Chapman.²¹⁴ Her team evaluated the loans that had accumulated during the halt in securitizations. The joint visitation report noted that of 4,000 Long Beach loans reviewed by WaMu by the end of November 2003, less than one quarter, about 950, could be sold to investors, another 800 were unsaleable, and the rest—over half of the loans—had deficiencies that had to be remediated before a sale could take place.²¹⁵

²⁰⁷ 4/2005 OTS internal email, Hearing Exhibit 4/13-8(a).

²⁰⁸ Subcommittee interview of Faye Chapman, WaMu General Counsel (2/9/2010). See also 12/21/2005 OTS memorandum, "Long Beach Mortgage Corporation (LBMC)," OTSWMS06-007 0001010, Hearing Exhibit 4/16-31.

²⁰⁹ 1/13/2004 report on "Joint Visitation Dated October 14, 2003," jointly prepared by the FDIC and the State of Washington Department of Financial Institutions, FDIC-E_00102515, at 3, Hearing Exhibit 4/13-8b (citing a Long Beach quality assurance report).

²¹⁰ Id.

²¹¹ Id. (citing a Long Beach Corporate Credit Review report).

²¹² Id.

²¹³ Id.

²¹⁴ Subcommittee interview of Fay Chapman (2/9/2010).

²¹⁵ 1/13/2004 report on "Joint Visitation Dated October 14, 2003," jointly prepared by the FDIC and the State of Washington Department of Financial Institutions, FDIC-E_00102515, at 3, Hearing Exhibit 4/13-8b.

After a short hiatus, WaMu allowed Long Beach to resume securitizing subprime loans in 2004.²¹⁶ An internal WaMu memorandum, later prepared by a WaMu risk officer who had been asked to review Long Beach in 2004, recalled significant problems:

“You’ve asked for a chronological recap of ERM [Enterprise Risk Management] market risk involvement with Longbeach and the sub prime conduit. ... [In] 2004: I conducted an informal but fairly intensive market risk audit of Longbeach The climate was very adversarial. ... We found a total mess.”²¹⁷

A November 2004 email exchange between two WaMu risk officers provides a sense that poor quality loans were still a problem. The first WaMu risk officer wrote:

“Just a heads-up that you may be getting some outreach from Carroll Moseley (or perhaps someone higher up in the chain) at Long Beach regarding their interest in exploring the transfer of ... a small amount (maybe \$10-20mm in UPB [unpaid principal balance]) of Piggieback ‘seconds’ (our favorite toxic combo of low FICO borrower and HLTV loan) from HFS [hold for sale portfolio] to HFI [hold for investment portfolio].

“As Carroll described the situation, these are of such dubious credit quality that they can’t possibly be sold for anything close to their ‘value’ if we held on to them. ... I urged him to reach out to you directly on these questions. (E.g., it’s entirely possible we might want to make a business decision to keep a small amount of this crap on our books if it was already written down to near zero, but we would want all parties to be clear that no precedent was being set for the product as a whole, etc., etc.).”²¹⁸

The second risk officer sent the email to the head of Long Beach, with the comment, “I think it would be prudent for us to just sell all of these loans.”

2005 Early Payment Defaults. Early in 2005, a number of Long Beach loans experienced “early payment defaults,” meaning that the borrower failed to make a payment on the loan within three months of the loan being sold to investors. That a loan would default so soon after origination typically indicates that there was a problem in the underwriting process. Investors who bought EPD loans often demanded that Long Beach repurchase them, invoking the representations and warranties clause in the loan sales agreements.

²¹⁶ Subcommittee interview of Fay Chapman (2/9/2010). See also 12/21/2005 OTS memorandum, “Long Beach Mortgage Corporation (LBMC),” OTSWS06-007 0001010, Hearing Exhibit 4/16-31 (“In 2003, adverse internal reviews of LBMC operations led to a decision to temporarily cease securitization activity. WMU’s Legal Department then led a special review of all loans in LBMC’s pipeline and held-for-sale warehouse in order to ensure file documentation adequately supported securitization representations and warranties and that WMI was not exposed to a potentially significant contingent liability. Securitization activity was reinstated in early 2004 after the Legal Department concluded there was not a significant liability issue.”).

²¹⁷ Undated memorandum from Dave Griffith to Michelle McCarthy, “Sub Prime Chronology,” likely prepared in early 2007, JPM_WM02095572.

²¹⁸ 11/24/2004 email from Michael Smith to Mark Hillis and others, “LBMC Transfer of Piggiebacks from HFS to HFI,” JPM_WM01407692.

To analyze what happened, WaMu conducted a “post mortem” review of 213 Long Beach loans that experienced first payment defaults in March, April, and May of 2005.²¹⁹ The review found that many early defaults were not only preventable, but that in some instances fraud should have been easily detected from the presence of “White Out” on an application or a borrower having two different signatures:

“First Payment Defaults (FPD’s) are preventable and / or detectable in nearly all cases (~99%)[.] Most FPD cases (60%) are failure of current control effectiveness[.] ... High incident rate of potential fraud among FPD cases[.] ... All roles in the origination process need to sharpen watch for misrepresentation and fraud[.] ... Underwriting guidelines are not consistently followed and conditions are not consistently or effectively met[.] ... Underwriters are not consistently recognizing non-arm’s length transactions and/or underwriting associated risk effectively[.] ... Credit Policy does not adequately address certain key risk elements in layered high risk transactions[.] ...

“66% of reviewed FPD cases had significant variances in the file[.] ... Stated Income should be reviewed more closely ([fraud] incidence rate of 35%) Signatures should be checked – 14% Borrowers signature vary[.] Altered documents are usually detectable –5% White-out on documentation[.] ... 92% of the Purchases reviewed are 100% CLTV [combined loan-to-value][.] ... 52% are Stated Income.”²²⁰

A subsequent review conducted by WaMu’s General Auditor of the “root causes” of the Long Beach loans with early payment defaults pointed not only to lax lending standards and a lack of fraud controls, but also to “a push to increase loan volume”:

“In 2004, LBMC [Long Beach] relaxed underwriting guidelines and executed loan sales with provisions fundamentally different from previous securitizations. These changes, coupled with breakdowns in manual underwriting processes, were the primary drivers for the increase in repurchase volume. The shift to whole loan sales, including the EPD provision, brought to the surface the impact of relaxed credit guidelines, breakdowns in manual underwriting processes, and inexperienced subprime personnel. These factors, coupled with a push to increase loan volume and the lack of an automated fraud monitoring tool, exacerbated the deterioration in loan quality.”²²¹

Due to the early payment defaults, Long Beach was forced to repurchase loans totaling nearly \$837 million in unpaid principal, and incurred a net loss of about \$107 million.²²² This

²¹⁹ 11/1/2005 “LBMC Post Mortem – Early Findings Read Out,” prepared by WaMu, JPM_WM03737297, Hearing Exhibit 4/13-9.

²²⁰ Id.

²²¹ 4/17/2006 WaMu memorandum to the Washington Mutual Inc. and WaMu Board of Directors’ Audit Committee, “Long Beach Mortgage Company - Repurchase Reserve Root Cause Analysis,” prepared by WaMu General Auditor, JPM_WM02533760-61, Hearing Exhibit 4/13-10.

²²² Id. (Long Beach “experienced a dramatic increase in EPD’s [early payment defaults], during the third quarter of 2005 [which] ... led to a large volume of required loan repurchases. The unpaid principal balance repurchased as a

loss overwhelmed Long Beach's repurchase reserves, leading to a reserve shortfall of nearly \$75 million.²²³ Due to its insufficient loss reserves, its outside auditor, Deloitte and Touche, cited Long Beach for a serious deficiency in its financial reporting.²²⁴ These unexpected repurchases were significant enough that Washington Mutual Inc., Long Beach's parent company, made special mention of them in its 2005 10-K filing:

“In 2004 and 2005, the Company's Long Beach Mortgage Company subsidiary engaged in whole loan sale transactions of originated subprime loans in which it agreed to repurchase from the investor each ‘early payment default’ loan at a price equal to the loan's face value plus the amount of any premium paid by the investor. An early payment default occurs when the borrower fails to make the first post-sale payment due on the loan by a contractually specified date. Usually when such an event occurs, the fair value of the loan at the time of its repurchase is lower than the face value. In the fourth quarter of 2005, the Company experienced increased incidents of repurchases of early payment default loans sold by Long Beach Mortgage Company and this trend is expected to continue in the first part of 2006.”²²⁵

In addition to the early payment default problem, a September 2005 WaMu audit observed that at Long Beach, policies designed to mitigate the risk of predatory lending practices were not always followed. The audit report stated: “In 24 of 27 (88%) of the refinance transactions reviewed, policies established to preclude origination of loans providing no net tangible benefit to the borrower were not followed.”²²⁶ In addition, in 8 out of 10 of the newly issued refinance loans that WaMu reviewed, Long Beach had not followed procedures designed to detect “loan flipping,” an industry term used to describe the practice of unscrupulous brokers or lenders quickly or repeatedly refinancing a borrower's loan to reap fees and profits but provide no benefit to the borrower.²²⁷

2006 Purchase of Long Beach. In response to all the problems at Long Beach, at the end of 2005, WaMu fired Long Beach's senior management and moved the company under the direct supervision of the President of WaMu's Home Loans Division, David Schneider.²²⁸ Washington Mutual promised its regulator, OTS, that Long Beach would improve.²²⁹ The bank also filed a formal application, requiring OTS approval, to purchase Long Beach from its parent company, so that it would become a wholly owned subsidiary of the bank.²³⁰ WaMu told OTS that making Long Beach a subsidiary would give the bank greater control over Long Beach's

result of the EPD provision for the year ended December 31, 2005 was \$837.3 million. The net loss from these repurchases was approximately \$107 million.”).

²²³ Id.

²²⁴ Id.

²²⁵ Washington Mutual Inc. 2005 10-K filing with the SEC.

²²⁶ 9/21/2005 WaMu audit of Long Beach, JPM_WM04656627.

²²⁷ Id.

²²⁸ Subcommittee interview of David Schneider (2/17/2010).

²²⁹ See, e.g., 12/21/2005 OTS memorandum, “Long Beach Mortgage Corporation (LBMC),” OTSWMS06-007 0001009, Hearing Exhibit 4/16-31.

²³⁰ Id. at OTSWMS06-007 0001009 (stating WaMu filed a 12/12/2005 application to acquire Long Beach).

operations and allow it to strengthen Long Beach's lending practices and risk management, as well as reduce funding costs and administrative expenses.²³¹ In addition, WaMu proposed that it replace its current "Specialty Mortgage Finance" program, which involved purchasing subprime loans for its portfolio primarily from Ameriquest, with a similar loan portfolio provided by Long Beach.²³² OTS had expressed a number of concerns about Long Beach in connection with the purchase request,²³³ but in December 2005, after obtaining commitments from WaMu to strengthen Long Beach's lending and risk management practices, OTS agreed to the purchase.²³⁴ The actual purchase date was March 1, 2006.²³⁵

Immediately after the purchase in April 2006, after reviewing Long Beach's operations, WaMu President Rotella sent an email to WaMu CEO Killinger warning about the extent of the problems: "[D]elinquencies are up 140% and foreclosures close to 70%. ... First payment defaults are way up and the 2005 vintage is way up relative to previous years. It is ugly."²³⁶ Mr. Rotella, however, expressed hope that operations would improve:

"Early changes by the new team from HL [Home Loans], who have deep subprime experience, indicate a solid opportunity to mitigate some of this. I would expect to see this emerge in 3 to 6 months. That said, much of the paper we originated in the 05 growth spurt was low quality. ... I have the utmost confidence in the team overseeing this now and no doubt this unit will be more productive and better controlled, but I figured you should know this is not a pretty picture right now. We are all over it, but as we saw with repurchases, there was a lot of junk coming in."

Despite the new management and direct oversight by WaMu's Home Loans Division, Long Beach continued to perform poorly. Five months later, expected improvements had not materialized. In September 2006, Mr. Rotella sent another email to Mr. Killinger stating that Long Beach was still "terrible":

"[Long Beach] is terrible, in fact negative right now. ... We are being killed by the lingering movement of EPDs [early payment defaults] and other credit related issues [W]e are cleaning up a mess. Repurchases, EPDs, manual underwriting, very weak servicing/collections practices and a weak staff. Other than that, well you get the picture."²³⁷

²³¹ Id. at OTSWMS06-007 0001010.

²³² Id. at OTSWMS06-007 0001011.

²³³ See, e.g., 6/3/2005 OTS internal memorandum by OTS examiner to OTS Deputy Regional Director, at OTSWMS06-007 0002683, Hearing Exhibit 4/16-28.

²³⁴ See 12/21/2005 OTS memorandum, "Long Beach Mortgage Corporation (LBMC)," OTSWMS06-007 0001009, Hearing Exhibit 4/16-31.

²³⁵ "Washington Mutual Regulators Timeline," chart prepared by the Subcommittee, Hearing Exhibit 4/16-1j.

²³⁶ 4/27/2006 email from Steve Rotella to Kerry Killinger, JPM_WM05380911, Hearing Exhibit 4/13-11.

²³⁷ 9/14/2006 WaMu internal email, Hearing Exhibit 4/13-12.

Again, he expressed hope that the situation would improve: “The good news is David and his team are pros and are all over it.”²³⁸ Two months later, in November 2006, however, the head of WaMu Capital Markets in New York, David Beck, relayed even more bad news to Mr. Schneider, the Home Loans President: “LBMC [Long Beach] paper is among the worst performing in the mkt [market] in 2006.”²³⁹

Despite the additional focus on improving its lending operations throughout 2006, Long Beach was once again flooded with repurchase requests. According to a memorandum later written by an FDIC examination specialist, “[d]uring 2006, more than 5,200 LBMC loans were repurchased, totaling \$875.3 million.”²⁴⁰ Even though, in January 2006, the bank had ceased executing whole loan sales which allowed an automatic repurchase in the event of an EPD, 46% of the repurchase volume was as a result of EPDs. Further, 43% of the repurchase volume resulted from first payment defaults (FPDs) in which the borrower missed making the first payment on the loan after it was sold.²⁴¹ Another 10% of the repurchases resulted from violations related to representation and warranties (R&W) not included in the EPD or FPD numbers, meaning the violations were identified only later in the life of the loan.

R&W repurchases generally pose a challenge for a bank’s loss reserves, because the potential liability—the repurchase request—continues for the life of the loan. The FDIC memorandum observed:

“Management claims that R&W provisions are industry standard and indeed they may be. However, I still found that the Mortgage Loan Purchase Agreement contains some representations and warranties worth noting. For example, not only must the loans be ‘underwritten in accordance with the seller’s underwriting guideline,’ but the ‘origination, underwriting, and collection practices used by the seller with respect to each mortgage loan have been in all material respects legal, proper, prudent, and customary in the subprime mortgage business.’ This provision elevates the potential that investors can put back a problem loan years after origination and not only must the loan have been underwritten in line with bank guidelines but must also have been underwritten in accordance with what is customary with other subprime lenders.”²⁴²

R&W repurchase requests and loss reserves continued to be an issue at Long Beach. The fourth quarter of 2006 saw another spike in R&W repurchase requests, and in December the required amount of R&W loss reserves jumped from \$18 million to \$76 million.²⁴³

²³⁸ Id.

²³⁹ 11/7/2006 WaMu internal email, Hearing Exhibit 4/13-50.

²⁴⁰ See 6/5/2007 memorandum by Christopher Hovik, Examination Specialist, sent to FDIC Dedicated Examiner Steve Funaro, “WaMu – Long Beach Mortgage Company (LMC) Repurchases,” at 1, FDIC_WAMU_000012348, Hearing Exhibit 4/13-13b.

²⁴¹ Id.

²⁴² Id.

²⁴³ Id. at 3.

On December 22, 2006, the FDIC Dedicated Examiner at WaMu, Steve Funaro, sent an email to Mr. Schneider, the Home Loans President, raising questions about the unexpected loan defaults and repurchase demands. He wrote that Long Beach had the “[s]ame issues as FPD last quarter ... Current forecast of 35 to 50m [million] risk.” His email also noted potentially insufficient loss reserves related to WaMu’s own subprime conduit that purchased subprime loans from other lenders and mortgage brokers, some of which were going out of business and would be unable to shoulder any liability for defaulting loans. His email noted forecasts of early payment defaults totaling \$15.6 million and loan delinquencies totaling \$10.7 million, in addition to other problems, and asked: “Why the miss? ... Who is accountable?”²⁴⁴

Mr. Schneider forwarded the email to his team and expressed frustration at Long Beach’s continuing problems:

“Short story is this is not good. ... There is [a] growing potential issue around Long Beach repurchases [W]e have a large potential risk from what appears to be a recent increase in repurchase requests. ... We are all rapidly losing credibility as a management team.”²⁴⁵

Performance in 2007 Worsens. The following year, 2007, was no better as the performance of WaMu’s loan portfolio continued to deteriorate. WaMu’s chief risk officer, Ron Cathcart, asked WaMu’s Corporate Credit Review team to assess the quality of Long Beach loans and RMBS securities in light of the slowdown and decline in home prices in some areas.²⁴⁶ In January 2007, he forwarded an email with the results of the review, which identified “key risk issues” related to recent loans and described deteriorating loan performance at Long Beach. The “top five priority issues” were:

“Appraisal deficiencies that could impact value and were not addressed[;]
Material misrepresentations relating to credit evaluation were confirmed[;]
Legal documents were missing or contained errors or discrepancies[;]
Credit evaluation or loan decision errors[; and]
Required credit documentation was insufficient or missing from the file.”²⁴⁷

The review also found: “[D]eterioration was accelerating in recent vintages with each vintage since 2002 having performed worse than the prior vintage.” Mr. Cathcart also expressed concern that problems were not being reported to senior management. He wrote: “Long Beach represents a real problem for WaMu. ... I am concerned that Credit Review may seem to have been standing on the sidelines while problems continue. For instance, why have Cathcart, Schneider, Rotella and Killinger received NO report on any of this?”²⁴⁸

²⁴⁴ 12/22/2006 email from Steve Funaro to David Schneider, Hearing Exhibit 4/13-13a.

²⁴⁵ 12/2006 WaMu internal email, Hearing Exhibit 4/13-13a.

²⁴⁶ 12/7/2006 email from Ron Cathcart to his colleagues, Hearing Exhibit 4/13-15.

²⁴⁷ 1/2/2007 email from Ron Cathcart to Cory Gunderson, Hearing Exhibit 4/13-16.

²⁴⁸ Id.

In February 2007, WaMu senior managers discussed “how best to dispose” of \$433 million in Long Beach performing second lien loans, due to “disarray” in the securitization market.²⁴⁹ David Beck, head of WaMu’s Wall Street operation, wrote that securitizing the loans was “not a viable exit strategy” and noted:

“Investors are suffering greater than expected losses from subprime in general as well as subprime 2nd lien transactions. As you know, they are challenging our underwriting representations and warrants. Long Beach was able to securitize 2nd liens once in 2006 in May. We sold the BBB- bonds to investors at Libor +260. To date, that transaction has already experienced 7% foreclosures.”²⁵⁰

WaMu CEO Killinger complained privately to President Steve Rotella:

“Is this basically saying that we are going to lose 15 [percent] on over \$400 million of this product or 60 million. That is a pretty bad hit that reflects poorly on credit and others responsibility for buying this stuff. Is this showing up in hits to compensation or personnel changes.”²⁵¹

WaMu President Rotella responded:

“This is second lien product originated 7-10 months ago from Long Beach. ... In 2006 Beck’s team started sprinkling seconds in deals as they could. And, we now have the % down to the low single digits, so that we can sell all into our deals (assuming the market doesn’t get even worse).”

He continued: “In terms of folks losing their jobs, the people largely responsible for bringing us this stuff are gone, the senior management of LB.”²⁵²

Also in February 2007, early payment defaults again ticked up. A review of the first quarter of 2007 found: “First payment defaults (FPDs) rose to 1.96% in March but are projected to fall back to 1.87% in April based on payments received through May 5th.”²⁵³ It also reported that the findings from a “deep dive into February FPDs revealed” that many of the problems could have been eliminated had existing guidelines been followed:

“The root cause of over 70% of FPDs involved operational issues such as missed fraud flags, underwriting errors, and condition clearing errors. This finding indicates there may be opportunities to improve performance without further restricting underwriting guidelines.”²⁵⁴

²⁴⁹ 2/2007 email chain among WaMu personnel, JPM_WM00673101-03, Hearing Exhibit 4/13-17.

²⁵⁰ Id. at JPM_WM00673103.

²⁵¹ Id. at JPM_WM00673101.

²⁵² Id.

²⁵³ “Quarterly Credit Risk Review SubPrime,” prepared by WaMu Home Loans Risk Management (1st Quarter, 2007), Hearing Exhibit 4/13-18.

²⁵⁴ Id.

In June 2007, WaMu decided to discontinue Long Beach as a separate entity, and instead placed its subprime lending operations in a new WaMu division called “Wholesale Specialty Lending.” That division continued to purchase subprime loans and issue subprime securitizations.

Some months later, an internal WaMu review assessed “the effectiveness of the action plans developed and implemented by Home Loans to address” the first payment default problem in the Wholesale Specialty Lending division.²⁵⁵ After reviewing 187 FPD loans from November 2006 through March 2007, the review found:

“The overall system of credit risk management activities and process has major weaknesses resulting in unacceptable level of credit risk. Exposure is considerable and immediate corrective action is essential in order to limit or avoid considerable losses, reputation damage, or financial statement errors.”²⁵⁶

In particular, the review found:

“Ineffectiveness of fraud detection tools – 132 of the 187 (71%) files were reviewed ... for fraud. [The review] confirmed fraud on 115 [and 17 were] ... ‘highly suspect’. ... Credit weakness and underwriting deficiencies is a repeat finding 80 of the 112 (71%) stated income loans were identified for lack of reasonableness of income[.] 133 (71%) had credit evaluation or loan decision errors 58 (31%) had appraisal discrepancies or issues that raised concerns that the value was not supported.”²⁵⁷

July 2007 was a critical moment not only for WaMu, but also for the broader market for mortgage securities. In that month, Moody’s and S&P downgraded the ratings of hundreds of RMBS and CDO securities, including 40 Long Beach subprime securities.²⁵⁸ The mass downgrades caused many investors to immediately stop buying subprime RMBS securities, and the securities plummeted in value. Wall Street firms were increasingly unable to find investors for new subprime RMBS securitizations.

In August 2007, WaMu’s internal audit department released a lengthy audit report criticizing Long Beach’s poor loan origination and underwriting practices.²⁵⁹ By that time, Long Beach had been rebranded as WaMu’s Wholesale Specialty Lending division, the subprime market had collapsed, and subprime loans were no longer marketable. The audit report nevertheless provided a detailed and negative review of its operations:

²⁵⁵ 9/28/2007 “Wholesale Specialty Lending-FPD,” WaMu Corporate Credit Review, JPM_WM04013925, Hearing Exhibit 4/13-21.

²⁵⁶ Id. at 2.

²⁵⁷ Id. at 3.

²⁵⁸ 7/10/2007-7/12/2007 excerpts from Standard & Poor’s and Moody’s Downgrades, Hearing Exhibit 4/23-99.

²⁵⁹ 8/20/2007 “Long Beach Mortgage Loan Origination & Underwriting,” WaMu audit report, JPM_WM02548939, Hearing Exhibit 4/13-19

“[T]he overall system of risk management and internal controls has deficiencies related to multiple, critical origination and underwriting processes These deficiencies require immediate effective corrective action to limit continued exposure to losses. ... Repeat Issue – Underwriting guidelines established to mitigate the risk of unsound underwriting decisions are not always followed Improvements in controls designed to ensure adherence to Exception Oversight Policy and Procedures is required [A]ccurate reporting and tracking of exceptions to policy does not exist.”²⁶⁰

In response, Mr. Rotella wrote to WaMu’s General Auditor: “This seems to me to be the ultimate in bayonetting the wounded, if not the dead.”²⁶¹

Subprime Lending Ends. In September 2007, with investors no longer interested in buying subprime loans or securitizations, WaMu shut down all of its subprime operations.²⁶² During the prior year, which was their peak, Long Beach and WaMu had securitized \$29 billion in subprime loans; by 2007, due to the collapse of the subprime secondary market, WaMu’s volume for the year dropped to \$5.5 billion. Altogether, from 2000 to 2007, Long Beach and WaMu had securitized at least \$77 billion in subprime loans.²⁶³

When asked about Long Beach at the Subcommittee’s hearing, all of the WaMu former managers who testified remembered its operations as being problematic, and could not explain why WaMu failed to strengthen its operations. Mr. Vanasek, former Chief Risk Officer, testified that Long Beach did not have an effective risk management regime when he arrived at WaMu in 1999, and that it had not developed an effective risk management regime by the time he retired at the end of 2005.²⁶⁴ Likewise, Mr. Cathcart, who replaced Mr. Vanasek as Chief Risk Officer, testified that Long Beach never developed effective risk management during the course of his tenure.²⁶⁵

At the April 13 Subcommittee hearing, Senator Levin asked Mr. Vanasek: “Is it fair to say that WaMu is not particularly worried about the risk associated with Long Beach subprime mortgages because it sold those loans and passed the risk on to investors?” Mr. Vanasek replied: “Yes, I would say that was a fair characterization.”²⁶⁶

Home Loans President David Schneider, who had direct responsibility for addressing the problems at Long Beach, testified that he tried to improve Long Beach, but “ultimately decided ... Long Beach was an operation that we should shut down.”²⁶⁷ WaMu President Steve Rotella also acknowledged the inability of WaMu management to resolve the problems at Long Beach:

²⁶⁰ Id. at JPM_WM02548940-41.

²⁶¹ 8/21/2007 email from Steve Rotella to Randy Melby, JPM_WM04859837, Hearing Exhibit 4/13-20.

²⁶² “Washington Mutual Regulators Timeline,” chart prepared by the Subcommittee, Hearing Exhibit 4/16-1j.

²⁶³ “Securitizations of Washington Mutual Subprime Home Loans,” chart prepared by the Subcommittee, Hearing Exhibit 4/13-1c.

²⁶⁴ April 13, 2010 Subcommittee Hearing at 22.

²⁶⁵ Id. at 22.

²⁶⁶ Id. at 23.

²⁶⁷ Id. at 55.

“We did bring the volume in Long Beach down substantially every quarter starting in the first quarter of 2006. As we went through that process, it became increasingly clear, as I have indicated in here, that the problems in Long Beach were deep and the only way we could address those were to continue to cut back volume and ultimately shut it down.”²⁶⁸

Community Impact. Long Beach’s poor quality loans not only proved unprofitable for many investors, they were often devastating for the borrowers and their communities. Mr. Killinger testified at the Subcommittee hearing that WaMu, “entered the subprime business with our purchase of Long Beach Mortgage in 1999 to better serve an underserved market.”²⁶⁹ But the unfortunate result of many Long Beach loans was that they left communities reeling from widespread foreclosures and lost homes.

In November 2008, the Office of the Comptroller of the Currency (OCC) which oversees all nationally chartered banks, identified the ten metropolitan areas across the United States with the highest rates of foreclosure for subprime and Alt A mortgages originated from 2005 through 2007.²⁷⁰ Those ten areas were, in order: Detroit, Cleveland, Stockton, Sacramento, Riverside/San Bernardino, Memphis, Miami/Fort Lauderdale, Bakersfield, Denver, and Las Vegas. The OCC then identified the lenders with the highest foreclosure rates in each of those devastated cities. Long Beach had the worst foreclosure rate in four of those areas, and was near the worst in five more, with the lone exception being Las Vegas. The OCC data also showed that, overall in the ten metropolitan areas, Long Beach mortgages had the second worst foreclosure rate of all the lenders reviewed, with over 11,700 foreclosures at the time of the report. Only New Century was worse.

(2) WaMu Retail Lending

Washington Mutual’s problems were not confined to its subprime operations; they also affected its retail operations. WaMu loosened underwriting standards as part of its High Risk Lending Strategy, and received repeated criticisms from its regulators, as outlined in the next chapter, for weak underwriting standards, risk layering, excessive loan error and exception rates, appraisal problems, and loan fraud. In August of 2007, more than a year before the collapse of the bank, WaMu’s President Steve Rotella emailed CEO Kerry Killinger saying that, aside from Long Beach, WaMu’s prime home loan business “was the worst managed business I had seen in my career.”²⁷¹

(a) Inadequate Systems and Weak Oversight

One reason for WaMu’s poor lending practices was its failure to adequately monitor the hundreds of billions of dollars of residential loans being issued each year by its own loan

²⁶⁸ Id. at 90.

²⁶⁹ Id. at 86.

²⁷⁰ 11/13/2008 “Worst Ten in the Worst Ten,” document prepared by the Office of the Comptroller of the Currency, <http://www.occ.treas.gov/news-issuances/news-releases/2009/nr-occ-2009-112b.pdf>, Hearing Exhibit 4/13-58.

²⁷¹ 8/23/2007 email from Mr. Rotella to Mr. Killinger, JPM_WM00675851, Hearing Exhibit 4/13-79.

personnel. From 1990 until 2002, WaMu acquired more than 20 new banks and mortgage companies, including American Savings Bank, Great Western Bank, Fleet Mortgage Corporation, Dime Bancorp, PNC Mortgage, and Long Beach. WaMu struggled to integrate dozens of lending platforms, information technology systems, staffs, and policies, whose inconsistencies and gaps exposed the bank to loan errors and fraud.

To address the problem, WaMu invested millions of dollars in a technology program called Optis, which WaMu President Rotella described in the end as “a complete failure” that the bank “had to write off” and abandon.²⁷² In 2004, an OTS Report of Examination (ROE), which was given to the bank’s Board of Directors, included this observation:

“Our review disclosed that past rapid growth through acquisition and unprecedented mortgage refinance activity placed significant operational strain on [Washington Mutual] during the early part of the review period. Beginning in the second half of 2003, market conditions deteriorated, and the failure of [Washington Mutual] to fully integrate past mortgage banking acquisitions, address operational issues, and realize expectations from certain major IT initiatives exposed the institution’s infrastructure weaknesses and began to negatively impact operating results.”²⁷³

The records reviewed by the Subcommittee showed that, from 2004 until its shuttering in 2008, WaMu constantly struggled with information technology issues that limited its ability to monitor loan errors, exception rates, and indicators of loan fraud.

From 2004 to 2008, WaMu’s regulators also repeatedly criticized WaMu’s failure to exercise sufficient oversight of its loan personnel to reduce excessive loan error and exception rates that allowed the issuance of loans in violation of WaMu’s credit standards.²⁷⁴ In 2004, Craig Chapman, then the President of WaMu Home Loans, visited a number of the bank’s loan centers around the country. Lawrence Carter, then OTS Examiner-in-Charge at WaMu, spoke with Mr. Chapman about what he found. Recalling that conversation in a later email, Mr. Carter wrote:

“Craig has been going around the country visiting home lending and fulfillment offices. His view is that band-aids have been used to address past issues and that there is a fundamental absence of process.”²⁷⁵

The regulators’ examination reports on WaMu indicate that its oversight efforts remained weak. In February 2005, OTS stated that WaMu’s loan underwriting “has been an area of

²⁷² Subcommittee interview of Steve Rotella (2/24/2010).

²⁷³ See 3/15/2004 OTS Report of Examination, at OTS WMS04-0000001482, Hearing Exhibit 4/16-94 [Sealed Exhibit]. See also, e.g., 12/17/2004 email exchange among WaMu executives, “Risks/Costs to Moving GSE Share to FH,” JPM_WM05501400, Hearing Exhibit 4/16-88 (noting that Fannie Mae “is well aware of our data integrity issues (miscoding which results in misdeliveries, expensive and time consuming data reconciliations), and has been exceedingly patient.”).

²⁷⁴ See, e.g., OTS examination reports cited in Chapter IV, below.

²⁷⁵ 8/13/2004 email from Lawrence Carter to Michal Finn, Finn_Michael-00005331.

concern for several exams.”²⁷⁶ In June 2005, OTS expressed concern about the bank’s underwriting exceptions and policy compliance.²⁷⁷ In August of the same year, the OTS Report of Examination stated that, “the level of deficiencies, if left unchecked, could erode the credit quality of the portfolio,” and specifically drew attention to WaMu concentrations in higher risk loans that were a direct result of its High Risk Lending Strategy.²⁷⁸ 2006 was no better. OTS repeatedly criticized the level of underwriting exceptions and errors.²⁷⁹

Another problem was the weak role played by WaMu’s compliance department. In March 2007, an OTS examiner noted that WaMu had just hired its “ninth compliance leader since 2000,” and that its “compliance management program has suffered from a lack of steady, consistent leadership.” The examiner added: “The Board of Directors should commission an evaluation of why smart, successful, effective managers can’t succeed in this position. ... (HINT: It has to do with top management not buying into the importance of compliance and turf warfare and Kerry [Killinger] not liking bad news.)”²⁸⁰

Still another problem was that WaMu failed to devote sufficient resources to overseeing the many loans it acquired from third party lenders and mortgage brokers. The 2010 Treasury and FDIC IG report found that, from 2003 to 2007, a substantial portion of WaMu’s residential loans—from 48% to 70%—came from third party lenders and brokers.²⁸¹ The IG report also found:

“The financial incentive to use wholesale loan channels for production was significant. According to an April 2006 internal presentation to the WaMu Board, it cost WaMu about 66 percent less to close a wholesale loan (\$1,809 per loan) than it did to close a retail loan (\$5,273). Thus, WaMu was able to reduce its cost of operations through the use of third-party originators but had far less oversight over the quality of originations.”²⁸²

During its last five years, WaMu accepted loans from tens of thousands of third party brokers and lenders across the country, not only through its wholesale and correspondent channels, but also through its securitization conduits that bought Alt A and subprime loans in bulk. Evidence gathered by the Subcommittee from OTS examination reports, WaMu internal

²⁷⁶ 2/7/2005 OTS Letter to Washington Mutual Board of Directors on Matters Requiring Board Attention, OTSWMEF-0000047591, Hearing Exhibit 4/16-94 [Sealed Exhibit]. See the Regulator Chapter of this Report for more information.

²⁷⁷ 6/3/2005 OTS Findings Memorandum, “Single Family Residential Home Loan review,” OTSWME05-004 0000392, Hearing Exhibit 4/16-26. For more information, see Chapter IV, below.

²⁷⁸ 3/14/2005 OTS Report of Examination, OTSWMS05-004 0001794, Hearing Exhibit 4/16-94 [Sealed Exhibit]. (Examination findings were issued to WaMu on August 28, 2005.)

²⁷⁹ See, for example, 5/23/2006 OTS Exam Finding Memo, “Home Loan Underwriting,” OTSWMS06-008 0001299, Hearing Exhibit 4/16-33; and 8/29/2006 OTS Report of Examination, OTSWMS06-008 0001690, Hearing Exhibit 4/16-94 [Sealed Exhibit].

²⁸⁰ 5/31/2007 Draft OTS Findings Memorandum, “Compliance Management Program,” Franklin_Benjamin-00020408_001, Hearing Exhibit 4/16-9.

²⁸¹ 4/2010 IG Report, at 23, Hearing Exhibit 4/16-82.

²⁸² Id. at 23.

documents, and oral testimony shows that WaMu exercised weak oversight over the thousands of brokers submitting loans. For example, a 2003 OTS report concluded that WaMu's "annual review and monitoring process for wholesale mortgage brokers was inadequate, as management did not consider key performance indicators such as delinquency rates and fraud incidents."²⁸³ A 2003 WaMu quality assurance review found an "error rate of 29 percent for wholesale mortgage loans, more than triple the acceptable error rate of 8 percent established by WaMu."²⁸⁴ A 2004 OTS examination noted that 20,000 brokers and lenders had submitted loans to WaMu for approval during the year, a volume that was "challenging to manage."²⁸⁵ A 2005 internal WaMu investigation of two high volume loan centers in Southern California that accepted loans from brokers found that "78% of the funded retail broker loans reviewed were found to contain fraud."²⁸⁶ A 2006 internal WaMu inquiry into why loans purchased through its subprime conduit were experiencing high delinquency rates found the bank had securitized broker loans that were delinquent, not underwritten to standards, and suffering from "lower credit quality."²⁸⁷

OTS examinations in 2006 and 2007 also identified deficiencies in WaMu's oversight efforts.²⁸⁸ For example, a 2007 OTS memorandum found that, in 2007, Washington Mutual had only 14 full-time employees overseeing more than 34,000 third party brokers submitting loans to the bank for approval,²⁸⁹ which meant that each WaMu employee oversaw more than 2,400 brokers. The OTS examination not only questioned the staffing level, but also criticized the scorecard WaMu used to rate the mortgage brokers, which did not include the rates at which significant lending or documentation deficiencies were attributed to the broker, the rate at which the broker's loans were denied or produced unsaleable loans, or any indication of whether the broker was included on industry watch lists for prior or suspected misconduct.

In 2006, federal regulators issued Interagency Guidance on Nontraditional Mortgage Product Risks (NTM Guidance) providing standards on how banks "can offer nontraditional mortgage products in a safe and sound manner."²⁹⁰ It focused, in part, on the need for banks to "have strong systems and controls in place for establishing and maintaining relationships" with third party lenders and brokers submitting high risk loans for approval. It instructed banks to monitor the quality of the submitted loans to detect problems such as "early payment defaults, incomplete documentation, and fraud." If problems arose, the NTM Guidance directed banks to "take immediate action":

²⁸³ Id.

²⁸⁴ Id. at 24.

²⁸⁵ Id.

²⁸⁶ 11/16/2005 "Retail Fraud Risk Overview," prepared by WaMu Credit Risk Management, at JPM_WM02481938, Hearing Exhibit 4/13-22b.

²⁸⁷ 12/12/2006 WaMu Market Risk Committee Minutes, JPM_WM02095545, Hearing Exhibit 4/13-28.

²⁸⁸ 4/2010 IG Report, at 24-25, Hearing Exhibit 4/16-82.

²⁸⁹ 6/7/2007 OTS Asset Quality Memo 11, "Broker Credit Administration," Hedger_Ann-00027930_001, Hearing Exhibit 4/16-10.

²⁹⁰ 10/4/2006 "Interagency Guidance on Nontraditional Mortgage Product Risks," (NTM Guidance), 71 Fed. Reg. 192 at 58609.

“Oversight of third party brokers and correspondents who originate nontraditional mortgage loans should involve monitoring the quality of originations so that they reflect the institution’s lending standards and compliance with applicable laws and regulations. ... If appraisal, loan documentation, credit problems or consumer complaints are discovered, the institution should take immediate action.”²⁹¹

WaMu did, at times, exercise oversight of its third party brokers. A 2006 credit review of its subprime loans, for example, showed that Long Beach—which by then reported to the WaMu Home Loans Division—had terminated relationships with ten brokers in 2006, primarily because their loans had experienced high rates of first payment defaults requiring Long Beach to repurchase them at significant expense.²⁹² But terminating those ten brokers was not enough to cure the many problems with the third party loans WaMu acquired. The report also noted that, in 2006, apparently for the first time, Long Beach had introduced “collateral and broker risk” into its underwriting process.²⁹³

WaMu closed down its wholesale and subprime channels in 2007, and its Alt A and subprime securitization conduits in 2008.

(b) Risk Layering

During the five-year period reviewed by the Subcommittee, from 2004 to 2008, WaMu issued many loans with multiple higher risk features, a practice known as “risk layering.” At the April 13 Subcommittee hearing, Mr. Vanasek, its Chief Risk Officer from 2004 to 2005, testified about the dangers of this practice:

“It was the layering of risk brought about by these incremental changes that so altered the underlying credit quality of mortgage lending which became painfully evident once housing prices peaked and began to decline. Some may characterize the events that took place as a ‘perfect storm,’ but I would describe it as an inevitable consequence of consistently adding risk to the portfolio in a period of inflated housing price appreciation.”²⁹⁴

Stated Income Loans. One common risk layering practice at WaMu was to allow borrowers to “state” the amount of their annual income in their loan applications without any direct documentation or verification by the bank. Data compiled by the Treasury and the FDIC IG report showed that, by the end of 2007, 50% of WaMu’s subprime loans, 73% of its Option ARMs, and 90% of its home equity loans were stated income loans.²⁹⁵ The bank’s acceptance of unverified income information came on top of its use of loans with other high risk features, such

²⁹¹ Id. at 58615.

²⁹² 12/2006 “Home Loans – SubPrime Quarterly Credit Risk Review,” JPM_WM04107374, Hearing Exhibit 4/13-14.

²⁹³ Id. at JPM_WM04107375.

²⁹⁴ April 13, 2010 Subcommittee Hearing at 16.

²⁹⁵ 4/2010 IG Report, at 10, Hearing Exhibit 4/16-82.

as borrowers with low credit scores or the use of low initial teaser interest rates followed by much higher rates.

Stated income loans were originally developed to assist self employed individuals that had good credit and high net worth to obtain loans they could afford. But from 2004 to 2008, stated income loans became much more widespread, including with respect to a wide variety of high risk loans.²⁹⁶ Mr. Cathcart testified at the Subcommittee hearing:

“[Stated income loans] originated as a product for self-employed individuals who didn’t have pay stubs and whose financial statements didn’t necessarily reflect what they made. It was intended to be available for only the most creditworthy borrowers and it was supposed to be tested for reasonableness so that a person who said that they were a waiter or a lower-paid individual couldn’t say that they had an income of \$100,000.

“I think that the standards eroded over time. At least I have become aware, reading all that has happened ... standards eroded over time and that it became a competitive tool that was used by banks to gather business, so that if a loan consultant could send his loan to Bank A or Bank B, the consultant would say, well, why don’t you go to Bank B? You don’t have to state your income.

“I do think, thinking it through, that there was a certain amount of coaxing that was possible between the loan consultant and the individual, which would be something which would be invisible to a bank that received the application and the only test for that would be reasonableness, which as you have heard there were some issues within the portfolio.”²⁹⁷

WaMu required its loan personnel to determine whether a loan applicant’s stated income was reasonable, but evidence obtained by the Subcommittee indicates that requirement was not effectively implemented. A 2008 press report about a WaMu stated income loan is illustrative:

“As a supervisor at a Washington Mutual mortgage processing center, John D. Parsons was accustomed to seeing baby sitters claiming salaries worthy of college presidents, and schoolteachers with incomes rivaling stockbrokers. He rarely questioned them. A real estate frenzy was under way and WaMu, as his bank was known, was all about saying yes.

“Yet even by WaMu’s relaxed standards, one mortgage four years ago raised eyebrows. The borrower was claiming a six-figure income and an unusual profession: mariachi singer.

²⁹⁶ See, e.g., NTM Guidance at 58614 (“Institutions increasingly rely on reduced documentation, particularly unverified income, to qualify borrowers for nontraditional mortgage loans.”). The NTM Guidance directed banks to use stated income loans “with caution,” but did not prohibit them or even issue guidance limiting their use. *Id.* at 58611, 58614.

²⁹⁷ April 13, 2010 Subcommittee Hearing at 41.

“Mr. Parsons could not verify the singer’s income, so he had him photographed in front of his home dressed in his mariachi outfit. The photo went into a WaMu file. Approved.”²⁹⁸

Instead of verifying borrower income, WaMu loan personnel apparently focused instead on borrower credit scores, as a proxy measure of a borrower’s creditworthiness. The problem with this approach, however, was that a person could have a high credit score—reflecting the fact that they paid their bills on time—and still have an income that was insufficient to support the mortgage amount being requested.

High LTV Ratios. A second risk-layering practice at WaMu involved loan-to-value (LTV) ratios. LTV ratios are a critical risk management tool, because they compare the loan amount to the estimated dollar value of the property. If an LTV ratio is too high and the borrower defaults, the sale of the property may not produce sufficient proceeds to pay off the loan. In interagency guidance, federal banking regulators noted that banks should generally avoid issuing loans with LTV ratios over 80%, and directed banks to ensure that loans with LTV ratios of 90% or more have additional credit support such as mortgage insurance or added collateral.²⁹⁹ The Treasury and the FDIC IG report found that WaMu held a “significant percentage” of home loans in which the LTV ratios exceeded 80%.³⁰⁰

These loans were the result of explicit WaMu policies allowing high LTV ratios to be used in loans that already had other high risk features. In February 2005, for example, WaMu set up automated loan approval parameters to approve loans with a 90% LTV in Option ARM and interest-only loans providing financing of up to \$1 million.³⁰¹ Still another layer of risk was added to these loans by permitting the borrowers to have credit scores as low as 620.

The Treasury and the FDIC IG report determined that 44% of WaMu’s subprime loans and 35% of its home equity loans had LTV ratios in excess of 80%.³⁰² These loans resulted in part from a 2006 WaMu decision to combine home equity loans bearing high LTV ratios with borrowers bearing low credit scores. That initiative was discussed in a June 2006 email sent to Mr. Rotella, after he inquired about the project. He was informed:

²⁹⁸ “Saying Yes, WaMu Built Empire on Shaky Loans,” New York Times (12/27/08). When asked about this press report, WaMu told the Subcommittee that it had no record of this loan, but could not deny that the incident took place as reported. See also, in the following subsection, a WaMu loan issued to a “Sign Designer” who claimed earnings of \$34,000 per month.

²⁹⁹ See 10/8/1999 “Interagency Guidance on High LTV Residential Real Estate Lending,” <http://www.federalreserve.gov/boarddocs/srletters/1993/SR9301.htm>.

³⁰⁰ 4/2010 IG Report, at 10, Hearing Exhibit 4/16-82.

³⁰¹ 2/2005 email chain between Timothy Bates, Tony Meola, Mr. Rotella and others, JPM_WM00616783-84.

³⁰² 4/2010 IG Report, at 10, Hearing Exhibit 4/16-82. See also 3/1/2007 Washington Mutual Inc. 10-K filing with the SEC, at 52 (showing that, as of 12/31/2006, WaMu held \$7.4 billion in home mortgages without private mortgage insurance or government guarantees with LTV ratios in excess of 80%, and \$15 billion in home equity loans and lines of credit with LTV ratios in excess of 80%).

“\$4 billion home equity investment program [was] approved ... last Friday. High CLTVs [Combined Loan-to-Value ratios] (up to 100%) and lower FICOs (down to 600) permitted with some concentration limits.”³⁰³

In order to issue these loans as soon as possible in 2006, WaMu set up an underwriting team to provide “manual” approvals outside of its automated systems:

“Our team is currently focused on several HE [Home Equity] modeling initiatives to include higher risk lending [W]e are adjusting our decision engine rules for a July roll out to allow for 580-620 [FICO scores] and LT 80% CLTV [combined loan-to-value] loans to be referred to a manual ‘sub-prime’ underwriting team that we are putting in place. ... [W]e see this 580-620 segment as the biggest opportunity where we aren’t lending today.”³⁰⁴

Also in 2006, WaMu began issuing so-called “80/20 loans,” in which a package of two loans are issued together, imposing an 80% LTV first lien and a 20% LTV second lien on the property, for a total combined LTV (CLTV) of 100%.³⁰⁵ Loans that provide financing for 100% of a property’s value are extremely high risk, because the borrower has no equity in the property, the borrower can stop payments on the loan without losing a personal investment, and a subsequent home sale may not produce sufficient funds to pay off the debt.³⁰⁶ Yet in 2006, Home Loans Division President David Schneider approved issuing 80/20 loans despite the risk and despite the fact that WaMu’s automatic underwriting system was not equipped to accept them, and loan officers initially had to use a manual system to issue the loans.³⁰⁷

Using Low Interest Rates to Qualify Borrowers. A third risk layering practice at WaMu was allowing loan officers to qualify prospective borrowers for short term hybrid ARMs or Option ARMs based upon only the initial low rate and not the higher interest rate that would take effect later on. In a filing with the SEC, for example, Washington Mutual Inc. wrote that its “underwriting guidelines” allowed “borrowers with hybrid adjustable-rate home loans ... where the initial interest rate is fixed for 2 to 5 years” to be “qualified at the payment associated with the fixed interest rate charged in the initial contractual period.”³⁰⁸ In addition, in 2005, WaMu personnel informed OTS that, since 2004, the bank had not been qualifying its Option ARM

³⁰³ 6/13/2006 email from Cheryl Feltgen to David Schneider who forwarded it to Steve Rotella, JPM_WM01311922-23.

³⁰⁴ 6/14/2006 email from Mark Hillis to Cheryl Feltgen, included in a longer email chain involving Mr. Rotella and Mr. Schneider, among others, JPM_WM01311922.

³⁰⁵ See, e.g., 6/2006 email chain between Mr. Rotella, Mr. Schneider, Mr. Hillis, and Ms. Feltgen, JPM_WM01311922-23.

³⁰⁶ See NTM Guidance at 58614. See also SEC v. Mozilo, Case No. CV09-03994 (USDC CD Calif.), Complaint (June 4, 2009), at ¶ 50 (quoting an email by Countrywide CEO Angelo Mozilo who, when discussing the 80/20 loans being issued by his bank, wrote: “In all my years in the business I have never seen a more toxic pr[o]duct.”).

³⁰⁷ Id.; Subcommittee interview of Cheryl Feltgen (2/6/2010). 2/2006 WaMu internal email chain, “FW: 80/20,” JPM_WM03960778. See also 3/19/2007 email from Ron Cathcart to David Schneider, JPM_WM02571598, Hearing Exhibit 4/16-75 (indicating WaMu issued loans with CLTVs in excess of 95% until ending the practice in March 2007).

³⁰⁸ See 3/1/2007 Washington Mutual Inc. 10-K filing with the SEC at 56.

borrowers using the “fully indexed rate.”³⁰⁹ Instead, WaMu was using a lower “administrative” rate that was “significantly less than the fully indexed rate.”³¹⁰

Borrowers, loan officers, and WaMu executives often assumed that hybrid and Option ARMs could be refinanced before the payments reset to higher levels—an expectation that eventually proved to be unfounded. In a November 30, 2007 email discussing loan modifications from Mr. Schneider to Mr. Killinger, Mr. Rotella and other senior executives, Mr. Schneider described WaMu’s faulty assumptions about the “start rate” and life span of these loans:

“I also think it is clear that the economic benefit of providing modifications for these borrowers is compelling for the following reasons:

- None of these borrowers ever expected that they would have to pay at a rate greater than the start rate. In fact, for the most part they were qualified at the start rate
- We need to provide incentive to these borrowers to maintain the home – especially if the home value has declined
- When we booked these loans, we anticipated an average life of 2 years and never really anticipated the rate adjustments....”³¹¹

Qualifying borrowers using the lower initial interest rate enabled banks to qualify more borrowers for those loans and enabled them to issue loans for larger amounts. Concerned that more banks were beginning to use this risky practice, federal banking regulators addressed it in the October 2006 NTM Guidance, which cautioned banks to use the fully indexed rate when qualifying borrowers for a loan, including loans with lower initial teaser rates.³¹² In addition, the Guidance provided that for negatively amortizing loans, banks should consider not only the “initial loan amount” but also “any balance increase that may accrue from the negative amortization provision.”³¹³ After the NTM Guidance was issued, a WaMu analyst calculated that applying the new requirement to all of its loans would cause a 33% drop in its loan volume due to borrowers who would no longer qualify for its loans:

“Implementing the NTM change for Purchase only drops additional 2.5% of volume ... If we implement the NTM changes to all loans, then we’ll see additional drop of 33% of volume.”³¹⁴

³⁰⁹ 9/15/2005 email from Darrel Dochow to OTS Examiner-In-Charge at WaMu, OTSWMS05-002 0000537, Hearing Exhibit 4/16-6. The “fully indexed rate” is the prevailing interest rate in the published index to which an adjustable rate mortgage is tied, plus the additional percentage points that the lender adds to the index value to calculate the loan’s interest rate. See NTM Guidance at 58614, n.5.

³¹⁰ Id.

³¹¹ 11/30/2007 email from David Schneider to John McMurray, Kerry Killinger and others, JPM_WM05382127-28.

³¹² NTM Guidance at 58614.

³¹³ Id.

³¹⁴ 3/19/2007 email from Ron Cathcart to David Schneider, JPM_WM02571598, Hearing Exhibit 4/16-75.

In response to this information, WaMu's chief risk officer wrote that the impact on the bank "argues in favor of holding off on implementation until required to act for public relations ... or regulatory reasons."

Because OTS gave the bank more than six months to come into compliance with the NTM Guidance, WaMu continued qualifying high risk borrowers using the lower interest rate, originating billions of dollars in new loans that would later suffer significant losses.

WaMu's risk-layering practices went beyond its use of stated income loans, high LTV ratios, and the qualification of borrowers using low initial interest rates. The bank also allowed its loan officers to issue large volumes of high risk loans to borrowers who did not occupy the homes they were purchasing or had large debt-to-income ratios.³¹⁵ On top of those risks, WaMu concentrated its loans in a small number of states, especially California and Florida, increasing the risk that a downturn in those states would have a disproportionate impact upon the delinquency rates of its already high risk loans.

At one point in 2004, Mr. Vanasek made a direct appeal to WaMu CEO Killinger, urging him to scale back the high risk lending practices that were beginning to dominate not only WaMu, but the U.S. mortgage market as a whole. Despite his efforts, he received no response:

"As the market deteriorated, in 2004, I went to the Chairman and CEO with a proposal and a very strong personal appeal to publish a full-page ad in the *Wall Street Journal* disavowing many of the then-current industry underwriting practices, such as 100 percent loan-to-value subprime loans, and thereby adopt what I termed responsible lending practices. I acknowledged that in so doing the company would give up a degree of market share and lose some of the originators to the competition, but I believed that Washington Mutual needed to take an industry-leading position against deteriorating underwriting standards and products that were not in the best interests of the industry, the bank, or the consumers. There was, unfortunately, never any further discussion or response to the recommendation."³¹⁶

(c) Loan Fraud

Perhaps the clearest evidence of WaMu's shoddy lending practices came when senior management was informed of loans containing fraudulent information, but then did little to stop the fraud.

³¹⁵ See, e.g., OTS document, "Hybrid ARM Lending Survey" (regarding WaMu), undated but the OTS Examiner-in-Charge estimated it was prepared in March or mid-2007, JPM_WM03190673 ("For Subprime currently up to 100% LTV/CLTV with 50% DTI is allowed for full Doc depending on FICO score. Up to 95% LTV/CLTV is allowed with 50% DTI for Stated Doc depending on FICO score. ... For No Income Verification, No Income No Ratio, and No Income No Asset only up to 95% LTV/CLTV is allowed.").

³¹⁶ April 13, 2010 Subcommittee Hearing at 17.

Downey and Montebello Fraud Investigations. The most significant example involves an internal WaMu investigation that, in 2005, uncovered substantial evidence of loan fraud involving two top producing loan offices in Southern California. WaMu management was presented with the findings, but failed to respond, leading to the same fraud allegations erupting again in 2007. According to the WaMu Home Loans Credit Risk Mitigation Team that conducted the 2005 internal investigation, it was initiated in response to “a sustained history of confirmed fraud findings over the past three years” involving the two offices, known as Downey and Montebello.³¹⁷ Each office was located in a low-income area of Los Angeles and headed by a loan officer who had won repeated WaMu awards for high volume loan production.

To conduct its inquiry, the WaMu Risk Mitigation Team reviewed all of the loans produced by the two offices over a two-month period from August to September 2005, which totaled 751 loans. Analysts scored the loans using a standard electronic fraud detection program, and then reviewed all of the loans flagged for possible fraud, as well as ten percent of the remaining loans.³¹⁸ A November 2005 memorandum summarizing the review stated that it found an “extensive level of loan fraud” caused primarily by employees circumventing bank policies:

“[A]n extensive level of loan fraud exists in the Emerging Markets [loan processing centers], virtually all of it stemming from employees in these areas circumventing bank policy surrounding loan verification and review. Of the 129 detailed loan review[s] ... conducted to date, 42% of the loans reviewed contained suspect activity or fraud, virtually all of it attributable to some sort of employee malfeasance or failure to execute company policy. In terms of employee activity enabling this perpetration of fraud, the following categories of activity appeared most frequently: inconsistent application of credit policy, errors or negligence, process design flaws, intentional circumvention of established processes, and overriding automated decisioning recommendations. ... Based on the consistent and pervasive pattern of activity among these employees, we are recommending firm action be taken to address these particular willful behaviors on the part of the employees named.”³¹⁹

A presentation prepared for WaMu management provided additional detail.³²⁰ It stated that, out of the 751 loans produced, the Risk Mitigation Team had selected 180 loans for detailed review, of which 129 had been completed.³²¹ It stated that 42% of the reviewed loans had “contained excessive levels of fraud related to loan qualifying data.”³²² It also stated that the fraud findings did not differ between loans originated by WaMu’s own loan officers and loans

³¹⁷ 11/17/2005 WaMu internal memorandum, “So. CA Emerging Markets Targeted Loan Review Results,” JPM_WM01083051, Hearing Exhibit 4/13-22a.

³¹⁸ Id.

³¹⁹ Id.

³²⁰ 11/16/2005 “Retail Fraud Risk Overview,” prepared by Credit Risk Management, JPM_WM02481934, Hearing Exhibit 4/13-22b.

³²¹ Id. at JPM_WM02481940.

³²² Id. at JPM_WM02481936.

originated by third party brokers and brought to the loan centers.³²³ The presentation also stated that the fraud uncovered by the review was found to be “preventable with improved processes and controls.”

The presentation indicated that the loan fraud involved primarily “misrepresentation of loan qualifying data,” including misrepresentations of income and employment, false credit letters and appraisal issues.³²⁴ The presentation included a few examples of misrepresentations, including:

“Loan #0694256827[:] Misrepresentation [of] the borrower’s identification and qualifying information were confirmed in every aspect of this file, including: – Income – SSN – Assets – Alternative credit reference letters – Possible Strawbuyer or Fictitious borrower[.] The credit package was found to be completely fabricated. Throughout the process, red flags were over-looked, process requirements were waived, and exceptions to policy were granted.”³²⁵

The presentation noted that the loan delinquency rate for Luis Fragoso, the loan officer heading the Montebello loan office, was “289% worse than the delinquency performance for the entire open/active retail channel book of business,” while the delinquency rate for Thomas Ramirez, the loan officer heading the Downey loan office was 157% worse.³²⁶ The message from the Risk Mitigation Team was clear that the two head loan officers were willfully flouting bank policy, issuing poor quality loans, and needed to be the subject of “firm action” by the bank.

Three months prior to its formal presentation on the fraud, the Risk Mitigation Team supplied a lengthy email with its fraud findings to colleagues in the credit risk department. The August 2005 email provided spreadsheets containing data collected on the loans from the two offices as well as figures about the types of loans reviewed and fraud found.³²⁷ Among other information, it indicated that at the Downey office, 83 loans had been reviewed, including 28 originated by the WaMu loan officer Thomas Ramirez, and 54 submitted to him by third party brokers; while at the Montebello office, 48 loans had been reviewed, including 19 originated by the WaMu loan officer Luis Fragoso and 29 submitted to him by third party brokers. The email was forwarded by a credit risk officer to WaMu’s Chief Risk Officer Jim Vanasek, with the following comment:

“As you requested in our Enterprise Fraud Committee meeting last Friday, the attached email contains a high-level summary of the investigations the Home Loans Risk Mit team has conducted on [the two offices] over the past year and a half, based on loans that were referred to them. ... As you can see, among the referred cases there is an extremely high

³²³ Id. at JPM_WM02481936.

³²⁴ Id. at JPM_WM02481938.

³²⁵ Id. at JPM_WM02481943.

³²⁶ Id. at JPM_WM02481948.

³²⁷ 8/29/2005 email from Jill Simons to Tim Bates, JPM_WM04026076-77, Hearing Exhibit 4/13-23b.

incidence of confirmed fraud (58% for Ramirez, 83% for Fragoso) [Additional analysis] will allow us to substantially validate what we suspect, which is that the incidence of fraud in this area is greater than with other producers.”³²⁸

At the Subcommittee hearing, Mr. Vanasek agreed these were “eye popping” rates of fraud.³²⁹

On November 18, 2005, Cheryl Feltgen, the Home Loans Chief Credit Officer, “had a very quick meeting” with Home Loans President David Schneider, the head of Home Loans sales Tony Meola, and others in which she reviewed the memorandum and presentation on the fraud investigation.³³⁰ After the meeting, she sent an email to the Risk Mitigation Team stating: “The good news is that people are taking this very seriously. They requested some additional information that will aid in making some decisions on the right course of action.”³³¹ She asked the Risk Mitigation Team to prepare a new spreadsheet with the loan information, which the team did over the weekend in anticipation of a Monday meeting.

The trail of documentation in 2005 about the fraud investigation ends there. Despite the year-long effort put into the investigation, the written materials prepared, the meetings held, and fraud rates in excess of 58% and 83% at the Downey and Montebello offices, no discernable actions were taken by WaMu management to address the fraud problem in those two offices. No one was fired or disciplined for routinely violating bank policy, no anti-fraud program was installed, no notice of the problem was sent to the bank’s regulators, and no investors who purchased RMBS securities containing loans from those offices were alerted to the fraud problem underlying their high delinquency rates. Mr. Vanasek retired from the bank in December 2005, and the new Chief Risk Officer Ron Cathcart was never told about the fraud investigation. Senior personnel, including Mr. Schneider, Mr. Meola, and Ms. Feltgen, failed to follow up on the matter.

Over the next two years, the Downey and Montebello head loan officers, Mr. Ramirez and Mr. Fragoso, continued to issue high volumes of loans³³² and continued to win awards for their loan productivity, including winning trips to Hawaii as members of WaMu’s “President’s Club.” One of the loan officers even suggested to bank President Steve Rotella ways to further relax bank lending standards.³³³

In June 2007, however, the fraud problem erupted again. That month, AIG, which provided mortgage insurance for some of WaMu’s residential mortgages, contacted the bank with concerns about material misrepresentations and fraudulent documents included in

³²⁸ 8/30/2005 email from Tim Bates to Jim Vanasek and others, JPM_WM04026075, Hearing Exhibit 4/13-23b.

³²⁹ April 13, 2010 Subcommittee Hearing at 28.

³³⁰ 11/18/2005 email from Cheryl Feltgen to Nancy Gonseth on the Risk Mitigation Team and Tim Bates, JPM_WM03535695, Hearing Exhibit 4/13-23a.

³³¹ Id.

³³² At the Subcommittee’s hearing, Mr. Vanasek testified that as much as \$1 billion in loans originated out of these two offices per year. April 13, 2010 Subcommittee Hearing at 27.

³³³ See, e.g., 3/2006 WaMu email chain, JPM_WM03985880-83.

mortgages being issued by Mr. Fragoso, the loan officer heading the Montebello office.³³⁴ When no one responded to its concerns, in September 2007, AIG filed a Suspected Fraud Claim with the California Department of Insurance which, in turn, notified OTS of the problem.³³⁵ The OTS Examiner-in-Charge at WaMu at the time, Benjamin Franklin, asked the bank to conduct an investigation into the matter.³³⁶ WaMu's legal department asked the WaMu Corporate Fraud Investigation (CFI) group and the Audit department to conduct a joint inquiry.

Seven months later, in April 2008, CFI and the Audit department issued a 12-page memorandum with their findings.³³⁷ The memorandum not only confirmed the presence of fraud in the Montebello office, citing a loan file review that found a fraud rate of 62%, it also uncovered the 2005 investigation that had identified the problem two years earlier, but was ignored by management. The 2008 memorandum stated:

“In 2005, HL [Home Loans] Risk Mitigation provided Senior HL Management with an assessment of fraud and loan performance in the Retail Broker Program and two Southern California Emerging Markets [loan centers] for the period of September 2003 through August 2005. This assessment identified excessive levels of fraud related to loan qualifying data It also highlighted the Downey and Montebello [loan centers] as the primary contributors of these fraudulent loan documents based upon volume and articulated strategies to mitigate fraud. The report also stated that delinquency performance on these [loan centers] ... were significantly worse than the delinquency performance for the entire open/active retail channel book of business. In 2007, HL Risk Mitigation mirrored their 2005 review with a smaller sample of loans and found that, for the September and October 2007 sampled time period, the volume of misrepresentation and suspected loan fraud continued to be high for this [loan center] (62% of the sampled loans).”³³⁸

Examples of fraudulent loan information uncovered in the 2007 review included falsified income documents, unreasonable income for the stated profession, false residency claims, inflated appraisal values, failure of the loan to meet bank guidelines, suspect social security numbers, misrepresented assets, and falsified credit information.³³⁹

The memorandum found that, in 2005, the WaMu Risk Mitigation Team had reported its findings to several WaMu managers whom it “felt were very aware of high volumes of fraud” in the loans issued by the two loan officers.³⁴⁰ The memorandum reported that one individual believed that David Schneider “was made aware of these findings” and wanted Risk Mitigation

³³⁴ 4/4/2008 WaMu Memorandum of Results, “AIG/UG and OTS Allegation of Loan Frauds Originated by [name redacted],” at 1, Hearing Exhibit 4/13-24.

³³⁵ Id. at 1.

³³⁶ Subcommittee interview of Benjamin Franklin (2/18/2010).

³³⁷ 4/4/2008 WaMu Memorandum of Results, “AIG/UG and OTS Allegation of Loan Frauds Originated by [name redacted],” at 1, Hearing Exhibit 4/13-24.

³³⁸ Id. at 2.

³³⁹ Id. at 3.

³⁴⁰ Id. at 7.

to “monitor the situation.”³⁴¹ But no one knew “of additional monitoring that was done, or efforts to bring additional attention to” the fraudulent loans from the Downey and Montebello offices. The memorandum also noted that no personnel action had been taken against either of the loan officers heading the two offices.³⁴² David Schneider was interviewed and “recalled little about the 2005 fraud findings or actions taken to address them.”³⁴³ He “thought the matter was handled or resolved.” The WaMu memorandum concluded:

“Outside of training sessions ... in late 2005, there was little evidence that any of the recommended strategies were followed or that recommendations were operationalized. There were no targeted reviews conducted ... on the Downey or Montebello loan portfolios between 2005 and the actions taken in December 2007.”³⁴⁴

After the memorandum was issued, WaMu initially resisted providing a copy to OTS, claiming it was protected by attorney-client privilege.³⁴⁵ The OTS Examiner-in-Charge Benjamin Franklin told the Subcommittee that he insisted on seeing the memorandum. After finally receiving it and reading about the substantial loan fraud occurring at the two loan offices since 2005, he told the Subcommittee that it was “the last straw” that ended his confidence that he could rely on WaMu to combat fraudulent practices within its own ranks.

The 2008 WaMu memorandum and a subsequent OTS examination memorandum³⁴⁶ included a number of recommendations to address the fraud problem at the Downey and Montebello offices. The recommendations in the WaMu memorandum included actions to “[d]etermine appropriate disciplinary actions for employees”; “[e]nhance Code of Conduct training to stress each employee’s role as a corporate steward and the consequences for passively facilitating the placement of loans into the origination process that could be suspect”; enhance WaMu compensation incentives “to support loan quality”; and determine if further analysis was required of the loans originated by the Montebello office or “the broader loan population (bank owned and securitized)” including “if actions are needed to address put backs or sales to investors of loans that contain misrepresentation[s] or other fraud findings.”³⁴⁷

By the time WaMu issued the April 2008 memorandum on the Downey and Montebello fraud problem, however, the bank was already experiencing serious liquidity problems and was cutting back on its loan operations and personnel. On April 30, 2008, WaMu put an end to its wholesale loan channel which had accepted loans from third party mortgage brokers, closed 186

³⁴¹ Id.

³⁴² Id.

³⁴³ Id. at 8.

³⁴⁴ Id. at 9.

³⁴⁵ Subcommittee interview of Benjamin Franklin (2/18/2010).

³⁴⁶ 1/7/2008 OTS Asset Quality Memo 22, “Loan Fraud Investigation,” JPM_WM02448184, Hearing Exhibit 4/13-25.

³⁴⁷ 4/4/2008 WaMu Memorandum of Results, “AIG/UG and OTS Allegation of Loan Frauds Originated by [name redacted],” at 4, Hearing Exhibit 4/13-24.

stand-alone loan centers, and reduced its workforce by 3,000.³⁴⁸ The Downey and Montebello offices were closed as part of that larger effort. The two loan officers heading those offices left the bank and found other jobs in the mortgage industry that involve making loans to borrowers.

Other Fraud Problems. The loan fraud problems at the Downey and Montebello offices were not the only fraud problems plaguing WaMu. The Subcommittee uncovered three additional examples that demonstrate the problem was not isolated.

The first example involves the Westlake Village loan office outside of Los Angeles. On April 1, 2008, WaMu's Risk Mitigation Team sent thirteen home loans with early payment defaults to the WaMu Corporate Fraud Investigations (CFI) group for further examination.³⁴⁹ All thirteen, whose unpaid loan balances totaled about \$14.3 million, had been issued in 2007, by the Westlake Village loan office which was one of WaMu's top loan producers. Two loan officers, Chris O'Brien and Brian Minkow, who worked in tandem, had won multiple awards for their loan production and had a team of 14 sales associates assisting them.³⁵⁰ CFI reviewed the referred loans which contained a variety of fraud indicators, including "fabricated asset statements, altered statements, income misrepresentation and one altered statement that is believed to have been used in two separate loans."³⁵¹ CFI then interviewed the loan officers, sales associates, and personnel at the WaMu "loan fulfillment center" (LFC) that processed Westlake Village loan applications.

In one egregious example of document "manufacturing," a sales associate confessed that if "it was too late to call the borrower," the "sales associates would take [bank] statements from other [loan] files and cut and paste the current borrower's name and address" onto the old bank statements.³⁵² The same sales associate "admitted that during that crunch time some of the Associates would 'manufacture' asset statements from previous loan docs," because end-of-month loans would often get funded without full documentation. The pressure to get the necessary documentation was "tremendous" and they had been told to get the loans funded "with whatever it took."³⁵³

The LFC loan processor in charge of handling Westlake Village's loan applications was fired, as was the sales associate who confessed to manufacturing false documents. The rest of the employees were also let go, when the office itself was closed on April 30, 2008, in

³⁴⁸ Subcommittee interview of Brian Minkow (2/16/2010); 5/27/2008 "Internal Investigative Report" on Westlake Home Loan Center, JPM_WM03171384, Hearing Exhibit 4/13-31. See also "Washington Mutual Exits Wholesale Lending Business, Will Close Home-Loan Centers," Mercury News, 4/7/2008, <http://blogs.mercurynews.com/realestate/2008/04/07/washington-mutual-exits-wholesale-lending-business-will-close-home-loan-centers>.

³⁴⁹ 5/12/2008 "WaMu Significant Incident Notification (SIN)," JPM_WM05452386, Hearing Exhibit 4/13-30.

³⁵⁰ Subcommittee interview of Brian Minkow (2/16/2010). See also 2005 "President's Club 2005 - Maui, Awards Night Show Script," Washington Mutual, Home Loans Group, Hearing Exhibit 4/13-63a (stating Mr. O'Brien and Mr. Minkow had produced \$1.2 billion in loans in 2005).

³⁵¹ *Id.*

³⁵² 5/27/2008 "Internal Investigative Report" on Westlake Home Loan Center, JPM_WM03171384, Hearing Exhibit 4/13-31.

³⁵³ 5/12/2008 "WaMu Significant Incident Notification (SIN)," JPM_WM05452386, Hearing Exhibit 4/13-30.

connection with WaMu's reorganization and downsizing. One of the loan officers who headed the office told the Subcommittee, however, that he had been offered another job within the bank, but declined it due to lower compensation.³⁵⁴ He went on to work in the mortgage industry arranging residential loans.

The second example involves 25 Home Equity Lines of Credit (HELOCs) totaling \$8.5 million that were originated in 2008 by a WaMu loan officer at the Sunnyvale loan office in California. Before all of the loans were funded, they were referred to the Risk Mitigation Team because of fraud indicators. On May 1, 2008, the loan files were sent on to the CFI group for further inquiry. An internal document summarizing the CFI investigation stated:

"The review found that the borrowers indicated they owned the property free and clear when in fact existing liens were noted on the properties. The properties are located in California, Arizona and Washington. ... WaMu used ... Abbreviated Title reports [that] ... do not provide existing lien information on the subject property."³⁵⁵

Of the 25 loan applications, 22 were ultimately terminated or declined. The employee involved in originating the loans was terminated as part of the April 30, 2008 reorganization.

The third example involves a review of 2006 and 2007 WaMu loans conducted by Radian Guaranty Inc., a company which provided mortgage insurance for those loans.³⁵⁶ Radian's objectives were to test WaMu's "compliance with Radian's underwriting guidelines and eligible loan criteria," assess the quality of WaMu's underwriting decisions, "rate the risk of the individual loans insured," and identify any errors in the loan data transmitted to Radian.³⁵⁷ The review looked at a random selection of 133 loans and found enough problems to give WaMu an overall rating of "unacceptable."³⁵⁸

The Radian review identified a number of problems in the loan files it deemed ineligible for insurance. In one, WaMu issued a \$484,500 loan to a "Sign Designer" who claimed to be making \$34,000 in income every month.³⁵⁹ The Radian review observed: "Borrower's stated monthly income of \$34,000 does not appear reasonable for a 'Sign Designer.'" The review also noted several high risk elements in the loan, which was an 85% LTV loan given to a borrower with a 689 credit score who used the loan to refinance an existing loan and "cash-out" the equity in the house. The review noted that the borrower received \$203,000 at the loan closing. In addition, the review stated that WaMu had appraised the house at \$575,000, but an automated appraisal verification program assigned the house a probable value of only \$321,000, less than the amount of the loan.

³⁵⁴ Subcommittee interview of Brian Minkow (2/16/2010).

³⁵⁵ 5/15/2008 "WaMu Significant Incident Notification (SIN)," JPM_WM05452389, Hearing Exhibit 4/13-32b.

³⁵⁶ 2/7/2008 Radian Guaranty Inc. review of Washington Mutual Bank loans, JPM_WM02057526, Hearing Exhibit 4/13-33.

³⁵⁷ Id. at 1.

³⁵⁸ Id.

³⁵⁹ Id. at 5.

Extent of Fraud. At the Subcommittee hearing, when asked about these matters, Mr. Vanasek, WaMu's Chief Risk Officer from 2004 to 2005, attributed the loan fraud to compensation incentives that rewarded loan personnel and mortgage brokers according to the volume of loans they processed rather than the quality of the loans they produced:

“Because of the compensation systems rewarding volume versus quality and the independent structure of the originators, I am confident at times borrowers were coached to fill out applications with overstated incomes or net worth to meet the minimum underwriting requirements. Catching this kind of fraud was difficult at best and required the support of line management. Not surprisingly, loan originators constantly threatened to quit and to go to Countrywide or elsewhere if the loan applications were not approved.”³⁶⁰

When asked by Senator Coburn if he thought the type of fraud at the Downey and Montebello loan offices extended beyond those two offices, Mr. Vanasek replied: “Yes, Senator.”³⁶¹

Another sobering internal WaMu report, issued in September 2008, a few weeks before the bank's failure, found that loans marked as containing fraudulent information had nevertheless been securitized and sold to investors. The report blamed ineffective controls that had “existed for some time”:

“The controls that are intended to prevent the sale of loans that have been confirmed by Risk Mitigation to contain misrepresentations or fraud are not currently effective. There is not a systematic process to prevent a loan in the Risk Mitigation Inventory and/or confirmed to contain suspicious activity from being sold to an investor. ... Of the 25 loans tested, 11 reflected a sale date after the completion of the investigation which confirmed fraud. There is evidence that this control weakness has existed for some time.”³⁶²

Loans not meeting the bank's credit standards, deliberate risk layering, sales associates manufacturing documents, offices issuing loans in which 58%, 62%, or 83% contained evidence of loan fraud, and selling fraudulent loans to investors are evidence of deep seated problems that existed within WaMu's lending practices. Equally disturbing is evidence that when WaMu senior managers were confronted with evidence of substantial loan fraud, they failed to take corrective action. WaMu's failure to strengthen its lending practices, even when problems were identified, is emblematic of how lenders and mortgage brokers produced billions of dollars in high risk, poor quality home loans that contributed to the financial crisis.

³⁶⁰ April 13, 2010 Subcommittee Hearing at 17.

³⁶¹ Id. at 30.

³⁶² 9/8/2008 “WaMu Risk Mitigation and Mortgage Fraud 2008 Targeted Review,” JPM_WM00312502, Hearing Exhibit 4/13-34.

(d) Steering Borrowers to High Risk Option ARMs

In addition to subprime loans, Washington Mutual made a variety of high risk loans to “prime” borrowers, including its flagship product, the Option Adjustable Rate Mortgage (“Option ARM”). Washington Mutual’s Option ARMs typically offered borrowers an initial teaser rate, sometimes as low as 1% for the first month, which later adjusted to a much higher floating interest rate linked to an index, but gave borrowers the choice each month of paying a higher or lower amount. These loans were called “Option” ARMs, because borrowers were typically given four options: (1) paying the fully amortizing amount needed to pay off the loan in 30 years; (2) paying an even higher amount to pay off the loan in 15 years; (3) paying only the interest owed that month and no principal; or (4) making a “minimum payment” that covered only a portion of the interest owed and none of the principal.³⁶³ If the borrower selected the minimum payment option, unpaid interest would be added to the loan principal. If the borrower repeatedly selected the minimum payment, the loan principal would increase rather than decrease over time, creating a negatively amortizing loan.

Negative amortization created additional credit risk for WaMu and posed a challenge to risk managers. At the April 13 Subcommittee hearing, Mr. Vanasek testified:

“We had concerns from the standpoint of negative amortization that was accumulating and we had been reassured that in the past, borrowers would negatively amortize during difficult times and then make up for the lost payments in good times. But the percentage and the potential percentage for negative amortization was very large, and, of course the attendant payment shock was also very large, which was a concern to credit.”³⁶⁴

Few executives at WaMu shared Mr. Vansek’s concern about the Option ARM. To the extent that risk managers expressed concern, it was outweighed by the product’s favorable gain-on-sale margin.

As part of its High Risk Lending Strategy, WaMu determined to increase its issuance of its Option ARM loans. To do that, WaMu had to convince customers to forego a simple, low risk conventional loan in favor of the complex and higher risk Option ARM. In late 2003, WaMu conducted two focus group studies to “explore ways to increase sales of Option ARMs, Washington Mutual’s most profitable mortgage loan products.”³⁶⁵ The first focus group examined the views of WaMu loan consultants and third party mortgage brokers. The second focus group examined the views of WaMu Option ARM customers.

The report following the first focus group with WaMu loan consultants and mortgage brokers identified a number of impediments to selling Option ARMs. It noted that Option ARM

³⁶³ See 8/2006 “Option ARM Credit Risk,” WaMu presentation, at 3, Hearing Exhibit 4/13-37; 10/17/2006 “Option ARM” draft presentation to the WaMu Board of Directors, JPM_WM02549027, Hearing Exhibit 4/13-38.

³⁶⁴ April 13, 2010 Subcommittee Hearing at 49.

³⁶⁵ 9/17/2003 “Option ARM Focus Groups – Phase II, WaMu Option ARM Customers,” WaMu research report, at 3, Hearing Exhibit 4/13-35.

loans had to be “sold” to customers asking for a 30-year fixed loan, and training was needed to overcome the feeling of “many” WaMu loan consultants that Option ARMs were “bad” for their customers. The report also recommended increasing commissions so salespersons would take the “hour” needed to sell an Option ARM, and increasing loan processing times so salespersons and brokers were not inconvenienced. The report stated in part:

“Option ARMs are **sold** to customers and few walk through the door and ask for them. ...

If salespeople don’t understand Option ARMs, they won’t sell them. Many felt that more training would be needed to better educate salespeople about this type of loan, and to change the mindset of current Loan Consultants. Some felt there were many within Washington Mutual who simply felt these loans were ‘bad’ for customers, probably from a lack of understanding the product and how it could benefit customers. ...

It is critical that salespeople fully understand a customer’s financial situation and motivation for the loan. By taking into account these factors, they can recommend the loan that will best fit their customers’ needs. Given today’s low interest rate environment, it can be challenging to get salespeople to take the time to do this. Currently it is easier to give customers what they ask for (a 30 year fixed loan) than to sell them an Option ARM. They can take 20 minutes and sell a 30 fixed-rate loan, or spend an hour trying to sell an Option ARM.

Commission caps make it unappealing for Mortgage Brokers to sell Washington Mutual Option ARMs. Most would not sell loans to customers with prepayment penalties, and given the low commission rate for selling them without the prepayment penalty, many simply go to another company or product where they can make more money.

Slow ARM processing times (up to 90 days) can cause Mortgage Brokers to take business elsewhere...

Improving collateral would help salespeople better explain Option ARMs to customers and take away some of the mystery. ... They also would like improved brochures which talk to the customer in simple, easy to understand terms about features and benefits. They liked the current sample statements they are provided.”³⁶⁶

The second focus group with existing Option ARM customers showed they were also unenthusiastic about the product. The focus group report stated:

“In general, people do not seem to have a good understanding of their mortgage and its terms. What understanding they do have is framed by the concept of a 30-year fixed mortgage. Option ARMs are very complicated and need to be explained in simple, easy

³⁶⁶ 8/14/2003 “Option ARM Focus Groups – Phase I, WaMu Loan Consultants and Mortgage Brokers,” WaMu research report, at 3, Hearing Exhibit 4/13-36 [emphasis in original].

to understand terms, prospective borrowers need to be educated about the loan – this is not a product that sells itself.”³⁶⁷

The focus group identified several reasons that borrowers were leery of Option ARMs and suggested ways to address the unease: “Helping prospective borrowers understand payment and interest rate caps may mitigate fears of wild monthly payment swings Similarly, fears about negative amortization, a concept also not very well understood by the participants, could be reduced or eliminated by showing how much residential properties in the local market have appreciated over time.”³⁶⁸

The main findings of the focus group included:

“Few participants fully understood the Option ARM and its key benefits. A number of them were not familiar with the payment options or how they could be used. ... Additionally, most did not understand how their interest rate was derived, how often their payments would change, and what, if any, were the interest and/or payment caps.

“Perhaps the best selling point for the Option ARM loan was being shown how much lower their monthly payment would be by choosing an Option ARM versus a fixed-rate loan.

“Many participants did not know what happened to their loan at the end of the fixed interest rate period. Most of them assumed they would have to sell or refinance because of a potential balloon payment or a steep jump in their payments. Because of these misperceptions, most participants expect to refinance their loans within the next three to five years.”³⁶⁹

To increase Option ARM sales, WaMu increased the compensation paid to its loan personnel and outside mortgage brokers for the loans.³⁷⁰ The bank also qualified borrowers for Option ARMs by using a monthly payment amount that was less than what the borrower would likely pay once the loan recast.³⁷¹

The Option ARM was also frequently featured in sales promotion efforts communicated to loan officers through WaMu’s internal alert email system known as, “e-Flash.” For example, a June 5, 2006 e-Flash from Steve Stein, the Director of Retail Lending in the Home Loans division, to the entire retail sales team announced:

³⁶⁷ 9/17/2003 “Option ARM Focus Groups – Phase II, WaMu Option ARM Customers,” WaMu research report, at 4, Hearing Exhibit 4/13-35.

³⁶⁸ Id.

³⁶⁹ Id. at 5 [emphasis in original].

³⁷⁰ Subcommittee interview of David Schneider (2/17/2010).

³⁷¹ See April 13, 2010 Subcommittee Hearing at 50.

“We are beginning to focus on higher-margin products like our flagship product, the Option ARM. This is a fantastic product for almost any borrower. To help our sales force feel more comfortable with selling the Option ARM to a wide variety of borrowers, we are rolling out a comprehensive skills assessment and training initiative. ... This initiative is not about selling the Option ARM to everyone. We will always stay true to our values and provide the right loan for every customer. ... Through the skills assessment, training, role playing and a best-practices selling tips video, I think this retail sales team will be unstoppable with the Option ARM. ... The Option ARM is our product and we can sell it better than anyone. I have great confidence that we’ll improve our Option ARM market share quickly, like the experts that we are.”³⁷²

One month later, Mr. Stein announced increased compensation incentives for selling Option ARMs. In another e-Flash to the entire retail sales team, Mr. Stein wrote:

“You’ve seen and heard a lot recently about our refined business model and focus on higher margin products, especially Option ARMs. To further drive this focus, I’m pleased to announce the 2006 Option ARM Blitz – Quarterly Incentive Campaign. This will allow eligible Loan Consultants to earn 5 additional basis points on all Option ARM volume funded during the 3rd quarter 2006.”³⁷³

Under the rules of the Option ARM Blitz, loan consultants who increased the percentage of Option ARMs they sold by at least 10% would receive an additional bonus. In August 2006, an e-Flash announced that the underwriting guidelines for Option ARMs had been loosened, allowing higher loan amounts for “condos and co-ops” and greater loan-to-value ratios for “low-doc” second home mortgages.³⁷⁴ Also in August, an e-Flash announced that the “Option ARM Sales Mastery Program” that was launched in June, would now become part of the mandatory loan originator training curricula.³⁷⁵

In September 2006, WaMu introduced pricing incentives for Option ARMs in the consumer direct channel which waived all closing costs for Option ARMs except for an appraisal deposit.³⁷⁶ In the fourth quarter of 2006, the consumer direct channel also held a contest called the “Fall Kickoff Contest.” For each of the 13 weeks in the quarter, the loan consultant who scored the most points would receive a \$100 gift card. An Option ARM sale was a “touchdown” and worth seven points; jumbo-fixed, equity, and nonprime mortgages were only “field goals” worth three points. At the end of the quarter the top five point winners were awarded with a \$1,000 gift card.³⁷⁷ In addition, from November 2006 through January 2007, e-Flashes sent to

³⁷² 6/5/2006 “e-Flash” from Steve Stein to Retail Production Sales, JPM_WM03246053.

³⁷³ 7/3/2006 “e-Flash” from Steve Stein to Retail Production Sales, JPM_WM04471136-37.

³⁷⁴ 8/17/2006 “e-Flash” from Steve Stein, Arlene Hyde, and John Schleck to Production and Operations, JPM_WM03277786-87.

³⁷⁵ 8/18/2006 “e-Flash” from Allen Myers to Retail Production Sales Managers, JPM_WM03277758.

³⁷⁶ 8/31/2006 “e-Flash” from Mary Ann Kovach to Consumer Direct, JPM_WM03077747.

³⁷⁷ 10/12/2006 “e-Flash” from Mary Ann Kovach to Consumer Direct, JPM_WM03627448-49.

consumer direct originators promoted Option ARM sales specials offering \$1,000 off closing costs for loans under \$300,000 and a waiver of all fees for loans greater than \$300,000.³⁷⁸

Judging by sales of Option ARMs in 2004, after the completion of the focus groups, WaMu's strategy to push sales of Option ARM loans was successful. In 2003, WaMu originated \$30.1 billion in Option ARMs; in 2004 WaMu more than doubled its Option ARM originations to \$67.5 billion. Although sales of Option ARMs declined thereafter because of challenges in the market, in 2006, WaMu still originated \$42.6 billion in Option ARMs. According to its internal documents, by 2006, Washington Mutual was the second largest Option ARM originator in the country.³⁷⁹

As WaMu's Option ARM portfolio grew, and as the wider economy worsened, the prevalence of negative amortization in the Option ARMs increased. While WaMu risk managers viewed negative amortization as a liability, WaMu accountants, following generally accepted accounting practices, treated negative amortization as an asset. In 2003, WaMu recognized \$7 million in earnings from deferred interest due to negative amortization.³⁸⁰ By 2006, capitalized interest recognized in earnings that resulted from negative amortization surpassed \$1 billion; by 2007 it exceeded \$1.4 billion.³⁸¹ In other words, as WaMu customers stopped paying down their mortgages, WaMu booked billions of dollars in earnings from the increasing unpaid balances. By another measure, in 2003, \$959 million in Option ARM loans that WaMu held in its investment portfolio experienced negative amortization; in 2007, the figure was more than \$48 billion.³⁸²

According to data compiled by the Treasury and the FDIC Inspectors General, in 2005, WaMu borrowers selected the minimum monthly payment option for 56% of the value of the Option ARM loans in its investment portfolio. By the end of 2007, 84% of the total value of the Option ARMs in WaMu's investment portfolio was negatively amortizing.³⁸³ To avoid having their loans recast at a higher interest rate, Option ARM borrowers typically refinanced the outstanding loan balance. Some borrowers chose to refinance every year or two.³⁸⁴ The Treasury and the FDIC IG report determined that a significant portion of Washington Mutual's Option ARM business consisted of refinancing existing loans.³⁸⁵

One WaMu loan officer, Brian Minkow, told the Subcommittee that he expected the vast majority of Option ARMs borrowers to sell or refinance their homes before their payments increased.³⁸⁶ As long as home prices were appreciating, most borrowers were able to refinance if

³⁷⁸ See, e.g., 11/13/2006 "e-Flash" from Mary Ann Kovack to Consumer Direct, JPM_WM03077089-90.

³⁷⁹ 2007 "Home Loans Product Strategy," WaMu presentation at JPM_WM03097203, Hearing Exhibit 4/13-60a (only Countrywide ranked higher).

³⁸⁰ 2005 Washington Mutual Inc. 10-K filing with the SEC at 27.

³⁸¹ *Id.*

³⁸² *Id.* at 55; 3/2007 Washington Mutual Inc. 10-K filing with the SEC at 57.

³⁸³ 4/2010 IG Report, at 9, Hearing Exhibit 4/16-82.

³⁸⁴ Subcommittee interview of Brian Minkow (2/16/2010).

³⁸⁵ 4/2010 IG Report, Hearing Exhibit 4/16-82.

³⁸⁶ Subcommittee interview of Brian Minkow (2/16/2010).

they chose to. According to Mr. Minkow, who was one of WaMu's top loan consultants and in some years originated more than \$1 billion in loans, 80% of his business was in Option ARMs, and 70% of his business consisted of refinances.³⁸⁷ Once housing prices stopped rising, however, refinancing became difficult. At recast, many people found themselves in homes they could not afford, and began defaulting in record numbers.

WaMu was one of the largest originators of Option ARMs in the country. In 2006 alone, WaMu securitized or sold \$115 billion in Option ARMs.³⁸⁸ Like Long Beach securitizations, WaMu Option ARM securitizations performed badly starting in 2006, with loan delinquency rates between 30 and 50%, and rising.³⁸⁹

(e) Marginalization of WaMu Risk Managers

WaMu knowingly implemented a High Risk Lending Strategy, but failed to establish a corresponding system for risk management. Instead, it marginalized risk managers who warned about and attempted to limit the risk associated with the high risk strategy.

At the time it formally adopted its High Risk Lending Strategy, WaMu executives acknowledged the importance of managing the risks it created. For example, the January 2005 "Higher Risk Lending Strategy 'Asset Allocation Initiative'" presentation to the Board of Directors Finance Committee stated in its overview:

"In order to generate more sustainable, consistent, higher margins within Washington Mutual, the **2005 Strategic Plan** calls for a shift in our mix of business, increasing our Credit Risk tolerance while continuing to mitigate our Market and Operational Risk positions.

"The Corporate Credit Risk Management Department has been tasked, in conjunction with the Business Units, to develop a framework for the execution of this strategy. Our numerous activities include:

- Selecting best available credit loss models
- Developing analytical framework foundation
- Identifying key strategy components per Regulatory Guidance documents

"A strong governance process will be important as peak loss rates associated with this higher risk lending strategy will occur with a several year lag and the correlation between high risk loan products is important. For these reasons, the Credit Department will pro-

³⁸⁷ Id.

³⁸⁸ 10/17/2006 "Option ARM" draft presentation to the WaMu Board of Directors, JPM_WM02549027, Hearing Exhibit 4/13-38, chart at 2.

³⁸⁹ See wamusecurities.com (subscription website maintained by JPMorgan Chase with data on Long Beach and WaMu mortgage backed securities showing, as of January 2011, delinquency rates for particular mortgage backed securities, including WMALT 2006 OA-3 – 57.87% and WAMU 2007-OA4 – 48.43%).

actively review and manage the implementation of the Strategic Plan and provide quarterly feedback and recommendations to the Executive Committee and timely reporting to the Board.”³⁹⁰

The robust risk management system contemplated by in the January 2005 memorandum, which was critical to the success of the High Risk Lending Strategy, was never meaningfully implemented. To the contrary, risk managers were marginalized, undermined, and often ignored. As former Chief Risk Manager Jim Vanasek testified at the April 13 Subcommittee hearing:

“I made repeated efforts to cap the percentage of high-risk and subprime loans in the portfolio. Similarly, I put a moratorium on non-owner-occupied loans when the percentage of these assets grew excessively due to speculation in the housing market. I attempted to limit the number of stated income loans, loans made without verification of income. But without solid executive management support, it was questionable how effective any of these efforts proved to be.”³⁹¹

Later in the hearing, Mr. Vanasek had the following exchange with Senator Coburn:

Senator Coburn: Did you ever step in and try to get people to take a more conservative approach at WaMu?

Mr. Vanasek: Constantly.

Senator Coburn: Were you listened to?

Mr. Vanasek: Very seldom.

Senator Coburn: [Had] you ever felt that your opinions were unwelcomed, and could you be specific?

Mr. Vanasek: Yes. I used to use a phrase. It was a bit of humor or attempted humor. I used to say the world was a very dark and ugly place in reference to subprime loans. I cautioned about subprime loans consistently.³⁹²

Mr. Vanasek’s description of his efforts is supported by contemporaneous internal documents. In a February 24, 2005 memorandum to the Executive Committee with the subject heading, “Critical Pending Decisions,” for example, Mr. Vanasek cautioned against expanding WaMu’s “risk appetite”:

³⁹⁰ 1/2005 “Higher Risk Lending Strategy ‘Asset Allocation Initiative,’” Washington Mutual Board of Directors Finance Committee Discussion, JPM_WM00302975, Hearing Exhibit 4/13-2a [emphasis in original].

³⁹¹ April 13, 2010 Subcommittee Hearing at 17.

³⁹² Id. at 32.

“My credit team and I fear that we are considering expanding our risk appetite at exactly the wrong point and potentially walking straight into a regulatory challenge and criticism from both the Street and the Board. Said another way I fear that the timing of further expansion into higher risk lending beyond what was contemplated in the ’05 Plan and most especially certain new products being considered is ill-timed given the overheated market and the risk [of] higher interest rates....

So we come down to the basic question, is this the time to expand beyond the ’05 Plan and/or to expand into new categories of higher risk assets? For my part I think not. We still need to complete EDE [Enterprise Decision Engine, an automated underwriting system], reduce policy exception levels, improve the pricing models, build our sub-prime collection capability, improve our modeling etc. We need to listen to our instincts about the overheated housing market and the likely outcome in our primary markets. We need to build further credibility with the regulators about the control exercised over our SFR underwriting and sub-prime underwriting particularly in LBMC.”³⁹³

Mr. Vanasek retired in December 2005, in part, because the management support for his risk policies and culture was lacking.³⁹⁴ When Mr. Vanasek left WaMu, the company lost one of the few senior officers urging caution regarding the high risk lending that came to dominate the bank. After his departure, many of his risk management policies were ignored or discarded. For example, by the end of 2007, stated income loans represented 73% of WaMu’s Option ARMs, 50% of its subprime loans, and 90% of its home equity loans.³⁹⁵

Ronald Cathcart was hired in December 2005 to replace Mr. Vanasek, and became the Chief Enterprise Risk Officer. He had most recently been the Chief Risk Officer for Canadian Imperial Bank of Commerce’s retail bank.³⁹⁶ Although the High Risk Lending Strategy was well underway, after Mr. Vanasek’s departure, risk management was in turmoil. Mr. Cathcart testified at the Subcommittee hearing: “When I arrived at WaMu, I inherited a Risk Department that was isolated from the rest of the bank and was struggling to be effective at a time when the mortgage industry was experiencing unprecedented demand for residential mortgage assets.” In early 2006, the bank reorganized WaMu’s risk management.³⁹⁷ Under the new system, much of the risk management was subordinated to the WaMu business divisions, with each business division’s Chief Risk Officer reporting to two bosses, Mr. Cathcart and the head of the business unit to which the Risk Officer was assigned. WaMu referred to this system of reporting as a “Double-Double.”³⁹⁸

³⁹³ 2/24/2005 Washington Mutual memorandum from Jim Vanasek to the Executive Committee, “Critical Pending Decisions,” JPM_WM01265462-64.

³⁹⁴ Subcommittee interview of Jim Vanasek (12/18/2009 and 1/19/2010).

³⁹⁵ 4/2010 IG Report, at 10, Hearing Exhibit 4/16-82.

³⁹⁶ Subcommittee interview of Ronald Cathcart (2/23/2010).

³⁹⁷ Id.

³⁹⁸ Id.; Subcommittee interviews of David Schneider (2/17/2010) and Cheryl Feltgen (2/6/2010).

Cheryl Feltgen, for example, was the Chief Risk Officer for the Home Loans division. She reported both to Mr. Cathcart and to Mr. Schneider, the Home Loans President, setting up a tension between the two.³⁹⁹ Mr. Schneider had hired Ms. Feltgen from Citi Mortgage, where she had been the Chief Marketing Officer, not a risk manager. Mr. Cathcart told the Subcommittee that he would not have hired her for the role, because of her lack of risk management experience.⁴⁰⁰

Ms. Feltgen told the Subcommittee that, although she was the Home Loans Chief Risk Officer, she also had responsibility to meet business goals. She indicated that she did not see her role as one of risk minimization, but rather of risk optimization.⁴⁰¹ Her 2007 performance evaluation reflected her dual responsibilities, but clearly subordinated her risk management duties to the achievement of business growth objectives. For example, the evaluation identified a series of goals and assigned each a percentage weighting to determine their precedence. Instead of assigning priority to her performance in the area of managing risk, Ms. Feltgen's number one performance goal for 2007 was "GROWTH" in home loans, given a weighting of 35%, followed by "RISK MANAGEMENT," given a weighting of only 25%.⁴⁰² Her performance review even listed specific sales targets:

"Employee Goals

GROWTH 35%

1. Achieve Net Income - \$340 MM for 2007
2. HL [Home Loan] Product Sales (Incl. Conduit)
 1. Home Equity - \$18B
 2. Subprime - \$32B
 3. Option ARM - \$33B
 4. Alt A - \$10B
3. Customer Satisfaction (Total HL) – 55%⁴⁰³

By conditioning her evaluation on whether her division hit pre-determined sales figures, the performance evaluation made her compensation more dependent upon the Home Loans division hitting revenue growth and product sales than upon her contributions to risk management.

Further complicating matters were Ms. Feltgen's two supervisors. In an interview, Ms. Feltgen stated that Ron Cathcart, her supervisor on risk matters, was "not well respected" and did not have "a strong voice."⁴⁰⁴ On the other hand, she described David Schneider, her

³⁹⁹ See April 13, 2010 Subcommittee Hearing at 34; Subcommittee interviews of Mr. Cathcart (2/23/2010), Mr. Schneider (2/17/2010), and Ms. Feltgen (2/6/2010).

⁴⁰⁰ Subcommittee interview of Ronald Cathcart (2/23/2010).

⁴⁰¹ Subcommittee interview of Cheryl Feltgen (2/6/2010).

⁴⁰² "Performance Review Form: Leadership," Hearing Exhibit 4/13-64 (the form is not dated, but Ms. Feltgen confirmed that it is the 2007 review).

⁴⁰³ Id.

⁴⁰⁴ Subcommittee interview of Cheryl Feltgen (2/6/2010).

supervisor on loan origination matters, as having a strong voice and acting more as her boss. This arrangement again de-emphasized the importance of her risk duties.

Ms. Feltgen's dedication to the growth of the Home Loans business is apparent in her communications with her staff. For example, on December 26, 2006, she sent a year-end email to her staff. Under the subject line, "Year-End 2006 Message for the Home Loans Risk Management Team," Ms. Feltgen wrote:

"As we approach the close of 2006, it is fitting to reflect on the challenges and accomplishments of this past year and to look forward to 2007 and beyond. Earlier this year David Schneider and the leadership team of Home Loans articulated a new business strategy that included: (1) a shift to higher margin products (Alt-A, subprime and home equity); (2) reducing market risk... and taking on more credit risk and (3) aggressively attacking the cost structure. We have made great strides as a business on all of those fronts and you have all been a part of those accomplishments. You have partnered successfully with the business units of Home Loans in pursuit of our collective goal to drive profitable growth with the right balance of risk and return."⁴⁰⁵

The email continued with a list of "accomplishments of the Home Loans Risk Management Team in support of business goals," that included the following accomplishment: "Our appetite for credit risk was invigorated with the expansion of credit guidelines for various product segments including the 620 to 680 FICO, low docs and also for home equity."⁴⁰⁶ The email continued with Ms. Feltgen stating her commitment to the High Risk Lending Strategy and emphasizing revenue and sales despite an acknowledgement of the worsening condition of the mortgage market:

"The year 2007 will be another challenging year for the mortgage industry with mortgage origination volumes down, the inverted yield curve putting pressure on profitability and gain on sale margins at lower level than prior years. The focus on the three key elements of our 2006 strategy remains important: shift to higher margin products, reduce market risk and increase credit risk and attack the cost structure. ... In 2007, we must find new ways to grow our revenue. Home Loans Risk Management has an important role to play in that effort.

"David Schneider has encouraged us to 'BE BOLD'.... Recognize that 'we are all in sales' passionately focused on delivering great products and service to our customers."⁴⁰⁷

Ms. Feltgen's year-end bonus was based upon her performance review.⁴⁰⁸ According to Mr. Cathcart, in 2007, the bank made bonus distributions more dependent on the performance of

⁴⁰⁵ 1/3/2007 email from Cheryl Feltgen, "Year-End 2006 Message for the Home Loans Risk Management Team," Hearing Exhibit 4/13-73.

⁴⁰⁶ Id.

⁴⁰⁷ Id.

⁴⁰⁸ Subcommittee Interview of Ronald Cathcart (2/23/2010).

each business line, rather than the performance of the bank as a whole, which largely removed his control over compensation of his risk managers. Mr. Cathcart told the Subcommittee that he disagreed with this change because it made his risk managers, who reported to him and to the heads of the business units, more beholden to the business heads. Mr. Cathcart said he approached the head of Human Resources, and strongly objected to the change, but was told to take it up with Mr. Killinger. Mr. Cathcart told the Subcommittee that he voiced his objection to Mr. Killinger, but Mr. Killinger told him to talk to Mr. Rotella. He said that he took his objection to Mr. Rotella, but was unsuccessful at preventing the policy change.

Mr. Cathcart told the Subcommittee that this change created further separation between him and his risk managers, and compromised the independence of risk management.⁴⁰⁹ He testified at the Subcommittee hearing:

Mr. Cathcart: The chairman adopted a policy of what he called double reporting, and in the case of the Chief Risk Officers, although it was my preference to have them reporting directly to me, I shared that reporting relationship with the heads of the businesses so that clearly any of the Chief Risk Officers reporting to me had a direct line to management apart from me.

Senator Coburn: And was that a negative or a positive in terms to the ultimate outcome in your view?

Mr. Cathcart: It depended very much on the business unit and on the individual who was put in that double situation. I would say that in the case of home loans, it was not satisfactory because the Chief Risk Officer of that business favored the reporting relationship to the business rather than to risk.⁴¹⁰

The subordination of risk management to sales was apparent at WaMu in many other ways as well. Tony Meola, the head of home loans sales, reported directly to David Schneider. He had direct access to Mr. Schneider and often pushed for more lenient lending standards. According to Ms. Feltgen, the sales people always wanted more lenient standards and more mortgage products, and Mr. Meola advocated for them.⁴¹¹

One example was the 80/20 loan, which consisted of a package of two loans issued together, an 80% LTV first lien and a 20% LTV second lien, for a total CLTV of 100%. Ms. Feltgen said she was nervous about the product, as a 100% CLTV was obviously very risky. WaMu's automatic underwriting system was not set up to accept such loans, but Mr. Meola wanted permission to "side step" the systems issue.⁴¹² Mr. Schneider approved the product, and Ms. Feltgen ultimately signed off on it. She told the Subcommittee that it was a high risk

⁴⁰⁹ Id.

⁴¹⁰ April 13, 2010 Subcommittee Hearing at 34.

⁴¹¹ Subcommittee Interview of Cheryl Feltgen (2/6/2010).

⁴¹² See 2/2006 WaMu internal email chain, "FW: 80/20," JPM_WM03960778.

product, but was priced accordingly, and that it might have been successful if housing prices had not declined.⁴¹³

When the housing market began to collapse, a time in which prudent risk management became even more critical, Mr. Cathcart, the Chief Enterprise Risk Manager, was accorded even less deference and authority. Mr. Cathcart testified at the April 13th hearing:

“Financial conditions... deteriorated further in 2007 and 2008. As head of risk, I began to be excluded from key management decisions. By February 2008, I had been so fully isolated that I initiated a meeting with the Director, where I advised that I was being marginalized by senior management to the point that I was no longer able to discharge my responsibilities as Chief Enterprise Risk Officer of WaMu. Within several weeks, I was terminated by the Chairman.”⁴¹⁴

During his interview with the Subcommittee Mr. Cathcart provided additional detail about his marginalization by senior management.⁴¹⁵ He said that he initially had extensive interaction with the WaMu Board of Directors and presented to the full Board every six months. According to Mr. Cathcart, he attended all of the Board meetings until the end of 2007 or the beginning of 2008, at which time he was no longer invited. Mr. Cathcart felt he was excluded from Board meetings and calls with investment bankers because he was forthright about WaMu’s mortgage loss rates, whereas senior management used older, more favorable numbers. According to Mr. Cathcart, during one of the last Board meetings he attended, after a presentation on expected mortgage losses, he interjected that the loan loss data being presented were already out of date, and the real figures would be much worse. He also recalled speaking up in a 2007 conference call with investment bankers to correct an overly optimistic loss figure. According to Mr. Cathcart, he was chastised for his corrections by WaMu management and told to leave the credit discussions to another senior manager.

Mr. Cathcart told the Subcommittee that regulators were also given out-of-date loss projections as the situation worsened, because Mr. Killinger and Mr. Rotella wanted to prevent a negative reaction. Mr. Cathcart said that the loss rates were increasing every week, and the regulators were being provided with three-week old information. Mr. Cathcart told the Subcommittee that in February or March 2008, he discovered that Mr. Killinger had provided the Director of OTS, John Reich, with out-of-date loss rates. Mr. Cathcart said that he called a meeting with Mr. Dochow, head of the OTS West Regional Office, and provided him with the current numbers. Mr. Cathcart said that Mr. Killinger found out about the meeting and was upset. In April, Mr Killinger fired Mr. Cathcart.

⁴¹³ Subcommittee Interview of Cheryl Feltgen (2/6/2010). See also 2/2006 WaMu internal email chain, “FW: 80/20,” JPM_WM03960778.

⁴¹⁴ April 13, 2010 Subcommittee Hearing at 19.

⁴¹⁵ Subcommittee interview of Ronald Cathcart (2/23/2010).

E. Polluting the Financial System

Washington Mutual, as the nation's largest thrift, was a leading issuer of home loans. When many of those loans began to go bad, they caused significant damage to the financial system.

Washington Mutual originated or acquired billions of dollars of home loans through multiple channels, including loans originated by its own loan officers, loans brought to the bank by third party mortgage brokers, and loans purchased in bulk from other lenders or firms. Its subprime lender, Long Beach, originated billions of dollars in home loans brought to it by third party mortgage brokers across the country. According to a 2007 WaMu presentation, by 2006, Washington Mutual was the second largest nonagency issuer of mortgage backed securities in the United States, behind Countrywide.⁴¹⁶

Washington Mutual and Long Beach sold or securitized the vast majority of their subprime home loans. Initially, Washington Mutual kept most of its Option ARMs in its proprietary investment portfolio, but eventually began selling or securitizing those loans as well. With respect to other loans, such as fixed rate 30-year, Alt A, home equity, and jumbo loans, WaMu kept a portion for its own investment portfolio, and sold the rest either to Wall Street investors, usually after securitizing them, or to Fannie Mae or Freddie Mac.

By securitizing billions of dollars in poor quality loans, WaMu and Long Beach were able to decrease their risk exposure while passing along risk to others in the financial system. They polluted the financial system with mortgage backed securities which later incurred high rates of delinquency and loss. At times, WaMu securitized loans that it had identified as likely to go delinquent, without disclosing its analysis to investors to whom it sold the securities, and also securitized loans tainted by fraudulent information, without notifying purchasers of the fraud that was discovered and known to the bank.

(1) WaMu and Long Beach Securitizations

From 2000 to 2007, Washington Mutual and Long Beach securitized at least \$77 billion in subprime and home equity loans.⁴¹⁷ WaMu also sold or securitized at least \$115 billion in Option ARM loans.⁴¹⁸ Between 2000 and 2008, Washington Mutual sold over \$500 billion in loans to Fannie Mae and Freddie Mac, accounting for more than a quarter of every dollar in loans WaMu originated.⁴¹⁹

⁴¹⁶ See 6/11/2007 chart entitled, "Rate of Growth Exceeds the Industry," JPM_WM03409860, Hearing Exhibit 4/13-47c.

⁴¹⁷ 6/2008 "WaMu Wholesale Specialty Lending Securitization Performance Summary," JPM_WM02678980, Hearing Exhibit 4/13-45.

⁴¹⁸ 10/17/2006 "Option ARM" draft presentation to the WaMu Board of Directors, JPM_WM02549027, Hearing Exhibit 4/13-38 (see chart at 2). See also 8/2006 "Option ARM Credit Risk," WaMu presentation, at JPM_WM00212644, Hearing Exhibit 4/13-37 (see chart at 5).

⁴¹⁹ See chart in section E(4), below, using loan data from Inside Mortgage Finance.

According to a 2007 WaMu presentation at a securities investor meeting in New York, in 2004, WaMu issued \$37.2 billion in RMBS securitizations and was the sixth largest RMBS issuer in the United States.⁴²⁰ In 2005, it doubled its production, issuing \$73.8 billion in securitizations, and became the third largest issuer. In 2006, it issued \$72.8 billion and was the second largest issuer, behind Countrywide.⁴²¹

WaMu and Long Beach's securitizations produced only RMBS securities. Although WaMu considered issuing CDO securities as well, it never did so.⁴²² From 2004 to 2006, WaMu and Long Beach securitized dozens of pools of prime, subprime, Alt A, second lien, home equity, and Option ARM loans.⁴²³ WaMu and Long Beach also sold "scratch and dent" pools of nonperforming loans, including nonperforming primary mortgages, second lien, and Option ARMs.⁴²⁴

At first, Washington Mutual worked with Wall Street firms to securitize its home loans, but later built up its own securitization arm, Washington Mutual Capital Corporation (WCC), which gradually took over the securitization of both WaMu and Long Beach loans. WCC was a private Washington State corporation that WaMu acquired from another bank in 2001, and renamed.⁴²⁵ WCC became a wholly owned subsidiary of Washington Mutual Bank. In July 2002, WaMu announced that WCC would act as an institutional broker-dealer handling RMBS securities and would work with Wall Street investment banks to market and sell WaMu and Long Beach RMBS securities.⁴²⁶

WCC was initially based in Seattle, and by 2003, had between 30 and 40 employees.⁴²⁷ In 2004, due to increasing securitizations, WaMu decided to move the headquarters of WCC to Manhattan.⁴²⁸ In 2004, for the first time, WCC acted as the lead manager of a WaMu securitization. That same year, WCC initiated a "conduit program" to buy Alt A and subprime loans in bulk for securitization.⁴²⁹ WCC issued its first Alt A securitization in 2005, and its first subprime securitization in 2006.⁴³⁰ It also conducted whole loan sales and credit card

⁴²⁰ See 6/11/2007 chart entitled, "Rate of Growth Exceeds the Industry," JPM_WM03409860, Hearing Exhibit 4/13-47c.

⁴²¹ Id. WaMu attributed its rapid rise in the issuer rankings over the three-year period to its establishment of a Conduit Program, which began buying loans in bulk in 2004. Id.

⁴²² See 12/15/2006 Enterprise Risk Management Committee, JPM_WM02656967. See also 10/25/2006 Asset-Liability Management Committee Meeting Agenda, JPM_WM02406624.

⁴²³ See 6/2008 "WaMu Wholesale Specialty Lending Securitization Performance Summary," JPM_WM02678980, Hearing Exhibits 4/13-45 and 46; 6/11/2007 chart entitled, "WaMu Capital Corp Sole/Lead Underwriter," JPM_WM03409861, Hearing Exhibit 4/13-47c.

⁴²⁴ See, e.g., undated "List of WaMu-Goldman Loans Sales and Securitizations," Hearing Exhibit 4/13-47b; 2/2007 internal WaMu email chain, JPM_WM00652762.

⁴²⁵ See 6/11/2007 chart entitled, "Capital Markets Division Growth," JPM_WM03409858, Hearing Exhibit 4/13-47c.

⁴²⁶ Id.

⁴²⁷ Subcommittee interview of David Beck (3/2/2010).

⁴²⁸ Id.

⁴²⁹ See 6/11/2007 chart entitled, "Capital Markets Division Growth," JPM_WM03409858, Hearing Exhibit 4/13-47c.

⁴³⁰ Id.

securitizations.⁴³¹ At its peak, right before the collapse of the subprime securitization market, WCC had over 200 employees and offices in Seattle, New York, Los Angeles, and Chicago. The majority of WCC employees were based in New York.⁴³² WCC was headed by Tim Maimone, WCC President, who reported to David Beck, Executive Vice President in charge of WaMu's Capital Markets Division. Mr. Beck reported to the President of WaMu's Home Loans Division, David Schneider.⁴³³

At the Subcommittee hearing on April 13, 2010, Mr. Beck explained the role of WCC in WaMu and Long Beach securitizations as follows:

“WaMu Capital Corp. acted as an underwriter of securitization transactions generally involving Washington Mutual Mortgage Securities Corp. or WaMu Asset Acceptance Corp. Generally, one of the two entities would sell loans into a securitization trust in exchange for securities backed by the loans in question, and WaMu Capital Corp. would then underwrite the securities consistent with industry standards. As an underwriter, WaMu Capital Corp. sold mortgage-backed securities to a wide variety of institutional investors.”⁴³⁴

WCC sold WaMu and Long Beach loans and RMBS securities to insurance companies, pension funds, hedge funds, other banks, and investment banks.⁴³⁵ It also sold WaMu loans to Fannie Mae and Freddie Mac. WCC personnel marketed WaMu and Long Beach loans both in the United States and abroad.

Before WCC was able to act as a sole underwriter, WaMu and Long Beach worked with a variety of investment banks to arrange, underwrite, and sell its RMBS securitizations, including Bank of America, Credit Suisse, Deutsche Bank, Goldman Sachs, Lehman Brothers, Merrill Lynch, Royal Bank of Scotland, and UBS. To securitize its loans, WaMu typically assembled and sold a pool of loans to a qualifying special-purpose entity (QSPE) that it established for that purpose, typically a trust.⁴³⁶ The QSPE then issued RMBS securities secured by future cash flows from the loan pool. Next, the QSPE—working with WCC and usually an investment bank—sold the RMBS securities to investors, and used the sale proceeds to repay WaMu for the

⁴³¹ Id.

⁴³² Subcommittee interview of David Beck (3/2/2010).

⁴³³ Id.

⁴³⁴ April 13, 2010 Subcommittee Hearing at 53. Washington Mutual Mortgage Securities Corp. (WMMSC) and WaMu Asset Acceptance Corp. (WAAC) served as warehouse entities that held WaMu loans intended for later securitization. Mr. Beck explained in his prepared statement: “WMMSC and WAAC purchased loans from WaMu, and from other mortgage originators, and held the loans until they were sold into the secondary market. WCC was a registered broker-dealer and acted as an underwriter of securitization deals for a period of time beginning in 2004 and ending in the middle of 2007. In addition to buying and selling mortgage loans, WMMSC acted as a ‘master servicer’ of securitizations. The master servicer collects and aggregates the payments made on loans in a securitized pool and forwards those payments to the Trustee who, in turn, distributes those payments to the holders of the securities backed by that loan pool.” Id. at 163.

⁴³⁵ See 6/11/2007 chart entitled, “Origination Through Distribution,” JPM_WM03409859, Hearing Exhibit 4/13-47c; Subcommittee interview of David Beck (3/2/2010).

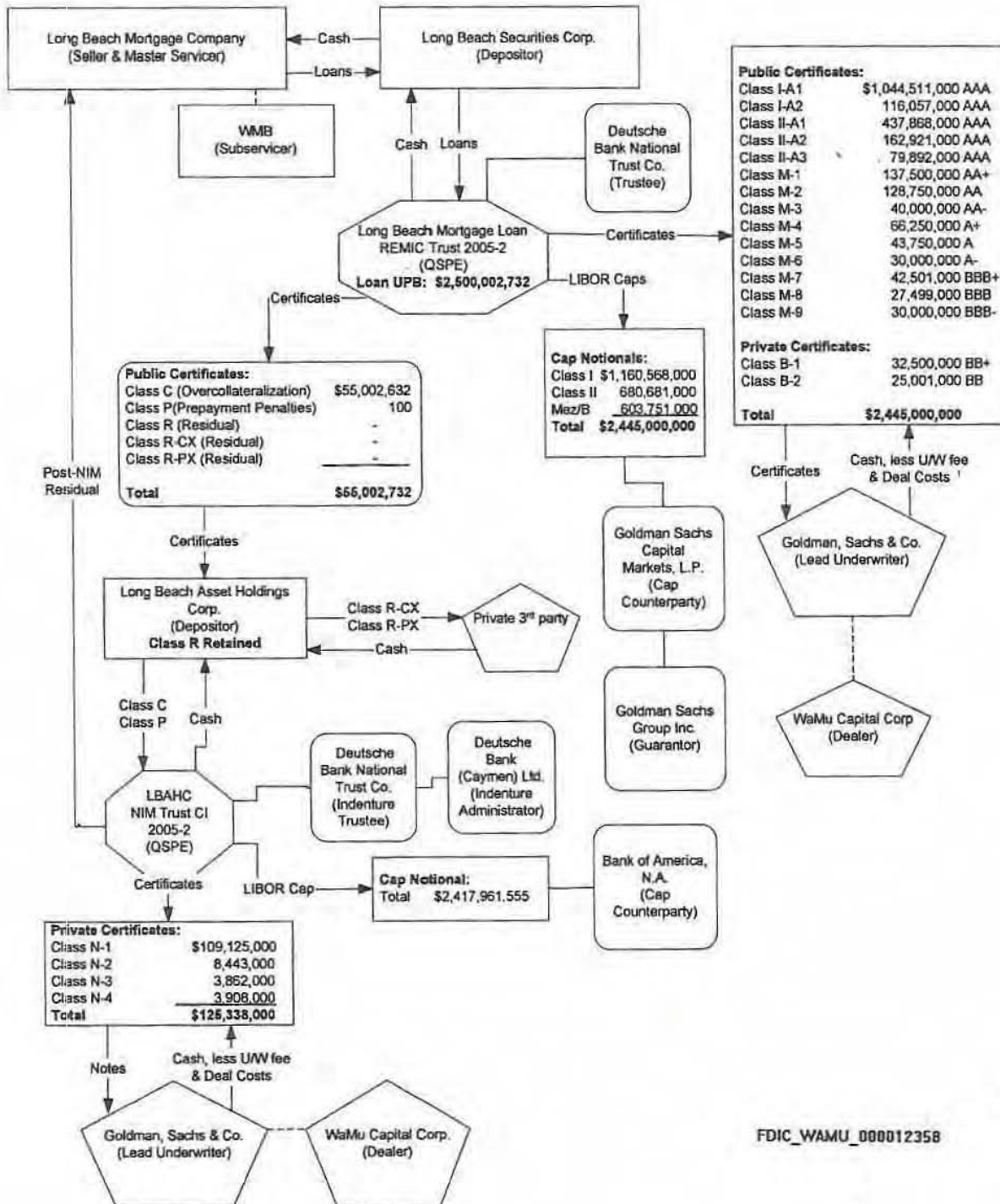
⁴³⁶ See 3/2007 Washington Mutual Inc. 10-K filing with the SEC, at 45 (describing securitization process).

cost of the loan pool. Washington Mutual Inc. generally retained the right to service the loans. WaMu or Long Beach might also retain a senior, subordinated, residual, or other interest in the loan pool.

The following two diagrams created for a 2005 Long Beach securitization, LBMC 2005-2, demonstrate the complex structures created to issue the RMBS securities, as well as the “waterfall” constructed to determine how the mortgage payments being made into the securitization pool would be used.⁴³⁷

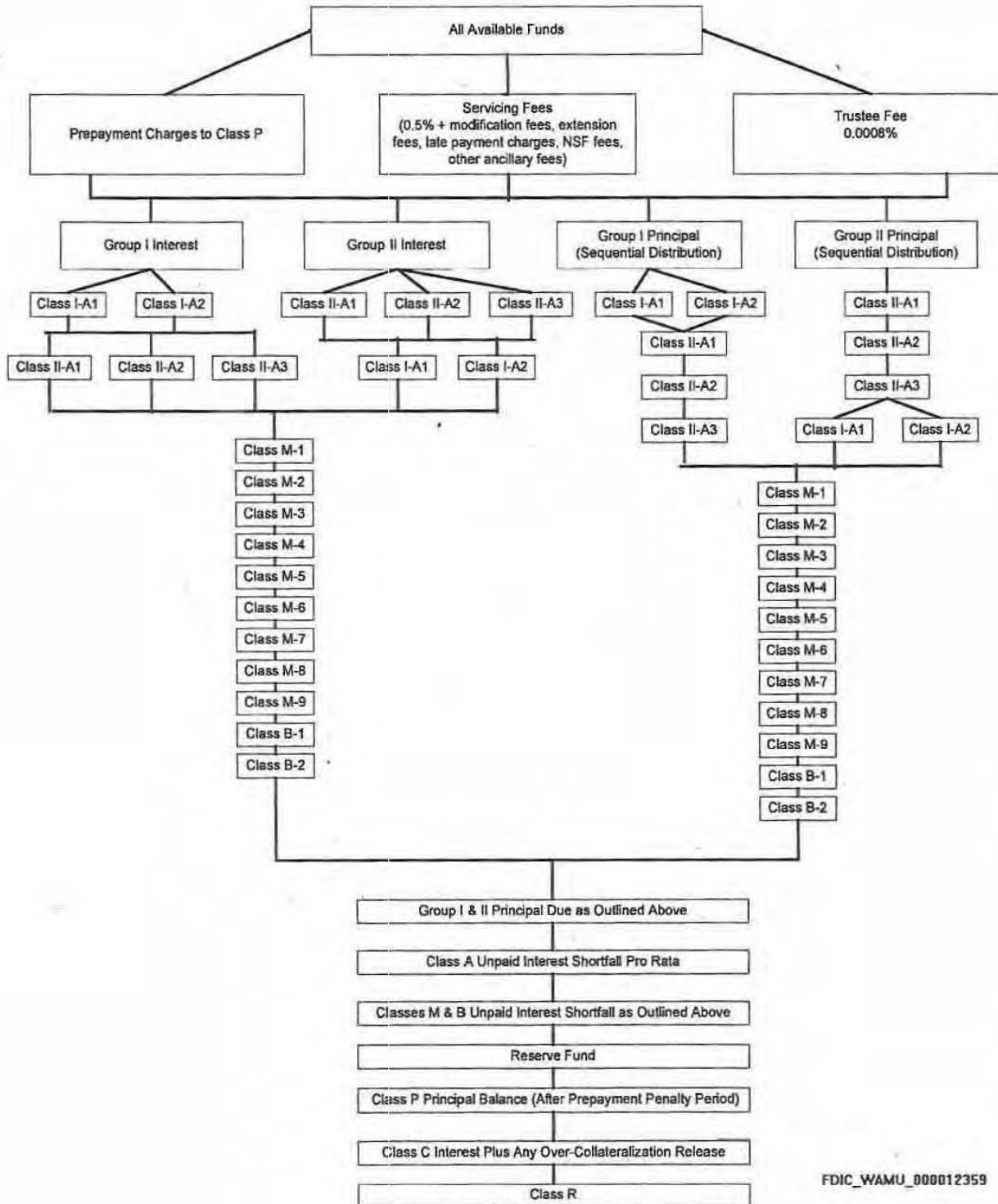
⁴³⁷ See “LBMC 2005-2 Structure” and “LBMC 2005-2 Cash Flow Waterfall,” FDIC_WAMU_000012358-59, Hearing Exhibit 47a.

LBMC 2005-2 Structure



FDIC_WAMU_000012358

LBMC 2005-2 Cash Flow Waterfall



In that particular securitization, Goldman Sachs served as the lead underwriter, WCC served as the securities dealer, Deutsche Bank served as the trustee of the trust set up to hold the securities, and Long Beach served as the mortgage servicer.

Another document, prepared by Goldman Sachs, shows the variety of relationships that WaMu engaged in as part of its securitization efforts.⁴³⁸ That document, which consists of a list of various loan pools and related matters, shows that WaMu worked with Goldman Sachs to make whole loan sales; securitize loans insured by the Federal Home Administration or Veterans Administration; and securitize prime, subprime, Alt A, second lien, and scratch and dent nonperforming loans. It also shows that Goldman Sachs asked WaMu and Long Beach to repurchase more than \$19.7 million in loans it had purchased from the bank.⁴³⁹

Goldman Sachs handled a number of securitizations for Long Beach. At one point in 2006, Goldman Sachs made a pitch to also handle loans issued by WaMu. One Goldman Sachs broker explained to a colleague in an email: “They have possibly the largest subprime portfolio on the planet.”⁴⁴⁰

(2) Deficient Securitization Practices

Over the years, both Long Beach and Washington Mutual were repeatedly criticized by the bank’s internal auditors and reviewers, as well as its regulators, OTS and the FDIC, for deficient lending and securitization practices. Their mortgage backed securities were among the worst performing in the marketplace due to poor quality loans that incurred early payment defaults, fraud, and high delinquency rates.

Long Beach Securitizations. In April 2005, an internal email sent by an OTS regulator recounted eight years of abysmal performance by Long Beach securities, noting that loan delinquencies and losses occurred in pools containing both fixed rate and adjustable rate mortgages:

“[Securitizations] prior to 2003 have horrible performance.... For FRM [fixed rate mortgage] losses, LBMC finished in the top 12 worst annual NCLs [net credit losses] in 1997 and 1999 thru 2003. LBMC nailed down the number 1 spot as top loser with an NCL of 14.1% in 2000 and placed 3rd in 2001 with 10.5% For ARM losses, LBMC really outdid themselves with finishes as one of the top 4 worst performers for 1999 thru 2003. For specific ARM deals, LBMC made the top 10 worst deal list from 2000 thru 2002. LBMC had an extraordinary year in 2001 when their securitizations had 4 of the top 6 worst NCLs (range: 11.2% to 13.2%).

⁴³⁸ Undated “List of WaMu-Goldman Loans Sales and Securitizations,” Hearing Exhibit 4/13-47b.

⁴³⁹ Id.

⁴⁴⁰ 3/24/2005 email from Kevin Gasvoda of Goldman Sachs to Christopher Gething, others, Hearing Exhibit 4/27-167b.

“Although underwriting changes were made from 2002 thru 2004, the older issues are still dragging down overall performance. Despite having only 8% of UPB [unpaid balances] in 1st lien FRM pools prior to 2002 and only 14.3% in 2002 jr. lien pools, LBMC still had third worst delinquencies and NCLs for most of [the] period graphed from 11/02 thru 2/05 and was 2nd worst in NCLs in 2005 out of 10 issuers graphed. ... At 2/05, LBMC was #1 with a 12% delinquency rate. Industry was around 8.25%. At 3/05, LBMC had a historical NCL rate of 2% smoking their closest competitor by 70bp and tripling the industry average.”⁴⁴¹

This email, which is based upon a 2005 Fitch analysis of Long Beach, shows that, from 1997 to March 2005, due to loan delinquencies and losses, Long Beach securities were among the very worst performing in the entire subprime industry.⁴⁴²

Long Beach’s performance did not improve after 2005. In April 2006, for example, Nomura Securities issued an analysis of the ABX Index that tracked a basket of 20 subprime RMBS securities and identified Long Beach as the worst performer:

“Long Beach Mortgage Loan Trust appears to be the poorest performing issuer, with its three deals averaging 15.67% in 60+ day delinquency and 12.75% in 90+ day delinquency. Unsurprisingly, all three deals issued by LBMLT have exceeded their delinquency trigger limits.”⁴⁴³

In November 2006, while attending the Asset Backed Securities East Conference for the securitization industry, the head of WaMu’s Capital Markets Division, David Beck, emailed WaMu’s Home Loans President, David Schneider, that with respect to RMBS securities carrying noninvestment grade ratings, “LBMC [Long Beach] paper is among the worst performing paper in the mkt [market] in 2006. Subordinate buyers want answers.”⁴⁴⁴

In March 2007, an analysis by JPMorgan Chase again singled out Long Beach securities for having the worst delinquency rates among the subprime securities tracked by the ABX Index:

“Washington Mutual Inc.’s subprime bonds are suffering from some of the worst rates of delinquency among securities in benchmark indexes, according to JPMorgan Chase & Co. research. ... Delinquencies of 60 days or more on loans supporting WaMu’s Long Beach LBMLT 2006-1 issue jumped ... to 19.44 percent ... the highest among the 20

⁴⁴¹ 4/14/2005 email from Steve Blelik to David Henry, “Fitch – LBMC Review,” Hearing Exhibit 4/13-8a.

⁴⁴² Id.

⁴⁴³ 4/19/2006 “ABX Index – The Constituent Breakdown,” prepared by Nomura Securities International Inc., <http://www.scribd.com/doc/19606903/Nomura-ABX-Index-The-Constituent-Breakdown>.

⁴⁴⁴ 11/7/2006 email from David Beck to David Schneider, Hearing Exhibit 4/13-50. See also 4/19/2006 “ABX Index – The Constituent Breakdown,” prepared by Nomura Securities International Inc., <http://www.scribd.com/doc/19606903/Nomura-ABX-Index-The-Constituent-Breakdown>.

bonds in the widely watched ABX-HE 06-2 index of bonds backed by residential loans to risky borrowers.”⁴⁴⁵

In July 2007, Moody’s and S&P downgraded the credit ratings of hundreds of subprime RMBS and CDO securities, due to rising mortgage delinquencies and defaults. Included were approximately 40 Long Beach securities.⁴⁴⁶ A July 12, 2007 presentation prepared by Moody’s to explain its ratings action shows that Long Beach was responsible for only 6% of all the subprime RMBS securities issued in 2006, but received 14% of the subprime RMBS ratings downgrades that day.⁴⁴⁷ Only Fremont had a worse ratio.

Over time, even AAA rated Long Beach securities performed terribly. Of the 75 Long Beach mortgage backed security tranches rated AAA by Standard and Poor’s in 2006, all 75 have been downgraded to junk status, defaulted, or been withdrawn.⁴⁴⁸ In most of the 2006 Long Beach securitizations, the underlying loans have delinquency rates of 50% or more.⁴⁴⁹

The problems were not confined to Long Beach loans. In early 2008, for example, an investment adviser posted information on his personal blog about a WaMu-sponsored RMBS securitization known as WMALT 2007-OC1. Formed in May 2007, this pool contained about 1,700 Alt A loans with a total outstanding balance of about \$515 million. WaMu was the sole underwriter. The credit rating agencies gave AAA and other investment grade ratings to more than 92% of the securitization, but within eight months, 15% of the pool was in foreclosure. The posting suggested that the poor performance of WaMu securities was systemic.

When informed by David Schneider of the complaint about the negative publicity surrounding the pool, David Beck responded:

“Yes (ughh!) we are doing some peer group performance and looking at the servicing data ... and putting together an analysis. ... The collateral is full of limited doc layered risk alt a paper and at least half is TPO [third party originated]. The performance is not great but my opinion is not a WaMu specific issue.”⁴⁵⁰

⁴⁴⁵ “WaMu subprime ABS delinquencies top ABX components,” *Reuters* (3/27/2007), Hearing Exhibit 4/13-52.

⁴⁴⁶ 7/10/2007-7/12/2007 excerpts from Standard & Poor’s and Moody’s Downgrades, Hearing Exhibit 4/23-99.

⁴⁴⁷ 7/12/2007 “Moody’s Structured Finance Teleconference and Web Cast: RMBS and CDO Rating Actions,” MOODY’S-PSI2010-0046902, Hearing Exhibit 4/23-106.

⁴⁴⁸ See Standard and Poor’s data at www.globalcreditportal.com.

⁴⁴⁹ See, e.g., wamusecurities.com (subscription website maintained by JPMorgan Chase with data on Long Beach and WaMu mortgage backed securities showing, as of March 2011, delinquency rates for particular mortgage backed securities, including LBMLT 2006-1 – 58.44%; LBMLT 2006-6 – 60.06%; and LBMLT 2005-11 – 54.32%).

⁴⁵⁰ 2/2/2008 email from David Beck to David Schneider and others, JPM_WM02445758, Hearing Exhibit 4/13-51.

Home Loans President David Schneider replied: “Ok – thanks Are we sure there isn’t a reporting issue?” Today, those securities have all been downgraded to junk status and more than half of the underlying loans are delinquent or in foreclosure.⁴⁵¹

Despite their poor performance, it is unclear that any investment bank refused to do business with either Long Beach or WaMu. As long as investors expressed interest in purchasing the securities, banks continued selling them until the entire subprime market collapsed. Before the market collapsed, WaMu earned hundreds of millions of dollars a year from its home loans sales and securitizations.⁴⁵²

Securitizing Fraudulent Loans. WaMu and Long Beach securitized not just poor quality loans, but also loans that its own personnel had flagged as containing fraudulent information. That fraudulent information included, for example, misrepresentations of the borrower’s income and of the appraised value of the mortgaged property. In September 2008, WaMu’s Corporate Credit Review team released a report which found that internal controls intended to prevent the sale of fraudulent loans to investors were ineffective:

“The controls that are intended to prevent the sale of loans that have been confirmed by Risk Mitigation to contain misrepresentations or fraud are not currently effective. There is not a systematic process to prevent a loan in the Risk Mitigation Inventory and/or confirmed to contain suspicious activity from being sold to an investor. ... Of the 25 loans tested, 11 reflected a sale date after the completion of the investigation which confirmed fraud. There is evidence that this control weakness has existed for some time.”⁴⁵³

In other words, even loans marked with a red flag indicating fraud were being sold to investors. The review identified several factors contributing to the problem, including insufficient resources devoted to anti-fraud work, an absence of automated procedures to alert personnel to fraud indicators, and inadequate training on fraud awareness and prevention. The 2008 review warned: “Exposure is considerable and immediate corrective action is essential in order to limit or avoid considerable losses, reputation damage, or financial statement errors.”⁴⁵⁴

(3) Securitizing Delinquency-Prone Loans

The Subcommittee uncovered an instance in 2007 in which WaMu securitized certain types of loans that it had identified as most likely to go delinquent, but did not disclose its analysis to investors who bought the securities. Investors who purchased these securities without the benefit of that analysis quickly saw the value of their purchases fall.

⁴⁵¹ As of December 2010, the total loan delinquency rate of the WMALT 2007-OC1 series was 57.37%. See wamusecurities.com.

⁴⁵² See 3/1/2007 Washington Mutual Inc. 10-K filing with the SEC, at 82, 87.

⁴⁵³ 9/8/2008 “Risk Mitigation and Mortgage Fraud 2008 Targeted Review,” WaMu Corporate Credit Review, JPM_WM00312502, Hearing Exhibit 4/13-34.

⁴⁵⁴ Id.

WaMu securitization agreements prohibited the bank from using an “adverse selection” process when including loans within a securitized pool. On March 22, 2007, WaMu filed a prospectus for WMALT Series 2007-OA3, in which Washington Mutual Bank and Washington Mutual Mortgage Securities Corp. co-sponsored a securitization of a \$2.3 billion pool of Option ARM loans. In the section entitled, “Representations and Warranties Regarding the Mortgage Loans,” the prospectus stated:

“Washington Mutual Mortgage Securities Corp. and Washington Mutual Bank, as applicable, used no adverse selection procedures in selecting the mortgage loans from among the outstanding adjustable rate conventional mortgage loans owned by it which were available for sale and as to which the representations and warranties in the mortgage loan sale agreement could be made.”⁴⁵⁵

On the following page of the prospectus, under the section heading, “Criteria for Selection of Mortgage Loans,” it stated:

“Each co-sponsor selected the mortgage loans it sold to the depositor from among its portfolio of mortgage loans held for sale based on a variety of considerations, including type of mortgage loan, geographic concentration, range of mortgage interest rates, principle balance, credit scores and other characteristics described in Appendix B to this prospectus supplement, and taking into account investor preferences and the depositor’s objective of obtaining the most favorable combination of ratings on the certificates.”⁴⁵⁶

WaMu emails and memoranda obtained by the Subcommittee indicate that, prior to assembling the loan pool used in the WMALT 2007-OA3 securitization, WaMu identified delinquency-prone Option ARM mortgages in its “Held for Investment” loan portfolio and transferred those loans to its portfolio of mortgages available for sale or securitization. WaMu then used its “Held for Sale” loan portfolio to select the loans for the loan pool used in the WMALT 2007-OA3 securitization. The prospectus provides a list of criteria used to select the loans in the WMALT 2007-OA3 loan pool, but omits any mention of the fact that some of the loans were selected using statistical analysis designed to identify Option ARM loans likely to go delinquent quickly. The internal emails demonstrate that WaMu selected delinquency-prone loans for sale in order to move risk from the bank’s books to the investors in WaMu securities, and profit from its internal analysis, which was not available to the market.

On Thursday, September 14, 2006, John Drastal, then Senior Managing Director of WCC, sent David Beck, head of WaMu’s Capital Markets Division, with copies to others, an email regarding “Tom Casey visit,” with the importance marked “high.” Tom Casey was then the Chief Financial Officer of Washington Mutual Bank. In the email Mr. Drastal relayed Mr. Casey’s concern about WaMu’s exposure to Option ARM loans:

⁴⁵⁵ 3/22/2007 WaMu Prospectus Supplement, “Washington Mutual Mortgage Pass-Through Certificates, WMALT Series 2007-OA3,” at S-102, Hearing Exhibit 4/13-86b.

⁴⁵⁶ Id. at S-103.

“David,

“Tom just stopped by after the Lehman investor conference. He says equity investors are totally freaking about housing now. He asked how we could prepare for this. A few items....

“2. On the portfolio side, he asked about exposure on option ARMs. We talked about looking to potentially sell '06 production Option ARMs in portfolio. He even said looking at this quarter. I don't think that this is possible but we should look at what the credit composition of this product is and see if we can sell quickly if it's the right thing to do (see Nagle's message). He doesn't for[e]see a tainting issue if we are doing it for credit issues. Youyi, can you get me a collateral strat from the portfolio?”⁴⁵⁷

Three months later, on Wednesday, February 14, 2007, a WaMu portfolio analyst and trader, Michael Liu, sent an email to a senior official in WaMu's portfolio management department, Richard W. Ellson, with the subject line: “Option ARM MTA and Option ARM MTA Delinquency.” The email included the abbreviations “MTA,” which stands for “Monthly Treasury Average,” and “PPD,” which stands for “Payment Past Due.” The email provided a description of Option ARM loans in WaMu's investment portfolio that were delinquent in the fourth quarter of 2006:

“Hi Rick,

“Attached is the spreadsheet with the total Option ARM MTA ... and Option ARM MTA >=1 PPD summary. Some points for the Option ARM MTA >=1PPD:

- \$105mm in Nonaccrual is between FICO 501-540.
- \$222mm in Nonaccrual between LTV 61-80.
- CA [California] represents the greatest amount of Delinquency (1PPD, 2PPD, 3PPD, nonaccrual)[.]
- Loans originated in 2004 and 2005 represent the highest amount of 3 PPD and nonaccrual [.]”⁴⁵⁸

On the same day, Mr. Ellson forwarded the email to the Division Executive for Portfolio Management and Research, Youyi Chen, with the following comments:

“Youyi – attached is a description of the Option ARMs that were delinquent in the 2006q4 [fourth quarter]. You can see that it is very much a function of FICOs and Low Doc loans. We are in the process of updating the optimum pricing matrix. Mike did the work. Your comments are appreciated.”⁴⁵⁹

⁴⁵⁷ 9/14/2006 email from John Drastal to David Beck, with Youyi Chen and Doug Potolsky copied, “Tom Casey visit,” Hearing Exhibit 4/13-40a.

⁴⁵⁸ 2/2007 WaMu internal email chain, Hearing Exhibit 4/13-40b.

⁴⁵⁹ Id.

Mr. Chen, in turn, forwarded the email to the head of WaMu's Capital Markets Division, David Beck. Mr. Chen's introductory comments indicated that the research had been performed in response to a question from WaMu Home Loans President David Schneider and was intended to identify criteria for the loans driving delinquencies in the Option ARM portfolio:

"This answers partially [David] Schneider's questions on break down of the option arm delinquencies.

"The details (1PPD tab) shows Low fico, low doc, and newer vintages are where most of the delinquency comes from, not a surprise."⁴⁶⁰

On the same day, February 14, Mr. Beck forwarded the entire email chain to David Schneider and WaMu Home Loans Risk Officer Cheryl Feltgen, adding his own view:

"Please review. The performance of newly minted option arm loans is causing us problems. Cheryl can validate but my view is our alt a (high margin) option arms [are] not performing well.

"We should address selling 1Q [first quarter] as soon as we can before we loose [sic] the oppty. We should have a figure out how to get this feedback to underwriting and fulfillment."⁴⁶¹

Mr. Beck's message indicated that recently issued Option ARM loans were not performing well, and suggested selling them before the bank lost the opportunity. WaMu would lose the opportunity to sell those loans if, for example, they went delinquent, or if the market realized what WaMu analysts had already determined about their likelihood of going delinquent. Mr. Beck's email proposed selling the loans during the first quarter of the year, already six weeks underway, and "as soon as we can."

Four days later, on Sunday, February 18, Mr. Schneider replied to the email chain by requesting Ms. Feltgen's thoughts. Later that day, Ms. Feltgen responded with additional analysis and an offer to help further analyze the Option ARM delinquencies:

"The results described below are similar to what my team has been observing. California, Option ARMs, large loan size (\$1 to \$2.5 million) have been the fastest increasing delinquency rates in the SFR [Single Family Residence] portfolio. Although the low FICO loans have ... higher absolute delinquency rates, the higher FICOs have been increasing at a faster pace than the low FICOs. Our California concentration is getting close to 50% and many submarkets within California actually have declining house prices according to the most recent OFHEO [Office of Federal Housing Enterprise Oversight] data from third quarter of 2006. There is a meltdown in the subprime market which is creating a 'flight to quality'. I was talking to Robert Williams just after his

⁴⁶⁰ Id.

⁴⁶¹ Id.

return from the Asia trip where he and Alan Magleby talked to potential investors for upcoming covered bond deals backed by our mortgages. There is still strong interest around the world in USA residential mortgages. Gain on sale margins for Option ARMs are attractive. This seems to me to be a great time to sell as many Option ARMs as we possibly can. Kerry Killinger was certainly encouraging us to think seriously about it at the MBR [Monthly Business Review] last week. What can I do to help? David, would your team like any help on determining the impact of selling certain groupings of Option ARMs on overall delinquencies? Let me know where we can help. Thanks.”⁴⁶²

As Chief Risk Officer in WaMu’s Home Loans division, Ms. Feltgen pointed out some counterintuitive features of the latest delinquencies, noting that the fastest increases in delinquencies occurred in large loans and loans with high FICO scores. She also noted that the subprime meltdown had led to a “flight to quality,” and that foreign investors still had a strong interest in U.S. residential mortgages, suggesting that WaMu might be able to sell its likely-to-go delinquent Option ARMs to those foreign investors. From her perspective as a risk manager, she urged selling “as many Option ARMs as we can.”

Her email also indicated that the topic of selling more Option ARMs had come up during the prior week at the monthly business review meeting, in which WaMu CEO Killinger expressed interest in exploring the idea.⁴⁶³ Finally, Ms. Feltgen offered help in analyzing the impact of selling “certain groupings of Options ARMs” on overall delinquencies. Removing those problematic loans from the larger pool of Option ARM loans in the bank’s investment portfolio would reduce loan delinquencies otherwise affecting the value of the portfolio as a whole.

Mr. Schneider sent a second email at 11:00 at night that same Sunday providing instructions for moving forward:

“Let[’]s do the following:

1. db [David Beck] - please select the potential sample portfolios - along the lines we discussed at the mbr [Monthly Business Review]
2. cf [Cheryl Feltgen] - please run credit scenarios
3. db - coordinate with finance on buy/sell analysis
4. db/cf – recommendation”⁴⁶⁴

On Tuesday morning, February 20, 2007, Mr. Beck replied with additional analysis:

“Here’s how I see this going.

⁴⁶² Id.

⁴⁶³ At the end of 2006, WaMu held about \$63.5 billion in Option ARM mortgages, then comprising about 28% of its investment portfolio. See 3/2007 Washington Mutual Inc. 10-K filing with the SEC, at 52.

⁴⁶⁴ 2/2007 WaMu internal email chain, Hearing Exhibit 4/13-40b.

“From the MBR [Monthly Business Review], my notes indicate two portfolios we discussed for sale; the 2007 high margin production (Jan and Feb so far) and the seasoned COFI book.”⁴⁶⁵

“I will supply to Cheryl the loan level detail on both pools and the pricing assumptions for losses. Cheryl, you need to run scenario analysis and on losses versus pricing AND reserving assumptions. I can supply pricing assumptions but would like you to pull the ALLL [Allowance for Loan and Lease Losses] against these pools.”⁴⁶⁶

Later that day, Ms. Feltgen forwarded the email chain to her team, changing the subject line to read: “URGENT NEED TO GET SOME WORK DONE IN THE NEXT COUPLE DAYS: Option ARM MTA and Option ARM MTA Delinquency.” Clearly, time was of the essence:

“See the attached string of emails. We are contemplating selling a larger portion of our Option ARMs than we have in the recent past. Gain on sale is attractive and this could be a way to address California concentration, rising delinquencies, falling house prices in California with a favorable arbitrage given that the market seems not to be yet discounting a lot for those factors. David Schneider has set a meeting for Friday morning with David Beck and me to hear our conclusions and recommendations. See the comments below about the information that we need to provide for this analysis. We will get the pools by tomorrow at the latest. We will need to coordinate with Joe Matthey and get input from him in order to make a judgment regarding the ALLL impact. ...

“In addition to the specific information that David Beck asks for, I would like your input on portions of the Option ARM portfolio that we should be considering selling. We may have a different view than David Beck’s team as to the most desirable to sell and we should provide that input. Our suggestion, for instance, might include loans in California markets where housing prices are declining. There may be other factors.

“I will need to get from you by Thursday, February 22 end of day a summary of our conclusions and recommendations.”⁴⁶⁷

⁴⁶⁵ Option ARMs were considered a “high margin” product within WaMu, because they produced a relatively high gain on sale when sold. See 4/18/2006 Washington Mutual Home Loans Discussion Board of Directors Meeting, at JPM_WM00690894, Hearing Exhibit 4/13-3 (chart showing gain on sale margin by product). “COFI” stands for “Cost of Funds Index” which is an index used to set variable interest rates. “Seasoned” means the loans are older production.

⁴⁶⁶ 2/2007 WaMu internal email chain, Hearing Exhibit 4/13-40b.

⁴⁶⁷ Id.

A WaMu risk analyst, Robert Shaw, replied the same day and identified eight specific factors that were driving delinquencies in the Option ARM portfolio:

“Cheryl,

“I reviewed the HFI [Hold for Investment] prime loan characteristics that contributed to rising 60+ delinquency rates⁴⁶⁸ between 1/06 - 1/07 [January 6 and 7]. The results of this analysis show that seven combined factors contain \$8.3 billion HFI Option ARM balances which experienced above-average increases in the 60+ delinquency rate during the last 12 months (a 821% increase, or 10 times faster than the average increase of 79%). I recommend that we select loans with some or all of these characteristics to develop a HFS [Hold for Sale] pool.

“Below, I have listed the factors (layered), their percentage change in 60+ delinquency rate over the last 12 months, and HFI balances as of January 2007.”⁴⁶⁹

- “1) HFI Option ARMs – 79% increase (.56% to 1.0%), \$60.6 billion
- 2) Above + Vintages 2004-2007 – 179% increase (.33% to .92%), \$47.8 billion
- 3) Above + CA – 312% increase (.16 to .66%), \$23.7 billion
- 4) Above + NY/NJ/CT – 254% increase (.21 to .76%), \$29.3 billion
- 5) Above + \$351k-1mil – 460% increase (.12 to .70%), \$17.2 billion
- 6) Above + FICO 700-739 – 1197% increase (.03% to .40%), \$4.2 billion
- 7) Above + FICO 780+ - 1484% increase (.02% to .38%), \$5.2 billion
- 8) Above + FICO 620-659 – 821% increase (.07 to .67%), \$8.3 billion[.]”⁴⁷⁰

Essentially, the eight factors identified Option ARMs that were in certain states, like California, had certain FICO scores or certain loan amounts, or were issued during the period 2004-2007.

Later that same day, Ms. Feltgen forwarded Mr. Shaw’s email to Mr. Beck, Mr. Chen, and Mr. Ellson. Her email carried the subject line: “Some thoughts on target population for potential Option ARM MTA loan sale.” She wrote:

“David, Youyi and Rick:

“My team and I look forward to receiving the loan level detail on the pools of Option ARMs we are considering for sale. I thought it might be helpful insight to see the information Bob Shaw provides below about the components of the portfolio that have been the largest contributors to delinquency in recent times. I know this is mostly an exercise about gain on sale, but we might also be able to accomplish the other purpose of reducing risk and delinquency at the same time. Talk to you soon.”⁴⁷¹

⁴⁶⁸ A “60+ delinquency rate” applies to loans in which a payment is late by 60 days or more.

⁴⁶⁹ 2/20/2007 WaMu internal email chain, Hearing Exhibit 4/13-40b.

⁴⁷⁰ 2/20/2007 email from Robert Shaw to Cheryl Feltgen, Hearing Exhibit 4/13-41.

⁴⁷¹ 2/20/2007 email from Cheryl Feltgen to David Beck, Youyi Chen, and Richard Ellson, Hearing Exhibit 4/13-41.

A week later, on Sunday, February 25, 2007, Mr. Beck sent an email with the subject heading, “HFI Option Arms redirect to HFS,” to much of WaMu’s top management, including Mr. Schneider, Mr. Rotella, Mr. Casey, as well as the FDIC Examiner-In-Charge Steve Funaro, and others. The email indicated that a decision had been made to sell \$3 billion in recent Option ARM loans, with as many as possible to be sold before the end of the quarter, which was four weeks away:

“David [Schneider] and I spoke today. He’s instructed me to take actions to sell all marketable Option Arms that we intend to transfer to portfolio in 1Q[first quarter], 2007. That amounts to roughly 3B [\$3 billion] option arms availab[I]e for sale. I would like to get these loans into HFS [the Hold for Sale portfolio] immediately so that [I] can sell as many as possible in Q1.

“John [Drastal], we are only targeting to sell Option Arms destined for portfolio since year end at this point. I’ll need direction from you on any special accounting concerns or documentation you will need to get these loans in the warehouse without tainting the HFI [Hold for Investment] book.”⁴⁷²

“Michelle, I believe this action requires MRC [Market Risk Committee] approval. Please advise.

“This week I’ll work to get the necessary governance sign offs in place. Cheryl, please direct me on what form the approval request should take and what committees should review and authorize the request. I can pull all of the data.

“We continue to work with Cheryl and the credit risk team to analyze emerging credit risks in our prime portfolio and recommend actions to mitigate them.

“Thanks for your help,
DJB”⁴⁷³

Two days later, on Tuesday, February 27, 2007, Mr. Chen sent an email with the subject line, “HFI selection criteria changes,” to Michelle McCarthy, who was head of WaMu’s Market Risk Management department⁴⁷⁴ as well as chair of both its Market Risk Committee and Asset Liability Committee.⁴⁷⁵ The email was copied to Mr. Beck, Ms. Feltgen and others, and showed that the implementation of the plan was underway:

⁴⁷² Loans in a bank’s Hold for Investment portfolio receive different accounting treatment than loans in the bank’s Hold for Sale portfolio, and generally accepted accounting principles (GAAP) frown upon frequent transfers between the two portfolios. The GAAP principles were a key reason for Mr. Beck’s instruction that the transfer of the Option ARM loans from WaMu’s HFI to HFS portfolios proceed “without tainting the HFI book.”

⁴⁷³ 2/25/2007 email from David Beck to himself, David Schneider, Steve Rotella, Ron Cathcart, Tom Casey, Cheryl Feltgen, others, Hearing Exhibit 4/13-42b.

⁴⁷⁴ 12/28/2007 WaMu internal report, “Disclosure Management,” JPM_WM02414318.

⁴⁷⁵ 3/9/2007 WaMu Market Risk Committee Meeting Minutes, Hearing Exhibit 4/13-43.

“After careful review with David and the teams, David suggested me to make the following recommendations to MRC [Market Risk Committee] on the existing prime HFI/HFS selection criteria

“1. Effective March 7th 2007, modify the portfolio option ARM and COFI ARM retention criteria (see attached ‘existing HFI descriptions’, ‘section 1.01 to 1.11 and section 2.01 to 2.08’) to include only following loans for the portfolio (HFI)

- a. Super jumbo of size greater or equal to \$ 3 MM (Risk based pricing applied, but difficult to sale)
- b. Advantage 90 (high LTV loans without MI, very little production as 80/10/10 gets popularity)
- c. Foreign Nationals (Risk based pricing applied, but difficult to sale due to FICO problems)
- d. FICO less than 620, except employee loans in which case FICO can be re-stated after closing.
- e. 3-4 units (excessive S & P level hit calls for portfolio execution)

“2. Further more, we would like to request, transferring from HFI to HFS, all the MTA option ARMs and COFI ARMs, **funded or locked between January 1st, 2007 to Mach [sic] 7th, 2007**, and DO NOT fit the criteria listed above, and DO NOT fit the criteria section 3.02 to 4.07 in the attached ‘existing HFI descriptions’)

“As a result of this change, we expected to securitize and settle about \$ 2 billion more option/COFI ARMs in Q1-07 (mostly margin greater than 295), and going forward \$ 1 billion per month potential incremental volume into HFS. For your information, the impact to gain on sale for the year is estimated to be about \$180 MM pretax based on current market, and the impacts to 2007 portfolio NII is estimated to be about - \$ 80 MM pretax.

“Also included in the attachment, is a pool of \$1.3 billion option/COFI ARMs funded to portfolio between January 1st and February 22nd that will be re-classified as HFS based on the above recommendations. We understand that this population of loans will be growing from now to March 7th until the portfolio selection criteria are officially modified.

“We expected to start marketing the deal on March 12th, your prompt response will be greatly appreciated as the TSG [Technology Solutions Group] and QRM [Quantitative Risk Management] teams also need time to implement the coding changes.”⁴⁷⁶

⁴⁷⁶ 2/27/2007 email from Youyi Chen to Michelle McCarthy, with copies to David Beck, Cheryl Feltgen, Steve Fortunato, and others, “HFI selection criteria changes,” Hearing Exhibit 4/13-42a [emphasis in original].

This email proposed several significant changes to WaMu's treatment of its Option ARMs. First, WaMu decided to require most of its Option ARMs to go directly into its Hold for Sale portfolio instead of going into its Held for Investment portfolio. In light of its analysis that Option ARM loans were rapidly deteriorating, the bank no longer wanted to treat them as investments it would keep, but immediately sell them. Second, the only Option ARMs that it would automatically direct into its investment portfolio were those that the bank considered to be so obviously of poor quality that they were "non-salable," according to another internal email.⁴⁷⁷ Third, WaMu proposed transferring all Option ARM loans originated in 2007 from the investment portfolio to the sale portfolio. Since these three changes in how WaMu would treat its Option ARMs had compliance, accounting, and tax consequences, they had to be approved by the Market Risk Committee. That Committee was composed of senior risk officers throughout the bank as well as senior managers in the bank's finance, treasury, and portfolio management departments. The email indicated that the changes needed to be implemented within about a week so that marketing of some of the Option ARMs could begin by March 12.

On March 9, 2007 the Market Risk Committee met and approved the Option ARM proposal. The minutes of that meeting describe the changes that had been proposed:

- "- Change the Held for Investment (HFI) ARM and COFI ARM retention criteria to include only the following loans for HFI effective March 12, 2007; Super jumbo \geq \$3.0 million, Advantage 90, Foreign Nationals, FICO < 620 except employee loans in which case FICO can be re-stated after closing, and 3 to 4 units.
- Increase Prime Option ARM's (including Second Liens) from \$26.0 billion to \$37.0 billion.
- Transfer up to \$3.0 billion of saleable Option ARM and COFI ARM loans originated between January 1, 2007 and March 12, 2007 from HFI to HFS (excluding HFI loans described above)."⁴⁷⁸

The minutes also recorded an exchange between Ms. McCarthy and another Committee member, Mr. Woods, who was the Chief Financial Officer of WaMu's Home Loans division:

"A second part of the proposal requests approval to transfer up to \$3.0 billion of saleable Option ARM and COFI ARM loans originated since January 1, 2007 from HFI to Held for Sale (HFS). In response to a question from Mr. Woods, Ms. McCarthy explained that there are other Option ARM loans not included in the criteria that we are retaining in portfolio. Ms. McCarthy noted that Ms. Feltgen ha[d] reviewed and approved this proposal. Mr. Woods noted that Deloitte has reviewed the proposal as well."⁴⁷⁹

⁴⁷⁷ 2/27/2007 email from Youyi Chen to David Griffith, "Option ARM," JPM_WM03117796 ("David, we sell all 295+ margin and other OA and COFI, and KEEP the 4 categories going forward due mostly to non-salable reasons.").

⁴⁷⁸ 3/9/2007 WaMu Market Risk Committee Meeting Minutes, Hearing Exhibit 4/13-43.

⁴⁷⁹ Id.

This exchange acknowledges that not all of the saleable Option ARM loans were diverted from the HFI to the HFS portfolio. WaMu chose to keep some Option ARMs and make other Option ARMs available for sale. The internal WaMu documents and communications reviewed by the Subcommittee strongly suggest that the decision to transfer the most recently originated Option ARMs from the Held-for-Investment portfolio to the Held-for-Sale portfolio was part of an effort to sell loans thought to be prone to delinquency, before they became delinquent. None of the hearing witnesses recalled how these loans were specifically selected for securitization, nor did any deny that they may have been selected for their propensity toward delinquency.⁴⁸⁰

The Subcommittee investigation determined that WaMu carried out the plan as approved, and transferred at least \$1.5 billion Option ARMs originated in the first quarter of 2007, from the HFI to HFS portfolio. Of these loans, about 1,900 with a total value of a little over \$1 billion were assembled into a pool and used in the WMALT 2007-OA3 securitization in March 2007.⁴⁸¹ WMALT 2007-OA3 securities were issued with WaMu as the sole underwriter and sold to investors.⁴⁸²

None of the materials associated with the sale of the WMALT 2007-OA3 securities informed investors of the process used to select the delinquency-prone Option ARMs from WaMu's investment portfolio and include them in the securitization.⁴⁸³ Nor did WaMu inform investors of the internal analysis it performed to identify the delinquency-prone loans. Senator Levin questioned Mr. Beck about this point at the April 13 Subcommittee hearing:

Senator Levin. When you said that investors were told of the characteristics of loans, they were told of all the characteristics of loans. Did they know, were they informed that loans with those or some of those characteristics had a greater propensity towards delinquency in WaMu's analysis? Were they told that?

Mr. Beck. They were not told of the WaMu analysis.⁴⁸⁴

Predictably, the securitization performed badly. Approximately 87% of the securities received AAA ratings.⁴⁸⁵ Within 9 months, by January 2008, those ratings began to be downgraded.⁴⁸⁶ As of February 2010, more than half of the loans in WMALT Series 2007-OA3

⁴⁸⁰ Mr. Schneider and Mr. Beck were asked about this matter at the hearing. See April 13, 2010 Subcommittee Hearing at 75-82.

⁴⁸¹ 4/10/2010 Subcommittee email from Brent McIntosh, Sullivan & Cromwell LLP, Counsel for JPMorgan Chase [Sealed Exhibit].

⁴⁸² 3/22/2007 WaMu Prospectus Supplement, "Washington Mutual Mortgage Pass-Through Certificates, WMALT Series 2007-OA3," at S-102, Hearing Exhibit 4/13-86b.

⁴⁸³ See, e.g., *id.* See also April 13, 2010 Subcommittee Hearing at 80.

⁴⁸⁴ April 13, 2010 Subcommittee Hearing at 82.

⁴⁸⁵ 4/11/2007 "New Issue: Washington Mutual Mortgage Pass-Through Certificates WMALT Series 2007-OA3 Trust," *S&P's Global Credit Portal*, www.globalcreditportal.com.

⁴⁸⁶ See 1/14/2008 "Moody's takes negative rating actions on certain WaMu Option Arm deals issued in 2007," *Moody's*, http://www.moodys.com/viewresearchdoc.aspx?lang=en&cy=global&docid=PR_147683.

were delinquent, and more than a quarter were in foreclosure.⁴⁸⁷ All of the investment grade ratings have been downgraded to junk status, and the investors have incurred substantial losses.

(4) WaMu Loan Sales to Fannie Mae and Freddie Mac

Washington Mutual had longstanding relationships with a number of government sponsored enterprises (GSEs), including the Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac).⁴⁸⁸ Between 2000 and 2008, Washington Mutual sold over \$500 billion in loans to Fannie Mae and Freddie Mac, accounting for more than a quarter of every dollar in loans WaMu originated.⁴⁸⁹ While the majority of those loans involved lower risk, fixed rate mortgages, WaMu also sold Fannie and Freddie billions of dollars in higher risk Option ARMs.

Relationships with Fannie and Freddie. Fannie Mae and Freddie Mac purchase residential mortgages that meet specified underwriting standards and fall below a specified dollar threshold, so-called “conforming loans.” They often enter into multi-year contracts with large mortgage issuers to purchase an agreed-upon volume of conforming loans at agreed-upon rates. Prior to 2005, Washington Mutual sold most of its conforming loans to Fannie Mae, with relatively little business going to Freddie Mac.⁴⁹⁰ From at least 1999 through 2004, WaMu sold those loans to Fannie Mae through a long term “Alliance Agreement,”⁴⁹¹ that resulted in its providing more than 85% of its conforming loans to Fannie Mae.⁴⁹² In 2004, WaMu calculated that it “contributed 15% of Fannie Mae’s 2003 mortgage business,”⁴⁹³ and was “Fannie Mae’s 2nd largest provider of business (behind Countrywide).”⁴⁹⁴ Among the advantages that WaMu believed it gained from its relationship with Fannie Mae were help with balance sheet

⁴⁸⁷ “Select Delinquency and Loss Data for Washington Mutual Securitizations,” chart prepared by the Subcommittee, Hearing Exhibit 4/13-1g.

⁴⁸⁸ See 9/29/2005 “GSE Forum,” internal presentation prepared by WaMu, Hearing Exhibit 4/16-91 at JPM_WM02575608. As mentioned earlier, GSEs are Congressionally chartered, nongovernment owned financial institutions created for public policy purposes. At the time of the financial crisis, the GSEs included Fannie Mae, Freddie Mac, the Government National Mortgage Association (Ginnie Mae), and the Federal Home Loan Bank System (FHLBS), all of which were created by Congress to strengthen the availability of capital for home mortgage financing.

⁴⁸⁹ See chart, below, using loan data from Inside Mortgage Finance.

⁴⁹⁰ See 4/12/2004 “Pre-Meeting for Fannie Mae,” internal presentation prepared by WaMu, at JPM_WM02405463, Hearing Exhibit 4/16-86 (“At current level, alternative executions, e.g., Freddie Mac, FHLB, and private investors, do not win a significant level of business.”).

⁴⁹¹ See 4/12/2004 “Pre-Meeting for Fannie Mae,” internal presentation prepared by WaMu, at JPM_WM02405462, Hearing Exhibit 4/16-86 (chart entitled, “Timeline of the Alliance Agreement”).


⁴⁹² See 4/12/2004 “Pre-Meeting for Fannie Mae,” internal presentation prepared by WaMu, at JPM_WM02405461, Hearing Exhibit 4/16-86 (“Under this Alliance Agreement with Fannie Mae, WaMu has agreed to deliver no less than 75% of eligible, conforming loans to Fannie Mae.”); 2/23/2005 email exchange between David Beck and WaMu executives, Hearing Exhibit 4/16-85 (“5 years of 85%+ share with Fannie”).

⁴⁹³ 4/12/2004 “Pre-Meeting for Fannie Mae,” internal presentation prepared by WaMu, at JPM_WM02405459, Hearing Exhibit 4/16-86.

⁴⁹⁴ Id. at JPM_WM02405467, Subcommittee Hearing Exhibit 4/16-86.

management, underwriting guidance, and support for WaMu's Community Reinvestment Act initiatives.⁴⁹⁵

The following slide, created by Washington Mutual in March 2004, provides an overview of the GSEs' impact on the mortgage market at the time as well as the status of WaMu's relationship with Fannie Mae in early 2004.⁴⁹⁶


Washington Mutual

GSE's Impact in the Market

- Total Single Family originations were \$3.76 trillion in 2003.
- Combined new business activity of Fannie Mae and Freddie Mac combined (including MBS securitizations and purchases) were \$2.25 trillion in 2003 – or 59.8% of market originations.
- Fannie Mae was responsible for 60% of the GSE's new business activity in 2003.
- WaMu contributed 15% of Fannie Mae's 2003 mortgage purchases.
- GSEs dominate the automated underwriting decisioning technology through LP and DU.
- Credit guidelines for the market, in general, follow the GSE's lead.

3

⁴⁹⁵ Id. at JPM_WM02405461, Subcommittee Hearing Exhibit 4/16-86. The Community Reinvestment Act (CRA) was passed by Congress to encourage banks to make loans in low- and moderate-income neighborhoods. See website of the Federal Financial Institutions Examination Council, "Community Reinvestment Act," <http://www.ffiec.gov/cra/history.htm>. Regulators, including the Office of Thrift Supervision, periodically reviewed banks' CRA activities and took them into account if a bank applied for deposit facilities or a merger or acquisition. Id. A 2005 presentation prepared by WaMu stated that its relationship with Freddie Mac helped the bank meet its CRA goals by purchasing more than \$10 billion in qualifying loans. See 9/29/2005 "GSE Forum," presentation prepared by WaMu Capital Markets, at JPM_WM02575611, Hearing Exhibit 4/16-91. Between 1991 and 2006, WaMu was evaluated 20 times by OTS and the FDIC, achieving the highest possible CRA rating of "Outstanding" in each evaluation. See website of the Federal Financial Institutions Examination Council, ratings search for "Washington Mutual," <http://www.ffiec.gov/craratings/default.aspx>. Regulations state that an "outstanding" institution is one that not only meets the needs of its surrounding community, but utilizes "innovative or flexible lending practices." See 12 C.F.R. 345, Appendix A, <http://www.fdic.gov/regulations/laws/rules/2000-6600.html#fdic2000appendixatopart345>.

⁴⁹⁶ Id. at JPM_WM02405459, Subcommittee Hearing Exhibit 4/16-86.

Despite Fannie Mae's long history with WaMu, in 2005, the bank made a major change and shifted the majority of its conforming loan business to Freddie Mac. WaMu made the change in part because its long term contract with Fannie Mae was up for renegotiation,⁴⁹⁷ and Freddie Mac offered better terms. According to WaMu, Freddie Mac had purchased \$6 billion of its Option ARM loans in 2004, without a contract in place, and WaMu wanted to sell more of those loans.⁴⁹⁸ WaMu conducted detailed negotiations with both firms that lasted more than six months.⁴⁹⁹ Internally, it considered a number of issues related to switching the majority of its conforming loans to Freddie Mac.⁵⁰⁰ The deciding factor was Freddie Mac's offer to purchase 100% of WaMu's conforming Option ARM mortgages which were among the bank's most profitable loans.⁵⁰¹ In January 2005, in a document comparing the proposals from Fannie and Freddie, WaMu wrote:

"The Freddie Mac Business Relationship [proposal] dated 12/21/2004 establishes another execution opportunity that diversifies WaMu's execution risk and confers material financial benefits for the Option ARM product. The key to the Freddie proposal is that it provides significant liquidity for our Option ARM originations, with more advantageous credit parameters, competitive g-fees and preferred access to their balance sheet relative to our current agreement with Fannie. Fannie has made it very clear to us that we should not expect to retain the same pricing and credit parameters for Option ARMs in our 2005 pricing agreement that we have enjoyed during 2004. For fixed rate loans and hybrids, g-fe[e]s adjusted for MAP Pricing and credit parameters are roughly equivalent to the Fannie Agreement."⁵⁰²

⁴⁹⁷ See 4/12/2004 "Pre-Meeting for Fannie Mae," internal presentation prepared by WaMu, at JPM_WM02405468, Hearing Exhibit 4/16-86.

⁴⁹⁸ See, e.g., 2/23/2005 email exchange between David Beck and WaMu executives, Hearing Exhibit 4/16-85 (reporting that Freddie Mac was "very aggressive in 2004 buying 6B of option arm without a share agreement in place.").

⁴⁹⁹ See, e.g., 4/12/2004 "Pre-Meeting for Fannie Mae," internal presentation prepared by WaMu, Hearing Exhibit 4/16-86; 12/17/2004 email exchange among WaMu executives, "Risks/Costs to Moving GSE Share to FH [Freddie Mac]," JPM_WM05501399, Hearing Exhibit 4/16-88; 1/5/2005 "Business Relationship Proposal Issues," document prepared by WaMu, Hearing Exhibit 4/16-90 (describing multiple issues negotiated with both firms); 2/23/2005 email exchange between David Beck and WaMu executives, Hearing Exhibit 4/16-85 (David Beck wrote: "Fannie negotiated hard for our business especially in the 11th hour." CEO Killinger responded: "Good work David. It appears we got a good economic outcome and haven't burnt any bridges for the future.").

⁵⁰⁰ See 12/17/2004 email exchange among WaMu executives, "Risks/Costs to Moving GSE Share to FH [Freddie Mac]," at JPM_WM05501401, Hearing Exhibit 4/16-88 (listing multiple issues including whether Fannie Mae would "be less supportative [sic] of using their balance sheet to support our quarter-end liquidity needs").

⁵⁰¹ Id. at JPM_WM05501399 (describing Fannie Mae's offer to purchase two-thirds of WaMu's Option ARM production); 2/23/2005 email exchange between David Beck and WaMu executives, Hearing Exhibit 4/16-85 ("I reviewed the most recent proposals from Freddie and Fannie today with Steve. We agreed that the Freddie 65% minimum share (100% of option arms) proposal offers us between 26MM and 37MM of benefit depending on volume... 39% of our 2005 home loans gain on sale comes from conforming option arm sales. FH [Freddie Mac] stepped up with 21B of committed balance sheet and aggressive forward pricing for OA [Option ARMs] that result in the financial benefit over FN [Fannie Mae]."). WaMu originated both conforming and nonconforming Option ARMs, depending upon whether the loan exceeded the GSEs' dollar limit for the loans they would purchase.

⁵⁰² 1/5/2005 "Business Relationship Proposal Issues," document prepared by WaMu, Hearing Exhibit 4/16-90.

In April 2004, at the conclusion of its negotiations with Fannie and Freddie, WaMu entered into a one-year contract with Freddie Mac, switching the lion's share of the bank's conforming loans to that company and away from Fannie Mae.⁵⁰³ According to WaMu, Freddie Mac's share of its conforming loans "went from 20% in Q1 [first quarter of 2005] to 81% in Q2 [second quarter of 2005]."⁵⁰⁴ WaMu reported internally that, as a result of the new contract, it became the second largest seller of mortgages to Freddie Mac behind Wells Fargo, and that "[f]orty percent of FRE's [Freddie Mac's] portfolio growth in '05 can be attributed to WM's \$8 billion sale of option ARMS."⁵⁰⁵

As the 2005 contract's expiration date neared, WaMu developed a list of issues to be negotiated with Freddie Mac for a new contract, noting that Freddie Mac "does not want to be a 'one-year' wonder."⁵⁰⁶ WaMu also observed that "FRE is not likely to outbid FNM by such a wide margin on option ARMS like in the current contract."⁵⁰⁷ In a list of "asks ... to cement our relationship" with Freddie Mac, WaMu indicated, among other issues, that it would press Freddie Mac to buy more subprime and "lower quality loans":

- **"Credit ...**
 - WM [WaMu] wants FRE [Freddie Mac] to expand the eligibility of lower quality loans to ensure WM is 'market competitive'. ...
- **Non-prime**
 - Potential securitization of SMF [Specialty Mortgage Finance] assets (\$1.5 - \$10 bil) that will create liquidity for WM and create a positive affordability profile for FRE;
 - Expansion of credit profile into subprime; (Keith Johnson wants to keep this point very general); ...
- **Liquidity** – we want to understand how we can best help the FRE portfolio w/Product.
 - Longer term portfolio commitment on option ARMS;
 - Broader deliverability guidelines w/respect to option ARMs."⁵⁰⁸

WaMu wrote that it also expected Freddie Mac to discuss trends related to accepting "lower documentation standards."⁵⁰⁹

In April 2006, WaMu signed a new, two-year contract with Freddie Mac, again agreeing to sell the majority of its conforming loans to that company.⁵¹⁰ WaMu President Steve Rotella

⁵⁰³ See 7/5/2006 "Freddie Mac – WaMu Meeting," document prepared by WaMu, JPM_WM03200453, Hearing Exhibit 4/16-87 ("WM executed a majority share arrangement w/FRE [Freddie Mac], effective 4/1/05 thru 3/31/06; included in that arrangement was a market-leading opportunity to sell up to \$21 billion of option ARMs to the FRE portfolio.").

⁵⁰⁴ Id.

⁵⁰⁵ Id.

⁵⁰⁶ Id.

⁵⁰⁷ Id. at JPM_WM03200453.

⁵⁰⁸ Id. at JPM_WM03200452-453 [italics in original omitted].

⁵⁰⁹ Id. at JPM_WM03200454.

wrote: “Congratulations to the team for getting this done and with terrific results for the company.”⁵¹¹ In a document describing the “highlights” of the new agreement, a Wamu employee wrote:

“Aligns WM with the stronger GSE over the next 12-18 months; we fully expect once FNM [Fannie Mae] gets its financial house in order to become a very aggressive competitor – just when this contract is coming up for renewal.”⁵¹²

WaMu’s reference to the “stronger GSE” was in response to accounting scandals that, over the prior year, had weakened both Freddie Mac and Fannie Mae. In 2003, Freddie Mac announced that it had misstated its earnings by at least \$4.5 billion, mostly by under-reporting its earnings in order to smooth the volatility of its quarterly earnings reports, and would be restating its earnings for the prior three years.⁵¹³ Later that year, Freddie Mac paid a \$125 million civil fine to settle civil charges of accounting fraud brought by its regulator, the Office of Federal Housing Enterprise Oversight (OFHEO).⁵¹⁴ In September 2004, OFEHO issued a report finding that Fannie Mae had also violated accounting rules to smooth its earnings reports.⁵¹⁵ Fannie Mae later filed a \$6.3 billion restatement of earnings and paid a \$400 million fine.⁵¹⁶ Both GSEs also changed their senior management.

When asked at the Subcommittee hearing to define Washington Mutual’s relationship with Fannie Mae and Freddie Mac, Mr. Rotella provided the following response:

“Well, like all big mortgage lenders, Senator, Fannie Mae and Freddie Mac were important [T]here was a substantial amount of production that was sold off to either Fannie or Freddie. ... [A]ny mortgage lender that is in the mortgage business, given the government advantages and the duopoly that Fannie and Freddie had, needed to do business with them. It would be very difficult to be a mortgage player without them.”⁵¹⁷

⁵¹⁰ See 4/28/2006 email exchange between WaMu executives, JPM_WM02521921, Hearing Exhibit 4/16-89 (celebrating contract that “David Schneider signed today”).

⁵¹¹ *Id.*

⁵¹² *Id.*

⁵¹³ See “Freddie Mac Raises its Estimate of Errors,” Associated Press (9/26/2003).

⁵¹⁴ See “Freddie to Settle with Fat Civil Fine,” Associated Press (12/11/2003). In 2007, Freddie Mac paid an additional \$50 million civil fine to the SEC to settle civil charges of securities fraud, without admitting or denying wrongdoing. “Freddie Mac to Pay \$50 million,” Associated Press (9/28/2007).

⁵¹⁵ 9/17/2004 Office of Federal Housing Enterprise Oversight Report of Findings to Date, “Special Examination of Fannie Mae,” available at <http://www.fhfa.gov/Preview-FHFAWWW/webfiles/748/FNMfindingstodate17sept04.pdf>.

⁵¹⁶ See 2004 10-K filing with the SEC. Fannie Mae paid the \$400 million civil fine in May 2006, to settle accounting fraud charges brought by OFHEO and SEC. See also “Fannie Settles Fraud Charges,” National Mortgage News (5/29/2006).

⁵¹⁷ April 13, 2010 Subcommittee Hearing at 105, Senator Coburn question to Mr. Rotella.

Loan Sales to Fannie and Freddie. During the years examined by the Subcommittee, WaMu sold a variety of loans to both Fannie Mae and Freddie Mac, including 15, 20, and 30-year fixed rate mortgages; Option ARMs; interest-only ARMs; and hybrid ARMs.⁵¹⁸

A September 2005 chart prepared by WaMu, identifying the loans it sold to Fannie Mae and Freddie Mac during the first part of that year, details the types and volumes of loans involved.⁵¹⁹ The chart showed, for example, that the largest category of loans that WaMu sold to Fannie and Freddie at that point in 2005 was fixed rate loans, which together totaled nearly 140,000 loans with a collective, total loan amount of about \$24.3 billion.⁵²⁰ The next largest category of loans was Option ARMs, which WaMu sold only to Freddie Mac and which consisted of 35,421 loans with a total loan amount of about \$7.9 billion.⁵²¹ The third largest category was interest-only ARMs, totaling about 8,400 loans with a total loan amount of about \$2 billion.⁵²² The fourth largest category was hybrid ARMs, totaling 6,500 loans with a total loan amount of about \$1.4 billion.⁵²³ WaMu also sold other loans to Fannie and Freddie which included 6,020 loans of various types bearing a total loan amount of about \$2 billion.⁵²⁴

The chart showed that, altogether by September 2005, WaMu had sold Fannie and Freddie about 196,000 loans with a total loan amount of \$36.5 billion.⁵²⁵ About 70% were fixed rate loans;⁵²⁶ about 20% were Option ARMs;⁵²⁷ and other types of loans made up the final 10%. In addition to those single family mortgages, WaMu had an active business with Fannie and Freddie regarding loans related to multifamily apartment buildings.⁵²⁸ The 2005 loan data indicates that WaMu sold twice as many loans to Fannie and Freddie as it did to all other buyers combined.⁵²⁹ Most of those loans were fixed rate mortgages, but they also included the higher

⁵¹⁸ See 9/29/2005 “GSE Forum,” internal presentation prepared by WaMu, at JPM_WM02575611, Hearing Exhibit 4/16-91 (chart entitled, “WaMu’s Deliveries – Contract to Date 2005”). For more information on these types of loans, see Chapter II, above. WaMu did not sell loans directly to Ginnie Mae which, instead, guaranteed certain government backed mortgages when they were securitized by one of its approved securitizers. The WaMu chart showed that, in 2005, WaMu originated 35,291 loans with a total loan amount of about \$4.6 billion that were securitized with Ginnie Mae guarantees. Id.

⁵¹⁹ Id.

⁵²⁰ Id. The WaMu chart showed that WaMu sold 31,460 fixed rate loans with a total loan amount of about \$5.2 billion to Fannie Mae, and 108,246 loans with a total loan amount of about \$19.1 billion to Freddie Mac.

⁵²¹ Id.

⁵²² Id. The WaMu chart showed that WaMu sold 5,350 interest-only ARMs with a total loan amount of about \$1.3 billion to Fannie Mae, and 3,016 interest-only ARMs with a total loan amount of \$724 million to Freddie Mac.

⁵²³ Id. The WaMu chart showed that WaMu sold 3,250 hybrid ARMs with with a total loan amount of nearly \$700 million to Fannie Mae, and 3,303 hybrid ARMs with a total loan amount of nearly \$700 million to Freddie Mac.

⁵²⁴ Id. See chart for more detail.

⁵²⁵ Id. The chart showed that, altogether, WaMu sold about 45,000 loans with a total loan amount of \$7.9 billion to Fannie Mae and 151,000 loans with a total loan amount of about \$28.6 billion to Freddie Mac.

⁵²⁶ By loan number, the percentage is 71%; by loan amount, the percentage is 67%.

⁵²⁷ By loan number, the percentage is 18%; by loan amount, the percentage is 22%.

⁵²⁸ See, e.g., 4/12/2004 “Pre-Meeting for Fannie Mae,” internal presentation prepared by WaMu, at JPM_WM02405461, JPM_WM02405467, Hearing Exhibit 4/16-86 (chart entitled, “Overview of the Alliance,” and “WaMu was responsible for 34.7% of Fannie Mae’s Multifamily business”).

⁵²⁹ See 9/29/2005 “GSE Forum,” internal presentation prepared by WaMu, at JPM_WM02575611, Hearing Exhibit 4/16-91 (chart entitled, “WaMu’s Deliveries – Contract to Date 2005”). During the same time period in 2005, WaMu sold about 99,000 loans with a total loan amount of about \$35 billion to buyers other than Fannie and

risk Option ARMs. In 2005, for example, WaMu sold three times as many Option ARMs to Freddie Mac than to all of its other buyers combined.⁵³⁰

The amount and variety of the loans that WaMu sold to the GSEs fluctuated over time. For example, the following chart, which is taken from data compiled by *Inside Mortgage Finance*, presents the total dollar volume of loans sold by WaMu to Fannie and Freddie from 2000 until 2008 when WaMu was sold, as well as the percentage those loans represented compared to WaMu's total loan originations.⁵³¹

Year	Sold to Freddie Mac (in billions)	Sold to Fannie Mae (in billions)	Percent of Total WaMu Originations Sold to GSEs
2000	\$ 0	\$ 7.1	14%
2001	\$ 1.4	\$ 35.3	20%
2002	\$ 0.2	\$ 95.7	29%
2003	\$ 2.2	\$ 174.3	40%
2004	\$ 1.1	\$ 25.9	10%
2005	\$ 34.6	\$ 20.3	20%
2006	\$ 32.3	\$ 11.2	23%
2007	\$ 31.8	\$ 8.2	29%
2008	\$ 20.8	\$ 2.1	70%
TOTAL	\$ 124.4	\$ 380.1	27.3%

Source: Inside Mortgage Finance

The data indicates that, in total, WaMu sold more than half a trillion dollars in loans to the two GSEs in the nine years leading up to the bank's collapse, accounting for more than a quarter of all of the loans WaMu originated.

The documents obtained by the Subcommittee indicate that, from 2004 to 2008, Fannie Mae and Freddie Mac competed to purchase billions of dollars in WaMu's residential mortgage loans, and WaMu used that competition to negotiate better terms for its loan sales. Twice during that period, WaMu successfully played one GSE off the other to sell more high risk Option ARM loans under better terms to Freddie Mac.

Freddie. The two largest categories of loans sold to buyers other than Fannie or Freddie were jumbo loans (43,758 loans with a total loan amount of \$26.9 billion) and government backed loans sold to Ginnie Mae (35,291 loans with a total loan amount of \$4.6 billion). *Id.*

⁵³⁰ *Id.* The chart indicates that WaMu sold over 17,000 loans with a total loan amount of nearly \$4 billion to Freddie Mac, but only 5,841 Option ARMs with a total loan amount of \$1.2 billion to all other buyers. It is possible, however, that the data on Option ARMs sold to other buyers is understated if some portion of the loans categorized on the chart as "jumbo" loans were, in fact, also Option ARMs. See, e.g., *Id.* at JPM_WM02575611, Hearing Exhibit 4/16-91 (interpretive note below chart); 8/2006 WaMu chart entitled, "WaMu Originations Product Mix," at JPM_WM00212644, Hearing Exhibit 4/13-37 (showing that WaMu used Option ARMs in both conforming and jumbo loans). In addition to selling Option ARMs to Freddie Mac and others, WaMu kept a portion of the Option ARMs it originated in its investment portfolio and securitized still others.

⁵³¹ "Historical Data from Inside Mortgage Finance, Inside Mortgage Finance, www.imfpubs.com/data.

F. Destructive Compensation Practices

Washington Mutual and Long Beach's compensation practices contributed to and deepened its high risk lending practices. Loan officers and processors were paid primarily on volume, not primarily on the quality of their loans, and were paid more for issuing higher risk loans. Loan officers and mortgage brokers were also paid more when they got borrowers to pay higher interest rates, even if the borrower qualified for a lower rate—a practice that enriched WaMu in the short term, but made defaults more likely down the road. Troubling compensation practices went right to the top. In 2008, when he was asked to leave the bank that failed under his management, CEO Kerry Killinger received a severance payment of \$15 million.⁵³²

(1) Sales Culture

WaMu's compensation policies were rooted in the bank culture that put loan sales ahead of loan quality. As early as 2004, OTS expressed concern about WaMu's sales culture: "The overt causes for past underwriting concerns were many, but included: (1) A sales culture focused heavily on market share via loan production, (2) extremely high lending volumes."⁵³³ In early 2005, WaMu's Chief Credit Officer complained to Mr. Rotella that: "[a]ny attempts to enforce [a] more disciplined underwriting approach were continuously thwarted by an aggressive, and often times abusive group of Sales employees within the organization."⁵³⁴ The aggressiveness of the sales team toward underwriters was, in his words, "infectious and dangerous."⁵³⁵

In late 2006, as home mortgage delinquency rates began to accelerate and threaten the viability of WaMu's High Risk Lending Strategy, Home Loans President David Schneider presided over a "town hall" meeting to rally thousands of Seattle based employees of the WaMu Home Loans Group.⁵³⁶ At the meeting, Mr. Schneider made a presentation, not just to WaMu's sales force, but also to the thousands of risk management, finance, and technology staff in

⁵³² See "Washington Mutual CEO Kerry Killinger: \$100 Million in Compensation, 2003-2008," chart prepared by the Subcommittee, Hearing Exhibit 4/13-1h.

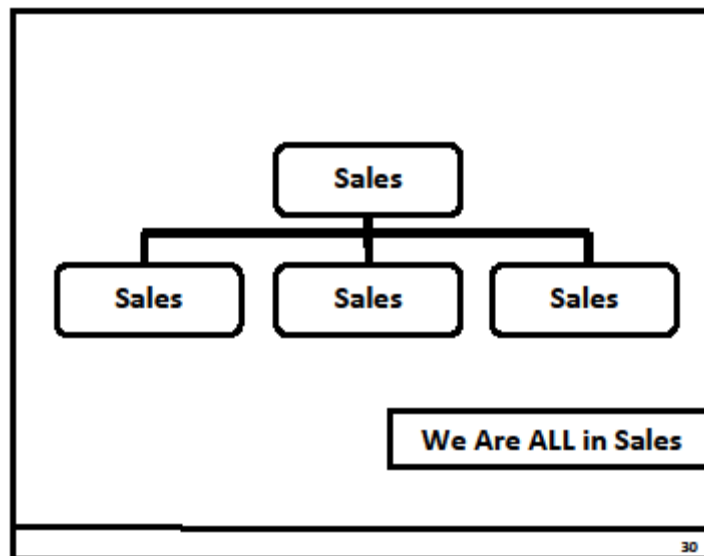
⁵³³ 5/12/2004 OTS Safety & Soundness Examination Memo 5, "SFR Loan Origination Quality," at 1, Hearing Exhibit 4/16-17.

⁵³⁴ Undated draft WaMu memorandum, "Historical Perspective HL – Underwriting: Providing a Context for Current Conditions, and Future Opportunities," JPM_WM00783315 (a legal pleading states this draft memorandum was prepared for Mr. Rotella by WaMu's Chief Credit Officer in or about February or March 2005; FDIC v. Killinger, Case No. 2:2011cv00459 (W.D. Wash.), Complaint (March 16, 2011), at ¶ 35).

⁵³⁵ Undated draft WaMu memorandum, "Historical Perspective HL – Underwriting: Providing a Context for Current Conditions, and Future Opportunities," JPM_WM00783315, at JPM_WM00783322.

⁵³⁶ Mr. Schneider told the Subcommittee that this meeting was held in early 2007, but Ms. Feltgen's end of 2006 email to her staff quotes Mr. Schneider's language from this presentation. 1/3/2007 email from Ron Cathcart to Cheryl Feltgen, Hearing Exhibit 4/13-73.

attendance.⁵³⁷ The title and theme of his presentation was: “Be Bold.”⁵³⁸ One slide demonstrates the importance and pervasiveness of the sales culture at WaMu:⁵³⁹



When asked about this presentation, Mr. Schneider told the Subcommittee it was an appropriate message, even for WaMu’s risk managers.⁵⁴⁰

The sales culture was also promoted through WaMu’s “President’s Club,” which sponsored an annual all-expense-paid gala and retreat in an exotic locale, such as Hawaii or the Bahamas, where the top producing loan officers were feted and lavished with gifts and plaudits.⁵⁴¹ Only a limited number of top producing loan officers were made members of the club, and the President’s Club trips were used to incentivize sales volume. Loan officers were encouraged to look up their sales rankings on the company’s intranet to see if they would qualify for a trip.

In November 2006, as subprime mortgages began to incur delinquencies, Mr. Schneider sent a letter about the President’s Club to WaMu loan consultants. Under a photo of the Grand Hyatt Kauai in Hawaii and the banner headline, “President’s Club – Take the Lead!,” Mr. Schneider wrote:

⁵³⁷ Subcommittee interview of David Schneider (2/17/2010).

⁵³⁸ “Way2Go, Be Bold!,” WaMu presentation prepared by David Schneider, Home Loans President, at 28, Hearing Exhibit 4/13-4.

⁵³⁹ Id. at 30 [recreated by the Subcommittee staff from an image].

⁵⁴⁰ Subcommittee interview of David Schneider (2/17/2010).

⁵⁴¹ Subcommittee interviews of Brian Minkow (2/16/2010), David Schneider (2/17/2010), and Kerry Killinger (2/5/2010).

“I attended WaMu’s President’s Club last year for the first time and had an awesome time getting to know the stars of our sales force. You work hard, but you know how to have a good time too....

“At the first-class awards dinner, I looked around the room and felt honored to be with so many talented people. Congratulations to those of you who were repeat President’s Club honorees. Of those of you who have not yet reached the President’s Club, I want each and every one of you to believe you have the potential to achieve this great reward.

“Now is the time to really kick it into high gear and drive for attending this awesome event! Rankings are updated and posted monthly on the DashBoards (under reports) and on WaMu.net: President’s Club Rankings. Where do you rank? What can you do to take your business [to] the next level? Your management team is here to help.”⁵⁴²

At the April 13 Subcommittee hearing, Mr. Schneider testified:

“As housing prices peaked, the economy softened, and credit markets tightened, WaMu adopted increasingly conservative credit policies and moved away from loan products with greater credit risk. ... During my time at WaMu, we reduced and then entirely stopped making Alt A loans and Option ARM loans.”⁵⁴³

However, his November 2006 letter to WaMu loan consultants showed no reticence about the High Risk Lending Strategy. The letter went on to say:

“As you know, growth is a key area of focus for WaMu and Home Loans. I am extremely proud of the achievements in Production so far this year—and I know it’s been tough. I’m especially pleased with your ability to change with the market and responsibly sell more higher-margin products—Option ARM, Home Equity, Non-prime, and Alt A. I also know that you—truly the best sales team in the industry—are up to the challenge of doing even more by year end. ...

“I hope to see you in Kauai!”⁵⁴⁴

The 2005 President’s Club retreat had taken place in Maui. The awards night was hosted by Magic Johnson. An excerpt of the script from the evening gives a sense of the proceedings:

“VOICE-OVER ANNOUNCER

Good evening ladies and gentleman and welcome to your President’s Club 2005 Awards Night program!

Please welcome the host of President’s Club, the President of the Washington Mutual Home Loans Group, Mr. David Schneider!

⁵⁴² 11/2006 “President’s Club - Take the Lead!,” WaMu Home Loans flier, Hearing Exhibit 4/13-62.

⁵⁴³ Prepared statement of David Schneider, April 13, 2010 Subcommittee Hearing.

⁵⁴⁴ 11/2006 “President’s Club - Take the Lead!,” WaMu Home Loans flier, Hearing Exhibit 4/13-62.

WALK-UP MUSIC
FOR DAVID SCHNEIDER

DAVID SCHNEIDER

Thank you ladies and gentlemen, and welcome to this very special Awards Evening.

Wow, could you feel the energy and excitement tonight out on the Red Carpet?! Talk about star power!

And it was great fun to learn so much more about some of you during the interviews ... and at the bar.

But don't worry. I'm told that the age-old tradition here at Washington Mutual is, 'What happens at President's Club stays at President's Club.' And who am I to mess with tradition?

Tonight we are gathered together to pay the highest respects and honors to those who deserve them the most, the President's Club Class of 2005. ...

And of course I want to pay special homage to all of you astonishing returning champions of President's Club. You multiple award-winning superstars clearly lead our entire industry as the standard others can only attempt to match. You folks really do make this feel like the academy awards tonight because everywhere I turn I see another star of another box office sensation."⁵⁴⁵

This 2005 awards ceremony was attended by WaMu loan officers Luis Fragoso and Thomas Ramirez at the same time they were under investigation for fraud. Both were members of the President's Club in 2005 and 2006.

When asked about the sales culture at the bank, Mr. Vanasek testified at the hearing that he tried in vain to counter it. He recalled one occasion at an annual management retreat in 2004, in which the bank was promoting a new advertising slogan called, "The Power of Yes":

"I stood in front of thousands of senior Washington Mutual managers and executives in an annual management retreat in 2004 and countered the senior executive ahead of me on the program who was rallying the troops with the company's advertising line, 'The power of yes.' The implication of that statement was that Washington Mutual would find some way to make a loan. The tag line symbolized the management attitude about mortgage lending more clearly than anything I can tell you.

⁵⁴⁵ 2005 "President's Club 2005 - Maui, Awards Night Show Script," Washington Mutual, Home Loans Group, Hearing Exhibit 4/13-63a.

“Because I believed this sent the wrong message to the loan originators, I felt compelled to counter the prior speaker by saying to the thousands present that the power of yes absolutely needed to be balanced by the wisdom of no. This was highly unusual for a member of the management team to do, especially in such a forum. In fact, it was so far out of the norm for meetings of this type that many considered my statement exceedingly risky from a career perspective.”⁵⁴⁶

The President’s Club annual trip was the pinnacle of WaMu awards to its top producing loan consultants. One loan consultant interviewed by the Subcommittee described it as an incredible experience, with first class airfare, daily gifts, lavish food, and top entertainment for both employees and their spouses.⁵⁴⁷ It was also an opportunity to meet WaMu’s top executives, including Mr. Killinger, Mr. Rotella, and Mr. Schneider. It sent a powerful message about the priority that WaMu placed on loan volume and sales of higher risk loans.

(2) Paying for Speed and Volume

The Long Beach and Washington Mutual compensation systems encouraged high volumes of risky loans but provided little or no incentive to ensure high quality loans that complied with the bank’s credit requirements. WaMu loan officers or their sales associates typically interacted directly with customers interested in obtaining loans. Some also were allowed to accept loans brought to them by third party lenders or mortgage brokers. Long Beach account executives dealt only with third party lenders or mortgage brokers; they did not deal directly with customers. After reaching agreement on a loan, the WaMu or Long Beach loan officers or executives completed the loan application and sent it to a loan processing center where the application was reviewed by an underwriter and, if approved, underwent further processing and brought to a loan closing.

Long Beach and Washington Mutual loan officers received more money per loan for originating higher risk loans and for exceeding established loan targets. Loan processing personnel were compensated according to the speed and number of the loans they processed. Loan officers and their sales associates received still more compensation if they charged borrowers higher interest rates or points than required in bank rate sheets specifying loan prices, or included prepayment penalties in the loan agreements. That added compensation created incentives to increase loan profitability, but not loan quality. A 2008 OTS review elaborated:

“[T]he review defines an origination culture focused more heavily on production volume rather than quality. An example of this was a finding that production personnel were allowed to participate in aspects of the income, employment, or asset verification process, a clear conflict of interest. ... Prior OTS examinations have raised similar issues

⁵⁴⁶ April 13, 2010 Subcommittee Hearing at 16-17.

⁵⁴⁷ Subcommittee interview of Brian Minkow (2/16/2010).

including the need to implement incentive compensation programs to place greater emphasis on loan quality.”⁵⁴⁸

(a) Long Beach Account Executives

Despite the years of internal and external audits that found a lack of internal controls at Long Beach that led to some of the worst rates of loan delinquency in the subprime industry, Long Beach continued to incentivize production volume over sound lending. The Subcommittee obtained a presentation of the Long Beach 2004 Incentive Plan.⁵⁴⁹ The plan outlines four compensation tiers based on volume, creating a system where the largest producers not only make more money by issuing more loans, but rather, as producers climb more of the tiers, they earn a higher rate of commission as well. Tier 1 Long Beach account executives, those who closed 1-6 loans or funded up to \$899,000 in loans per month, received 40 basis points (bps) commission for each broker sourced loan.⁵⁵⁰ Tier 2 Long Beach account executives, those who closed 7-12 loans or funded between \$900,000 and \$2,499,999 in loans per month, received 50 bps commission for each broker sourced loan plus \$30 per loan in additional compensation. Tier 3 Long Beach account executives, those who closed 13-26 loans or funded between \$2,500,000 and \$4,999,999 in loans per month, received 55 bps commission for each broker sourced loan plus \$30 additional per loan. Tier 4 Long Beach account executives, those who closed more than 26 loans or funded more than \$5,000,000 in loans per month, received 60 bps commission for each broker sourced loan.⁵⁵¹

The 2004 Long Beach Incentive Plan also introduced a contingent compensation program called, “Long Term Cash Incentive Program,” which provided bonuses tied to the performance of WaMu stock and could be converted to cash over a three-year period. Top producing Long Beach account executives received the Long Term Cash Incentive bonus calculated as a small percentage of overall volume. Like the tier system, as volume increased so did the percentage used to calculate the bonus. Account executives ranked in the top 25% in volume received a five bps bonus on their total production, account executives in the top 15% received a 7.5 bps bonus, and account executives in the top 5% received a 10 bps bonus. These bonuses could add up to tens of thousands, if not hundreds of thousands of dollars.⁵⁵²

In addition, in 2004, the top 40 Long Beach account executives were rewarded with a trip to the President’s Club. Long Beach used a point system to calculate the top account executives for this purpose. Three points were awarded for each loan unit funded for first mortgages, two

⁵⁴⁸ 6/19/2008 OTS Findings Memorandum, “Loan Fraud Investigation,” JPM_WM02448184, Hearing Exhibit 4/13-25.

⁵⁴⁹ Documents regarding Long Beach compensation, Hearing Exhibit 4/13-59a.

⁵⁵⁰ Id. The “units” referred to in the document are “loans.” Subcommittee interview of Brian Minkow (2/16/2010). By awarding “basis points” the compensation system ensured that the account executives got a percentage of the loan amounts that they successfully issued after receiving loan information from a broker, incentivizing them to maximize the dollar amount of the loans they issued. Some were also paid a per loan fee, incentivizing them to sell as many loans as possible.

⁵⁵¹ Id.

⁵⁵² Id.

points were awarded for each purchase unit funded (as opposed to a refinance), and two points were awarded for each \$100,000 funded. The point system created a competition that focused primarily on volume. The 2004 incentive plan makes no reference to loan quality.⁵⁵³

Long Beach regularly made changes to the compensation plan, but the basic volume incentives remained. In the 2007 incentive plan, which took effect after the collapse of the subprime market, the volume requirements were even greater than 2004 requirements. In 2007, the Tier 1 represented 1-9 qualified loans and up to \$1,499,999 funded; Tier 2 was 10-13 qualified loans and between \$1,500,000 and \$2,399,000 funded; Tier 3 was 14-35 qualified loans and between \$2,400,000 and \$5,999,999 funded; Tier 4 was 36 or more loans and \$6,000,000 or more funded.⁵⁵⁴

(b) WaMu Loan Consultants

Like Long Beach, at WaMu loan officers were compensated for the volume of loans closed and loan processors were compensated for speed of loan closing rather than a more balanced scorecard of timeliness and loan quality. According to the findings and recommendations from an April 2008 internal investigation into allegations of loan fraud at WaMu:

“A design weakness here is that the loan consultants are allowed to communicate minimal loan requirements and obtain various verification documents from the borrower that [are] need[ed] to prove income, employment and assets. Since the loan consultant is also more intimately familiar with our documentation requirements and approval criteria, the temptation to advise the borrower on means and methods to game the system may occur. Our compensation and reward structure is heavily tilted for these employees toward production of closed loans.”⁵⁵⁵

An undated presentation obtained by the Subcommittee entitled, “Home Loans Product Strategy, Strategy and Business Initiatives Update,” outlines WaMu’s 2007 Home Loans Strategy and shows the decisive role that compensation played, while providing still more evidence of WaMu’s efforts to execute its High Risk Lending Strategy:

“2007 Product Strategy

Product strategy designed to drive profitability and growth

-Driving growth in higher margin products (Option ARM, Alt A, Home Equity, Subprime) ...

⁵⁵³ Id.

⁵⁵⁴ Documents regarding Long Beach compensation, Hearing Exhibit 4/13-59b.

⁵⁵⁵ 4/4/2008 WaMu Memorandum of Results, “AIG/UG and OTS Allegation of Loan Frauds Originated by [name redacted],” at 11, Hearing Exhibit 4/13-24.

- Recruit and leverage seasoned Option ARM sales force, refresh existing training including top performer peer guidance

- Maintain a compensation structure that supports the high margin product strategy”⁵⁵⁶

The presentation goes on to explain the Retail Loan Consultant incentive plan: “Incentive Tiers reward high margin products ... such as the Option ARM, Non-Prime referrals and Home Equity Loans WaMu also provides a 15 bps ‘kicker’ for selling 3 year prepayment penalties.”⁵⁵⁷

In order to promote high risk, high margin products, WaMu paid its loan consultants more to sell them. WaMu divided its products into four categories: “W,” “A,” “M,” and “U.” WaMu paid the highest commissions for “W” category products, and in general, commissions decreased through the other categories. “W” products included new Option ARMs, “Non-prime” referrals, and home equity loans. “A” products included Option ARM refinancings, new hybrid ARMs, new Alt A loans, and new fixed rate loans. Like Long Beach, WaMu also created four compensation tiers with increasing commissions based on volume. The tiers were called: “Bronze,” “Silver,” “Gold,” and “Platinum.”⁵⁵⁸ Even in 2007, WaMu’s compensation plan continued to incentivize volume and high risk mortgage products.

In 2007, WaMu also adopted a plan to pay “overages,” essentially a payment to loan officers who managed to sell mortgages to clients with higher rates of interest than the clients qualified for or were called for in WaMu’s daily rate sheets. The plan stated:

“Overages ... [give a] Loan Consultant [the] [a]bility to increase compensation [and] [e]nhance compensation/incentive for Sales Management Major national competitors have a similar plan in place in the market.”⁵⁵⁹

Under the 2007 plan, if a loan officer sold a loan that charged a higher rate of interest than WaMu would have accepted according to its rate sheet, WaMu would split the additional profit with the loan officer.⁵⁶⁰ This compensation practice, often referred to as awarding “yield spread premiums,” has been barred by the Dodd-Frank Act implementing financial reforms.⁵⁶¹

⁵⁵⁶ 2007 WaMu Home Loans Product Strategy, “Strategy and Business Initiatives Update,” JPM_WM03097217, Hearing Exhibit 4/13-60a [emphasis in original].

⁵⁵⁷ Id.

⁵⁵⁸ Id.

⁵⁵⁹ 12/6/2006 WaMu Home Loan Credit Risk F2F, JPM_WM02583396-98, Hearing Exhibit 4/13-60b (The proposal to pay overages, adopted in 2007, increased compensation for loan officers who sold loans with a higher interest rate or more points than required on WaMu’s daily rate sheet.)

⁵⁶⁰ Subcommittee interview of David Schneider (2/17/2010).

⁵⁶¹ Section 1403 of the Dodd-Frank Act (prohibiting “steering incentives”).

(c) Loan Processors and Quality Assurance Controllers

At Long Beach and WaMu, volume incentives were not limited to the sales people. Back office loan processors and quality control personnel were also compensated for volume. While WaMu executives and senior managers told the Subcommittee that quality control was emphasized and considered as part of employee compensation, the back office staff said otherwise.⁵⁶² Diane Kosch worked as a Quality Assurance Controller in a Long Beach Loan Fulfillment Center (LFC) in Dublin, California, east of San Francisco Bay. She told the Subcommittee that the pressure to keep up with the loan volume was enormous. Each month the LFC would set volume goals, measured in dollar value and the number of loans funded. At the end of each month the pressure to meet those goals intensified. Ms. Kosch said that at month's end, she sometimes worked from 6:00 a.m. until midnight reviewing loan files. Monthly rallies were held, and prizes were awarded to the underwriters and loan processors who had funded the most loans.⁵⁶³

Documents obtained by the Subcommittee confirm Ms. Kosch's recollections. A September 2004 email sent to all Dublin LFC employees with the subject line, "Daily Productivity – Dublin," by the area manager uses creative formatting to express enthusiasm:

"Less than 1 week* and we have a long way to go to hit our 440M! including today, we have 4 days of fundings to end the Quarter with a ***bang! With all the new UW changes, we will be swamped next month, ***so don't hold any back!*****

4 days.....it's time for the mad dash to the finish line! ***Who is in the running.....***

Loan Set Up – Phuong is pulling away with another 18 files set up yesterday for 275 MTD! 2nd place is held by **Jean** with 243...can you catch **Phuong**? Get ready Set Up – come October, it's going to get a ***little crazy!***

Underwriting – Michelle did it! She broke the **200 mark** with 4 days left to go! ***Nice job Michelle!*** 2nd place is held by **Andre** with 176 for the month! Way to go **Andre!** Four other UW's had solid performances for the day as well including **Mikhail** with **15!** **Jason** and **Chioke** with 11 and June with 10 – The double digit club!"⁵⁶⁴

⁵⁶² Subcommittee interview of Mark Brown (2/19/2010). Mr. Brown, WaMu National Underwriting Director, told the Subcommittee that incentives for loan processors were based on quality standards and monthly volume.

⁵⁶³ Subcommittee interview of Diane Kosch (2/18/2010).

⁵⁶⁴ 9/2004 Long Beach processing center internal email, Hearing Exhibit 4/13-61. In the email, "UW" stands for Underwriting or Underwriter, and "SLC" stands for Senior Loan Coordinator.

Ms. Kosch told the Subcommittee that from late 2005 until early 2007, loan volume increased and loan quality remained very poor. She said that just about every loan she reviewed was a stated income loan, sloppy, or appeared potentially fraudulent. Yet she was not given the resources or support to properly review each loan. Ms. Kosch said that she was told by a Quality Control manager that she should spend 15 minutes on each file, which she felt was insufficient. Yet, because Quality Assurance Controllers received a bonus on the basis of the number of loans they reviewed, she said some of her colleagues spent only ten minutes on each file.⁵⁶⁵

Ms. Kosch found that often, when she tried to stop the approval of a loan that did not meet quality standards, it would be referred to management and approved anyway. She said good Quality Assurance Controllers were treated like “black sheep,” and hated because they got in the way of volume bonuses. She said certain brokers were identified as “elite,” and the Dublin LFC employees were told to, “take care of them.” Ms. Kosch even suspected some underwriters were getting kickbacks, in part, because of the clothes they wore and cars they drove, which she believed would have been unaffordable to even the top back office employees. She reported her suspicions to her supervisor, but she was not aware of any action taken as a result.

As it turns out, Ms. Kosch’s concerns about fraud were not unfounded. The Daily Productivity email quoted above also lauds the work of a Senior Loan Coordinator (SLC) named John Ngo:

“**SLC** – This one is still tight with **Sandy** holding on to the first place slot! **Sandy** funded 4 more on Friday for a MTD total of 46! 2nd place is **John Ngo** with 4 fundings on Friday and 44 MTD – only 2 back!”

About a year after this email was sent, the FBI began to question Mr. Ngo about a scheme to buy houses in Stockton, California with fake documents and stolen identities. According to court records, the FBI had uncovered documents that showed Mr. Ngo had received more than \$100,000 in payments from a mortgage broker, allegedly bribes to approve bad loans. Mr. Ngo’s estranged wife told the FBI that she didn’t know how he could afford their \$1.4 million home for which he made a down payment of \$350,000. At the time, his salary at Long Beach was \$54,000.⁵⁶⁶

Mr. Ngo later pled guilty to perjury and agreed to testify against his Long Beach sales associate, Joel Blanford. Long Beach paid Mr. Blanford more than \$1 million in commissions each year from 2003-2005. According to the Department of Justice:

“NGO admitted in his plea agreement that most of the payments were to ensure that fraudulent loan applications were processed and funded. NGO also admitted he received payments from Long Beach Mortgage sales representatives to push applications through the funding process. He knew many of these applications

⁵⁶⁵ Subcommittee interview of Diane Kosch (2/18/2010).

⁵⁶⁶ “At Top Subprime Mortgage Lender, Policies Were an Invitation to Fraud,” Huffington Post Investigative Fund (12/21/2009), http://www.huffingtonpost.com/2009/12/21/at-long-beach-mortgage-a_n_399295.html.

were fraudulent, and he and others took steps to ‘fix’ applications by creating false documents or adding false information to the applications or the loan file.”⁵⁶⁷

(3) WaMu Executive Compensation

Questionable compensation practices did not stop in the loan offices, but went all the way to the top of the company. WaMu’s CEO received millions of dollars in pay, even when his high risk loan strategy began unraveling, even when the bank began to falter, and even when he was asked to leave his post. From 2003 to 2007, Mr. Killinger was paid between \$11 million and \$20 million each year in cash, stock, and stock options. In addition, WaMu provided him with four retirement plans, a deferred bonus plan, and a separate deferred compensation plan. In 2008, when he was asked to leave the bank, Mr. Killinger was paid \$25 million, including \$15 million in severance pay. Altogether, from 2003 to 2008, Washington Mutual paid Mr. Killinger nearly \$100 million, on top of multi-million-dollar corporate retirement benefits.⁵⁶⁸

As WaMu began losing billions of dollars due to the declining value of its loans and mortgage backed securities, top management paid significant attention to ensuring that they would be well compensated despite the crisis. In January 2008, Mr. Killinger sent Mr. Rotella an email with the subject “comp,” seeking input on formulating compensation recommendations for the Board of Directors’ Human Resources Committee. The email discussed compensation for WaMu’s top executives. Mr Killinger wrote: “Our current thinking is to recommend that equity grants be in options this year. ... I am considering an additional restricted stock grant which would help a bit on retention and to help offset the low bonus for 2007.”⁵⁶⁹

Mr. Rotella responded that he thought WaMu executives would want more of their bonuses in cash:

“[T]he feeling people will have about this is tied to the level of pain on the cash bonus side Unfortunately more than a few feel that our stock price will not easily recover, that it is highly dependent on housing and credit and they can’t influence that at all. This will come on the heels of what will be a terrible fourth qtr, and likely very poor results in the first half along with continued bad news in the environment. So we will have some people thinking, ‘this is nice but I don’t see the upside in a time frame that works.’ Also, as you know folks feel very burned by the way their paper was tied to performance targets that they now see as unrealistic and tied to housing and have a jaundiced view of paper. ... People want more certainty now with some leverage, not a high dose of leverage with low cash.”⁵⁷⁰

⁵⁶⁷ 6/19/2008 Department of Justice press release, “Federal Authorities Announce Significant Regional Federal Mortgage Fraud Investigations and Prosecutions Coinciding with Nationwide ‘Operation Malicious Mortgage’ Takedown,” <http://sacramento.fbi.gov/dojpressrel/pressrel08/sc061908a.htm>.

⁵⁶⁸ “Washington Mutual CEO Kerry Killinger: \$100 Million in Compensation, 2003-2008,” chart prepared by the Subcommittee, Hearing Exhibit 4/13-1h.

⁵⁶⁹ 1/3/2008 email chain between Kerry Killinger and Steve Rotella, JPM_WM01335818, Hearing Exhibit 4/13-65.

⁵⁷⁰ Id.

Mr. Killinger replied: “In short, the success of the comp program is up to you and me. I think we are putting the right economics and opportunities on the table. But we have to convince our folks that they will all make a lot of money by being with WaMu.”⁵⁷¹

In February 2008, the Human Resources Committee approved a bonus plan for executive officers that tried to shield the executive bonuses from any impact caused by WaMu’s mounting mortgage losses. The Committee established a formula consisting of four weighted performance measures, but took steps to exclude mortgage losses. The first performance measure, for example, set a goal for WaMu’s 2008 net operating profit, but adjusted the profit calculation to exclude: “(i) loan loss provisions other than related to our credit card business and (ii) expenses related to foreclosed real estate assets.”⁵⁷² The second performance measure set a target limiting WaMu’s 2008 noninterest expense, but excluded expenses related to: “(i) business resizing or restructuring and (ii) foreclosed real estate assets.”⁵⁷³

WaMu filed its executive compensation plan with the SEC, as required. The exclusion of mortgage related losses and expenses in the plan attracted notice from shareholders and the press. One March 5, 2008 article entitled, “WaMu Board Shields Executives’ Bonuses,” reported: “The board of Washington Mutual Inc. has set compensation targets for top executives that will exclude some costs tied to mortgage losses and foreclosures when cash bonuses are calculated this year.”⁵⁷⁴ WaMu employees circulated the article through company email.⁵⁷⁵ Investors and analysts raised concerns.

Mr. Killinger sought to respond to the controversy in a way that would placate investors without alienating executives. His solution was to eliminate bonuses for the top five executives, and make cash payments to the other executives, without making that fact public. In July, Mr. Killinger emailed Steve Frank, the Chairman of the Board of Directors, with his proposal:

“We would like to have the HR [Human Resources] committee approve excluding the exec com [Executive Committee] from the 2008 bonus and to approve the cash retention grants to the non NEOs [Named Executive Officers]. This would allow me to respond to questions next week regarding the bonus plan on the analyst call. And it would help calm down some of the EC [Executive Committee] members.”⁵⁷⁶

In other words, WaMu would announce publicly that none of the Executive Committee members would receive bonuses in 2008, while quietly paying “retention grants” rather than “bonuses” to the next tier of executives. Mr. Frank replied, “Sounds OK to me.” Mr. Killinger followed up with the explanation: “We would disclose the exclusion of EC [Executive Committee] members from the bonus plan. There would be no disclosure of the retention cash payments. Option

⁵⁷¹ Id.

⁵⁷² 2/28/2008 email from David Schneider, “FW: 2008 Leadership Bonus,” JPM_WM02446549.

⁵⁷³ Id.

⁵⁷⁴ “WaMu Board Shields Executives’ Bonuses,” Wall Street Journal (3/5/2008), Hearing Exhibit 4/13-67.

⁵⁷⁵ Id.

⁵⁷⁶ 7/16/2008 email from Kerry Killinger, JPM_WM01240144, Hearing Exhibit 4/13-66.

grants would be held off until whenever other comp. actions were done.”⁵⁷⁷ At WaMu’s annual meeting with shareholders, the Board indicated that it had “reversed” the decision to exclude mortgage losses when calculating executive bonuses and made no mention of the cash retention payments planned for some executives.⁵⁷⁸

When WaMu failed, shareholders lost all of their investments. Yet in the waning days of the company, top executives were still well taken care of. On September 8, 2008, Mr. Killinger walked away with \$25 million, including \$15 million in severance pay. His replacement, Allen Fishman, received a \$7.5 million signing bonus for taking over the reins from Mr. Killinger in September 2008.⁵⁷⁹ Eighteen days later, WaMu failed, and Mr. Fishman was out of a job. According to his contract, he was eligible for about \$11 million in severance pay when the bank failed.⁵⁸⁰ It is unclear how much of the severance he received.

G. Preventing High Risk Lending

Washington Mutual was a \$300 billion, 120-year-old financial institution that was destroyed by high risk lending practices. By 2007, stated income loans—loans in which Washington Mutual made no effort to verify the borrower’s income or assets—made up 50% of its subprime loans, 73% of its Option ARMs, and 90% of its home equity loans. Nearly half of its loans were Option ARMs of which 95% of the borrowers were making minimum payments and 84% were negatively amortizing. Numerous loans had loan-to-value ratios of over 80%, and some provided 100% financing. Loans issued by two high volume loan offices in the Los Angeles area were found to have loan fraud rates of 58, 62, and even 83%. Loan officer sales assistants were manufacturing borrower documentation. The bank’s issuance of hundreds of billions of dollars in high risk, poor quality loans not only destroyed confidence in the bank, but also undermined the U.S. financial system.

The consequences of WaMu’s High Risk Lending Strategy and the proliferation of its RMBS structured finance products incorporating high risk, poor quality loans provide critical lessons that need to be learned to protect the U.S. financial system from similar financial disasters. A number of developments over the past two years hold promise in helping to address many of the problems identified in the Washington Mutual case history.

(1) New Developments

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), P.L. 111-203, which the President signed into law on July 21, 2010, contains a number of changes in law that will be implemented over the course of 2011. The Dodd-Frank changes

⁵⁷⁷ 7/16/2008 email from Kerry Killinger, JPM_WM01240144, Hearing Exhibit 4/13-66.

⁵⁷⁸ See, e.g., “Shareholders Score at WaMu,” Bloomberg BusinessWeek (4/15/2008) (“And perhaps most notable: WaMu reversed a much-criticized decision to leave out the company’s mortgage related losses when calculating profits that determine executive bonuses for the year ahead.”).

⁵⁷⁹ “WaMu Creditors could Challenge Payments to Killinger, Others,” Seattle Times (10/1/2008), Hearing Exhibit 4/13-68.

⁵⁸⁰ “WaMu CEO: 3 Weeks Work, \$18M,” CNNMoney.com (9/26/2008).

include banning stated income loans; restricting negative amortization loans; requiring lenders to retain an interest in high risk loan pools that they sell or securitize; prohibiting lenders from steering borrowers to poor quality, high risk loans; and re-evaluating the role of high risk, structured finance products in bank portfolios.

Ban on Stated Income Loans. Multiple witnesses at the Subcommittee’s April 16, 2010 hearing on the role of bank regulators expressed support for banning stated income loans. The FDIC Chairman Sheila Bair testified: “We are opposed to stated income. ... We think you should document income.”⁵⁸¹ When asked for his opinion of stated income loans, the FDIC Inspector General Jon Rymer responded: “I do not think they should be allowed,”⁵⁸² stressing the fraud risk: “I really can see no practical reason from a banker’s perspective or a lender’s perspective to encourage that. ... That is just, to me, an opportunity to essentially encourage fraud.”⁵⁸³ Treasury Inspector General Eric Thorson also criticized stated income loans, explaining: “[T]he problem is, you can’t assess the strength of the borrower and that has got to be at the foundation of underwriting, risk assessment, risk management.”⁵⁸⁴ Even the former head of OTS called stated income loans an “anathema” and expressed regret that OTS had allowed them.⁵⁸⁵

The Dodd-Frank Act essentially bans stated income loans by establishing minimum standards for residential mortgages in Title XIV of the law. Section 1411 establishes a new Section 129C of the Truth in Lending Act (TILA) prohibiting lenders from issuing a residential mortgage without first conducting a “good faith and reasonable” determination, based upon “verified and documented information,” that a borrower has a “reasonable ability to repay the loan” and all applicable taxes, insurance, and assessments. Subsection 129C(a)(4) states the lender “shall verify” the borrower’s income and assets by reviewing the borrower’s W-2 tax form, tax returns, payroll receipts, financial institution records, or “other third-party documents that provide reasonably reliable evidence” of the borrower’s income or assets. In addition, Section 1412 of the Dodd-Frank Act adds a new Subsection 129C(b) to TILA establishing a new category of “qualified mortgages” eligible for more favorable treatment under federal law. It states that, in all “qualified mortgages,” the “income and financial resources” of the borrower must be “verified and documented.”

These statutory requirements, by prohibiting lenders from issuing a residential mortgage without first verifying the borrower’s income and assets, essentially put an end to stated income loans.⁵⁸⁶

⁵⁸¹ April 16, 2010 Subcommittee Hearing at 88.

⁵⁸² *Id.* at 27.

⁵⁸³ *Id.* at 15.

⁵⁸⁴ *Id.* at 15.

⁵⁸⁵ *Id.* at 42, 142.

⁵⁸⁶ The Federal Reserve is charged with issuing regulations to implement Section 1411. Federal Reserve regulations issued in July 2008, under the authority of the Home Ownership and Equity Protection Act (HOEPA) of 1994, which took effect in October 2009, already require lenders issuing certain high cost mortgages to verify a borrower’s ability to repay the loan. 73 Fed. Reg. 147, at 44543 (7/30/2008). Since the Dodd-Frank Act applies to all types of

Restrictions on Negative Amortization Loans. Witnesses at the Subcommittee’s April 16 hearing also criticized WaMu’s heavy reliance on Option ARM loans. These loans provided borrowers with a low initial interest rate, which was followed at a later time by a higher variable rate. Borrowers were generally qualified for the loans by assuming they would pay the lower rather than the higher rate. In addition, borrowers were allowed to select one of four types of monthly payments, including a “minimum payment” that was less than the interest and principal owed on the loan. If the borrower selected the minimum payment, the unpaid interest was added to the unpaid loan principal, which meant that the loan debt could increase rather than decrease over time, resulting in negative amortization.

At the Subcommittee hearing, the FDIC Inspector General Jon Rymer warned that negative amortization loans are “extraordinarily risky” for both borrowers and banks.⁵⁸⁷ The FDIC Chairman Sheila Bair testified:

“We are opposed to teaser rate underwriting. You need to underwrite at the fully indexed rate. You should document the customer’s ability to repay, not just the initial introductory rate, but if it is an adjustable product, when it resets, as well.”⁵⁸⁸

The Dodd-Frank Act does not ban negatively amortizing loans, but does impose new restrictions on them. Section 1411 amends TILA by adding a new Section 129C(6) that requires, for any residential mortgage that allows a borrower “to defer the repayment of any principal or interest,” that the lender vet potential borrowers based upon the borrower’s ability to make monthly loan payments on a fully amortizing schedule—meaning a schedule in which the loan would be fully repaid by the end of the loan period—instead of evaluating the borrower’s ability to make payments at an initial teaser rate or in some amount that is less than the amount required at a fully amortized rate. The law also requires the lender, when qualifying a borrower, to “take into consideration any balance increase that may accrue from any negative amortization provision.” This provision essentially codifies the provisions in the 2006 Nontraditional Mortgage Guidance regarding qualification of borrowers for negatively amortizing loans.

In addition, Section 1414 of the Dodd-Frank Act adds a new Section 129C(c) to TILA prohibiting lenders from issuing a mortgage with negative amortization without providing certain disclosures to the borrower prior to the loan. The lender is required to provide the borrower with an explanation of negative amortization in a manner prescribed by regulation as well as describe its impact, for example, how it can lead to an increase in the loan’s outstanding principal balance. In the case of a first-time home buyer, the lender must also obtain documentation that the home buyer received homeownership counseling from a HUD-certified organization or counselor. Finally, Section 1412 of the Dodd-Frank Act, establishing the new favored category of “qualified mortgages,” states those mortgages cannot negatively amortize.

mortgage loans, the Federal Reserve is expected to issue revised regulations during 2011, expanding the verification requirement to all mortgage loans.

⁵⁸⁷ April 16, 2010 Subcommittee Hearing at 16.

⁵⁸⁸ Id. at 88.

Together, these borrower qualification and disclosure requirements, if well implemented, should reduce, although not eliminate, the issuance of negative amortization mortgages.

Risk Retention. One of the root causes of the financial crisis was the ability of lenders like Washington Mutual to securitize billions of dollars in high risk, poor quality loans, sell the resulting securities to investors, and then walk away from the risky loans it created. At the April 16 Subcommittee hearing, the FDIC Chairman Bair testified:

“[W]e support legislation to require that issuers of mortgage securitizations retain some ‘skin in the game’ to provide added discipline for underwriting quality. In fact, the FDIC Board will consider ... a proposal to require insured banks to retain a portion of the credit risk of any securitizations that they sponsor.”⁵⁸⁹

Section 941(b) of the Dodd-Frank Act adds a new section 15G to the Securities Exchange Act of 1934 to require the federal banking agencies, SEC, Department of Housing and Urban Development, and Federal Housing Finance Agency jointly to prescribe regulations to “require any securitizer to retain an economic interest in a portion of the credit risk for any residential mortgage asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party.”⁵⁹⁰ The retained economic interest must be “not less than 5 percent of the credit risk” of the assets backing the security, with an exception made for “qualified residential mortgages,” to be further defined by the regulators. The regulators issued a proposed rule early in 2011, which is currently the subject of a public comment period.

In the meantime, the FDIC has issued a new regulation, effective September 30, 2010, that imposes a range of disclosure, risk retention, and other obligations on all insured banks that issue asset backed securitizations.⁵⁹¹ One of the provisions imposes a 5% risk retention requirement on all asset backed securitizations issued by an insured bank, whether backed by mortgages or other assets. The provision states that the bank sponsoring the securitization must:

“retain an economic interest in a material portion, defined as not less than five (5) percent, of the credit risk of the financial assets. This retained interest may be either in the form of an interest of not less than five (5) percent in each of the credit tranches sold or transferred to the investors or in a representative sample of the securitized financial assets equal to not less than five (5) percent of the principal amount of the financial assets at transfer. This retained interest may not be sold or pledged or hedged, except for the hedging of interest rate or currency risk, during the term of the securitization.”⁵⁹²

The provision also states that this risk retention requirement applies only until the “effective

⁵⁸⁹ Id. at 81.

⁵⁹⁰ Section 941(b) also imposes risk retention requirements on other types of asset backed securities and collateralized debt obligations.

⁵⁹¹ 12 CFR § 360.6.

⁵⁹² 12 CFR § 360.6(b)(5)(i).

date” of the regulations to be issued under Section 941 of the Dodd-Frank Act.

The FDIC risk retention requirement, followed by the risk retention requirement to be developed under the Dodd-Frank Act, should, if well implemented, end the ability of banks to magnify risk through issuing asset backed securities and then walking away from that risk. Instead, banks will be required to keep “skin in the game” until each securitization concludes.

Ban on Steering. The Washington Mutual case history also exposed another problem: compensation incentives that encouraged loan officers and mortgage brokers to steer borrowers to higher risk loans. Compensation incentives called “overages” at WaMu and “yield spread premiums” at other financial institutions also encouraged loan officers and mortgage brokers to charge borrowers higher interest rates and points than the bank would accept, so that the loan officer or mortgage banker could split the extra money taken from the borrower with the bank.

To ban these compensation incentives, Section 1403 of the Dodd-Frank Act creates a new Section 129B(c) in TILA prohibiting the payment of any steering incentives, including yield spread premiums. It states: “no mortgage originator shall receive from any person and no person shall pay to a mortgage originator, directly or indirectly, compensation that varies based on the terms of loan (other than the amount of the principal).” It also states explicitly that no provision of the section should be construed as “permitting any yield spread premium or other similar compensation.” In addition, it directs the Federal Reserve to issue regulations to prohibit a range of abusive and unfair mortgage related practices, including prohibiting lenders and brokers from steering borrowers to mortgages for which they lack a reasonable ability to repay.

The Dodd-Frank provisions were enacted into law shortly before the Federal Reserve, in September 2010, promulgated new regulations prohibiting a number of unfair or abusive lending practices, including certain payments to mortgage originators.⁵⁹³ In its notice, the Federal Reserve noted that its new regulations prohibit many of the same practices banned in Section 1403 of the Dodd Frank Act, but that it will fully implement the new Dodd-Frank measures in a future rulemaking.⁵⁹⁴

High Risk Loans. Still another problem exposed by the Washington Mutual case history is the fact that, in the years leading up to the financial crisis, many U.S. insured banks held highly risky loans and securities in their investment and sale portfolios. When those loans and securities lost value in 2007, many banks had to declare multi-billion-dollar losses that triggered shareholder flight and liquidity runs.

Section 620 of the Dodd-Frank Act requires the federal banking regulators, within 18 months, to prepare a report identifying the activities and investments that insured banks and their affiliates are allowed to engage in under federal and state law, regulation, order, and guidance, and analyzing the risks associated with those activities and investments. The federal banking agencies are also asked to make recommendations on whether each allowed activity or

⁵⁹³ 75 Fed. Reg. 185 (9/24/2010).

⁵⁹⁴ Id. at 58509.

investment is appropriate, could negatively affect the safety and soundness of the banking entity or the U.S. financial system, and should be restricted to reduce risk.

(2) Recommendations

To further strengthen standards and controls needed to prevent high risk lending and safeguard the Deposit Insurance Fund, this Report makes the following recommendations.

- 1. Ensure “Qualified Mortgages” Are Low Risk.** Federal regulators should use their regulatory authority to ensure that all mortgages deemed to be “qualified residential mortgages” have a low risk of delinquency or default.
- 2. Require Meaningful Risk Retention.** Federal regulators should issue a strong risk retention requirement under Section 941 by requiring the retention of not less than a 5% credit risk in each, or a representative sample of, an asset backed securitization’s tranches, and by barring a hedging offset for a reasonable but limited period of time.
- 3. Safeguard Against High Risk Products.** Federal banking regulators should safeguard taxpayer dollars by requiring banks with high risk structured finance products, including complex products with little or no reliable performance data, to meet conservative loss reserve, liquidity, and capital requirements.
- 4. Require Greater Reserves for Negative Amortization Loans.** Federal banking regulators should use their regulatory authority to require banks issuing negatively amortizing loans that allow borrowers to defer payments of interest and principal, to maintain more conservative loss, liquidity, and capital reserves.
- 5. Safeguard Bank Investment Portfolios.** Federal banking regulators should use the Section 620 banking activities study to identify high risk structured finance products and impose a reasonable limit on the amount of such high risk products that can be included in a bank’s investment portfolio.

IV. REGULATORY FAILURE: CASE STUDY OF THE OFFICE OF THRIFT SUPERVISION

Washington Mutual Bank (WaMu), with more than \$300 billion in assets, \$188 billion in deposits, over 2,300 branches in 15 states, and 43,000 employees, was by late 2008 the largest thrift under the supervision of the Office of Thrift Supervision (OTS) and among the eight largest financial institutions insured by the Federal Deposit Insurance Corporation (FDIC). The bank's collapse in September 2008 came on the heels of the Lehman Brothers bankruptcy filing, accelerating the unraveling of the financial markets. WaMu's collapse also marked one of the most spectacular failures of federal bank regulators in recent history.

In 2007, many of WaMu's home loans, especially those with the highest risk profile, began experiencing increased rates of delinquency, default, and loss. After the subprime mortgage backed securities market collapsed in September 2007, Washington Mutual was unable to sell or securitize subprime loans and its loan portfolio began falling in value. By the fourth quarter of 2007, the bank recorded a loss of \$1 billion, and then in the first half of 2008, WaMu lost \$4.2 billion more. WaMu's stock price plummeted against the backdrop of these losses and a worsening financial crisis elsewhere on Wall Street, which was witnessing the forced sales of Countrywide Financial Corporation and Bear Stearns, the government takeover of IndyMac, Fannie Mae and Freddie Mac, the bankruptcy of Lehman Brothers, the taxpayer bailout of AIG, and the conversion of Goldman Sachs and Morgan Stanley into bank holding companies. From 2007 to 2008, WaMu's depositors withdrew a total of over \$26 billion in deposits from the bank, triggering a liquidity crisis. On September 25, 2008, OTS placed Washington Mutual Bank into receivership, and the FDIC, as receiver, immediately sold it to JPMorgan Chase for \$1.9 billion. Had the sale not gone through, Washington Mutual's failure could have exhausted the FDIC's entire \$45 billion Deposit Insurance Fund.

OTS records show that, during the five years prior to its collapse, OTS examiners repeatedly identified significant problems with Washington Mutual's lending practices, risk management, and asset quality, and requested corrective action. Year after year, WaMu promised to correct the identified problems, but failed to do so. OTS, in turn, failed to respond with meaningful enforcement action, choosing instead to continue giving the bank inflated ratings for safety and soundness. Until shortly before the thrift's failure in 2008, OTS regularly gave WaMu a CAMELS rating of "2" out of "5," which signaled to the bank and other regulators that WaMu was fundamentally sound.

Federal bank regulators are charged with ensuring that U.S. financial institutions operate in a safe and sound manner. However, in the years leading up to the financial crisis, OTS failed to prevent Washington Mutual's increasing use of high risk lending practices and its origination and sale of tens of billions of dollars in poor quality home loans. The agency's failure to adequately monitor and regulate WaMu's high risk lending stemmed in part from an OTS regulatory culture that viewed its thrifts as "constituents," relied on them to correct the problems identified by OTS with minimal regulatory intervention, and expressed reluctance to interfere with even unsound lending and securitization practices. OTS displayed an unusual amount of

deference to WaMu's management, choosing to rely on the bank to police itself. The reasoning appeared to be that if OTS examiners simply identified the problems at the bank, OTS could then rely on WaMu's assurances that problems were corrected, with little need for tough enforcement actions. It was a regulatory approach with disastrous results.

Over the five-year period reviewed by the Subcommittee, OTS examiners identified over 500 serious deficiencies in WaMu operations. Yet OTS did not once, from 2004 to 2008, take a public enforcement action against Washington Mutual, even when the bank failed to correct major problems. Only in late 2008, as the bank incurred mounting losses, did OTS finally take two informal, nonpublic enforcement actions, requiring WaMu to agree to a Board Resolution in March and a Memorandum of Understanding in September, but neither action was sufficient to prevent the bank's failure. OTS officials resisted calls by the FDIC, the bank's backup regulator, for stronger measures and even impeded FDIC oversight efforts at the bank. Hindered by a culture of deference to management, demoralized examiners, and agency infighting, OTS officials allowed the bank's short term profits to excuse its risky practices and failed to evaluate the bank's actions in the context of the U.S. financial system as a whole.

OTS not only failed to prevent Washington Mutual from engaging in unsafe and unsound lending practices, it gave its tacit approval and allowed high risk loans to proliferate. As long as Washington Mutual was able to sell off its risky loans, neither OTS nor the FDIC expressed concerns about the impact of those loans elsewhere. By not sounding the alarm, OTS and the FDIC enabled WaMu to construct a multi-billion-dollar investment portfolio of high risk mortgage assets, and also permitted WaMu to sell hundreds of billions of dollars in high risk, poor quality loans and securities to other financial institutions and investors in the United States and around the world. Similar regulatory failings by OTS, the FDIC, and other agencies involving other lenders repeated these problems on a broad scale. The result was a mortgage market saturated with risky loans, and financial institutions that were supposed to hold predominantly safe investments but instead held portfolios rife with high risk, poor quality mortgages. When those loans began defaulting in record numbers and mortgage related securities plummeted in value, financial institutions around the globe suffered hundreds of billions of dollars in losses, triggering an economic disaster. The regulatory failures that set the stage for these losses were a proximate cause of the financial crisis.

A. Subcommittee Investigation and Findings of Fact

To analyze regulatory oversight of Washington Mutual, the Subcommittee subpoenaed documents from OTS, the FDIC, and WaMu, including bank examination reports, legal pleadings, reports, internal memoranda, correspondence, and email. The Subcommittee also conducted over two dozen interviews with OTS, FDIC, and WaMu personnel, including the FDIC Chairman, OTS Director, OTS and the FDIC senior examiners assigned to Washington Mutual, and senior WaMu executives. The Subcommittee also spoke with personnel from the Offices of the Inspector General (IG) at the FDIC and the Department of Treasury, who were engaged in a joint review of WaMu's failure. In addition, the Subcommittee spoke with nearly a dozen experts on a variety of banking, accounting, regulatory, and legal issues. On April 16, 2010, the Subcommittee held a hearing at which OTS, the FDIC, and IG officials provided

testimony; released 92 hearing exhibits; and released the FDIC and Treasury IGs' joint report on Washington Mutual.⁵⁹⁵

In connection with the hearing, the Subcommittee released a joint memorandum from Chairman Levin and Ranking Member Coburn summarizing the investigation to date into the role of the regulators overseeing WaMu. That memorandum stated:

“Federal bank regulators are supposed to ensure the safety and soundness of individual U.S. financial institutions and, by extension, the U.S. banking system. Washington Mutual was just one of many financial institutions that federal banking regulators allowed to engage in such high risk home loan lending practices that they resulted in bank failure and damage to financial markets. The ineffective role of bank regulators was a major contributor to the 2008 financial crisis that continues to afflict the U.S. and world economy today.”

On March 16, 2011, the FDIC sued the three top former executives of Washington Mutual for pursuing a high risk lending strategy without sufficient risk management practices and despite their knowledge of a weakening housing market.⁵⁹⁶ The FDIC complaint states:

“Chief Executive Officer Kerry K. Killinger (“Killinger”), Chief Operating Officer Stephen J. Rotella (“Rotella”), and Home Loans President David C. Schneider (“Schneider”) caused Washington Mutual Bank (“WaMu” or “the Bank”) to take extreme and historically unprecedented risks with WaMu’s held-for-investment home loans portfolio. They focused on short term gains to increase their own compensation, with reckless disregard for WaMu’s longer term safety and soundness. Their negligence, gross negligence and breaches of fiduciary duty caused WaMu to lose billions of dollars. The FDIC brings this Complaint to hold these three highly paid senior executives, who were chiefly responsible for WaMu’s higher risk home lending program, accountable for the resulting losses.”

⁵⁹⁵ See “Wall Street and the Financial Crisis: Role of the Regulators,” before the U.S. Senate Permanent Subcommittee on Investigations, S.Hrg. 111-672 (April 16, 2010) (hereinafter “April 16, 2010 Subcommittee Hearing”).

⁵⁹⁶ The Federal Deposit Insurance Corporation v. Kerry K. Killinger, Stephen J. Rotella, David C. Schneider, et al., Case No. 2:11-CV-00459 (W.D. Wash.), Complaint (March 16, 2011), at <http://graphics8.nytimes.com/packages/pdf/business/conformedcomplaint.pdf> (hereinafter “FDIC Complaint Against WaMu Executives”).

The Levin-Coburn memorandum contained joint findings of fact regarding the role of federal regulators in the Washington Mutual case history. Those findings of fact, which this Report reaffirms, are as follows.

- 1. Largest U.S. Bank Failure.** From 2003 to 2008, OTS repeatedly identified significant problems with Washington Mutual's lending practices, risk management, and asset quality, but failed to force adequate corrective action, resulting in the largest bank failure in U.S. history.
- 2. Shoddy Lending and Securitization Practices.** OTS allowed Washington Mutual and its affiliate Long Beach Mortgage Company to engage year after year in shoddy lending and securitization practices, failing to take enforcement action to stop its origination and sale of loans with fraudulent borrower information, appraisal problems, errors, and notoriously high rates of delinquency and loss.
- 3. Unsafe Option ARM Loans.** OTS allowed Washington Mutual to originate hundreds of billions of dollars in high risk Option Adjustable Rate Mortgages, knowing that the bank used unsafe and unsound teaser rates, qualified borrowers using unrealistically low loan payments, permitted borrowers to make minimum payments resulting in negatively amortizing loans (*i.e.*, loans with increasing principal), relied on rising house prices and refinancing to avoid payment shock and loan defaults, and had no realistic data to calculate loan losses in markets with flat or declining house prices.
- 4. Short Term Profits Over Long Term Fundamentals.** OTS abdicated its responsibility to ensure the long term safety and soundness of Washington Mutual by concluding that short term profits obtained by the bank precluded enforcement action to stop the bank's use of shoddy lending and securitization practices and unsafe and unsound loans.
- 5. Impeding FDIC Oversight.** OTS impeded FDIC oversight of Washington Mutual by blocking its access to bank data, refusing to allow it to participate in bank examinations, rejecting requests to review bank loan files, and resisting the FDIC recommendations for stronger enforcement action.
- 6. FDIC Shortfalls.** The FDIC, the backup regulator of Washington Mutual, was unable to conduct the analysis it wanted to evaluate the risk posed by the bank to the Deposit Insurance Fund, did not prevail against unreasonable actions taken by OTS to limit its examination authority, and did not initiate its own enforcement action against the bank in light of ongoing opposition by the primary federal bank regulators to FDIC enforcement authority.
- 7. Recommendations Over Enforceable Requirements.** Federal bank regulators undermined efforts to end unsafe and unsound mortgage practices at U.S. banks by issuing guidance instead of enforceable regulations limiting those practices, failing to

prohibit many high risk mortgage practices, and failing to set clear deadlines for bank compliance.

- 8. Failure to Recognize Systemic Risk.** OTS and the FDIC allowed Washington Mutual and Long Beach to reduce their own risk by selling hundreds of billions of dollars of high risk mortgage backed securities that polluted the financial system with poorly performing loans, undermined investor confidence in the secondary mortgage market, and contributed to massive credit rating downgrades, investor losses, disrupted markets, and the U.S. financial crisis.
- 9. Ineffective and Demoralized Regulatory Culture.** The Washington Mutual case history exposes the regulatory culture at OTS in which bank examiners are frustrated and demoralized by their inability to stop unsafe and unsound practices, in which their supervisors are reluctant to use formal enforcement actions even after years of serious bank deficiencies, and in which regulators treat the banks they oversee as constituents rather than arms-length regulated entities.

B. Background

At the time of its collapse, Washington Mutual Savings Bank was a federally chartered thrift with over \$188 billion in federal insured deposits. Its primary federal regulator was OTS. Due to its status as an insured depository institution, it was also overseen by the FDIC.

(1) Office of Thrift Supervision

The Office of Thrift Supervision was created in 1989, in response to the savings and loan crisis, to charter and regulate the thrift industry.⁵⁹⁷ Thrifts are required by their charters to hold most of their assets in mortgage lending, and have traditionally focused on the issuance of home loans.⁵⁹⁸ OTS was part of the U.S. Department of the Treasury and headed by a presidentially appointed director. Like other bank regulators, OTS was charged with ensuring the safety and soundness of the financial institutions it oversaw. Its operations were funded through semiannual fees assessed on the institutions it regulated, with the fee amount based on the size, condition, and complexity of each institution's portfolio. Washington Mutual was the largest thrift overseen by OTS and, from 2003 to 2008, paid at least \$30 million in fees annually to the agency, which comprised 12-15% of all OTS revenue.⁵⁹⁹

⁵⁹⁷ Twenty years after its establishment, OTS was abolished by the Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203, (Dodd-Frank Act) which has transferred the agency's responsibilities to the Office of the Comptroller of the Currency (OCC), and directed the agency to cease all operations by 2012. This Report focuses on OTS during the time period 2004 through 2008.

⁵⁹⁸ 6/19/2002 OTS Regulatory Bulletin, "Thrift Activities Regulatory Handbook Update" (some educational loans, SBLs, and credit card loans also count towards qualifying as a thrift), <http://files.ots.treas.gov/74081.pdf>.

⁵⁹⁹ See April 16, 2010 Subcommittee Hearing at 11 (testimony of Treasury IG Eric Thorson).

In 2009, OTS oversaw about 765 thrift-chartered institutions.⁶⁰⁰ OTS supervised its thrifts through four regional offices, each led by a Regional Director, Deputy Director, and Assistant Director. Regional offices assigned an Examiner-in-Charge to each thrift in its jurisdiction, along with other supporting examination personnel. Approximately three-quarters of the OTS workforce reported to its four regional offices, while the remaining quarter worked at OTS headquarters in Washington, D.C. Washington Mutual, whose headquarters were located in Seattle, was supervised by the Western Region Office which, through the end of 2008, was based in Daly City, California.

During the years reviewed by the Subcommittee, the OTS Executive Director was John Reich; the Deputy Director was Scott Polakoff; the Western Region Office Director was Michael Finn and later Darrel Dochow; and the Examiners-in-Charge at WaMu were Lawrence Carter and later Benjamin Franklin.

(2) Federal Deposit Insurance Corporation

WaMu's secondary federal regulator was the FDIC. The FDIC's mission is to maintain stability and public confidence in the nation's financial system by insuring deposits, examining and supervising financial institutions for safety and soundness and consumer protection, and managing failed institutions placed into receivership.⁶⁰¹ The FDIC administers the Deposit Insurance Fund, which is the primary mechanism used to protect covered deposits at U.S. financial institutions from loss. The Deposit Insurance Fund is financed through fees assessed on the insured institutions, with assessments based on the amount of deposits requiring insurance, the amount of assets at each institution, and the degree of risk posed by each institution to the insurance fund.

To minimize withdrawals from the Deposit Insurance Fund, the FDIC is assigned backup supervisory authority over approximately 3,000 federally insured depository institutions whose primary regulators are the Federal Reserve, OCC, and, until recently, OTS. Among other measures, the FDIC is authorized to conduct a "special examination" of any insured institution "to determine the condition of such depository institution for insurance purposes."⁶⁰² To facilitate and coordinate its oversight obligations with those of the primary bank regulators and ensure it is able to protect the Deposit Insurance Fund, the FDIC has entered into an inter-agency agreement with the primary bank regulators.⁶⁰³ The 2002 version of that agreement, which was in effect until 2010, stated that the FDIC was authorized to request to participate in examinations of large institutions or higher risk financial institutions, recommend enforcement actions to be taken by the primary regulator, and if the primary regulator failed to act, take its own enforcement action with respect to an insured institution.

⁶⁰⁰ 2009 OTS Annual Report, "Agency Profile," http://www.ots.treas.gov/_files/482096.pdf.

⁶⁰¹ See "FDIC Mission, Vision, and Values," <http://www.fdic.gov/about/mission/index.html>.

⁶⁰² 12 U.S.C. § 1820(b)(3).

⁶⁰³ The interagency agreement is entitled, "Coordination of Expanded Supervisory Information Sharing and Special Examinations." During the time period of the Subcommittee's investigation, the 2002 version of the interagency agreement, signed by the FDIC, Federal Reserve, OCC, and OTS, was in effect. In July 2010, the federal financial regulators agreed to adopt a stronger version, discussed later in this Report.

For the eight largest insured institutions at the time, the FDIC assigned at least one Dedicated Examiner to work on-site at the institution. The examiner's obligation is to evaluate the institution's risk to the Deposit Insurance Fund and work with the primary regulator to lower that risk. During the period covered by this Report, Washington Mutual was one of the eight and had an FDIC-assigned Dedicated Examiner who worked with OTS examiners to oversee the bank.

During the years examined by the Subcommittee, the FDIC Chairman was Sheila Bair; the Acting Deputy Director for the FDIC's Division of Supervision and Consumer Protection's Complex Financial Institution Branch was John Corston; in the San Francisco Region, the Director was John Carter and later Stan Ivie, and the Assistant Director was George Doerr. At WaMu, the FDIC's Dedicated Examiner was Stephen Funaro.

(3) Examination Process

The stated mission of OTS was "[t]o supervise savings associations and their holding companies in order to maintain their safety and soundness and compliance with consumer laws, and to encourage a competitive industry that meets America's financial services needs." The OTS Examination Handbook required "[p]roactive regulatory supervision" with a focus on evaluation of "future needs and potential risks to ensure the success of the thrift system in the long term."⁶⁰⁴ OTS, like other bank regulators, had special access to the financial information of the thrifts under its regulation, which was otherwise kept confidential from the market and other parties.

To carry out its mission, OTS traditionally conducted an examination of each of the thrifts within its jurisdiction every 12 to 18 months and provided the results in a Report of Examination ("ROE"). In 2006, OTS initiated a "continuous exam" program for its largest thrifts, requiring its examiners to conduct a series of specialized examinations during the year with the results from all of those examinations included in an annual ROE. The Examiner-in-Charge led the examination activities which were organized around the CAMELS rating system used by all federal bank regulators. The CAMELS rating system evaluates a bank's: (C) capital adequacy, (A) asset quality, (M) management, (E) earnings, (L) liquidity, and (S) sensitivity to market risk. A CAMELS rating of 1 is the best rating, while 5 is the worst. In the annual ROE, OTS provided its thrifts with an evaluation and rating for each CAMELS component, as well as an overall composite rating on the bank's safety and soundness.⁶⁰⁵

At Washington Mutual, OTS examiners conducted both on-site and off-site activities to review bank operations, and maintained frequent communication with bank management through emails, telephone conferences, and meetings. During certain periods of the year, OTS examiners

⁶⁰⁴ 2004 OTS Examination Handbook, Section 010.2, OTSWMEF-0000031969, Hearing Exhibit 4/16-2.

⁶⁰⁵ A 1 composite rating in the CAMELS system means "sound in every respect"; a 2 rating means "fundamentally sound"; a 3 rating means "exhibits some degree of supervisory concern in one or more of the component areas"; a 4 rating means "generally exhibits unsafe and unsound practices or conditions"; and a 5 rating means "exhibits extremely unsafe and unsound practices or conditions" and is of "greatest supervisory concern." See chart in the prepared statement of Treasury IG Eric Thorson at 7, reprinted in April 16, 2010 Subcommittee Hearing at 107.

had temporary offices at Washington Mutual for accessing bank information, collecting data from bank employees, performing analyses, and conducting other exam activities. Washington Mutual formed a Regulatory Relations office charged with overseeing its interactions and managing its relationships with personnel at OTS, the FDIC, and other regulators.

During the year, OTS examiners issued “findings memoranda,” which set forth particular examination findings, and required a written response and corrective action plan from WaMu management. The memoranda contained three types of findings. The least severe was an “observation,” defined as a “weakness identified that is not of regulatory concern, but which may improve the bank’s operating effectiveness if addressed. ... Observations may or may not be reviewed during subsequent examinations.” The next level of finding was a “recommendation,” defined as a “secondary concern requiring corrective action. ... They may be included in the Report of Examination ... Management’s actions to address Recommendations are reviewed at subsequent or follow-up examinations.” The most severe type of finding was a “criticism,” defined as a “primary concern requiring corrective action ... often summarized in the ‘Matters Requiring Board Attention’ ... section of the Report of Examination. ... They are subject to formal follow-up by examiners and, if left uncorrected, may result in stronger action.”⁶⁰⁶

The most serious OTS examination findings were elevated to Washington Mutual Bank’s Board of Directors by designating them as a “Matter Requiring Board Attention” (MRBA). MRBAs were set forth in the ROE and presented to the Board in an annual meeting attended by OTS and FDIC personnel. Washington Mutual tracked OTS findings, along with its own responses, through an internal system called Enterprise Risk Issue Control System (ERICS). ERICS was intended to help WaMu manage its relationship with its regulators by storing the regulators’ findings in one central location. In one of its more unusual discoveries, the Subcommittee learned that OTS also came to rely largely on ERICS to track its dealings with WaMu. OTS’ reliance on WaMu’s tracking system was a unique departure from its usual practice of separately tracking the status of its past examination findings and a bank’s responses.⁶⁰⁷

The FDIC also participated in the examinations of Washington Mutual. Because WaMu was one of the eight largest insured banks in the country, the FDIC assigned a full-time Dedicated Examiner to oversee its operations. Typically, the FDIC examiners worked with the primary regulator and participated in or relied upon the examinations scheduled by that regulator, rather than initiating separate FDIC examinations. At least once per year, the FDIC examiner performed an evaluation of the institution’s risk to the Deposit Insurance Fund, typically relying primarily on the annual Report on Examination (ROE) issued by the primary regulator and the ROE’s individual and composite CAMELS ratings for the institution. After reviewing the ROE as well as other examination and financial information, the FDIC examiner reviewed the CAMELS ratings for WaMu to ensure they were appropriate.

⁶⁰⁶ Descriptions of these terms appeared in OTS findings memoranda. See, e.g., 6/19/2008 OTS Findings Memorandum of Washington Mutual Bank, at Bisset_John-00046124_002, Hearing Exhibit 4/16-12a.

⁶⁰⁷ See April 16, 2010 Subcommittee Hearing at 21 (information supplied by Treasury IG Thorson for the record).

In addition, for institutions with assets of \$10 billion or more, the FDIC had established a Large Insured Depository Institutions (“LIDI”) Program to assess and report on emerging risks that may pose a threat to the Deposit Insurance Fund. Under that program, the FDIC Dedicated Examiner and other FDIC regional case managers performed ongoing analysis of emerging risks within each covered institution and assigned it a quarterly risk rating, using a scale of A to E, with A being the best rating and E the worst. In addition, senior FDIC analysts within the Complex Financial Institutions Branch analyzed specific bank risks and developed supervisory strategies. If the FDIC viewed an institution as imposing an increasing risk to the Deposit Insurance Fund, it could perform one or more “special examinations” to take a closer look.

C. Washington Mutual Examination History

For the five-year period, from 2004 to 2008, OTS repeatedly identified significant problems with Washington Mutual’s lending practices, risk management, appraisal procedures, and issued securities, and requested corrective action. WaMu promised to correct the identified deficiencies, but failed to do so. OTS failed, in turn, to take enforcement action to ensure the corrections were made, until the bank began losing billions of dollars. OTS also resisted and at times impeded FDIC examination efforts at Washington Mutual.

(1) Regulatory Challenges Related to Washington Mutual

Washington Mutual was a larger and more complex financial institution than any other thrift overseen by OTS, and presented numerous regulatory challenges. By 2007, Washington Mutual had over \$300 billion in assets, 43,000 employees, and over 2,300 branches in 15 states, including a securitization office on Wall Street, a massive loan portfolio, and several lines of business, including home loans, credit cards, and commercial real estate.

Integration Issues. During the 1990s, as described in the prior chapter, WaMu embarked upon a strategy of growth through acquisition of smaller institutions, and over time became one of the largest mortgage lenders in the United States. One consequence of its acquisition strategy was that WaMu struggled with the logistical and managerial challenges of integrating a variety of lending platforms, information technology systems, staff, and policies into one system.

OTS was concerned about and critical of WaMu’s integration efforts. In a 2004 Report on Examination (ROE), OTS wrote:

“Our review disclosed that past rapid growth through acquisition and unprecedented mortgage refinance activity placed significant operational strain on [Washington Mutual] during the early part of the review period. Beginning in the second half of 2003, market conditions deteriorated, and the failure of [Washington Mutual] to fully integrate past mortgage banking acquisitions, address operational issues, and realize expectations from

certain major IT initiatives exposed the institution's infrastructure weaknesses and began to negatively impact operating results."⁶⁰⁸

Long Beach. One of WaMu's acquisitions, in 1999, was Long Beach Mortgage Company (Long Beach), a subprime lender that became a source of significant management, asset quality, and risk problems. Long Beach's headquarters were located in Long Beach, California, but as a subsidiary of Washington Mutual Inc., the parent holding company of Washington Mutual Bank, it was subject to regulation by the State of Washington Department of Financial Institutions and the FDIC. Long Beach's business model was to purchase subprime loans from third party mortgage brokers and lenders and then sell or securitize the loans for sale to investors.

For the first seven years, from 1999 to 2006, OTS had no direct jurisdiction over Long Beach, since it was a subsidiary of WaMu's parent holding company, but not a subsidiary of the bank itself. OTS was limited to reviewing Long Beach indirectly by examining its effect on the holding company and WaMu. In late 2003, OTS examiners took greater notice of Long Beach after WaMu's legal department halted Long Beach's securitizations while it helped the company strengthen its internal controls. As many as 4,000 Long Beach loans were of such poor quality that three quarters of them could not be sold to investors. In 2005, Long Beach experienced a surge in early payment defaults, was forced to repurchase a significant number of loans, lost over \$107 million, and overwhelmed its loss reserves. Washington Mutual requested permission to make Long Beach a division of the bank, so that it could assert greater control over Long Beach's operations, and in March 2006, OTS approved the purchase with conditions. In 2006, Long Beach experienced another surge of early payment defaults and was forced to repurchase additional loans. When Long Beach loans continued to have problems in 2007, Washington Mutual eliminated Long Beach as a separate operation and rebranded it as a Washington Mutual "Wholesale Specialty Lending" division. In August 2007, after the collapse of the subprime secondary market, WaMu stopped offering subprime loans and discontinued the last vestiges of the Long Beach operation.

High Risk Lending. In 2004, Washington Mutual shifted its strategy toward the issuance and purchase of higher risk home loans. OTS took note of the strategic shift in WaMu's 2004 ROE:

"Management provided us with a copy of the framework for WMI's 5-year (2005-2009) strategic plan [which] contemplates asset growth of at least 10% a year, with assets increasing to near \$500 billion by 2009."⁶⁰⁹

⁶⁰⁸ See 3/15/2004 OTS Report of Examination, at OTSWMS04-0000001482, Hearing Exhibit 4/16-94 [Sealed Exhibit]. See also, e.g., 12/17/2004 email exchange among WaMu executives, "Risks/Costs to Moving GSE Share to FH," JPM_WM05501400, Hearing Exhibit 4/16-88 (noting that Fannie Mae "is well aware of our data integrity issues (miscoding which results in misdeliveries, expensive and time consuming data reconciliations), and has been exceedingly patient.").

⁶⁰⁹ See 3/15/2004 OTS Report of Examination, at OTSWMS04-0000001509, Hearing Exhibit 4/16-94 [Sealed Exhibit].

OTS recommended, and the bank agreed, to spell out its new lending strategy in a written document that had to be approved by the WaMu Board of Directors.⁶¹⁰

The result was the bank's January 2005 High Risk Lending Strategy, discussed in the prior chapter, in which WaMu management obtained the approval of its Board to shift its focus from originating lower risk fixed rate and government backed loans to higher risk subprime, home equity, and Option ARM loans.⁶¹¹ The High Risk Lending Strategy also outlined WaMu's plans to increase its issuance of higher risk loans to borrowers with a higher risk profile. The purpose of the shift was to maximize profits by originating loans with the highest profit margins, which were usually the highest risk loans. According to actual loan data analyzed by WaMu, higher risk loans, such as subprime, Option ARM, and home equity loans, produced a higher "gain on sale" or profit for the bank compared to lower risk loans. For example, a presentation supporting the High Risk Lending Strategy indicated that selling subprime loans garnered more than eight times the gain on sale as government backed loans.⁶¹²

The WaMu submission to the Board noted that, in order for the plan to be successful, WaMu would need to carefully manage its residential mortgage business as well as its credit risk, meaning the risk that borrowers would not repay the higher risk loans.⁶¹³ During the Board's discussion of the strategy, credit officers noted that losses would likely lag by several years.⁶¹⁴ WaMu executives knew that even if loan losses did not immediately materialize, the strategy presented potentially significant risks down the road. OTS did not object to the High Risk Lending Strategy, even though OTS noted that the bank's five-year plan did not articulate a robust plan for managing the increased risk.⁶¹⁵

⁶¹⁰ 6/30/2004 OTS Memo to Lawrence Carter from Zalka Ancely, OTSWME04-0000005357 at 61 ("Joint Memo #9 - Subprime Lending Strategy"); 3/15/2004 OTS Report of Examination, at OTSWMS04-0000001483 [Sealed Exhibit]. See also 1/2005 "Higher Risk Lending Strategy Presentation," submitted to Washington Mutual Board of Directors, at JPM_WM00302978, Hearing Exhibit 4/13-2a ("As we implement our Strategic Plan, we need to address OTS/FDIC 2004 Safety and Soundness Exam Joint Memos 8 & 9 . . . Joint Memo 9: Develop and present a SubPrime/Higher Risk Lending Strategy to the Board.").

⁶¹¹ 1/2005 "Higher Risk Lending Strategy Presentation," submitted to Washington Mutual Board of Directors, at JPM_WM00302978, Hearing Exhibit 4/13-2a; see also "WaMu Product Originations and Purchases by Percentage – 2003-2007," chart prepared by the Subcommittee, Hearing Exhibit 4/13-1i.

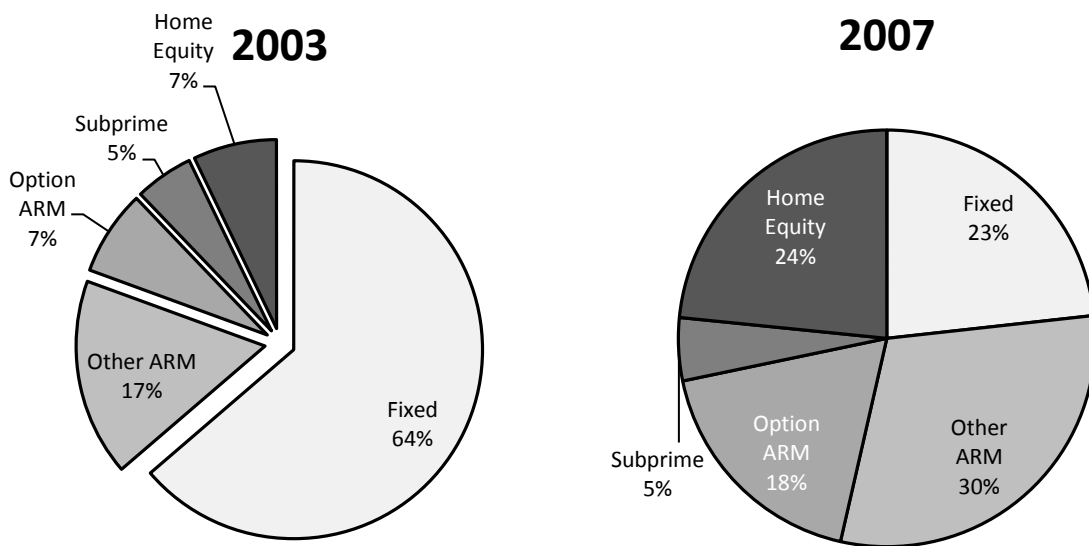
⁶¹² 4/18/2006 Washington Mutual Home Loans Discussion Board of Directors Meeting, at JPM_WM00690894, Hearing Exhibit 4/13-3 (see chart showing gain on sale for government loans was 13 basis points (bps); for 30-year, fixed rate loans was 19 bps; for Option ARMs was 109 bps; for home equity loans was 113 bps; and for subprime loans was 150 bps.)

⁶¹³ The Home Loans presentation to the Board acknowledged that risks of the High Risk Lending Strategy included managing credit risk, implementing lending technology and enacting organizational changes. 4/18/2006 Washington Mutual Home Loans Discussion Board of Directors Meeting, at JPM_WM00690899, Hearing Exhibit 4/13-3.

⁶¹⁴ 1/18/2005 Washington Mutual Inc. Washington Mutual Bank FA Finance Committee Minutes, JPM_WM06293964-68 at 67; see also 1/2005 Washington Mutual, Higher Risk Lending Strategy Presentation, at JPM_WM00302987, Hearing Exhibit 4/13-2a (chart showing peak loss rates in 2007).

⁶¹⁵ See 3/15/2004 OTS Report of Examination, at OTSWMS04-0000001509, Hearing Exhibit 4/16-94 [Sealed Exhibit].

Even before it received formal Board approval, Washington Mutual had begun shifting its loan originations toward higher risk loans. By 2007, rising defaults and the collapse of the subprime secondary market prevented WaMu from fully implementing its plans, but it did have time to shift the composition of the loans it originated and purchased, increasing the percentage of higher risk home loans from at least 19% in 2003, to over 47% in 2007.⁶¹⁶



Over the course of nearly three years, from 2005 to 2007, WaMu issued and securitized hundreds of billions of high risk loans, including \$49 billion in subprime loans⁶¹⁷ and \$59 billion in Option ARMs.⁶¹⁸ Data compiled by the Treasury and the FDIC Inspectors General showed that, by the end of 2007, Option ARMs constituted about 47% of all home loans on WaMu's balance sheet, of which about 56% of the borrowers were making the minimum payment amounts.⁶¹⁹ The data also showed that 84% of the total value of the Option ARMs was negatively amortizing, meaning that the borrowers were going into deeper debt rather than paying off their loan balances.⁶²⁰ In addition, by the end of 2007, stated income loans – loans in which the bank had not verified the borrower's income – represented 73% of WaMu's Option

⁶¹⁶ "WaMu Product Originations and Purchases by Percentage – 2003-2007," chart prepared by the Subcommittee, Hearing Exhibit 4/13-1i.

⁶¹⁷ "Securitizations of Washington Mutual and Long Beach Subprime Home Loans," chart prepared by the Subcommittee, Hearing Exhibit 4/13-1c.

⁶¹⁸ 4/2010 "Evaluation of Federal Regulatory Oversight of Washington Mutual Bank," report prepared by the Offices of Inspector General at the Department of the Treasury and Federal Deposit Insurance Corporation (hereinafter "Treasury and FDIC IG Report"), at 9, Hearing Exhibit 4/16-82.

⁶¹⁹ Id. An August 2006 WaMu internal presentation indicated that over 95% of its Option ARM borrowers were making minimum payments. See 8/2006 chart, "Borrower-Selected Payment Behavior," in WaMu internal presentation entitled, "Option ARM Credit Risk," JPM_WM00212646, Hearing Exhibit 4/13-37.

⁶²⁰ See Treasury and FDIC IG Report, at 9, Hearing Exhibit 4/16-82.

ARMs, 50% of its subprime loans, and 90% of its home equity loans.⁶²¹ WaMu also originated numerous loans with high loan-to-value (LTV) ratios, in which the loan amount exceeded 80% of the value of the underlying property. The Inspectors General determined, for example, that 44% of WaMu's subprime loans and 35% of its home equity loans had LTV ratios in excess of 80%.⁶²² Still another problem was that WaMu had high concentrations of its home loans in California and Florida, states that ultimately suffered above-average home value depreciation.⁶²³

WaMu issued loans through its own retail loan offices, through Long Beach, which issued subprime loans initiated by third party mortgage brokers, and through correspondent and conduit programs in which the bank purchased loans from third parties. The Treasury and the FDIC Inspectors General observed that, from 2003 to 2007, 48 to 70% of WaMu's residential mortgages came from third party mortgage brokers, and that only 14 WaMu employees were responsible for overseeing more than 34,000 third party brokers, requiring each WaMu employee to oversee more than 2,400 third party brokers.⁶²⁴

When the subprime market collapsed in July 2007, Washington Mutual was left holding a portfolio saturated with high risk, poorly performing loans. Prior to the collapse, WaMu had sold or securitized the majority of the loans it had originated or purchased, undermining the U.S. home loan mortgage market with hundreds of billions of dollars in high risk, poor quality loans. OTS documentation shows that WaMu's regulators saw what was happening, identified the problems, but then took no enforcement actions to protect either Washington Mutual or the U.S. financial system from the bank's shoddy lending practices.

(2) Overview of Washington Mutual's Ratings History and Closure

An overview of Washington Mutual's ratings history shows how OTS and the FDIC were required to work together to oversee Washington Mutual, which the two agencies did with varying levels of success. At times, the relationship was productive and useful, while at others they found themselves bitterly at odds over how to proceed. As Washington Mutual's problems intensified, the working relationship between OTS and the FDIC grew more dysfunctional.

From 2004 to 2006, Washington Mutual was a profitable bank and enjoyed a 2 CAMELS rating from both agencies, signifying it was a fundamentally sound institution. In late 2006, as housing prices began to level off for the first time in years, subprime loans began to experience delinquencies and defaults. In part because borrowers were unable to refinance their loans, those delinquencies and defaults accelerated in 2007. The poorly performing loans began to affect the payments supporting subprime mortgage backed securities, which began to incur losses. In July 2007, the subprime market was performing so poorly that the major credit rating agencies suddenly downgraded hundreds of subprime mortgage backed securities, including over 40 issued by Long Beach. The subprime market slowed and then collapsed, and Washington Mutual was suddenly left with billions of dollars in unmarketable subprime loans and securities

⁶²¹ Id. at 10.

⁶²² Id.

⁶²³ Id. at 11.

⁶²⁴ See Thorson prepared statement, at 5, April 16, 2010 Subcommittee Hearing at 105.

that were plummeting in value. WaMu stopped issuing subprime loans. In the fourth quarter of 2007, WaMu reported a \$1 billion loss.

As housing prices slowed and even began declining in some parts of the country, high risk prime loans, including hybrid adjustable rate mortgages, Alt A, and Option ARMs, also began incurring delinquencies and defaults.⁶²⁵ By March 2008, the total delinquency rate for prime/Alt A loans underlying WaMu and Long Beach securitizations was 8.57%, more than twice the industry average.⁶²⁶ In 2008, WaMu did not issue any new high risk, nonconforming mortgage securitizations due to, in the words of OTS, “continued market illiquidity, deterioration in the financial condition of the market, and the poor performance of WaMu’s outstanding securitizations.”⁶²⁷

In the first quarter of 2008, WaMu continued to incur losses as the value of its loan portfolio and mortgage backed securities continued to drop. In February 2008, OTS downgraded Washington Mutual for the first time, changing its CAMELS rating from a 2 to a 3, signifying that the bank was in trouble. Unfortunately, OTS did not follow up with a suitable enforcement action. Consistent with its own practice, OTS should have required WaMu to enter into a public Memorandum of Understanding specifying the measures WaMu would take to remedy its problems. Instead, in March, OTS allowed WaMu to issue a nonpublic Board Resolution in which the WaMu Board generally promised to address various problems, but did not identify any specific actions or deadlines.⁶²⁸

Also in March 2008, at the urging of the FDIC, OTS required Washington Mutual to allow potential buyers of the bank to conduct due diligence of its assets and operations.⁶²⁹ Several institutions participated, and JPMorgan Chase made an offer to buy the bank which Washington Mutual turned down. By the end of the first quarter of 2008, Washington Mutual had lost another \$1 billion. In April 2008, to reassure the market and its depositors, the holding company raised additional capital of \$7 billion from the private sector and provided \$3 billion of those funds to the bank. But by the end of the second quarter, WaMu lost another \$3.2 billion. Its stock price plummeted, and depositors began withdrawing substantial sums from the bank.

In June 2008, as a result of the bank’s financial and deposit losses, the FDIC downgraded WaMu to its lowest internal LIDI rating, an E, indicating “serious concern” that the bank would

⁶²⁵ WaMu’s Chief Credit Officer informed the Board of Directors that WaMu was “heavily concentrated” in residential mortgages and high risk products as well as in “highly stressed” geographic markets, which negatively affected WaMu’s portfolio performance. See 2/25/2008 Credit Risk Overview Report to the Board of Directors, prepared by John McMurray, WaMu Chief Credit Officer, JPM_WM02548447, at 28-29. He reported that WaMu’s mortgages were 1366% of its common tangible equity, the highest percentage of any of the top 20 banks. He also informed the Board that the bank’s residential mortgages “performed very poorly” and WaMu had “generally retained higher risk products (e.g., Option ARMS, 2nd Liens, Subprime, Low Doc).”

⁶²⁶ OTS Fact Sheet 12, “Securitizations,” Dochow_Darrel-00001364_001.

⁶²⁷ Id.

⁶²⁸ 3/17/2008 letter from Kerry Killinger to Darrel Dochow with enclosed Board Resolution, OTSWMS08-015 0001216. See also Treasury and FDIC IG Report at 31.

⁶²⁹ Subcommittee interviews of WaMu Chief Financial Officer Tom Casey (2/20/2010); WaMu Controller Melissa Ballenger (2/14/2010); and OTS Western Region Office Director Darrel Dochow (3/3/2010); 4/2010 “Washington Mutual Regulators Timeline,” prepared by the Subcommittee, Hearing Exhibit 4/16-1j.

cause a loss to the Deposit Insurance Fund. It also initiated a special insurance examination of WaMu, which it conducted concurrently with ongoing OTS examination efforts.⁶³⁰

Other financial institutions were also failing, compounding the concern of those who worried whether the Deposit Insurance Fund had sufficient funds. In July 2008, IndyMac Bank, another thrift with high risk loans, failed and was taken over by the FDIC.⁶³¹ In response, Washington Mutual depositors began to withdraw more funds from the bank, eventually removing over \$10 billion.⁶³² The Federal Home Loan Bank of San Francisco also began to limit WaMu's borrowing, further straining its liquidity.⁶³³ The parent holding company supplied an additional \$2 billion in capital to the bank.

In the final three months before WaMu's collapse, tensions increased further between OTS and the FDIC as they disagreed on the course of action. On July 3, 2008, the head of OTS sent an email to the CEO of WaMu informing him that the agency had decided to require the bank to issue a nonpublic Memorandum of Understanding (MOU).⁶³⁴ On July 15, OTS and the FDIC met with the WaMu Board of Directors to discuss the latest examination findings and formally advise the Board of the OTS decision to require the MOU. On July 21, 2008, the FDIC sent a letter to OTS urging it to take tough supervisory action in the MOU, including by requiring WaMu to increase its loan loss reserves, begin providing regular financial updates, and raise an additional \$5 billion in capital.⁶³⁵ OTS rejected the FDIC's advice.⁶³⁶ On July 31, 2008, both OTS and FDIC officials met with WaMu's Board. An FDIC official suggested at the Board meeting that WaMu look for a strategic partner to buy or invest in the bank; OTS expressed anger that the FDIC had raised the issue without first clearing it with OTS.⁶³⁷

On August 1, 2008, the FDIC informed OTS that it thought WaMu should be downgraded to a 4 CAMELS rating, signaling it was a troubled bank exhibiting unsafe and unsound practices.⁶³⁸ OTS strongly disagreed.⁶³⁹ Also on August 1, OTS provided WaMu with the proposed MOU. The proposed MOU would require the bank to correct lending and risk management deficiencies identified in a June 30 examination report, develop a capital contingency plan (rather than, as the FDIC originally urged, raise additional capital), submit a 3-year business plan, and engage a consultant to review its underwriting, risk management,

⁶³⁰ See 7/21/2008 letter from FDIC to OTS, FDIC_WAMU_000001730, Hearing Exhibit 4/16-59.

⁶³¹ For more information on IndyMac Bank, see section E(2), below.

⁶³² See undated charts prepared by FDIC on "Daily Retail Deposit Change," FDIC-PSI-01-000009.

⁶³³ See, e.g., 12/1/2008 "WaMu Bank Supervisory Timeline," prepared by OTS Examiner-in-Charge Benjamin Franklin, at Franklin_Benjamin-00035756_001, at 032 (7/22/2008 entry: "Although they have \$60 billion in borrowing capacity, the FHLB is not in a position to fund more than about \$4 to \$5 billion a week"). See also FDIC LIDI Report for the Second Quarter of 2008, at FDIC_WAMU_000014991 [Sealed Exhibit].

⁶³⁴ 7/3/2008 email from John Reich to Kerry Killinger, "MOU vs. Board Resolution," Hearing Exhibit 4/16-44.

⁶³⁵ 7/21/2008 letter from FDIC to OTS, FDIC_WAMU_000001730, Hearing Exhibit 4/16-59.

⁶³⁶ 7/22/2008 letter from OTS to FDIC, OTSWMS08-015 0001312, Hearing Exhibit 4/16-60.

⁶³⁷ See 8/1/2008 email exchange among FDIC colleagues, FDIC-EM_00246958, Hearing Exhibit 4/16-64.

⁶³⁸ 8/1/2008 email exchange among OTS officials, Hearing Exhibit 4/16-62. The FDIC had performed a capital analysis earlier in the summer and had been pushing for a downgrade for weeks. See 7/21/2008 letter from FDIC to OTS, FDIC_WAMU_000001730, Hearing Exhibit 4/16-59.

⁶³⁹ 8/1/2008 email from OTS Director John Reich to FDIC Chairman Sheila Bair, Hearing Exhibit 416-63.

management, and board oversight. On August 4, WaMu asked OTS to drop the requirement that the consultant review the Board's oversight efforts, and OTS agreed.

On August 6, the FDIC Chairman asked the OTS Director to discuss contingency plans for an emergency closure of the bank. The OTS Director reacted negatively and sent an email criticizing the FDIC Chairman for acting as if it were the primary regulator of the bank.⁶⁴⁰ As the agencies argued amongst themselves, the bank's condition continued to deteriorate.

By August 25, OTS and WaMu reached agreement on the terms of the MOU, but it was not actually signed until September 7, 2008.⁶⁴¹ Apart from the capitalization plan, OTS Deputy Director Scott Polakoff described the final MOU as a "benign supervisory document,"⁶⁴² meaning it would not bring about meaningful change at WaMu.⁶⁴³

On September 10, 2008, the FDIC Chairman, Sheila Bair, informed WaMu that there was a ratings disagreement between the FDIC and OTS, and that the FDIC was likely to downgrade WaMu to a 4. When she informed the OTS Director, John Reich, of her conversation with WaMu, he sent an internal email to his deputy, Scott Polakoff, venting his frustration that she had not discussed the matter with him first and allowed OTS to break the news to the bank: "I cannot believe the continuing audacity of this woman."⁶⁴⁴

Six days later, on September 16, 2008, Lehman Brothers declared bankruptcy, triggering another run on Washington Mutual. Over the next eight days, depositors pulled \$17 billion in cash from WaMu's coffers, leading to a second liquidity crisis.⁶⁴⁵ On September 18, the FDIC downgraded the bank to a 4 rating, and OTS agreed to the lower rating. Within days, because of the bank's accelerating liquidity problems, portfolio losses, share price decline, and other problems, OTS and the FDIC decided they had to close the bank.⁶⁴⁶

Due to the bank's worsening liquidity crisis, the regulators abandoned their customary practice of waiting until markets closed on Friday, and on Thursday, September 25, 2008, OTS closed Washington Mutual Bank and appointed the FDIC as receiver. The FDIC immediately sold the bank to JPMorgan Chase for \$1.9 billion. If the sale had not gone through, Washington Mutual's \$300 billion failure might have exhausted the entire \$45 billion Deposit Insurance Fund.

⁶⁴⁰ See 8/6/2008 email from John Reich, OTS Director, to Sheila Bair, FDIC Chairman, "Re: W," FDIC-EM_00110089, Hearing Exhibit 4/16-66.

⁶⁴¹ 9/11/2008 OTS document, "WaMu Ratings," Hearing Exhibit 4/16-48.

⁶⁴² 7/28/2008 email from OTS Deputy Director Scott Polakoff to Timothy Ward, "Re: WAMU MOU," Polakoff_Scott-00060660_001, Hearing Exhibit 4/16-45.

⁶⁴³ Subcommittee interview of Tim Ward, OTS Deputy Director of Examinations, Supervision and Consumer Protection (2/12/2010).

⁶⁴⁴ 9/10/2008 email from OTS Director John Reich to OTS Deputy Director Scott Polakoff, Polakoff_Scott-00065461_001, Hearing Exhibit 4/16-68.

⁶⁴⁵ See undated charts prepared by FDIC on "Daily Retail Deposit Change," FDIC-PSI-01-000009.

⁶⁴⁶ See IG Report at 13.

(3) OTS Identification of WaMu Deficiencies

During the five-year period reviewed by the Subcommittee, from 2004 through 2008, OTS examiners identified over 500 serious deficiencies in Washington Mutual's lending, risk management, and appraisal practices.⁶⁴⁷ OTS examiners also criticized the poor quality loans and mortgage backed securities issued by Long Beach, and received FDIC warnings regarding the bank's high risk activities. When WaMu failed in 2008, it was not a case of hidden problems coming to light; the bank's examiners were well aware of and had documented the bank's high risk, poor quality loans and deficient lending practices.

(a) Deficiencies in Lending Standards

From 2004 to 2008, OTS Findings Memoranda and annual Reports of Examination (ROE) repeatedly identified deficiencies in WaMu's lending standards and practices. Lending standards, also called "underwriting" standards, determine the types of loans that a loan officer may offer or purchase from a third party mortgage broker. These standards determine, for example, whether the loan officer may issue a "stated income" loan without verifying the borrower's professed income, issue a loan to a borrower with a low FICO score, or issue a loan providing 90% or even 100% of the appraised value of the property being purchased.

When regulators criticize a bank's lending or "underwriting" standards as weak or unsatisfactory, they are expressing concern that the bank is setting its standards too low, issuing risky loans that may not be repaid, and opening up the bank to later losses that could endanger its safety and soundness. When they criticize a bank for excessively high lending or underwriting "errors," regulators are expressing concern that the bank's loan officers are failing to comply with the bank's standards, such as by issuing a loan that finances 90% of a property's appraised value when the bank's lending standards prohibit issuing loans that finance more than 80% of the appraised value.

In addition to errors, regulators may express concern about the extent to which a bank allows its loan officers to make "exceptions" to its lending standards and issue a loan that does not comply with some aspects of its lending standards. Exceptions that are routinely approved can undermine the effectiveness of a bank's formal lending standards. Another common problem is inadequate loan documentation indicating whether or not a particular loan complies with the bank's lending standards, such as loan files that do not include a property's appraised value, the source of the borrower's income, or key analytics such as the loan-to-value or debt-to-income ratios. In the case of Washington Mutual, from 2004 to 2008, OTS examiners routinely found all four sets of problems: weak standards, high error and exception rates, and poor loan documentation.

2004 Lending Deficiencies. In 2004, OTS examiners identified a variety of problems with WaMu's lending standards. In May of that year, an OTS Findings Memorandum stated:

⁶⁴⁷ See IG Report at 28.

“Several of our recent examinations concluded that the Bank’s single family loan underwriting was less than satisfactory due to excessive errors in the underwriting process, loan document preparation, and in associated activities.”⁶⁴⁸

After reviewing an OTS examination of a loan sample, the FDIC examiner wrote that the loans:

“reflected inconsistencies with underwriting and documentation practices, particularly in the brokered channel. Additionally, examiners noted that Washington Mutual’s SFR [Single Family Residential] portfolio has an elevated level of risk to a significant volume of potential negative amortization loans, high delinquency and exception rates, and a substantial volume of loans with higher risk characteristics, such as low FICO scores.”⁶⁴⁹

A few months later, in September, an OTS review of a sample of 2003 WaMu loans found “critical error rates as high as 57.3%”:

“[Residential Quality Assurance]’s review of 2003 originations disclosed critical error rates as high as 57.3 percent of certain loan samples, thereby indicating that SFR [Single Family Residential] underwriting still requires much improvement. While this group has appropriately identified underwriting deficiencies, it has not been as successful in effecting change.”⁶⁵⁰

The same OTS Report of Examination observed that one of the three causes of underwriting deficiencies was “a sales culture focused on building market share.” It also stated:

“Notwithstanding satisfactory asset quality overall, some areas still require focused management and Board attention. Most important is the need to address weaknesses in single-family residential (SFR) underwriting, which is an ongoing issue from prior exams.”⁶⁵¹

The OTS ROE concluded: “Underwriting of SFR loans remains less than satisfactory.”⁶⁵²

The next month, when OTS conducted a field visit to follow up on some of the problems identified earlier, it concluded:

“The level of SFR [Single Family Residential] underwriting exceptions in our samples has been an ongoing examination issue for several years and one that management has found difficult to address. The institution instituted a major organizational/staffing

⁶⁴⁸ 5/12/2004 OTS Memo 5, “SFR Loan Origination Quality,” OTSWME04-0000004883.

⁶⁴⁹ 5/20/2004 FDIC-DFI Memo 3, “Single Family Residential Review,” OTSWME04-0000004889.

⁶⁵⁰ 9/13/2004 OTS Report of Examination, at OTSWMS04-0000001498, Hearing Exhibit 4/16-94 [Sealed Exhibit].

⁶⁵¹ 9/13/2004 OTS Report of Examination, at OTSWMS04-0000001492, Hearing Exhibit 4/16-94 [Sealed Exhibit].

⁶⁵² 9/13/2004 OTS Report of Examination, at OTSWMS04-0000001497, Hearing Exhibit 4/16-94 [Sealed Exhibit].

realignment in September 2003 and has continued to make additional adjustments since that time to address accumulating control issues.”⁶⁵³

2005 Lending Deficiencies. In early 2005, OTS elevated the problems with the bank’s lending standards to the attention of the WaMu Board of Directors. In a letter to the Board, OTS wrote:

“SFR Loan Underwriting – This has been an area of concern for several exams. As management continues to make change in organization, staffing, and structure related to SFR loan underwriting, delays in meeting target dates become inevitable. The board should closely monitor these delays to ensure they do not become protracted.”⁶⁵⁴

OTS officials attended a Board meeting to address this and other concerns. Yet a few months later, in June, an OTS examiner wrote: “We continue to have concerns regarding the number of underwriting exceptions and with issues that evidence lack of compliance with Bank policy.”⁶⁵⁵ The examination findings memorandum also noted that, while WaMu tried to make changes, those changes produced “only limited success” and loan underwriting remained “less than satisfactory.”⁶⁵⁶

In August 2005, the OTS ROE for the year indicated that the lending standards problem had not been resolved:

“[W]e remain concerned with the number of underwriting exceptions and with issues that evidence lack of compliance with bank policy [T]he level of deficiencies, if left unchecked, could erode the credit quality of the portfolio. Our concerns are increased with the risk profile of the portfolio is considered, including concentrations in Option ARM loans to higher-risk borrowers, in low and limited documentation loans, and loans with subprime or higher-risk characteristics. We are concerned further that the current market environment is masking potentially higher credit risk.”⁶⁵⁷

2006 Lending Deficiencies. The same problems continued into 2006. In March 2006, OTS issued the same strong warning about WaMu’s loan portfolio that it had provided in August 2005:

“We believe the level of delinquencies, if left unchecked, could erode the credit quality of the portfolio. Our concerns are increased when the risk profile of the portfolio is considered, including concentrations in Option ARMS to higher-risk borrowers, in low and limited documentation loans, and loans with subprime or higher-risk characteristics.

⁶⁵³ 10/18/2004 OTS Field Visit Report of Examination, at OTSWMEF-0000047576-78, Hearing Exhibit 4/16-94 [Sealed Exhibit].

⁶⁵⁴ 2/7/2005 OTS Letter to Washington Mutual Board of Directors on Matters Requiring Board Attention, OTSWMEF-0000047591 [Sealed Exhibit].

⁶⁵⁵ 6/3/2005 OTS Findings Memorandum, “Single Family Residential Home Loan Review,” OTSWME05-004 0000392, Hearing Exhibit 4/16-26.

⁶⁵⁶ Id. at OTSWME05-004 0000392.

⁶⁵⁷ 8/29/2005 OTS Report of Examination, at OTSWMS05-004 0001794, Hearing Exhibit 4/16-94 [Sealed Exhibit].

We are concerned further that the current market environment is masking potentially higher credit risk.”⁶⁵⁸

Two months later, in May 2006, an OTS examiner wrote:

“During the prior examination, we noted numerous instances of underwriters exceeding underwriting guidelines, errors in income calculations, errors in debt-to-income (DTI) calculations, lack of sufficient mitigating factors for credit-quality related issues, and insufficient title insurance coverage on negative amortization loans. . . . [U]nderwriting errors [] continue to require management’s attention.”⁶⁵⁹

While OTS was documenting its concerns, however, it is apparent in hindsight that the agency tempered its criticism. The OTS examiner who authored the memo found that in his review, none of the negatively amortizing loans he analyzed for safety and soundness carried an “exception,” meaning it “probably should not have been made.”⁶⁶⁰ Many of the loans made in this time period would later default.

Another OTS Findings Memorandum the same month concluded: “Overall, we concluded that the number and severity of underwriting errors noted remain at higher than acceptable levels.”⁶⁶¹

The 2006 OTS ROE for the year concluded:

“Subprime underwriting practices remain less than satisfactory. . . . [T]he number and severity of underwriting exceptions and errors remain at higher than acceptable levels. . . . The findings of this judgmental sample are of particular concern since loans with risk layering . . . should reflect more, rather than less, stringent underwriting.”⁶⁶²

2007 Lending Deficiencies. In 2007, the problems with WaMu’s lending standards were no better, and the acceleration of high risk loan delinquencies and defaults threatened serious consequences.

By July 2007, the major credit rating agencies had begun mass ratings downgrades of hundreds of mortgage backed securities, the subprime secondary market froze, and WaMu was left holding billions of dollars worth of suddenly unmarketable subprime and other high risk loans. In September, the OTS ROE for the year concluded:

“Underwriting policies, procedures, and practices were in need of improvement, particularly with respect to stated income lending. Based on our current findings, and the

⁶⁵⁸ 3/14/2006 OTS Report of Examination, at 19, OTSWMEF-0000047030, Hearing Exhibit 4/16-94 [Sealed Exhibit].

⁶⁵⁹ 5/23/2006 OTS Findings Memorandum, “Home Loan Underwriting,” OTSWMS06-008 0001299, Hearing Exhibit 4/16-33.

⁶⁶⁰ Id.

⁶⁶¹ 5/25/2006 OTS Findings Memorandum, “Loan Underwriting Review - Long Beach Mortgage,” OTSWMS06-008 0001243, Hearing Exhibit 4/16-35.

⁶⁶² 8/26/2006 OTS Report of Examination, at OTSWMS06-008 0001680, Hearing Exhibit 4/16-94 [Sealed Exhibit].

fact that a number of similar concerns were raised at prior examinations, we concluded that too much emphasis was placed on loan production, often at the expense of loan quality.”⁶⁶³

The ROE also reported on an unsatisfactory review of loans that had been originated by Long Beach and warned that, if the problems were not promptly corrected, “heightened supervisory action would be taken”:

“Based on our review of 75 subprime loans originated by [Long Beach], we concluded that subprime underwriting practices remain less than satisfactory Given that this is a repeat concern and MRBA [Matter Requiring Board Attention], we informed management that underwriting must be promptly corrected, or heightened supervisory action would be taken, including limiting the Bank’s ability to continue SFR subprime underwriting.”⁶⁶⁴

In the fourth quarter of 2007, WaMu’s loan portfolio lost \$1 billion in value. Despite that loss, and the strong language in the 2007 examinations, OTS took no enforcement action against the bank that would result in WaMu’s tightening its lending standards or strengthening compliance with the standards it had.

2008 Lending Deficiencies. In the first six months of 2008, WaMu continued to incur billions of dollars in losses, as its high risk loan portfolio lost value and its share price fell. In July 2008, about two months before the bank failed, OTS met with the WaMu Board of Directors to discuss, among other matters, the bank’s deficient lending standards. While the presentation to the Board reiterated the concerns from past years, it failed to convey a sense of urgency to a bank on the verge of collapse. Instead, the presentation focused on long term corrective action that WaMu should take. The OTS written presentation to the Board included the following:

“High SFR [Single Family Residential] losses due in part to downturn in real estate market but exacerbated by: geographic concentrations[,] risk layering[,] liberal underwriting policy[,] poor underwriting. . . . Discontinuing higher risk lending and tightened underwriting policy should improve asset quality; however, actions should have been taken sooner. . . .

Significant underwriting and process weaknesses noted again in the Home Loans Group[,] . . . Reducing higher risk lending products and practices should have been done sooner.”⁶⁶⁵

Failure to Correct Deficient Lending Practices. In various reports for nearly five consecutive years, OTS criticized WaMu’s lending standards, error and exception rates, and loan documentation, and directed the bank to improve its performance. When WaMu failed to improve during that span, OTS failed to take action, such as requiring a board resolution,

⁶⁶³ 9/18/2007 OTS Report of Examination, at OTSWMEF-0000046679, Hearing Exhibit 4/16-94 [Sealed Exhibit].

⁶⁶⁴ 9/18/2007 OTS Report of Examination, at OTSWMEF-0000047146, Hearing Exhibit 4/16-94 [Sealed Exhibit].

⁶⁶⁵ 7/15/2008 OTS Presentation to WaMu Board of Directors based on Comprehensive Examinations, Polakoff_Scott-00061303_007, 012, 027, Hearing Exhibit 4/16-12b.

memorandum of understanding, or cease and desist order compelling WaMu to tighten its lending standards and increase oversight of its loan officers to reduce underwriting error and exception rates and improve loan documentation. The result was that WaMu originated or purchased hundreds of billions of dollars of high risk loans, including stated income loans without verification of the borrower's assets or ability to repay the loan; loans with low FICO scores and high loan-to-value ratios; loans that required interest-only payments; and loan payments that did not cover even the interest owed, much less the principal.

(b) Deficiencies in Risk Management

Over the same five-year period, from 2004 to 2008, in addition to identifying deficiencies associated with WaMu's lending practices, OTS repeatedly identified problems with WaMu's risk management practices. Risk management involves identifying, evaluating, and mitigating the risks that threaten the safety, soundness, and profitability of an institution. At thrifts, the primary risk issues include setting lending standards that will produce profitable loans, enforcing those standards, evaluating the loan portfolio, identifying home loans that may default, establishing adequate reserves to cover potential losses, and advising on measures to lower the identified risks. When regulators criticize a bank's risk management practices as weak or unsatisfactory, they are expressing concern that the bank is failing to identify the types of risk that threaten the bank's safety and soundness and failing to take actions to reduce and manage those risks.

Within WaMu, from 2004-2005, oversight of risk management practices was assigned to a Chief Risk Officer. In 2006, it was assigned to an Enterprise Risk Management (ERM) Department headed by a Chief Enterprise Risk Officer. ERM employees reported, not only to the department, but also to particular lines of business such as the WaMu Home Loans Division, and reported both to the Chief Risk Officer and to the head of the business line, such as the president of the Home Loans Division. WaMu referred to this system of reporting as a "Double-Double."⁶⁶⁶

As with the bank's poor lending standards, OTS allowed ongoing risk management problems to fester without taking enforcement action. From 2004 to 2008, OTS explicitly and repeatedly alerted the WaMu Board of Directors to the need to strengthen the bank's risk management practices.

2004 Risk Management Deficiencies. In 2004, prior to the bank's adoption of its High Risk Lending Strategy, OTS expressed concern about the bank's risk management practices, highlighted the issue in the annual ROE, and brought it to the attention of the WaMu Board of Directors. The 2004 ROE stated:

⁶⁶⁶ Subcommittee interviews of Ronald Cathcart (2/23/2010), David Schneider (2/17/2010), and Cheryl Feltgen (2/6/2010).

“Board oversight and management performance has been satisfactory ... but ... increased operational risks warrant prompt attention. These issues limit the institution’s flexibility and may threaten its ability to remain competitive and independent.”⁶⁶⁷

At another point, the ROE warned: “Ensure cost-cutting measures are not impacting critical risk management areas.”⁶⁶⁸

Another OTS examination that focused on WaMu’s holding company identified multiple risks associated with Long Beach: “[P]rimary risks associated with Long Beach Mortgage Company remain regulatory risk, reputation risk, and liquidity of the secondary market in subprime loans.”⁶⁶⁹

Its concern about WaMu’s risk management practices prompted, in part, OTS’ requirement that WaMu commit its high risk lending strategy to paper and gain explicit approval from the Board of Directors.

2005 Risk Management Deficiencies. In 2005, after adoption of the High Risk Lending Strategy, OTS again highlighted risk management issues in its examination reports and again brought the matter to the attention of WaMu’s Board of Directors.

In March 2005, OTS observed that WaMu’s five-year strategy, which increased credit risk for the bank, did not “clearly articulate the need to first focus on addressing the various operational challenges before embarking on new and potentially more risky growth initiatives.”⁶⁷⁰ OTS also wrote: “We discussed the lack of a clear focus in the plan on resolving operational challenges with CEO Killinger and the Board.”⁶⁷¹ OTS continued to express concerns about the bank’s weak risk management practices for the rest of the year, yet took no concrete enforcement action to compel the bank to address the issue. In June 2005, OTS described risk management weaknesses within WaMu’s Corporate Risk Oversight group, a subgroup within the ERM Department responsible for evaluating credit and compliance risk. OTS wrote that it had deemed its comments as “criticisms” of the bank, because of the significance of the risk management function in addressing ongoing problems with the bank’s lending standards and loan error rates:

“Most of the findings are considered ‘criticisms’ due to the overall significance of CRO [Corporate Risk Oversight] activities and the fact that we have had concerns with quality assurance and underwriting processes within home lending for several years.”⁶⁷²

In August 2005, in its annual Report on Examination, OTS urged the WaMu Board to obtain progress reports from the ERM Department and ensure it had sufficient resources to

⁶⁶⁷ 9/13/2004 OTS Report of Examination, at OTSWMS04-0000001504, Hearing Exhibit 4/16-94 [Sealed Exhibit].

⁶⁶⁸ Id. at OTSWMS04-000001488.

⁶⁶⁹ 4/5/2004 OTS Report of Examination, at OTSWMEF-0000047477, Hearing Exhibit 4/16-94 [Sealed Exhibit].

⁶⁷⁰ 3/15/2004 OTS Report of Examination, at OTSWMS04-0000001509, Hearing Exhibit 4/16-94 [Sealed Exhibit].

⁶⁷¹ Id.

⁶⁷² 6/1/2005 OTS Findings Memorandum, “Corporate Risk Oversight,” OTSWMS05-005 0002046, Hearing Exhibit 4/16-23.

become an effective counterweight to the increased risk-taking entailed in the High Risk Lending Strategy:

“Monitor and obtain reports from management on status of [Enterprise Risk Management] in terms of effectiveness and resource adequacy. ... ERM provides an important check and balance on the company’s profit-oriented units and warrants ongoing strong Board commitment given the institution’s current strategic direction.”⁶⁷³

The same ROE noted that the bank did not have effective procedures in place to evaluate the many exceptions being granted to allow loan officers to issue loans that failed to comply with the bank’s lending standards, and urged attention to the risks being established:

“Until full exception data collection, reporting, and follow-up processes are in place and stabilized, senior management and the Board cannot fully assess whether quality assurance processes are having a meaningful impact on line activities, including loan underwriting. We are particularly concerned with the establishment of good quality assurance process for SFR underwriting, which has been an issue for the past several examinations.”⁶⁷⁴

A follow-up field examination, conducted in September 2005, stated:

“We criticized the lack of Trend and Dashboard Report to senior management and the board, without which it is impossible to determine whether line functions are performing acceptably and, more specifically, whether the quality assurance process is having a meaningful impact on improving loan underwriting.”⁶⁷⁵

2006 Risk Management Deficiencies. In 2006, OTS again expressed concern about WaMu’s risk management practices, but took no further steps to compel improvements. The annual ROE urged the Board of Directors to:

“[c]ontinue to monitor and obtain reports from management on the status of ERM to ensure its effectiveness and adequacy of resources. ... ERM should provide an important check and balance on profit-oriented units ... particularly given the bank’s current strategy involving increased credit risk.”⁶⁷⁶

The 2006 ROE also commented that: “[w]ithin ERM, fraud risk management at the enterprise level is in the early stage of development. ... Currently, fraud management is decentralized and does not provide a streamlined process to effectively track fraud events across all business lines. In addition, consistent fraud reporting capabilities are not in place to consolidate data for analysis, reporting, and risk management at the enterprise level.”⁶⁷⁷

⁶⁷³ 8/29/2005 OTS Report of Examination, at OTSWMS05-003 0001783, Hearing Exhibit 4/16-94 [Sealed Exhibit].

⁶⁷⁴ Id. at OTSWMS05-004 0001792.

⁶⁷⁵ 10/3/2005 OTS Field Visit Report of Examination, at OTSWMEF-0000047602, Hearing Exhibit 4/16-94 [Sealed Exhibit].

⁶⁷⁶ 8/29/2006 OTS Report of Examination, at OTSWMS06-008 0001671, Hearing Exhibit 4/16-94 [Sealed Exhibit].

⁶⁷⁷ Id. at OTSWMS06-008 0001687, 91.

2007 Risk Management Deficiencies. In 2007, as high risk loan delinquencies and defaults accelerated and WaMu began to incur losses, OTS examiners used harsher language to describe the deficiencies in WaMu's risk management practices, criticizing the bank's failure to institute stronger risk controls and procedures at an earlier date, as recommended.

In June 2007, for example, OTS examiners completed a review critical of WaMu procedures to oversee the loans it purchased from third party mortgage brokers.⁶⁷⁸ From 2003 to 2007, 48 to 70% of WaMu's loans were purchased from third parties.⁶⁷⁹ An OTS memorandum noted that Washington Mutual had only 14 full-time employees overseeing more than 34,000 third party brokers submitting loans to the bank for approval. OTS also criticized the scorecard used to rate those brokers which, among other problems, did not include the rate at which significant lending or documentation deficiencies were attributed to the broker, the rate at which its loans were denied or produced unsaleable loans, or an indication of whether the broker was included in industry watchlists for misconduct. After describing these and other problems, rather than lower WaMu's safety and soundness scores for its poor oversight, however, the OTS memorandum made only the following observation: "Given the . . . increase in fraud, early payment defaults, first payment defaults, subprime delinquencies, etc., management should re-assess the adequacy of staffing."⁶⁸⁰ WaMu management agreed with the finding, but provided no corrective action plan, stating only that "[s]taffing needs are evaluated continually and adjusted as necessary."⁶⁸¹

In the September 2007 annual ROE, OTS wrote:

"Risk management practices in the HLG (Home Loans Group) during most of the review period were inadequate We believe that there were sufficient negative credit trends that should have elicited more aggressive action by management with respect to limiting credit exposure. In particular, as previously noted, the risk misrepresentation in stated income loans has been generally reported for some time. This information should have led management to better assess the prudence of stated income lending and curtail riskier products well before we indicated during this examination that we would limit the Bank's ability to continue such lending."⁶⁸²

The ROE also faulted management and Board inaction:

"Board oversight and management's performance was less than satisfactory. ... Contributing factors should have been more proactively managed by the Board and management. The most significant of these factors include Matters Requiring Board

⁶⁷⁸ 6/7/2007 OTS Asset Quality Memo 11, "Broker Credit Administration," Hedger_Ann-00027930_001, Hearing Exhibit 4/16-10.

⁶⁷⁹ Prepared statement of Treasury IG Thorson, April 16, 2010 Subcommittee Hearing, at 5.

⁶⁸⁰ 6/7/2007 OTS Asset Quality Memo 11, "Broker Credit Administration," Hedger_Ann-00027930_001, Hearing Exhibit 4/16-10.

⁶⁸¹ Id. at 011.

⁶⁸² 9/18/2007 OTS Report of Examination, at OTSWMEF-0000046681, Hearing Exhibit 4/16-94 [Sealed Exhibit].

Attention that were noted in prior examinations but were not adequately addressed, including ... an ERM function that was not fully effective.”⁶⁸³

The ROE concluded: “The ERM function has been less than effective for some time. ... ERM has not matured in a timely manner and other ERM functions have been generally ineffective.”⁶⁸⁴

A separate OTS examination of WaMu’s compliance function observed that WaMu had hired nine different compliance officers in the past seven years, and that “[t]his amount of turnover is very unusual for an institution of this size and is a cause for concern.”⁶⁸⁵

Despite these harsh assessments in 2007, OTS again refrained from taking any enforcement action against the bank such as developing a nonpublic Memorandum of Understanding or a public Cease and Desist Order with concrete plans for strengthening WaMu’s risk management efforts.

2008 Risk Management Deficiencies. In 2008, as WaMu continued to post billions of dollars in losses, OTS continued to express concerns about its risk management practices. In February 2008, OTS downgraded WaMu to a 3 CAMELS rating and required the bank to issue a Board Resolution committing to certain strategic initiatives including “a more disciplined framework for the identification and management of compliance risks.”⁶⁸⁶

In June 2008, OTS issued a Findings Memorandum reacting to a WaMu internal review that found significant levels of loan fraud at a particular loan office, and expressed concern “as to whether similar conditions are systemic throughout the organization.”⁶⁸⁷ The memorandum noted that “a formalized process did not exist to identify, monitor, resolve, and escalate third party complaints” about loan fraud, expressed concern about “an origination culture focused more heavily on production volume rather than quality”; noted that the WaMu review had found the “loan origination process did not mitigate misrepresentation/fraud”; and described the “need to implement incentive compensation programs to place greater emphasis on loan quality.”

As referenced above, in July 2008, two months before the bank’s failure, OTS made a presentation to the WaMu Board which, among other problems, criticized its risk management efforts:

“An adequate [Enterprise Risk Management] function still does not exist although this has been an MRBA [Matter Requiring Board Attention] for some time. Critical as a check and balance for profit oriented units[.] Necessary to ensure that critical risks are

⁶⁸³ Id. at OTSWMEF-0000046690.

⁶⁸⁴ Id. at OTSWMEF-0000046691.

⁶⁸⁵ 5/31/2007 Draft OTS Findings Memorandum, “Compliance Management Program,” Franklin_Benjamin-00020408_001, Hearing Exhibit 4/16-9.

⁶⁸⁶ 3/11/2008 WaMu presentation, “Summary of Management’s Action to Address OTS Concerns,” JPM_WM01022322; 3/17/2008 letter from Kerry Killinger to Darrel Dochow with enclosed Board Resolution, OTSWMS08-015 0001216 (committing to initiatives outlined by management).

⁶⁸⁷ 6/19/2008 OTS Asset Quality Memo 22, Bisset_John-00046124_002, Hearing Exhibit 4/16-12a.

identified, measured, monitored and communicated[.] Even more critical given increased credit, market, and operational risk.”⁶⁸⁸

Failure to Correct Poor Risk Management. By neglecting to exercise its enforcement authority, OTS chronicled WaMu’s inadequate risk management practices over a period of years, but ultimately failed to change its course of action. During a hearing of the Subcommittee, the Department of the Treasury Inspector General, Eric Thorson, whose office conducted an in-depth review of WaMu’s regulatory oversight, testified:

“Issues related to poor underwriting and weak risk controls were noted as far back as 2003, but the problem was OTS did not ensure that WaMu ever corrected those weaknesses. We had a hard time understanding why OTS would allow these satisfactory ratings to continue given that, over the years, they found the same things over and over.”⁶⁸⁹

(c) Deficiencies in Home Appraisals

Still another area in which OTS failed to take appropriate enforcement action involves WaMu’s appraisal practices. OTS failed to act even after other government entities accused WaMu of systematically inflating property values to justify larger and more risky home loans.

Appraisals provide estimated dollar valuations of property by independent experts. They play a key role in the mortgage lending process, because a property’s appraised value is used to determine whether the property provides sufficient collateral to support a loan. Lending standards at most banks require loans to meet, for example, certain loan-to-value (LTV) ratios to ensure that, in the event of a default, the property can be sold and the proceeds used to pay off any outstanding debt.

From 2004 to mid-2006, WaMu conducted its own property appraisals as part of the loan approval process. During that period, OTS repeatedly expressed concerns about WaMu’s appraisal efforts.⁶⁹⁰ In May 2005, OTS criticized WaMu – the most severe type of finding – regarding its practice of allowing sellers to estimate the value of their property. OTS directed WaMu to stop including an Owner’s Estimate of Value in documents sent to appraisers since it biased the review; this criticism had been repeatedly noted in prior examinations, yet WaMu did not satisfactorily address it until the end of 2005.⁶⁹¹ A second finding criticized WaMu’s use of automated appraisal software, noting “significant technical document weaknesses.”⁶⁹² OTS ultimately determined that none of WaMu’s automated appraisals complied with standard appraisal practices and some even had “highly questionable value conclusions.”⁶⁹³ Despite this

⁶⁸⁸ 7/15/2008 OTS presentation to WaMu Board of Directors based on Comprehensive Examinations, Polakoff_Scott-00061303-028, Hearing Exhibit 4/16-12b.

⁶⁸⁹ See April 16, 2010 Subcommittee Hearing at 25.

⁶⁹⁰ See, e.g., 10/3/2005 OTS Report of Examination, at OTSWMEF-0000047601, Hearing Exhibit 4/16-94 [Sealed Exhibit].

⁶⁹¹ 5/20/2005 OTS Memo 4, “Safety and Soundness Examination,” at OTSWME06-039 0000214.

⁶⁹² Id.

⁶⁹³ 3/14/2005 OTS Report of Examination, at OTSWMEN-000001794, Hearing Exhibit 4/16-94 [Sealed Exhibit].

dramatic criticism, OTS found in the next year's examination that WaMu had continued to use noncompliant automated appraisals.⁶⁹⁴ Before any enforcement action was taken, WaMu management agreed to cease using automated appraisals by October 2006.

To address the issue, WaMu decided in mid-2006 to outsource its appraisal function to two vendors: eAppraiseIT and Lender Service Incorporated (LSI).⁶⁹⁵ Calling the move "Project Cornerstone," WaMu fired all of its residential staff appraisers, reducing a staff of about 400 to 30,⁶⁹⁶ and eAppraiseIT and LSI were tasked with conducting appraisals of homes purchased with WaMu loans.⁶⁹⁷ WaMu assigned oversight of the outside appraisals to a new Appraisal Business Oversight (ABO) group, a unit within the WaMu Home Loans Risk Management division.

The Decision to Outsource. WaMu's decision to outsource the appraisal function received minimal attention from OTS. Documentation obtained by the Subcommittee indicates only a few meetings took place between OTS examiners and the WaMu staff tasked with the outsourcing. During a Subcommittee interview, the key OTS appraisal expert, Bruce Thorvig, explained that it was his first time supervising a large institution that decided to outsource the appraisal function.⁶⁹⁸ Though the bank had repeatedly delayed taking action or failed to respond to OTS recommendations and criticisms in the appraisal area in the past, the OTS appraisal expert told the Subcommittee that he saw nothing to indicate that WaMu management could not competently handle a large appraisal outsourcing project of this scale.⁶⁹⁹ In one of the few meetings that did occur between WaMu and OTS staff on appraisal issues, the bank's management came away with what they thought was full OTS approval for the outsourcing project,⁷⁰⁰ though OTS' appraisal expert disputed that he was even in a position to grant approval and was instead simply receiving notification of WaMu's plans.⁷⁰¹

Appraisal Problems. Problems began almost immediately after WaMu outsourced the appraisal function. Whether appraisals are conducted internally by the bank or through a vendor, the bank must take responsibility for establishing a standard process to ensure accurate, unbiased home appraisal values. One, for example, was a repeat problem from when WaMu did its own appraisals: "WaMu allowed a homeowner's estimate of the value of the home to be included on the form sent from WaMu to third party appraisers, thereby biasing the appraiser's evaluation" toward a higher home value, in violation of standard residential appraisal methods.⁷⁰² A seasoned appraisal compliance manager, who oversaw WaMu as an FDIC examiner prior to coming to work for the bank, drafted a February 2007 Residential Appraisal Department Review which included a long list of issues. Problems included: "undefined" appraisal standards and processes; "loosely defined" vendor management; "unreasonable and imprudent sales force

⁶⁹⁴ 5/23/2006 OTS Memo 2, "Safety and Soundness Examination," at OTSWME06-039 0000205.

⁶⁹⁵ Undated OTS internal memo, OTSWMSP-00000001936-51 at 39 [Sealed Exhibit].

⁶⁹⁶ Undated OTS internal memo, OTSWMEN-0000015926-31 at 28 [Sealed Exhibit].

⁶⁹⁷ Undated OTS internal memo, OTSWMSP-00000001936-51 at 39 [Sealed Exhibit].

⁶⁹⁸ Subcommittee Interview of Bruce Thorvig (2/24/2010).

⁶⁹⁹ Id.

⁷⁰⁰ 5/22/2006 WaMu internal email, OTSWMEN-0000020983.

⁷⁰¹ Subcommittee Interview of Bruce Thorvig (2/24/2010).

⁷⁰² IG Report, at 11, Hearing Exhibit 4/16-82.

influence over the appraisal function;” and a “broken” third party appraisal risk control process that “may be contributing to the increasing incidence of mortgage fraud.”⁷⁰³

These problems continued without resolution or enforcement action from OTS throughout 2007. In an April 2007 memorandum, OTS detailed its concerns, both old and new, with WaMu’s appraisal operations. OTS found that WaMu had failed to update and revise its appraisal manual after outsourcing, which put the bank at risk of regulatory violations. In addition, an OTS review of 54 WaMu appraisals identified a number of concerns:

“Primary appraisal issues (red flags requiring attention by the underwriter or review appraiser) included seller paid closing costs and concession, misstatements/contradictions, inadequate/incomplete explanations and support for the value conclusion, reconciliation of the sales comparison approach, and weakness in the appraisal review process.”⁷⁰⁴

Despite the extent of these concerns, OTS issued a “recommendation” to the bank that it address the identified problems, rather than the stronger “criticism” which would have elevated the issue to the bank’s senior management or Board of Directors.⁷⁰⁵

Attorney General Complaint. On November 1, 2007, the New York Attorney General issued a complaint against WaMu’s appraisal vendors, LSI and eAppraiseIT, alleging fraud and collusion with WaMu to systematically inflate real estate values.⁷⁰⁶ The complaint stated in part:

“[F]irst American and eAppraiseIT have abdicated their role in providing ‘third-party, unbiased valuations’ for eAppraiseIT’s largest client, WaMu. Instead, eAppraiseIT improperly allows WaMu’s loan production staff to hand-pick appraisers who bring in appraisal values high enough to permit WaMu’s loans to close, and improperly permits WaMu to pressure eAppraiseIT appraisers to change appraisal values that are too low to permit loans to close.”⁷⁰⁷

Though OTS had been aware of the Attorney General’s investigation in May 2007, it took no action until after the Attorney General issued the complaint. Even then, OTS did not initiate its own investigation until after an internal WaMu investigation was already underway. The OTS Western Region Director advised: “I believe OTS needs to open up its own special investigation. WaMu started their own special investigation a few days ago when this broke.”⁷⁰⁸

⁷⁰³ 2/21/2007 draft internal WaMu report, “Residential Appraisal Department Review,” OTSWMEN-0000000274 (drafted by Mark Swift).

⁷⁰⁴ 4/5/2007 OTS Asset Quality Memo 2, OTSWME07-067 0001082.

⁷⁰⁵ Id.

⁷⁰⁶ 11/1/2007 New York Attorney General press release, http://www.ag.ny.gov/media_center/2007/nov/nov1a_07.html. Both companies appraised property in New York, which provided jurisdiction for the complaint.

⁷⁰⁷ New York v. First American Corporation, et al., (N.Y. Sup.), Complaint (November 1, 2007), at 3.

⁷⁰⁸ 11/7/2007 email from Darrel Dochow to Benjamin Franklin, Randy Thomas, others, OTSWMS07-011 0001294.

It took nearly a month for OTS to launch its own investigation into the allegations set out in the New York Attorney General's complaint.⁷⁰⁹ In November 2007, when the director of OTS, John Reich, was presented with his agency's investigation plan, he responded:

“This appears to be a comprehensive (and impressive) review schedule. It doesn't appear, on the surface anyway, to leverage off of WaMu's own review. Do you think we might be totally reinventing the wheel and possibly taking too long to complete our review?”⁷¹⁰

Despite his concerns about how long the planned investigation might take, the OTS investigation proceeded as proposed. It took over 10 months, until September 2008, for OTS to gather, analyze, and reach conclusions about WaMu's appraisal practices.

The OTS investigation uncovered many instances of improper appraisals. After reviewing 225 loan files, the OTS appraisal expert found that “[n]umerous instances were identified where, because of undue influence on the appraiser, values were increased without supporting documentation.”⁷¹¹ OTS also found that WaMu had violated the agency's appraisal regulations by failing to comply with appraisal independence procedures after they outsourced the function.⁷¹² The OTS investigation concluded that WaMu's appraisal practices constituted “unsafe or unsound banking practices.”⁷¹³ The OTS investigation also concluded that WaMu was not in compliance with the Uniform Standards of Professional Appraisal Practice and other minimum appraisal standards.⁷¹⁴

Failure to Correct Appraisal Deficiencies. Shortly before WaMu was sold, OTS' staff prepared a draft recommendation that the agency issue a cease and desist order to bar the bank from engaging in any activity that would lead to further violation of the appraisal regulations.⁷¹⁵ A cease and desist order would have been the first public enforcement action against WaMu regarding its lending practices. Ultimately, the legal staff submitted the memorandum to OTS' Deputy Director and Chief Counsel on October 3, 2008, more than a week after the bank collapsed and was sold.⁷¹⁶ By this point, the recommendation was too late and the issue was moot.

⁷⁰⁹ See undated OTS internal memo to John Bowman, OTSWMSP-0000001936 [Sealed Exhibit].

⁷¹⁰ 11/16/2007 email from OTS Director John Reich to OTS Operations Director Scott Polakoff, Reich_John-00040045_001.

⁷¹¹ 7/28/2008 Draft Memo to Hugo Zia from Bruce Thorvig, OTSWMEN-0000015851 [Sealed Exhibit].

⁷¹² See 12 CFR Part 564.

⁷¹³ Undated OTS internal memo, OTSWMSP-00000001936-51 at 47 [Sealed Exhibit].

⁷¹⁴ *Id.* at 37 [Sealed Exhibit]. The Subcommittee found no evidence that anyone in OTS senior management disputed the conclusions of the investigation.

⁷¹⁵ *Id.*

⁷¹⁶ OTS internal document, OTS Enforcement Status of Formal Investigations, Quigley_Lori-00231631_001.

(d) Deficiencies Related to Long Beach

In 1999, WaMu's parent holding company, Washington Mutual Inc., purchased Long Beach Mortgage Company (Long Beach). Long Beach's business model was to issue subprime loans initiated by third party mortgage lenders and brokers and then sell or package those loans into mortgage backed securities for sale to Wall Street firms. Beginning in 1999, Washington Mutual Bank worked closely with Long Beach to sell or securitize its subprime loans and exercised oversight over its lending and securitization operations. Because Long Beach was a subsidiary of Washington Mutual Inc., the holding company, however, and not a subsidiary of Washington Mutual Bank, OTS did not have direct regulatory authority over the company, but could review its operations to the extent they affected the holding company or the bank itself.

OTS was aware of ongoing problems with Long Beach's management, lending and risk standards, and issuance of poor quality loans and mortgage backed securities. OTS reported, for example, that Long Beach's "early operations as a subsidiary of [Washington Mutual Inc.] were characterized by a number of weaknesses" including "loan servicing weaknesses, documentation exceptions, high delinquencies, and concerns regarding compliance with securitization-related representations and warranties."⁷¹⁷ OTS also reported that, in 2003, "adverse internal reviews of [Long Beach] operations led to a decision to temporarily cease securitization activity" until a "special review" by the WaMu legal department ensured that file documentation "adequately supported securitization representations and warranties" made by Long Beach.⁷¹⁸ OTS was aware of an examination report issued by a state regulator and the FDIC after a review of 2003 Long Beach loans, which provides a sense of the extent of problems with those loans at the time:

"An internal residential quality assurance (RQA) report for [Long Beach]'s first quarter 2003 ... concluded that 40% (109 of 271) of loans reviewed were considered unacceptable due to one or more critical errors. This raised concerns over [Long Beach]'s ability to meet the representations and warranty's made to facilitate sales of loan securitizations, and management halted securitization activity. A separate credit review report ... disclosed that [Long Beach]'s credit management and portfolio oversight practices were unsatisfactory. ... Approximately 4,000 of the 13,000 loans in the warehouse had been reviewed ... of these, approximately 950 were deemed saleable, 800 were deemed unsaleable, and the remainder contained deficiencies requiring remediation prior to sale. ... [O]f 4,500 securitized loans eligible for foreclosure, 10% could not be foreclosed due to documentation issues."⁷¹⁹

Despite these severe underwriting and operational problems, Long Beach resumed securitization of its subprime loans in 2004. In April 2005, OTS examiners circulated an internal email commenting on the poor quality of Long Beach loans and mortgage backed securities compared to its peers:

⁷¹⁷ 12/21/2005 OTS internal memorandum by OTS examiners to OTS Deputy Regional Director, OTSWMS06-007 0001010, Hearing Exhibit 4/16-31.

⁷¹⁸ Id.

⁷¹⁹ 1/13/2004 FDIC-Washington State joint visitation report, FDIC-EM_00102515-20, Hearing Exhibit 4/13-8b. OTS held a copy of this report in its files, OTSWME04-0000029592.

“Performance data for 2003 and 2004 vintages appear to approximate industry average while issues prior to 2003 have horrible performance. . . . [Long Beach] finished in the top 12 worst annualized [Net Credit Losses] in 1997 and 1999 thru 2003. [Long Beach] nailed down the number 1 spot as top loser with an [Net Credit Loss] of 14.1% in 2000 and placed 3rd in 2001 with 10.5%. . . . For ARM [adjustable rate mortgage] losses, [Long Beach] really outdid themselves with finishes as one of the top 4 worst performers from 1999 through 2003. For specific ARM deals, [Long Beach] made the top 10 worst deal list from 2000 thru 2002. . . . Although underwriting changes were made from 2002 thru 2004, the older issues are still dragging down overall performance. . . . At 2/05, [Long Beach] was #1 with a 12% delinquency rate. Industry was around 8.25%.”⁷²⁰

Six months later, after conducting a field visit, an OTS examiner wrote: “Older securitizations of [Long Beach] continue to have some issues due to previously known underwriting issues in some vintages. The deterioration in these older securitizations is not unexpected.”⁷²¹

Purchase of Long Beach. In 2005, Washington Mutual Bank proposed purchasing Long Beach from its holding company so that Long Beach would become a wholly owned subsidiary of the bank. In making the case for the purchase, which required OTS approval, WaMu contended that making Long Beach a subsidiary would give the bank greater control over Long Beach’s operations and allow it to strengthen Long Beach’s lending practices and risk management, as well as reduce funding costs and administrative expenses. In addition, WaMu proposed that it could replace its current “Specialty Mortgage Finance” program, which involved purchasing subprime loans for its portfolio primarily from Ameriquest, with a similar loan portfolio provided by Long Beach.⁷²²

In June 2005, an OTS examiner expressed concerns about the purchase in an internal memorandum to OTS regional management and recommended that the purchase be conditioned on operational improvements:

“At the start of this examination, it was our intent to perform a review of the operation of [Long Beach] with the expectation that [Washington Mutual Inc.] or the bank would be requesting approval to move [Long Beach] as an operating subsidiary of the bank. Such a move would obviously place the heightened risks of a subprime lending operation directly within the regulated institution structure. Because of the high profile nature of the business of [Long Beach] and its problematic history, we believe that any and all concerns regarding the subprime operation need to be fully addressed prior to any move.”⁷²³

⁷²⁰ 4/14/2005 OTS internal email, OTSWME05-012 0000806, Hearing Exhibit 4/16-19.

⁷²¹ 10/3/2005 OTS Holding Company Field Visit Report of Examination, at OTSWMS06-010 00002532, Hearing Exhibit 4/16-94 [Sealed Exhibit].

⁷²² See 12/21/2005 OTS internal memorandum by OTS examiners to OTS Deputy Regional Director, at OTSWMS06-007 0001011, Hearing Exhibit 4/16-31.

⁷²³ 6/3/2005 OTS memorandum from Rich Kuczek to Darrel Dochow, “Long Beach Mortgage Corporation (LBMC) Review,” OTSWMS06-007 0002683, Hearing Exhibit 4/16-28.

The memorandum identified several matters that required resolution prior to a WaMu purchase of Long Beach, including the establishment of pre- and post-funding loan quality reviews that were already in place at the bank. The memorandum also stated that Long Beach management had “worked diligently to improve its operation and correct significant deficiencies ... reported in prior years,” and observed, “there is definitely a new attitude and culture.”⁷²⁴

OTS continued to review Long Beach’s lending practices and found additional deficiencies throughout the year. Those deficiencies included errors in loan calculations of debt-to-income ratios, lack of documentation to support the reasonableness of borrower income on stated income loans, and lack of explanation of a borrower’s ability to handle payment shock on loans with rising interest rates.⁷²⁵ OTS also determined that Long Beach’s newly created portfolio of subprime loans “had attributes that could result in higher risk” than WaMu’s existing subprime loan portfolio.⁷²⁶

Nevertheless, in December 2005, OTS examiners wrote that, even though Long Beach was “engaged in a high-risk lending activity and we are not yet fully satisfied with its practices,” they recommended approving WaMu’s purchase of the company with certain conditions.⁷²⁷ Those conditions included WaMu’s reconsidering its high risk lending concentration limits, including “stated income loans with low FICOs and high LTV ratios”; WaMu’s assurance that Long Beach would comply with certain loan guidance; a WaMu commitment to continue to bring down its loan exception and error rates; and a WaMu commitment to ensure its Enterprise Risk Management division would provide a “countervailing balance” to “imprudent” desires to expand Long Beach’s subprime lending.⁷²⁸

About the same time as this memorandum was completed, OTS learned that, during the fourth quarter of 2005, Long Beach had been required to repurchase tens of millions of dollars of loans it had sold to third parties due to early payment defaults.⁷²⁹ By December, this unexpected wave of repurchases had overwhelmed Long Beach’s repurchase reserves, leading to a reserve shortfall of nearly \$75 million. Altogether in the second half of 2005, Long Beach had to repurchase loans with about \$837 million in unpaid principal, and incurred a net loss of about

⁷²⁴ Id. See also 5/19/2005 OTS email, “LBMC Fair Lending,” OTSWMS05-005 0002002, Hearing Exhibit 4/16-20 (“I would not ... feel comfortable with their moving [Long Beach] under the thrift without some conditions”).

⁷²⁵ See 12/21/2005 OTS internal memorandum by OTS examiners to OTS Deputy Regional Director Darrel Dochow, OTSWMS06-007 0001009-16, Hearing Exhibit 4/16-31.

⁷²⁶ Id. at OTSWMS06-007 0001011.

⁷²⁷ See 12/21/2005 OTS internal memorandum by OTS examiners to OTS Deputy Regional Director Darrel Dochow, OTSWMS06-007 0001009-16, Hearing Exhibit 4/16-31.

⁷²⁸ Id. at OTSWMS06-007 0001015-16.

⁷²⁹ See 10/3/2005 OTS Report of Examination, OTSWMS06-010 0002530, Hearing Exhibit 4/16-94 [Sealed Exhibit] (noting that, after a field visit to Long Beach that concluded in December 2005, OTS learned that loan repurchases had surged: “Subsequent to our on-site field visit, management informed us that loan repurchases had increased considerably. ... Management indicated that approximately \$0.6 billion in loans were repurchased during the fourth quarter of 2005 out of approximately \$13.2 billion in total whole loan sales. The gross financial impact at December 31, 2005, was \$72.3 million.”); 1/20/2006 email from Darrel Dochow to Michael Finn and others, with chart, OTSWMS06-007 0001020 to 1021 (describing Long Beach repurchases).

\$107 million.⁷³⁰ In response, its auditor, Deloitte and Touche, cited Long Beach for a Significant Deficiency in its financial reporting. Despite the sudden evidence of Long Beach's poor quality loans, inadequate repurchase reserves, and negative earnings impact on its parent company, Washington Mutual Inc., OTS approved the bank's application to purchase Long Beach. OTS explained its decision to the Subcommittee by contending that the change in status gave WaMu more control over Long Beach to ensure its improvement.⁷³¹

WaMu ultimately purchased Long Beach on March 1, 2006.⁷³² After the purchase, Long Beach's practices did not improve, but continued to exhibit numerous problems, as described in the prior chapter. A May 2006 OTS examination of Long Beach loans concluded, for example, "that the number and severity of underwriting errors noted remain at higher than acceptable levels."⁷³³ In a June 2006 internal email to his colleagues, the OTS Regional Deputy Director wrote:

"We gave them the benefit of doubt based on commitments and some progress when we allowed them to bring [Long Beach] into the bank, but ... we have the same type of concerns remaining 6 months later."⁷³⁴

In the annual 2006 ROE and again in the annual 2007 ROE, OTS found that Long Beach's lending practices "remain[ed] less than satisfactory."⁷³⁵ At a hearing of the Subcommittee on April 13, 2010, WaMu's chief credit risk officers from 2004 to 2008 uniformly condemned Long Beach's poor performance and testified that it had never developed an effective risk management system.⁷³⁶

⁷³⁰ See 4/17/2006 memorandum by WaMu General Auditor to Board of Directors' Audit Committees of Washington Mutual Inc. and Washington Mutual Bank, "Long Beach Repurchase Reserve Root Cause Analysis," JPM_WM02533760, Hearing Exhibit 4/13-10 (Long Beach "experienced a dramatic increase in EPD's [early payment defaults], during the third quarter of 2005 [which] ... led to a large volume of required loan repurchases. The unpaid principal balance repurchased as a result of the EPD provision for the year ended December 31, 2005 was \$837.3 million. The net loss from these repurchases was approximately \$107 million.").

⁷³¹ Subcommittee interview of Benjamin Franklin (2/18/2010).

⁷³² See "Washington Mutual Regulators Timeline," chart prepared by the Subcommittee, Hearing Exhibit 4/16-1j.

⁷³³ 5/25/2006 OTS Findings Memorandum, "Loan Underwriting Review - Long Beach Mortgage," OTSWMS06-008 0001243, Hearing Exhibit 4/16-35. See also 1/20/2006 email from Darrel Dochow to Michael Finn, et al., "LBMC EDP Impact," OTSWMS06-007 0001020 (emphasis added).

⁷³⁴ 6/9/2006 email from Darrel Dochow to Richard Kuczek, Lawrence Carter, and Benjamin Franklin, "Findings Memos," OTSWMS06-008 0001253, Hearing Exhibit 4/16-36.

⁷³⁵ 8/29/2006 OTS Report of Examination, at OTSWMS06-008 0001680, Hearing Exhibit 4/16-94 [Sealed Exhibit]; 9/18/2007 OTS Report of Examination, OTSWMEF-0000047146, Hearing Exhibit 4/16-94 ("Based on our review of 75 subprime loans originated by LBMC, we concluded that subprime underwriting practices remain less than satisfactory Given that this is a repeat concern and MRBA, we informed management that underwriting must be promptly corrected, or heightened supervisory action would be taken, including limiting the Bank's ability to continue SFR subprime underwriting.") [Sealed Exhibit].

⁷³⁶ April 13, 2010 Subcommittee Hearing at 22.

(e) Over 500 Deficiencies in 5 Years

As part of their review of Washington Mutual, the Treasury and the FDIC Inspectors General determined that, over a five-year period, 2004-2008, OTS examiners identified a total of over 540 criticisms, observations, and recommendations related to WaMu operations.⁷³⁷ At the Subcommittee hearing, when asked whether those 540 findings constituted “serious criticisms” of the bank, Treasury IG Eric Thorson responded: “Absolutely.”⁷³⁸ The FDIC Inspector General, Jon Rymer, agreed:

“[T]he examiners, from what I have seen here, were pointing out the problems, underwriting problems, riskier products, concentrations, distributions, and markets that may display more risk – they were all significant problems and they were identified. At the end of the day, though, I don’t think forceful enough action was taken.”⁷³⁹

As WaMu accumulated hundreds of infractions from OTS, longstanding problems with asset quality in the bank’s portfolio continued. While some observers have blamed WaMu’s failure on its liquidity troubles in late 2008, years of unresolved problems festered below the surface.

The consequences of WaMu’s failure to address its underwriting problems, risk concentrations, risk layering, and other problems were exponential increases in its loss rates. The FDIC later calculated the loss rates for several WaMu products. In WaMu’s held-for-investment Option ARM portfolio, delinquency rates nearly doubled every year, rising from 0.48% at the end of 2005 to 0.90% a year later, to 2.63% at year end 2007, and up to 4.63% by June 30, 2008.⁷⁴⁰ In its subprime portfolio, its delinquency rate increased from 7.39% in 2005 to 25.20% in June 2008.⁷⁴¹ The delinquency rate in its HELOC portfolio rose from 0.58% in 2005 to 4.00% in June 2008.⁷⁴² As a result, net charge-offs for WaMu’s Option ARM portfolio rose from \$15 million at year end 2005 to \$37 million in 2006, to \$147 million in 2007, and to \$777 million by June 2008.⁷⁴³ HELOC net charge-offs likewise increased, rising from \$21 million in 2005, to \$23 million in 2006, to \$424 million in 2007, and to \$1.19 billion by June 2008.⁷⁴⁴ Subprime net charge-offs expanded even more rapidly, rising from \$47 million in 2005, to \$134 million in 2006, to \$550 million in 2007, and \$956 million by June 2008.⁷⁴⁵ To account for these losses, WaMu’s loss provisions jumped from \$218 million in 2006 to over \$2 billion in 2007, and an additional \$6 billion by June 2008.⁷⁴⁶

⁷³⁷ Id. at 20. See also IG Report at 28.

⁷³⁸ April 16, 2010 Subcommittee Hearing at 17.

⁷³⁹ Id. at 18.

⁷⁴⁰ See FDIC Complaint Against WaMu Executives at ¶ 79.

⁷⁴¹ Id.

⁷⁴² Id.

⁷⁴³ Id. at ¶ 81.

⁷⁴⁴ Id.

⁷⁴⁵ Id.

⁷⁴⁶ Id. at ¶ 82.

The joint report of the Treasury and the FDIC Inspectors General specifically identified WaMu's poor quality loans and poor risk management practices as the real cause of its failure, rather than the liquidity crisis that hit the bank in 2008.⁷⁴⁷ During the Subcommittee's hearing, when asked why WaMu failed, a senior FDIC official put it this way: "Asset quality. Weak asset quality. It brought on the liquidity problems."⁷⁴⁸ He explained:

"If you have strong asset quality, you will not have liquidity issues because your assets – you can borrow either against them or you can sell them. If you have weak asset quality, then you are going to have liquidity issues at some point."⁷⁴⁹

(4) OTS Turf War Against the FDIC

As WaMu approached the end, tensions between OTS and the FDIC that had built up over two years evolved into a turf war. OTS examination and regional officials began to express distrust of their FDIC counterparts. The conflict was elevated to the top leaders of both agencies, who came to take different views of what to do with WaMu – the FDIC becoming more aggressive and OTS becoming more protective. When the bank's imminent collapse was no longer a question, the result was a hasty seizure and sale. Had the two government agencies acted in concert, rather than as adversaries, it is likely that WaMu's problems would have been resolved earlier and with less collateral damage. During an interview, the chairman of the FDIC, Sheila Bair, stated pointedly that WaMu "could have sold themselves in July if they had tried."⁷⁵⁰ The same outcome was not accomplished until two months later in September when no other options remained, and OTS worked with the FDIC to make it happen.

As mentioned earlier, OTS was the primary, but not the only, federal bank regulator that oversaw Washington Mutual. Since WaMu was also an insured institution, the FDIC served as a backup examiner responsible for evaluating the risk that the bank posed to the Deposit Insurance Fund. Because WaMu was one of the eight largest insured institutions in the country, the FDIC had assigned a Dedicated Examiner whose full time responsibility was to determine whether the bank was operating in a safe and sound manner. The FDIC Examiner reviewed all OTS ROEs and examination findings, participated on many occasions in OTS examinations, and reviewed bank documents. The FDIC reviewed the CAMELS ratings for the bank, as well as LIDI ratings under its Large Insured Depository Institutions Program.

For many years, FDIC examiners worked cooperatively with OTS examiners to conduct oversight of WaMu. But beginning in 2006, OTS management expressed increasing reluctance to allow FDIC examiners to participate in WaMu examinations and review bank documents. Claiming that joint efforts created confusion about which agency was WaMu's primary

⁷⁴⁷ IG Report at 8.

⁷⁴⁸ April 16, 2010 Subcommittee Hearing at 76. John Corston was the Acting Deputy Director of the FDIC's Division of Supervision and Consumer Protection, Complex Financial Institution Branch.

⁷⁴⁹ Id.

⁷⁵⁰ Subcommittee interview of Sheila Bair (4/5/2010).

regulator,⁷⁵¹ OTS officials employed a variety of tactics to limit the FDIC oversight of the bank, including restricting its physical access to office space at the bank, its participation in bank examinations, and its access to loan files. In addition, as the FDIC began to express greater concern about the bank's viability, recommend ratings downgrades, and urge enforcement action, OTS officials displayed increasing resistance to its advice. In the end, OTS not only undermined years of cooperative oversight efforts, but at times actively impeded FDIC oversight of one of the largest insured banks in the country.

Resisting FDIC Advice. During the period 2004-2008, internal FDIC evaluations of Washington Mutual were consistently more negative than those of OTS, at times creating friction between the two agencies. OTS also resisted the FDIC's advice to subject WaMu to stronger enforcement actions, downgrade its CAMELS rating, and solicit buyers for the bank.

As early as 2005, the FDIC examination team expressed concerns about WaMu's high risk lending strategy, even though the bank's management expressed confidence that the risks were manageable. In an internal memorandum, for example, the FDIC team identified multiple negative impacts on WaMu's loan portfolio if housing prices were to stop climbing. The memorandum stated in part:

"Washington Mutual Bank's (WMB) single-family residential (SRF) loan portfolio has embedded risk factors that increase exposure to a widespread decline in housing prices. The overall level of risk is moderate, but increasing. ... A general decline in housing prices would adversely impact: a) The SRF loan portfolio; b) The home equity loan portfolio; and c) Mortgage banking revenue. ... In January 2005, management developed a higher-risk lending (HRL) strategy and defined company-wide higher-risk loans as ... sub prime loans ... SFR loans with FICO scores below 620, ... consumer loans with FICO scores below 660, and ... [the] Long Beach ... portfolio. Management intends to expand the HRL definition and layer additional risk characteristics in the future. ... Management acknowledges the risks posed by current market conditions and recognizes that a potential decline in housing prices is a distinct possibility. Management believes, however that the impact on WMB would be manageable, since the riskiest segments of production are sold to investors, and that these investors will bear the brunt of a bursting housing bubble."⁷⁵²

⁷⁵¹ See, e.g., April 16, 2010 Subcommittee Hearing at 61 (testimony of OTS Director Reich: "[F]irst of all, the primary regulator is the primary Federal regulator, and when another regulator enters the premises, when the FDIC enters the premises, confusion develops about who is the primary regulator, who really is calling the shots, and who do we report to, which agency.")

⁷⁵² Undated draft memorandum from the WaMu examination team at the FDIC to the FDIC Section Chief for Large Banks, FDIC-EM_00251205-10, Hearing Exhibit 4/16-51a (likely mid-2005). In an interview, when shown the draft memorandum, FDIC Assistant Regional Director George Doerr, who was a member of the WaMu examination team, told the Subcommittee that this type of analysis was prepared for a select group of mortgage lenders, including WaMu, to understand where the mortgage market was headed and how it would affect those insured thrifts. He did not have a copy of the final version of the memorandum, but said the FDIC's analysis was discussed with OTS. Subcommittee interview of George Doerr (3/30/2010).

In mid-2005, an internal FDIC memorandum discussed the increased risk associated with the new types of higher risk mortgage loans being issued in the U.S. housing market:

“Despite the favorable history, we believe recent lending practices and buyer behavior have elevated the risk of residential lending. Concerns are compounded by significantly increased investor activity and new loan products that allow less creditworthy borrowers to obtain mortgages. The new loan products of most concern include Option Adjustment Rate Mortgage (ARM) Loans, Interest Only (IO) Loans, and Piggyback Home Equity Loans.”⁷⁵³

WaMu offered all three types of loans, in addition to subprime loans through Long Beach.

In 2007, an FDIC memorandum again identified WaMu’s high risk home loans as its “primary risk,” singling out both its subprime and Option ARM loans:

“SFR [Single Family Residential loan] credit risk remains the primary risk. The bank has geographic concentrations, moderate exposure to subprime assets, and significant exposure to mortgage products with potential for payment shock. ... The bank’s credit culture emphasized home price appreciation and the ability to perpetually refinance. ... In the past, the bank relied on quarterly sales of delinquent residential loans to manage its non performing assets. The bank’s underwriting standards were lax as management originated loans under an originate to sell model. When the originate to sell model collapsed in July 2007 for private and subprime loans, management was no longer able to sell non performing assets. Consequently, non performing assets are now mounting, and the bank’s credit risk mitigation strategy is no longer effective.”⁷⁵⁴

From 2004 to 2008, the FDIC assigned LIDI ratings to WaMu that indicated a higher degree of risk at the bank than portrayed by the bank’s CAMELS ratings. LIDI ratings are intended to convey the degree of risk that a bank might cause loss to the Deposit Insurance Fund, with A being the best rating and E the worst.⁷⁵⁵ The FDIC IG explained the difference between LIDI and CAMELS ratings as follows: “LIDI ratings consider future risks at an institution, where CAMELS rating, in practice, are more point-in-time measures of performance.”⁷⁵⁶ As

⁷⁵³ 7/5/2005 memorandum from FDIC Associate Director John H. Corston to FDIC Associate Director Michael Zamorski, “Insured Institutions’ Exposures to a Housing Slowdown,” FDIC_WAMU_000015114, Hearing Exhibit 4/16-51b.

⁷⁵⁴ FDIC Washington Mutual Bank LIDI Report, Q307, FDIC_WAMU_000014851, Hearing Exhibit 4/16-94 [Sealed Exhibit].

⁷⁵⁵ An A rating indicates a “low risk” of concern that an institution will cause a loss to the Deposit Insurance Fund, a B rating indicates an “ordinary level of concern,” a C rating indicates a “more than an ordinary level of concern,” a D rating conveys a “high level of concern,” and an E rating conveys “serious concerns.” See prepared statement of FDIC IG Rymer at 5 (chart showing FDIC LIDI ratings descriptions), April 16, 2010 Subcommittee Hearing, at 124 (showing FDIC LIDI ratings description).

⁷⁵⁶ Id.

early as 2004, the FDIC viewed WaMu as having higher levels of risk than indicated by its CAMELS ratings. This chart shows the comparable ratings over time:

WaMu CAMELS and LIDI Ratings, 2004-2008⁷⁵⁷

Assessment Period	CAMELS Composite Rating	LIDI Rating
January 2004	2	B
July 2004	2	B/C
January 2005	2	B/C
July 2005	2	B/C
January 2006	2	B/C
July 2006	2	B/C
March 2007	2	B/C
June 2007	2	C
September 2007	2	C
December 2007	2	C
March 2008	3	D
June 2008	3	E
September 2008	4	E

FDIC IG Rymer explained that the B/C rating meant that the FDIC viewed WaMu as posing a “somewhat more than ordinary risk” to the Deposit Insurance Fund, the C rating meant it “posed more than an ordinary risk,” D meant the FDIC had “a high level of concern,” and E meant that the FDIC had “serious concerns” that WaMu would cause a loss to the Fund.⁷⁵⁸

Despite assigning lower LIDI ratings to the bank, indicating the increasing risk it posed to the Deposit Insurance Fund, the FDIC – like OTS – continued to support a 2 CAMELS rating throughout 2007. The result of both regulators delaying a downgrade in WaMu’s rating had a direct impact on FDIC operations. According to the FDIC Inspector General, WaMu’s CAMELS rating of 2 prevented the FDIC from charging higher premiums for the Deposit Insurance Fund until February 2008, when its rating was dropped to a 3.⁷⁵⁹ Higher premiums are one of the tools used by the FDIC to signal to financial institutions that they should better control their risk. Unfortunately, in this case, that tool was not available in 2005, 2006, or 2007.

OTS downgraded the bank to a 3 CAMELS rating in February 2008, after WaMu incurred substantial losses. OTS also required WaMu to issue a nonpublic Board Resolution making general commitments to strengthen its operations. The FDIC undertook a special insurance examination of the bank, analyzed its capital, and concluded that the bank should raise

⁷⁵⁷ See prepared statement of FDIC IG Rymer at 6 (chart showing WaMu ratings and insurance assessments), April 16, 2010 Subcommittee Hearing at 125.

⁷⁵⁸ Id.

⁷⁵⁹ Prepared statement of FDIC IG Rymer at 6-7, April 16, 2010 Subcommittee Hearing, at 125-26. See also IG Report at 40-42.

additional capital.⁷⁶⁰ The FDIC staff attempted to engage OTS staff in discussions about increasing the bank's capital and downgrading its CAMELS ratings, but OTS was not persuaded.⁷⁶¹

In July 2008, tensions between the FDIC and OTS flared after the FDIC sent a letter to OTS urging it to take additional enforcement action: "As we discussed, we believe that [WaMu's] financial condition will continue to deteriorate unless prompt and effective supervisory action is taken."⁷⁶² The letter urged OTS to impose a "corrective program" that included requiring the bank to raise \$5 billion in additional capital and provide quarterly reports on its financial condition. OTS not only rejected that advice, but also expressed the hope that the FDIC would refrain from future "unexpected letter exchanges."⁷⁶³ In a separate email, Scott Polakoff, a senior OTS official called the FDIC letter "inappropriate and disingenuous":

"I have read the attached letter from the FDIC regarding supervision of Wamu and am once again disappointed that the FDIC has confused its role as insurer with the role of the Primary Federal Regulator. Its letter is both inappropriate and disingenuous. I would like to see our response to the FDIC, which I assume will remind it that we, as the PFR, will continue to effectively supervise the entity and will continue to consider the FDIC's views."⁷⁶⁴

Two weeks later, on July 31, both OTS and the FDIC met with the WaMu Board of Directors to discuss the bank's problems. At that meeting, the FDIC Dedicated Examiner suggested that the bank look for a "strategic partner" who could buy or invest in the bank. The OTS director, John Reich, later expressed anger at the FDIC for failing to clear that suggestion first with OTS as the bank's primary regulator. An FDIC examiner wrote to his colleagues:

"Major ill will at WAMU meeting yesterday caused by FDIC suggestion in front of WAMU management that they find a strategic partner. [OTS Director] Reich reportedly indicated that was totally inappropriate and that type of conversation should have occurred amongst regulatory agencies before it was openly discussed with management."⁷⁶⁵

The next day, on August 1, 2008, due to WaMu's increasing financial and deposit losses, the FDIC Chairman, Sheila Bair, suggested that the bank's condition merited a downgrade in its CAMELS rating to a 4, signaling a troubled bank.⁷⁶⁶ The head of OTS sent an email to the head of the FDIC responding that "rating WaMu a 4 would be a big error":

"In my view rating WaMu a 4 would be a big error in judging the facts in this situation. It would appear to be a rating resulting from fear and not a rating based on the condition

⁷⁶⁰ See 7/21/2008 letter from FDIC to OTS, FDIC_WAMU_000001730, Hearing Exhibit 4/16-59.

⁷⁶¹ Subcommittee interview of Steve Funaro (3/18/2010).

⁷⁶² 7/21/2008 letter from the FDIC to OTS, FDIC_WAMU_000001730, Hearing Exhibit 4/16-59.

⁷⁶³ 7/22/2008 letter from OTS to the FDIC, OTSWMS08-015 0001312, Hearing Exhibit 4/16-60.

⁷⁶⁴ 7/22/2008 email from OTS Deputy Director Scott Polakoff to OTS colleagues, Hearing Exhibit 4/16-59.

⁷⁶⁵ 8/1/2008 email from David Promani to FDIC colleagues, FDIC-EM_00246958, Hearing Exhibit 4/16-64.

⁷⁶⁶ See 8/1/2008, email from Darrell Dochow to OTS senior officials, Hearing Exhibit 4/16-62.

of the institution. WaMu has both the capital and the liquidity to justify a 3 rating. It seems based on email exchanges which have taken place that FDIC supervisory staff in San Francisco is under pressure by the fear in Washington to downgrade this institution. ... [P]rior to such action I would request a[n FDIC] Board meeting to consider the proper rating on this institution.”⁷⁶⁷

The FDIC Chairman responded: “We will follow the appropriate procedures if the staff cannot agree.”⁷⁶⁸

A few days later, Ms. Bair sent an email to Mr. Reich requesting a discussion of “contingency planning” for WaMu, including making “discrete inquiries” to determine whether any institution would be willing to buy the bank. The OTS Director responded with a lengthy email criticizing the request and stating in part:

“I do not under any circumstances want to discuss this on Friday’s conference call I should not have to remind you the FDIC has no role until the PFR [Primary Federal Regulator] (i.e. the OTS) rules on solvency You personally, and the FDIC as an agency, would likely create added instability if you pursue what I strongly believe would be a precipitous and unprecedented action. ... It seems as though the FDIC is behaving as some sort of super-regulator – which you and it are not.”⁷⁶⁹

In September 2008, Ms. Bair informed WaMu that there was a likely ratings disagreement between the FDIC and OTS, and that the FDIC intended to lower the bank’s rating to a 4. After the FDIC Chairman informed the OTS Director by email of her conversation with WaMu, Mr. Reich forwarded the exchange to his OTS Deputy Director, upset that she had not come to him first with that information: “I cannot believe the continuing audacity of this woman.”⁷⁷⁰ Two weeks later, the bank failed.

Restricting Office Space and Information. Throughout the period examined by the Subcommittee, OTS not only rebuffed the FDIC’s analysis and advice, it began to actively impede FDIC oversight efforts at WaMu. OTS even went so far as to limit the FDIC’s physical access to office space, as well as to needed information, at WaMu’s new headquarters. Prior to 2006, OTS had always provided the FDIC examiners with space in its on-site offices at the bank, making it easy for FDIC examiners to participate in OTS examinations. In the summer of 2006, however, following WaMu’s move to a new headquarters in Seattle, OTS did not provide any of its desks for the FDIC examiners. OTS also restricted the FDIC’s access to an important database that all examiners used to review WaMu documents, referred to as the “examiner’s library.” From July until November 2006, a period of about four months, the FDIC examiners were denied access to both office space on the bank’s premises and the examiner’s library. The

⁷⁶⁷ 8/1/2008 email from OTS Director John Reich to FDIC Chairman Sheila Bair, Hearing Exhibit 416-63.

⁷⁶⁸ Id.

⁷⁶⁹ 8/6/2008 email from OTS Director John Reich to FDIC Chairman Sheila Bair, “Re: W,” FDIC-EM_00110089, Hearing Exhibit 4/16-66.

⁷⁷⁰ 9/10/2008 email from OTS Director John Reich to OTS Deputy Director Scott Polakoff, Polakoff_Scott-00065461_001, Hearing Exhibit 4/16-68.

FDIC had to make multiple requests, taking the issue up through the OTS hierarchy in Washington, D.C. headquarters, to regain the access it had enjoyed for years at WaMu.

In an October 2006 email to the FDIC Assistant Regional Director, George Doerr, the FDIC Dedicated Examiner at WaMu, described in exasperation how he had been promised permanent space at the bank, but still did not have it. Demonstrating how poisoned the relationship was at that point, the FDIC examiner blamed the lack of cooperation on “stalling tactics and misrepresentations:”

“Our issue is with OTS management (Finn and Dochow) and how they have apparently mislead RD [Regional Director] Carter, DRD [Deputy Regional Director] Villalba, you, and me. This regards space for the dedicated examiner and access to information I met with OTS examiners yesterday and they have not made arrangements for permanent space for me at the new location and protocols for information sharing have not been developed In July RD Carter [from FDIC] talked with Finn [from OTS] and he agreed to space and access. On 8/17 you and DRD Villalba had a telephone conversation with Dochow and he agreed it was not necessary to fix what was not broken and he promised access to space and information. On 9/15 I met with Dochow and he agreed to space and information sharing I am prepared for more of Dochow’s stalling tactics and misrepresentations.”⁷⁷¹

Mr. Doerr forwarded the “info about OTS denying us space and access to information” to other FDIC officials stating: “The situation has gone from bad to worse.”⁷⁷²

At the Subcommittee hearing, when asked why OTS took four months to restore FDIC access to office space and WaMu documents, Mr. Doerr of the FDIC responded:

Mr. Doerr: I can’t explain what the reason was. I personally think they didn’t want us there. I mean, we were denied physical access and the access to this examiner library ... of electronic materials that WaMu puts together for the regulators [Y]ou shouldn’t have to go 4 months without having to have that. ...

Senator Levin: And it was essential that Mr. Funaro [the FDIC Dedicated Examiner] have access to that library in order to get information about the Washington Mutual?

Mr. Doerr: Absolutely.⁷⁷³

By November 2006, when OTS relented and provided desk space and database access to the FDIC Dedicated Examiner, it did little to ameliorate the situation. Its actions contributed to a

⁷⁷¹ 10/13/2006 email chain from Vanessa Villalba to J. George Doerr, John F. Carter, and John H. Corston, “Re: wamu quarterly,” FDIC_WAMU_000014449, Hearing Exhibit 4/16-53. See also 9/6/2006 FDIC internal email chain, “OTS re: WAMU,” FDIC-EM_00252239, Hearing Exhibit 4/16-51c (“He absolutely agreed you’d have access to the Examiner Library. And he hasn’t arranged that.”).

⁷⁷² Id.

⁷⁷³ April 16, 2010 Subcommittee Hearing at 72-73.

worsening relationship between the two agencies, impeded FDIC oversight efforts, and weakened oversight of WaMu's activities.⁷⁷⁴

Restricting FDIC Examinations. At the same time OTS was withholding office space and database access from the FDIC examination team, it also, for the first time, refused an FDIC request to participate in an OTS examination of WaMu.

Although the FDIC has a broad statutory right to participate in examinations of insured depository institutions,⁷⁷⁵ it had agreed to spell out how it would exercise that statutory authority in a 2002 Interagency Agreement with the Federal Reserve, OCC, and OTS.⁷⁷⁶ The Interagency Agreement authorized the FDIC to conduct "special examinations" of insured institutions that "represent a heightened risk" to the Deposit Insurance Fund, defined as institutions with a 3, 4, or 5 rating on the CAMELS scale or which were "undercapitalized as defined under Prompt Corrective Action" standards.⁷⁷⁷ Other FDIC bank examinations had to be authorized by the primary regulator. Prior to 2006, OTS had routinely authorized joint OTS-FDIC examinations without regard to the CAMELS ratings, but in January 2006, OTS suddenly changed its policy. The change was signaled in an email sent by a senior OTS official to his colleagues:

"The message was crystal clear today. Absolutely no FDIC participation on any OTS 1 and 2 rated exams. . . . We should also deny FDIC requests to participate on HC [holding company] or affiliate exams.

Permission for FDIC to join us on WaMu ... will stand for now, but they should not be [in] direct contact with thrift management or be requesting info directly from the thrift."⁷⁷⁸

This email signaled the beginning of a much more restrictive policy toward the FDIC participation in OTS examinations, even though in January 2006, OTS indicated it would allow an exception for the FDIC examiners to continue participating in its scheduled examination of WaMu. The reasons for this change in policy were never made clear, but in several interviews, OTS and FDIC officials attributed it to certain senior OTS officials who were reluctant to share thrift oversight responsibilities with the FDIC.

In August 2006, the FDIC made what it viewed as a routine request to join in the next OTS examination of WaMu, which was designed to focus, in part, on WaMu's subprime lending. To the surprise and consternation of the FDIC, the OTS Regional Director Michael Finn sent a letter denying the request and stating that OTS would instead "share our exam findings with the

⁷⁷⁴ See also IG Report at 42-45 ("It appears that 2006 was a turning point in the relationship between FDIC and OTS in terms of information sharing that carried through to 2008.").

⁷⁷⁵ See 12 U.S.C. § 1820(b)(3).

⁷⁷⁶ See "Coordination of Expanded Supervisory Information Sharing and Special Examinations," PSI-FDIC-10-0001.

⁷⁷⁷ *Id.*

⁷⁷⁸ 1/24/2006 email from OTS senior official Michael Finn to Edwin Chow and Darrel Dochow, OTSWM06-006 0000129, Hearing Exhibit 4/16-49.

FDIC, as we have in the past.”⁷⁷⁹ Mr. Finn wrote that because WaMu’s CAMELS rating was a 2 and FDIC had not shown “any concerns regarding our past or planned examination activities, and our continued commitment to share all appropriate information, the FDIC has not shown the regulatory need to participate in the upcoming Washington Mutual examination.”

After discussing the Finn letter in an internal email, the FDIC Assistant Regional Director, George Doerr, wrote to his colleagues:

“Obviously, we have a major problem here. OTS is taking the approach we need to establish a ‘regulatory need to participate’ on an exam, and that the basis would have to be disagreement on exam findings. Mr. Finn is totally missing the point on our need for timely accurate information to properly categorize WAMU for deposit insurance premium purposes, more so now than ever in the past.”⁷⁸⁰

In October 2006, John Carter with the FDIC sent Michael Finn of OTS a letter repeating the FDIC’s request to participate in the WaMu examination:

“I have received your response to our August 14 2006 letter in which we request permission to participate in aspects of the upcoming examination of Washington Mutual Bank. Regarding your reasoning for rejecting our participation in these target reviews, you are correct that our request is not predicated on any current disagreement related to examination findings or concerns regarding supervisory activities at Washington Mutual. Such criteria are not prerequisite for requesting – or for the OTS granting – FDIC staff participation in target examination activities.

As you are aware, the FDIC and the OTS have a long, cooperative, and productive working relationship with respect to the examination of Washington Mutual Bank, which we hope to continue. Past experience has proven that our participation in targeted reviews is beneficial to our respective Agencies, as well as to the Bank. ... The 2002 Agreement clearly allows for FDIC staff participation in examination activities to evaluate the risk of a particular banking activity to the deposit insurance fund.

Washington Mutual Bank is very large insured financial institution, and in our view participation on the upcoming targeted reviews is necessary to fulfill our responsibilities to protect the deposit insurance fund.”⁷⁸¹

On November 10, 2006, Mr. Finn responded with a letter that, again, refused to allow the FDIC to participate in the WaMu examination:

“OTS does not seek to have FDIC staff actively participate in our examination activities and conclusions at Washington Mutual. We do understand your need for access to

⁷⁷⁹ 9/6/2006 FDIC internal email chain, “OTS re: WAMU,” FDIC-EM_00252239-40, Hearing Exhibit 4/16-51c.

⁷⁸⁰ Id. at FDIC-EM_00252240.

⁷⁸¹ 10/6/2006 letter from FDIC senior official John Carter to OTS senior official Michael Finn, FDIC_WAMU_000014445-46, Hearing Exhibit 4/16-52a.

examination information and your need to meet with OTS staff to discuss our supervisory activities at Washington Mutual. To facilitate this information sharing and discussions, we have agreed to allow your Dedicated Examiner ... to conduct his FDIC risk assessment activities on site at Washington Mutual when our examination team is on site. All FDIC requests for information should continue to be funneled through our examiner-in-charge.”⁷⁸²

The OTS letter also restricted the ability of the FDIC to place more than one examiner on site at WaMu, even though the bank, with \$300 billion in assets, was one of the largest insured institutions in the country and was engaged in a high risk lending strategy:

“We also understand that the FDIC may occasionally request OTS permission to have FDIC examination staff assist [its Dedicated Examiner] on site at Washington Mutual in his risk assessment activities. We will consider these limited requests to send additional FDIC staff to Washington Mutual on a case-by-case basis.”⁷⁸³

Despite the negative tone of the OTS letter, the FDIC persisted in its request, and OTS eventually allowed the FDIC examiners to participate in some WaMu examinations in 2006 and 2007, though it continued to press the FDIC to limit its requests and personnel.⁷⁸⁴

During the Subcommittee hearing, the FDIC staff described their surprise at the new OTS policy and frustration at its seemingly circular reasoning – that the FDIC needed to specify a “basis” and “disagreement” with OTS to justify joining an OTS examination, but the FDIC was also barred from participating in the very examinations that could develop that basis and disagreement.⁷⁸⁵

Restricting Access to Loan Files. Even after OTS reluctantly allowed the FDIC to participate in some OTS examinations, it held firm in its refusal to allow the FDIC to directly review WaMu loan files, insisting that the FDIC instead rely on the findings and conclusions of OTS examiners who conducted the loan file reviews.

In September 2006, when OTS first refused to give the FDIC direct access to WaMu loan files, an FDIC senior official commented: “The OTS must really be afraid of what we might come across, but bottom line is we need access to the information.”⁷⁸⁶ The FDIC explained to the Subcommittee that it needed direct access to the loan files to assess the higher risk loans WaMu was issuing, both to evaluate what insurance fees should be imposed on Washington Mutual and to assess the extent of any threat to the Deposit Insurance Fund.

⁷⁸² 11/10/2006 letter from OTS senior official Michael Finn to FDIC Regional Director John Carter, OTSWMS06-008 0001827, Hearing Exhibit 4/16-52b.

⁷⁸³ Id.

⁷⁸⁴ See, e.g., 1/22/2007 letter from Michael Finn to John Carter, Hearing Exhibit 4/16-52d.

⁷⁸⁵ See, e.g., April 16, 2010 Subcommittee Hearing at 73-74.

⁷⁸⁶ 9/7/2006 email from FDIC senior official John Carter to George Doerr, FDIC-EM_00252239, Hearing Exhibit 4/16-51c.

In February 2007, OTS refused an FDIC request to review WaMu loan files to evaluate the bank's compliance with recently issued federal guidance on how to handle nontraditional mortgages, such as subprime, stated income, and negatively amortizing loans. Even though Washington Mutual was issuing exactly those types of loans under its High Risk Lending Strategy, OTS indicated that it did not plan to evaluate WaMu's compliance with the guidance and did not want the FDIC to perform that evaluation either. In a February email, the FDIC Dedicated Examiner at WaMu informed the FDIC Assistant Regional Director: "OTS is restricting FDIC on the current examination in the SFR [single family residential loan] review segment. OTS will not allow us to review SFR loan files."⁷⁸⁷ The Assistant Regional Director relayed the development to the Regional Director: "John, here we go again. ... OTS wants to draw a distinction between loan file review as an examination activity (that they object to) vs. risk assessment (which they do not object to). I don't fathom the distinction."⁷⁸⁸

Two months later, in April 2007, the FDIC continued to press for permission to review WaMu loan files. The FDIC Assistant Regional Deputy wrote in an email to a colleague:

"[OTS Regional Director] Finn pushed back on his previous approval of our participation in the 2007 exam targets, specifically as to our ability to work loan files alongside OTS examiner, and we were particularly interested in WAMU's compliance with nontraditional mortgage guidance. ... Mr. Finn and his examiner, Ben Franklin, stated that OTS did not intend to look at files for purposes of testing nontraditional mortgage guidance until after the bank made a few changes they had agreed to. I asked if we could then join the file review whenever ots did look at this, and he said, 'No.'"⁷⁸⁹

At the Subcommittee hearing, when asked about these incidents, the FDIC Chairman Sheila Bair testified:

"[I]n 2005 ... OTS management determined that FDIC should not actively participate in OTS examinations at WaMu, citing the 2002 interagency agreement. In subsequent years, FDIC faced repeated resistance to its efforts to fully participate in examinations of WaMu. Even as late as 2008, as problems at WaMu were becoming more apparent, OTS management sought to limit the number of FDIC examiners involved in the examination and did not permit the FDIC to review loan files."⁷⁹⁰

Both the Treasury and the FDIC Inspectors General were critical of OTS' actions. In response to a question about "[w]hether or not OTS should have allowed the FDIC to help" with the examinations of WaMu, FDIC IG Rymer responded:

"[I]t is clear to me that they [OTS] should have. ... [T]hey [the FDIC] had concerns and those concerns were principally driven by its own LIDI analysis. ... [T]here is no question in my mind that the FDIC's request for back-up authority, simply given the

⁷⁸⁷ 2/6/2007 email from Stephen Funaro to George Doerr, Hearing Exhibit 4/16-55.

⁷⁸⁸ 2/6/2007 email from George Doerr to John Carter and others, Hearing Exhibit 4/16-55.

⁷⁸⁹ 4/30/2007 email from George Doerr to David Collins, FDIC_WAMU 000014457, Hearing Exhibit 4/16-57.

⁷⁹⁰ April 16, 2010 Subcommittee Hearing at 80-81 (testimony of Sheila Bair).

sheer size of WaMu, was, to me, enough reason for FDIC to ask for back-up authority.”⁷⁹¹

Treasury IG Thorson agreed:

“I agree with Mr. Rymer. ... [T]he sheer size of the bank would say that there should be a maximum of cooperation, not to mention the fact that it is dictated by statute, as well. ... [A]s a matter of policy, I think they [OTS] should have allowed that. No matter what their reasoning was, as a matter of policy, they should have, yes.”⁷⁹²

OTS Turf War. At the Subcommittee hearing, John Reich, the OTS Director, was asked about the friction between the two agencies. In response to a question about the August 2008 email in which he wrote that the FDIC had “no role” at WaMu until OTS “rules on solvency,”⁷⁹³ Mr. Reich stressed that the key point he was trying to convey was that OTS was WaMu’s primary federal regulator:

Mr. Reich: I think basically and fundamentally it was who was the primary Federal regulator.

Senator Levin: It was turf, in a word.

Mr. Reich: I think OTS had the responsibility as the primary Federal regulator.

Senator Levin: Turf.

Mr. Reich: We had the statutory responsibility.

Senator Levin: Instead of going at this as partners –

Mr. Reich: I have more than most – an understanding of the role of the FDIC and their need to participate. I have been there.”⁷⁹⁴

The evidence shows that OTS senior officials not only resisted, but resented the FDIC participation in the oversight of Washington Mutual Bank and deliberately took actions that limited the FDIC oversight, even in the face of a deteriorating \$300 billion institution whose failure could have exhausted the entire Deposit Insurance Fund. After contrasting OTS’ hard-edged treatment of the FDIC with the collaborative approach it took towards WaMu, Senator Levin observed:

“About the only time OTS showed backbone was against another agency’s moving, in your view, into your turf. Boy, that really got your dander up. That got your blood pressure up. I do not see your blood pressure getting up against a bank which is engaged

⁷⁹¹ April 16, 2010 Subcommittee Hearing at 34.

⁷⁹² Id. at 35.

⁷⁹³ See 8/6/2008 email from OTS Director John Reich to FDIC Chairman Sheila Bair, “Re: W,” FDIC-EM_00110089, Hearing Exhibit 4/16-66 (“I should not have to remind you the FDIC has no role until the PFR [Primary Federal Regulator] (i.e. the OTS) rules on solvency.”).

⁷⁹⁴ April 16, 2010 Subcommittee Hearing at 64.

in the kind of dangerous practices that the bank engaged in, dangerous to their solvency, dangerous to their investors, dangerous to their depositors, dangerous to this economy.”⁷⁹⁵

Because OTS has been abolished, its turf war with the FDIC is over. But witnesses from the FDIC told the Subcommittee that the remaining banking regulators also sometimes resist its participation in bank oversight. In particular, a senior FDIC official told the Subcommittee that, although the FDIC has the statutory authority to take an enforcement action against a bank, the FDIC has never used that authority because the other regulators would view it as “an act of war.” The WaMu case history demonstrates how important it is for our federal regulators to view each other as partners rather than adversaries in the effort to ensure the safety and soundness of U.S. financial institutions.

D. Regulatory Failures

In a market economy, the purpose of regulation within the financial markets is to provide a level playing field that works for everyone involved, from the financial institutions, to the investors, to the consumers and businesses that rely on well functioning financial systems. When financial regulators fail to enforce the rules in an effective and even handed manner, they not only tilt the playing field in favor of some and not others, but also risk creating systemic problems that can damage the markets and even the entire economy.

At the April 16, 2010 hearing of the Subcommittee, Senator Coburn had the following exchange with Inspectors General Thorson and Rymer, which explains in part why OTS failed as a regulator to address WaMu’s harmful lending policies:

Senator Coburn: As I sat here and listened to both the opening statement of the Chairman and to your statements, I come to the conclusion that actually investors would have been better off had there been no OTS because, in essence, the investors could not get behind the scene to see what was essentially misled by OTS because they had faith the regulators were not finding any problems, when, in fact, the record shows there are tons of problems, just there was no action taken on it. ... I mean, we had people continually investing in this business on the basis—as a matter of fact, they raised an additional \$7 billion before they collapsed, on the basis that OTS said everything was fine, when, in fact, OTS knew everything was not fine and was not getting it changed. Would you agree with that statement or not?

Mr. Thorson: Yes, sir. I think ... basically assigning a ‘satisfactory’ rating when conditions are not is contradictory to the very purpose for which regulators use a rating system. I think that is what you are saying.

Senator Coburn: Any comments on that Mr. Rymer?

Mr. Rymer: I would agree with Mr. Thorson. ...

⁷⁹⁵ Id. at 66.

Senator Coburn: [To Mr. Thorson] By your statement, it would imply almost that OTS is an enabler of this effort rather than an enabler of making sure that the American people's taxpayer dollars and the trust in institutions that are supposed to be regulated by an agency of the Federal Government can be trusted.

Mr. Thorson: Right.

In trying to understand why OTS failed to make use of its enforcement tools to compel WaMu to operate in a safe and sound manner, the Subcommittee investigation has identified factors that have resonance not only in the recent financial crisis, but are critical for regulators and policymakers to address in order to avoid future financial disasters as well.

(1) OTS' Failed Oversight of WaMu

During the five-year period of the Subcommittee's inquiry, from 2004 to 2008, OTS identified over 500 serious operational deficiencies at WaMu and Long Beach. At WaMu, the problems included weak lending standards, high loan exception and error rates, noncompliance with bank loan policy, weak risk management, poor appraisal practices, and poor quality loans. At Long Beach, OTS identified many of the same problems and added on top of those, weak management, poor quality mortgage backed securities, and inadequate repurchase reserves. The problems are described in examination report after examination report, and OTS raised many of the same concerns, in writing and in person, with WaMu's Board of Directors.

But for all those years, OTS did little beyond describing the problems and asking bank executives to make improvements. When the reforms failed to materialize, the problems continued, and the risk increased, OTS stood on the sidelines. Subcommittee interviews found that, until 2008, OTS regulators never even held internal discussions about taking an enforcement action against the bank. In 2008, in the face of mounting losses, OTS took two informal, nonpublic enforcement actions, which contained few mandatory measures or deadlines and were together insufficient to save the bank.

In trying to understand the agency's years of inaction, the Subcommittee's investigation concluded that the lack of enforcement reflected an OTS culture of deference to bank management, demoralized examiners whose oversight efforts were unsupported by their supervisors, and a narrow regulatory focus that allowed short term profits to excuse high risk activities and disregarded systemic risk. Inflated CAMELS ratings may have further reduced the pressure to act, while conflicts of interest may have also tempered OTS' willingness to take tough enforcement action against WaMu.

(a) Deference to Management

Part of the reason that OTS declined to take enforcement action against Washington Mutual was a posture of deference to the management of the institutions it regulated. Ronald Cathcart, WaMu's chief enterprise risk officer from 2006-2008, described OTS as essentially believing in "self-regulation":

“I ... have actually operated in banks under three regulators, in Canada under the Office of the Supervisor of Financial Institutions, at Bank One under the OCC, and then at Washington Mutual under the OTS[...] ... [T]he approach that the OTS took was much more light-handed than I was used to. It seemed as if the regulator was prepared to allow the bank to work through its problems and had a higher degree of tolerance that I had ... seen with the other two regulators. ... I would say that the OTS did believe in self-regulation.”⁷⁹⁶

A former OTS regulator who later took a job with WaMu, was quoted in a press report as saying that OTS provided “by far the softest” oversight of any federal bank regulator.⁷⁹⁷

Evidence of OTS’ unusually deferential approach can be found in its internal documents, starting at the top. In a May 2007 email, for example, cancelling lunch with a colleague so he could instead have lunch with WaMu’s CEO, Kerry Killinger, OTS Director, John Reich, described the bank as “my largest constituent.”⁷⁹⁸ At the Subcommittee hearing, Mr. Reich defended using the term, testifying that referring to others as constituents was a “habit” he had picked up while working on Capitol Hill.⁷⁹⁹ One Senator pointed out that OTS’ true constituents were not the banks it regulated, but “the American people it was supposed to protect from unsafe and unsound banking practices.”⁸⁰⁰

On another occasion in July 2008, Mr. Reich sent an email to Mr. Killinger informing him that OTS had decided to issue a Memorandum of Understanding (MOU) to address issues of concern at the bank. In the email, the OTS Director apologized twice for his method of communication, but also sounded a note of regret for his decision to take a tougher approach:

“Kerry,

I’m sorry to communicate by email – I’ve left a couple of messages on your office phone, but I’m guessing you may be off for a long weekend.

I’ve been wrestling with the issue of an MOU versus a Board Resolution as a result of our conversation in my office last week. And I’ve decided that an MOU is the right approach for OTS to do in this situation

We almost always do an MOU for 3-rated institutions, and if someone were looking over our shoulders, they would probably be surprised we don’t already have one in place. ...

So as much as I would like to be able to say a Board Resolution is the appropriate regulatory response, I don’t really believe it is. I do believe we need to do an MOU. We

⁷⁹⁶ April 13, 2010 Subcommittee Hearing, at 39-40 (Testimony of Ronald J. Cathcart, former WaMu Chief Enterprise Risk Officer, 2006-2008).

⁷⁹⁷ “Lax Regulators Helped Doom Washington Mutual,” *Associated Press* (4/16/2010).

⁷⁹⁸ 5/2/2007 email from OTS Director John Reich to Shelley Hymes, “Re: Lunch Friday,” Reich_John-00025837_001, Hearing Exhibit 4/16-78.

⁷⁹⁹ April 16, 2010 Subcommittee Hearing at 36.

⁸⁰⁰ Id. at 5 (opening statement of Senator Levin).

don't consider it a disclosable event, and we also think the investment community won't be surprised if they learn of it, and would probably only be surprised to learn one didn't already exist.

Again, I'm sorry to communicate this decision by email, but I'm scheduled to be out of the office next week myself and wanted you to have this information.

Best regard, Kerry,

John”⁸⁰¹

The email does not convey a message from an arms-length regulator concerned about a failing bank. To the contrary, the email conveys a sense of familiarity and discloses that the head of OTS knew his agency had already been providing preferential treatment to the bank by failing to impose an MOU after its downgrade to a 3 rating five months earlier, in February 2008. Mr. Reich stated that others “looking over our shoulders ... would probably be surprised” an MOU was not already in place at WaMu.

When asked about this email at the Subcommittee hearing, the Treasury and the FDIC Inspectors General both expressed discomfort with its language and tone:

Mr. Thorson: Again, he sort of apologizes in the previous document that this could become known. This gets right to the heart of what you were talking about, the culture. ... [T]here is not an acceptance of the fact that a strong regulatory control helps them.

Senator Levin: This is far too cozy?

Mr. Thorson: Absolutely, as far as I am concerned, yes.

Senator Levin: Mr. Rymer, do you have any reaction to this?

Mr. Rymer: It does indicate a level of familiarity that makes me uncomfortable.⁸⁰²

Equally telling is the fact that, even after sending the email, OTS delayed imposing the MOU on WaMu for another two months, waiting until September 2008, just three weeks before the bank's failure.⁸⁰³

Like the head of the agency, OTS examiners also took a deferential approach to WaMu. In a January 2006 email discussing WaMu's desire to purchase Long Beach, for example, the OTS Examiner-in-Charge indicated that, rather than insist the bank clean up Long Beach

⁸⁰¹ 7/3/2008 email from OTS Director John Reich to WaMu CEO Kerry Killinger, OTSWMS08-014 0000912-13, Hearing Exhibit 4/16-44.

⁸⁰² April 16, 2010 Subcommittee Hearing at 34.

⁸⁰³ See also id. at 46 (When asked why OTS took so long to complete the MOU, former OTS Director John Reich testified: “I don't know, to tell you the truth. I do not know why it took so long to implement the MOU. ... I regret [the] ... delay.”).

problems before the purchase, OTS would have to rely on its “relationship” with WaMu to get the job done:

“The letter [from WaMu] seems okay. They obviously want to leave it a little squishy, of course, on the growth plans, but at least they make a firm commitment to clean up the underwriting issues. At some level, it seems we have to rely on our relationship and their understanding that we are not comfortable with current underwriting practices and don’t want them [Long Beach] to grow significantly without having the practices cleaned up first.”⁸⁰⁴

On another occasion in June 2006, the same OTS Examiner-in-Charge sent a lengthy email to his Regional Director discussing plans for the annual WaMu Report on Examination (ROE). His email expressed concern about losing credibility with the bank if OTS pressed too hard on certain reforms, twice noted the bank’s size and complexity, and stressed that the bank was making progress in fixing identified problems:

“[W]e still have some strong feelings on some items that I’d like to ‘push back’ ... some on. Generally we feel that we are quite balanced and do not have any gloves on in our approach to our findings and conclusions at WAMU. We have some concern that if we press forward with some things ... we may run the risk of losing some credibility in terms of understanding the size and complexity of their business and looking as though we do not have a balanced perspective. My own fear is that we may not have done enough to communicate to you [the Regional Director] why we feel that the few negative things we have brought up through findings memos and meetings, while important to keep in front of management, are not so serious they wipe out all the right things the institution is doing in all those areas we reviewed and did not have any issues, nor should they negate the ongoing good progress in making improvements in a manner that seems reasonable given the size, complexity, and status of the institution.”⁸⁰⁵

The Examiner-in-Charge then listed three areas of concern, problems at Long Beach which he seemed to downplay, the need to limit the number of corrective actions listed in the ROE, and the need to review how OTS cited the bank for compliance violations. In the Long Beach discussion, he wrote that improvements “will take time because of size and complexity We don’t feel demanding more than providing us with an acceptable action plan with realistic timelines is appropriate or necessary at this time.” On the corrective actions, he wrote that the list had to be limited or “more important findings will get lost. ... We feel strongly that we should not cite all findings and corrective actions within the body of the ROE ... [which] is already not getting read I believe.” He also expressed concern that OTS was “starting to ‘over-meeting’ the institution” and suggested that “the exit meeting” with the bank to discuss the ROE findings had “become almost unnecessary.”

⁸⁰⁴ 1/27/2006 email from Lawrence Carter to Darrel Dochow, OTSWMS06-008 0001082, Hearing Exhibit 4/16-32.

⁸⁰⁵ 6/15/2006 email from Lawrence Carter to Darrel Dochow, Dochow_Darrel-00022908_001, Hearing Exhibit 4/16-7.

After urging patience on WaMu reforms, suggesting a limit on the corrective actions listed in the ROE, and recommending fewer meetings with WaMu management, the curious final line in the email is: “My management class this week has made me feel empowered! Can you tell? Please don’t fire me!”

Additional evidence of OTS deference is its reliance on WaMu to track its own compliance with OTS findings calling for corrective action. At all other thrifts, OTS tracked the extent to which the thrift implemented OTS findings, using its own systems. But at WaMu, OTS did not keep its own records, but relied on WaMu’s Enterprise Risk Issue Control System (ERICS). The Treasury and the FDIC Inspectors General criticized this arrangement, noting that they were unable to use WaMu’s system to determine the status of multiple OTS findings.⁸⁰⁶ In addition, they noted that, in 2006, ERICS discontinued its practice of identifying “repeat findings,” making it difficult to identify and track those findings.⁸⁰⁷ Their report explicitly recommends against OTS’ relying on a bank’s systems in the future to track compliance.

Finally, the actual language used by OTS in its reports and memoranda that described deficiencies demonstrated a passive approach to dealing with management. Common phrases noted that the bank’s practices were “less than satisfactory,” error rates were at “higher than acceptable levels,” and “management’s actions did not improve underwriting to a satisfactory level.” OTS reports rarely used more assertive language that, for example, called the bank’s efforts unsatisfactory, inadequate, or ineffective. An exchange at the Subcommittee hearing between Senator Levin and the OTS Examiner-in-Charge at WaMu from 2004 to 2006, Lawrence Carter, captured the issue:

“Mr. Carter: I think that what I said here is that we could not conclude that their progress was wholly inadequate, because they did make some progress.

Senator Levin: ... Can you use the words, ‘Folks, your progress was inadequate?’ Are you able to tell them that?

Mr. Carter: For their progress on this specific action plan, I did not conclude we could tell them that.

Senator Levin: That it was inadequate?

Mr. Carter: That is right.

Senator Levin: You could tell them it was not wholly adequate.

Mr. Carter: Yes.

Senator Levin: But not inadequate.

Mr. Carter: I do not think I could say it was wholly inadequate.

⁸⁰⁶ See, e.g., IG Report at 30.

⁸⁰⁷ See Thorson prepared statement, April 16, 2010 Subcommittee Hearing at 12.

Senator Levin: I did not use the word ‘wholly.’ You could tell them it was not wholly adequate, but you could not tell them it was inadequate. That is what you are telling us.

Mr. Carter: Yes.

Senator Levin: That is the kind of bureaucratic speech which I think sends the message to people you regulate that, hey, folks, you are making progress, instead of telling them it is inadequate.”⁸⁰⁸

At times, WaMu took advantage of its special relationship with OTS and lobbied for leniency. In one instance from May 2006, a WaMu official from the Regulatory Relations division sent an email to his colleagues stating that he was able to convince the agency to reduce an audit “criticism” to the less serious category of a “recommendation”: “OTS confirmed today that they will re-issue this memo without the ‘Criticism.’ It will be a ‘Recommendation.’”⁸⁰⁹ His colleague forwarded the email to bank executives noting: “Good news - John was able to get the OTS to see the light and revise the Underwriting rating to a Recommendation.”⁸¹⁰

A more serious incident involved WaMu’s 2005 discovery, after almost a year-long investigation by an internal Home Loans Risk Mitigation Team, of substantial loan fraud taking place at two high volume loan offices in California, known as Downey and Montebello. The WaMu investigators found that 83% of the loans reviewed from the Downey office and 58% of the loans reviewed from the Montebello office contained fraudulent information, either with respect to the borrower or the appraised value of the property. The investigators wrote up their findings and presented them to WaMu’s Chief Risk Officer and the President of Home Loans.⁸¹¹ No one, however, informed OTS, and WaMu took no action to stop the fraudulent loans.

Two years later, in 2007, after a mortgage insurer refused to insure any more loans issued by the lead loan officer in the Montebello office, OTS directed WaMu to investigate the matter. WaMu’s internal auditors launched an investigation, confirmed the loan fraud problem at the Montebello office, and also uncovered the 2005 investigation whose fraud findings had been ignored. WaMu took until April 2008 to produce a report documenting its findings.⁸¹² WaMu also initially resisted providing the report to OTS, claiming it was protected by attorney-client

⁸⁰⁸ April 16, 2010 Subcommittee Hearing at 60-61.

⁸⁰⁹ 5/30/2006 email from John Robinson, WaMu VP of Regulatory Relations, to colleagues, JPM_WM02619435. Hearing Exhibit 4/16-34.

⁸¹⁰ 5/30/2006 email from Wayne Pollack, WaMu SVP, to David Schneider, et al., JPM_WM02619434, Hearing Exhibit 4/16-34.

⁸¹¹ See 11/17/2005 WaMu internal memorandum, “re So. CA Emerging Markets Targeting Loan Review Results,” JPM_WM01083051, Hearing Exhibit 4/13-22a; 11/16/2005 WaMu internal PowerPoint presentation, “Retail Fraud Risk Overview,” JPM_WM02481934-49, Hearing Exhibit 4/13-22b; 11/19/2005 email from Cheryl Feltgen to colleagues, “Re: Retail Fraud Risk Overview,” JPM_WM03535694-95, Hearing Exhibit 4/13-23a; 8/29/2005 email from Jill Simons to Timothy Bates, “Risk Mit Loan review data ‘Confidential,’” JPM_WM04026076-77, Hearing Exhibit 4/13-23b.

⁸¹² 4/4/2008 WaMu internal memorandum, from June Thoreson-Rogers, Corporate Fraud Investigations, and Michele Snyder, Deputy General Auditor, to Stewart Landefeld, Acting Chief Legal Officer, and others, Hearing Exhibit 4/13-24.

privilege.⁸¹³ The OTS Examiner-in-Charge at the time told the Subcommittee that he insisted on seeing the report. After finally receiving it and reading about the substantial loan fraud occurring at the two loan offices since 2005, he told the Subcommittee that it was “the last straw” that ended his confidence that he could rely on WaMu to combat fraudulent practices within its own ranks.

OTS’ deference to WaMu management appeared to be the result of a deliberate posture of reliance on the bank to take the steps needed to ensure that its personnel were engaged in safe and sound practices. The reasoning appeared to be that if OTS examiners simply identified the problems at the bank, OTS could then rely on WaMu’s own self interest, competence, and discipline to ensure the problems were corrected, with no need for tough enforcement action. It was a regulatory approach with disastrous results. While OTS may have hoped that it could accomplish its regulatory responsibilities by simply identifying problems without the threat of enforcement action, that approach proved ineffective.

(b) Demoralized Examiners

For five years, OTS examiners identified serious problems with WaMu’s lending practices and risk management, but OTS senior officials failed to support their efforts by using the agency’s enforcement tools to compel the bank to correct the identified problems. WaMu’s chief risk officer from 2004 to 2005, James Vanasek, remarked at the Subcommittee hearing on how OTS examiners seemed to receive little support from more senior officials in terms of enforcement:

“[T]he OTS Examiner-in-Charge during the period time in which I was involved ... did an excellent job of finding and raising the issues. Likewise, I found good performance from ... the FDIC Examiner-in-Charge. ... What I cannot explain is why the superiors in the agencies didn’t take a tougher tone with the banks given the degree of ... negative findings. My experience with the OTS, versus with the OCC, was completely different. So there seemed to be a tolerance there or a political influence on senior management of those agencies that prevent them from taking a more active stance. By a more active stance, I mean putting the banks under letters of agreement and forcing change.”⁸¹⁴

Internal OTS documents and emails indicate that the result was a cadre of OTS examiners who were skeptical of their ability to effect meaningful change at WaMu, who were too often rebuffed by their own management when they tried to reduce risk or strengthen bank controls, and whose leaders worked to weaken rather than strengthen the standards used by examiners to hold banks accountable.

⁸¹³ Subcommittee interview of OTS Examiner-in-Charge Benjamin Franklin (2/17/2010).

⁸¹⁴ April 13, 2010 Subcommittee Hearing at 39 (testimony of James G. Vanasek, former WaMu Chief Risk Officer, 2004-2005).

Low Expectations. The documents show that OTS examiners had low expectations that WaMu would actually implement recommended changes at the bank. Ultimately, OTS examiners adapted to the situation, they gave up trying to make the bank act more quickly, and WaMu was able to delay needed changes for long periods of time if it wished.

In 2003, for example, one OTS examiner wrote to the Examiner-in-Charge:

“It is clear from my experience that changes seem to progress slowly at WaMu so I don’t know if we can expect faster progress If any target is missed, as happens at WaMu, then we may not be in a position to determine the effectiveness of the corrective actions.”⁸¹⁵

In 2005, another OTS examiner wrote: “They agree to take all action required to correct the problem. The Target Completion Dates are not real timely but fine for WaMu.”⁸¹⁶

Other examiners were more critical. In 2007, for example, one OTS examiner wrote:

“Regulatory Relations [the WaMu office established to work with regulators] is a joke. The purpose of this group seems to be how can we give the regulators the bare minimum without them raising a fuss.”⁸¹⁷

The examiner also wrote:

“WaMu’s compliance management program has suffered from a lack of steady, consistent leadership. Dick Stevenson, who took over as Chief Compliance Officer on March 2, 2007, is the bank’s ninth compliance leader since 2000. ... The OTS is very concerned that this lack of consistent, stable leadership leaves the program vulnerable. This amount of turnover is very unusual for an institution of this size and is a cause for concern. The Board of Directors should commission an evaluation of why smart, successful, effective managers can’t succeed in this position. If you would like my opinion, just ask. (HINT: It has to do with top management not buying into the importance of compliance and turf warfare and Kerry [Killinger] not liking bad news.)”⁸¹⁸

In an interview, OTS examiner Benjamin Franklin, who worked at the agency for 24 years, told the Subcommittee that the thrifts he oversaw generally did not “collaborate” with the agency but would “fight” OTS reviews and resist OTS recommendations. He said that at WaMu,

⁸¹⁵ 6/27/2003 email from Dennis Fitzgerald, OTS Examiner, to Lawrence Carter, OTSWEM04-0000006748, Hearing Exhibit 4/16-15.

⁸¹⁶ 6/8/2005 email from Verlin Campbell, OTS Examiner, to Zalka Ancely, OTS Examiner, OTSWME05-003 0000634, Hearing Exhibit 4/16-29.

⁸¹⁷ 5/31/2007 Draft Compliance Memo from Susie Clark, OTS Compliance Specialist, Franklin_Benjamin-00020408_002, Hearing Exhibit 4/16-9.

⁸¹⁸ Id. at Franklin_Benjamin-00020408_001.

“for the most part” OTS examiners were “butting heads” with bank personnel and it was difficult to effect change.⁸¹⁹

Weak Standards. The documents show that the OTS examiners were also frustrated by the agency’s weak standards, which made it difficult to cite WaMu for violations or require the bank to strengthen its operations.

In 2007, for example, an examiner critical of WaMu’s compliance procedures wanted to downgrade the bank’s compliance rating from 2 to 3, but told the OTS Examiner-in-Charge that, due to the lack of standards on compliance matters, she didn’t believe she could win a battle with the bank:

“I’m not up for the fight or the blood pressure problems. ... It doesn’t matter that we are right, what matters is how it is framed. ... They [Washington Mutual] aren’t interested in our ‘opinions’ of the [compliance] program. They want black and white, violations or not. ... [O]ur training always emphasizes ‘Best Practices’ but when it comes down to it, we don’t have the resources to show the risk.”⁸²⁰

At another point, when discussing standards for calculating acceptable loan error rates, an OTS examiner wrote:

“We will need additional discussion of acceptable error rates and how we view their [WaMu’s] standard. ... [A] 2.5 percent error rate would mean that approximate[ly] \$600.0 million could be originated and be within acceptable guidelines. A 20.0 percent medium error rate means that \$4.8 billion of loans with these types of errors could be originated without a criticism. The latter seem[s] especially high when you consider that their medium criteria includes loans that we don’t think should be made.”⁸²¹

The OTS Examiner-in-Charge responded with a lengthy email criticizing outdated, unclear OTS standards on the acceptable loan error rate for a portfolio of subprime loans:

“Unfortunately, our sampling standards are 10 years old and we have no standards of acceptance really. It depends on our own comfort levels, which differ. ... Moreover, our guidance requires that an exception be SIGNIFICANT, which ... we have over time interpreted as loans that should not have been made. ... While we may (and have) questioned the reasonableness of these standards, they are all we have at this time. If our tolerance for some reason is now a lot lower than our handbook standards, it would be nice to have this clarified. I have always used these standards as rough benchmarks and not absolutes myself, upping my expectations for higher risk portfolios. ... It would be

⁸¹⁹ Subcommittee interview of Benjamin Franklin (2/17/2010).

⁸²⁰ 6/3/2007 email from OTS examiner Mary Clark to Examiner-in-Charge Benjamin Franklin, “Compliance Rating,” OTSWMS07-013 0002576, Hearing Exhibit 4/16-39.

⁸²¹ 11/21/2005 email exchange between OTS examiner Benjamin Franklin and Examiner-in-Charge Lawrence Carter and others, OTSEMS05-004 0001911-12, Hearing Exhibit 4/16-30.

nice if they [higher risk loan portfolios] could meet even higher expectations, but that would require us to agree on what the standard should be.”⁸²²

At another point, the same Examiner-in-Charge wrote a long email discussing issues related to a decision by WaMu to qualify borrowers for adjustable rate mortgages using an interest rate that was less than the highest rate that could be charged under the loan. He complained that it was difficult to force WaMu to comply with the OTS “policy of underwriting at or near the fully indexed rate,” when “in terms of policy, I am not sure we have ever had a really hard rule that institutions MUST underwrite to the fully indexed rate.”⁸²³ He also noted that OTS sometimes made an exception to that rule for loans held for sale.

NTM Guidance. While some OTS examiners were complaining about the agency’s weak standards, other OTS officials worked to ensure that new standards being developed for high risk mortgages would not restrain WaMu’s lending practices. The effort began in 2006 with an aim to address concerns about lax lending standards and the risks posed by subprime, negatively amortizing, and other exotic home loans. The federal banking agencies convened a joint effort to reduce the risk associated with those mortgages by issuing interagency guidance for “nontraditional mortgage” products (“NTM Guidance”). Washington Mutual filed public comments on the proposed NTM Guidance and argued that Option ARM and Interest-Only loans were “considered more safe and sound for portfolio lenders than many fixed rate mortgages,” so regulators should “not discourage lenders from offering these products.”⁸²⁴ It also stated that calculating a potential borrower’s “DTI [debt-to-income ratio] based on the potential payment shock from negative amortization would be highly speculative” and “inappropriate to use in lending decisions.”⁸²⁵ During subsequent negotiations to finalize that guidance, OTS argued for less stringent lending standards than other regulators were advocating and bolstered its points using data supplied by Washington Mutual.⁸²⁶

In one July 2006 email, for example, an OTS official expressed the view that early versions of the new guidance focused too much on negative amortization loans, which were popular with several thrifts and at WaMu in particular, and failed to also look closely at other high risk lending products more common elsewhere.⁸²⁷ He also wrote that OTS needed to address this issue and “should consider going on the offensive, rather than defensive to refute the OCC’s positions” on negatively amortizing loans, defending the loans using WaMu Option ARM loan data.⁸²⁸ In August, several OTS officials discussed over email how to prevent the

⁸²² Id.

⁸²³ 9/15/2005 email from OTS Examiner-in-Charge Lawrence Carter to OTS Western Region Deputy Director Darrel Dochow, OTSWMS05-002 0000535, Hearing Exhibit 4/16-6.

⁸²⁴ 3/29/2006 letter from Washington Mutual Home Loans President David C. Schneider to OTS Chief Counsel, Proposed Guidance – Interagency Guidance on Nontraditional Mortgage Products 70 Fed. Reg. 77249, JPM_WM04473292.

⁸²⁵ Id. at JPM_WM04473298.

⁸²⁶ Subcommittee interviews of Sheila Bair (4/5/2010) and George Doerr (3/30/2010). The Subcommittee was told that OTS was the “most sympathetic to industry” concerns of the participating agencies and was especially protective of Option ARMs.

⁸²⁷ 7/27/2006 email from Steven Gregovich to Grovetta Gardineer and others, “NTM Open Issues,” OSWMS06-008 0001491-495, Hearing Exhibit 4/16-71.

⁸²⁸ Id.

proposed restrictions on negatively amortizing loans from going farther than they believed necessary, noting in part the “profitable secondary market” for Option ARMs and the fact that “hybrid IO [interest only] ARMs are a huge product for Wamu.” One OTS official wrote:

“We have dealt with this product [negatively amortizing loans] longer than any other regulator and have a strong understanding of best practices. I just don’t see us taking a back seat on guidance that is so innate to the thrift industry.”⁸²⁹

OTS officials argued variously that the new proposal would wrongly put the focus on “products” instead of “underwriting,” as well as that it would hurt the business of large thrifts like WaMu.⁸³⁰

The NTM Guidance was finally issued on October 4, 2006.⁸³¹ The final version did not fully reflect the recommendations of OTS on negatively amortizing loans. Among other matters, it called on banks to:

- evaluate a borrower’s ability to fully repay a prospective loan, including any balance increase from negative amortization;
- qualify borrowers using the higher interest rate that would apply after any teaser or introductory interest rate;
- avoid loans whose repayment was dependent solely upon the value of the collateral or the borrower’s ability to refinance the loan; and
- implement strong quality control and risk mitigation procedures for loans containing layers of risk, including loans with no documentation requirements, no verification of the borrower’s income or assets, or high loan-to-value ratios.

The Guidance also called for capital levels commensurate with risk and adequate allowances for loan losses.

The Guidance was not promulgated as a bank regulation that could be enforced in court, and it contained no explicit deadline for compliance. Instead, it provided policies and procedures that regulators could use as benchmarks during examinations. Agencies could penalize noncompliance with the standards through lower CAMELS ratings or enforcement actions. FDIC officials told the Subcommittee that the FDIC expected banks to come into immediate

⁸²⁹ 8/14/2006 email from Kurt Kirch to David Henry and Steven Gregovich, “Latest AMP Guidance,” Hearing Exhibit 4/16-72.

⁸³⁰ 7/27/2006 email from Steven Gregovich to Grovetta Gardineer, et al., “NTM Open Issues,” OSWMS06-008 0001491-495, Hearing Exhibit 4/16-71.

⁸³¹ 10/4/2006 “Interagency Guidance on Nontraditional Mortgage Product Risks,” (NTM Guidance), 71 Fed. Reg. 192 at 58609.

compliance with the Guidance, and that no agency should have been telling a bank that it did not have to comply with the new standards.⁸³²

A few days after the NTM Guidance went into effect, WaMu officials met with OTS about implementation and reported back that OTS had indicated that compliance was something institutions “should” do, not something they “must” do.⁸³³ According to a written summary by WaMu of its October 12, 2006 meeting with OTS to discuss the new rules, OTS told the bank that it “view[ed] the guidance as flexible” and “specifically pointed out that the language in the guidance says ‘should’ vs. ‘must’ in most cases and they [were] looking to WaMu to establish our position on how the guidance impacts our business processes.”⁸³⁴

In 2007, OTS conducted a review of WaMu’s Option ARM activities and compliance efforts and found that three months after the NTM Guidance had become effective, the bank was not yet complying with the new standards when issuing Option ARMs.⁸³⁵ The OTS review noted that as of January 31, 2007, the bank had a total of \$62 billion in outstanding Option ARMs in its investment portfolio, of which 80% were negatively amortizing.⁸³⁶ The review stated that, as of December 31, 2006, WaMu was not in compliance with the NTM Guidance, because it continued not to consider potential negative amortization amounts when qualifying borrowers for Option ARMs; placed too much reliance on FICO scores instead of income verification to qualify borrowers for nontraditional mortgages; failed to consider amortizing payments or payment shocks when qualifying borrowers for interest only loans; and placed too much reliance on collateral, rather than borrower income, as the primary repayment source in the event of a loan default.⁸³⁷ The review contained no recommendations for actions to ensure WaMu changed its procedures.

In April 2007, the FDIC asked OTS for permission to conduct its own review of WaMu loan files to evaluate the bank’s compliance with the NTM Guidance.⁸³⁸ OTS refused, however, to provide the FDIC with access to the relevant loan files and effectively blocked the review.⁸³⁹ The FDIC Assistant Regional Director George Doerr told the Subcommittee that when he

⁸³² Subcommittee interviews of Sheila Bair (4/5/2010) and George Doerr (3/30/2010).

⁸³³ See 10/2006 OTS Meeting, “Washington Mutual Alternative Mortgage Guidance Implementation Plan,” JPM_WM02549033, Hearing Exhibit 4/16-73.

⁸³⁴ Id. at JPM_WM02549037. Subcommittee interview of Darrel Dochow (3/3/2010) (indicating that the NTM Guidance used “should” instead of “must” to avoid being a “one-size-fits-all” set of requirements). See also Subcommittee interview of John Bowman (4/6/2010) (indicating that guidance is not enforceable and that giving banks more time to comply was a reasonable approach).

⁸³⁵ See undated OTS document, “Option ARM Neg Am Review Workprogram 212A(1) & Nontraditional Mortgage Guidance Review,” OTSWMEF-0000009888, Hearing Exhibit 4/16-74. The document quotes Option ARM data from March 31, 2007, indicating that the document was prepared after that date.

⁸³⁶ Id. at OTSWMEF-0000009890.

⁸³⁷ Id. at OTSWMEF-0000009893-94.

⁸³⁸ See, e.g., 4/30/2007 email from FDIC Western Region Assistant Director George Doerr to FDIC official David Collins, FDIC_WAMU 000014457, Hearing Exhibit 4/16-57.

⁸³⁹ See April 16, 2010 Subcommittee Hearing at 33 (Testimony of FDIC IG John Rymer: “OTS did grant FDIC greater access at WaMu, but limited FDIC’s review of WaMu’s residential loan files. The FDIC wanted to review these files to assess underwriting and WaMu’s compliance with the Non-Traditional Mortgage Guidance.”); See also April 16, 2010 Subcommittee Hearing at 187 (Testimony of George Doerr, FDIC).

contacted OTS official Mike Finn about the FDIC's request to review WaMu loan files to test NTM compliance, Mr. Finn said that OTS was giving its institutions more time to comply with the guidance, even though it had taken effect more than six months earlier.⁸⁴⁰ The FDIC Chairman Sheila Bair told the Subcommittee that the FDIC had not known until then that OTS was allowing institutions to delay compliance with the NTM Guidance and were "surprised" by the agency's actions. She said that normally, if an institution needs more time to comply with new standards, a regulator required it to provide a written plan with milestones for achieving compliance.⁸⁴¹

Documents uncovered by the Subcommittee show how WaMu took advantage of the delay to continue its high risk lending practices. The NTM Guidance directed banks, for example, to evaluate a borrower's ability to repay a mortgage using the highest interest rate that would be charged under the loan and the fully amortized payment amount rather than any smaller or minimum payment amount. After determining that those new requirements could lead to a 33% drop in Option ARM loan volume due to borrowers who would no longer qualify for the loans, WaMu's Chief Enterprise Risk Officer, Ron Cathcart, advised "holding off on implementation until required to act for public relations (CFC [Countrywide] announces unexpectedly) or regulatory reasons."⁸⁴² When he made that suggestion in March 2007, OTS had already allowed Washington Mutual to delay its compliance with the Guidance for six months, resulting in the bank's originating billions of dollars in new Option ARM loans that would later suffer significant losses.⁸⁴³ Instead of using the NTM Guidance as an opportunity to strengthen WaMu's lending standards and reduce its loan risk, OTS chose to delay its implementation.

In addition, in May 2007, when an OTS official attempted to stop WaMu from issuing mortgages without verifying borrower incomes, relying on the NTM Guidance and other rules as justification, OTS senior management rebuffed the official's efforts. Instead, OTS senior managers interpreted its standards as allowing thrifts to continue issuing "stated income loans," also called "No Income No Asset" (NINA) or "no doc" loans, because they permitted lenders to provide credit without verifying the borrower's income or assets. On May 15, 2007, after reviewing a summary of WaMu's loans, an OTS official in Washington, Bill Magrini, sent an email to the OTS Examiner-in-Charge with responsibility for WaMu stating:

"I note that WAMU makes a significant amount of No-doc loans. OTS policy states that no-doc loans are unsafe and unsound. I assume they mean no doc regarding NINA or no income-no asset loans.

⁸⁴⁰ Subcommittee interview of George Doerr (3/30/2010).

⁸⁴¹ Subcommittee interview of Sheila Bair (4/5/2010).

⁸⁴² 3/19/2007 email from Ron Cathcart to David Schneider, JPM_WM02571598, Hearing Exhibit 4/16-75.

⁸⁴³ See wamusecurities.com. (subscription website maintained by JPMorgan Chase with data on Long Beach and WaMu mortgage backed securities showing, as of January 2011, delinquency rates for particular mortgage backed securities, including WMALT 2006 OA-3 – 57.87%).

Without even asking for income or assets/liabilities, the loans are collateral-dependent. This is imprudent ... [T]he interagency NTM Guidance states specifically that collateral dependent loans are unsafe and unsound. ...

Does WAMU have any plans to amend its policies per no doc loans?”⁸⁴⁴

The Examiner-in-Charge, Benjamin Franklin, relayed the inquiry to the then Director of the OTS Western Region Office, Darrel Dochow, and stated that, while WaMu had not issued “true NINAs” in the past, the bank had begun “doing NINA’s in 2006 through their conduit program. As such, all these loans are held for sale.” He estimated WaMu then had about \$90 million of NINA loans held for sale, had originated about \$600 million in 2006, and would originate the same amount again in 2007.⁸⁴⁵

Mr. Dochow responded that he was already in regular contact with OTS officials in Washington about WaMu and “there is no need to duplicate with Bill Magrini as far as I know.”⁸⁴⁶ Later the same day, Mr. Dochow wrote:

“I am being told that Bill’s views may not necessarily represent OTS policy in these matters. I value Bill’s input, but we should be careful about relaying his views to others as being OTS policy, absent collaborating written guidance. [His] views ... are somewhat inconsistent with NTM guidance and industry practice. I also understand Grovetta [another OTS official] promised to clarify section 212 of the handbook in several areas as a result of the NTM roundtable discussion in Wash DC last month.”⁸⁴⁷

That same day, another OTS official, Mark Reiley, sent an email indicating his belief that sections of the OTS handbook barred WaMu from issuing NINA loans, even when those loans were originated for sale to Wall Street:

“The Handbook guidance Section 212 states that no-doc loans (NINAs) are unsafe and unsound loans (Pg. 212.7). Furthermore, even if the no-doc (NINA) loans are originated and held for sale the guidance indicates (pg. 212.8) the association must use prudent underwriting and documentation standards and we have already concluded they are unsafe and unsound. Even if the institution holds the loans for a short period of time. ... [T]his is a hot topic in DC and we are getting a significant amount of push back from the

⁸⁴⁴ See 5/15/2007 email from OTS Examiner-in-Charge Benjamin Franklin to OTS Western Region Director Darrel Dochow, Franklin_Benjamin-00020449_001, Hearing Exhibit 4/16-79 (quoting email from Bill Magrini). See also 3/27/2007 email from OTS official Bill Magrini to OTS colleagues, Quigley_Lori-00110324, Hearing Exhibit 4/16-76 (“I noted that several of our institutions make NINA loans. That, in my humble opinion is collateral dependent lending and deemed unsafe and unsound by all the agencies. ... It is not at all surprising that delinquencies are up, even among Alt-A. In my opinion, credit standards have gone too low.”). See also undated OTS document, “Option ARM Neg Am Review Workprogram 212A(1) & Nontraditional Mortgage Guidance Review,” at OTSWMEF-0000009891, Hearing Exhibit 4/16-74 (determining that 73% of the Option ARMs in WaMu’s portfolio were “low doc” loans).

⁸⁴⁵ 5/16/2007 email from OTS Western Region Director Darrel Dochow to OTS Examiner-in-Charge Benjamin Franklin, Franklin_Benjamin-00020449_001, Hearing Exhibit 4/16-79.

⁸⁴⁶ Id.

⁸⁴⁷ Id.

industry. ... At this point I don't think a memo is the best avenue, I think we need to request in writing that WAMU respond to us on how the NINA's comply with the handbook guidance?"

The WaMu Examiner-in-Charge, Benjamin Franklin, responded:

"I didn't intend to send a memo until I got a blessing from [the Western Region Director] or DC on what our official policy is on this. ... [M]any of our larger institutions now do NINAs (including Countrywide) Apparently [OTS policy official] Bill Magrini is the lone ranger in his view that NINA's are imprudent. West region position seems to be that FICO, appraisal, and other documentation ... is sufficient to assess the borrower's ability to repay in all but subprime loans. While I probably fall more into the Magrini camp (until we get empirical data to support NINAs are not imprudent) we will just document our findings ... until the 'official' policy on this has been worked out."⁸⁴⁸

A year later, in October 2008, after WaMu's failure, the same Examiner-in-Charge, Benjamin Franklin, wrote to a colleague:

"[N]ot one regulatory agency had a rule or guideline saying you couldn't do stated income lending, even to this day. That, I find incredible. We criticized stated income lending at WaMu but they never got it completely fixed. ... [I]n hindsight, I'm convinced that it is just a flawed product that can't be fixed and never should have been allowed in the first place. How do you really assess underwriting adequacy when you allow the borrower to tell you what he makes without verification. We used to have documentation requirements for underwriting in the regs, but when those were taken out, the industry slowly migrated to an anything goes that got us into this mess. ... When I told Scott Polakoff [OTS Deputy Director] that stated income subprime should not be made under any circumstance, I was corrected by Mike Finn [OTS Western Region head] that that was not the West Region's position. I rest my case."⁸⁴⁹

Data compiled by the Treasury and FDIC Inspectors General shows that, by the end of 2007, stated income loans – loans in which the bank did not verify the borrower's income – represented 50% of WaMu's subprime loans, 73% of its Option ARMs, and 90% of its home equity loans.⁸⁵⁰ At the Subcommittee hearing, virtually every witness condemned stated income loans as unsafe and unsound.⁸⁵¹ OTS Director John Reich testified that he regretted not doing more to prevent supervised thrifts from issuing stated income loans.⁸⁵²

Subcommittee interviews with OTS examiners who worked at WaMu found those examiners to be demoralized and frustrated at their inability to effect change at the bank. They

⁸⁴⁸ Id.

⁸⁴⁹ 10/7/2008 email exchange between OTS Examiner-in-Charge Benjamin Franklin and OTS examiner Thomas Constantine, "West Region Update," Franklin_Benjamin-00034415_001, Hearing Exhibit 4/16-14.

⁸⁵⁰ 4/2010 "Evaluation of Federal Regulatory Oversight of Washington Mutual Bank," prepared by the Offices of Inspector General at the Department of the Treasury and Federal Deposit Insurance Corporation, at 10, Hearing Exhibit 4/16-82.

⁸⁵¹ See, e.g., April 16, 2010 Subcommittee Hearing at 14-15, 41-42.

⁸⁵² Id. at 42 ("In hindsight, I regret it.").

had identified serious deficiencies at the bank year after year, with no enforcement consequences; some tried to interpret OTS standards in ways that would reduce risk, only to be rebuffed by their leaders; and others were told that the NTM Guidance being enforced by other agencies did not have standards that could be enforced by OTS examiners. Days after WaMu's failure, one OTS examiner had this to say about OTS leadership:

"My examination history here is filled with the editing and removal of my comments as well as predictions (that turned out to be true) by EICs [Examiners-in-Charge]. No system in place to keep that from happening. Instead we put whitewashers and scaredity cats in charge of the most problematic shops. I don't know what happened to you at WAMU, but I was critical of their accounting at Card Services and the AP. Fortunately, I think I made the 'don't let him come back here' list. ... [O]ur leadership screwed us and can't acknowledge it. They should resign."⁸⁵³

(c) Narrow Regulatory Focus

In addition to a policy of deference to management, weak standards, and demoralized examiners, OTS employed an overly narrow regulatory focus that allowed WaMu's short term profits to excuse its risky practices and that ignored systemic risk. For a time, its short term profits masked the problems at Washington Mutual, and regulators allowed practices which they knew to be risky and problematic to continue. Because it mishandled its responsibilities, OTS gave the illusion to investors, economists, policy makers, and others that the bank was sound, when in reality, it was just the opposite. Unfortunately, the truth of the matter was not revealed until it was too late, and the bank collapsed.

Using Short Term Profits to Excuse Risk. OTS justified not taking enforcement action against WaMu in part by pointing to Washington Mutual's profits and low loss rates during the height of the mortgage boom, claiming they made it difficult to require the bank to reduce the risks threatening its safety and soundness. In 2005, when faced with underwriting problems at WaMu, the OTS Examiner-in-Charge put it this way:

"It has been hard for us to justify doing much more than constantly nagging (okay, 'chastising') through ROE [Reports of Examination] and meetings, since they [WaMu] have not been really adversely impacted in terms of losses. It has been getting better and has not recently been bad enough to warrant any ratings downgrade."⁸⁵⁴

The OTS Handbook was explicit, however, in stating that profits should not be used to overlook or excuse high risk activities:

⁸⁵³ 10/7/2008 emails from OTS examiner Thomas Constantine to OTS Examiner-in-Charge Benjamin Franklin, "West Region Update," Franklin_Benjamin-00034415_002, Hearing Exhibit 4/16-14.

⁸⁵⁴ 9/15/2005 email from Examiner-in-Charge Lawrence Carter to Western Region Deputy Director Darrel Dochow, OTSWMS05-002 0000535, Hearing Exhibit 4/16-6.

“If an association has high exposure to credit risk, it is not sufficient to demonstrate that the loans are profitable or that the association has not experienced insignificant losses in the near term.”⁸⁵⁵

But in the case of Washington Mutual, profits did make a difference. At the Subcommittee hearing, when asked by Senator Kaufman to identify one or two reasons why no regulatory action was taken against WaMu, the FDIC IG Jon Rymer testified as follows:

“[L]et me start by saying I think the problem in 2005, 2006, and into 2007, the problem was the bank was profitable. I think there was a great reluctance to [take action], even though problems were there in underwriting, the product mix, the distribution process, the origination process, all in my view extraordinarily risky [T]he people in [agency] leadership positions have to be willing to make the tough calls and be experienced enough to know that today’s risky practices may show today profitability, but to explain to management and enforce with regulatory action that risky profitability is going to have a cost. It either has a cost in control processes an institution would have to invest in now, or it is going to have a cost ultimately to the bank’s profitability and perhaps eventually to the Deposit Insurance Fund.”⁸⁵⁶

In his prepared statement, the Treasury Inspector General, Eric Thorson, noted that OTS examiners told his staff they did not lower WaMu’s CAMELS ratings because “even though underwriting and risk management practices were less than satisfactory, WaMu was making money and loans were performing.”⁸⁵⁷

This problem was not isolated within OTS, however, but applied to other regulatory agencies as well. The FDIC Inspector General noted, for example, that the bank’s profitability also tempered the FDIC views of the bank. He explained that, prior to 2008, the FDIC did not challenge WaMu’s 2 CAMELS ratings, because “the risks in WaMu’s portfolio had not manifested themselves as losses and nonperforming loans, and therefore did not impact WaMu’s financial statements.”⁸⁵⁸ At the same time, an internal FDIC analysis of the bank identified a long list of “embedded risk factors” in WaMu’s home loans that, despite the bank’s profitability, exposed the bank to losses in the event of “a widespread decline in housing prices.”⁸⁵⁹

In the financial industry, high risk activities are undertaken by financial institutions to earn higher marginal returns. The role of the regulator is to enforce rules that ensure the risks an institution undertakes do not unfairly transfer that risk to others or threaten the safety and soundness of the economy, despite any short term profits. In the case of the FDIC, the judgment

⁸⁵⁵ 11/2004 Office of Thrift Supervision Examination Handbook, at 070.8, OTSWMEF-0000032053; 2/2011 Office of Thrift Supervision Examination Handbook, at 070.9, http://www.ots.treas.gov/_files/422008.pdf (quote is the same in updated version of handbook). See also April 16, 2010 Subcommittee Hearing at 19 (testimony of FDIC and Treasury Inspectors General).

⁸⁵⁶ April 16, 2010 Subcommittee Hearing at 24-26.

⁸⁵⁷ Thorson prepared statement at 10, April 16, 2010 Subcommittee Hearing at 110.

⁸⁵⁸ Rymer prepared statement at 10, April 16, 2010 Subcommittee Hearing at 129.

⁸⁵⁹ Undated draft memorandum from the WaMu examination team at the FDIC to the FDIC Section Chief for Large Banks, FDIC-EM_00251205-10, Hearing Exhibit 4/16-51a (likely mid-2005).

includes whether the risk threatens loss to the Deposit Insurance Fund. Any firm that decides to take a risk should be the only firm, along with its investors, to bear the brunt of the problem if it turns out to have been a mistake. Regulators that, when faced with short term profits, stop evaluating or downplay attendant risks that could produce later losses fail in their obligation to ensure the safety and soundness of the financial institutions they are regulating. In the case of WaMu, both OTS and the FDIC allowed the bank's success in the short term to paper over its underlying problems.

In October 2008, after Washington Mutual failed, the OTS Examiner-in-Charge at the bank, Benjamin Franklin, deplored OTS' failure to prevent its thrifts from engaging in high risk lending because "the losses were slow in coming":

"You know, I think that once we (pretty much all the regulators) acquiesced that stated income lending was a reasonable thing, and then compounded that with the sheer insanity of stated income, subprime, 100% CLTV [Combined Loan-to-Value], lending, we were on the figurative bridge to nowhere. Even those of us that were early opponents let ourselves be swayed somewhat by those that accused us of being 'chicken little' because the losses were slow in coming, and let[']s not forget the mantra that 'our shops have to make these loans in order to be competitive'. I will never be talked out of something I know to be fundamentally wrong ever again!!"⁸⁶⁰

Failure to Consider Financial System Impacts. A related failing was that OTS took a narrow view of its regulatory responsibilities, evaluating each thrift as an individual institution without evaluating the effect of thrift practices on the financial system as a whole. The U.S. Government Accountability Office, in a 2009 evaluation of how OTS and other federal financial regulators oversaw risk management practices, concluded that none of the regulators took a systemic view of factors that could harm the financial system:

"Even when regulators perform horizontal examinations across institutions in areas such as stress testing, credit risk practices, and the risks of structured mortgage products, they do not consistently use the results to identify potential system risks."⁸⁶¹

Evidence of this narrow regulatory focus includes the fact that OTS examiners carefully evaluated risk factors affecting home loans that WaMu kept on its books in a portfolio of loans held for investment, but paid less attention to the bank's portfolio of loans held for sale. OTS apparently reasoned that the loans held for sale would soon be off WaMu's books so that little analysis was necessary. From 2000 to 2007, WaMu securitized about \$77 billion in subprime

⁸⁶⁰ 10/7/2008 email from OTS Examiner-in-Charge Benjamin Franklin to OTS Examiner Thomas Constantine, Franklin_Benjamin-00034415, Hearing Exhibit 4/16-14.

⁸⁶¹ 3/18/2009 Government Accountability Office, "Review of Regulators' Oversight of Risk Management Systems at a Limited Number of Large, Complex Financial Institutions," Testimony of Orice M. Williams, Hearing Exhibit 4/16-83 (GAO reviewed risk management practices of OTS, as well as the Federal Reserve, the Office of the Comptroller of the Currency, the SEC, and self-regulatory organizations.).

loans, mostly from Long Beach, as well as about \$115 billion in Option ARM loans.⁸⁶² Internal documents indicate that OTS did not consider the problems that could result from widespread defaults of poorly underwritten mortgage securities from WaMu and other thrifts.

Numerous documents show that OTS and the FDIC were, in fact, aware that WaMu was issuing high risk loans that led to poor quality securitizations:

2005 OTS email describing poor quality Long Beach mortgage backed securities: “Performance data for 2003 and 2004 vintages appear to approximate industry average while issues [of securities] prior to 2003 have horrible performance. ... [Long Beach] finished in the top 12 worst annualized [net credit losses] in 1997 and 1999 thru 2003. ... At 2/05, [Long Beach] was #1 with a 12% delinquency rate. Industry was around 8.25%.”⁸⁶³

2005 FDIC analysis of WaMu high risk loans: “Management acknowledges the risks posed by current market conditions and recognizes that a potential decline in housing prices is a distinct possibility. Management believes, however that the impact on [WaMu] would be manageable, since the riskiest segments of production are sold to investors, and that these investors will bear the brunt of a bursting housing bubble.”⁸⁶⁴

2005 OTS email discussing allowing lower standards for loans held for sale: “[L]oans held for sale could be underwritten to secondary market standards I believe we would still find that secondary market requirements are more lax than our policy on underwriting to fully indexed rates. ... [I]f you allow them [WaMu] the exception for loans held for sale ... they probably do not have a ton of loans that fall far outside our policy guidance.”⁸⁶⁵

2006 OTS email discussing Long Beach loans that had to be repurchased from buyers: “The primary reasons for the problem were ... [g]eneral lower quality 2005 production due to economy and lowered standards The \$4.749 billion in loans on [Long Beach] books at 12/31/05 are largely comprised of the same 2005 vintage production that was sold in the whole loan sales and are now subject to the increased repurchases. ... Management is balancing the probability that these loans will perform worse than expected and priced for, versus the increased income they generate ... in considering whether to [sell] some or all of the portfolio.”⁸⁶⁶

⁸⁶² “Securitizations of Washington Mutual and Long Beach Subprime Home Loans,” chart prepared by the Subcommittee, Hearing Exhibit 4/13-1c; 10/17/2006 “Option ARM” draft presentation to the WaMu Board of Directors, JPM_WM02549027, chart at 2, Hearing Exhibit 4/13-38.

⁸⁶³ 4/14/2005 email from OTS examiner to colleagues, OTSWME05-0120000806, Hearing Exhibit 4/13-8a.

⁸⁶⁴ Undated draft memorandum from WaMu examination team to the FDIC Section Chief for Large Banks, FDIC-EM_00251205-10, Hearing Exhibit 4/16-51a (likely mid-2005).

⁸⁶⁵ 9/16/2005 email from OTS Examiner-in-Charge at WaMu, OTSWMS05-002 0000535, Hearing Exhibit 4/16-6.

⁸⁶⁶ 1/20/2006 email from Darrel Dochow to Michael Finn and others, OTSWMS06-007 0001020.

2008 OTS email after WaMu's failure: "We were satisfied that the loans were originated for sale. SEC and FED [were] asleep at the switch with the securitization and repackaging of the cash flows, irrespective of who they were selling to."⁸⁶⁷

2005 WaMu audit of Loan Sales and Securitization planned no further audit for three years. In March 2007, OTS informally suggested that more frequent audits would be appropriate given the high volume and high risk nature of WaMu's securitization activity and "data integrity issues surrounding the creation of securitization trusts, resulting in loan repurchases from those trusts."⁸⁶⁸ OTS was two years too late, however; the secondary market for subprime securities collapsed four months later.

Neither OTS nor the FDIC saw preventing WaMu's sale of high risk mortgages into U.S. securitization markets as part of its regulatory responsibilities.

(d) Inflated CAMELS Ratings

Still another possible explanation for OTS' inaction may have been the overly positive CAMELS ratings it assigned WaMu. From 2004 until early 2008, WaMu held a 2 rating, which meant that it was "fundamentally sound," had "satisfactory risk management," and had "only moderate weaknesses that [were] within the board's and management's capability and willingness to correct."⁸⁶⁹ A lower CAMELS rating would have represented one of the strongest actions that OTS and the FDIC could have taken, because it would have required changes from WaMu.

Both the Treasury and the FDIC Inspector General criticized the assignment of the 2 ratings as inaccurate and inappropriate, highlighting how those inflated ratings masked the true problems.⁸⁷⁰ Treasury IG Thorson focused in particular on the 2 rating assigned to WaMu's high risk home loans:

"[W]e find it difficult to understand how OTS could assign WaMu a satisfactory asset quality 2-rating for so long. Assigning a satisfactory rating when conditions are not satisfactory sends a mixed and inappropriate supervisory message to the institution and its board. It is also contrary to the very purpose for which regulators use the CAMELS rating system."⁸⁷¹

Inspector General Thorson also criticized the 2 rating assigned to WaMu's management, which signaled "satisfactory performance by management and the Board of Directors and

⁸⁶⁷ 10/7/2008 email from OTS examiner Thomas Constantine to OTS colleague Benjamin Franklin, Franklin_Benjamin-00034415_001, Hearing Exhibit 4/16-14.

⁸⁶⁸ See 3/5/2007 WAMU Examination "Review of Securitization," OTSWME07-075 0000780-791 at 789 (data gathered from WaMu's Market Risk Committee minutes, Dec. 2006 and Jan. 2007).

⁸⁶⁹ Thorson prepared statement at 7, April 16, 2010 Subcommittee Hearing at 107.

⁸⁷⁰ See, e.g., Treasury and FDIC IG Report at 16.

⁸⁷¹ Thorson prepared statement at 10, April 16, 2010 Subcommittee Hearing at 110. See also id. at 8, April 16, 2010 Subcommittee Hearing at 108.

satisfactory risk management practices.”⁸⁷² He noted that OTS gave management this positive rating until June 2008, despite the bank’s ongoing failure to correct the many deficiencies identified by OTS examiners and the fact that management problems at WaMu were longstanding. At the Subcommittee hearing, the FDIC Inspector General Rymer also criticized the 2 rating assigned to WaMu’s management:

“[T]he management piece should be, in my view, downgraded if management has not demonstrated that it has built the adequate systems and control processes and governance processes to help manage problems when they eventually do occur in assets. ... I find it difficult to understand why the management rating at a minimum was not lowered much earlier on.”⁸⁷³

The FDIC Inspector General also noted that, from 2004 to 2008, the FDIC had assigned LIDI ratings to WaMu that indicated a higher degree of risk at the bank than portrayed by the bank’s CAMELS ratings. He observed that LIDI ratings, which are intended to convey the degree of risk that a bank might cause loss to the Deposit Insurance Fund, are designed to be more forward-looking and incorporate consideration of future risks to a bank, as compared to CAMELS ratings, which are designed to convey the state of an institution at a particular point in time.⁸⁷⁴

WaMu kept its 2 rating despite the five-year litany of lending, risk management, appraisal, and Long Beach deficiencies identified by OTS examiners from 2004 to 2008. It was only in February 2008, after the bank began to incur substantial losses, that OTS downgraded the bank to a 3. When the FDIC urged a further downgrade to a 4 rating in the summer of 2008, OTS disagreed. In September 2008, however, while still resisting the ratings downgrade, OTS acknowledged internally that WaMu’s poor quality loans and poor risk management were the source of its problems:

“The bank’s overall unsatisfactory condition is primarily the result of the poor asset quality and operating performance in the bank’s major Home Loans Group area of business. ... The deteriorating asset quality in the Home Loans Group is accompanied by inadequacies in risk management, internal controls, and oversight that made more vulnerable to the current housing and economic downturn. The examination criticized past liberal home loan underwriting practices and concentrated delivery of nontraditional mortgage products to higher risk geographic markets.”⁸⁷⁵

It was only on September 18, 2008, after the bank began to run out of the cash needed to conduct its affairs and the FDIC independently downgraded the bank to a 4, that OTS finally agreed to the downgrade. One week later, OTS placed the bank into receivership.

⁸⁷² See Thorson prepared statement at 11, April 16, 2010 Subcommittee Hearing at 111.

⁸⁷³ April 16, 2010 Subcommittee Hearing at 24-26.

⁸⁷⁴ See, e.g., Rymer prepared statement at 5.

⁸⁷⁵ 9/11/2008 OTS document, “WaMu Ratings of 3/343432,” Polakoff_Scott-00065325, Hearing Exhibit 4/16-48.

Hindsight establishes that the CAMELS ratings assigned to Washington Mutual Bank were inflated. Whether the ratings inflation was attributable to the OTS culture of deference to management, examiners who were too intimidated to downgrade the agency's largest institution, an overly narrow regulatory focus that was blinded by WaMu's short term profits and ignored systemic risk, or an absence of forward-looking risk analysis, the WaMu collapse suggests that the CAMELS rating system did not work as it should.

(e) Fee Issues

During the investigation, when asked why OTS senior officials were not tougher on Washington Mutual Bank, several persons brought up the issue of fees – that WaMu supplied \$30 million or nearly 15% of the fees per year that paid for OTS' operating expenses. WaMu's former Chief Risk Officer James Vanasek offered this speculation:

“I think you have to look at the fact that Washington Mutual made up a substantial portion of the assets of the OTS and one wonders if the continuation of the agency would have existed had Washington Mutual failed.”⁸⁷⁶

The issue was also raised by Treasury IG Thorson who warned that OTS should have been “very clear from top to bottom” that WaMu's payment of \$30 million in fees per year to OTS was “not a factor. It just [was] not.”⁸⁷⁷

The OCC and OTS are the only federal banking regulators reliant on fees paid by their regulated entities to fund their operations. At OTS, Washington Mutual was far larger than any other thrift overseen by the agency and was a far larger and more important contributor to the agency's budget. It is possible that the agency's oversight was tempered by recognition of the thrift's unique importance to the agency's finances and a concern that tough regulation might cause WaMu to convert its charter and switch to a different regulator. Its dependence on WaMu fees may have given OTS the incentive to avoid subjecting WaMu to regulatory enforcement actions and ultimately compromised its judgments.

Conclusion. WaMu is the largest bank failure in the history of the United States. When OTS seized it, WaMu had \$307 billion in assets. By comparison, the next largest U.S. bank failure was Continental Illinois, which had \$40 billion in assets when it collapsed in 1984. OTS' failure to act allowed Washington Mutual to engage in unsafe and unsound practices that cost borrowers their homes, led to a loss of confidence in the bank, and sent hundreds of billions of dollars of toxic mortgages into the financial system with its resulting impact on financial markets at large. Even more sobering is the fact that WaMu's failure was large enough that, if the bank had not been purchased by JPMorgan Chase, it could have exhausted the entire Deposit Insurance Fund which then contained about \$45 billion. Exhausting the Deposit Insurance Fund

⁸⁷⁶ April 13, 2010 Subcommittee Hearing at 40 (Testimony of James Vanasek).

⁸⁷⁷ See April 16, 2010 Subcommittee Hearing at 25.

could have triggered additional panic and loss of confidence in the U.S. banking system and financial markets.

(2) Other Regulatory Failures

Washington Mutual was not the only failed thrift overseen by OTS. In 2008, OTS closed the doors of five thrifts with combined assets of \$354 billion.⁸⁷⁸ Another seven thrifts holding collective assets of \$350 billion were sold or declared bankruptcy.⁸⁷⁹ Virtually all of these thrifts conducted high risk lending, accumulated portfolios with high risk assets, and sold high risk, poor quality mortgages to other financial institutions and investors. At the Subcommittee hearing, the Treasury Inspector General testified that, after completing 17 reviews and working on another 33 reviews of a variety of failed financial institutions, he could say that OTS' lack of enforcement action was "not unique to WaMu" and lax enforcement by the relevant federal banking regulator was "not unique to OTS."⁸⁸⁰

Mortgage lenders other than banks also failed. Many of these mortgage lenders had operated as private firms, rather than as depository institutions, and were not overseen by any federal or state bank regulator. Some were overseen by the SEC; others were not overseen by any federal financial regulator. Some became large companies handling billions of dollars in residential loans annually, yet operated under minimal and ineffective regulatory oversight. When residential loans began to default in late 2006, and the subprime securitization market dried up in 2007, these firms were unable to sell their loans, developed liquidity problems, and went out of business. Together, these failed mortgage lenders, like the failed thrifts, contributed to systemic risk that damaged the U.S. banking system, U.S. financial markets, and the U.S. economy as a whole.

(a) Countrywide

Countrywide Financial Corporation, now a division of Bank of America and known as Bank of America Home Loans, was formerly the largest independent mortgage lender in the United States and one of the most prolific issuers of subprime mortgages.⁸⁸¹ For a number of years, Countrywide operated as a national bank under the OCC. In March 2007, it converted to a thrift charter and operated for its last 18 months under the regulatory supervision of OTS.⁸⁸² At its height, Countrywide had approximately \$200 billion in assets, 62,000 employees, and issued in excess of \$400 billion in residential mortgages each year. In 2008, Countrywide originated

⁸⁷⁸ 1/2009 Center for Responsible Lending report, "The Second S&L Scandal," at 1, Hearing Exhibit 4/16-84.

⁸⁷⁹ *Id.*

⁸⁸⁰ April 16, 2010 Subcommittee Hearing at 18 (Testimony of Treasury IG Thorson). The Treasury IG also reviewed, for example, failed banks overseen by the OCC.

⁸⁸¹ See, e.g., "Mortgage Lender Rankings by Residential Originations," charts prepared by MortgageDaily.com, <http://www.mortgagedaily.com/MortgageLenderRanking.asp> (indicating Countrywide was one of the top three issuers of U.S. residential mortgages from 2003 to 2008); "A Mortgage Crisis Begins to Spiral, and the Casualties Mount," *New York Times* (3/5/2007).

⁸⁸² 3/5/2007 OTS press release, "OTS Approves Countrywide Application," http://www.ots.treas.gov/_files/777014.html.

nearly 20% of all mortgages in the United States.⁸⁸³ But in August 2008, after the collapse of the subprime secondary market, Countrywide could no longer sell or securitize its subprime loans and was unable to obtain replacement financing, forcing the bank into a liquidity crisis.⁸⁸⁴ By the end of the summer of 2008, it would have declared bankruptcy, but for its sale to Bank of America for \$2.8 billion.⁸⁸⁵

Neither the OCC nor OTS ever filed a public enforcement action against the bank. In June 2009, the SEC filed suit against the three most senior Countrywide executives, the chief executive officer, the chief operating officer and president, and the chief financial officer, charging them with fraudulently misleading investors by representing that Countrywide had issued loans primarily to “prime” or low risk borrowers, when it had actually written increasingly risky loans that senior executives knew would result in substantial defaults and delinquencies.⁸⁸⁶ In addition, the SEC charged that CEO Angelo Mozilo had violated his federal disclosure obligations and engaged in insider trading.⁸⁸⁷

The SEC complaint detailed the bank’s increasingly risky underwriting and lending practices from 2005 to 2007, including its use of stated income loans, loan-to-value ratios in excess of 95%, loans to borrowers with low FICO scores, frequent use of loan exceptions, and willingness to match the loan terms of any competitor. Like WaMu, from 2003 to 2007, the bank switched from issuing primarily low risk, 30-year loans, to subprime and other high risk mortgages.⁸⁸⁸

The complaint also described how Mr. Mozilo was internally alarmed and critical of the increased credit risks that Countrywide was incurring, while at the same time telling investors that the bank was more prudent than its competitors.⁸⁸⁹ The SEC complaint cited, for example, an April 2006 email from Mr. Mozilo discussing Countrywide’s issuance of subprime 80/20 loans, which are loans that have no down payment and are comprised of a first loan for 80% of the home’s value and a second loan for the remaining 20% of the value, resulting in a loan-to-value ratio of 100%. Mr. Mozilo wrote: “In all my years in the business I have never seen a more toxic pr[o]duct.”⁸⁹⁰ In another email that same month, after being informed that most borrowers were making the minimum payments allowed on Option ARM loans, Mr. Mozilo wrote: “Since over 70% have opted to make the lower payment it appears it is just a matter of time that we will be faced with much higher resets and therefore much higher delinquencies.”⁸⁹¹

⁸⁸³ OCC, “Annual Report: Fiscal Year 2009,” <http://www.occ.gov/static/publications/annrpt/2009AnnualReport.pdf>.

⁸⁸⁴ See, e.g., SEC v. Mozilo, Case No. CV09-03994 (USDC CD Calif.), Complaint (June 4, 2009), at ¶¶ 102-104 (hereinafter “SEC Complaint against Countrywide Executives”).

⁸⁸⁵ “Countrywide Financial Corporation,” New York Times (10/15/2010).

⁸⁸⁶ SEC Complaint against Countrywide Executives.

⁸⁸⁷ Id.

⁸⁸⁸ See, e.g., SEC Complaint against Countrywide Executives, at ¶¶ 17-19.

⁸⁸⁹ See, e.g., id. at ¶¶ 6-7.

⁸⁹⁰ Id. at ¶ 50.

⁸⁹¹ Id. at ¶ 63.

Later he warned that the bank was “flying blind” on the ultimate delinquency rate and should consider selling the loans.⁸⁹² The SEC complaint also stated:

“Mozilo went on to write that he had ‘personally observed a serious lack of compliance within our origination system as it relates to documentation and generally a deterioration in the quality of loans originated versus the pricing of those loan[s].’ Mozilo noted that, ‘In my conversations with Sambol [Countrywide’s chief operating officer] he calls the 100% sub prime seconds as the ‘milk’ of the business. Frankly, I consider that product line to be the poison of ours.’”⁸⁹³

On October 15, 2010, the SEC announced a record settlement with the three Countrywide executives.⁸⁹⁴ Mr. Mozilo agreed to pay \$22.5 million to settle the disclosure fraud allegations and \$45 million to settle the insider trading allegations, bringing his total settlement to \$67.5 million.⁸⁹⁵ He also agreed to be permanently barred from serving as an officer or director of a publicly traded corporation. Countrywide’s former chief operating officer paid \$5.5 million and agreed to a three-year bar. The chief financial officer paid \$130,000 and agreed to a one-year bar on practicing before the SEC.

In June 2010, in a case brought by the Federal Trade Commission, Countrywide agreed to pay penalties of \$108 million for charging inflated mortgage servicing fees to homeowners in delinquency, including excessive fees to inspect property or mow lawns for people struggling to keep their homes.⁸⁹⁶ In August 2010, Countrywide and some former executives agreed to pay \$600 million to settle several class action lawsuits.⁸⁹⁷

(b) IndyMac

IndyMac Bank was established in 1985 by Countrywide co-founders Angelo Mozilo and David Loeb. While its lines of business changed over time, in 2000, it became a chartered thrift overseen by OTS, and grew to become the country’s ninth-largest originator of residential mortgage loans.⁸⁹⁸ IndyMac specialized in two types of high risk home loans, Alt A loans which did not require verification or documentation of the borrower’s income, assets or employment; and Option ARM loans which allowed borrowers to pay less than the fully amortized cost of the mortgage. From 2004 to 2006, Option ARMs made up 75% of IndyMac’s home loans and, in 2006, IndyMac allowed 75% of its Option ARM borrowers to make only the minimum payment

⁸⁹² Id. at ¶ 68-69.

⁸⁹³ Id. at ¶ 49.

⁸⁹⁴ 10/15/2010 SEC Press Release, “Former Countrywide CEO Angelo Mozilo to Pay SEC’s Largest-Ever Financial Penalty Against a Public Company’s Senior Executive,” <http://www.sec.gov/news/press/2010/2010-197.htm>.

⁸⁹⁵ Id.

⁸⁹⁶ 6/7/2010 U.S. Federal Trade Commission press release, “Countrywide Will Pay \$108 Million for Overcharging Struggling Homeowners; Loan Servicer Inflated Fees, Mishandled Loans of Borrowers in Bankruptcy,” <http://www.ftc.gov/opa/2010/06/countrywide.shtm>.

⁸⁹⁷ See, e.g., “\$600 Million Countrywide Settlement,” *Associated Press* (8/3/2010).

⁸⁹⁸ 2/26/2009 Office of Inspector General, Dept. of the Treasury Audit Report, “Safety and Soundness: Material Loss Review of IndyMac Bank,” at 40, <http://www.treasury.gov/about/organizational-structure/ig/Documents/oig09032.pdf> (hereinafter “IG Report on IndyMac Bank”).

required by the loan, triggering negative amortization. In addition to originating loans, IndyMac packaged them into securities and sold them on the secondary market.⁸⁹⁹

In July 2007, after the credit rating agencies downgraded the ratings on most subprime mortgage backed securities and the subprime secondary market collapsed, IndyMac – like WaMu – was left holding a large inventory of poor quality mortgage loans it could not sell. As delinquencies increased and the value of the mortgages fell, IndyMac incurred substantial losses, and its depositors began withdrawing funds. The withdrawals continued throughout 2007 and into 2008, eventually reaching \$1.55 billion and triggering a liquidity crisis at the bank.⁹⁰⁰ In July 2008, IndyMac collapsed and was seized by the FDIC, which had to pay more than \$10 billion from the Deposit Insurance Fund to protect insured deposits and pay related expenses.⁹⁰¹

As it did with WaMu, OTS gave IndyMac high CAMELS ratings until shortly before the thrift's failure, despite the fact that OTS had identified numerous problems with IndyMac's subprime mortgage business practices.⁹⁰² Those problems included adopting an overly narrow definition of "subprime," so that IndyMac could maintain a lower level of capital reserves;⁹⁰³ poor underwriting and sloppy property appraisal practices;⁹⁰⁴ and improper risk mitigation.⁹⁰⁵ Neither OTS nor the FDIC ever took a public enforcement action against the bank.

After IndyMac's failure, the Treasury Inspector General conducted a review and issued a report evaluating OTS' oversight efforts.⁹⁰⁶ The report attributed IndyMac's collapse to its strategy of rapid growth; originating and securitizing nontraditional, high risk loans; lack of verification of borrowers' income or assets; lax underwriting; and reliance on high interest loans for its own operations.⁹⁰⁷ The Treasury IG found that OTS was aware of IndyMac's problems, but did not take sufficient enforcement action to correct them.⁹⁰⁸ According to the Inspector

⁸⁹⁹ Id. at 7.

⁹⁰⁰ Id. at 3.

⁹⁰¹ Id. at 1.

⁹⁰² Id. at 8.

⁹⁰³ Id. at 18.

⁹⁰⁴ Id. at 21-31.

⁹⁰⁵ Id.

⁹⁰⁶ Id. In addition to the Material Loss Review, the Treasury Inspector General investigated OTS' conduct in permitting thrifts, including IndyMac to backdate certain capital infusions. See 12/22/2008 Office of the Inspector General, Dept. of the Treasury, Letter to Ranking Member Charles Grassley, Senate Committee on Finance, http://media.washingtonpost.com/wp-srv/business/documents/Indymac_Thorson_122308pdf.pdf?sid=ST2008122202386. Darrel Dochow was removed from his position as Director of the OTS West Division for having allowed IndyMac to backdate a capital contribution of \$18 million, which made it appear stronger than it really was in the relevant financial statement. Then Acting OTS Director Scott Polakoff was also placed on leave during the backdating investigation, but he disputed that he directed anyone to allow backdated capital injections and asserted that the real impetus for his being placed on leave was his Congressional testimony critical of the agency's conduct related to AIG. Subcommittee interview of Scott Polakoff (3/16/10).

⁹⁰⁷ 3/31/2009 Office of the Inspector General, Dept. of the Treasury, "Semiannual Report to Congress," at 15, <http://www.treasury.gov/about/organizational-structure/ig/Documents/sar042009.pdf>.

⁹⁰⁸ Id. at 31.

General, OTS typically relied on the “cooperation of IndyMac management to obtain needed improvements” – which was usually not forthcoming – to remedy identified problems.⁹⁰⁹

In February 2011, the SEC charged three former senior IndyMac executives with securities fraud for misleading investors about the company’s deteriorating financial condition.⁹¹⁰ The SEC alleged that the former CEO and two former CFOs participated in the filing of false and misleading disclosures about the financial stability of IndyMac and its main subsidiary, IndyMac Bank F.S.B. One of the executives – S. Blair Abernathy, former CFO – has agreed to settle the SEC’s charges without admitting or denying the allegations for approximately \$125,000. The SEC’s complaint against former CEO Michael W. Perry and former CFO A. Scott Keys seeks, among other things, disgorgement, financial penalties, and a bar on their acting as an officer or director of a publicly traded corporation.⁹¹¹

IndyMac was the third-largest bank failure in U.S. history and the largest collapse of a FDIC-insured depository institution since 1984.⁹¹² At the time of its collapse, IndyMac had \$32 billion in assets and \$19 billion in deposits, of which approximately \$18 billion were insured by the FDIC.⁹¹³ IndyMac’s failure cost the FDIC \$10.7 billion,⁹¹⁴ a figure which, at the time, represented over 10% of the federal Deposit Insurance Fund.⁹¹⁵

(c) New Century

New Century Financial Corporation is an example of a failed mortgage lender that operated largely without federal or state oversight, other than as a publicly traded corporation overseen by the SEC. New Century originated, purchased, sold, and serviced billions of dollars in subprime residential mortgages, operating not as a bank or thrift, but first as a private corporation, then as a publicly traded corporation, and finally, beginning in 2004, as a publicly traded Real Estate Investment Trust (REIT).⁹¹⁶ By 2007, New Century had approximately 7,200 employees, offices across the country, and a loan production volume of \$51.6 billion, making it

⁹⁰⁹ Id. at 38.

⁹¹⁰ 2/11/2011 SEC press release, “SEC Charges Former Mortgage Lending Executives With Securities Fraud,” <http://www.sec.gov/news/press/2011/2011-43.htm>.

⁹¹¹ Id.

⁹¹² “The Fall of IndyMac,” [CNNMoney.com](http://www.cnnmoney.com) (7/13/2008).

⁹¹³ Id.

⁹¹⁴ 3/31/2010 Office of Inspector General, Dept. of the Treasury, “Semiannual Report to Congress,” [http://www.treasury.gov/about/organizational-structure/ig/Documents/March%202010%20SAR%20Final%20%20\(04-30-10\).pdf](http://www.treasury.gov/about/organizational-structure/ig/Documents/March%202010%20SAR%20Final%20%20(04-30-10).pdf).

⁹¹⁵ “Crisis Deepens as Big Bank Fails; IndyMac Seized in Largest Bust in Two Decades,” [Wall Street Journal](http://www.wsj.com) (7/12/2008).

⁹¹⁶ See *SEC v. Morrice*, Case No. SACV09-01426 (USDC CD Calif.), Complaint (Dec. 7, 2009), ¶¶ 12-13 (hereinafter “SEC Complaint against New Century Executives”). See also *In re New Century*, Case No. 2:07-cv-00931-DDP (USDC CD Calif.), Amended Consolidated Class Action Complaint (March 24, 2008), at ¶¶ 55-58 (hereinafter “New Century Class Action Complaint”).

the second largest subprime lender in the country.⁹¹⁷ Because it did not accept deposits or have insured accounts, it was not overseen by any federal or state bank regulator.

In 2007, after the company announced its intent to restate its 2006 financial results, investors lost confidence in the company, its stock plummeted, and New Century collapsed. In April 2007, it filed for bankruptcy.⁹¹⁸ In February 2008, the bankruptcy examiner released a detailed report that found New Century was responsible for “significant improper and imprudent practices related to its loan originations, operations, accounting and financial reporting processes.”⁹¹⁹ Like WaMu, New Century had engaged in a number of harmful mortgage practices, including “increasing loan originations, without due regard to the risks associated with that business strategy”; risk layering in which it issued high risk loans to high risk borrowers, including originating in excess of 40% of its loans on a stated income basis; allowing multiple exceptions to underwriting standards; and utilizing poor risk management practices that relied on the company’s selling or securitizing its high risk mortgages rather than retaining them.

After New Century’s bankruptcy, a 2007 class action complaint was filed by the New York State Teachers’ Retirement System and others alleging that New Century executives had violated federal securities laws and committed fraud.⁹²⁰ Among other matters, the complaint alleged that the company sold poor quality loans that incurred early payment defaults, received numerous demands from third party buyers of the loans to repurchase them, and built up a huge backlog of hundreds of millions of dollars in repurchase requests that the company deliberately delayed paying to make its 2005 and 2006 financial results appear better than they actually were.⁹²¹ The complaint also alleged that New Century issued loans using lax underwriting standards to maximize loan production,⁹²² and “routinely and increasingly lent money to people who were unable to repay the debt shortly after the loans were closed.”⁹²³ The suit took note of a news article stating: “Loans made by New Century, which filed for bankruptcy protection in March, have some of the highest default rates in the industry.”⁹²⁴

In December 2009, the SEC filed a civil complaint charging three former New Century executives, the CEO, CFO, and controller, with fraudulent accounting that misled investors about the company’s finances.⁹²⁵ The SEC alleged that, while the company’s financial disclosures painted a picture that the company’s performance exceeded that of its peers, its executives had failed to disclose material negative information, such as significant increases in its loans’ early

⁹¹⁷ In re New Century TRS Holdings, Inc., Case No. 07-10416 (KJC) (US Bankruptcy Court, Del.), 2/29/2008 Final Report of Michael J. Missal, Bankruptcy Court Examiner, at 2, http://graphics8.nytimes.com/packages/pdf/business/Final_Report_New_Century.pdf (hereinafter “New Century Bankruptcy Report”). See also New Century Class Action Complaint at ¶ 59-60.

⁹¹⁸ In re New Century TRS Holdings, Inc., Case No. 07-10416 (KJC) (US Bankruptcy Court, Del.).

⁹¹⁹ New Century Bankruptcy Report.

⁹²⁰ New Century Class Action Complaint.

⁹²¹ Id. at ¶¶ 75-79.

⁹²² Id. at ¶ 112. See also ¶¶ 126-130.

⁹²³ Id. at ¶ 113. See also ¶¶ 114-116.

⁹²⁴ Id. at ¶ 123.

⁹²⁵ SEC Complaint against New Century Executives; See also 12/7/2009 SEC Press Release, “SEC Charges Former Offices of Subprime Lender New Century With Fraud.”

payment defaults and a backlog of loan repurchases, which had the effect of materially overstating the company's financial results. The SEC complaint also stated that, although New Century had represented itself as a prudent subprime lender, it "soon became evident that its lending practices, far from being 'responsible,' were the recipe for financial disaster."⁹²⁶ The complaint detailed a number of high risk lending practices, including the issuance of interest only loans; 80/20 loans with loan-to-value ratios of 100%; and stated income loans in which the borrower's income and assets were unverified.⁹²⁷ The complaint charged the New Century executives with downplaying the riskiness of the company's loans and concealing their high delinquency rates.

In July 2010, the three former New Century executives settled the SEC complaint for about \$1.5 million, without admitting or denying wrongdoing.⁹²⁸ Each also agreed to be barred from serving as an officer or director of any publicly traded corporation for five years. A larger group of about a dozen former New Century officers and directors settled several class action and other shareholder lawsuits for \$88.5 million.⁹²⁹

In 2007, New Century reported publicly that it was under criminal investigation by the U.S. Attorney's Office for the Central District of California, but no indictment of the company or any executive has been filed.⁹³⁰

(d) Fremont

Fremont Investment & Loan was once the fifth largest subprime mortgage lender in the United States.⁹³¹ At its peak in 2006, it had \$13 billion in assets, 3,500 employees, and nearly two dozen offices.⁹³² Fremont Investment & Loan was neither a bank nor a thrift, but an "industrial loan company" that issued loans and held insured deposits.⁹³³ It was owned by Fremont General Credit Corporation which was owned, in turn, by Fremont General Corporation. In 2007, the bank was the subject of an FDIC cease and desist order which identified multiple problems with its operations and ordered the bank to cease its subprime lending.⁹³⁴ In 2008, due to insufficient capital, the FDIC ordered Fremont General Corporation to either recapitalize the bank or sell it. The bank was then sold to CapitalSource, Inc.⁹³⁵ In June

⁹²⁶ SEC Complaint against New Century Executives at 3.

⁹²⁷ See, e.g., SEC Complaint against New Century Executives at ¶¶ 24-32.

⁹²⁸ See 7/30/2010 SEC Litigation Release No. 21609, "SEC Settles With Former Officers of Subprime Lender New Century," <http://www.sec.gov/litigation/litreleases/2010/lr21609.htm>.

⁹²⁹ See, e.g., "New Century Ex-leaders to Pay \$90 Million in Settlements," Los Angeles Times (7/31/2010).

⁹³⁰ See 3/12/2007 New Century Financial Corporation Form 8-K, Item 8.01.

⁹³¹ "Fremont Ordered by FDIC to Find Buyer; Curbs Imposed," Bloomberg (3/28/2010), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=atIgi9otRZ3k>.

⁹³² 3/2006 Fremont General Corporation Form 10-K filed with the SEC.

⁹³³ Id.

⁹³⁴ In re Fremont Investment & Loan, Order to Cease and Desist, Docket No. FDIC-07-035b (March 7, 2007) (hereinafter "Fremont Cease and Desist Order").

⁹³⁵ In re Fremont Investment & Loan, Supervisory Prompt Corrective Action Directive, Docket No. FDIC-08-069 PCAS (March 26, 2008); "CapitalSource, Inc.," Hoover's Company Records. See also "CapitalSource to Acquire Fremont's Retail Arm," New York Times (4/14/2008).

2008, Fremont General Corporation declared bankruptcy under Chapter 11 and has since reorganized as Signature Group Holdings, Inc.⁹³⁶

As a California based industrial loan company, Fremont Investment & Loan was overseen by the California Department of Financial Institutions, a state bank regulator. Since it had deposits that were federally insured, Fremont was also regulated by the FDIC.⁹³⁷ The March 2007 FDIC cease and desist order required the bank to end its subprime lending business, due to “unsafe and unsound banking practices and violations of law,” including operating with “a large volume of poor quality loans”; “unsatisfactory lending practices”; “excessive risk”; and inadequate capital.⁹³⁸ The FDIC also determined that the bank lacked effective risk management practices, lacked adequate mortgage underwriting criteria, and was “approving loans with loan-to-value ratios approaching or exceeding 100 percent of the value of the collateral.”⁹³⁹

Many of the specific practices cited in the cease and desist order mirror the FDIC and OTS criticisms of WaMu. For example, the FDIC determined that Fremont was “marketing and extending adjustable-rate mortgage (‘ARM’) products to subprime borrowers in an unsafe and unsound manner that greatly increase[d] the risk that borrowers will default”; “qualifying borrowers for loans with low initial payments based on an introductory or ‘start’ rate that will expire after an initial period”; “approving borrowers without considering appropriate documentation and/or verification of the their income”; and issuing loans with “features likely to require frequent refinancing to maintain an affordable monthly payment and/or to avoid foreclosure.”⁹⁴⁰ Fremont later reported receiving default notices on \$3.15 billion in subprime mortgages it had sold to investors.⁹⁴¹

One year later, in March 2008, the FDIC filed another public enforcement action against the bank, for failing to provide an acceptable capital restoration plan or obtaining sufficient capital, and ordered the bank’s parent company to either adequately capitalize the bank within 60 days or sell it.⁹⁴² The bank was then sold to CapitalSource, Inc.

The FDIC took action against Fremont much earlier – in March 2007 – than other regulators did with respect to other financial institutions, including OTS’ nonpublic enforcement actions against WaMu in March and September 2008; the FDIC’s seizure of IndyMac in July 2008; the SEC’s action against Countrywide in June 2009; and the SEC’s action against New

⁹³⁶ In re Fremont General Corporation, Case No. 8:08-bk-13421-ES (US Bankruptcy Court, CD Calif.), First Status Report (July 30, 2010) (included in 7/30/2010 Fremont General Corporation 8K filing with the SEC).

⁹³⁷ 2006 Fremont 10-K Statement with the SEC.

⁹³⁸ Fremont Cease and Desist Order at 1-3. See also 3/7/2007 FDIC press release, “FDIC Issues Cease and Desist Order Against Fremont Investment & Loan, Brea, California, and its Parents.”

⁹³⁹ Fremont Cease and Desist Order at 2-4.

⁹⁴⁰ Id. at 3.

⁹⁴¹ See 3/4/2008 Fremont General Corporation press release, “Fremont General Corporation Announces Receipt of Notice of Covenant Default With Respect to Guaranties Issued in Connection With Certain Prior Residential Sub-Prime Loan Sale Transactions,” http://media.corporate-ir.net/media_files/irol/10/106265/08-03-04N%20FGCAnnouncesDefaultNoticewithRRELoanTransactions.pdf. See also “CapitalSource to Acquire Fremont’s Retail Arm,” *New York Times* (4/14/2008).

⁹⁴² In re Fremont Investment & Loan, Supervisory Prompt Corrective Action Directive, Docket No. FDIC-08-069 PCAS (March 26, 2008).

Century in December 2009. By putting an early end to Fremont's subprime lending, the FDIC stopped it from selling additional poor quality mortgage backed securities into U.S. securitization markets.

In November 2008, the OCC researched the ten metropolitan areas with the highest foreclosure rates and identified the ten lenders in each area with the most foreclosed loans; Long Beach, Countrywide, IndyMac, New Century, and Fremont all made the list of the "Worst Ten in the Worst Ten."⁹⁴³ Moody's, the credit rating agency, later calculated that, in 2006 alone, Long Beach, New Century, and Fremont were responsible for 24% of the residential subprime mortgage backed securities issued, but 50% of the subsequent credit rating downgrades of those securities.⁹⁴⁴ The fact is that each of these lenders issued billions of dollars in high risk, poor quality home loans. By allowing these lenders, for years, to sell and securitize billions of dollars in poor quality, high risk home loans, regulators permitted them to contaminate the secondary market and introduce systemic risk throughout the U.S. financial system.

E. Preventing Regulatory Failures

Regulators stood on the sidelines as U.S. mortgage lenders introduced increasingly high risk mortgage products into the U.S. mortgage market. Stated income loans, NINA loans, and so-called "liar loans" were issued without verifying the borrower's income or assets. Alt A loans also had reduced documentation requirements. Interest-only loans, Option ARMs, and hybrid ARMs involved charging low introductory interest rates on loans that could be refinanced before much higher interest rates took effect. Negative amortization loans – loans that became bigger rather than smaller over time – became commonplace. Home equity loans and lines of credit, piggybacks and silent seconds, 100% financing – all involved loans that required the borrower to make virtually no down payment or equity investment in the property, relying instead on the value of the property to ensure repayment of the loan. All of these loans involved higher risks than the 30-year and 15-year fixed rate mortgages that dominated the U.S. mortgage market prior to 2004. When property values stopped climbing in late 2006, these higher risk loans began incurring delinquencies, losses, and defaults at record rates.

A number of new developments have occurred in the past several years to address the problems highlighted throughout this Report.

(1) New Developments

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which the President signed into law on July 21, 2010, contains many changes in the law that will be implemented over the next year. The Dodd-Frank changes include abolishing OTS, banning stated income loans, and restricting negative amortization loans. Other developments include a revised interagency agreement strengthening the FDIC's ability to conduct examinations of

⁹⁴³ See 11/13/2008 "Worst Ten in the Worst Ten," document prepared by the OCC, Hearing Exhibit 4/13-58.

⁹⁴⁴ 7/12/2007 "Moody's Structured Finance Teleconference and Web Cast: RMBS and CDO Rating Actions," prepared by Moody's Investors Service, Hearing Exhibit 4/23-106.

insured depository institutions and a new FDIC deposit insurance pricing system that requires higher risk institutions to pay higher insurance fees.

OTS Abolished. One significant new change brought about by the Dodd-Frank Act is the abolishment of the Office of Thrift Supervision. Title III of the Dodd-Frank Act reassigned OTS' duties and personnel to other agencies, primarily the Office of the Comptroller of the Currency (OCC).⁹⁴⁵ Although some OTS officials claim the law intended OTS to be a merger partner with the OCC, the statute is clear in its intent to abolish OTS, rather than effect a merger of equals.

Revised Interagency Agreement. A second important change is that the interagency agreement that guides when the FDIC can examine an insured institution was altered to give the FDIC increased authority. Under federal law, the FDIC can conduct an examination of an insured depository institution "whenever the [FDIC] Board of Directors determines a special examination ... is necessary to determine the condition of such depository institution for insurance purposes."⁹⁴⁶ Despite this broad statutory grant of examination authority, in 2002, the FDIC agreed to limit the circumstances in which it would examine banks subject to regulation by another agency. The resulting interagency agreement essentially required the FDIC to establish that an institution was at "heightened risk" of causing loss to the Deposit Insurance Fund before the FDIC could compel another banking regulator to allow the FDIC to participate in an examination of its operations. OTS used that agreement to impede the FDIC's participation in examinations of WaMu.

In 2010, the FDIC renegotiated that agreement with the other financial regulators, and they signed a revised version that will facilitate more cooperation on a less bureaucratic and more timely basis.⁹⁴⁷ Compared to the 2002 version, the revised agreement explicitly provides for special examinations of a broader scope of insured depository institutions. It also streamlined the process for resolving differences in CAMELS ratings between financial regulators. In the case of WaMu, this new process would have helped facilitate a quicker response to WaMu's deteriorating condition. Additionally, the new agreement establishes a continuous on-site FDIC presence, with five or more examiners, at certain large institutions, including those that receive ratings under the FDIC's Large Insured Depository Institutions Program. This new provision ensures the FDIC has consistent access to information about big banks that, by virtue of their size, pose the most risk to the Deposit Insurance Fund. Finally, after first discussing it with the primary federal regulator, the FDIC is permitted to gather information directly from financial institutions. These provisions will help ensure that the FDIC can obtain the information needed to safeguard the Deposit Insurance Fund.

⁹⁴⁵ See, e.g., Section 312 of the Dodd-Frank Act.

⁹⁴⁶ 12 U.S.C. § 1820(b)(3).

⁹⁴⁷ 9/17/2010 letter from FDIC Chairman Sheila C. Bair to the Subcommittee, PSI-FDIC-13-000001 ("Enclosed please find a signed copy of a revised and much-strengthened memorandum of understanding among the FDIC and other bank regulators which will greatly enhance our ability to continually access and monitor information related to our risks as deposit insurer. I believe this is a very strong agreement and one which we accomplished due in no small part to the work of your Subcommittee in identifying weaknesses in the supervisory processes leading up to the failure of Washington Mutual.").

Risk Factors in Insurance Fees. Under a new FDIC deposit insurance pricing system that takes effect in 2011, large depository institutions with higher risk activities will be required to pay higher fees into the Deposit Insurance Fund.⁹⁴⁸ This new assessment system is designed to “better capture risk at the time large institutions assume the risk, to better differentiate among institutions for risk and take a more forward-looking view of risk, [and] to better take into account the losses that the FDIC may incur if such an insured depository institution fails.”⁹⁴⁹ It is the product of both past FDIC revisions and changes to the insurance fund assessment system made by the Dodd-Frank Act.⁹⁵⁰ It is intended to impose higher assessments on large banks “with high-risk asset concentrations, less stable balance sheet liquidity, or potentially higher loss severity in the event of failure,” and impose those higher assessments when the banks “assume these risks rather than when conditions deteriorate.”⁹⁵¹ Under this new system, banks with higher risk activities will be assessed higher fees, not only to safeguard the insurance fund and allocate insurance costs more fairly, but also to help discourage high risk activities.

Financial Stability Oversight Council. The Dodd-Frank Act has also established a new intra-governmental council, the Financial Stability Oversight Council (FSOC), to identify systemic risks and respond to emerging threats to the stability of the U.S. financial system.⁹⁵² The council is comprised of ten existing regulators in the financial services sector, including the Chairman of the Federal Reserve Board of Governors, the Chairman of the FDIC, and the Comptroller of the Currency, and is chaired by the Secretary of the Treasury. This Council is intended to ensure that U.S. financial regulators consider the safety and soundness of not only individual financial institutions, but also of U.S. financial markets and systems as a whole.

(2) Recommendations

To further strengthen oversight of financial institutions to reduce risk, protect U.S. financial markets and the economy, and safeguard the Deposit Insurance Fund, this Report makes the following recommendations.

1. **Complete OTS Dismantling.** The Office of the Comptroller of the Currency (OCC) should complete the dismantling of the Office of Thrift Supervision (OTS), despite attempts by some OTS officials to preserve the agency’s identity and influence within the OCC.
2. **Strengthen Enforcement.** Federal banking regulators should conduct a review of their major financial institutions to identify those with ongoing, serious deficiencies, and review their enforcement approach to those institutions to eliminate any policy of deference to bank management, inflated CAMELS ratings, or use of short term profits to excuse high risk activities.

⁹⁴⁸ See 2/7/2011 FDIC Final Rule of Assessments, Dividends, Assessment Base and Large Bank Pricing, RIN 3064.

⁹⁴⁹ Id.

⁹⁵⁰ See Sections 331, 332 and 334 of the Dodd-Frank Act.

⁹⁵¹ 2/7/2011 FDIC press release, “FDIC Approves Final Rule of Assessments, Dividends, Assessment Base and Large Bank Pricing,” <http://www.fdic.gov/news/news/press/2011/pr11028.html>.

⁹⁵² See Title I, Subtitle A, of the Dodd-Frank Act establishing the Financial Stability Oversight Council, including Section 112(a) which provides its purposes and duties.

- 3. Strengthen CAMELS Ratings.** Federal banking regulators should undertake a comprehensive review of the CAMELS ratings system to produce ratings that signal whether an institution is expected to operate in a safe and sound manner over a specified period of time, asset quality ratings that reflect embedded risks rather than short term profits, management ratings that reflect any ongoing failure to correct identified deficiencies, and composite ratings that discourage systemic risks.
- 4. Evaluate Impacts of High Risk Lending.** The Financial Stability Oversight Council should undertake a study to identify high risk lending practices at financial institutions, and evaluate the nature and significance of the impacts that these practices may have on U.S. financial systems as a whole.

V. INFLATED CREDIT RATINGS: CASE STUDY OF MOODY'S AND STANDARD & POOR'S

Moody's Investors Service, Inc. (Moody's) and Standard & Poor's Financial Services LLC (S&P), the two largest credit rating agencies (CRAs) in the United States, issued the AAA ratings that made residential mortgage backed securities (RMBS) and collateralized debt obligations (CDOs) seem like safe investments, helped build an active market for those securities, and then, beginning in July 2007, downgraded the vast majority of those AAA ratings to junk status.⁹⁵³ The July mass downgrades sent the value of mortgage related securities plummeting, precipitated the collapse of the RMBS and CDO secondary markets, and perhaps more than any other single event triggered the financial crisis.

In the months and years of buildup to the financial crisis, warnings about the massive problems in the mortgage industry were not adequately addressed within the ratings industry. By the time the rating agencies admitted their AAA ratings were inaccurate, it took the form of a massive ratings correction that was unprecedented in U.S. financial markets. The result was an economic earthquake from which the aftershocks continue today.

Between 2004 and 2007, taking in increasing revenue from Wall Street firms, Moody's and S&P issued investment grade credit ratings for the vast majority of the RMBS and CDO securities issued in the United States, deeming them safe investments even though many relied on subprime and other high risk home loans. In late 2006, high risk mortgages began to go delinquent at an alarming rate. Despite signs of a deteriorating mortgage market, Moody's and S&P continued for six months to issue investment grade ratings for numerous subprime RMBS and CDO securities. In July 2007, as mortgage defaults intensified and subprime RMBS and CDO securities began incurring losses, both companies abruptly reversed course and began downgrading at record numbers hundreds and then thousands of their RMBS and CDO ratings, some less than a year old. Investors like banks, pension funds, and insurance companies were suddenly forced to sell off their RMBS and CDO holdings, because they had lost their investment grade status. RMBS and CDO securities held by financial firms lost much of their value, and new securitizations were unable to find investors. The subprime RMBS market initially froze and then collapsed, leaving investors and financial firms around the world holding unmarketable subprime RMBS securities plummeting in value. A few months later, the CDO market collapsed as well.

Traditionally, investments holding AAA ratings have had a less than 1% probability of incurring defaults. But in the financial crisis, the vast majority of RMBS and CDO securities with AAA ratings incurred substantial losses; some failed outright. Investors and financial institutions holding those AAA securities lost significant value. Those widespread losses led, in turn, to a loss of investor confidence in the value of the AAA rating, in the holdings of major U.S. financial institutions, and even in the viability of U.S. financial markets. Inaccurate AAA

⁹⁵³ S&P issues ratings using the "AAA" designation; Moody's equivalent rating is "Aaa." For ease of reference, this Report will refer to both ratings as "AAA."

credit ratings introduced systemic risk into the U.S. financial system and constituted a key cause of the financial crisis.

The Subcommittee's investigation uncovered a host of factors responsible for the inaccurate credit ratings issued by Moody's and S&P. One significant cause was the inherent conflict of interest arising from the system used to pay for credit ratings. Credit rating agencies were paid by the Wall Street firms that sought their ratings and profited from the financial products being rated. The rating companies were dependent upon those Wall Street firms to bring them business and were vulnerable to threats that the firms would take their business elsewhere if they did not get the ratings they wanted. Rating standards weakened as each credit rating agency competed to provide the most favorable rating to win business and greater market share. The result was a race to the bottom.

Additional factors responsible for the inaccurate ratings include rating models that failed to include relevant mortgage performance data, unclear and subjective criteria used to produce ratings, a failure to apply updated rating models to existing rated transactions, and a failure to provide adequate staffing to perform rating and surveillance services, despite record revenues. Compounding these problems were federal regulations that required the purchase of investment grade securities by banks and others, thereby creating pressure on the credit rating agencies to issue investment grade ratings. Still another factor were the Securities and Exchange Commission's (SEC) regulations which required use of credit ratings by Nationally Recognized Statistical Rating Organizations (NRSRO) for various purposes but, until recently, resulted in only three NRSROs, thereby limiting competition.⁹⁵⁴

Evidence gathered by the Subcommittee shows that credit rating agencies were aware of problems in the mortgage market, including an unsustainable rise in housing prices, the high risk nature of the loans being issued, lax lending standards, and rampant mortgage fraud. Instead of using this information to temper their ratings, the firms continued to issue a high volume of investment grade ratings for mortgage backed securities. If the credit rating agencies had issued ratings that accurately exposed the increasing risk in the RMBS and CDO markets and appropriately adjusted existing ratings in those markets, they might have discouraged investors from purchasing high risk RMBS and CDO securities, slowed the pace of securitizations, and as a result reduced their own profits. It was not in the short term economic self interest of either Moody's or S&P to provide accurate credit ratings for high risk RMBS and CDO securities, because doing so would have hurt their own revenues. Instead, the credit rating agencies' profits became increasingly reliant on the fees generated by issuing a large volume of investment grade ratings.

⁹⁵⁴ See, e.g., 1/2003 "Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets," prepared by the SEC, at 5-6 (explaining how the SEC came to rely on NRSRO credit ratings); 9/3/2009 "Credit Rating Agencies and Their Regulation," report prepared by the Congressional Research Service, Report No. R40613 (revised report issued 4/9/2010) (finding that, prior to the 2006 Credit Rating Agency Reform Act, "[t]he SEC never defined the term NRSRO or specified how a CRA might become one. Its approach has been described as essentially one of 'we know-it-when-we-see-it.' The resulting limited growth in the pool of NRSROs was widely believed to have helped to further entrench the three dominant CRAs: by some accounts, they have about 98% of total ratings and collect 90% of total rating revenue." 9/3/2009 version of the report at 2-3).

Looking back after the first shock of the crisis, one Moody's managing director offered this critical self analysis:

“[W]hy didn't we envision that credit would tighten after being loose, and housing prices would fall after rising, after all most economic events are cyclical and bubbles inevitably burst. Combined, these errors make us look either incompetent at credit analysis, or like we sold our soul to the devil for revenue, or a little bit of both.”⁹⁵⁵

A. Subcommittee Investigation and Findings of Fact

For more than one year, the Subcommittee conducted an in-depth investigation of the role of credit rating agencies in the financial crisis, using as case histories Moody's and S&P. The Subcommittee subpoenaed and reviewed hundreds of thousands of documents from both companies including reports, analyses, memoranda, correspondence, and email, as well as documents from a number of financial institutions that obtained ratings for RMBS and CDO securities. The Subcommittee also collected and reviewed documents from the SEC and reports produced by academics and government agencies on credit rating issues. In addition, the Subcommittee conducted nearly two dozen interviews with current and former Moody's and S&P executives, managers, and analysts, and consulted with credit rating experts from the SEC, Federal Reserve, academia, and industry. On April 23, 2010, the Subcommittee held a hearing and released 100 hearing exhibits.⁹⁵⁶

In connection with the hearing, the Subcommittee released a joint memorandum from Chairman Levin and Ranking Member Coburn summarizing the investigation into the credit rating agencies and the problems with the credit ratings assigned to RMBS and CDO securities. The memorandum contained joint findings regarding the role of the credit rating agencies in the Moody's and S&P case histories, which this Report reaffirms. The findings of fact are as follows.

- 1. Inaccurate Rating Models.** From 2004 to 2007, Moody's and S&P used credit rating models with data that was inadequate to predict how high risk residential mortgages, such as subprime, interest only, and option adjustable rate mortgages, would perform.
- 2. Competitive Pressures.** Competitive pressures, including the drive for market share and need to accommodate investment bankers bringing in business, affected the credit ratings issued by Moody's and S&P.
- 3. Failure to Re-evaluate.** By 2006, Moody's and S&P knew their ratings of RMBS and CDOs were inaccurate, revised their rating models to produce more accurate ratings, but then failed to use the revised model to re-evaluate existing RMBS and

⁹⁵⁵ 9/2007 anonymous Moody's Managing Director after a Moody's Town Hall meeting on the financial crisis, at 763, Hearing Exhibit 4/23-98.

⁹⁵⁶ “Wall Street and the Financial Crisis: The Role of Credit Rating Agencies,” before the U.S. Senate Permanent Subcommittee on Investigations, S.Hrg. 11-673 (4/23/2010) (hereinafter “April 23, 2010 Subcommittee Hearing”).

CDO securities, delaying thousands of rating downgrades and allowing those securities to carry inflated ratings that could mislead investors.

4. **Failure to Factor in Fraud, Laxity, or Housing Bubble.** From 2004 to 2007, Moody's and S&P knew of increased credit risks due to mortgage fraud, lax underwriting standards, and unsustainable housing price appreciation, but failed adequately to incorporate those factors into their credit rating models.
5. **Inadequate Resources.** Despite record profits from 2004 to 2007, Moody's and S&P failed to assign sufficient resources to adequately rate new products and test the accuracy of existing ratings.
6. **Mass Downgrades Shocked Market.** Mass downgrades by Moody's and S&P, including downgrades of hundreds of subprime RMBS over a few days in July 2007, downgrades by Moody's of CDOs in October 2007, and actions taken (including downgrading and placing securities on credit watch with negative implications) by S&P on over 6,300 RMBS and 1,900 CDOs on one day in January 2008, shocked the financial markets, helped cause the collapse of the subprime secondary market, triggered sales of assets that had lost investment grade status, and damaged holdings of financial firms worldwide, contributing to the financial crisis.
7. **Failed Ratings.** Moody's and S&P each rated more than 10,000 RMBS securities from 2006 to 2007, downgraded a substantial number within a year, and, by 2010, had downgraded many AAA ratings to junk status.
8. **Statutory Bar.** The SEC is barred by statute from conducting needed oversight into the substance, procedures, and methodologies of the credit rating models.
9. **Legal Pressure for AAA Ratings.** Legal requirements that some regulated entities, such as banks, broker-dealers, insurance companies, pension funds, and others, hold assets with AAA or investment grade credit ratings, created pressure on credit rating agencies to issue inflated ratings making assets eligible for purchase by those entities.

B. Background

(1) Credit Ratings Generally

Credit ratings, which first gained prominence in the late 1800s, are supposed to provide independent assessments of the creditworthiness of particular financial instruments, such as a corporate bond, mortgage backed security, or CDO. Essentially, credit ratings predict the likelihood that a debt will be repaid.⁹⁵⁷

⁹⁵⁷ 9/3/2009 "Credit Rating Agencies and Their Regulation," report prepared by the Congressional Research Service, Report No. R40613 (revised report issued 4/9/2010).

The United States has three major credit rating agencies: Moody's, S&P, and Fitch Rating Ltd., each of which is a NRSRO. By some accounts, these three firms issue about 98% of total credit ratings and collect 90% of total credit rating revenue.⁹⁵⁸

Paying for Ratings. Prior to the 1929 crash, credit rating agencies made money by charging subscription fees to investors who were considering investing in the financial instruments being rated. This method of payment was known as the “subscriber-pays” model. Following the 1929 crash, the credit rating agencies fell out of favor. As one academic expert has explained:

“Investors were no longer very interested in purchasing ratings, particularly given the agencies’ poor track record in anticipating the sharp drop in bond values beginning in late 1929. ... The rating business remained stagnant for decades.”⁹⁵⁹

In 1970, the credit rating agencies changed to an “issuer-pays” model and have used it since.⁹⁶⁰ In this model, the party seeking to issue a financial instrument, such as a bond or security, pays the credit rating agency to analyze the credit risk and assign a credit rating to the financial instrument.

Credit Ratings. Credit ratings use a scale of letter grades, from AAA to C, with AAA ratings designating the safest investments and the other grades designating investments at greater risk of default.⁹⁶¹ Investments with AAA ratings have historically had low default rates. For example, S&P reported that its cumulative RMBS default rate by original rating class (through September 15, 2007) was 0.04% for AAA initial ratings and 1.09% for BBB.⁹⁶² Financial instruments bearing AAA through BBB- ratings are generally called “investment grade,” while those with ratings below BBB- (or Baa3) are referred to as “below investment grade” or sometimes as “junk” investments. Financial instruments that default receive a D rating from S&P, but no rating at all by Moody's.

⁹⁵⁸ Id.

⁹⁵⁹ “How and Why Credit Rating Agencies Are Not Like Other Gatekeepers,” Frank Partnoy, University of San Diego Law School Legal Studies Research Paper Series (5/2006), at 63.

⁹⁶⁰ 9/3/2009 “Credit Rating Agencies and Their Regulation,” report prepared by the Congressional Research Service, Report No. R40613 (revised report issued 4/9/2010). A few small credit rating agencies use the “subscriber-pays” model. However, 99% of outstanding credit ratings are issued by agencies using the “issuer-pays” model. 1/2011 “Annual Report on Nationally Recognized Statistical Rating Organizations,” report prepared by the SEC, at 6.

⁹⁶¹ The Moody's rating system is similar in concept but with a slightly different naming convention. For example its top rating scale is Aaa, Aa1, Aa2, Aa3, A1, A2, A3.

⁹⁶² Prepared statement of Vickie A. Tillman, Executive Vice President, Standard & Poor's Credit Market Services, “The Role of Credit Rating Agencies in the Structured Finance Market,” before U.S. House of Representatives Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, Cong.Hrg. 110-62 (9/27/2007), S&P SEN-PSI 0001945-71, at 51. See also 1/2007 S&P document, “Annual 2006 Global Corporate Default Study and Ratings Transitions.”

Investors often rely on credit ratings to gauge the safety of a particular investment. A former senior credit analyst at Moody's explained that investors use ratings to:

“satisfy any number of possible needs: institutional investors such as insurance companies and pension funds may have portfolio guidelines or requirements, investment fund portfolio managers may have risk-based capital requirements or investment committee requirements. And of course, private investors lacking the resources to do separate analysis may use the published ratings as their principal determinant of the risk of the investment.”⁹⁶³

Legal Requirements. Some state and federal laws restrict the amount of below investment grade bonds that certain investors can hold, such as pension funds, insurance companies, and banks. Banks, for example, are limited by law in the amount of non-investment grade bonds they can hold, and are sometimes required to post additional capital for those higher risk instruments.⁹⁶⁴ Broker-dealers and money market funds that register with the SEC operate under similar restrictions.⁹⁶⁵ The rationale behind these legal requirements is to require or provide economic incentives for banks and other financial institutions to purchase investments that have been identified as liquid and “safe” by an independent third party with a high level of market expertise, such as a credit rating agency. Because so many federal and state statutes and regulations require the purchase of investment grade ratings, issuers of securities and other instruments work hard to obtain favorable credit ratings to ensure regulated financial institutions can buy their products. As a result, those legal requirements not only increased the demand for investment grade ratings, but also created pressure on credit rating agencies to issue top ratings in order to make the rated products eligible for purchase by regulated financial institutions. The legal requirements also generated more work and greater profits for the credit rating agencies.

CRA Oversight and Accountability. The credit rating agencies are currently subject to regulation by the SEC. In September 2006, Congress enacted the Credit Rating Agency Reform Act, P.L. 109-291, to require SEC oversight of the credit rating industry. Among other provisions, the law charged the SEC with designating NRSROs and defined that term for the first time. By 2008, the SEC had granted NRSRO status to ten credit rating agencies (CRA).⁹⁶⁶ The

⁹⁶³ Prepared statement of Richard Michalek, Former VP/Senior Credit Officer, Moody's Investors Service, April 23, 2010 Subcommittee Hearing, at 2 (hereinafter “Michalek prepared statement”). See also 8/29/2006 email from Greg Lippmann, (Deutsche Bank), to Paolo Pellegrini (Paulson & Co.) and others, DBSI_PSI_EMAIL01625848 at 52 (“Since a CDO without a triple-A-rated senior tranche would be unmarketable, their imprimatur is indispensable.”); 11/13/2007 email from Ralph Silva (Goldman Sachs), GS MBS-E-010023525, Tri-Lateral Combined Comments Attachment, GS MBS-E-01035693-715, at 713 (“Investors in subprime related securities, especially higher rated bonds, have historically relied significantly on bond ratings particularly when securities are purchased by structured investing vehicles.”); M&T Bank Corporation v. Gemstone CDO VII, Ltd., Index No. 200800764 (N.Y. Sup.), Complaint, (June 16, 2008) at 12.

⁹⁶⁴ See, e.g., Section 28 (d) and (e) of the Federal Deposit Insurance Act, codified at 12 U.S.C. § 1831e(d)-(e).

⁹⁶⁵ See, e.g., Rule 15c3-1 of the Securities Exchange Act of 1934 (allowing broker-dealers to avoid “haircuts” for net capital requirements provided they hold instruments with investment grade credit ratings); and Rule 2a-7 of the Investment Company Act of 1940 (limiting money market funds to investments in “high quality” securities).

⁹⁶⁶ The ten NRSROs are Moody's; Standard & Poor's; Fitch; A.M. Best Company, Inc.; DBRS Ltd.; Egan-Jones Rating Company; Japan Credit Rating Agency, Ltd.; LACE Financial Corp.; Rating and Investment Information,

Act also directed the SEC to conduct examinations of the CRAs, while at the same time prohibiting the SEC from regulating the substance, criteria, or methodologies used in credit rating models.⁹⁶⁷

Prior to the 2006 Reform Act, CRAs had been subject to uneven or limited regulatory oversight by state and federal agencies. The SEC had developed the NRSRO system, for example, but had no clear statutory basis for establishing that system or exercising regulatory authority over the credit rating agencies. Because the requirements for the NRSRO designation were not defined in law, the SEC had designated only three rating agencies, limiting competition. No government agency conducted routine examinations of the credit rating agencies or the procedures they used to rate financial products.

In addition, private investors have generally been unable to hold CRAs accountable for poor quality ratings or other malfeasance through civil lawsuits.⁹⁶⁸ The CRAs have successfully won dismissal of investor lawsuits, claiming that they are in the financial publishing business and their opinions are protected under the First Amendment.⁹⁶⁹ In addition, the CRAs have attempted to avoid any legal liability for their ratings by making disclaimers to investors who potentially may rely on their opinions. For example, S&P's disclaimer reads as follows:

“Standard & Poor’s Ratings

Analytic services provided by Standard & Poor’s Ratings Services (“Ratings Services”) are the result of separate activities designed to preserve the independence and objectivity of ratings opinions. The credit ratings and observations contained herein are solely statements of opinion and not statements of fact or recommendations to purchase, hold, or sell any securities or make any other investment decisions. Accordingly, any user of the information contained herein should not rely on any credit rating or other opinion contained herein in making any investment decision. Ratings are based on information received by Ratings Services. ...”⁹⁷⁰

RMBS and CDO Ratings. Over the last ten years, Wall Street firms have devised ever more complex financial instruments for sale to investors, including the RMBS and CDO securities that played a key role in the financial crisis. Because of the complexity of the instruments, investors often relied heavily on credit ratings to determine whether they could or should buy the products. For a fee, Wall Street firms helped design the RMBS and CDO securities, worked with the credit rating agencies to obtain ratings, and sold the securities to investors like pension funds, insurance companies, university endowments, municipalities, and

Inc.; and Realpoint LLC. 9/25/2008 “Credit Rating Agencies – NRSROs,” SEC, available at <http://www.sec.gov/answers/nrsro.htm>.

⁹⁶⁷ See Sections 15E(c)(2) and 17(a)(1) of the Securities Exchange Act of 1934, as amended by the Credit Rating Agency Reform Act of 2006, codified at 15 U.S.C § 78o-7(c)(2) and § 78q(a)(1).

⁹⁶⁸ “How and Why Credit Rating Agencies Are Not Like Other Gatekeepers,” Frank Partnoy, University of San Diego Law School Legal Studies Research Paper Series (5/2006), at 61.

⁹⁶⁹ Id.

⁹⁷⁰ Standard & Poor’s ClassicDirect website, <https://www.eclassicdirect.com/NASApp/cotw/CotwLogin.jsp>.

hedge funds.⁹⁷¹ Without investment grade ratings, Wall Street firms would have had a much more difficult time selling these products to investors, because each investor would have had to perform its own due diligence review of the financial instrument. Credit ratings simplified the review and enhanced the sales. Here's how one federal bank regulatory handbook put it:

“The rating agencies perform a critical role in structured finance – evaluating the credit quality of the transactions. Such agencies are considered credible because they possess the expertise to evaluate various underlying asset types, and because they do not have a financial interest in a security's cost or yield. Ratings are important because investors generally accept ratings by the major public rating agencies in lieu of conducting a due diligence investigation of the underlying assets and the servicer.”⁹⁷²

In addition to making structured finance products easier to sell to investors, Wall Street firms used financial engineering to create high risk assets that were given AAA ratings – ratings which are normally reserved for ultra-safe investments with low rates of return. Firms combined high risk assets, such as the BBB tranches from subprime mortgage backed securities paying a relatively high rate of return, in a new financial instrument, such as a CDO, that issued securities with AAA ratings and were purportedly safe investments. Higher rates of return, combined with AAA ratings, made subprime RMBS and related CDO securities especially attractive investments.

(2) The Rating Process

Prior to the massive ratings downgrade in mid-2007, the RMBS and CDO rating process followed a generally well-defined pattern. It began with the firm designing the securitization – the arranger – sending a detailed proposal to the credit rating agency. The proposal contained information on the mortgage pools involved and how the security would be structured. The rating agency examined the proposal and provided comments and suggestions, before ultimately agreeing to run the securitization through one of its models. The results from the model were used by a rating committee within the agency to determine a final rating, which was then published.

Arrangers. For RMBS, the “arranger” – typically an investment bank – initiated the rating process by sending to the credit rating agency information about a prospective RMBS and data about the mortgage loans included in the prospective pool. The data typically identified the characteristics of each mortgage in the pool including: the principal amount, geographic location of the property, FICO score, loan to value ratio of the property, and type of loan. In the case of a CDO, the process also included a review of the underlying assets, but was based primarily on the ratings those assets had already received.

⁹⁷¹ See 9/2009 “The Financial Crisis of 2007-2009: Causes and Circumstances,” report prepared by the Task Force on the Cause of the Financial Crisis, Banking Law Committee, Section of Business Law, American Bar Association (This report was prepared by a subgroup of the Banking Law Committee and did not represent the official position of the Committee or the Association).

⁹⁷² 11/1997 Comptroller of the Currency Administrator of National Banks Comptroller's Handbook, “Asset Securitization,” at 11.

In addition to data on the assets, the arranger provided a proposed capital structure for the financial instrument, identifying, for example, how many tranches would be created, how the revenues being paid into the RMBS or CDO would be divided up among those tranches, and how many of the tranches were designed to receive investment grade ratings. The arranger also identified one or more “credit enhancements” for the pool to create a financial cushion that would protect the designated investment grade tranches from expected losses.⁹⁷³

Credit Enhancements. Arrangers used a variety of credit enhancements. The most common was “subordination” in which the arranger “creates a hierarchy of loss absorption among the tranche securities.”⁹⁷⁴ To create that hierarchy, the arranger placed the pool’s tranches in an order, with the lowest tranche required to absorb any losses first, before the next highest tranche. Losses might occur, for example, if borrowers defaulted on their mortgages and stopped making mortgage payments into the pool. Lower level tranches most at risk of having to absorb losses typically received noninvestment grade ratings from the credit rating agencies, while the higher level tranches that were protected from loss typically received investment grade ratings. One key task for both the arrangers and the credit rating agencies was to calculate the amount of “subordination” required to ensure that the higher tranches in a pool were protected from loss and could be given AAA or other investment grade ratings.

A second common form of credit enhancement was “over-collateralization.” In this credit enhancement, the arranger ensured that the revenues expected to be produced by the assets in a pool exceeded the revenues designated to be paid out to each of the tranches. That excess amount provided a financial cushion for the pool and was used to create an “equity” tranche, which was the first tranche in the pool to absorb losses if the expected payments into the pool were reduced. This equity tranche was subordinate to all the other tranches in the pool and did not receive any credit rating. The larger the excess, the larger the equity tranche, and the larger the cushion created to absorb losses and protect the more senior tranches in the pool. In some pools, the equity tranche was also designed to pay a relatively higher rate of return to the party or parties who held that tranche due to its higher risk.

Still another common form of credit enhancement was the creation of “excess spread,” which involved designating an amount of revenue to pay the pool’s monthly expenses and other liabilities, but ensuring that the amount was slightly more than what was likely needed for that purpose. Any funds not actually spent on expenses would provide an additional financial cushion to absorb losses, if necessary.

Credit Rating Models. After the arranger submitted the pool information, proposed capital structure, and proposed credit enhancements to the CRA, a CRA analyst was assigned to evaluate the proposed financial instrument. The first step that most CRA analysts took was to use a credit rating model to evaluate the rate of probable defaults or expected losses from the

⁹⁷³ See, e.g., 7/2008 “Summary Report of Issues Identified in the Commission Staff’s Examination of Select Credit Rating Agencies,” report prepared by the SEC, at 6-10.

⁹⁷⁴ Id. at 6.

asset pool. Credit rating models are mathematical constructs that analyze a large number of data points related to the likelihood of an asset defaulting. RMBS rating models typically use statistical analyses of past mortgage performance data to calculate expected RMBS default rates and losses. In contrast, rather than statistics, CDO models use assumptions to build simulations that can be used to project likely CDO defaults and losses.

The major RMBS credit rating model at Moody's was called the Mortgage Metrics Model (M3), while the S&P model was called the Loan Evaluation and Estimate of Loss System (LEVELS). Both models used large amounts of statistical data related to the performance of residential mortgages over time to develop criteria to analyze and rate submitted mortgage pools. CRA analysts relied on these quantitative models to predict expected loss (Moody's) or the probability of default (S&P) for a pool of residential loans.

To derive the default or loss rate for an RMBS pool of residential mortgages, the CRA analyst typically fed a "loan tape" – most commonly a spreadsheet provided by the arranger with details on each loan – into the credit rating model. The rating model then automatically assessed the expected credit performance of each loan in the pool and aggregated that information. To perform this function, the model selected certain data points from the loan tape, such as borrower credit scores or loan-to-value ratios, and compared that information to past mortgage data using various assumptions, to determine the likely "frequency of foreclosure" and "loss severity" for the particular types of mortgages under consideration. It then projected the level of "credit enhancement," or cushion needed to protect investment grade tranches from loss.

For riskier loans, the model required a larger cushion to protect investment grade tranches from losses. For example, the model might project that 30% of the pool's incoming revenue would need to be set aside to ensure that the remaining 70% of incoming revenues would be protected from any losses. Tranches representing the 70% of the incoming revenues could then receive AAA ratings, while the remaining 30% of incoming revenues could be assigned to support the payment of expenses, an equity tranche, or one or more of the subordinated tranches.

In addition to using quantitative models, Moody's analysts also took into account qualitative factors in their analysis of expected default and loss rates. For example, Moody's analysts considered the quality of the originators and servicers of the loans included in a pool. Originators known for issuing poor quality loans or servicers known for providing poor quality servicing could decrease the loss levels calculated for a pool by a significant degree, up to a total of 20%.⁹⁷⁵ Moody's only began incorporating that type of analysis into its M3 ratings process in December 2006, only six months before the mass downgrades began.⁹⁷⁶ In contrast, S&P

⁹⁷⁵ See 2008 SEC Examination Report for Moody's Investor Services Inc., PSI-SEC (Moody's Exam Report)-14-0001-16, at 2-3, footnote 5.

⁹⁷⁶ Id. See also 7/2008 "Summary Report of Issues Identified in the Commission Staff's Examination of Select Credit Rating Agencies," report prepared by the Securities and Exchange Commission, at 35, n.70.

analysts did not conduct this type of analysis of mortgage originators and servicers during the time period examined in this Report.⁹⁷⁷

Credit Analysis. After obtaining the model's projections for the cushion or subordination needed to protect the pool's investment grade tranches from loss, the CRA analyst compared that projection to the tranches and credit enhancements actually proposed for the particular pool to evaluate their sufficiency.

In addition to evaluating an RMBS pool's expected default and loss rates, credit enhancements, and capital structure, CRA analysts conducted a cash flow analysis of the interest and principal payments to be made into the proposed pool to determine that the revenue generated would be sufficient to pay the rates of return projected for each proposed tranche. CRA analysts also reviewed the proposed legal structure of the financial instrument to understand how it worked and how revenues and losses would be allocated. Some RMBS and CDO transactions included complex "waterfalls" that allocated projected revenues and expected losses among an array of expenses, tranches, and parties. The CRA analyst was expected to evaluate whether the projected revenues were sufficient for the designated purposes. The CRA review also included a legal analysis "ensuring that there was no structural risk presented due to a failure to fulfill minimally necessary legal requirements ... and confirming that the deal documentation accurately and faithfully described the structure modeled by the Quant [quantitative analyst]."⁹⁷⁸

The process for assigning credit ratings to cash CDOs followed a similar path. CRA analysts used CDO rating models to predict the CDO's expected defaults and losses. However, unlike RMBS statistical models that used past performance data to predict RMBS default and loss rates, the CDO models relied primarily on the underlying ratings of the assets as well as on a set of assumptions, such as asset correlation, and ran multiple simulations to predict how the CDO pool would perform. The CDO simulation model at Moody's was called "CDOROM," while the S&P CDO model was called the "CDO Evaluator," which was repeatedly updated, eventually to "Evaluator 3" or "E3." Both companies' CDO models analyzed the likely rates of loss for assets within a particular CDO, but neither model re-analyzed any underlying RMBS securities included within a CDO. Instead, both models simply relied on the credit rating already assigned to those securities.⁹⁷⁹

⁹⁷⁷ In November 2008, after the time period examined in this Report, S&P published enhanced criteria requiring the quality of mortgage originators and their underwriting processes to be factored into its RMBS rating analyses. 6/24/2010 supplemental letter from S&P to the Subcommittee, Hearing Exhibit 4/23-108, Exhibit W, 11/25/2008 "Standard & Poor's Enhanced Mortgage Originator and Underwriting Review Criteria for U.S. RMBS."

⁹⁷⁸ Michalek prepared statement, at 4.

⁹⁷⁹ Synthetic CDOs, on the other hand, involved a different type of credit analysis. Unlike RMBS and cash CDOs, synthetic CDOs do not contain any cash producing assets, but simply reference them. The revenues paid into synthetic CDOs do not come from mortgages or other assets, but from counterparties betting that the referenced assets will lose value or suffer a specified credit event.

After calculating the CDO's default and loss rates and the cushion or subordination needed to protect the pool's investment grade tranches from loss, the CRA analyst examined the CDO's capital structure, credit enhancements, cash flow, and legal structure, in the same manner as for an RMBS pool.

Evidence gathered by the Subcommittee indicates that it was common for a CRA analyst to speak with the arranger or issuer of an RMBS or CDO to gather additional information and discuss how a proposed financial instrument would work. Among other tasks, the analyst worked with the arranger or issuer to evaluate the cash flows, the number and size of the tranches, the size and nature of the credit enhancements, and the rating each tranche would receive. Documents obtained by the Subcommittee show that CRA analysts and investment bankers often negotiated over how specific deal attributes would affect the credit ratings of particular tranches.

Rating Recommendations. After completing analysis of a proposed financial instrument, the CRA analyst developed a rating recommendation for each proposed RMBS or CDO tranche that would be used to issue securities, and presented the recommended ratings internally to a rating committee composed of other analysts and managers within the credit rating agency. The rating committee reviewed and then voted on the analyst's recommendations. Once the committee approved the ratings, a rating committee memorandum was prepared memorializing the actions taken, and the ratings were provided to the arranger. If the arranger indicated that the issuer accepted the ratings, the credit rating agency made the ratings available publicly. If dissatisfied, the arranger could appeal a ratings decision.⁹⁸⁰ The entire rating process typically took several weeks, sometimes longer for novel or complex transactions.

RMBS and CDO Groups. Moody's and S&P had separate groups and analysts responsible for rating RMBS and CDOs. In 2007, Moody's RMBS ratings were issued by the RMBS Group, which had about 25 analysts, while it had about 50 derivatives analysts in its Derivatives Group, whose responsibilities included rating CDOs.⁹⁸¹ Each group responsible for rating these products was headed by a Team Managing Director who reported to a Group Managing Director. Both the RMBS Group and the Derivatives Group were housed in the Structured Finance Group. The setup was similar at S&P. At S&P, RMBS ratings were issued by the RMBS Group, which had about 90 analysts in 2007, while CDO ratings were issued by the Global CDO Group, with about 85 analysts.⁹⁸² Each group was headed by a Managing Director, and housed in the Structured Finance Ratings Group which was headed by a Senior Managing Director.

During the years reviewed by the Subcommittee, at Moody's, the CEO and Chairman of the Board was Raymond W. McDaniel, Jr.; the Senior Managing Director of the Structured

⁹⁸⁰ 7/2008 "Summary Report of Issues Identified in the Commission Staff's Examination of Select Credit Rating Agencies," report prepared by the Securities and Exchange Commission, at 9.

⁹⁸¹ 3/11/2008 compliance letter from Moody's to SEC, SEC_OCIE_CRA_011212; SEC_OCIE_CRA_011214; and SEC_OCIE_CRA_011217.

⁹⁸² 3/14/2008 compliance letter from S&P to SEC, SEC_OCIE_CRA_011218-59, at 32-34, and at 43-44.

Finance Group was Brian Clarkson; the head of the RMBS Group was Pramila Gupta; and the heads of the Derivatives CDO analysts were Gus Harris and Yuri Yoshizawa. At S&P, the President was Kathleen A. Corbet; the Senior Managing Director of the Structured Finance Ratings Group was Joanne Rose; the head of the RMBS Group was Frank Raiter and then Susan Barnes; and the head of the Global CDO Group was Richard Gugliada.

Surveillance. Following an initial credit rating, both Moody's and S&P conducted ongoing surveillance of all rated securities to evaluate a product's ongoing credit risk and to determine whether its credit rating should be affirmed, upgraded, or downgraded over the life of the security. Both used automated surveillance tools that, on a monthly basis, flagged securities whose performance indicated their rating might need to be adjusted to reflect the current risk of default or loss. Surveillance analysts investigated the flagged securities and presented recommendations for rating changes to a ratings committee. Within both the RMBS and Derivatives Groups, in 2007, Moody's had 15 RMBS surveillance analysts and 24 derivatives surveillance analysts, respectively.⁹⁸³ S&P maintained a Structured Finance Surveillance Group that included an RMBS Surveillance Group and a CDO Surveillance Group, with about 20 analysts in each group in 2007.⁹⁸⁴ Each of these groups was headed by a Managing Director who reported to the head of the Structured Finance Group. The Managing Director for Moody's surveillance analysts was Nicolas Weill. At S&P, the Managing Director of the Structured Finance Surveillance Group was Peter D'Erchia.

Meaning of Ratings. The purpose of a credit rating, whether stated at first issuance or after surveillance, is to forecast a security's probability of default (S&P) or expected loss (Moody's). If the security has an extremely low likelihood of default, credit rating agencies grant it AAA status. For securities with a higher probability of default, they provide lower credit ratings.

When asked about the meaning of an AAA rating, Moody's CEO Raymond McDaniel explained that it represented the safest type of investment and had the same significance across various types of financial products.⁹⁸⁵ While all credit rating agencies leave room for error by designing procedures to downgrade or upgrade ratings over time, Moody's and S&P told the Subcommittee that their ratings are designed to take into account future performance. Prior to the financial crisis, the numbers of downgrades and upgrades for structured finance ratings were substantially lower.⁹⁸⁶

⁹⁸³ 3/11/2008 compliance letter from Moody's to SEC, SEC_OCIE_CRA_011212; SEC_OCIE_CRA_011214; and SEC_OCIE_CRA_011217.

⁹⁸⁴ 3/14/2008 compliance letter from S&P to SEC, SEC_OCIE_CRA_011218-59, at 48-49, and at 56-57.

⁹⁸⁵ Subcommittee interview of Raymond McDaniel (4/6/2010).

⁹⁸⁶ See, e.g., 3/26/2010 "Fitch Ratings Global Structured Finance 2009 Transition and Default Study," prepared by Fitch.

(3) Record Revenues

From 2004 to 2007, Moody's and S&P produced a record number of ratings and a record amount of revenues in structured finance, primarily because of RMBS and CDO ratings. A 2008 S&P submission to the SEC indicates, for example, that from 2004 to 2007, S&P issued more than 5,500 RMBS ratings and more than 835 mortgage related CDO ratings.⁹⁸⁷ The number of ratings it issued increased each year, going from approximately 700 RMBS ratings in 2002, to more than 1,600 in 2006. Its mortgage related CDO ratings increased tenfold, going from 34 in 2002, to over 340 in 2006.⁹⁸⁸ Moody's experienced similar growth. According to a 2008 Moody's submission to the SEC, from 2004 to 2007, it issued over 4,000 RMBS ratings and over 870 CDO ratings.⁹⁸⁹ Moody's also increased the ratings it issued each year, going from approximately 540 RMBS and 45 CDO ratings in 2002, to more than 1,200 RMBS and 360 CDO ratings in 2006.⁹⁹⁰

Both companies charged substantial fees to rate a product. To obtain an RMBS or CDO rating during the height of the market, for example, S&P charged issuers generally from \$40,000 to \$135,000 to rate tranches of an RMBS and from \$30,000 to \$750,000 to rate the tranches of a CDO.⁹⁹¹ Surveillance fees, which may be imposed at the initial rating or annually, ranged generally from \$5,000 to \$50,000 for these mortgage backed securities.⁹⁹²

Revenues increased dramatically over time as well. Moody's gross revenues from RMBS and CDO ratings more than tripled in five years, from over \$61 million in 2002, to over \$260 million in 2006.⁹⁹³ S&P's revenue increased even more. In 2002, S&P's gross revenue for RMBS and mortgage related CDO ratings was over \$64 million and increased to over \$265 million in 2006.⁹⁹⁴ In that same period, revenues from S&P's structured finance group tripled from about \$184 million in 2002 to over \$561 million in 2007.⁹⁹⁵ In 2002, structured finance ratings contributed 36% to S&P's bottom line; in 2007, it made up 49% of all S&P revenues

⁹⁸⁷ 3/14/2008 compliance letter from S&P to SEC, SEC_OCIE_CRA_011218-59, at 20. These numbers represent the RMBS or CDO pools that were presented to S&P which then issued ratings for multiple tranches per RMBS or CDO pool.

⁹⁸⁸ Id.

⁹⁸⁹ 3/11/2008 compliance letter from Moody's to SEC, SEC_OCIE_CRA_011212 and SEC_OCIE_CRA_011214. These numbers represent the RMBS or CDO pools that were presented to Moody's which then issued ratings for multiple tranches per RMBS or CDO pool. The data Moody's provided to the SEC on CDOs represented ABS CDOs, some of which may not be mortgage related. However, by 2004, most, but not all, CDOs relied primarily on mortgage related assets such as RMBS securities. Subcommittee interview of Gary Witt, former Managing Director of Moody's RMBS Group (10/29/2009).

⁹⁹⁰ Id.

⁹⁹¹ See, e.g., "U.S. Structured Ratings Fee Schedule Residential Mortgage-Backed Financings and Residential Servicer Evaluations," prepared by S&P, S&P-PSI 0000028-35; and "U.S. Structured Ratings Fee Schedule Collateralized Debt Obligations Amended 3/7/2007," prepared by S&P, S&P-PSI 0000036-50.

⁹⁹² Id.

⁹⁹³ 3/11/2008 compliance letter from Moody's to SEC, SEC_OCIE_CRA_011212 and SEC_OCIE_CRA_011214. The 2002 figure does not include gross revenue from CDO ratings as this figure was not readily available due to the transition of Moody's accounting systems.

⁹⁹⁴ 3/14/2008 compliance letter from S&P to SEC, SEC_OCIE_CRA_011218-59, at 18-19.

⁹⁹⁵ Id. at 19.

from ratings.⁹⁹⁶ In addition, from 2000 to 2007, operating margins at the CRAs averaged 53%.⁹⁹⁷ Altogether, revenues from the three leading credit rating agencies more than doubled from nearly \$3 billion in 2002 to over \$6 billion in 2007.⁹⁹⁸

Both companies also saw their share prices shoot up. The chart below reflects the significant price increase that Moody's shares experienced as a result of increased revenues during the years of explosive growth in the ratings of both RMBS and CDOs.⁹⁹⁹ Moody's percentage gain in share price far outpaced the major investment banks on Wall Street from 2002 to 2006.

⁹⁹⁶ Id. at 19.

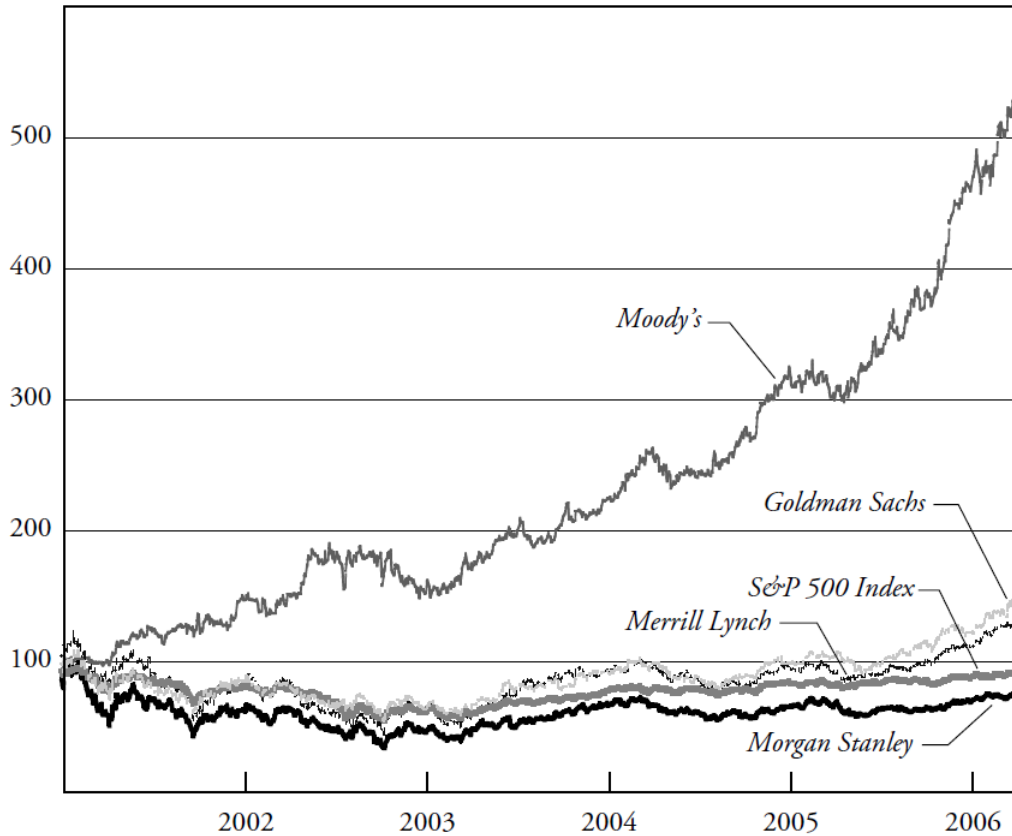
⁹⁹⁷ "Debt Watchdogs: Tamed or Caught Napping?" New York Times (12/7/2008). The operating margin is a ratio used to measure a company's operating efficiency and is calculated by dividing operating income by net sales.

⁹⁹⁸ "Revenue of the Three Credit Rating Agencies: 2002-2007," chart prepared by Subcommittee using data from thismatter.com/money, Hearing Exhibit 4/23-1g.

⁹⁹⁹ "How and Why Credit Rating Agencies Are Not Like Other Gatekeepers," Frank Partnoy, University of San Diego Law School Legal Studies Research Paper Series (5/2006), at 67.

Figure 3-1. *Change in Moody's Share Price versus S&P 500 versus Major Investment Banks*

Percent change^a



Source: <http://finance.yahoo.com>

Standard & Poor's is a division of The McGraw-Hill Companies (NYSE: MHP), whose share price also increased significantly during this time period.¹⁰⁰⁰

Top CRA executives received millions of dollars each year in compensation. Moody's CEO, Raymond McDaniel, for example, earned more than \$8 million in total compensation in 2006.¹⁰⁰¹ Brian Clarkson, the head of Moody's structured finance group, received \$3.8 million in total compensation in the same year.¹⁰⁰² Upper and middle managers also did well. Moody's managing directors made between \$385,000 to about \$460,000 in compensation in 2007, before

¹⁰⁰⁰ See "The McGraw-Hill Companies, Inc.," Google Finance, <http://www.google.com/finance?q=mcgraw+hill>.

¹⁰⁰¹ 3/19/2008 Moody's 2008 Proxy Statement, "Summary Compensation Table."

¹⁰⁰² Id.

stock options. Including stock options, their total compensation ranged from almost \$700,000 to over \$930,000.¹⁰⁰³ S&P managers received similar compensation.¹⁰⁰⁴

C. Mass Credit Rating Downgrades

In the years leading up to the financial crisis, Moody's and S&P together issued investment grade ratings for tens of thousands of RMBS and CDO securities, earning substantial sums for issuing these ratings. In mid-2007, however, both credit rating agencies suddenly reversed course and began downgrading hundreds, then thousands of RMBS and CDO ratings. These mass downgrades shocked the financial markets, contributed to the collapse of the subprime RMBS and CDO secondary markets, triggered sales of assets that had lost investment grade status, and damaged holdings of financial firms worldwide. Perhaps more than any other single event, the sudden mass downgrades of RMBS and CDO ratings were the immediate trigger for the financial crisis.

To understand why the credit rating agencies suddenly reversed course and how their RMBS and CDO ratings downgrades impacted the financial markets, it is useful to review trends in the housing and mortgage backed security markets in the years leading up to the crisis.

(1) Increasing High Risk Loans and Unaffordable Housing

The years prior to the financial crisis saw increasing numbers of borrowers buying not only more homes than usual, but higher priced homes, requiring larger and more frequent loans that were constantly refinanced. By 2005, about 69% of Americans had purchased homes, the largest percentage in American history.¹⁰⁰⁵ In the five-year period running up to 2006, the median home price, adjusted for inflation, increased 50 percent.¹⁰⁰⁶ The pace of home price appreciation was on an unsustainable trajectory, as is illustrated by the chart below.¹⁰⁰⁷

¹⁰⁰³ 4/27/2007 email from Yuri Yoshizawa to Noel Kirnon, PSI-MOODYS-RFN-000044 (Attachment, PSI-MOODYS-RFN-000045).

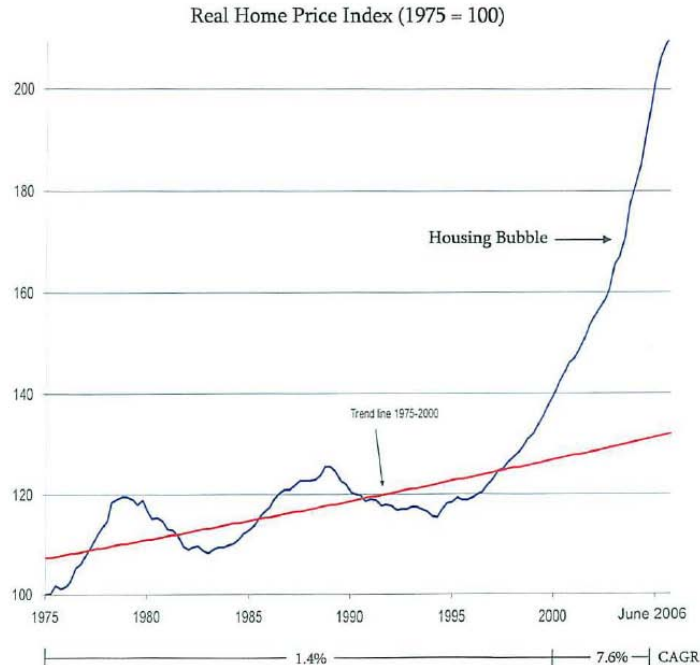
¹⁰⁰⁴ See S&P's "Global Compensation Guidelines 2007/2008," S&P-SEC 067708, 067733, 067740, and 067747.

¹⁰⁰⁵ See 3/1/2006 "Housing Vacancies and Homeownership Annual Statistics: 2005," U.S. Census Bureau.

¹⁰⁰⁶ "Housing Bubble Trouble," *The Weekly Standard* (4/10/2006).

¹⁰⁰⁷ 1/25/2010, "Estimation of Housing Bubble: Comparison of Recent Appreciation vs. Historical Trends," chart prepared by Paulson & Co. Inc., Hearing Exhibit 4/23-1j.

ESTIMATION OF HOUSING BUBBLE: Comparison of Recent Appreciation vs. Historical Trends



Source: Office of Federal Housing Enterprise Oversight, Bureau of Economic Analysis

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Subprime lending fueled the overall growth in housing demand and housing price increases that began in the late 1990s and ran through mid-2006.¹⁰⁰⁸ “Between 2000 and 2007, backers of subprime mortgage-backed securities – primarily Wall Street and European investment banks – underwrote \$2.1 trillion worth of [subprime mortgage backed securities] business, according to data from trade publication *Inside Mortgage Finance*.”¹⁰⁰⁹ By 2006, subprime lending made up 13.5% of mortgage lending in the United States, a fivefold increase from 2001.¹⁰¹⁰ The graph below reflects the unprecedented growth in subprime mortgages between 2003 and 2006.¹⁰¹¹

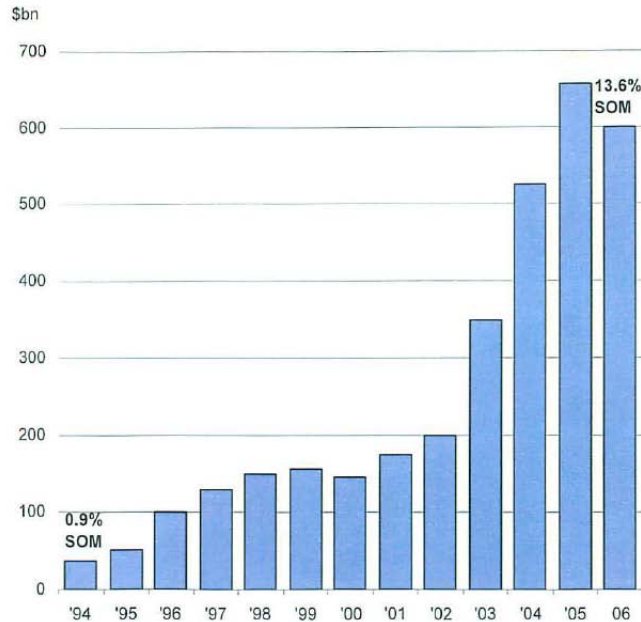
¹⁰⁰⁸ See 3/2009 U.S. Department of Housing and Urban Development Interim Report to Congress, “Root Causes of the Foreclosure Crisis,” at 36. See also “A Brief History of Credit Rating Agencies: How Financial Regulation Entrenched this Industry’s Role in the Subprime Mortgage Debacle of 2007 – 2008,” Mercatus on Policy (10/2009), at 2.

¹⁰⁰⁹ “The Roots of the Financial Crisis: Who is to Blame?” The Center for Public Integrity (5/6/2009), http://www.publicintegrity.org/investigations/economic_meltdown/articles/entry/1286.

¹⁰¹⁰ 3/2009 U.S. Department of Housing and Urban Development Interim Report to Congress, “Root Causes of the Foreclosure Crisis,” at 7.

¹⁰¹¹ 1/25/2010, “Mortgage Subprime Origination,” chart prepared by Paulson & Co. Inc., PSI-Paulson&Co-02-0001-21, at 4.

MORTGAGE SUBPRIME ORIGINATION



Source: Lehman Brothers

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To enable subprime borrowers to buy homes that they would not traditionally qualify for, lenders began using exotic mortgage products that reduced or eliminated the need for large down payments and allowed monthly mortgage payments that reflected less than the fully amortized cost of the loan. For example, some types of mortgages allowed borrowers to obtain loans for 100% of the cost of a house; make monthly payments that covered only the interest owed on the loan; or pay artificially low initial interest rates on loans that could be refinanced before higher interest rates took effect. In 2006, Barron's reported that first-time home buyers put no money down 43% of the time in 2005; interest only loans made up approximately 33% of new mortgages and home equity loans in 2005, up from 0.6% in 2000; by 2005, 15% of borrowers owed at least 10% more than their home was worth; and more than \$2.5 trillion in adjustable rate mortgages were due to reset to higher interest rates in 2006 and 2007.¹⁰¹²

These new mortgage products were not confined to subprime borrowers; they were also offered to prime borrowers who used them to purchase expensive homes. Many borrowers also used them to refinance their homes and take out cash against their homes' increased value. Lenders also increased their issuance of home equity loans and lines of credit that offered low

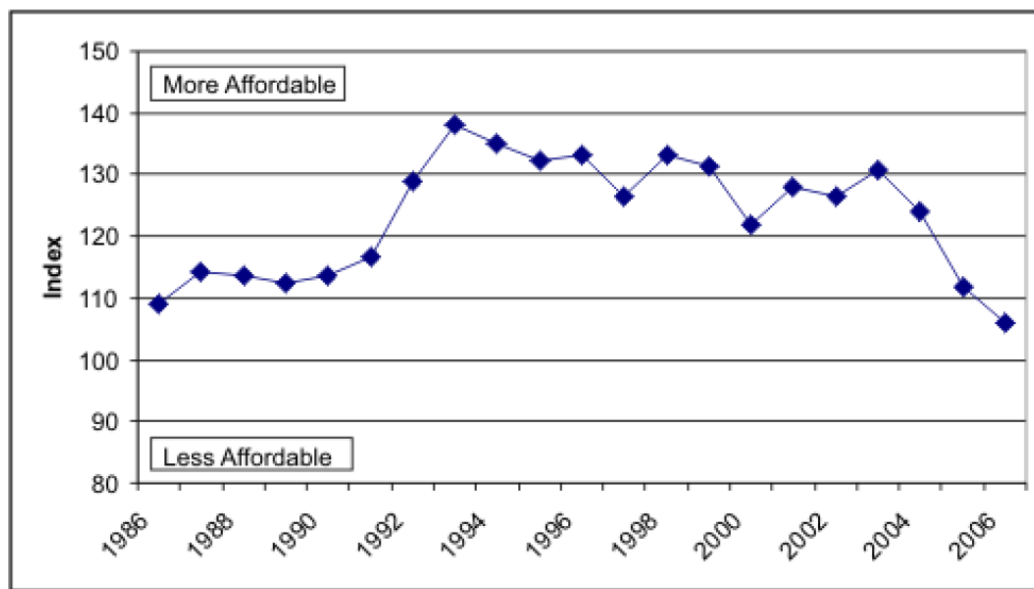
¹⁰¹² "The No-Money-Down Disaster," Barron's (8/21/2006).

initial interest rates or interest-only features, often taking a second lien on an already mortgaged home.¹⁰¹³

Subprime loans, Alt A mortgages that required little or no documentation, and home equity loans all posed a greater risk of default than traditional 30-year, fixed rate mortgages. By 2006, the combined market share of these higher risk home loans totaled nearly 50% of all mortgage originations.¹⁰¹⁴

At the same time housing prices and high risk loans were increasing, the National Association of Realtors' housing affordability index showed that, by 2006, housing had become less affordable than at any point in the previous 20 years, as presented in the graph below.¹⁰¹⁵ The "affordability index" measures how easy it is for a typical family to afford a typical mortgage. Higher numbers mean that homes are more affordable, while lower numbers mean that homes are generally less affordable.

Figure 2. Housing Affordability Index, 1986-2006



Source: National Association of Realtors.

Notes: Affordability index is based on median house prices, median family income, and mortgage rates, using a composite of fixed and adjustable mortgage rates. The index defines higher values as more affordable.

By the end of 2006, the concentration of higher risk loans for less affordable homes had set the stage for an unprecedented number of credit rating downgrades on mortgage related securities.

¹⁰¹³ 3/2009 U.S. Department of Housing and Urban Development Interim Report to Congress, "Root Causes of the Foreclosure Crisis," at 8.

¹⁰¹⁴ Id.

¹⁰¹⁵ 11/7/2007 "Would a Housing Crash Cause a Recession?" report prepared by the Congressional Research Service, at 3-4.

(2) Mass Downgrades

Although ratings downgrades for investment grade securities are supposed to be relatively infrequent, in 2007, they took place on a massive scale that was unprecedented in U.S. financial markets. Beginning in July 2007, Moody's and S&P downgraded hundreds and then thousands of RMBS and CDO ratings, causing the rated securities to lose value and become much more difficult to sell, and leading to the subsequent collapse of the RMBS and CDO secondary markets. The massive downgrades made it clear that the original ratings were not only deeply flawed, but the U.S. mortgage market was much riskier than previously portrayed.

Housing prices peaked in 2006. In late 2006, as the increase in housing prices slowed or leveled out, refinancing became more difficult, and delinquencies in subprime residential mortgages began to multiply. By January 2007, nearly 10% of all subprime loans were delinquent, a 68% increase from January 2006.¹⁰¹⁶ Housing prices then began to decline, exposing more borrowers who had purchased homes that they could not afford and could no longer refinance. Subprime lenders also began to close their doors, which the U.S. Department of Housing and Urban Development marked as the beginning of economic trouble:

“Arguably, the first tremors of the national mortgage crisis were felt in early December 2006 when two sizeable subprime lenders, Ownit Mortgage Solutions and Sebring Capital, failed. The Wall Street Journal described the closing of these firms as ‘sending shock waves’ through the mortgage-bond market. ...By late February 2007 when the number of subprime lenders shuttering their doors had reached 22, one of the first headlines announcing the onset of a ‘mortgage crisis’ appeared in the Daily Telegraph of London.”¹⁰¹⁷

During the first half of 2007, despite the news of failing subprime lenders and increasing subprime mortgage defaults, Moody's and S&P continued to issue AAA credit ratings for a large number of RMBS and CDO securities. In the first week of July 2007 alone, S&P issued over 1,500 new RMBS ratings, a number that almost equaled the average number of RMBS ratings it issued in each of the preceding three months.¹⁰¹⁸ From July 5 to July 11, 2007, Moody's issued approximately 675 new RMBS ratings, nearly double its weekly average in the prior month.¹⁰¹⁹ The timing of this surge of new ratings on the eve of the mass downgrades is troubling, and raises serious questions about whether S&P and Moody's quickly pushed these ratings through to avoid losing revenues before the mass downgrades began.

¹⁰¹⁶ 1/25/2010 “60 Day+Delinquency and Foreclosure,” chart prepared by Paulson & Co. Inc., PSI-Paulson&Co-02-0001-21, at 15. Subcommittee interview of Sihan Shu (2/24/2010).

¹⁰¹⁷ 3/2009 U.S. Department of Housing and Urban Development Interim Report to Congress, “Root Causes of the Foreclosure Crisis,” at 2 [citations omitted].

¹⁰¹⁸ 6/24/2010 supplemental response from S&P to the Subcommittee, at 12, Hearing Exhibit 4/23-108.

¹⁰¹⁹ Data compiled by the Subcommittee using 6/14/2007 “Structured Finance New Ratings: May 28, 2007 through June 13, 2007,” Moody's; 6/28/2007 “Structured Finance New Ratings: June 11, 2007 through June 27, 2007,” Moody's; 7/5/2007 “Structured Finance New Ratings: June 18, 2007 through July 4, 2007,” Moody's; and 7/12/2007 “Structured Finance New Ratings: June 25, 2007 through July 11, 2007,” Moody's.

In the second week of July 2007, S&P and Moody's initiated the first of several mass rating downgrades, shocking the financial markets. On July 10, S&P placed on credit watch, the ratings of 612 subprime RMBS with an original value of \$7.35 billion,¹⁰²⁰ and two days later downgraded 498 of these securities.¹⁰²¹ On July 10, Moody's downgraded 399 subprime RMBS with an original value of \$5.2 billion.¹⁰²² By the end of July, S&P had downgraded more than 1,000 RMBS and almost 100 CDO securities.¹⁰²³ This volume of rating downgrades was unprecedented in U.S. financial markets.

The downgrades created significant turmoil in the securitization markets, as investors were required to sell off RMBS and CDO securities that had lost their investment grade status, RMBS and CDO securities in the investment portfolios of financial firms lost much of their value, and new securitizations were unable to find investors. The subprime RMBS secondary market initially froze and then collapsed, leaving financial firms around the world holding suddenly unmarketable subprime RMBS securities that were plummeting in value.¹⁰²⁴

Neither Moody's nor S&P produced any meaningful contemporaneous documentation explaining their decisions to issue mass downgrades in July 2007, disclosing how the mass downgrades by the two companies happened to occur two days apart, or analyzing the possible impact of their actions on the financial markets. When Moody's CEO, Raymond McDaniel, was asked about the July downgrades, he indicated that he could not recall any aspect of the decision-making process.¹⁰²⁵ He told the Subcommittee that he was merely informed that the downgrades would occur, but was not personally involved in the decision.¹⁰²⁶

¹⁰²⁰ 6/24/2010 supplemental response from S&P to the Subcommittee, Exhibit H, Hearing Exhibit 4/23-108 (7/11/2007 "S&PCORRECT: 612 U.S. Subprime RMBS Classes Put On Watch Neg; Methodology Revisions Announced," S&P RatingsDirect (correcting the original version issued on 7/10/2007)).

¹⁰²¹ 6/24/2010 supplemental response from S&P to the Subcommittee, Exhibit I, Hearing Exhibit 4/23-108 (7/12/2007 "Various U.S. First-Lien Subprime RMBS Classes Downgraded," S&P's RatingsDirect).

¹⁰²² 7/30/2010 supplemental response from Moody's to the Subcommittee, Hearing Exhibit 4/23-106 (7/12/2007 Moody's Structured Finance Teleconference and Web Cast, "RMBS and CDO Rating Actions," at MOODYSPSI2010-0046899-900). The \$5.2 billion also included the original value of 32 tranches that were put on review for possible downgrade that same day.

¹⁰²³ 6/24/2010 supplemental response from S&P to the Subcommittee, at 3, 6, Hearing Exhibit 4/23-108. According to this letter, the July downgrades were not the first to take place during 2007. The letter reports that, altogether in the first six months of 2007, S&P downgraded 739 RMBS and 25 CDOs. These downgrades, however, took place on multiple days over a six-month period. Prior to July, Moody's had downgraded approximately 480 RMBS during the first six months of 2007 (this figure was calculated by the Subcommittee based on information from Moody's "Structured Finance: Changes & Confirmations" reports for that time period).

¹⁰²⁴ See 3/19/2007 "Subprime Mortgages: Primer on Current Lending and Foreclosure Issues," report prepared by the Congressional Research Service, Report No. RL33930; 5/2008 "The Subprime Lending Crisis: Causes and Effects of the Mortgage Meltdown," report prepared by CCH, at 13.

¹⁰²⁵ Subcommittee interview of Ray McDaniel (4/6/2010).

¹⁰²⁶ Id. At S&P, no emails were produced that explained the decision-making process, but a few indicated that, prior to the mass downgrades, the RMBS Group was required to make a presentation to the chief executive of its parent company about "how we rated the deals and are preparing to deal with the fallout (downgrades)." 3/18/2007 email from Michael Gutierrez to William LeRoy, Hearing Exhibit 4/23-52a; 3/2007 S&P internal email chain, "Pre-empting bad press on the subprime situation," Hearing Exhibit 4/23-52c.

Although neither Moody's nor S&P produced documentation on its internal decision-making process related to the mass downgrades, one bank, UBS, produced an email in connection with a court case indicating that Moody's was meeting with a series of investment banks to discuss the upcoming downgrades. In an email dated July 5, 2007, five days before the mass downgrades began, a UBS banker sent an email to a colleague about a meeting with Moody's:

"I just got off the phone with David Oman Apparently they're meeting w/ Moodys to discuss impacts of ABS subprime downgrades, etc. Has he been in contact with the [UBS] Desk? It sounds like Moodys is trying to figure out when to start downgrading, and how much damage they're going to cause – they're meeting with various investment banks."¹⁰²⁷

It is unclear how much notice Moody's or S&P provided to investment banks regarding their planned actions.

One senior executive at S&P, Ian Bell, the head of European structured finance ratings, provided his own views in a post-mortem analysis a few days after the initial downgrades. He expressed frustration and concern that S&P had mishandled its public explanation of the mass downgrades, writing:

"[O]ne aspect of our handling of the subprime that really concerns me is what I see as our arrogance in our messaging. Maybe it is because I am away from the center of the action and so have more of an 'outsider's' point of view. ...

I listened to the telecon TWICE. That guy [who asked a question about the timing of the mass downgrades] was not a 'jerk'. He asked an entirely legitimate question that we should have anticipated. He then got upset when we totally fluffed our answer. We did sound like the Nixon White House. Instead of dismissing people like him or assuming some dark motive on their part, we should ask ourselves how we could have so mishandled the answer to such an obvious question.

I have thought for awhile now that if this company suffers from an Arthur Andersen event, we will not be brought down by a lack of ethics as I have never seen an organisation more ethical, nor will it be by greed as this plays so little role in our motivations; it will be arrogance."¹⁰²⁸

In August 2007, Eric Kolchinsky, a managing director of Moody's CDO analysts, sent an urgent email to his superiors about the pressures to rate still more new CDOs in the midst of the mass downgrades:

¹⁰²⁷ 7/5/2007 email from David Goldsteen (UBS) to Dayna Corlito (UBS), "ABS Subprime & Moody's downgrades," UBS-CT 021485, Hearing Exhibit 4/23-94o.

¹⁰²⁸ 7/13/2007 internal S&P email from Ian Bell to Tom Gillis and Joanne Rose, Hearing Exhibit 4/23-54a.

“[E]ach of our current deals is in crisis mode. This is compounded by the fact that we have introduced new criteria for ABS CDOs. Our changes are a response to the fact that we are already putting deals closed in the spring on watch for downgrade. This is unacceptable and we cannot rate the new deals in the same way [sic] we have done before. ... [B]ankers are under enormous pressure to turn their warehouses into CDO notes.”¹⁰²⁹

Both Moody’s and S&P continued to rate new CDO securities despite their companies’ accelerating downgrades.

In October 2007, Moody’s began downgrading CDOs on a daily basis, using the month to downgrade more than 270 CDO securities with an original value of \$10 billion.¹⁰³⁰ In December 2007, Moody’s downgraded another \$14 billion in CDOs, and placed another \$105 billion on credit watch. Moody’s calculated that, overall in 2007, “8725 ratings from 2116 deals were downgraded and 1954 ratings from 732 deals were upgraded,” which means it issued four times as many downgrades as upgrades.¹⁰³¹ S&P calculated that, during the second half of 2007, it downgraded over 9,000 RMBS ratings.¹⁰³²

The downgrades continued into 2008. On January 30, 2008, S&P took action on over 6,300 subprime RMBS securities and over 1,900 CDO securities—meaning it either downgraded their ratings or placed the securities on credit watch with negative implications. The affected RMBS and CDO securities represented issuance amounts of approximately \$270.1 billion and \$263.9 billion, respectively.¹⁰³³

The rating downgrades affected a wide range of RMBS and CDO securities. Some of the downgraded securities had been rated years earlier; others had received AAA ratings less than 12 months before. For example, in April 2007, both Moody’s and S&P gave AAA ratings to three tranches of approximately \$1.5 billion in a cash CDO known as Vertical ABS CDO 2007-1. Six months later, the majority of the CDO’s tranches were downgraded to junk status; in 2008, the CDO’s ratings were withdrawn, its assets were liquidated, and the AAA rated securities became worthless. In another case, in February and March 2007, Moody’s and S&P gave AAA ratings to 5 tranches of about a \$1 billion RMBS securitization known as GSAMP Trust 2007-FM2. In late 2007, both credit rating agencies began downgrading the securities; by 2008, they began

¹⁰²⁹ 8/22/2007 email from Moody’s Eric Kolchinsky, “Deal Management,” Hearing Exhibit 4/23-42.

¹⁰³⁰ 7/30/2010 supplemental response from Moody’s to the Subcommittee, at 9, Hearing Exhibit 4/23-106. In an email sent in the midst of these CDO downgrades, one Moody’s analyst commented to a colleague: “You’re right about CDOs as WMD – but it’s only CDOs backed by subprime that are WMD.” 11/27/2007 email from William May to Deepali Advani, Hearing Exhibit 4/23-58.

¹⁰³¹ 2/2008 “Structured Finance Ratings Transitions, 1983-2007,” Credit Policy Special Comment prepared by Moody’s, at 4.

¹⁰³² 6/24/2010 supplemental response from S&P to the Subcommittee, at 6, Hearing Exhibit 4/23-108.

¹⁰³³ 6/24/2010 supplemental response from S&P to the Subcommittee, Exhibit N, Hearing Exhibit 4/23-108 (1/30/2008 “S&P Takes Action on 6,389 U.S. Subprime RMBS Ratings and 1,953 CDO Ratings,” S&P’s RatingsDirect).

downgrading the AAA rated securities, and by August 2009 S&P had downgraded all its tranches to noninvestment grade or junk status.

One more striking example involved a \$1.6 billion hybrid CDO known as Delphinus CDO 2007-1, Ltd., which was downgraded a few months after its rating was issued. Moody's gave AAA ratings to seven of its tranches and S&P to six tranches in July and August 2007, respectively, but began downgrading its securities by the end of the year, and by the end of 2008, had fully downgraded its AAA rated securities to junk status.¹⁰³⁴

Analysts have determined that, by 2010, over 90% of subprime RMBS securities issued in 2006 and 2007 and originally rated AAA had been downgraded to junk status by Moody's and S&P.¹⁰³⁵

**Percent of the Original AAA Universe
Currently Rated Below Investment Grade**

Vintage	Prime Fixed	Prime ARM	Alt-A Fixed	Alt-A ARM	Option ARM	Subprime
2004	3%	9%	10%	17%	50%	11%
2005	39%	58%	73%	81%	76%	53%
2006	81%	90%	96%	98%	97%	93%
2007	92%	90%	98%	96%	97%	91%

Source: BlackRock Solutions as of February 8, 2010.

Prepared by the U.S. Senate Permanent Subcommittee on Investigations, April 2010.

D. Ratings Deficiencies

The Subcommittee's investigation uncovered a host of factors responsible for the inaccurate credit ratings assigned by Moody's and S&P to RMBS and CDO securities. Those factors include the drive for market share, pressure from investment banks to inflate ratings, inaccurate rating models, and inadequate rating and surveillance resources. In addition, federal regulations that limited certain financial institutions to the purchase of investment grade financial instruments encouraged investment banks and investors to pursue and credit rating agencies to provide those top ratings. All these factors played out against the backdrop of an ongoing conflict of interest that arose from how the credit rating agencies earned their income. If the

¹⁰³⁴ For more details about these three examples, see "Fact Sheet for Three Examples of Failed AAA Ratings," prepared by the Subcommittee based on information from S&P and Moody's websites.

¹⁰³⁵ See "Percent of the Original AAA Universe Currently Rated Below Investment Grade," chart prepared by the Subcommittee using data from BlackRock Solutions, Hearing Exhibit 4/23-1i. See also 3/2008 "Understanding the Securitization of Subprime Mortgage Credit," report prepared by Federal Reserve Bank of New York staff, no. 318, at 58 and table 31 ("92 percent of 1st-lien subprime deals originated in 2006 as well as ... 91.8 percent of 2nd-lien deals originated in 2006 have been downgraded."). See also "Regulatory Use of Credit Ratings: How it Impacts the Behavior of Market Constituents," University of Westminster - School of Law International Finance Review (2/2009), at 65-104 (citations omitted) ("As of February 2008, Moody's had downgraded at least one tranche of 94.2% of the subprime RMBS issues it rated in 2006, including 100% of the 2006 RMBS backed by second-lien loans, and 76.9% of the issues rated in 2007. In its rating transition report, S&P wrote that it had downgraded 44.3% of the subprime tranches it rated between the first quarter of 2005 and the third quarter of 2007.")

credit rating agencies had issued ratings that accurately exposed the increasing risk in the RMBS and CDO markets, they may have discouraged investors from purchasing those securities, slowed the pace of securitizations, and as a result reduced their own profits. It was not in the short term economic self-interest of either Moody's or S&P to provide accurate credit risk ratings for high risk RMBS and CDO securities.

(1) Awareness of Increasing Credit Risks

The evidence shows that analysts within Moody's and S&P were aware of the increasing risks in the mortgage market in the years leading up to the financial crisis, including higher risk mortgage products, increasingly lax lending standards, poor quality loans, unsustainable housing prices, and increasing mortgage fraud. Yet for years, neither credit rating agency heeded warnings – even their own – about the need to adjust their processes to accurately reflect the increasing credit risk.

Moody's and S&P began issuing public warnings about problems in the mortgage market as early as 2003, yet continued to issue inflated ratings for RMBS and CDO securities before abruptly reversing course in July 2007. Moody's CEO testified before the House Committee on Oversight and Government Reform, for example, that Moody's had been warning the market continuously since 2003, about the deterioration in lending standards and inflated housing prices.

“Beginning in July 2003, we published warnings about the increased risks we saw and took action to adjust our assumptions for the portions of the residential mortgage backed securities (“RMBS”) market that we were asked to rate.”¹⁰³⁶

Both S&P and Moody's published a number of articles indicating the potential for deterioration in RMBS performance.¹⁰³⁷ For example, in September 2005, S&P published a report entitled, “Who Will Be Left Holding the Bag?” The report contained this strong warning:

“It's a question that comes to mind whenever one price increase after another – say, for ridiculously expensive homes – leaves each succeeding buyer out on the end of a longer

¹⁰³⁶Prepared statement of Raymond W. McDaniel, Moody's Chairman and Chief Executive Officer, “Credit Rating Agencies and the Financial Crisis,” before the U.S. House of Representatives Committee on Oversight and Government Reform, Cong.Hrg. 110-155 (10/22/2008), at 1 (hereinafter “10/22/2008 McDaniel prepared statement”).

¹⁰³⁷ See, e.g., 6/24/2010 supplemental response from S&P to the Subcommittee, Hearing Exhibit 4/23-108 (4/20/2005 Subprime Lenders: Basking in the Glow of A Still-Benign Economy, but Clouds Forming on the Horizon” S&P; 9/13/2005 “Simulated Housing Market Decline Reveals Defaults Only in Lowest-Rated U.S. RMBS Transactions,” S&P; and 1/19/2006 “U.S. RMBS Market Still Robust, But Risks Are Increasing and Growth Drivers Are Softening” S&P). “Housing Market Downturn in Full Swing,” Moody's Economy.com (10/4/2006); 1/18/2007 “Special Report: Early Defaults Rise in Mortgage Securitization,” Moody's ; and 9/21/2007 “Special Report: Moody's Subprime Mortgage Servicer Survey on Loan Modifications,” Moody's. See 10/22/2008 McDaniel prepared statement at 13-14. In addition, in March 2007 Moody's warned of the possible effect that downgrades of subprime mortgage backed securities might have on its structured finance CDOs. See 3/2007 “The Impact of Subprime Residential Mortgage-Backed Securities on Moody's-Rated Structured Finance CDOs: A Preliminary Review,” Moody's.

and longer limb: When the limb finally breaks, who's going to get hurt? In the red-hot U.S. housing market, that's no longer a theoretical riddle. Investors are starting to ask which real estate vehicles carry the most risk – and if mortgage defaults surge, who will end up suffering the most.”¹⁰³⁸

Internal Moody's and S&P emails further demonstrate that senior management and ratings personnel were aware of the deteriorating mortgage market and increasing credit risk. In June 2005, for example, an outside mortgage broker who had seen the head of S&P's RMBS Group, Susan Barnes, on a television program sent her an email warning about the “seeds of destruction” in the financial markets. He noted that no one at the time seemed interested in fixing the looming problems:

“I have contacted the OTS, FDIC and others and my concerns are not addressed. I have been a mortgage broker for the past 13 years and I have never seen such a lack of attention to loan risk. I am confident our present housing bubble is not from supply and demand of housing, but from money supply. In my professional opinion the biggest perpetrator is Washington Mutual. 1) No income documentation loans. 2) Option ARMS (negative amortization) ... 5) 100% financing loans. I have seen instances where WAMU approved buyers for purchase loans; where the fully indexed interest only payments represented 100% of borrower's gross monthly income. We need to stop this madness!!!”¹⁰³⁹

Several email chains among S&P employees in the Servicer Evaluation Group in Structured Finance demonstrate a clear awareness of mortgage market problems. One from September 2006, for example, with the subject line “Nightmare Mortgages,” contains an exchange with startling frankness and foresight. One S&P employee circulated an article on mortgage problems, stating: “Interesting Business Week article on Option ARMs, quoting anecdotes involving some of our favorite servicers.” Another responded: “This is frightening. It wreaks of greed, unregulated brokers, and ‘not so prudent’ lenders.”¹⁰⁴⁰ Another employee commenting on the same article said: “I'm surprised the OCC and FDIC doesn't come downharder [sic] on these guys - this is like another banking crisis potentially looming!!”¹⁰⁴¹

Another email chain that same month shows that at least some employees understood the significance of problems within the mortgage market nine months before the mass downgrades began. One S&P employee wrote: “I think [a circulated article is] telling us that underwriting fraud; appraisal fraud and the general appetite for new product among originators is resulting in loans being made that shouldn't be made. ... [I]f [Eliot] Spitzer [then-New York Attorney General] could prove coercion this could be a RICO offense!” A colleague responded that the

¹⁰³⁸ “Economic Research: Who Will be Left Holding the Bag?” S&P's RatingsDirect (9/12/2005).

¹⁰³⁹ 7/22/2005 email from Michael Blomquist (Resource Realty) to Susan Barnes (S&P), “Washington Mutual,” Hearing Exhibit 4/23-45.

¹⁰⁴⁰ 9/2/2006 email from Robert Mackey to Richard Koch, “Nightmare Mortgages,” Hearing Exhibit 4/23-46a.

¹⁰⁴¹ 9/5/2006 email from Michael Gutierrez to Richard Koch and Edward Highland, “RE: Nightmare Mortgages,” Hearing Exhibit 4/23-46b.

head of the S&P Surveillance Group “told me that broken down to loan level what she is seeing in losses is as bad as high 40’s – low 50% I’d love to be able to publish a commentary with this data but maybe too much of a powder keg.”¹⁰⁴²

In a third email chain from August 2006, commenting on an article about problems in the mortgage market, a director in the S&P Servicer Evaluation Group wrote: “I’m not surprised; there has been rampant appraisal and underwriting fraud in the industry for quite some time as pressure has mounted to feed the origination machine.”¹⁰⁴³ Another S&P director in the same group wrote in an October 2006 internal email about a news article entitled, “More Home Loans Go Sour – Though New Data Show Rising Delinquencies, Lenders Continue to Loosen Mortgage Standards”: “Pretty grim news as we suspected – note also the ‘mailing in the keys and walking away’ epidemic has begun – I think things are going to get mighty ugly next year!”¹⁰⁴⁴ Still another S&P email the same month circulated an article entitled, “Home Prices Keep Sliding; Buyers Sit Tight,” and remarked: “[J]ust curious...are there ever any positive repo[r]ts on the housing market?”¹⁰⁴⁵

An email among several S&P employees a few months later circulated an article entitled, “The Mortgage Mess Spreads” with one person noting ominously: “This is like watching a hurricane from FL [Florida] moving up the coast slowly towards us. Not sure if we will get hit in full or get trounced a bit or escape without severe damage...”¹⁰⁴⁶

Government Warnings. At the same time the credit rating agencies were publishing reports and circulating articles internally about the deteriorating mortgage market, several government agencies issued public warnings about lax lending standards and increasing mortgage fraud. A 2004 quarterly report by the FDIC, for example, sounded an alarm over the likelihood of more high risk loan delinquencies:

“[I]t is unlikely that home prices are poised to plunge nationwide, even when mortgage rates rise The greater risk to insured institutions is the potential for increased credit delinquencies and losses among highly leveraged, subprime, and ARM borrowers. These

¹⁰⁴² 9/29/2006 email from Michael Gutierrez, Director at S&P, PSI-S&P-RFN-000029.

¹⁰⁴³ 8/7/2006 email from Richard Koch, Director at S&P, Hearing Exhibit 4/23-1d.

¹⁰⁴⁴ 10/20/2006 email from Michael Gutierrez to Richard Koch and others, Hearing Exhibit 4/23-47.

¹⁰⁴⁵ 10/26/2006 email from Ernestine Warner to Robert Pollsen, Hearing Exhibit 4/23-48.

¹⁰⁴⁶ 3/9/2007 email from KP Rajan, Hearing Exhibit 4/23-51. See also 2/14/2006 email from Robert Pollsen, PSI-S&P-RFN-000038 (forwarding “Coming Home to Roost,” Barron’s (2/13/2006), which includes the sentences “The red-hot U.S. housing market may be fast approaching its date with destiny much anxiety is being focused on a looming ‘reset problem.’”); see also 3/25/2007 S&P internal email chain, PSI-S&P-RFN-000006 (forwarding “Slow-Motion Train Wreck Picks Up Speed,” Barron’s (3/26/2007)). 3/26/2007 Moody’s internal email, PSI-S&P-RFN-000003 (forwarding “Slow-Motion Train Wreck Picks Up Speed,” Barron’s (3/26/2007)); 10/19/2006 Moody’s internal email, PSI-MOODYS-RFN-000009 (forwarding “More Home Loans Go Sour—Though New Data Show Rising Delinquencies, Lenders Continue to Loosen Mortgage Standards,” The Wall Street Journal (10/19/2006)); 9/6/2006 Moody’s internal email, PSI-MOODYS-RFN-000001 (forwarding “The No-Money-Down Disaster,” Barron’s (8/21/2006)).

high-risk segments of mortgage lending may drive overall mortgage loss rates higher if home prices decline or interest rates rise.”¹⁰⁴⁷

In 2005, in its 11th Annual Survey on Credit Underwriting Practices, the Office of the Comptroller of the Currency (OCC), which oversees nationally chartered banks, described a significant lowering of retail lending standards, noting it was the first time in the survey’s history that a net lowering of retail lending practices had been observed. The OCC wrote:

“Retail lending has undergone a dramatic transformation in recent years as banks have aggressively moved into the retail arena to solidify market positions and gain market share. Higher credit limits and loan-to-value ratios, lower credit scores, lower minimum payments, more revolving debt, less documentation and verification, and lengthening amortizations - have introduced more risk to retail portfolios.”¹⁰⁴⁸

Starting in 2004, federal law enforcement agencies also issued multiple warnings about fraud in the mortgage marketplace. For example, the Federal Bureau of Investigation (FBI) made national headlines when it warned that mortgage fraud had the potential to be a national epidemic,¹⁰⁴⁹ and issued a 2004 report describing how mortgage fraud was becoming more prevalent. The report noted: “Criminal activity has become more complex and loan frauds are expanding to multitransactional frauds involving groups of people from top management to industry professionals who assist in the loan application process.”¹⁰⁵⁰ The FBI also testified about the problem before Congress:

“The potential impact of mortgage fraud on financial institutions and the stock market is clear. If fraudulent practices become systemic within the mortgage industry and mortgage fraud is allowed to become unrestrained, it will ultimately place financial institutions at risk and have adverse effects on the stock market.”¹⁰⁵¹

In 2006, the FBI reported that the number of Suspicious Activity Reports describing mortgage fraud had risen significantly since 2001.¹⁰⁵²

¹⁰⁴⁷ “Housing Bubble Concerns and the Outlook for Mortgage Credit Quality,” *FDIC Outlook* (Spring 2004), available at <http://www.fdic.gov/bank/analytical/regional/ro20041q/na/infocus.html>.

¹⁰⁴⁸ 6/2005 “Survey of Credit Underwriting Practices,” report prepared by the Office of the Comptroller of the Currency, at 6, available at <http://www.occ.gov/publications/publications-by-type/survey-credit-underwriting/pub-survey-cred-under-2005.pdf>.

¹⁰⁴⁹ “FBI: Mortgage Fraud Becoming an ‘Epidemic,’” *USA Today* (9/17/2004).

¹⁰⁵⁰ FY 2004 “Financial Institution Fraud and Failure Report,” prepared by the Federal Bureau of Investigation, available at http://www.fbi.gov/stats-services/publications/fiff_04.

¹⁰⁵¹ Prepared statement of Chris Swecker, Assistant Director of the Criminal Investigative Division, Federal Bureau of Investigation, “Mortgage Fraud and Its Impact on Mortgage Lenders,” before the U.S. House of Representatives Financial Services Subcommittee on Housing and Community Opportunity, Cong.Hrg. 108-116 (10/7/2004), at 2.

¹⁰⁵² “Financial Crimes Report to the Public: Fiscal Year 2006, October 1, 2005 – September 30, 2006,” prepared by the Federal Bureau of Investigation, available at http://www.fbi.gov/stats-services/publications/fcs_report2006/financial-crimes-report-to-the-public-2006-pdf/view.

The FBI's fraud warnings were repeated by industry analysts. The Mortgage Bankers Association's Mortgage Asset Research Institute (MARI), for example, had been reporting increasing fraud in mortgages for years. In April 2007, MARI reported a 30% increase in 2006 in loans with suspected mortgage fraud. The report also noted that while 55% of overall fraud incidents reported to MARI involved loan application fraud, the percentage of subprime loans with loan application fraud was even higher at 65%.¹⁰⁵³

Press Reports. Warnings in the national press concerning the threat posed by deteriorating mortgages and unsustainable housing prices were also prevalent. A University of Florida website has collected dozens of these articles, many of which were published in 2005. The headlines include: "Fed Debates Pricking the U.S. Housing 'Bubble'," New York Times, May 31, 2005; "Yale Professor Predicts Housing 'Bubble' Will Burst," NPR, June 3, 2005; "Cover Story: Bubble Bath of Doom" [warning of overheated real estate market], Washington Post, July 4, 2005; "Housing Affordability Hits 14-Year Low," The Wall Street Journal, December 22, 2005; "Foreclosure Rates Rise Across the U.S.," NPR, May 30, 2006; "For Sale Signs Multiply Across U.S.," The Wall Street Journal, July 20, 2006; and "Housing Gets Ugly," New York Times, August 25, 2006.¹⁰⁵⁴

Had Moody's and S&P heeded their own warnings as well as the warnings in government reports and the national press, they might have issued more conservative, including fewer AAA, ratings for RMBS and CDO securities from 2005 to 2007; required additional credit enhancements earlier; and issued ratings downgrades earlier and with greater frequency, gradually letting the air out of the housing bubble instead of puncturing it with the mass downgrades that began in July 2007. The problem, however, was that neither company had a financial incentive to assign tougher credit ratings to the very securities that for a short while increased their revenues, boosted their stock prices, and expanded their executive compensation. Instead, ongoing conflicts of interest, inaccurate credit rating models, and inadequate rating and surveillance resources made it possible for Moody's and S&P to ignore their own warnings about the U.S. mortgage market. In the longer run, these decisions cost both companies dearly. Between January 2007 and January 2009, the stock price for both The McGraw-Hill Companies (S&P's parent company) and Moody's fell nearly 70%, and neither share price has fully recovered.

(2) CRA Conflicts of Interest

In transitioning from the *fact* that the rating agencies issued inaccurate ratings to the question of *why* they did, one of the primary issues is the conflicts of interest inherent in the "issuer-pays" model. Under this system, the firm interested in profiting from an RMBS or CDO security is required to pay for the credit rating needed to sell the security. Moreover, it requires the credit rating agencies to obtain business from the very companies paying for their rating

¹⁰⁵³ 4/2007 "Ninth Periodic Mortgage Fraud Case Report to Mortgage Bankers Association," prepared by the Mortgage Asset Research Institute, LLC, at 10.

¹⁰⁵⁴ "Business Library – The Housing Bubble," University of Florida George A. Smathers Libraries, http://www.uflib.ufl.edu/cm/business/cases/housing_bubble.htm.

judgment. The result is a system that creates strong incentives for the rating agencies to inflate their ratings to attract business, and for the issuers and arrangers of the securities to engage in “ratings shopping” to obtain the highest ratings for their financial products.

The conflict of interest inherent in an issuer-pay setup is clear: rating agencies are incentivized to offer the highest ratings, as opposed to offering the most accurate ratings, in order to attract business. It is much like a person trying to sell a home and hiring a third-party appraiser to make sure it is worth the price. Only, with the credit rating agencies, it is the seller who hires the appraiser on behalf of the buyer – the result is a misalignment of interests. This system, currently permitted by the SEC, underlies the “issuers-pay” model.

The credit rating agencies assured Congress and the investing public that they could “manage” these conflicts, but the evidence indicates that the drive for market share and increasing revenues, ratings shopping, and investment bank pressures have undermined the ratings process and the quality of the ratings themselves. Multiple former Moody’s and S&P employees told the Subcommittee that, in the years leading up to the financial crisis, gaining market share, increasing revenues, and pleasing investment bankers bringing business to the firm assumed a higher priority than issuing accurate RMBS and CDO credit ratings.

(a) Drive for Market Share

Prior to the explosive growth in revenues generated from the ratings of mortgage backed securities, the credit rating agencies had a reputation for exercising independent judgment and taking pride in requiring the information and performing the analysis needed to issue accurate credit ratings. A journalist captured the rating agency culture in a 1995 article when she wrote: “Ask a [company’s] treasurer for his opinion of rating agencies, and he’ll probably rank them somewhere between a trip to the dentist and an IRS audit. You can’t control them, and you can’t escape them.”¹⁰⁵⁵

But a number of analysts who worked for Moody’s during the 1990s and into the new decade told the Subcommittee that a major cultural shift took place at the company around 2000. They told the Subcommittee that, prior to 2000, Moody’s was academically oriented and conservative in its issuance of ratings. That changed, according to those interviewed, with the rise of Brian Clarkson who worked at Moody’s from 1990 to 2008, and rose from Group Managing Director of the Global Asset Backed Finance Group to President and Chief Operating Officer of Moody’s. These employees indicated that during Mr. Clarkson’s tenure Moody’s began to focus less on striving for accurate credit ratings, and more on increasing market share and “servicing the client,” who was identified as the investment banks that brought business to the firm.

This testimonial evidence that increasing revenues gained importance is corroborated by documents obtained by the Subcommittee during the course of its investigation. For example, in a March 2000 email, the head of Moody’s Structured Finance Group in Paris wrote that she was

¹⁰⁵⁵ “Rating the Rating Agencies,” Treasury and Risk Management (7/1995).

leaving the firm, because she was uncomfortable with “the lack of a strategy I can clearly understand, other than maximize the market share and the gross margin with insufficient resources.”¹⁰⁵⁶ A 2002 Moody’s survey of the Structured Finance Group (SFG) also documents the shift, finding that most employees who responded to the survey indicated that SFG business objectives included: generating increased revenue; increasing market share; fostering good relationships with issuers and investors; and delivering high quality ratings and research. According to the survey results: “When asked about how business objectives were translated into day-to-day work, most agreed that writing deals was paramount, while writing research and developing new products and services received less emphasis. Most agreed that there was a strong emphasis on relationships with issuers and investment bankers.”¹⁰⁵⁷

A 2003 email sent by Mr. Clarkson to one of his senior managers about the performance of the Structured Finance Real Estate and Derivatives Group further demonstrates the firm’s emphasis on market share. Mr. Clarkson wrote:

“Noel and his team handled the increase and met or exceeded almost every financial and market share objective and goal for his Group. ... Through November total revenue for Noel’s Group has grown 16% compared with budgeted growth of 10% with CMBS [Commercial Mortgage Backed Securities] up 19% and Derivatives up 14%. This was achieved by taking advantage of increased CMBS issuance volumes and by meeting or slightly exceeding market share objectives for the Group. The Derivatives team has achieved a year to date 96% market share compared to a target share of 95%. This is down approximately 2% from 2002 primarily due to not rating Insurance TRUP CDO’s and rating less subordinated tranches. Noel’s team is considering whether we need to refine our approach to these securities. The CMBS team was able to meet their target share of 75%. However this was down from 84% market share in 2002 primarily due to competitor’s [sic] easing their standards to capture share.”¹⁰⁵⁸

This performance analysis notes that the team being reviewed put up a strong performance despite competitors “easing their standards to capture [market] share.” It also notes that for certain CDOs and “less subordinated tranches,” Moody’s might “need to refine our approach.” The clear emphasis of the analysis is increasing revenues and meeting “market share objectives,” and appears silent with regard to issuing accurate ratings.

One former Moody’s senior vice president, Mark Froeba, told the Subcommittee that Mr. Clarkson used fear and intimidation tactics to make analysts spend less time on the ratings process and work more cooperatively with investment bankers.¹⁰⁵⁹ At the Subcommittee hearing, another former Moody’s senior analyst, Richard Michalek, described a meeting that he

¹⁰⁵⁶ 3/19/2000 email from Catherine Gerst to Debra Perry, Moody’s Chief Administrative Officer, PSI-MOODYS-RFN-000039.

¹⁰⁵⁷ 5/2/2002 Moody’s SFG 2002 Associate Survey, prepared by Metrus Group, at 4, Hearing Exhibit 4/23-92a.

¹⁰⁵⁸ 12/1/2003 email from Brian Clarkson to Noel Kirnon, Managing Director of Real Estate and Derivatives Group, Hearing Exhibit 4/23-15.

¹⁰⁵⁹ Subcommittee interview of Mark Froeba (10/27/2010). See also 6/2/2010 statement of Mark Froeba submitted by request to the Financial Crisis Inquiry Commission.

had with Mr. Clarkson shortly after he was promoted to head of the Structured Finance Group. Mr. Michalek stated:

“In my ‘discussion,’ I was told that he [Mr. Clarkson] had met with the investment banks to learn how our Group was working with the various clients and whether there were any analysts who were either particularly difficult or particularly valuable. I was named ... as two of the more ‘difficult’ analysts who had a reputation for making ‘too many’ comments on the deal documentation.

The conversation was quite uncomfortable, and it didn’t improve when he described how he had previously had to fire [another analyst], a former leader of the Asset-Backed group who he otherwise considered a ‘good guy.’ He described how, because of the numerous complaints he had received about [that analyst’s] extreme conservatism, rigidity and insensitivity to client perspective, he was left with no choice. ... He then asked me to convince him why he shouldn’t fire me. ... [T]he primary message of the conversation was plain: further complaints from the ‘customers’ would very likely abruptly end my career at Moody’s.”¹⁰⁶⁰

Several former Moody’s employees have testified that Moody’s employees were fired when they challenged senior management with a more conservative approach to rating RMBS and CDO securities. According to Mr. Froeba:

“[T]he fear was real, not rare and not at all healthy. You began to hear of analysts, even whole groups of analysts, at Moody’s who had lost their jobs because they were doing their jobs, identifying risks and describing them accurately.”¹⁰⁶¹

A former Managing Director, Eric Kolchinsky, one of the senior managers in charge of the business line which rated subprime backed CDOs at Moody’s stated:

“Managers of rating groups were expected by their supervisors and ultimately the Board of Directors of Moody’s to build, or at least maintain, market share. It was an unspoken understanding that loss of market share would cause a manager to lose his or her job.”¹⁰⁶²

He described how market share concerns were addressed:

“Senior management would periodically distribute emails detailing their departments’ market share. These emails were limited to Managing Directors only. Even if the market share dropped by a few percentage points, managers would be expected to justify

¹⁰⁶⁰ Michalek prepared statement, at 13-14.

¹⁰⁶¹ 6/2/2010 statement of Mark Froeba, submitted by request to the Financial Crisis Inquiry Commission, at 4.

¹⁰⁶² Prepared Statement of Eric Kolchinsky, Former Managing Director at Moody’s Investor Service, April 23, 2010 Subcommittee Hearing, at 1.

‘missing’ the deals which were not rated. Colleagues have described enormous pressure from their superiors when their market share dipped.”¹⁰⁶³

A Moody’s email sent in early October 2007 to Managing Directors of the CDO Group illustrates the intense pressure placed on CDO analysts to retain or increase market share, even in the midst of the onset of the financial crisis.¹⁰⁶⁴ This email reported that for CDOs:

“Market share by deal count [had] dropped to 94%, though by volume it’s 97%. It’s lower than the 98+% in prior quarters. Any reason for concern, are issuers being more selective to control costs (is Fitch cheaper?) or is it an aberration[?]”¹⁰⁶⁵

This email was sent during the same period when Moody’s began downgrading CDOs on a daily basis, eventually downgrading almost 1,500 CDO securities with an original value likely in the tens of billions in the last three months of 2007 alone. Despite the internal recognition at Moody’s that previously rated CDOs were at substantial risk for downgrades, the email shows management pressing the CDO Managing Directors about losing a few points of market share in the middle of an accelerating ratings disaster.

The drive for market share was similarly emphasized at S&P. One former S&P Managing Director in charge of the RMBS Ratings Group described it as follows:

“By 2004 the structured finance department at S&P was a major source of revenue and profit for the parent company, McGraw-Hill. Focus was directed at collecting market share and revenue data on a monthly basis from the various structured finance rating groups and forwarded to the finance staff at S&P.”¹⁰⁶⁶

Numerous internal emails illustrate not only S&P’s drive to maintain or increase market share, but also how that pressure negatively impacted the ratings process, placing revenue concerns ahead of ratings quality. For example, in a 2004 email, S&P management discussed the possibility of changing its CDO ratings criteria in response to an “ongoing threat of losing deals”:

“We are meeting with your group this week to discuss adjusting criteria for rating CDOs of real estate assets this week because of the ongoing threat of losing deals.”¹⁰⁶⁷

¹⁰⁶³ Id. at 2.

¹⁰⁶⁴ 10/5/2007 email from Sunil Surana to Yuri Yoshizawa, and others, “RE: 3Q Market Coverage-CDO,” Hearing Exhibit 4/23-24a.

¹⁰⁶⁵ Id.

¹⁰⁶⁶ Prepared statement of Frank Raiter, Former Managing Director at S&P, April 23, 2010 Subcommittee Hearing, at 5.

¹⁰⁶⁷ 8/17/2004 email from S&P manager, “RE: SF CIA: CDO methodology invokes reactions,” Hearing Exhibit 4/23-3 [emphasis in the original].

On another occasion, in response to a 2005 email stating that S&P's ratings model needed to be adjusted to account for the higher risks associated with subprime loans, a director in RMBS research, Frank Parisi, wrote that S&P could have released a different ratings model, LEVELS 6.0, months ago "if we didn't have to massage the sub-prime and Alt-A numbers to preserve market share."¹⁰⁶⁸ This same director wrote in an email a month later: "Screwing with criteria to 'get the deal' is putting the entire S&P franchise at risk – it's a bad idea."¹⁰⁶⁹

A 2004 email chain among members of the S&P Analytical Policy Board, which set standards to ensure integrity for the ratings process, provides additional evidence of how market share concerns affected the credit ratings process. In that chain of emails, a senior S&P manager, Gale Scott, openly expressed concern about how a criteria change could impact market share and cause S&P to lose business. Ms. Scott wrote: "I am trying to ascertain whether we can determine at this point if we will suffer any loss of business because of our decision and if so, how much? We should have an effective way of measuring the impact of our decision over time."¹⁰⁷⁰ After a colleague reassured her that he did not believe it would cause a loss of business, she reiterated her concerns, noting, "I think the criteria process must include appropriate testing and feedback from the marketplace."

On another occasion, an August 2006 email reveals the frustration that at least one S&P employee in the Servicer Evaluation Group felt about the dependence of his employer on the issuers of structured finance products, going so far as to describe the rating agencies as having "a kind of Stockholm syndrome" – the phenomenon in which a captive begins to identify with the captor:

"They've become so beholden to their top issuers for revenue they have all developed a kind of Stockholm syndrome which they mistakenly tag as Customer Value creation."¹⁰⁷¹

In October 2007, Moody's Chief Credit Officer explicitly raised concerns at the highest levels of the firm that it was losing market share "[w]ith the loosening of the traditional duopoly" between Moody's and S&P, noting that Fitch was becoming an "acceptable substitute."¹⁰⁷² In a memorandum entitled, "Credit Policy issues at Moody's suggested by the subprime/liquidity crisis," the author set out to answer the question, "how do rating agencies compete?"¹⁰⁷³ The candid reflection noted that in an ideal situation "ratings quality" would be paramount, but the need to maintain, and even increase, market share, coupled with pressures exerted by the companies seeking credit ratings, were also affecting the quality of its ratings. Moody's Chief Credit Officer wrote the following lament:

¹⁰⁶⁸ 3/23/2005 email from Frank Parisi to Thomas Warrack, and others, Hearing Exhibit 4/23-5.

¹⁰⁶⁹ 6/14/2005 email from Frank Parisi to Frank Bruzese, and others, Hearing Exhibit 4/23-6.

¹⁰⁷⁰ 11/9/2004 email from Gale Scott to Perry Inglis, Hearing Exhibit 4/23-4.

¹⁰⁷¹ 8/8/2006 email from Michael Gutierrez to Richard Koch, "RE: Loss Severity vs gross/net proceeds," Hearing Exhibit 4/23-14.

¹⁰⁷² 10/21/2007 Moody's internal email, Hearing Exhibit 4/23-24b. Although this email is addressed to and from the CEO, the Chief Credit Officer told the Subcommittee that he wrote the memorandum attached to the email.

Subcommittee interview of Andy Kimball (4/15/2010).

¹⁰⁷³ *Id.*

“Analysts and MDs [Managing Directors] are continually ‘pitched’ by bankers, issuers, investors – all with reasonable arguments – whose views can color credit judgment, sometimes improving it, other times degrading it (we ‘drink the kool-aid’). Coupled with strong internal emphasis on market share & margin focus, this does constitute a ‘risk’ to ratings quality.”¹⁰⁷⁴

By the time his memorandum was written, both Moody’s and S&P were already issuing thousands of RMBS and CDO rating downgrades, admitting that their prior investment grade ratings had not accurately reflected the risk that these investments would fail.

(b) Investment Bank Pressure

At the same time Moody’s and S&P were pressuring their RMBS and CDO analysts to increase market share and revenues, the investment banks responsible for bringing RMBS and CDO business to the firms were pressuring those same analysts to ease rating standards. Former Moody’s and S&P analysts and managers interviewed by the Subcommittee described, for example, how investment bankers pressured them to get their deals done quickly, increase the size of the tranches that received AAA ratings, and reduce the credit enhancements protecting the AAA tranches from loss. They also pressed the CRA analysts and managers to ignore a host of factors that could be seen as increasing credit risk. Sometimes described as “ratings shopping,” the analysts described how some investment bankers threatened to take their business to another credit rating agency if they did not get the favorable treatment they wanted. The evidence collected by the Subcommittee indicates that the pressure exerted by investment banks frequently impacted the ratings process, enabling the banks to obtain more favorable treatment than they otherwise would have received.

The type of blatant pressure exerted by some investment bankers is captured in a 2006 email in which a UBS banker warned an S&P senior manager not to use a new, more conservative rating model for CDOs. He wrote:

“[H]eard you guys are revising your residential mbs [mortgage backed security] rating methodology - getting very punitive on silent seconds. [H]eard your ratings could be 5 notches back of [Moody’s] equivalent. [G]onna kill your resi[dential] biz. [M]ay force us to do moodyfitch only cdos!”¹⁰⁷⁵

When asked by his colleague about the change in the model, an S&P senior manager, Thomas Warrack, noted that the new model “took a more conservative approach” that would result in “raising our credit support requirements going forward,” but Mr. Warrack was also quick to add: “We certainly did [not] intend to do anything to bump us off a significant amount of deals.”¹⁰⁷⁶

¹⁰⁷⁴ Id.

¹⁰⁷⁵ 5/3/2006 email from Robert Morelli (UBS) to Peter Kambeseles (S&P), Hearing Exhibit 4/23-11.

¹⁰⁷⁶ Id.

In another instance in May 2007, an S&P analyst reported to her colleagues about attempting to apply a default stress test to a CDO transaction proposed by Lehman Brothers. She wrote:

“[T]hey claim that their competitor investment banks are currently doing loads of deals that are static in the US and where no such stress is applied. ... [W]e’d initially calculated some way of coming up with the stresses, by assuming the lowest rated assets default first [T]hey claim that once they have priced the whole thing, it is possible that the spreads would change We suggested that it was up to them to build up some cushion at the time they price, but they say this will always make their structures uneconomic and is basically unmanageable => I understand that to mean they would not take us on their deals.”¹⁰⁷⁷

Her supervisor responded in part: “I would recommend we do something. Unless we have too many deals in US where this could hurt.”

On still another occasion in 2004, several S&P employees discussed the pressure to make their ratings profitable rather than just accurate, especially when their competitor employed lower rating standards:

“We just lost a huge Mizuho RMBS deal to Moody’s due to a huge difference in the required credit support level. It’s a deal that six analysts worked through Golden Week so it especially hurts. What we found from the arranger was that our support level was at least 10% higher than Moody’s. ... Losing one or even several deals due to criteria issues, but this is so significant that it could have an impact in the future deals. There’s no way we can get back on this one but we need to address this now in preparation for the future deals.”¹⁰⁷⁸

Other emails illustrate the difficulty of upgrading the ratings models, because of the potential disruption to securitizations in the process of being rated. Some investment banks applied various types of pressure to maintain the status quo, despite the fact that the newer models were considered more accurate. In a February 2006 email to an S&P analyst, for example, an investment banker from Citigroup wrote:

“I am VERY concerned about this E3 [new CDO rating model]. If our current struc[tur]e, which we have been marketing to investors ... doesn’t work under the new assumptions, this will not be good. Happy to comply, if we pass, but will ask for an exception if we fail.”¹⁰⁷⁹

¹⁰⁷⁷ 5/23/2007 email from Claire Robert to Lapo Guadagnuolo, and others, Hearing Exhibit 4/23-31.

¹⁰⁷⁸ 5/25/2004 email from Yu-Tsung Chang to Joanne Rose and Pat Jordan, “Competition with Moody’s,” Hearing Exhibit 4/23-2.

¹⁰⁷⁹ 2/16/2006 email from Edward Tang (Citigroup) to Lina Kharnak (S&P), Hearing Exhibit 4/23-8.

In another instance from May 2005, an investment banker from Nomura in the middle of finalizing a securitization raised concerns that S&P was not only failing to provide the desired rating, but that a new model could make the situation worse. He wrote:

“My desire is to keep S&P on all of my deals. I would rather not drop S&P from the upcoming deal, particularly if it ends up being for only a single deal until the new model is in place. Can you please review the approval process on this deal?”¹⁰⁸⁰

Initially hesitant, S&P analysts ultimately decided to recommend approval of the deal in line with the banker’s proposal.

The same pressure was applied to Moody’s analysts. In an April 2007 email, for example, a SunTrust Bank employee told Moody’s:

“SunTrust is disconcerted by the dramatic increase in Moody’s loss coverage levels given initial indications. ... Our entire team is extremely concerned. ... Each of the other agencies reduced their initial levels, and the material divergence between Moody’s levels and the other agencies seems unreasonable and unwarranted given our superior collateral and minimal tail risk.”¹⁰⁸¹

On another occasion in March 2007, a Moody’s analyst emailed a colleague about problems she was having with someone at Deutsche Bank after Moody’s suggested adjustments to the deal: “[The Deutsche Bank investment banker] is pushing back dearly saying that the deal has been marketed already and that we came back ‘too late’ with this discovery She claims it’s hard for them to change the structure at this point.”¹⁰⁸²

Special Treatment. Documents obtained by the Subcommittee indicate that investment bankers who complained about rating methodologies, criteria, or decisions were often able to obtain exceptions or other favorable treatment. In many instances, the decisions made by the credit rating agencies appeared to cross over from the healthy give and take involved in complex analysis to concessions made to prevent the loss of business. While the former facilitates efficient transactions, the second distorts the market and hurts investors.

In a February 2007 email directed to Moody’s, for example, a Chase investment banker complained that a transaction would receive a significantly lower rating than the same product was slated to receive from another rating agency: “There’s going to be a three notch difference when we print the deal if it goes out as is. I’m already having agita about the investor calls I’m going to get.” Upon conferring with a colleague, the Moody’s manager informed the banker that Moody’s was able to make some changes after all: “I spoke to Osmin earlier and confirmed that

¹⁰⁸⁰ 5/6/2005 email from Robert Gartner (Nomura) to Thomas Warrack (S&P), PSI-S&P-RFN-000024-28, at 28.

¹⁰⁸¹ 4/12/2007 email from Patrick DellaValle (SunTrust) to David Teicher (Moody’s), and others, PSI-MOODYS-RFN-000032.

¹⁰⁸² 3/8/2007 email from Karen Ramallo to Yakov Krayn, Hearing Exhibit 4/23-22.

Jason is looking into some adjustments to his [Moody's] methodology that should be a benefit to you folks."¹⁰⁸³

In another instance, a difference of opinion arose between Moody's and UBS over how to rate a UBS transaction known as Lancer II. One senior Moody's analyst wrote to her colleagues that, given the "time line for closing" the deal, they should side with the investment bank: "I agree that what the [Moody's rating] committee was asking is reasonable, but given the other modeling related issues and the time line for closing, I propose we let them go with the CDS Cp criteria for this deal."¹⁰⁸⁴

S&P made similar concessions while rating three deals for Bear Stearns in 2006. An analyst wrote:

"Bear Stearns is currently closing three deals this month which ha[ve] 40 year mortgages (negam) There was some discrepancy in that they were giving some more credit to recoveries than we would like to see. ... [I]t was agreed that for the deals this month we were OK and they would address this issue for deals going forward."¹⁰⁸⁵

While the rating process involved some level of subjective discretion, these electronic communications make it clear that in many cases, close calls were made in favor of the customer.

An exception made one time often turned into further exceptions down the road. In August 2006, for example, an investment banker from Morgan Stanley tried to leverage past exceptions into a new one, couching his request in the context of prior deals:

"When you went from [model] 2.4 to 3.0, there was a period of time where you would rate on either model. I am asking for a similar 'dual option' window for a short period. I do not think this is unreasonable."

A frustrated S&P manager resisted, saying: "You want this to be a commodity relationship and this is EXACTLY what you get." But even in the midst of his defense, the same S&P manager reminded the banker how often he had granted exceptions in other transactions: "How many times have I accommodated you on tight deals? Neer, Hill, Yoo, Garzia, Nager, May, Miteva, Benson, Erdman all think I am helpful, no?"¹⁰⁸⁶

¹⁰⁸³ 2/20/2007 email from Mark DiRienz (Moody's) to Robert Miller (Chase), PSI-MOODYS-RFN-000031. See also 4/27/2006 email from Karen Ramallo to Wioletta Frankowicz and others, Hearing Exhibit 4/23-18 ("For previous synthetic deals this wasn't as much of an issue since the ARM % wasn't as high, and ... at this point, I would feel comfortable keeping the previously committed levels since such a large adjustment would be hard to explain to Bear So unless anybody objects, Joe and I will tell Bear that the levels stand where they were previously.").

¹⁰⁸⁴ 5/23/2007 email from Yvonne Fu to Arnaud Lasseron, PSI-MOODYS-RFN-000013.

¹⁰⁸⁵ 2/23/2006 email from Errol Arne to Martin Kennedy, and others, "Request for prioritization," PSI-S&P-RFN-000032.

¹⁰⁸⁶ 8/1/2006 email from Elwyn Wong (S&P) to Shawn Stoval (Morgan Stanley) and Belinda Ghetty (S&P), Hearing Exhibit 4/23-13.

Some rating analysts who granted exceptions to firm policies, and then tried to limit those exceptions in future deals, found it difficult to do. In June 2007, for example, a Moody's analyst agreed to an exception, while warning that no exceptions would be made in future transactions:

"This is an issue we feel strongly about and it is a published Moody's criteria. We are making an exception for this deal only. ... Going forward this has to be effective date level. I would urge you to let your colleagues know as well since we will not be in a position to give in on this issue in future deals."¹⁰⁸⁷

A similar scenario played out at S&P. A Goldman Sachs banker strongly objected to a rating decision on a CDO called Abacus 2006-12:

"I would add that this scenario is very different from an optional redemption as you point out below since the optional redemption is at Goldman's option and a stated maturity is not. We therefore cannot settle for the most conservative alternative as I believe you are suggesting."

The S&P director pushed back, saying that what Goldman wanted was "a significant departure from our current criteria," but then suggested an exception could be made if it were limited to the CDO at hand and did not apply to future transactions:

"As you point out, it is a conservative position for S&P to take, but it is one we've taken with all Dealers. Since time is of the essence, this may be another issue that we table for 2006-12 [the CDO under consideration], but would have to be addressed in future trades."¹⁰⁸⁸

But a Moody's analyst showed how difficult it was to allow an exception once and demand different conduct in the future:

"I am worried that we are not able to give these complicated deals the attention they really deserve, and that they [Credit Suisse] are taking advantage of the 'light' review and the growing sense of 'precedent'.

As for the precedential effects, we had indicated that some of the 'fixes' we agreed to in Qian's deal were 'for this deal only' ... When I asked Roland if they had given further thought to a more robust approach, he said (unsurprisingly) that they had no success and could we please accept the same [stopgap] measure for this deal."¹⁰⁸⁹

¹⁰⁸⁷ 6/28/2007 email from Pooja Bharwani (Moody's) to Frank Li (Citigroup), and others, PSI-MOODYS-RFN-000019.

¹⁰⁸⁸ 4/23/2006 email from Chris Meyer (S&P) to Geoffrey Williams and David Gerst (Goldman Sachs), and others, PSI-S&P-RFN-000002. See also 5/1/2006 email from Matthew Bieber (Goldman Sachs) to Malik Rashid (S&P), and others, PSI-S&P-RFN-000008-11, at 9 ("GS has not agreed to this hold back provision in any of our previous transactions (including the ABACUS deal that just closed last week) - and we cannot agree to it in this deal.").

¹⁰⁸⁹ 5/1/2006 email from Richard Michalek to Yuri Yoshizawa, Hearing Exhibit 4/23-19; see also 5/23/2007 email from Eric Kolchinsky to Yuri Yoshizawa and Yvonne Fu, PSI-MOODYS-RFN-000011 ("In that case, should we

Linking a Rating to a Fee. On at least one occasion, an investment bank seeking a credit rating attempted to link the ratings it would receive with the amount of fees it would pay. In June 2007, Merrill Lynch was seeking a rating from Moody's for a CDO known as Belden Point.¹⁰⁹⁰ Moody's agreed to rate the CDO, but only for a higher than usual fee using a "complex CDO fee schedule."¹⁰⁹¹ Merrill Lynch responded: "[N]o one here has ever heard or seen this fee structure applied for any deal in the past. Could you point us to a precedent deal where we have approved this?"¹⁰⁹² Moody's replied:

"[W]e do not view this transaction as a standard CDO transaction and the rating process so far has already shown that the analysis for this deal is far more involved and will continue to be so. We have spent significant amount of resource[s] on this deal and it will be difficult for us to continue with this process if we do not have an agreement on the fee issue."¹⁰⁹³

The next day, Merrill Lynch wrote:

"We are okay with the revised fee schedule for this transaction. We are agreeing to this under the assumption that this will not be a precedent for any future deals and that you will work with us further on this transaction to try and get to some middle ground with respect to the ratings."¹⁰⁹⁴

Moody's responded:

"We agree that this will not be a precedent for future deals by default and we will discuss with you on a case by case basis if [the] Complex CDO rating application should be applied to future deals. We will certainly continue working with you on this transaction, but analytical discussions/outcomes should be independent of any fee discussions."¹⁰⁹⁵

Vertical CDO. A transaction known as Vertical ABS CDO 2007-1 helps illustrate how imbalanced the relationship between investment bankers and rating analysts became. In connection with that CDO, an investment banker from UBS failed to cooperate with S&P rating analysts requesting information to analyze the transaction.

On March 30, 2007, an S&P analyst wrote that UBS wanted to close the deal in ten days, but was not providing the information S&P needed:

exclude any mention of the one notch rule from the general communication? Instead, we should give comm[ittee] chairs the discretion to apply the rule as they see fit. In this way, there is less of a chance of it getting back to the bankers as a 'general rule'. They are more likely to know it as something that only applies, as a concession, on the deal that they are working on.").

¹⁰⁹⁰ See 6/11/2007 email exchange between Merrill Lynch and Moody's, Hearing Exhibit 4/23-23.

¹⁰⁹¹ Id.

¹⁰⁹² Id.

¹⁰⁹³ Id.

¹⁰⁹⁴ Id.

¹⁰⁹⁵ 6/12/2007 email from Moody's to Merrill Lynch, Hearing Exhibit 4/23-23 Addendum.

“Sarah and I have been working with James Yao from UBS but we have not been getting cooperation from him. He has told me that I am jeopardizing the deal. ... This is the third time that he refuses to model the cashflow according to the Indenture and Criteria.”¹⁰⁹⁶

A few days later, in an April 5, 2007 instant message, one S&P analyst wrote: “[W]hat happened? ... [I] heard some fury.” His colleague responded that it was Mr. Yao, the UBS banker.¹⁰⁹⁷ Later the same day, an S&P manager wrote that the three analysts:

“[W]ould like to give us a heads-up with respect to the lack of responsiveness/cooperation from UBS ... on Vertical 2007-1. There seems to be a general lack of interest to work WITH us, incorporate our comments, or modeling to our criteria. Based on their collective difficult experience so far, our analysts estimate a smooth closing is unlikely. (The behavior is not limited to this deal either.)”¹⁰⁹⁸

An S&P senior director responded:

“Vertical is politically closely tied to B of A – and is mostly a marketing shop – helping to take risk off books of B o A. Don’t see why we have to tolerate lack of cooperation. Deals likely not to perform.”¹⁰⁹⁹

Despite the uncooperative investment banker and prediction that the CDO was unlikely to perform, S&P analysts continued to work hard on the rating. One of the analysts sent an email to her colleagues describing their efforts to get the CDO to pass tests for issuing investment grade ratings:

“Just wanted to let you know that this deal is closing and going Effective next Tuesday, but our rated Equity tranche (BBB) is failing in our cashflow modeling.

“Sarah tried a lot of ways to have the model passed. Unfortunately we are still failing by 1bp [basis point], without any stress runs and without modeling certain fees (anticipated to be minimal).

“In addition, we already incorporated the actual ramped up portfolio, and not a hypothetical one, for this exercise.”¹¹⁰⁰

After another day of work, the analyst reported she had found a “mistake” that, when corrected, would allow Vertical to get the desired investment grade credit ratings:

¹⁰⁹⁶ 3/30/2007 email from Lois Cheng, “Vertical ABS CDO 2007-1, Ltd. UBS,” Hearing Exhibit 4/23-94c.

¹⁰⁹⁷ 4/5/2007 instant message exchange between Brian Trant and Shannon Mooney, Hearing Exhibit 4/23-94a.

¹⁰⁹⁸ 4/5/2007 email from Bujiang Hu to Peter Kambeseles, and others, Hearing Exhibit 4/23-94b [emphasis in the original].

¹⁰⁹⁹ 4/5/2007 email from James Halprin to Bujiang Hu and others, Hearing Exhibit 4/23-94b.

¹¹⁰⁰ 4/5/2007 email from Lois Cheng to Brian O’Keefe and Peter Kambeseles, and others, Hearing Exhibit 4/23-94c.

“Just wanted to update you guys on Vertical. The model is passing now. We found a mistake in the waterfall modeling that was more punitive than necessary. James Yao [the UBS investment banker] has been notified and is probably having a chuckle at our expense. I still feel that his attitude toward our rating process and our team still needs to be addressed in some way.”¹¹⁰¹

These emails show S&P analysts expending great effort to provide favorable ratings to the UBS CDO, despite concerns about its creditworthiness.¹¹⁰²

On April 10, 2007, just three months before the July 2007 mass downgrades of subprime RMBS, S&P issued ratings for the Vertical securitization. All but one of the nine tranches were given investment grade ratings, with the top three receiving AAA. Moody’s issued similar ratings.¹¹⁰³

Four months later in August 2007, all but the top three tranches were put on credit watch.¹¹⁰⁴ Two months after that, in October, Moody’s downgraded all but one of the Vertical securities to junk status.¹¹⁰⁵ In 2008, the CDO was liquidated.¹¹⁰⁶ The chart below shows how the various tranches were originally rated by S&P, only to be downgraded to a D—the rating given to securities in default.

ISSUE ID	ISSUER NAME	SERIES	COLLATERAL TYPE	SALE DATE	RATING		
					ORIGINAL	11/1/2007	1/31/2010
829994	Vertical ABS CDO 2007-1, Ltd		CDO.HYB.MZ.CDO.OF.ABS	4/10/2007	AAA	AAA	D
829994	Vertical ABS CDO 2007-1, Ltd		CDO.HYB.MZ.CDO.OF.ABS	4/10/2007	AAA	AAA	D
829994	Vertical ABS CDO 2007-1, Ltd		CDO.HYB.MZ.CDO.OF.ABS	4/10/2007	AAA	AAA	D
829994	Vertical ABS CDO 2007-1, Ltd		CDO.HYB.MZ.CDO.OF.ABS	4/10/2007	AA	AA	D
829994	Vertical ABS CDO 2007-1, Ltd		CDO.HYB.MZ.CDO.OF.ABS	4/10/2007	A	A	D
829994	Vertical ABS CDO 2007-1, Ltd		CDO.HYB.MZ.CDO.OF.ABS	4/10/2007	BBB	BBB	D
829994	Vertical ABS CDO 2007-1, Ltd		CDO.HYB.MZ.CDO.OF.ABS	4/10/2007	BBB-	BBB-	D
829994	Vertical ABS CDO 2007-1, Ltd		CDO.HYB.MZ.CDO.OF.ABS	4/10/2007	BB	BB	D
829994	Vertical ABS CDO 2007-1, Ltd		CDO.HYB.MZ.CDO.OF.ABS	4/10/2007	BBB-	BBB-	D

¹¹⁰¹ 4/6/2007 email from Lois Cheng to Brian O’Keefe and Peter Kambeseles, and others, Hearing Exhibit 4/23-94c.

¹¹⁰² For a similar situation involving an RMBS, see 2/8/2006 email exchange among S&P analysts, “EMC Compares,” PSI-SP-000362, Hearing Exhibit 4/23-7 (describing how an analyst worked to find a way to reduce the size of the cushion that an RMBS had to set aside to protect its investment grade tranches from loss, and found that changing the way first loan payment dates were reported in LEVELS would produce a slight reduction; a colleague responded: “I don’t think this is enough to satisfy them. What’s the next step?”).

¹¹⁰³ 4/2007 Moody’s internal memorandum from Saiyid Islam and Peter Hallenbeck to the Derivatives Rating Committee, Hearing Exhibit 4/23-94d. Moody’s gave investment grade ratings to seven of the eight tranches it rated, including AAA ratings to the top three tranches.

¹¹⁰⁴ Moody’s downgrade of Vertical ABS CDO 2007-1, Hearing Exhibit 4/23-94k.

¹¹⁰⁵ Id.; 10/25/2007 “Moody’s Downgrades Vertical ABS CDO 2007-1 Notes; Further Downgrades Possible,” Moody’s; 1/14/2008 and 6/23/2008 “Moody’s downgrades ratings of Notes issued by Vertical ABS CDO 2007-1, Ltd.,” Moody’s; 9/11/2008 “Moody’s withdraws ratings of Notes issued by 34 ABS CDOs,” Moody’s. Moody’s downgraded all but the super senior Vertical tranche to junk status in October 2007, just six months after giving investment grade ratings to seven of the eight tranches it rated. See 10/24/2007 email from Jonathan Polansky to Moody’s colleagues, Hearing Exhibit 4/23-94f. S&P followed suit on November 14, 2007, downgrading all but two of Vertical’s tranches, with five falling to junk status. 11/14/2007 “112 Ratings Lowered on 21 U.S. Cash Flow, Hybrid CDOs of ABS; \$4.689B In Securities Affected,” S&P.

¹¹⁰⁶ 9/11/2008 “Moody’s Withdraws Ratings of Notes Issued by 34 ABS CDOs,” Moody’s.

One of the purchasers of Vertical securities, a hedge fund called Pursuit Partners, sued UBS, S&P, and Moody's over the quick default. Both credit rating agencies filed successful motions to be dismissed from the lawsuit, but the court ordered UBS to set aside \$35 million for a possible award to the investor. The investor had found internal UBS emails calling the investment grade Vertical securities "crap."¹¹⁰⁷

Barring Analysts. Rating analysts who insisted on obtaining detailed information about transactions sometimes became unpopular with investment bankers who pressured the analysts' directors to have them barred from rating their deals. One Moody's analyst, Richard Michalek, testified before the Subcommittee that he was prohibited from working on RMBS transactions for several banks because he scrutinized deals too closely. He stated:

"During my tenure at Moody's, I was explicitly told that I was 'not welcome' on deals structured by certain banks. ... I was told by my then-current managing director in 2001 that I was 'asked to be replaced' on future deals by ... CSFB [Credit Suisse First Boston], and then at Merrill Lynch. Years later, I was told by a different managing director that a CDO team leader at Goldman Sachs also asked, while praising the thoroughness of my work, that after four transactions he would prefer another lawyer be given an opportunity to work on his deals."¹¹⁰⁸

This analyst's claim was corroborated by the Moody's Managing Director who was his superior at the time.¹¹⁰⁹

At the Subcommittee's April 23 hearing, Yuri Yoshizawa, the Senior Managing Director of Moody's Derivatives Group testified that the relationship between CDO analysts and investment banks "could get very contentious and very abusive."¹¹¹⁰ She testified that she did get complaints from investment banks who wanted analysts removed from conducting their ratings, because they were unhappy with those analysts. She testified that "[t]here was always pressure from banks, including [removing analysts from transactions]."¹¹¹¹ She stated that she did, in fact, remove analysts from rating certain banks' transactions, but claimed she did so to protect the analysts from abuse rather than to appease the complaining bank.¹¹¹² When asked whether she ever protected her analysts by instead banning the abusive bank employee from Moody's interactions, she could not recall taking that action.

¹¹⁰⁷ 8/28/2007 email from Evan Malik (UBS) to Hugh Corcoran (UBS) regarding Pursuit Partners' purchase of Vertical securities, Hearing Exhibit 4/23-94n.

¹¹⁰⁸ Michalek prepared statement at 16.

¹¹⁰⁹ Prepared statement of Gary Witt, Former Managing Director, Moody's Investors Service, submitted by request to the Financial Crisis Inquiry Commission (6/2/2010) at 6-7.

¹¹¹⁰ April 23, 2010 Subcommittee Hearing at 64. Employees from both Moody's and S&P confirmed this abusive conduct in interviews with the Subcommittee, which was also corroborated in emails. Subcommittee interviews of Richard Michalek (1/18/2010) and Eric Kolchinsky (10/7/2009). See also, e.g., 4/6/2007 email from Lois Cheng to Brian O'Keefe and Peter Kambeseles, and others, Hearing Exhibit 4/23-94c.

¹¹¹¹ April 23, 2010 Subcommittee Hearing at 65.

¹¹¹² Id. at 64, 66.

Ratings Shopping. It is not surprising that credit rating agencies at times gave into pressure from the investment banks and accorded them undue influence in the ratings process. The rating companies were directly dependent upon investment bankers to bring them business and were vulnerable to threats that the investment bankers would take their business elsewhere if they did not get the ratings they wanted. Moody's Chief Credit Officer told the Subcommittee staff that ratings shopping, the practice in which investment banks chose the credit rating agency offering the highest rating for a proposed transaction, was commonplace prior to 2008.¹¹¹³

Ratings shopping inevitably weakens standards as each credit rating agency seeks to provide the most favorable rating to win business. It is a conflict of interest problem that results in a race to the bottom – with every credit rating agency competing to produce credit ratings to please its paying clients. Moody's CEO described the problem this way: “What happened in '04 and '05 with respect to subordinated tranches is that our competition, Fitch and S&P, went nuts. Everything was investment grade. It didn't really matter.”¹¹¹⁴

All of the witnesses who were questioned about ratings shopping during the Subcommittee's hearing confirmed its existence:

Senator Levin: Ms. Yoshizawa [Senior Managing Director, Moody's Derivatives Group], we were advised by Moody's Chief Credit Officer that it was common knowledge that ratings shopping occurred in structured finance. In other words, investment bankers sought ratings from credit rating agencies who would give them their highest ratings. Would you agree with that?

Ms. Yoshizawa: I agree that credit shopping does exist, yes.

Senator Levin: Ms. Barnes [Managing Director, S&P RMBS Group], would you agree that the same thing existed in your area?

Ms. Barnes: Yes, Mr. Chairman.¹¹¹⁵

Moody's CEO, Ray McDaniel echoed this concern during the hearing:

Senator Levin: There are a lot of interesting things there that your Chief Credit Officer, Mr. Kimball, wrote in October of 2007 One of the things he wrote, and this is under market share, he says in paragraph five, ‘Ideally, competition would be primarily on the basis of ratings quality’ – that is ideally – ‘with a second component of price and a third

¹¹¹³ Subcommittee interview of Andy Kimball (4/15/2010). See also 2007 Moody's draft “2007 Operating Plan: Public Finance, Global Structured Finance and Investor Services,” prepared by Brian Clarkson, MIS-OCIE-RMBS-0419014-53, at 25. In a draft presentation Clarkson wrote: “Challenges for 2007 ... Competitive issues (ex. Rating inflation, successful rating shopping)” He also noted in the presentation “increased ‘rating shopping’ by market participants.”

¹¹¹⁴ 9/10/2007 Transcript of Raymond McDaniel at Moody's MD Town Hall Meeting, at 63, Hearing Exhibit 4/23-98.

¹¹¹⁵ April 23, 2010 Subcommittee Hearing at 66-67.

component of service. Unfortunately, of the three competitive factors, rating quality is proving the least powerful.’ ... ‘It turns out that ratings quality has surprisingly few friends; issuers want high ratings; investors don’t want rating downgrades; short-sighted bankers labor short-sightedly to game the rating agencies for a few extra basis points on execution.’ Would you agree with that?

Mr. McDaniel: In this section, he is talking about the issue of rating shopping, and I agree that that existed then and exists now.¹¹¹⁶

(3) Inaccurate Models

The conflict of interest problem was not the only reason that Moody’s and S&P issued inaccurate RMBS and CDO credit ratings. Another problem was that the credit rating models they used were flawed. Over time, from 2004 to 2006, S&P and Moody’s revised their rating models, but never enough to produce accurate forecasts of the coming wave of mortgage delinquencies and defaults. Key problems included inadequate performance data for the higher risk mortgages flooding the mortgage markets and inadequate correlation factors.

In addition, the companies failed to provide their ratings personnel with clear, consistent, and comprehensive criteria to evaluate complex structured finance deals. The absence of effective criteria was particularly problematic, because the ratings models did not conclusively determine the ratings for particular transactions. Instead, modeling results could be altered by the subjective judgment of analysts and their supervisors. This subjective factor, while unavoidable due to the complexity and novelty of the transactions being rated, rendered the process vulnerable to improper influence and inflated ratings.

(a) Inadequate Data

CRA analysts relied on their firm’s quantitative rating models to calculate the probable default and loss rates for particular pools of assets. These models were handicapped, however, by a lack of relevant performance data for the high risk residential mortgages supporting most RMBS and CDO securities, by a lack of mortgage performance data in an era of stagnating or declining housing prices, by the credit rating agencies’ unwillingness to devote sufficient resources to update their models, and by the failure of the models to incorporate accurate correlation assumptions predicting how defaulting mortgages might affect other mortgages.

Lack of High Risk Mortgage Performance Data. The CRA models failed, in part, because they relied on historical data to predict how RMBS securities would behave, and the models did not use adequate performance data in the development of criteria to rate subprime and other high risk mortgages that proliferated in the housing market in the years leading up to the financial crisis. From 2004 through 2007, many RMBS and CDO securities were comprised of residential mortgages that were not like those that had been modeled in the past. As one S&P email observed:

¹¹¹⁶ April 23, 2010 Subcommittee Hearing at 100-101.

“[T]he assumptions and the historical data used [in the models] ... never included the performance of these types of residential mortgage loans The data was gathered and computed during a time when loans with over 100% LTV or no stated income were rare.”¹¹¹⁷

In contrast to decades of actual performance data for 30-year mortgages with fixed interest rates, the new subprime, high risk products had little to no track record to predict their rates of default. In fact, Moody’s RMBS rating model was not even used to rate subprime mortgages until December 2006; prior to that time, Moody’s used a system of “benchmarking” in which it rated a subprime mortgage pool by comparing it to other subprime pools Moody’s had already rated.¹¹¹⁸

Lack of Data During Era of Stagnant or Falling Home Prices. In addition, the models operated with subprime data for mortgages that had not been exposed to stagnant or falling housing prices. As one February 2007 presentation from a Deutsche Bank investment banker explained, the models used to calculate “subprime mortgage lending criteria and bond subordination levels are based largely on performance experience that was mostly accumulated since the mid-1990s, when the nation’s housing market has been booming.”¹¹¹⁹ A former managing director in Moody’s Structured Finance Group put it this way: “[I]t was ‘like observing 100 years of weather in Antarctica to forecast the weather in Hawaii.’”¹¹²⁰ In September 2007, after the crisis had begun, an S&P executive testified before Congress that:

“[W]e are fully aware that, for all our reliance on our analysis of historically rooted data that sometimes went as far back as the Great Depression, some of that data has proved no longer to be as useful or reliable as it has historically been.”¹¹²¹

The absence of relevant data for use in RMBS modeling left the credit rating agencies unable to accurately predict mortgage default and loss rates when housing prices stopped climbing. The absence of relevant performance data for high risk mortgage products in an era of stagnant or declining housing prices impacted the rating of not only RMBS transactions, but also CDOs, which typically included RMBS securities and relied heavily on RMBS credit ratings.

Lack of Investment. One reason that Moody’s and S&P lacked relevant loan performance data for their RMBS models was not simply that the data was difficult to obtain, but

¹¹¹⁷ 9/30/2007 email from Belinda Ghetty to David Teshler, and others, Hearing Exhibit 4/23-33.

¹¹¹⁸ See 2008 SEC Examination Report for Moody’s Investor Services Inc., PSI-SEC (Moody’s Exam Report)-14-0001-16, at 3.

¹¹¹⁹ 2/2007 “Shorting Home Equity Mezzanine Tranches,” Deutsche Bank Securities Inc., DBSI_PSI_EMAIL01988773-845, at 776. See also 6/4/2007 FDIC memorandum from Daniel Nuxoll to Stephen Funaro, “ALLL Modeling at Washington Mutual,” FDIC_WAMU_000003743-52, at 47 (“Virtually none of the data is drawn from an episode of severe house price depreciation. Even introductory statistics textbooks caution against drawing conclusions about possibilities that are outside the data. A model based on data from a relatively benign period in the housing market cannot produce reliable inferences about the effects of a housing price collapse.”).

¹¹²⁰ “Triple-A Failure,” *New York Times* (4/27/2008).

¹¹²¹ Prepared statement of Vickie Tillman, S&P Executive Vice President, “The Role of Credit Rating Agencies in the Structured Finance Market,” before U.S. House of Representatives Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, Cong.Hrg. 110-62 (9/27/2007), S&P SEN-PSI 0001945-71, at 46-47.

that both companies were reluctant to devote the resources needed to improve their modeling, despite soaring revenues.

Moody's senior managers even expressed skepticism about whether new loan data was needed and, in fact, generally did not purchase new loan data for a four-year period, from 2002 to 2006.¹¹²² In a 2000 internal email exchange, the head of Moody's Structured Finance Group at the time, Brian Clarkson, wrote the following regarding the purchasing of data for Moody's RMBS model:

"I have a wild thought also – let[']s not even consider BUYING anymore data, programs, software or companies until we figure out what we have and what we intend to do with what we have. From what I have heard and read so far we have approaches (MBS, Tranching and Spread) few use or understand (let alone being able to explain it to the outside) and new data that we are unable to use. We want more data when most of the time we rate MBS deals using arbitrary rule of thumb?!! ...

"I suggest we spend less time asking for more data and software (I have not seen anything that sets forth the gains in revenue from such spending -- it is easy to ask for \$\$ -- much harder to justify it against competing projects) and more time figuring out how to utilize what we have by way of good analysis, a solid approach to this market a proper staffing model."¹¹²³

In response to Brian Clarkson's email, a managing director wrote:

"As you know, I don't think we need to spend a lot of \$ or resources to improve the model from an analytic perspective; but I'd need to defer to people more in the loop (looks like you're that person) on whether the marketing component mandates some announcement of model and data improvement. ...

Make sure you talk to Noel and maybe Fons about the decision to buy the data; I was invited to the original meeting so that the powers that be (at the time) could understand the data originally used. I felt that the arguments for buying the data and re-inventing the model were not persuasive The most convincing argument for buying the data was that it would be a cornerstone for marketing, that S&P touted the size of their database as a competitive advantage and that this was why they had the market share advantage."¹¹²⁴

Moody's advised the Subcommittee that, in fact, it generally did not obtain any new loan data for its RMBS model development for four years, from 2002 until 2006, although it continued to improve its RMBS model in other ways.¹¹²⁵ In 2005, a Moody's employee survey

¹¹²² 2/24/2011 Response from Moody's to Subcommittee questions. The Subcommittee asked Moody's to provide information on any new data it had received or purchased for its models from 2002 to 2007.

¹¹²³ 11/3/2000 email from Brian Clarkson to David Zhai and others, PSI-MOODYS-RFN-000007.

¹¹²⁴ 11/13/2000 email from Jay Siegel to Brian Clarkson, PSI-MOODYS-RFN-000007.

¹¹²⁵ 2/17/2011 and 2/24/2011 Responses from Moody's to Subcommittee questions.

found that the company's employees felt that Moody's should have been spending more resources on improving its models.¹¹²⁶ In 2006, Moody's obtained new loan level data for use in its new subprime model, M3 Subprime.¹¹²⁷

In contrast to Moody's, S&P did purchase new loan data on several occasions from 2002 to 2006, but told the Subcommittee that this data did not provide meaningful results that could be used in its RMBS model prior to 2006.¹¹²⁸ In 2002, for example, S&P said that it purchased data on approximately 640,000 loans, including ARM and hybrid loans. S&P told the Subcommittee that it developed an equation from that data set which predicted a lower default rate for ARM and hybrid loans than for fixed rate loans. S&P considered this counter-intuitive and chose not to incorporate it into its model.¹¹²⁹ In 2005, S&P purchased data on another 2.9 million loans that included first and second liens for prime, subprime, Alt A, high LTV, and home equity loans.¹¹³⁰ S&P claimed that it made "concerted efforts to analyze" this data, "both by employing external consultants and dedicating resources within Standard & Poor's to analyze the data for criteria development."¹¹³¹

Contrary to S&P's claim, the former head of the S&P RMBS Ratings Group, Frank Raiter, who worked at S&P until 2005, told the Subcommittee that management did not provide him with sufficient resources to analyze the data and develop improved criteria for the RMBS model.¹¹³² Mr. Raiter told the Subcommittee that he personally informed S&P's senior management about the need to update S&P's model with better loan data several years before the crisis.¹¹³³ Mr. Raiter also testified that the "analysts at S&P had developed better methods for determining default which did capture some of the variations among products that were to become evident at the advent of the crisis,"¹¹³⁴ but those methods were not incorporated into the RMBS model before he left in 2005. Mr. Raiter said that "[i]t is my opinion that had these models been implemented we would have had an earlier warning about the performance of many of the new products that subsequently lead [sic] to such substantial losses."¹¹³⁵

¹¹²⁶ 4/7/2006 "Moody's Investor Service, BES-2005: Presentation to Derivatives Team." Hearing Exhibit 4/23-92b.

¹¹²⁷ 2/24/2011 Response from Moody's to Subcommittee questions. Moody's also advised the Subcommittee that it "generally receives, as part of the surveillance process, updated loan performance statistics on a monthly basis for the collateral pools of the transactions it has rated." Moody's told the Subcommittee that its surveillance data tracked the deterioration in the RMBS market, and its rating committee members were able to incorporate that information into their rating considerations. 2/17/2011 Response from Moody's to Subcommittee questions.

¹¹²⁸ 2/10/2011 Response from S&P to Subcommittee questions.

¹¹²⁹ *Id.*

¹¹³⁰ *Id.*

¹¹³¹ *Id.* S&P also told the Subcommittee that, between 2001 and 2008, it updated its RMBS model multiple times, using other types of data and analytical improvements. 2/2010 Standard & Poor's Presentation on LEVELS, PSI-Standard&Poor's-04-0001-0025, at 6.

¹¹³² Subcommittee interviews of Frank Raiter (7/15/2009 and 4/8/2010).

¹¹³³ *Id.* See also prepared statement of Frank Raiter, "Credit Rating Agencies and the Financial Crisis," before the U.S. House of Representatives Committee on Oversight and Government Reform, Cong.Hrg. 110-155 (10/22/2008), at 5.

¹¹³⁴ Prepared statement of Frank Raiter, "Credit Rating Agencies and the Financial Crisis," before the U.S. House of Representatives Committee on Oversight and Government Reform, Cong.Hrg. 110-155 (10/22/2008), at 5-6.

¹¹³⁵ *Id.*

According to Mr. Raiter, even though S&P revenues had increased dramatically and were generated in large part by the RMBS Group, senior management had no interest in committing the resources needed to update the RMBS model with improved criteria from the new loan data. Mr. Raiter said that S&P did not spend sufficient money on better analytics, because S&P already dominated the RMBS ratings market: “[T]he RMBS group enjoyed the largest ratings market share among the three major rating agencies (often 92% or better), and improving the model would not add to S&P’s revenues.”¹¹³⁶

Poor Correlation Risk Assumptions. In addition to using inadequate loan performance data, the S&P and Moody’s credit rating models also incorporated inadequate assumptions about the correlative risk of mortgage backed securities. Correlative risk measures the likelihood of multiple negative events happening simultaneously, such as the likelihood of RMBS assets defaulting together. It examines the likelihood, for example, that two houses in the same neighborhood will default together compared to two houses in different states. If the neighborhood houses are more likely to default together, they would have a higher correlation risk than the houses in different states.

The former head of S&P’s Global CDO Group, Richard Gugliada, told the Subcommittee that the inaccurate RMBS and CDO ratings issued by his company were due, in part, to wrong assumptions in the S&P models about correlative risk.¹¹³⁷ Mr. Gugliada explained that, because CDOs held fewer assets than RMBS, statistical analysis was less helpful, and the modeling instead required use of significant performance assumptions, including on correlative risk. He explained that the primary S&P CDO model, the “CDO Evaluator,” ran 1,000 simulations to determine how a pool would perform. These simulations ran on a set of assumptions that took the place of historical performance data, according to Mr. Gugliada, and included assumptions on the probability of default and the correlation between assets if one or more assets began to default. He said that S&P believed that RMBS assets were more likely to default together than, for example, corporate bonds held in a CDO. He said that S&P had set the probability of corporate correlated defaults at 30 out of 100, and set the probability of RMBS correlated defaults at 40 out of 100. He said that the financial crisis has now shown that the RMBS correlative assumptions were far too low and should have been set closer to 80 or 90 out of 100.¹¹³⁸

On one occasion in 2006, an outside party also highlighted a problem with the S&P model’s consideration of correlative risk. On March 20, 2006, a senior managing director at Aladdin Capital Management, LLC sent an email to S&P expressing concern about a later version of its CDO model, Evaluator 3:

“Thanks for a terrific presentation at the UBS conference. I mentioned to you a possible error in the new Evaluator 3.0 assumptions:

¹¹³⁶ Id. at 6.

¹¹³⁷ Subcommittee interview of Richard Gugliada, Former Head of S&P’s CDO Ratings Group (10/9/2009).

¹¹³⁸ Id.

Two companies in the same Region belonging to two *different* local Sectors are assumed to be correlated (by 5%), while if they belong to the *same* local Sector then they are *uncorrelated*.

I think you probably didn't mean that."¹¹³⁹

Apparently, this problem with the model had already been identified within S&P. Two S&P employees discussed the problem on the same email, with one saying:

"I have already brought this issue up and it was decided that it would be changed in the future, the next time we update the criteria. ... [T]he correlation matrix is inconsistent."

Despite this clear problem resulting in the understatement of correlative risk for assets in the same region, S&P in this instance did not immediately take the steps needed to repair its CDO model.

At Moody's, a former Managing Director of the CDO Group, Gary Witt, observed a different set of correlation problems with Moody's CDO model. Mr. Witt, who was responsible for managing Moody's CDO analysts as well as its CDO modeling, told the Subcommittee that he had become uncomfortable with the lack of correlation built into the company's methodology.¹¹⁴⁰ According to Mr. Witt, Moody's model, which then used the "Binomial Expansion Technique (BET)," addressed correlation by having a diversity score at a time when CDOs had diverse assets such as credit cards or aircraft lease revenues, in addition to RMBS securities. By 2004, however, Mr. Witt said that most CDOs contained primarily RMBS assets, lacked diversity, and made little use of the diversity score.

Mr. Witt told the Subcommittee that, from 2004 to 2005, he worked on modifying the BET model to improve its consideration of correlation factors. According to Mr. Witt, modeling changes like the one he worked on had to be done on an employee's own time – late nights and weekends – because there was no time during the work week due to the volume of deals. Indeed, during his eighteen month tenure as a Managing Director in the CDO Group, Mr. Witt "spent a huge amount of time working on methodology because the ABS CDO market especially was in transition from multi-sector to single sector transactions [RMBS]" which he felt necessitated an update of Moody's model.¹¹⁴¹ Mr. Witt indicated that, in June 2005, Moody's CDO model was changed to incorporate part of his suggested improvements, but did not go as far as he had proposed. When asked about this 2005 decision, Mr. Witt indicated that he did not feel that Moody's was getting the ratings wrong for CDOs with RMBS assets, but he did "think that we [Moody's] were not allocating nearly enough resources to get the ratings right."¹¹⁴²

¹¹³⁹ 3/20/2006 email from Isaac Efrat (Aladdin Capital Management LLC) to David Tesher (S&P), Hearing Exhibit 4/23-26 [emphasis in original].

¹¹⁴⁰ Subcommittee interview of Gary Witt, Former Managing Director, Moody's Investors Service (10/29/2009).

¹¹⁴¹ 6/2/2010 Statement of Gary Witt, Former Managing Director, Moody's Investors Service, submitted by request to the Financial Crisis Inquiry Commission, at 11.

¹¹⁴² Id. at 21.

The lack of performance data for high risk residential mortgage products, the lack of mortgage performance data in an era of stagnating or declining housing prices, the failure to expend resources to improve their model analytics, and incorrect correlation assumptions meant that the RMBS and CDO models used by Moody's and S&P were out of date, technically deficient, and could not provide accurate default and loss predictions to support the credit ratings being issued. Yet Moody's and S&P analysts told the Subcommittee that their analysts relied heavily on their model outputs to project the default and loss rates for RMBS and CDO pools and rate RMBS and CDO securities.

(b) Unclear and Subjective Ratings Process

Obtaining expected default and loss analysis from the Moody's and S&P credit rating models was only one aspect of the work performed by RMBS and CDO analysts. Equally important was their effort to analyze a proposed transaction's legal structure, cash flow, allocation of revenues, the size and nature of its tranches, and its credit enhancements. Analyzing each of these elements involved often complex judgments about how a transaction would work and what impact various factors would have on credit risk. Although both Moody's and S&P published a number of criteria, methodologies, and guidance on how to handle a variety of credit risk factors, the novelty and complexity of the RMBS and CDO transactions, the volume and speed of the ratings process, and inconsistent applications of the various rules, meant that CRA analysts were continuously faced with issues that were difficult to resolve about how to analyze a transaction and apply the company's standards. Evidence obtained by the Subcommittee indicates that, at times, ratings personnel acted with limited guidance, unclear criteria, and a limited understanding of the complex deals they were asked to rate.

Many documents obtained by the Subcommittee disclosed confusion and a high level of frustration from RMBS and CDO analysts about how to handle ratings issues and how the ratings process actually worked. In May 2007, for example, one S&P employee wrote: "[N]obody gives a straight answer about anything around here [H]ow about we come out with new [criteria] or a new stress and ac[tu]ally have clear cut parameters on what the hell we are supposed to do."¹¹⁴³ Two years earlier, in May 2005, an S&P analyst complaining about a rating decision wrote:

"Chui told me that while the three of us voted 'no', in writing, that there were 4 other 'yes' votes. ... [T]his is a great example of how the criteria process is NOT supposed to work. Being out-voted is one thing (and a good thing, in my view), but being out-voted by mystery voters with no 'logic trail' to refer to is another. ... Again, this is exactly the kind of backroom decision-making that leads to inconsistent criteria, confused analysts, and pissed-off clients."¹¹⁴⁴

¹¹⁴³ 5/8/2007 instant message exchange between Shannon Mooney and Andrew Loken, Hearing Exhibit 4/23-30b.

¹¹⁴⁴ 5/12/2005 email from Michael Drexler to Kenneth Cheng and others, Hearing Exhibit 4/23-10c. In a similar email, S&P employees discuss questionable and inconsistent application of criteria. 8/7/2007 email from Andrew Loken to Shannon Mooney, Hearing Exhibit 4/23-96a ("Back in May, the deal had 2 assets default, which caused it to fail. We tried some things, and it never passed anything I ran. Next thing I know, I'm told that because it had

When asked by the SEC to compile a list of its rating criteria in 2007, S&P was unable to identify all of its criteria for making rating decisions. The head of criteria for the structured finance department, for example, who was tasked with gathering information for the SEC, wrote in an email to colleagues:

“[O]ur published criteria as it currently stands is a bit too unwieldy and all over the map in terms of being current or comprehensive. ... [O]ur SF [Structured Finance] rating approach is inherently flexible and subjective, while much of our written criteria is detailed and prescriptive. Doing a complete inventory of our criteria and documenting all of the areas where it is out of date or inaccurate would appear to be a huge job”¹¹⁴⁵

The confused and subjective state of S&P criteria, including when the criteria had to be applied, is also evident in a May 2007 email sent by an S&P senior director to colleagues discussing whether to apply a default stress test to certain CDOs:

“[T]he cash-flow criteria from 2004 (see below), actually states [using a default stress test when additional concerns about the CDO are raised] ... in the usual vague S&P’s way Still, consistency is key for me and if we decide we do not need that, fine but I would recommend we do something. Unless we have too many deals in [the] US where this could hurt.”¹¹⁴⁶

Moody’s ratings criteria were equally subjective, changeable, and inconsistent. In an October 2007 internal email, for example, Moody’s Chief Risk Officer wrote:

“Methodologies & criteria are published and thus put boundaries on rating committee discretion. (However, there is usually plenty of latitude within those boundaries to register market influence.)”¹¹⁴⁷

Another factor was that ratings analysts were also under constant pressure to quickly analyze and rate complex RMBS and CDO transactions. To enable RMBS or CDO transactions to meet projected closing dates, it was not uncommon, as shown above, for CRA analysts to grant exceptions to established methodologies and criteria, put off analysis of complex issues to later transactions, and create precedents that investment banks invoked in subsequent

gone effective already, it was surveillance’s responsibility, and I never heard about it again. Anyway, because of that, I never created a new monitor.”).

¹¹⁴⁵ 3/14/2007 email from Calvin Wong to Tom Gillis, Hearing Exhibit 4/23-29. See also 2008 SEC Examination Report for Standard and Poor’s Ratings Services, Inc., PSI-SEC (S&P Exam Report)-14-0001-24, at 6-7 (“[C]ertain significant aspects of the rating processes and the methodologies used to rate RMBS and CDOs were not always disclosed, or were not fully disclosed [S]everal communications by S&P employees to outside parties related to the application of unpublished criteria, such as ‘not all our criteria is published. [F]or example, we have no published criteria on hybrid deals, which doesn’t mean that we have no criteria,’” citing an 8/2006 email from the S&P Director of the Analytical Pool for the Global CDO Group.).

¹¹⁴⁶ 5/24/2007 email from Lapo Guadagnuolo to Belinda Ghetti, and others, Hearing Exhibit 4/23-31.

¹¹⁴⁷ 10/21/2007 Moody’s internal email, Hearing Exhibit 4/23-24b. Although this email is addressed to and from the CEO, the Chief Credit Officer told the Subcommittee that he wrote the memorandum attached to the email. Subcommittee interview of Andy Kimball (4/15/2010).

securitizations. CRA analysts were then compelled to decide whether to follow an earlier exception, revert to the published methodology and criteria, or devise still another compromise. The result was additional confusion over how to rate complex RMBS and CDO securities.

Publication of the CRAs' ratings methodologies and criteria was also inconsistent. According to an October 2006 email sent by an investment banker at Morgan Stanley to an analyst at Moody's, for example, key methodology changes had not been made public: "Our problem here is that nobody has told us about the changes that we are later expected to adhere to. Since there is no published criteria outlining the change in methodology how are we supposed to find out about it?"¹¹⁴⁸ On another occasion, a Moody's analyst sought guidance from senior managers because of the lack of consistency in applying certain criteria. He wrote: "Over time, different chairs have been giving different guidelines at different point[s] of time on how much over-enhancement we need for a bond to be notched up to Aaa."¹¹⁴⁹ In a November 2007 email, another senior executive described the criteria problem this way: "It seems, though, that the more of the ad hoc rules we add, the further away from the data and models we move and the closer we move to building models that ape analysts expectations, no?"¹¹⁵⁰

The rating agency models were called by some the "black box," because they were difficult to understand and not always predictable. Issuers and investors alike vented frustrations toward the black box and that they had to base their decisions on a computer program few understood or could replicate. This email from June 20, 2006, recounts the conversation one Moody's employee had with another over frustrations they had heard from an outside issuer.

"Managers are tired of large 'grids.' They would rather prefer a model based test like what S&P and Fitch do. Pascale disagrees with these managers. As a wrapper, she hates that the credit quality of what she wraps is linked to a black box. Also, she hates the fact that the black box can change from time to time."¹¹⁵¹

A January 2007 email from BlackRock to S&P (and other rating agencies) also complained about the "black box" problem:

"What steps are you taking to better communicate and comfort investors about your ratings process? In other w[o]rds, how do we break the 'black box' that determines enhancement levels?"¹¹⁵²

¹¹⁴⁸ 10/19/2006 email from Graham Jones (Morgan Stanley) to Yuri Yoshizawa (Moody's) and others, Hearing Exhibit 4/23-37. See 2008 SEC Examination Report for Moody's Investor Services Inc., PSI-SEC (Moody's Exam Report)-14-0001-16, at 5 ("[C]ertain significant aspects of the rating processes and the methodologies used to rate RMBS and CDOs were not always disclosed, or were not fully disclosed").

¹¹⁴⁹ 6/28/2007 email from Yi Zhang to Warren Kornfeld and others, Hearing Exhibit 4/23-39.

¹¹⁵⁰ 11/28/2007 email from Roger Stein to Andrew Kimball and Michael Kanef, Hearing Exhibit 4/23-44.

¹¹⁵¹ 6/20/2006 email from Paul Mazataud to Noel Kirnon, MIS-OCIE-RMBS-0035460 [emphasis in original].

¹¹⁵² 1/16/2007 email from Kishore Yalamanchili (BlackRock) to Scott Mason (S&P), Glenn Costello (Fitch Ratings), and others, PSI-S&P-RFN-000044.

At times, some CRA analysts openly questioned their ability to rate some complex securities. In a December 2006 email chain regarding a synthetic CDO squared, for example, S&P analysts appeared challenged by a modeling problem and questioned their ability to rate the product. One analyst wrote: “Rating agencies continue to create and [sic] even bigger monster - the CDO market. Let’s hope we are all wealthy and retired by the time this house of cards falters.”¹¹⁵³ In an email written in a similar vein, an S&P manager preparing for a presentation wrote to her colleagues: “Can anyone give me a crash course on the ‘hidden risks in CDO’s of RMBS’?”¹¹⁵⁴ In an April 2007 instant message, an S&P analyst offered this cynical comment: “[W]e rate every deal[.] [I]t could be structured by cows and we would rate it.”¹¹⁵⁵

(4) Failure to Retest After Model Changes

Another key factor that contributed to inaccurate credit ratings was the failure of Moody’s and S&P to retest outstanding RMBS and CDO securities after improvements were made to their credit rating models. These model improvements generally did not derive from data on new types of high risk mortgages, but were intended to improve the models’ predictive capability,¹¹⁵⁶ but even after they were made, CRA analysts failed to utilize them to downgrade artificially high RMBS and CDO credit ratings.

Key model adjustments were made in 2006 to both the RMBS and CDO models to improve their ability to predict expected default and loss rates for higher risk mortgages. Both Moody’s and S&P decided to apply the revised models to rate new RMBS and CDO transactions, but not to retest outstanding subprime RMBS and CDO securities, even though many of those securities contained the same types of mortgages and risks that the models were recalibrated to evaluate. Had they retested the existing RMBS and CDO securities and issued appropriate rating downgrades starting in 2006, the CRAs could have signaled investors about the increasing risk in the mortgage market, possibly dampened the rate of securitizations, and possibly reduced the impact of the financial crisis.

Surveillance Obligations. Both Moody’s and S&P were obligated by contract to conduct ongoing surveillance of the RMBS and CDO securities they rated to ensure the ratings remained valid over the life of the rated securities. In fact, both companies charged annual surveillance fees to the issuers of the securities to pay for the surveillance costs, and each had established a separate division to carry out surveillance duties. Due to the huge numbers of RMBS and CDO securities issued in the years leading up to the financial crisis, those surveillance divisions were responsible for reviewing tens of thousands of securities. The issue of whether to retest the outstanding securities using the revised credit rating models was, thus, a significant issue affecting numerous securities and substantial company resources.

¹¹⁵³ 12/15/2006 email from Chris Meyer to Belinda Ghatti and Nicole Billick, Hearing Exhibit 4/23-27.

¹¹⁵⁴ 1/17/2007 email from Monica Perelmutter to Kyle Beauchamp, and others, Hearing Exhibit 4/23-28.

¹¹⁵⁵ 4/5/2007 instant message exchange between Shannon Mooney and Rahul Dilip Shah, Hearing Exhibit 4/23-30a.

¹¹⁵⁶ These model improvements still significantly underestimated subprime risk as is evidenced by the sheer number of downgrades that occurred after the model improvements for securities issued in 2006 and 2007.

Increased Loss Protection. In July 2006, S&P made significant adjustments to its subprime RMBS model. S&P had determined that, to avoid an increasing risk of default, subprime RMBS securities required additional credit enhancements that would provide 40% more protection to keep the investment grade securities from experiencing losses.¹¹⁵⁷ Moody's made similar adjustments to its RMBS model around the same time, settling on parameters that required 30% more loss protection. As Moody's explained to the Senate Banking Committee in September 2007:

“In response to the increase in the riskiness of loans made during the last few years and the changing economic environment, Moody's steadily increased its loss expectations and subsequent levels of credit protection on pools of subprime loans. Our loss expectations and enhancement levels rose by about 30% over the 2003 to 2006 time period, and as a result, bonds issued in 2006 and rated by Moody's had more credit protection than bonds issued in earlier years.”¹¹⁵⁸

The determination that RMBS pools required 30-40% more credit enhancements to protect higher rated tranches from loss reflected calculations by the updated CRA models that these asset pools were exposed to significantly more risk of delinquencies and defaults. Requiring increased loss protection meant that Moody's and S&P analysts had to require more revenues to be set aside in each pool to provide AAA ratings greater protection than before the model adjustments. Requiring increased loss protection also meant RMBS pools would have a smaller pool of AAA securities to sell to investors. That meant, in turn, that RMBS pools would produce fewer profits for issuers and arrangers. Requiring increased loss protection had a similar impact on CDOs that included RMBS assets.

Retesting RMBS Securities. Even though S&P and Moody's had independently revised their RMBS models and, by 2006, determined that additional credit enhancements of 30-40% were needed to protect investment grade tranches from loss, in 2006 and the first half of 2007, neither company used its revised models to evaluate existing rated subprime RMBS securities as part of its surveillance efforts.¹¹⁵⁹ Instead S&P, for example, sent out a June 2006 email announcing that no retests would be done:

¹¹⁵⁷ 3/19/2007 “Structured Finance Ratings - Overview and Impact of the Residential Subprime Market,” S&P Monthly Review Meeting, at S&P SEC-PSI 0001473, Hearing Exhibit 4/23-52b.

¹¹⁵⁸ Prepared statement of Michael Kanef, Group Managing Director of Moody's Asset Backed Finance Rating Group, “The Role and Impact of Credit Rating Agencies on the Subprime Credit Markets,” before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, S.Hrg. 110-931 (9/26/2007), at 17.

¹¹⁵⁹ 6/2006 S&P internal email exchange, Hearing Exhibit 4/23-72; and 3/31/2008 Moody's Structured Finance Credit Committee Meeting Notes, Hearing Exhibit 4/23-80. See also 7/16/2007 Moody's email from Joseph Snailer to Qingyu Liu, and others, PSI-MOODYS-RFN-000029 (when an analyst sought guidance on whether to use the new or old methodology for testing unrated tranches of outstanding deals, she was advised: “The ratings you are generating should reflect what we would have rated the deals when they were issued knowing what we knew then and using the methodology in effect then (ie, using the OC model we built then.”); 6/1/2007 email from Moody's Senior Director in Structured Finance, “RE: Financial Times inquiry on transparency of assumptions,” MIS-OCIE-RMBS-0364942-46, at 43.

“Simply put – although the RMBS Group does not ‘grandfather’ existing deals, there is not an absolute and direct link between changes to our new ratings models and subsequent rating actions taken by the RMBS Surveillance Group. As a result, there will not be wholesale rating actions taken in July or shortly thereafter on outstanding RMBS transactions, absent a deterioration in performance and projected credit support on any individual transaction.”¹¹⁶⁰

Moody’s and S&P each advised the Subcommittee that it had decided not to retest any existing rated RMBS securities, because it felt that actual performance data for the pools in question would provide a better indicator of future defaults and loss than application of its statistical model. But actual loan performance data for the subprime mortgages in the pools – the fact that, for example, timely loan payments had been made in the past on most of those loans – provided an incomplete picture regarding whether those payments would continue to be made after home prices stopped climbing, refinancings became difficult, and higher interest rates took effect in many of the mortgages. By focusing only on actual past performance, the ratings ignored foreseeable problems and gave investors false assurances about the creditworthiness of the RMBS and CDO securities.

Some CRA employees expressed concern about the limitations placed on their ability to alter ratings to reflect expected performance of the rated securities. In a July 2007 email just before the mass ratings downgrades began, for example, an S&P senior executive raised concerns about these to the head of the RMBS Surveillance Group as follows:

“Overall, our ratings should be based on our *expectations* of performance, not solely the *month to month* performance record, which will only be backward looking. ... Up to this point, Surveillance has been ‘limited’ in *when* we can downgrade a rating (only *after* it has experienced realized losses), how far we can adjust the rating (no more than 3 notches at a time is preferred), and how high up the capital structure we can go (not downgrading higher rated classes, if they ‘pass’ our stressed cash flow runs).”¹¹⁶¹

In addition, many of the RMBS loans were less than a year old, making any performance data less significant and difficult to analyze. In others words, the loans were too unseasoned or new to offer any real predictive performance value.

¹¹⁶⁰ 6/23/2006 email from Thomas Warrack to Pat Jordan and Rosario Buendia, Hearing Exhibit 4/23-72 [emphasis in original]. Despite this 2006 email, the former head of S&P’s RMBS Group, Frank Raiter, told a House Committee: “At S&P, there was an ongoing, often heated discussion that using the ratings model in surveillance would allow for re-rating every deal monthly and provide significantly improved measures of current and future performance.” Prepared statement of Frank L. Raiter, “Credit Rating Agencies and the Financial Crisis,” before the U.S. House of Representatives Committee on Oversight and Government Reform, Cong.Hrg. 110-155 (10/22/2008), at 7.

¹¹⁶¹ 7/3/2007 S&P email from Cliff Griep to Ernestine Warner and Stephen Anderberg, Hearing Exhibit 4/23-32 [emphasis in original].

Some internal S&P emails suggest alternative explanations for the decision not to retest. In October 2005, for example, an S&P analytic manager in the Structured Finance Ratings Group sent an email to his colleagues asking: “How do we handle existing deals especially if there are material changes [to a model] that can cause existing ratings to change?” His email then laid out what he believed was S&P’s position at that time:

- “I think the history has been to only re-review a deal under new assumptions/criteria when the deal is flagged for some performance reason. I do not know of a situation where there were wholesale changes to existing ratings when the primary group changed assumptions or even instituted new criteria. The two major reasons why we have taken the approach is (i) lack of sufficient personnel resources and (ii) not having the same models/information available for surveillance to relook at an existing deal with the new assumptions (i.e. no cash flow models for a number of assets). The third reason is concerns of how disruptive wholesale rating changes, based on a criteria change, can be to the market.
- CDO is current[ly] debating the issue and appropriate approach as they change the methodology.”¹¹⁶²

This email suggests the reason retesting did not occur was, not because S&P thought actual performance data would produce more accurate ratings for existing pools, but because S&P did not have the resources to retest, and lower ratings on existing deals might have disrupted the marketplace, upsetting investment banks and investors. Several S&P managers and analysts confirmed in Subcommittee interviews that these were the real reasons for the decision not to retest existing RMBS securities.¹¹⁶³ Moody’s documents also suggest that resource constraints may lay behind its decision not to retest.¹¹⁶⁴

The Subcommittee also found evidence suggesting that investment banks may have rushed to have deals rated before the CRAs implemented more stringent revised models. In an attempt to explain why one RMBS security from the same vintage and originator was pricing better than another, a CDO trader wrote:

“Only reasons I can think for my guys showing you a tighter level is that we are very short this one and that the June 06 deals have a taint that earlier months don[’]t due to the theory that late June deals were crammed with bad stuff in order to beat the S & P [model] revisions.”¹¹⁶⁵

¹¹⁶² 10/6/2005 email from Roy Chun, Hearing Exhibit 4/23-62.

¹¹⁶³ Prepared statement of Frank Raiter, Former Managing Director at Standard & Poor’s, April 23, 2010 Subcommittee Hearing, at 2; and Subcommittee interviews of S&P confidential sources (2/24/2010) and (4/9/2010).

¹¹⁶⁴ See, e.g., 3/31/2008 Moody’s Structured Finance Credit Committee Meeting Notes, Hearing Exhibit 4/23-80 (“Currently, following a methodology change, Moody’s does not re-evaluate every outstanding, affected rating. Instead, it reviews only those obligations that it considers most prone to multi-notch rating changes, in light of the revised rating approach. This decision to selectively review certain ratings is made due to resource constraints.”).

¹¹⁶⁵ 10/20/2006 email from Greg Lippmann (Deutsche Bank) to Craig Carlozzi (Mast Capital), DBSI_PSI_EMAIL01774820.

Retesting CDO Securities. The debate over retesting existing CDO securities followed a similar path to the debate over retesting RMBS securities. The CDO Group at S&P first faced the retest question in the summer of 2005, when it made a major change to its CDO model, then Evaluator 3 (E3).¹¹⁶⁶ The S&P CDO Group appeared ready to announce and implement the improved model that summer, but then took more than a year to implement it as the group struggled to rationalize why it would not retest existing CDO securities with the improved assumptions.¹¹⁶⁷ Internal S&P emails indicate that the primary considerations were, again, resource limitations and possible disruption to the CDO market, rather than concerns over accuracy. For instance, in a June 2005 email sent to an S&P senior executive, the head of the CDO Group wrote:

“The overarching issue at this point is what to do with currently rated transactions if we do release a new version of Evaluator. Some of [us] believe for both logistical and market reasons that the existing deals should mainly be ‘grand fathered’. Others believe that we should run all deals using the new Evaluator. The problem with running all deals using E3 is twofold: we don’t have the model or resource capacity to do so, nor do we all believe that even if we did have the capability, it would be the responsible thing to do to the market.”¹¹⁶⁸

Several months later the S&P CDO Ratings Group was still deliberating the issue. In November 2005, an investment banker at Morgan Stanley who had concerns about whether E3 would be used to retest existing deals and those in the pipeline expressed frustration at the delay:

“We are in a bit of a pickle here. My legal staff is not letting me send anything out to any investor on anything with an S&P rating right now. We are waiting for you to tell us ... that you approve the disclaimer or are grandfathering [not retesting with E3] our existing and pipeline deals. My business is on ‘pause’ right now.”¹¹⁶⁹

One S&P senior manager, frustrated by an inability to get an answer on the retesting issue, sent an email to a colleague complaining: “Lord help our f**king scam this has to be the stupidest place I have worked at.”¹¹⁷⁰

¹¹⁶⁶ The CDO models were simulation models dependent upon past credit ratings for the assets they included plus various performance and correlation assumptions. See earlier discussion of these models.

¹¹⁶⁷ 7/12/2005 S&P internal email, “Delay in Evaluator 3.0 incorporation in EOD/CDOi platform,” PSI-S&P-RFN-000017.

¹¹⁶⁸ 6/21/2005 email from Pat Jordan to Cliff Griep, “RE: new CDO criteria,” Hearing Exhibit 4/23-60. See also 3/21/2006 email from an S&P senior official, Hearing Exhibit 4/23-71. (“FYI. Just sat on a panel with Frderic Drevon, my opposite number at Moody’s who fielded a question on what happens to old transactions when there is a change to rating methodologie[s]. The official Moody’s line is that there is no ‘grandfathering’ and that old transactions are reviewed using the new criteria. However, the ‘truth is that we do not have the resources to review thousands of transactions, so we focus on those that we feel are more at risk.’”).

¹¹⁶⁹ 11/23/2005 email from Brian Neer (Morgan Stanley) to Elwyn Wong (S&P), Hearing Exhibit 4/23-64.

¹¹⁷⁰ 11/23/2005 email from Elwyn Wong to Andrea Bryan, Hearing Exhibit 4/23-64.

In May 2006, S&P circulated a draft policy setting up what seemed to be an informal screening process “prior to transition date” to see how existing CDOs would be affected by the revised CDO model. The draft offered a convoluted approach in an apparent attempt to avoid retesting all existing CDOs, which included allowing the use of the prior “E2” model and review “by a special E3 committee.” The draft policy read in part as follows:

“ *****PRIVILEGED AND CONFIDENTIAL - S&P DISCUSSION PURPOSES ONLY*****

Prior to Transition Date (in preparation for final implementation of E3 for cash CDOs):

- A large majority of the pre- E3 cash flow CDOs will be run through E3 in batch processes to see how the ratings look within the new model ...
- Ratings falling *more than* 3 notches +/- from the current tranche rating in the batch process will be reviewed in detail for any modeling, data, performance or other issues
- If any transactions are found to be passing/failing E3 by more than 3 notches due to performance reasons they will be handled through the regular surveillance process to see if the ratings are stable under current criteria (i.e., if they pass E2.4.3 using current cash flow assumptions the ratings will remain unchanged)
- If any transactions are found to be passing/failing E3 by more than 3 notches due to a model gap between E2.4.3 and E3, they will be reviewed by a special E3 committee¹¹⁷¹

It is unclear whether this screening actually took place.

Questions continued to be raised internally at S&P about the retesting issue. In March 2007, almost a year after the change was made in the CDO model, an S&P senior executive wrote to the Chief Criteria Officer in the structured finance department:

“Why did the criteria change made in mid 2006 not impact any outstanding transactions at the time we changed it, especially given the magnitude of the change we are highlighting in the article? Should we apply the new criteria now, given what we now know? If we did, what would be the impact?”¹¹⁷²

In July 2007, the same senior executive raised the issue again in an email asking the S&P Analytic Policy Board to address the alignment of surveillance methodology and new model changes at a “special meeting.”¹¹⁷³ But by then, residential mortgages were already defaulting in record numbers, and the mass downgrades of RMBS and CDO ratings had begun.

¹¹⁷¹ 5/19/2006 email from Stephen Anderberg to Pat Jordan, David Teshler, and others, PSI-S&P-RFN-000021 [emphasis in original].

¹¹⁷² 3/12/2007 email from Cliff Griep to Tom Gillis, and others, PSI-S&P-RFN-000015.

¹¹⁷³ 7/15/2007 email from Tom Gillis to Valencia Daniels, “Special APB meeting,” Hearing Exhibit 4/23-74.

Consequences for Investors. During the April 23 Subcommittee hearing, credit ratings expert, Professor Arturo Cifuentes, explained to the Subcommittee the importance of retesting existing rated deals when there is a model change.

Senator Levin: If a ratings model changes its assumptions or criteria, for instance, if it becomes materially more conservative, how important is it that the credit rating agency use the new assumptions or criteria to re-test or re-evaluate securities that are under surveillance?

Mr. Cifuentes: Well, it is very important for two reasons: Because if you do not do that, you are basically creating two classes of securities, a low class and an upper class, and that creates a discrepancy in the market. At the same time, you are not being fair because you are giving an inflated rating then to a security or you are not communicating to the market that the ratings given before were of a different class.¹¹⁷⁴

Moody's and S&P updated their RMBS and CDO models with more conservative criteria in 2006, but then used the revised models to evaluate only new RMBS and CDO transactions, bypassing the existing RMBS and CDO securities that could have benefited from the new credit analysis. Even with respect to the new RMBS and CDOs, investment banks sought to delay use of the revised models that required additional credit enhancements to protect investment grade tranches from loss. For example, in May 2007, Morgan Stanley sent an email to a Moody's Managing Director with the following:

"Thanks again for your help (and Mark's) in getting Morgan Stanley up-to-speed with your new methodology. As we discussed last Friday, please find below a list of transactions with which Morgan Stanley is significantly engaged already (assets in warehouses, some liabilities placed). We appreciate your willingness to grandfather these transactions [under] Moody's old methodology."¹¹⁷⁵

When asked about the failure of Moody's and S&P to retest existing securities after their model updates in 2006, the global head trader for CDOs from Deutsche Bank told the Subcommittee that he believed the credit rating agencies did not retest them, because to do so would have meant significant downgrades and "they did not want to upset the apple cart."¹¹⁷⁶ Instead, the credit rating agencies waited until 2007, when the high risk mortgages underlying the outstanding RMBS and CDO securities incurred record delinquencies and defaults and then, based upon the actual loan performance, instituted mass ratings downgrades. Those sudden mass downgrades caught many financial institutions and other investors by surprise, leaving them with

¹¹⁷⁴ April 23, 2010 Subcommittee Hearing at 35.

¹¹⁷⁵ 5/2/2007 email from Zach Buchwald (Morgan Stanley Executive Director) to William May (Moody's Managing Director), and others, Hearing Exhibit 4/23-76. See also 4/11/2007 email from Moody's Managing Director to Calyon, PSI-MOODYS-RFN-000040.

¹¹⁷⁶ Subcommittee interview of Greg Lippmann, Former Managing Director and Global Head of Trading of CDOs for Deutsche Bank (10/18/2010). Mr. Lippmann said he thought the agencies' decision not to retest existing securities was "ridiculous."

billions of dollars of suddenly unmarketable securities. The RMBS secondary market collapsed soon after, and the CDO secondary market followed.

(5) Inadequate Resources

In addition to operating with conflicts of interest, models containing inadequate performance data, subjective and inconsistent rating criteria, and a policy against using improved models to retest outstanding RMBS and CDO securities, despite the increasing numbers of ratings issued each year and record revenues as a result, neither Moody's nor S&P hired sufficient staff or devoted sufficient resources to ensure that the initial rating process and the subsequent surveillance process produced accurate credit ratings.

Instead, both Moody's and S&P forced their staffs to churn out new ratings and conduct required surveillance with limited resources. Over time, the credit rating agencies' profits became increasingly connected to issuing a high volume of ratings. By not devoting sufficient resources to handle the high volume of ratings, the strain on resources negatively impacted the quality of the ratings and their surveillance.

High Speed Ratings. From 2000 to 2007, Moody's and S&P issued record numbers of RMBS and CDO ratings. Each year the number of ratings issued by each firm increased. According to SEC examinations of the firms, from 2002 to 2006, "the volume of RMBS deals rated by Moody's increased by 137%, and the number of CDO deals ... increased by 700%."¹¹⁷⁷ At S&P, the SEC determined that over the same time period, "the volume of RMBS deals rated by S&P increased by 130%, and the number of CDO deals ... increased by over 900%."¹¹⁷⁸ In addition to the rapid growth in numbers, the transactions themselves grew in complexity, requiring more time and talent to analyze.

The former head of the S&P RMBS Group, Frank Raiter, described the tension between profits and resources this way: "Management wanted increased revenues and profit while analysts wanted more staff, data and IT support which increased expenses and obviously reduced profit."¹¹⁷⁹

Moody's CEO, Ray McDaniel, readily acknowledged during the Subcommittee's April 23 hearing that resources were stressed and that Moody's was short staffed.¹¹⁸⁰ He testified: "People were working longer hours than we wanted them to, working more days of the week than we wanted them to." He continued: "It was not for lack of having open positions, but with

¹¹⁷⁷ 2008 SEC Examination Report for Moody's Investor Services Inc., PSI-SEC (Moody's Exam Report)-14-0001-16, at 4.

¹¹⁷⁸ 2008 SEC Examination Report for Standard and Poor's Ratings Services, Inc., PSI-SEC (S&P Exam Report)-14-0001-24, at 3.

¹¹⁷⁹ Prepared statement of Frank Raiter, Former Managing Director at Standard & Poor's, April 23, 2010 Subcommittee Hearing, at 1-2.

¹¹⁸⁰ April 23, 2010 Subcommittee Hearing at 96-97.

the pace at which the market was growing, it was difficult to fill positions as quickly as we would have liked.”¹¹⁸¹

Moody’s staff, however, had raised concerns about personnel shortages impacting their work quality as early as 2002. A 2002 survey of the Structured Finance Group staff reported, for example:

“[T]here is some concern about workload and its impact on operating effectiveness. ... Most acknowledge that Moody’s intends to run lean, but there is some question of whether effectiveness is compromised by the current deployment of staff.”¹¹⁸²

Similar concerns were expressed three years later in a 2005 employee survey:

“We are over worked. Too many demands are placed on us for admin[istrative] tasks ... and are detracting from primary workflow We need better technology to meet the demand of running increasingly sophisticated models.”¹¹⁸³

In 2006, Moody’s analyst Richard Michalek worried that investment bankers were taking advantage of the fact that analysts did not have the time to understand complex deals. He wrote:

“I am worried that we are not able to give these complicated deals the attention they really deserve, and that they (CS) [Credit Suisse] are taking advantage of the ‘light’ review and the growing sense of ‘precedent’.”¹¹⁸⁴

Moody’s managers and analysts interviewed by the Subcommittee stated that staff shortages impacted how much time could be spent analyzing a transaction. One analyst responsible for rating CDOs told the Subcommittee that, during the height of the boom, Moody’s analysts didn’t have time to understand the complex deals being rated and had to set priorities on what issues would be examined:

“When I joined the [CDO] Group in 1999 there were seven lawyers and the Group rated something on the order of 40 – 60 transactions annually. In 2006, the Group rated over 600 transactions, using the resources of approximately 12 lawyers. The hyper-growth years from the second half of 2004 through 2006 represented a steady and constant adjustment to the amount of time that could be allotted to any particular deal’s analysis, and with that adjustment, a constant re-ordering of the priority assigned to the issues to be raised at rating Committees.”¹¹⁸⁵

¹¹⁸¹ Id. at 97.

¹¹⁸² 5/2/2002 “Moody’s SFG 2002 Associate Survey: Highlights of Focus Groups and Interviews,” Hearing Exhibit 4/23-92a at 6.

¹¹⁸³ 4/7/2006 “Moody’s Investor Service, BES-2005: Presentation to Derivatives Team,” Hearing Exhibit 4/23-92b.

¹¹⁸⁴ 5/1/2006 email from Richard Michalek to Yuri Yoshizawa, Hearing Exhibit 4/23-19.

¹¹⁸⁵ Michalek prepared statement at 20, n.29.

A Moody's managing director responsible for supervising CDO analysts put it this way in a 2007 email: "Unfortunately, our analysts are o[v]erwhelmed..."¹¹⁸⁶ Moody's CEO testified at the Subcommittee's hearing "[w]e had stress on our resources in this period, absolutely."¹¹⁸⁷ Senator Levin asked him if Moody's was profitable at the time, and he responded "[w]e were profitable, yes."¹¹⁸⁸

S&P also experienced significant resource shortages. In 2004, for example, a managing director in the RMBS Group wrote a lengthy email about the resource problems impacting credit analysis:

"I am trying to put my hat on not only for ABS/RMBS but for the department and be helpful but feel that it is necessary to re-iterate that there is a shortage in resources in RMBS. If I did not convey this to each of you I would be doing a disservice to each of you and the department. As an update, December is going to be our busiest month ever in RMBS. I am also concerned that there is a perception that we have been getting all the work done up until now and therefore can continue to do so.

"We ran our Staffing model assuming the analysts are working 60 hours a week and we are short resources. We could talk about the assumptions and make modifications but the results would be similar. The analysts on average are working longer than this and we are burning them out. We have had a couple of resignations and expect more. It has come to my attention in the last couple of days that we have a number of staff members that are experiencing health issues."¹¹⁸⁹

A May 2006 internal email from an S&P senior manager in the Structured Finance Real Estate Ratings Group expressed similar concerns:

"We spend most of our time keeping each other and our staff calm. Tensions are high. Just too much work, not enough people, pressure from company, quite a bit of turnover and no coordination of the non-deal 'stuff' they want us and our staff to do"¹¹⁹⁰

The head of the S&P CDO Ratings Group sent a 2006 email to the head of the Structured Finance Department to make a similar point. She wrote:

"While I realize that our revenues and client service numbers don't indicate any ill [e]ffects from our severe understaffing situation, I am more concerned than ever that we are on a downward spiral of morale, analytical leadership/quality and client service."¹¹⁹¹

¹¹⁸⁶ 5/23/2007 email from Eric Kolchinsky to Yvonne Fu and Yuri Yoshizawa, Hearing Exhibit 4/23-91.

¹¹⁸⁷ April 23, 2010 Subcommittee Hearing at 97.

¹¹⁸⁸ Id.

¹¹⁸⁹ 12/3/2004 email from Gail McDermott to Abe Losice and Pat Jordan, PSI-S&P-RFN-000034.

¹¹⁹⁰ 5/2/2006 email from Gale Scott to Diane Cory, "RE: Change in scheduling/Coaching sessions/Other stuff," PSI-S&P-RFN-000012.

¹¹⁹¹ 10/31/2006 S&P internal email, "A CDO Director resignation," PSI-S&P-RFN-000001.

Some of the groups came up with creative ways to address their staffing shortages. For example, the head of the S&P RMBS Ratings Group between 2005 and 2007, Susan Barnes, advised the Subcommittee that her group regularly borrowed staff from the S&P Surveillance Group to assist with new ratings. She said that almost half the surveillance staff provided assistance on issuing new ratings during her tenure, and estimated that each person in the surveillance group might have contributed up to 25% of his or her time to issuing new ratings.¹¹⁹²

The Subcommittee investigation discovered a cadre of professional RMBS and CDO rating analysts who were rushed, overworked, and demoralized. They were asked to evaluate increasing numbers of increasingly complex financial instruments at high speed, using out-of-date rating models and unclear ratings criteria, while acting under pressure from management to increase market share and revenues and pressure from investment banks to ignore credit risk. These analysts were short staffed even as their employers collected record revenues.

Resource-Starved Surveillance. Resource shortages also impacted the ability of the credit rating agencies to conduct surveillance on outstanding rated RMBS and CDO securities to evaluate their credit risk. The credit rating agencies were contractually obligated to monitor the accuracy of the ratings they issued over the life of the rated transactions. CRA surveillance analysts were supposed to evaluate each rating on an ongoing basis to determine whether the rating should be affirmed, upgraded, or downgraded. To support this analysis, both companies collected substantial annual surveillance fees from the issuers of the financial instruments they rated, and set up surveillance groups to review the ratings. In the case of RMBS and CDO securities, the Subcommittee investigation found evidence that these surveillance groups may have lacked the resources to properly monitor the thousands of rated products.

At Moody's, for example, a 2007 email disclosed that about 26 surveillance analysts were responsible for tracking over 13,000 rated CDO securities:

"Thanks for sharing the draft of the CDO surveillance piece you're planning to publish later this week. ... In the section about your CDO surveillance infrastructure, we were struck by the data point about the 26 professionals who are dedicated to monitoring CDO ratings. While this is, no doubt, a strong team, we wanted to at least raise the question about whether the company's critics could twist that number – e.g., by comparing it to the 13,000+ CDOs you're monitoring – and once again question if you have adequate resources to do your job effectively. Given that potential risk, we thought you might consider removing any specific reference to the number of people on the CDO surveillance team."¹¹⁹³

The evidence of surveillance shortages at S&P was particularly telling. Although during an interview with the Subcommittee, the head of S&P's RMBS Surveillance Group from 2001 to 2008, Ernestine Warner, said she had adequate resources to conduct surveillance of rated RMBS

¹¹⁹² Subcommittee interview of Susan Barnes (3/18/2010).

¹¹⁹³ 7/9/2007 email to Yuri Yoshizawa, "FW: CDO Surveillance Note 7_071.doc," PSI-MOODYS-RFN-000022.

securities during her tenure, her emails indicate otherwise.¹¹⁹⁴ In emails sent over a two-year period, she repeatedly described and complained about a lack of resources that was impeding her group's ability to complete its work. In the spring of 2006, she emailed her colleague about her growing anxiety:

"RMBS has an all time high of 5900 transactions. Each time I consider what my group is faced with, I become more and more anxious. The situation with Lal [a surveillance analyst], being off line or out of the group, is having a huge impact."¹¹⁹⁵

In June 2006, she wrote that the problems were not getting better:

"It really feels like I am repeating myself when it comes to completing a very simple project and addressing some of the other surveillance needs. ... The inability to make a decision about how the project is going to be resourced is causing undue stress. I have talked to you and Peter [D'Erchia, head of global structured finance surveillance,] about each of the issues below and at this point I am not sure what else you need from me. ...

To rehash the points below:

In addition to the project above that involves some 863 deals, I have a back log of deals that are out of date with regard to ratings. ... We recognize that I am still understaffed with these two additional bodies. ... [W]e may be falling further behind at the rate the deals are closing. If we do not agree on the actual number, certainly we can agree that I need more recourse if I am ever going to be near compliance."¹¹⁹⁶

In December 2006, she wrote:

"In light of the current state of residential mortgage performance, especially sub-prime, I think it would be very beneficial for the RMBS surveillance team to have the work being done by the temps to continue. It is still very important that performance data is loaded on a timely basis as this has an impact on our exception reports. Currently, there are nearly 1,000 deals with data loads aged beyond one month."¹¹⁹⁷

In February 2007, she expressed concerns about having adequate resources to address potential downgrades in RMBS:

"I talked to Tommy yesterday and he thinks that the [RMBS] ratings are not going to hold through 2007. He asked me to begin discussing taking rating actions earlier on the

¹¹⁹⁴ During an interview, the head of RMBS surveillance advised that she believed she was adequately resourced and prioritized her review of outstanding securities by focusing on 2006 and 2007 vintages that had performance problems. Subcommittee interview of Ernestine Warner (3/11/2010).

¹¹⁹⁵ 4/28/2006 email from Ernestine Warner to Roy Chun, and others, Hearing Exhibit 4/23-82.

¹¹⁹⁶ 6/1/2006 emails from Ernestine Warner to Roy Chun, Hearing Exhibit 4/23-83.

¹¹⁹⁷ 12/20/2006 email from Ernestine Warner to Gail Houston, Roy Chun, others, Hearing Exhibit 4/23-84.

poor performing deals. I have been thinking about this for much of the night. We do not have the resources to support what we are doing now. A new process, without the right support, would be overwhelming. ... My group is under serious pressure to respond to the burgeoning poor performance of sub-prime deals. ... we are really falling behind. ... I am seeing evidence that I really need to add staff to keep up with what is going on with sub prime and mortgage performance in general, NOW.”¹¹⁹⁸

In April 2007, a managing director at S&P in the Structured Finance Group wrote an email confirming the staffing shortages in the RMBS Surveillance Group:

“We have worked together with Ernestine Warner (EW) to produce a staffing model for RMBS Surveillance (R-Surv). It is intended to measure the staffing needed for detailed surveillance of the 2006 vintage and also everything issued prior to that. This model shows that the R-Surv staff is short by 7 FTE [Full Time Employees] - about 3 Directors, 2 AD’s, and 2 Associates. The model suggests that the current staff may have been right sized if we excluded coverage of the 2006 vintage, but was under titled lacking sufficient seniority, skill, and experience.”¹¹⁹⁹

The global head of the S&P Structured Finance Surveillance Group, Peter D’Erchia, told the Subcommittee that, in late 2006, he expressed concerns to senior management about surveillance resources and the need to downgrade subprime in more significant numbers in light of the deteriorating subprime market.¹²⁰⁰ According to Mr. D’Erchia, the executive managing director of the Global Structured Finance Ratings Group, Joanne Rose, disagreed with him about the need to issue significantly more downgrades in subprime RMBS and this disagreement continued into the next year. He also told the Subcommittee that after this disagreement with her, he received a disappointing 2007 performance evaluation. He wrote the following in the employee comment section of his evaluation:

“Even more offensive – and flatly wrong – is the statement that I am not working for a good outcome for S&P. That is all I am working towards and have been for 26 years. It is hard to respond to such comments, which I think reflect Joanne’s [Rose] personal feelings arising from our disagreement over subprime debt deterioration, not professional assessment. ... Such comments, and others like it, suggest to me that this year-end appraisal, in contrast to the mid-year appraisal, has more to do with our differences over subprime deterioration than an objective assessment of my overall performance.”¹²⁰¹

In 2008, Mr. D’Erchia was removed from his surveillance position, where he oversaw more than 314 employees, as part of a reduction in force. He was subsequently rehired as a managing director in U.S. Public Finance at S&P, a position without staff to supervise.

¹¹⁹⁸ 2/3/2007 email from Ernestine Warner to Peter D’Erchia, Hearing Exhibit 4/23-86 [emphasis in original].

¹¹⁹⁹ 4/24/2007 email from Abe Losice to Susan Barnes, “Staffing for RMBS Surveillance,” Hearing Exhibit 4/23-88.

¹²⁰⁰ Subcommittee interview of Peter D’Erchia (4/13/2010).

¹²⁰¹ 2007 Performance Evaluation for Peter D’Erchia, S&P SEN-PSI 0007442; See also April 23, 2010 Subcommittee Hearing at 74-75.

Similarly, Ernestine Warner, the head of RMBS Surveillance, lost her managerial position and was reassigned to investor relations in the Structured Finance Group.

On July 10, 2007, amid record mortgage defaults, S&P abruptly began downgrading its outstanding RMBS and CDO ratings. In July alone, it downgraded the ratings of more than 1,000 RMBS and 100 CDO securities. Both credit rating agencies continued to issue significant downgrades throughout the remainder of 2007. On January 30, 2008, S&P took action on over 8,200 RMBS and CDO ratings – meaning it either downgraded their ratings or placed the securities on credit watch with negative implications. These and other downgrades, matched by equally substantial numbers at Moody's, paint a picture of CRA surveillance teams acting at top speed in overwhelming circumstances to correct thousands of inaccurate RMBS and CDO ratings. When asked to produce contemporaneous decision-making documents indicating how and when the ratings were selected for downgrade, neither S&P nor Moody's produced meaningful documentation. The facts suggest that CRA surveillance analysts with already substantial responsibilities and limited resources were forced to go into overdrive to clean up ratings that could not "hold."

(6) Mortgage Fraud

A final factor that contributed to inaccurate credit ratings involves mortgage fraud. Although the credit rating agencies were clearly aware of increased levels of mortgage fraud, they did not factor that credit risk into their quantitative models or adequately factor it into their qualitative analyses. The absence of that credit risk meant that the credit enhancements they required were insufficient, the tranches bearing AAA ratings were too large, and the ratings they issued were too optimistic.

Reports of mortgage fraud were frequent and mounted yearly prior to the financial crisis. As noted above, as early as 2004, the FBI began issuing reports on increased mortgage fraud.¹²⁰² The FBI was also quoted in Congressional testimony and in the popular press about the mortgage fraud problem. CNN reported that "[r]ampant fraud in the mortgage industry has increased so sharply that the FBI warned Friday of an 'epidemic' of financial crimes which, if not curtailed, could become 'the next S&L crisis.'"¹²⁰³ In 2006, the FBI reported that the number of Suspicious Activity Reports on mortgage fraud had increased sixfold, from about 6,800 in 2002, to about 36,800 in 2006, while pending mortgage fraud cases nearly doubled from 436 in FY 2003 to 818 in FY 2006.¹²⁰⁴ The Mortgage Asset Research Institute, LLC (MARI) also reported increasing mortgage fraud over several years, including a 30% increase in 2006 alone.¹²⁰⁵

¹²⁰² FY 2004 "Financial Institution Fraud and Failure Report," prepared by the Federal Bureau of Investigation, available at http://www.fbi.gov/stats-services/publications/fiff_04.

¹²⁰³ "FBI warns of mortgage fraud 'epidemic'," [CNN.com](http://articles.cnn.com/2004-09-17/justice/mortgage.fraud_1_mortgage-fraud-mortgage-industry-s-1-crisis?_s=PM:LAW) (9/17/2004), http://articles.cnn.com/2004-09-17/justice/mortgage.fraud_1_mortgage-fraud-mortgage-industry-s-1-crisis?_s=PM:LAW.

¹²⁰⁴ "Financial Crimes Report to the Public: Fiscal Year 2006, October 1, 2005 – September 30, 2006," prepared by the Federal Bureau of Investigation, available at http://www.fbi.gov/stats-services/publications/fcs_report2006/financial-crimes-report-to-the-public-2006-pdf/view.

¹²⁰⁵ 4/2007 "Ninth Periodic Mortgage Fraud Case Report to Mortgage Bankers Association," prepared by Mortgage Asset Research Institute, LLC.

Published reports, as well as internal emails, demonstrate that analysts within both Moody's and S&P were aware of the serious mortgage fraud problem in the industry.¹²⁰⁶ Despite being on notice about the problem and despite assertions about the importance of loan data quality in the ratings process for structured finance securities,¹²⁰⁷ neither Moody's nor S&P established procedures to account for the possibility of fraud in its ratings process. For example, neither company took any steps to ensure that the loan data provided for specific RMBS loan pools had been reviewed for accuracy.¹²⁰⁸ The former head of S&P's RMBS Group, Frank Raiter, stated in his prepared testimony for the Subcommittee hearing that the S&P rating process did not include any "due diligence" review of the loan tape or any requirement for the provider of the loan tape to certify its accuracy. He stated: "We were discouraged from even using the term 'due diligence' as it was believed to expose S&P to liability."¹²⁰⁹ Fraud was also not factored into the RMBS or CDO quantitative models.¹²¹⁰

Yet when Moody's and S&P initiated the mass downgrades of RMBS and CDO securities in July 2007, they directed some of the blame for the rating errors on the volume of mortgage fraud. On July 10, 2007, when S&P announced that it was placing 612 U.S. subprime RMBS on negative credit watch, S&P noted the high incidence of fraud reported by MARI, "misrepresentations on credit reports," and that "[d]ata quality concerning some of the borrower and loan characteristics provided during the rating process [had] also come under question."¹²¹¹ In October 2007, the CEO of Fitch Ratings, another ratings firm, said in an interview that "the blame may lie with fraudulent lending practices, not his industry."¹²¹² Moody's made similar observations. In 2008, Moody's CEO Ray McDaniel told a panel at the World Economic Forum:

"In hindsight, it is pretty clear that there was a failure in some key assumptions that were supporting our analytics and our models. ... [One reason for the failure was that the]

¹²⁰⁶ See, e.g., 9/2/2006 email chain between Richard Koch, Robert Mackey, and Michael Gutierrez, "Nightmare Mortgages," Hearing Exhibit 4/23-46a; 9/5/2006 email chain between Edward Highland, Michael Gutierrez, and Richard Koch, "Nightmare Mortgages," Hearing Exhibit 4/23-46b; and 9/29/2006 email from Michael Gutierrez, Director of S&P, PSI-S&P-RFN-000029.

¹²⁰⁷ See, e.g., 6/24/2010 supplemental response from S&P to the Subcommittee, Exhibit H, Hearing Exhibit 4/23-108 (7/11/2007 "S&PCORRECT: 612 U.S. Subprime RMBS Classes Put On Watch Neg; Methodology Revisions Announced," S&P's RatingsDirect (correcting the original version issued on 7/10/2007)).

¹²⁰⁸ See, e.g., 2008 SEC Examination Report for Moody's Investor Services Inc., PSI-SEC (Moody's Exam Report)-14-0001-16, at 7; and 2008 SEC Examination Report for Standard and Poor's Ratings Services, Inc., PSI-SEC (S&P Exam Report)-14-0001-24, at 11 (finding with respect to each credit rating agency that it "did not engage in any due diligence or otherwise seek to verify the accuracy and quality of the loan data underlying the RMBS pools it rated").

¹²⁰⁹ Prepared statement of Frank Raiter, Former Managing Director at Standard & Poor's, April 23, 2010 Subcommittee Hearing, at 3.

¹²¹⁰ Subcommittee interviews of Susan Barnes (3/18/2010) and Richard Gugliada (10/9/2009).

¹²¹¹ 6/24/2010 supplemental response from S&P to the Subcommittee, Exhibit H, Hearing Exhibit 4/23-108 (7/11/2007 "S&PCORRECT: 612 U.S. Subprime RMBS Classes Put On Watch Neg; Methodology Revisions Announced," S&P's RatingsDirect (correcting the original version issued on 7/10/2007)).

¹²¹² 10/12/2007 Moody's internal email, PSI-MOODYS-RFN-000035 (citing "Fitch CEO says fraudulent lending practices may have contributed to problems with ratings," Associated Press, and noting: "After S&P, Fitch is now blaming fraud for the impact on RMBS, at least partially.").

‘information quality’ [given to Moody’s,] both the complete[ness] and veracity, was deteriorating.”¹²¹³

In 2007, Fitch Ratings decided to conduct a review of some mortgage loan files to evaluate the impact of poor lending standards on loan quality. On November 28, 2007, Fitch issued a report entitled, “The Impact of Poor Underwriting Practices and Fraud in Subprime RMBS Performance.” After reviewing a “sample of 45 subprime loans, targeting high CLTV [combined loan to value] [and] stated documentation loans, including many with early missed payments,” Fitch reported that it decided to summarize information about the impact of fraud, as well as lax lending standards, on the mortgages. Fitch explained: “[t]he result of the analysis was disconcerting at best, as there was the appearance of fraud or misrepresentation in almost every file.”¹²¹⁴

To address concerns about fraud and lax underwriting standards generally, S&P considered a potential policy change in November 2007 that would give an evaluation of the quality of services provided by third parties more influence in the ratings process. An S&P managing director wrote:

“We believe our analytical process and rating opinions will be enhanced by an increased focus on the role third parties can play in influencing loan default and loss performance. ... [W]e’d like to set up meetings where specific mortgage originators, investment banks and mortgage servicers are discussed. We would like to use these meetings to share ideas with a goal of determining whether loss estimates should be altered based upon your collective input.”¹²¹⁵

An S&P employee who received this announcement wrote to a colleague: “Should have been doing this all along.”¹²¹⁶

S&P later decided that its analysts would also review specific loan originators that supplied loans for the pool. Loans issued by originators with a reputation for issuing poor quality loans, including loans marked by fraud, would be considered a greater credit risk and ratings for the pool containing the loans would reflect that risk. S&P finalized that policy in November 2008.¹²¹⁷ As part of its ratings analysis, S&P now ranks mortgage originators based on the past historical performance of their loans and factors the assessment of the originator into credit enhancement levels for RMBS.¹²¹⁸

¹²¹³ “Moody’s: They Lied to Us,” New York Times (1/25/2008), <http://norris.blogs.nytimes.com/2008/01/25/moodys-they-lied-to-us/>.

¹²¹⁴ 11/28/2007 “The Impact of Poor Underwriting Practices and Fraud in Subprime RMBS Performance,” report prepared by Fitch Ratings, at 4, Hearing Exhibit 4/23-100.

¹²¹⁵ 11/15/2007 email from Thomas Warrack to Michael Gutierrez, and others, Hearing Exhibit 4/23-34.

¹²¹⁶ 11/15/2007 email from Robert Mackey to Michael Gutierrez, and others, Hearing Exhibit 4/23-34.

¹²¹⁷ 6/24/2010 supplemental letter from S&P to the Subcommittee, Exhibit W, Hearing Exhibit 4/23-108 (11/25/2008 “Standard & Poor’s Enhanced Mortgage Originator and Underwriting Review Criteria for U.S. RMBS,” S&P’s RatingsDirect).

¹²¹⁸ *Id.*

In September 2007, Moody's solicited industry feedback on proposed enhancements to its evaluation of nonprime RMBS securitizations, including the need for third-party due diligence reviews of the loans in a securitization. Moody's wrote: "To improve the accuracy of loan information upon which it relies, Moody's will look for additional oversight by a qualified third party."¹²¹⁹ In November 2008, Moody's issued a report detailing its enhanced approach to RMBS originator assessments.¹²²⁰

E. Preventing Inflated Credit Ratings

Weak credit rating agency performance has long been a source of concern to financial regulators. Many investors rely on credit ratings to identify "safe" investments. Many regulated financial institutions, including banks, broker-dealers, insurance companies, pension funds, mutual funds, money market funds, and others have been required to operate under restrictions related to their purchase of "investment grade" versus "noninvestment grade" financial instruments. When credit agencies issue inaccurate credit ratings, both retail investors and regulated financial institutions may mistakenly purchase financial instruments that are riskier than they intended or are permitted to buy. The recent financial crisis has demonstrated how the unintended purchase of high risk financial products by multiple investors and financial institutions can create systemic risk and endanger, not only U.S. financial markets, but the entire U.S. economy.

(1) Past Credit Rating Agency Oversight

Even before the recent financial crisis, the SEC and Congress had been reviewing the need for increased regulatory oversight of the credit rating industry. In 1994, for example, the SEC "issued a Concept Release soliciting public comment on the appropriate role of ratings in the federal securities laws, and the need to establish formal procedures for recognizing and monitoring the activities of [credit rating agencies]."¹²²¹

In 2002, the Senate Committee on Governmental Affairs examined the collapse of the Enron Corporation, focusing in part on how the credit rating agencies assigned investment grade credit ratings to the company "until a mere four days before Enron declared bankruptcy."¹²²² The Committee issued a report finding, among other things, that the credit rating agencies:

¹²¹⁹ "Moody's Proposes Enhancements to Non-Prime RMBS Securitization," Moody's (9/25/2007).

¹²²⁰ "Moody's Enhanced Approach to Originator Assessments for U.S. Residential Mortgage Backed Securities (RMBS)," Moody's, Hearing Exhibit 4/23-106 (originally issued 11/24/2008 but due to minor changes was republished on 10/5/2009).

¹²²¹ 1/2003 "Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets," prepared by the SEC, at 5.

¹²²² 10/8/2002 "Financial Oversight of Enron: The SEC and Private-Sector Watchdogs," prepared by the U.S. Senate Committee on Governmental Affairs, at 6. See also "Rating the Raters: Enron and the Credit Rating Agencies," before the U.S. Senate Committee on Governmental Affairs, S.Hrg. 107-471 (3/20/2002). The Committee has since been renamed as the Committee on Homeland Security and Governmental Affairs.

“failed to detect Enron’s problems – or take sufficiently seriously the problems they were aware of – until it was too late because they did not exercise the proper diligence. ... [T]he agencies did not perform a thorough analysis of Enron’s public filings; did not pay appropriate attention to allegations of financial fraud; and repeatedly took company officials at their word ... despite indications that the company had misled the rating agencies in the past.”¹²²³

The report also found the credit rating “analysts [did] not view themselves as accountable for their actions,” since the rating agencies were subject to little regulation or oversight, and their liability for poor quality ratings was limited by regulatory exemptions and First Amendment protections.¹²²⁴ The report recommended “increased oversight for these rating agencies in order to ensure that the public’s trust in these firms is well-placed.”¹²²⁵

In 2002, the Sarbanes-Oxley Act required the SEC to conduct a study into the role of credit rating agencies in the securities markets, including any barriers to accurately evaluating the financial condition of the issuers of securities they rate.¹²²⁶ In response, the SEC initiated an in-depth study of the credit rating industry and released its findings in a 2003 report. The SEC’s oversight efforts “included informal discussions with credit rating agencies and market participants, formal examinations of credit rating agencies, and public hearings, where market participants were given the opportunity to offer their views on credit rating agencies and their role in the capital markets.”¹²²⁷ The report expressed a number of concerns about CRA operations, including “potential conflicts of interest caused by the [issuer-pays model].”¹²²⁸

The Credit Rating Agency Reform Act, which was signed into law in September 2006, was designed to address some of the shortcomings identified by Congress and the SEC. The Act made it clear that the SEC had jurisdiction to conduct oversight of the credit rating industry, and formally charged the agency with designating companies as NRSROs.¹²²⁹ The statute also required NRSROs to meet certain criteria before registering with the SEC. In addition, the statute instructed the SEC to promulgate regulations requiring NRSROs to establish policies and procedures to prevent the misuse of nonpublic information and to disclose and manage conflicts of interest.¹²³⁰ Those regulations were designed to take effect in September 2007.

In the summer of 2007, after the mass downgrades of RMBS and CDO ratings had begun and as the financial crisis began to intensify, the SEC initiated its first examinations of the major

¹²²³ 10/8/2002 “Financial Oversight of Enron: The SEC and Private-Sector Watchdogs,” prepared by the U.S. Senate Committee on Governmental Affairs, at 6, 108.

¹²²⁴ *Id.* at 122.

¹²²⁵ *Id.* at 6.

¹²²⁶ Section 702 of the Sarbanes-Oxley Act of 2002.

¹²²⁷ 1/2003 “Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets,” prepared by the SEC, at 4.

¹²²⁸ *Id.* at 19.

¹²²⁹ 9/3/2009 “Credit Rating Agencies and Their Regulation,” report prepared by the Congressional Research Service, Report No. R40613 (revised report issued 4/9/2010).

¹²³⁰ *Id.*

credit rating agencies. According to the SEC, “[t]he purpose of the examinations was to develop an understanding of the practices of the rating agencies surrounding the rating of RMBS and CDOs.”¹²³¹ The examinations reviewed CRA practices from January 2004 to December 2007. In 2008, the SEC issued a report summarizing its findings. The report found that “there was a substantial increase in the number and in the complexity of RMBS and CDO deals,” “significant aspects of the ratings process were not always disclosed,” the ratings policies and procedures were not fully documented, “the surveillance processes used by the rating agencies appear to have been less robust than the processes used for initial ratings,” and the “rating agencies’ internal audit processes varied significantly.”¹²³² In addition, the report raised a number of conflict of interest issues that influenced the ratings process, noted that the rating agencies failed to verify the accuracy or quality of the loan data used to derive their ratings, and raised questions about the factors that were or were not used to derive the credit ratings.¹²³³

(2) New Developments

Although the Credit Rating Agency Reform Act of 2006 strengthened oversight of the credit rating agencies, Congress passed further reforms in response to the financial crisis to address weaknesses in regulatory oversight of the credit rating industry. The Dodd-Frank Act dedicated an entire subtitle to those credit rating reforms which substantially broadened the powers of the SEC to oversee and regulate the credit rating industry and explicitly allowed investors, for the first time, to file civil suits against credit rating agencies.¹²³⁴ The major reforms include the following:

- a. establishment of a new SEC Office of Credit Ratings charged with overseeing the credit rating industry, including by conducting at least annual NRSRO examinations whose reports must be made public;
- b. SEC authority to discipline, fine, and deregister a credit rating agency and associated personnel for violating the law;
- c. SEC authority to deregister a credit rating agency for issuing poor ratings;
- d. authority for investors to file private causes of action against credit rating agencies that knowingly or recklessly fail to conduct a reasonable investigation of a rated product;
- e. requirements for credit rating agencies to establish internal controls to ensure high quality ratings and disclose information about their rating methodologies and about each issued rating;

¹²³¹ 7/2008 “Summary Report of Issues Identified in the Commission Staff’s Examinations of Select Credit Rating Agencies,” prepared by the SEC, at 1. The CRAs examined by the SEC were not formally subject to the Credit Rating Agency Reform Act of 2006 or its implementing SEC regulations until September 2007.

¹²³² *Id.* at 1-2.

¹²³³ *Id.* at 14, 17-18, 23-29, 31-37.

¹²³⁴ See Title IX, Subtitle C – Improvements to the Regulation of Credit Rating Agencies of the Dodd-Frank Act.

- f. amendments to federal statutes removing references to credit ratings and credit rating agencies in order to reduce reliance on ratings;
- g. a GAO study to evaluate alternative compensation models for ratings that would create financial incentives to issue more accurate ratings; and
- h. an SEC study of the conflicts of interest affecting ratings of structured finance products, followed by the mandatory development of a plan to reduce ratings shopping.¹²³⁵

The Act stated that these reforms were needed, “[b]ecause of the systemic importance of credit ratings and the reliance placed on credit ratings by individual and institutional investors and financial regulators,” and because “credit rating agencies are central to capital formation, investor confidence, and the efficient performance of the United States economy.”¹²³⁶

(3) Recommendations

To further strengthen the accuracy of credit ratings and reduce systemic risk, this Report makes the following recommendations.

- 1. Rank Credit Rating Agencies by Accuracy.** The SEC should use its regulatory authority to rank the Nationally Recognized Statistical Rating Organizations in terms of performance, in particular the accuracy of their ratings.
- 2. Help Investors Hold CRAs Accountable.** The SEC should use its regulatory authority to facilitate the ability of investors to hold credit rating agencies accountable in civil lawsuits for inflated credit ratings, when a credit rating agency knowingly or recklessly fails to conduct a reasonable investigation of the rated security.
- 3. Strengthen CRA Operations.** The SEC should use its inspection, examination, and regulatory authority to ensure credit rating agencies institute internal controls, credit rating methodologies, and employee conflict of interest safeguards that advance rating accuracy.
- 4. Ensure CRAs Recognize Risk.** The SEC should use its inspection, examination, and regulatory authority to ensure credit rating agencies assign higher risk to financial instruments whose performance cannot be reliably predicted due to their novelty or complexity, or that rely on assets from parties with a record for issuing poor quality assets.

¹²³⁵ See id. at §§ 931-939H; “Conference report to accompany H.R. 4173,” Cong. Report No. 111-517 (June 29, 2010).

¹²³⁶ See Section 931 of the Dodd-Frank Act.

5. **Strengthen Disclosure.** The SEC should exercise its authority under the new Section 78o-7(s) of Title 15 to ensure that the credit rating agencies complete the required new ratings forms by the end of the year and that the new forms provide comprehensible, consistent, and useful ratings information to investors, including by testing the proposed forms with actual investors.
6. **Reduce Ratings Reliance.** Federal regulators should reduce the federal government's reliance on privately issued credit ratings.

VI. INVESTMENT BANK ABUSES: CASE STUDY OF GOLDMAN SACHS AND DEUTSCHE BANK

A key factor in the recent financial crisis was the role played by complex financial instruments, often referred to as structured finance products, such as residential mortgage backed securities (RMBS), collateralized debt obligations (CDOs), and credit default swaps (CDS), including CDS contracts linked to the ABX Index. These financial products were envisioned, engineered, sold, and traded by major U.S. investment banks.

From 2004 to 2008, U.S. financial institutions issued nearly \$2.5 trillion in RMBS securities and over \$1.4 trillion in CDOs securitizing primarily mortgage related products.¹²³⁷ Investment banks charged fees ranging from \$1 to \$8 million to act as the underwriter of an RMBS securitization,¹²³⁸ and from \$5 to \$10 million to act as the placement agent for a CDO securitization.¹²³⁹ Those fees contributed substantial revenues to the investment banks which set up structured finance groups, and a variety of RMBS and CDO origination and trading desks within those groups, to handle mortgage related securitizations. Investment banks placed these securities with investors around the world, and helped develop a secondary market where private RMBS and CDO securities could be bought and sold. The investment banks' trading desks participated in those secondary markets, buying and selling RMBS and CDO securities either for their customers or for themselves.

Some of these financial products allowed investors to profit, not only from the success of an RMBS or CDO securitization, but also from its failure. CDS contracts, for example, allowed counterparties to wager on the rise or fall in the value of a specific RMBS security or on a collection of RMBS and other assets contained or referenced in a CDO. Major investment banks also developed standardized CDS contracts that could be traded on a secondary market. In

¹²³⁷ 3/4/2011 "U.S. Mortgage-Related Securities Issuance" and 1/1/2011 "Global CDO Issuance," charts prepared by Securities Industry and Financial Markets Association, www.sifma.org/research/statistics.aspx. The RMBS total does not include about \$6.6 trillion in RMBS securities issued by government sponsored enterprises like Fannie Mae and Freddie Mac.

¹²³⁸ See, e.g., 2/2011 chart, "Goldman Sachs Expected Profit from RMBS Securitizations," prepared by the U.S. Senate Permanent Subcommittee on Investigations using Goldman-produced documents for securitizations from 2005-2007 (underlying documents retained in Subcommittee file); 3/21/2011 letter from Deutsche Bank counsel, PSI-Deutsche_Bank-32-0001.

¹²³⁹ See "Banks' Self-Dealing Super-Charged Financial Crisis," *ProPublica* (8/26/2010), <http://www.propublica.org/article/banks-self-dealing-super-charged-financial-crisis> ("A typical CDO could net the bank that created it between \$5 million and \$10 million – about half of which usually ended up as employee bonuses. Indeed, Wall Street awarded record bonuses in 2006, a hefty chunk of which came from the CDO business."). Fee information obtained by the Subcommittee is consistent with this range of CDO fees. For example, Deutsche Bank received nearly \$5 million in fees for Gemstone 7, and the head of its CDO Group said that Deutsche Bank received typically between \$5 and 10 million in fees, while Goldman Sachs charged a range of \$5 to \$30 million in fees for Camber 7, Fort Denison, and the Hudson Mezzanine 1 and 2 CDOs. 12/20/2006 Gemstone 7 Securitization Credit Report, DB_PSI_00237655-71 and 3/15/2007 Gemstone CDO VII Ltd. Closing Memorandum, DB_PSI_00133536-41; Subcommittee interview of Michael Lamont (9/29/2010); and Goldman Sachs response to Subcommittee QFRs at PSI-QFR-GS0249.

addition, they established the ABX Index which allowed counterparties to wager on the rise or fall in the value of a basket of subprime RMBS securities, and which could be used to reflect the state of the subprime mortgage market as a whole.

Investment banks sometimes matched up parties who wanted to take opposite sides in a structured finance transaction, and other times took one or the other side of a transaction to accommodate a client. At still other times, investment banks used these financial instruments to make their own proprietary wagers. In extreme cases, some investment banks set up structured finance transactions which enabled them to profit at the expense of their clients.

Two case studies, involving Goldman Sachs and Deutsche Bank, illustrate a variety of troubling and sometimes abusive practices involving the origination or use of RMBS, CDO, CDS, and ABX financial instruments. Those practices included at times constructing RMBS or CDOs with assets that senior employees within the investment banks knew were of poor quality; underwriting securitizations for lenders known within the industry for issuing high risk, poor quality mortgages or RMBS securities; selling RMBS or CDO securities without full disclosure of the investment bank's own adverse interests; and causing investors to whom they sold the securities to incur substantial losses.

In the case of Goldman Sachs, the practices included exploiting conflicts of interest with the firm's clients. For example, Goldman used CDS and ABX contracts to place billions of dollars of bets that specific RMBS securities, baskets of RMBS securities, or collections of assets in CDOs would fall in value, while at the same time convincing customers to invest in new RMBS and CDO securities. In one instance, Goldman took the entire short side of a \$2 billion CDO known as Hudson 1, selected assets for the CDO to transfer risk from Goldman's own holdings, allowed investors to buy the CDO securities without fully disclosing its own short position, and when the CDO lost value, made a \$1.7 billion gain at the expense of the clients to whom it had sold the securities. While Goldman Sachs sometimes told customers that it might take an adverse investment position to the RMBS or CDO securities it was selling them, Goldman did not disclose that, in fact, it already had significant proprietary investments that would pay off if the particular security it was selling or if RMBS and CDO securities in general fell in value. In another instance, Goldman marketed a CDO known as Abacus 2007-AC1 to clients without disclosing that it had allowed the sole short party in the CDO, a hedge fund, to play a major role in selecting the assets. The Abacus securities quickly lost value, and the three long investors together lost \$1 billion, while the hedge fund profited by about the same amount. In still other instances, Goldman took on the role of a collateral put provider or liquidation agent in a CDO, and leveraged that role to obtain added financial benefits to the fiscal detriment of the clients to whom it sold the CDO securities.

In the case of Deutsche Bank, during 2006 and 2007, the bank's top CDO trader, Greg Lippmann, repeatedly warned and advised his Deutsche Bank colleagues and some of his clients seeking to buy short positions about the poor quality of the RMBS securities underlying many CDOs, describing some of those securities as "crap" and "pigs." At one point, Mr. Lippmann

was asked to buy a specific CDO security and responded that it “rarely trades,” but he “would take it and try to dupe someone” into buying it. He also disparaged RMBS securities that, at the same time, were being included in Gemstone 7, a CDO being assembled by the bank for sale to investors. Gemstone 7 included or referenced 115 RMBS securities, many of which carried BBB, BBB-, or even BB credit ratings, making them among the highest risk RMBS securities sold to the public, yet received AAA ratings for its top three tranches. Deutsche Bank sold \$700 million in Gemstone securities to eight investors who saw their investments rapidly incur delinquencies, rating downgrades, and losses. Mr. Lippmann at times referred to the industry’s ongoing CDO marketing efforts as a “CDO machine” or “ponzi scheme,” and predicted that the U.S. mortgage market as a whole would eventually plummet in value. Deutsche Bank’s senior management disagreed with his negative views, and used the bank’s own funds to make large proprietary investments in mortgage related securities that, in 2007, had a notional or face value of \$128 billion and a market value of more than \$25 billion. At the same time, Deutsche Bank allowed Mr. Lippmann to develop for the bank a \$5 billion proprietary short position in the RMBS market, which it later cashed in for a profit of approximately \$1.5 billion. Despite that gain, in 2007, due to its substantial long investments, Deutsche Bank incurred an overall loss of about \$4.5 billion from its mortgage related proprietary investments.

The two case studies illustrate how investment banks engaged in high intensity sales efforts to market new CDOs in 2007, even as U.S. mortgage delinquencies climbed, RMBS securities incurred losses, the U.S. mortgage market as a whole deteriorated, and investors lost confidence. They demonstrate how these investment banks benefitted from structured finance fees, and had little incentive to stop producing and selling high risk, poor quality structured finance products. They also illustrate how the development of complex structured finance products, such as synthetic CDOs and naked credit default swaps, amplified market risk by allowing investors with no ownership interest in the “reference obligations” to place unlimited side bets on their performance. Finally, the two case histories demonstrate how proprietary trading led to dramatic losses in the case of Deutsche Bank and to conflicts of interest in the case of Goldman Sachs.

Investment banks were a major driving force behind the structured finance products that provided a steady stream of funding for lenders to originate high risk, poor quality loans and that magnified risk throughout the U.S. financial system. The investment banks that engineered, sold, traded, and profited from mortgage related structured finance products were a major cause of the financial crisis.

A. Background

(1) Investment Banks In General

Historically, investment banks helped raise capital for business and other endeavors by helping to design, finance, and sell financial products like stocks or bonds. When a corporation needed capital to fund a large construction project, for example, it often hired an investment bank either to arrange a bank loan or to raise capital by designing, financing, and marketing an issue of shares or corporate bonds for sale to investors. Investment banks performed these services in exchange for fees.

Today, investment banks also participate in a wide range of other financial activities, including providing broker-dealer and investment advisory services, and trading commodities and derivatives. Investment banks also often engage in proprietary trading, meaning trading with their own money and not on behalf of a customer. Many investment banks are structured today as affiliates of one or more banks.

Under the Glass-Steagall Act of 1933, certain types of financial institutions had been prohibited from commingling their services. For example, with limited exceptions, only broker-dealers could provide brokerage services; only banks could offer banking; and only insurers could offer insurance. Each financial sector had its own primary regulator who was generally prohibited from regulating services outside of its jurisdiction.¹²⁴⁰ Glass-Steagall also contained prohibitions against proprietary trading.¹²⁴¹ One reason for keeping the sectors separate was to ensure that banks with federally insured deposits did not engage in the type of high risk activities that might be the bread and butter of a broker-dealer or commodities trader. Another reason was to avoid the conflicts of interest that might arise, for example, from a financial institution pressuring its clients to obtain all of its financial services from the same firm. A third reason was to avoid the conflicts of interest that arise when a financial institution is allowed to act for its own benefit in a proprietary capacity, while at the same time acting on behalf of customers in an agency or fiduciary capacity.

Glass-Steagall was repealed in 1999, after which the barriers between banks, broker-dealers, and insurance firms fell. U.S. financial institutions not only began offering a mix of financial services, but also intensified their proprietary trading activities. The resulting changes in the way financial institutions were organized and operated made it more difficult for regulators to distinguish between activities intended to benefit customers versus the financial institution itself. The expanded set of financial services investment banks were allowed to offer also contributed to the multiple and significant conflicts of interest that arose between some investment banks and their clients during the financial crisis.

¹²⁴⁰ Federal law has never established a “super-regulator” with jurisdiction to police compliance and conduct across banking, brokerage, investment advisory, and insurance sectors, and that remains the case today.

¹²⁴¹ See Section 16 of the Banking Act of 1933, Pub. L. 73-66 (also known as the Glass-Steagall Act).

(2) Roles and Duties of an Investment Bank:

Market Maker, Underwriter, Placement Agent, Broker-Dealer

Investment banks typically play a variety of significant roles when dealing with their clients, including that of market maker, underwriter, placement agent, and broker-dealer. Each role brings different legal obligations under federal securities law.

Market Maker. A “market maker” is typically a dealer in financial instruments that stands ready to buy and sell for its own account a particular financial instrument on a regular and continuous basis at a publicly quoted price.¹²⁴² A major responsibility of a market maker is filling orders on behalf of customers. Market makers do not solicit customers; instead they maintain buy and sell quotes in a public setting, demonstrating their readiness to either buy or sell the specified security, and customers come to them. For example, a market maker in a particular stock typically posts the prices at which it is willing to buy or sell that stock, attracting customers based on the competitiveness of its prices. This activity by market makers helps provide liquidity and efficiency in the trading market for the security.¹²⁴³ It is common for a particular security to have multiple market makers who competitively quote the security.

Market makers generally use the same inventory of assets to carry out both their market-making and proprietary trading activities. Market makers are allowed, in certain circumstances specified by the SEC, to sell securities short in situations to satisfy market demand when they do not have the securities in their inventory in order to provide liquidity. Market makers have among the most narrow disclosure obligations under federal securities law, since they do not actively solicit clients or make investment recommendations to them. Their disclosure obligations are generally limited to providing fair and accurate information related to the execution of a particular trade.¹²⁴⁴ Market makers are also subject to the securities laws’ prohibitions against fraud and market manipulation. In addition, they are subject to legal requirements relating to the handling of customer orders, for example using best execution efforts when placing a client’s buy or sell order.¹²⁴⁵

Underwriter and Placement Agent. If an investment bank agrees to act as an “underwriter” for the issuance of a new security to the public, such as an RMBS, it typically

¹²⁴² Section 3(a)(38) of the Securities Exchange Act of 1934 states: “The term “market maker” means any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.” See also SEC website, <http://www.sec.gov/answers/mktmaker.htm>; FINRA website, FAQs, “What Does a Market Maker Do?” <http://finra.atgnow.com/finra/categoryBrowse.do>.

¹²⁴³ See SEC website, <http://www.sec.gov/answers/mktmaker.htm>; FINRA website, FAQs, “What Does a Market Maker Do?” <http://finra.atgnow.com/finra/categoryBrowse.do>.

¹²⁴⁴ 1/2011 “Study on Investment Advisers and Broker-Dealers,” study conducted by the U.S. Securities and Exchange Commission, at 55, <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

¹²⁴⁵ See Responses to Questions for the Record from Goldman Sachs at PSI_QFR_GS0046.

purchases the securities from the issuer, holds them on its books, conducts the public offering, and bears the financial risk until the securities are sold to the public. By law, securities sold to the public must be registered with the SEC. Underwriters help issuers prepare and file the registration statements filed with the SEC, which explain to potential investors the purpose of a proposed public offering, the issuer's operations and management, key financial data, and other important facts. Any offering document, or prospectus, given to the investing public in connection with a registered security must also be filed with the SEC.

If a security is not offered to the general public, it can still be offered to investors through a "private placement." Investment banks often act as the "placement agent," performing intermediary services between those seeking to raise money and investors. Placement agents often help issuers design the securities, produce the offering materials, and market the new securities to investors. Offering documents in connection with private placements are exempt from SEC registration and are not filed with the SEC.

In the years leading up to the financial crisis, RMBS securities were registered with the SEC, while CDOs were sold to investors through private placements. Both of these securities were also traded in a secondary market by market makers. Investment banks sold both types of securities primarily to large institutional investors, such as other banks, pension funds, insurance companies, municipalities, university endowments, and hedge funds.

Whether acting as an underwriter or placement agent, a major part of the investment bank's responsibility is to solicit customers to buy the new securities being offered. Under the securities laws, investment banks that act as an underwriter or placement agent for new securities are liable for any material misrepresentation or omission of a material fact made in connection with a solicitation or sale of those securities to investors.¹²⁴⁶

The obligation of an underwriter and placement agent to disclose material facts to every investor it solicits comes from two sources: the duties as an underwriter specifically, and the duties as a broker-dealer generally. With respect to duties relating to being an underwriter, the U.S. Court of Appeals for the First Circuit observed that underwriters have a "unique position" in the securities industry:

¹²⁴⁶ See Sections 11 and 12 of Securities Act of 1933. See also Rule 10b-5 of the Securities Exchange Act of 1934. See also, e.g., *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 201 (1963) ("Experience has shown that disclosure in such situations, while not onerous to the advisor, is needed to preserve the climate of fair dealing which is so essential to maintain public confidence in the securities industry and to preserve the economic health of the country."). See also SEC Study on Investment Advisers and Broker-Dealers at 51 (citations omitted) ("Under the so-called 'shingle' theory ..., a broker-dealer makes an implicit representation to those persons with whom it transacts business that it will deal fairly with them, consistent with the standards of the profession. ... Actions taken by the broker-dealer that are not fair to the customer must be disclosed in order to make this implied representation of fairness not misleading.").

“[T]he relationship between the underwriter and its customer implicitly involves a favorable recommendation of the issued security. ... Although the underwriter cannot be a guarantor of the soundness of any issue, he may not give it his implied stamp of approval without having a reasonable basis for concluding that the issue is sound.”¹²⁴⁷

In addition, Section 11 of the Securities Act of 1933 makes underwriters liable to any investor in any registered security if any part of the registration statement “contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”¹²⁴⁸

Broker-Dealer. Broker-dealers also have affirmative disclosure obligations to their clients. With respect to the duties of a broker-dealer, the SEC has held:

“[W]hen a securities dealer recommends a stock to a customer, it is not only obligated to avoid affirmative misstatements, but also must disclose material adverse facts to which it is aware. That includes disclosure of ‘adverse interests’ such as ‘economic self interest’ that could have influenced its recommendation.”¹²⁴⁹

To help broker-dealers understand when they are obligated to disclose material adverse facts to investors, the Financial Industry Regulatory Authority (FINRA) has further defined the term “recommendation”:

“[A] broad range of circumstances may cause a transaction to be considered recommended, and this determination does not depend on the classification of the transaction by a particular member as ‘solicited’ or ‘unsolicited.’ In particular a transaction will be considered to be recommended when the member or its associated person brings a specific security to the attention of the customer through any means, including, but not limited to, direct telephone communication, the delivery of promotional material through the mail, or the transmission of electronic messages.”¹²⁵⁰

There is no indication in any law or regulation that the obligation to disclose material adverse facts is diminished or waived in relation to the level of sophistication of the potential investor.¹²⁵¹

¹²⁴⁷ SEC v. Tambone, 550 F.3d 106 (1st Cir. 2008) [citations omitted].

¹²⁴⁸ Section 11 of the Securities Act of 1933, codified at 15 U.S.C. § 77a.

¹²⁴⁹ In the Matter of Richmark Capital Corporation, Securities Exchange Act Rel. No. 48758 (Nov. 7, 2003) (citing Chasins v. Smith Barney & Co., Inc., 438 F.3d 1167, 1172 (2d Cir. 1970) (“The investor... must be permitted to evaluate overlapping motivations through appropriate disclosures, especially where one motivation is economic self-interest”)).

¹²⁵⁰ FINRA Notice No. 96-60.

¹²⁵¹ See FINRA Rules 2210(d)(1)(A) and 2211(a)(3) and (d)(1) (by rule all institutional sales material and correspondence may not “omit any material fact or qualification if the omission, in the light of the context of the material presented, would cause the communications to be misleading.”). See also FINRA Rule 2310 and IM-2310-

(3) Structured Finance Products

Over time, investment banks have devised, marketed, and sold increasingly complex financial instruments to investors, often referred to as “structured finance” products. These products include residential mortgage backed securities (RMBS), collateralized debt obligations (CDOs), and credit default swaps (CDS), including CDS contracts linked to the ABX Index, all of which played a central role in the financial crisis.

RMBS and CDO Securities. RMBS and CDO securities are two common types of structured finance products. RMBS securities contain pools of mortgage loans, while CDOs contain or reference pools of RMBS securities and other assets. RMBS concentrate risk by including thousands of subprime and other high risk home loans, with similar characteristics and risks, in a single financial instrument. Mortgage related CDOs concentrate risk even more by including hundreds or thousands of RMBS securities, with similar characteristics and risks, in a single financial instrument. In addition, while some CDOs included only AAA rated RMBS securities, others known as “mezzanine” CDOs contained RMBS securities that carried the riskier BBB, BBB-, and even BB credit ratings and were more susceptible to losses if the underlying mortgages began to incur delinquencies or defaults.

Some investment banks went a step farther and assembled CDO securities into pools and resecuritized them as so-called “CDO squared” instruments, which further concentrated the risk in the underlying CDOs.¹²⁵² Some investment banks also assembled “synthetic CDOs,” which did not contain any actual RMBS securities or other assets, but merely referenced them. Some devised “hybrid CDOs,” which contained a mix of cash and synthetic assets.

The securitization process generated billions of dollars in funds that allowed investment banks to supply financing to lenders to issue still more high risk mortgages and securities, which investment banks and others then sold or securitized in exchange for still more fees. This cycle was repeated again and again, introducing more and more risk to a wider and wider range of investors.

Credit Default Swaps. Some investment banks modified still another structured finance product, a derivative known as a credit default swap (CDS), for use in the mortgage market. Much like an insurance contract, a CDS is a contract between two parties in which one party guarantees payment to the other if the assets referenced in the contract lose value or experience a negative credit event. The party selling the insurance is referred to as the “long” party, since it profits if the referenced asset performs well. The party buying the insurance protection is referred to as the “short” party because it profits if the referenced asset to perform poorly.

3 (suitability obligation to institutional customers).

¹²⁵² CDO squared transactions will generally be referred to in this Report as “CDO².” Some Goldman materials also use the term “CDO^{^2}.”

The short party, or CDS buyer, typically pays periodic premiums, similar to insurance premiums, to the long party or CDS seller, who has guaranteed the referenced assets against a loss in value or a negative credit event such as a credit rating downgrade, default, or bankruptcy. If the loss or negative credit event occurs, the CDS seller is required to pay an agreed upon amount to the CDS buyer. Many CDS contracts also tracked the changing value of the referenced assets over time, and required the long and short parties to post cash collateral with each other to secure payment of their respective contractual obligations.

CDS contracts that reference a single, specific security or bond for protection against a loss in value or negative credit event have become known as “single name” CDS contracts. Other CDS contracts have been designed to protect a broader basket of securities, bonds, or other assets.

By 2005, investment banks had standardized CDS contracts that referred to a “single name” RMBS or CDO security. Some investment banks and investors, which held large inventories of RMBS and CDO securities, purchased those single name CDS contracts as a hedge against possible losses in the value of their holdings. Other investors, including investment banks, began to purchase single name CDS contracts, not as a hedge to offset losses from the RMBS or CDO securities they owned, but as a way to profit from particular RMBS or CDO securities they predicted would lose value or fail. CDS contracts that paid off on securities that were not owned by the CDS buyer became known as “naked credit default swaps.” Naked CDS contracts enabled investors to bet against mortgage related assets, using the minimal capital needed to make the periodic premium payments and collateral calls required by a CDS contract.

The key significance of the CDS product for the mortgage market was that it offered an alternative to investing in RMBS and CDO securities that would perform well. Single name CDS contracts instead enabled investors to place their dollars in financial instruments that would pay off if specific RMBS or CDO securities lost value or failed.

ABX Index. In January 2006, a consortium of investment banks, led by Goldman Sachs and Deutsche Bank, launched still another type of structured finance product, linked to a newly created “ABX Index,” to enable investors to bet on multiple subprime RMBS securities at once. The ABX Index was administered by a private company called the Markit Group and consisted of five separate indices, each of which tracked the performance of a different basket of 20 designated subprime RMBS securities.¹²⁵³ The values of the securities in each basket were aggregated into a single composite value that rose and fell over time. Investors could then arrange, through a broker-dealer, to enter into a CDS contract with another party using the ABX basket of subprime RMBS securities as the “reference obligation” and the relevant ABX Index value as the agreed

¹²⁵³ Each of the five indices tracked a different basket of subprime RMBS securities. One index tracked a basket of 20 AAA rated RMBS securities; the second a basket of AA rated RMBS securities; and the remaining indices tracked baskets of A, BBB, and BBB- rated RMBS securities. Every six months, a new set of RMBS securities was selected for each index. See 3/2008 Federal Reserve Bank of New York Staff Report No. 318, “Understanding the Securitization of Subprime Mortgage Credit,” at 26. Markit Group Ltd. administered the ABX Index which issued indices in 2006 and 2007, but has not issued any new indices since then.

upon value of that basket. For a fee, investors could take either the “long” position, betting on the rise of the index, or the “short” position, betting on the fall of the index, without having to physically purchase or hold any of the referenced securities or raise the capital needed to pay for the full face value of those referenced securities. The index also used standardized CDS contracts that remained in effect for a standard period of time, making it easier for investors to participate in the market, and buy and sell ABX-linked CDS contracts.

The ABX Index allowed investors to place unlimited bets on the performance of one or more of the subprime RMBS baskets. It also made it easier and cheaper for investors, including some investment banks, to short the subprime mortgage market in bulk.¹²⁵⁴ Investment banks not only helped establish the ABX Index, they encouraged their clients to enter into CDS contracts based upon the ABX Index, and used it themselves to bet on the mortgage market as a whole. The ABX Index expanded the risks inherent in the subprime mortgage market by providing investors with a way to make unlimited investments in RMBS securities.

Synthetic CDOs. By mid-2006, there was a large demand for RMBS and CDO securities as well as a growing demand for CDS contracts to short the mortgage market. To meet this demand, investment banks and others began to make greater use of synthetic CDOs, which could be assembled more quickly, since they did not require the CDO arranger to find and purchase actual RMBS securities or other assets. The increasing use of synthetic CDOs injected even greater risk into the mortgage market by enabling investors to make unlimited wagers on various groups of mortgage related assets and, if those assets performed poorly, expanding the number of investors who would realize losses.

Synthetic CDOs did not depend upon actual RMBS securities or other assets to bring in cash to pay investors. Instead, the CDO simply developed a list of existing RMBS or CDO securities or other assets that would be used as its “reference obligations.” The parties to the CDO were not required to possess an ownership interest in any of those reference obligations; the CDO simply tracked their performance over time. The performance of the underlying reference obligations, in the aggregate, determined the performance of the synthetic CDO.

The synthetic CDO made or lost money for its investors by establishing a contractual agreement that they would make payments to each other, based upon the aggregate performance of the underlying referenced assets, using CDS contracts. The “short” party essentially agreed to make periodic payments, similar to insurance premiums, to the other party in exchange for an agreement that the “long” party would pay the full face value of the synthetic CDO if the underlying assets lost value or experienced a defined credit event such as a ratings downgrade. In essence, then, the synthetic CDO set up a wager in which the short party bet that its underlying assets would perform poorly, while the long party bet that they would perform well.

¹²⁵⁴ Subcommittee Interview of Joshua Birnbaum (4/22/2010); Subcommittee Interview of Rajiv Kamilla (10/12/2010).

Synthetic CDOs provided still another vehicle for investors looking to short the mortgage market in bulk. The synthetic CDO typically referenced a variety of RMBS securities. One or more investors could then take the “short” position and wager that the referenced securities as a whole would fall in value or otherwise perform poorly. Synthetic CDOs became a way for investors to short multiple specific RMBS securities that they expected to incur delinquencies, defaults, and losses.

Synthetic CDOs magnified the risk in the mortgage market, because arrangers had no limit on the number of synthetic CDOs they could create. In addition, multiple synthetic CDOs could reference the same RMBS and CDO securities in various combinations, and sell financial instruments dependent upon the same sets of high risk, poor quality loans over and over again to various investors. Since every synthetic CDO had to have a “short” party betting on the failure of the referenced assets, at least some poor quality RMBS and CDO securities could be included in each transaction to attract those investors. When some of the high risk, poor quality loans later incurred delinquencies or defaults, they caused losses, not in a single RMBS, but in multiple cash, synthetic, and hybrid CDOs whose securities had been sold to a wide circle of investors.¹²⁵⁵

Conflicts of Interest. Investment banks that designed, obtained credit ratings for, underwrote, sold, managed, and serviced CDO securities, made money from the fees they charged for these and other services. Investment banks reportedly netted from \$5 to \$10 million in fees per CDO.¹²⁵⁶ Some also constructed CDOs to transfer the financial risk of poorly performing RMBS and CDO securities from their own holdings to the investors they were soliciting to buy the CDO securities.¹²⁵⁷ By selling the CDO securities to investors, the investment banks profited not only from the CDO sales, but also eliminated possible losses from the assets removed from their warehouse accounts. In some instances, unbeknownst to the customers and investors, the investment banks that sold them CDO securities bet against those instruments by taking short positions through single name CDS contracts. Some even took the short side of the CDO they

¹²⁵⁵ See, e.g., “Senate’s Goldman Probe Shows Toxic Magnification,” Wall Street Journal (5/2/2010) (showing how a single \$38 million subprime RMBS, created in June 2006, was included in 30 CDOs and, by 2008, had caused \$280 million in losses to investors).

¹²⁵⁶ See “Banks’ Self-Dealing Super-Charged Financial Crisis,” ProPublica (8/26/2010), <http://www.propublica.org/article/banks-self-dealing-super-charged-financial-crisis> (“A typical CDO could net the bank that created it between \$5 million and \$10 million – about half of which usually ended up as employee bonuses. Indeed, Wall Street awarded record bonuses in 2006, a hefty chunk of which came from the CDO business.”). Fee information obtained by the Subcommittee is consistent with this range of CDO fees. For example, Deutsche Bank received nearly \$5 million in fees for Gemstone 7, and the head of its CDO group said that Deutsche bank received typically between \$5 and 10 million in fees, while Goldman Sachs charged a range of \$5 to \$30 million in fees for Camber 7, Fort Denison, and the Hudson Mezzanine 1 and 2 CDOs. 12/20/2006 Gemstone 7 Securitization Credit Report, DB_PSI_00237655-71 and 3/15/2007 Gemstone CDO VII Ltd. Closing Memorandum, DB_PSI_00133536-41; Subcommittee interview of Michael Lamont (9/29/2010); and Goldman Sachs response to Subcommittee QFRs at PSI-QFR-GS0249.

¹²⁵⁷ See, e.g., discussion of the Hudson CDO, below; Subcommittee interview of Daniel Sparks (4/15/10) (Goldman tried selling subprime loans but could not; it was easier and more efficient to securitize them and then sell the securitized product to transfer loans in bulk; it was also easier to sell CDOs than individual underlying positions).

constructed, and profited when the referenced assets lost value, and the investors to whom they had sold the long side of the CDO were required to make substantial payments to the CDO.

The following two case studies examine how two investment banks active in the U.S. mortgage market constructed, marketed, and sold RMBS and CDO securities; how their activities magnified risk in the mortgage market; and how conflicts of interest negatively impacted investors and contributed to the financial crisis. The Deutsche Bank case history provides an insider's view of what one senior CDO trader described as Wall Street's "CDO machine." It reveals the trader's negative view of the mortgage market in general, the poor quality RMBS assets placed in a CDO that Deutsche Bank marketed to clients, and the fees that made it difficult for investment banks like Deutsche Bank to stop selling CDOs. The Goldman Sachs case history shows how one investment bank was able to profit from the collapse of the mortgage market, and ignored substantial conflicts of interest to profit at the expense of its clients in the sale of RMBS and CDO securities.

B. Running the CDO Machine: Case Study of Deutsche Bank

This case history examines the role of Deutsche Bank USA in the design, marketing, and sale of collateralized debt obligations (CDOs) that incorporated or referenced residential mortgage backed securities (RMBS).

From 2004 to 2008, U.S. financial institutions issued over \$1.4 trillion worth of CDO securities. At first, this complex structured finance product proved highly profitable for investment banks which established CDO departments and trading desks to create and market the securities. By early 2007, however, due to declining housing prices, accelerating mortgage delinquencies, and RMBS losses, investor interest in CDOs began to drop off sharply. In July 2007, the major credit rating agencies began lowering credit ratings for many CDO securities, at times eliminating the investment grade ratings that had supported CDO sales. Despite waning investor interest, U.S. investment banks continued to issue new mortgage related CDOs throughout 2007, in an apparent effort to sustain their fees and CDO departments. Some investment banks supported the CDO market by purchasing existing CDO securities for inclusion in new, even more complex CDOs, seeking customers in Europe and Asia, or retaining risky CDO securities on their own books.

Deutsche Bank was a major player in the CDO market, both in creating new CDO issues and trading these securities in the secondary market. Deutsche Bank's top global CDO trader, Greg Lippmann, began to express concerns that the CDO market was unsustainable. By the middle of 2006, Mr. Lippmann repeatedly warned and advised his Deutsche Bank colleagues and some of his clients seeking to buy short positions about the poor quality of the assets underlying many CDOs. He described some of those assets as "crap" and "pigs," and predicted the assets and the CDO securities would lose value.

At one point, Mr. Lippmann was asked to buy a specific CDO security and responded that it "rarely trades," but he "would take it and try to dupe someone" into buying it. He also at times referred to the industry's ongoing CDO marketing efforts as a "CDO machine" or "ponzi scheme." Deutsche Bank's senior management disagreed with his negative views, and used the bank's own funds to make large proprietary investments in mortgage related securities that, in 2007, had a notional or face value of \$128 billion and a market value of more than \$25 billion.

Despite disagreeing with his negative views on the mortgage market, Deutsche Bank allowed Mr. Lippmann, in 2005, to develop a large proprietary short position for the bank in the RMBS market. Since carrying that short position required the bank to pay millions of dollars in premiums, senior management also required Mr. Lippmann to defray or eliminate those costs by convincing others to take short positions in the mortgage market, thereby generating fees for the bank from arranging those shorts. In 2006, Mr. Lippmann generated an estimated \$200 million in fees by encouraging his clients, such as hedge funds, to buy short positions. Simultaneously, Mr. Lippmann increased the size of the bank's short position by taking the short side of credit default swaps (CDS) referencing individual RMBS securities, an investment strategy often

referred to as investing in “single name CDS” contracts. Over a two-year period from 2005 to 2007, Mr. Lippmann built a massive short position in single name CDS contracts totaling \$5 billion. From 2007 to 2008, at the direction of the bank’s senior management, he cashed in that position, generating a profit for his trading desk of approximately \$1.5 billion, which he claims made more money on a single position than any other trade had ever made for Deutsche Bank in its history. Despite that gain, due to its substantial long investments, Deutsche Bank incurred an overall loss of about \$4.5 billion from its mortgage related proprietary investments.¹²⁵⁸

To understand how Deutsche Bank continued to issue and market CDO securities even as the market for mortgage related securities began collapsing, the Subcommittee examined a specific CDO in detail, called Gemstone CDO VII Ltd. (Gemstone 7). In October 2006, Deutsche Bank began assisting in the gathering of assets for Gemstone 7, which issued its securities in March 2007. It was the last in a series of CDOs sponsored by HBK Capital Management (HBK), a large hedge fund which acted as the collateral manager for the CDO. Deutsche Bank made \$4.7 million in fees from the deal, while HBK was slated to receive \$3.3 million. It was not the last CDO issued by Deutsche Bank. Even after Gemstone 7 was issued in March of 2007, Deutsche Bank issued 9 additional CDOs.

Gemstone 7 was a hybrid CDO containing or referencing a variety of high risk, subprime RMBS securities initially valued at \$1.1 billion when issued. Deutsche Bank’s head global trader, Mr. Lippmann, recognized that these RMBS securities were high risk and likely to lose value, but did not object to their inclusion in Gemstone 7. Deutsche Bank, the sole placement agent, marketed the initial offering of Gemstone 7 in the first quarter of 2007. Its top tranches received AAA ratings from Standard & Poor’s and Moody’s, despite signs that the CDO market was failing and the CDO itself contained many poor quality assets.

Nearly a third of Gemstone’s assets consisted of high risk subprime loans originated by Fremont, Long Beach, and New Century, three lenders known at the time within the financial industry for issuing poor quality loans and RMBS securities. Although HBK directed the selection of assets for Gemstone 7, Mr. Lippmann’s CDO Trading Desk was involved in the process and did not object to including certain RMBS securities in Gemstone 7, even though Mr. Lippmann was simultaneously referring to them as “crap” or “pigs.” Mr. Lippmann was also at the same time advising some of his clients to short some of those same RMBS securities. In addition, Deutsche Bank sold five RMBS securities directly from its inventory to Gemstone 7, several of which were also contemporaneously disparaged by Mr. Lippmann.

The Deutsche Bank sales force aggressively sought purchasers for the CDO securities, while certain executives expressed concerns about the financial risk of retaining Gemstone 7 assets as the market was deteriorating in early 2007. In its struggle to sell Gemstone 7, Deutsche Bank motivated its sales force with special financial incentives, and sought out buyers in Europe and Asia because the U.S. market had dried up. Deutsche Bank also talked of providing HBK’s marks, instead of its own, to clients asking about the value of Gemstone 7’s assets, since HBK’s

¹²⁵⁸ Subcommittee interview of Greg Lippmann (10/18/2010); Net Revenues from ABS Products Backed by U.S. Residential Mortgages, DB_PSI_C00000003.

marks showed the CDO's assets performing better. Deutsche Bank was ultimately unable to sell \$400 million, or 36%, of the Gemstone 7 securities, and agreed with HBK to split the unsold securities, each taking \$200 million onto its own books. Deutsche Bank did not disclose to the eight investors whom it had solicited and convinced to buy Gemstone 7, that its global head trader of CDOs had an extremely negative view of a third of the assets in the CDO or that the bank's internal valuations showed that the assets had lost over \$19 million in value since purchased.¹²⁵⁹

Gemstone 7 also demonstrated how CDOs magnified risk by including or referencing within itself 115 different RMBS securities containing thousands of high risk, poor quality subprime loans. Many of those RMBS securities carried BB ratings, which are non-investment grade credit ratings and were among the highest risk securities in the CDO. Gemstone 7 also included CDO securities that, in themselves, concentrated the risk of their underlying assets. Over 75% of Gemstone's assets consisted of RMBS securities with ratings of BBB or lower, including approximately 33% with non-investment grade ratings, yet Gemstone's top three tranches were given AAA ratings by the credit rating agencies. The next three tranches were given investment grade ratings as well. Those investment grade ratings enabled investors like pension funds, insurance companies, university endowments, and municipalities, some of which were required by law, regulation, or their investment plans to put their funds in safe investments, to consider buying Gemstone securities. Eight investors actually purchased them. Within eight months, the Gemstone securities began incurring rating downgrades. By July 2008, all seven tranches in the CDO had been downgraded to junk status, and the long investors were almost completely wiped out. Today, the Gemstone 7 securities are nearly worthless.

Deutsche Bank was, in Mr. Lippmann's words, part of a "CDO machine" run by investment banks that produced hundreds of billions of high risk CDO securities. Because the fees to design and market CDOs ranged from \$5 to \$10 million per CDO, investment bankers had a strong financial incentive to continue issuing them, even in the face of waning investor interest and poor quality assets, since reduced CDO activity would have led to less income for structured finance units, smaller bonuses for executives, and even the disappearance of CDO departments, which is eventually what occurred. The Deutsche Bank case history provides a cautionary tale for both market participants and regulators about how complex structured finance products gain advocates within an organization committed to pushing the products through the pipeline to maintain revenues and jobs, regardless of the financial risks or possible impact on the marketplace.

¹²⁵⁹ See Sections 11 and 12 of Securities Act of 1933. See also Rule 10b-5 of the Securities Exchange Act of 1934. For a more detailed discussion of the legal obligations of underwriters, placement agents, and broker-dealers, see Section C(6) on conflicts of interest analysis, below.

(1) Subcommittee Investigation and Findings of Fact

As part of its investigation into the CDO market and the Deutsche Bank case study, the Subcommittee collected and reviewed hundreds of thousands of Deutsche Bank documents including reports, analyses, memoranda, correspondence, transcripts, spreadsheets, and email. The Subcommittee also collected and reviewed documents from HBK Capital Management, several financial institutions that purchased Deutsche Bank CDO securities, and the Securities and Exchange Commission (SEC). In addition, the Subcommittee conducted 14 interviews, including interviews with current and former Deutsche Bank and HBK executives, managers, sales representatives, and traders; spoke with personnel from the financial institutions that invested in Gemstone 7; and consulted with a number of experts from the SEC, academia, and industry.

Based upon the Subcommittee's review, the Report makes the following findings of fact.

1. **CDO Machine.** From late 2006 through 2007, despite increasing mortgage delinquencies, RMBS losses, and investor flight from the U.S. mortgage market, U.S. investment banks continued to issue new CDOs, including Deutsche Bank which issued 15 new CDOs securitizing nearly \$11.5 billion of primarily mortgage related assets from December 2006 to December 2007.
2. **Fee Incentives.** Because the fees charged to design and market CDOs were in the range of \$5 to \$10 million per CDO, investment banks had strong incentives to continue issuing CDOs despite increasing risks and waning investor interest, since reduced CDO activity meant less revenues for structured finance units and even the disappearance of CDO departments and trading desks, which is eventually what occurred.
3. **Deutsche Bank's \$5 Billion Short.** Although Deutsche Bank as a whole and through an affiliated hedge fund, Winchester Capital, made proprietary investments in long mortgage related assets, the bank also permitted its head CDO trader to make a \$5 billion short investment that bet against the mortgage market and produced bank profits totaling approximately \$1.5 billion.
4. **Proprietary Loss.** By 2007, Deutsche Bank, through its mortgage department and an affiliated hedge fund, had substantial proprietary holdings in the mortgage market, including more than \$25 billion in long investments and a \$5 billion short position, which together resulted in 2007 losses to the bank of about \$4.5 billion.
5. **Gemstone 7.** In the face of a deteriorating market, Deutsche Bank aggressively sold a \$1.1 billion CDO, Gemstone 7, which included RMBS securities that the bank's top CDO trader had disparaged as "crap" and "pigs," and which produced \$1.1 billion of high risk, poor quality securities that are now virtually worthless.

(2) Deutsche Bank Background

CDOs In General. According to the Securities Industry and Financial Markets Association, \$1.4 trillion worth of CDOs were issued in the United States from 2004 through the end of 2007.¹²⁶⁰ The following chart depicts the dramatic rise and fall of the U.S. CDO market over the last ten years, with total CDO issuance reaching its peak in 2006 at \$520 billion, and then falling to a low of \$4 billion in 2009.¹²⁶¹

**Total Annual CDO Issuance
2000-2009**

Year	Total CDO Issuance (\$ in billions)
2000	67.99
2001	78.45
2002	83.07
2003	86.63
2004	157.82
2005	251.27
2006	520.64
2007	481.60
2008	61.89
2009	4.34

In 2006 and 2007, investment banks created around half a trillion dollars in CDO securities each year, even as U.S. housing prices began to stagnate and decline, subprime mortgages began to default at record rates, and RMBS securities began to incur dramatic losses. By the middle of 2007, due to the increasing risks, U.S. institutional investors like pension funds, hedge funds, and others began to purchase fewer CDO securities, and investment banks turned their attention increasingly to European and Asian investors as well as the issuers of new CDOs who became the primary buyers of CDO securities.¹²⁶² In 2007, U.S. investment banks kept issuing and selling CDOs despite slowed sales, which meant that investment banks had to retain an increasing portion of the unsold assets on their own balance sheets.¹²⁶³

¹²⁶⁰ 10/15/2010 “Global CDO Issuance,” Securities Industry and Financial Markets Association, <http://www.sifma.org/research/statistics.aspx>.

¹²⁶¹ Chart prepared by the Subcommittee using data from 10/15/2010 “Global CDO Issuance,” Securities Industry and Financial Markets Association, <http://www.sifma.org/research/statistics.aspx>. By 2004, most, but not all, CDOs relied primarily on mortgage related assets such as RMBS securities. Subcommittee interview of Gary Witt, former Managing Director of Moody’s RMBS Group (10/29/2009).

¹²⁶² See 7/12/2007 email from Michael Lamont to Boaz Weinstein at Deutsche Bank, DBSI_01201843; “Banks’ Self-Dealing Super Charged Financial Crisis,” *ProPublica* (8/26/2010), <http://www.propublica.org/article/banks-self-dealing-super-charged-financial-crisis>; and “Mortgage-Bond Pioneer Dislikes What He Sees,” *Wall Street Journal* (2/24/2007).

¹²⁶³ “Banks’ Self-Dealing Super Charged Financial Crisis,” *ProPublica* (8/26/2010).

The credit rating agencies marked a “sea change” in the CDO market in 2007, in which investment banks issued CDOs at near record levels in the first half of the year, but then sharply reined in their efforts after the mass rating downgrades of RMBS and CDO securities began in July 2007:

“[The CDO] market in the U.S. was very active in terms of issuance throughout the first half of 2007. ... The year 2007 saw a sea change for the CDO market. Moody’s rated more than 100 SF [structured finance] CDO transactions in each of the first two quarters, but the number fell sharply to 40 in the third quarter and to just eight in the fourth quarter as the sheer speed and magnitude of the subprime mortgage fallout significantly weakened investors’ confidence.”¹²⁶⁴

In the years leading up to the financial crisis, the typical size of a CDO deal was between \$1 and \$1.5 billion,¹²⁶⁵ and generated large fees for investment banks in the range of \$5 to \$10 million per CDO.¹²⁶⁶ To handle these transactions, a number of large investment banks established CDO departments and trading desks charged with designing, underwriting, selling, or trading CDO securities. The CDO origination desks typically worked with the investment banks’ structured finance sales forces to sell the resulting CDO securities. This structure meant that stopping the issuance of CDO securities would require the investment banks to lose out on the fees, prestige, and market share tied to CDO sales. In addition, whole CDO departments, with their dedicated bankers, traders, and supervisors, would have to disappear, which is eventually what happened after the CDO market crashed.

CDOs at Deutsche Bank. From 2004 to 2008, Deutsche Bank issued 47 asset backed CDOs for a total securitization of \$32.2 billion.¹²⁶⁷ According to analysts, in both 2006 and 2007, Deutsche Bank ranked fourth globally in issuing asset backed CDOs, behind Merrill Lynch, JPMorgan Chase, and Citigroup.¹²⁶⁸

¹²⁶⁴ Moody’s 2008 Global CDO Review (3/3/2008).

¹²⁶⁵ “Wall Street’s money machine breaks down,” [CNNMoney.com](http://money.cnn.com/magazines/fortune/fortune_archive/2007/11/26/101232838/index.htm) (11/12/2007), http://money.cnn.com/magazines/fortune/fortune_archive/2007/11/26/101232838/index.htm.

¹²⁶⁶ See “Banks’ Self-Dealing Super-Charged Financial Crisis,” [ProPublica](http://www.propublica.org/article/banks-self-dealing-super-charged-financial-crisis) (8/26/2010), <http://www.propublica.org/article/banks-self-dealing-super-charged-financial-crisis> (“A typical CDO could net the bank that created it between \$5 million and \$10 million – about half of which usually ended up as employee bonuses. Indeed, Wall Street awarded record bonuses in 2006, a hefty chunk of which came from the CDO business.”). Fee information obtained by the Subcommittee is consistent with this range of CDO fees. For example, Deutsche Bank received nearly \$5 million in fees for Gemstone 7, and the head of its CDO Group said that Deutsche bank received typically between \$5 and 10 million in fees per CDO, while Goldman Sachs charged a range of \$5 to \$30 million in fees for its Camber 7, Fort Denison, and Hudson Mezzanine 1 and 2 CDOs. 12/20/2006 Gemstone 7 Securitization Credit Report, DB_PSI_00237655-71; undated Gemstone 7 Securitization Credit Report, MTSS000011-13; 3/15/2007 Gemstone CDO VII Ltd. Closing Memorandum, DB_PSI_00133536-41; Subcommittee interview of Michael Lamont (Deutsche Bank) (9/29/2010); 3/21/2011 letter from Deutsche Bank’s counsel to the Subcommittee, PSI-Deutsche_Bank-0001-04; Goldman Sachs response to Subcommittee QFRs at PSI-QFR-GS0249.

¹²⁶⁷ Chart, ABS CDOs Issued by DBSI (between 2004 and 2008), PSI-Deutsche_Bank-02-0005-23.

¹²⁶⁸ See “Global ABS CDO Issuance” chart, [Reuters](http://graphics.thomsonreuters.com/10/04/GLB_GCDOV0410.gif) (4/20/2010), http://graphics.thomsonreuters.com/10/04/GLB_GCDOV0410.gif; “Banks in Talks to End Bond Probe,” [Wall Street](http://www.nytimes.com)

At Deutsche Bank, five different parts of the Securitized Product Group played key roles in its CDO business. They were the CDO Group (North America); the CDO sales force, formally called Securitized Products; the CDO Syndication Desk which helped promote and track CDO sales; the mortgage department; and the CDO Trading Desk, formally called ABS (Asset Backed Security) Trading, CDO Trading, and ABS Correlation Trading.

The CDO Group had two co-heads, Michael Lamont and Michael Herzig, and approximately 20 employees. The heads of the group reported to Richard D'Albert, Global Head of Deutsche Bank's Securitized Product Group. The CDO Group designed and structured the bank's CDOs, analyzed the assets that went into the CDOs, monitored the purchasing and warehousing of those assets, obtained CDO credit ratings, prepared CDO legal documentation, acted as the CDO underwriter or placement agent on behalf of Deutsche Bank, and oversaw the issuance of the CDO securities.¹²⁶⁹

The CDO sales force sold the resulting CDO securities for Deutsche Bank. It received assistance from the CDO Syndication, sometimes called the "syndicate," which helped promote the deals with investors and tracked CDO sales. The CDO sales force was headed by Sean Whelan and Michael Jones. They reported to Munir D'auhajre, overall head of sales, who reported, in turn, to Fred Brettschneider, the head of the Institutional Client Group of Deutsche Bank Americas. The CDO sales force had approximately 20 employees. In the United States, the CDO Syndication had about seven employees, and was headed by Anthony Pawlowski, who reported to Mr. Lamont and Mr. Herzig, who headed the CDO Group.

The Deutsche Bank mortgage department was responsible for purchasing residential mortgages from a variety of sources, warehousing those mortgages, and securitizing the mortgages into RMBS securities for which Deutsche Bank acted as the underwriter or placement agent. Some of those RMBS securities were later included or referenced in CDOs issued by the bank.

The CDO Trading Desk was headed by Greg Lippmann, who served as global head of Deutsche Bank's CDO, ABS, and ABS Correlation Trading Desks.¹²⁷⁰ Those desks were responsible for trading a variety of RMBS, CDO, and other asset backed securities on the secondary market. Mr. Lippmann had a staff of approximately 30 employees, 20 in the United States and 10 in London. Like the head of the CDO Group, Mr. Lippmann reported to Mr. D'Albert, the head of the bank's Securitized Product Group. Mr. Lippmann was also the head of

Journal (12/2/2010), <http://online.wsj.com/article/SB10001424052748704594804575649170454587534.html?KEYWORDS=Banks+in+Talks+to+End+Bond+Probe>. See also 10/2006, "CDO Primary Update Progress Report," prepared by Deutsche Bank, DBSI_PSI_EMAIL03970167-72, at 68 (ranking Deutsche Bank as third in CDO issuances as of October 2006).

¹²⁶⁹ Subcommittee interview of Michael Lamont (9/29/2010).

¹²⁷⁰ Organizational Chart for Deutsche Bank Global CDO Group, DB_PSI_C00000001.

risk management for all new issue CDOs and described himself as “involved in underwriting, structuring, marketing and hedging our warehouse risk for new issue cdos.”¹²⁷¹

The CDO Trading Desk conducted trades for both clients and other Deutsche Bank entities. It was further divided into three trading desks, designated the CDO, ABS, and ABS Correlation Desks. Each traded certain structured finance products, tracked relevant market news and developed expertise in its assigned products, and served as a source of asset and market information for other branches of Deutsche Bank. The CDO Desk focused on buying and selling CDO securities; the ABS Desk concentrated on trading RMBS and other asset backed securities as well as short trading strategies involving credit default swap (CDS) contracts in single name RMBS; and the ABS Correlation Desk acted primarily in a market making capacity for Deutsche Bank clients, trading both long and short RMBS and CDO securities and CDS contracts with the objective of taking offsetting positions that minimized the bank’s risk.¹²⁷²

Mr. Lippmann was well known in the CDO marketplace as a trader. He had joined Deutsche Bank in 2000, after a stint at Credit Suisse trading bonds. One publication noted that Mr. Lippmann “made his name with big bets on a housing bust,” continuing: “Mr. Lippmann emerged as a Cassandra of the financial crisis, spotting cracks in the mortgage market as early as 2006. His warnings helped Deutsche brace for the crisis. He also helped investors — and himself — land huge profits as big bets that the housing market would collapse materialized.”¹²⁷³

(3) Deutsche Bank’s \$5 Billion Short

In 2006 and 2007, Deutsche Bank’s top CDO trader, Greg Lippmann, repeatedly warned his Deutsche Bank colleagues and some clients outside of the bank about the poor quality of the assets underlying many RMBS and CDO securities. Although senior management within the bank did not agree with his views, they allowed Mr. Lippmann, in 2005, to establish a large short position on behalf of the bank, essentially betting that mortgage related securities would fall in value. From 2005 to 2007, Mr. Lippmann built that position into a \$5 billion short.

(a) Lippmann’s Negative Views of Mortgage Related Assets

Emails produced to the Subcommittee provide repeated examples of Mr. Lippmann’s negative views of mortgage related assets, particularly those involving subprime mortgages. At times, he expressed his views to colleagues within the bank; at other times he expressed them in connection with advising a client to bet against an RMBS security by taking a short position. At times, Mr. Lippmann recommended that his clients short poor quality RMBS assets, even while his trading desk was participating in a selection process that included those same assets in

¹²⁷¹ 7/14/2006 email from Greg Lippmann to Melissa Goldsmith at Deutsche Bank, DBSI_PSI_EMAIL01400135-37.

¹²⁷² Subcommittee interview of Greg Lippmann (10/18/2010).

¹²⁷³ “Lippmann, Deutsche Trader, Steps Down,” *New York Times* (4/21/2010), <http://dealbook.nytimes.com/2010/04/21/lippmann-deutsche-trader-steps-down/>. See also Michael Lewis, *The Big Short* (2010), at 64.

Gemstone 7. The following emails by Mr. Lippmann, written during 2006 and 2007, provide examples of his negative views.

- Emails regarding LBMLT 2004-3 M8, a subprime RMBS security issued by Long Beach: “[T]his bond blows.”¹²⁷⁴ (2/24/2006)
- Email providing Deutsche Bank trader his opinion regarding RMBS shelves: “[Y]ikes didn’t see that[.] ... [H]alf of these are crap and rest are ok[.] ... [C]rap-heat pchlt sail tmts.”¹²⁷⁵ (4/5/2006)
- Email advising an investment banker at JPMorgan Chase regarding subprime RMBS securities issued by Aegis Asset Backed Securities Trust (“aabst”), Bay View Financial Acquisition Trust (“bayv”), Home Equity Mortgage Loan Asset Based Trust (“inabs”), Park Place Securities Inc. (“ppsi”), and Structured Asset Investment Loan (“sail”): “This is a good pool for you because it has a fair number of weak names but not so many that investors should balk (I wouldn’t add more of these) and also has only a few names that are very good.”¹²⁷⁶ (6/23/2006)
- Email advising an investment banker at Oppenheimer Funds: “[Y]ou can certainly build a portfolio by picking only bad names and you have largely done that as Rasc ahl is considered bad as is Fremont (bsabs fr, fhlt, jpmac fre, sabr fr, nheli fm deals) ace, arsi and lbmlt.”¹²⁷⁷ Mr. Lippmann listed ACE Securities Corp. as a “bad name” even though it was created by and associated with Deutsche Bank itself.¹²⁷⁸ (8/4/2006)

¹²⁷⁴ 2/24/2006 emails between Greg Lippmann and Rocky Kurita at Deutsche Bank, DBSI_PSI_EMAIL00966290. Mr. Lippmann’s negative comments did not begin in 2006; as early as May 2005, he wrote that the “real money flows are buying protection.” 5/11/2005 email from Greg Lippmann to Rocky Kurita at Deutsche Bank, DBSI_PSI_EMAIL00048683.

¹²⁷⁵ 4/5/2006 email from Greg Lippmann to Deutsche Bank employee, DBSI_PSI_EMAIL01073270. The acronyms in the email refer to the following lenders: Home Equity Asset Trust (“heat”), People’s Choice Home Loan Securities Trust (“pchlt”), Structured Asset Investment Loan (“sail”), and Terwin Mortgage Trust (“tmts”).

¹²⁷⁶ 6/23/2006 email from Greg Lippmann to Derek Kaufman at JPMorgan, DBSI_PSI_EMAIL01344930-33.

¹²⁷⁷ 8/4/2006 email from Greg Lippmann to Michelle Borre at Oppenheimer Funds, DBSI_PSI_EMAIL01528941-43. The acronyms in the email refer to the following lenders: Residential Asset Securities Corp. (“Rasc”), American Home Loans (“ahl”), Fremont (“fr,” “fre,” “fm,” and “fhlt”), Bear Stearns Asset Backed Securities (bsabs), JPMorgan Acquisition Trust (“jpmac”), Securitized Asset Backed Receivables Trust (“sabr”), Nomura Home Equity Loan, Inc. (“nheli”), ACE Securities Corp. (“ace”), Argent Securities Inc. (“arsi”), and Long Beach Mortgage Trust (“lbmlt”).

¹²⁷⁸ Subcommittee interview of Greg Lippmann (10/18/2010); Subcommittee interview with Deutsche Bank’s counsel (3/7/2011); 3/21/2011 letter from Deutsche Bank’s counsel to the Subcommittee (ACE is one of “Deutsche Bank’s own shelf offerings.”), PSI-Deutsche_Bank-32-0001-04. See also 3/2/2011 letter from Deutsche Bank’s counsel to the Subcommittee (“Deutsche Bank has no ownership interest in ACE Securities Corp. (‘ACE’). All shares of ACE are held by Altamont Holdings Corp, a Delaware corporation. Deutsche Bank Securities, Inc. (‘DBSI’), however, is an administrative agent for ACE and in that role has authority to act on behalf of ACE in connection with offerings of asset-backed securities, including RMBS offerings. ... Deutsche Bank hired the AMACAR Group, LLC (‘AMACAR’) to assist in the creation of ACE to act as a registrant and depositor in

- Email to co-head of the Deutsche Bank CDO Group and to Global Head of Deutsche Bank's Securitized Product Group: "I was going to reject this [long purchase of a synthetic CDO] because it seems to be a pig cdo position dump 60^ but then I noticed winchester [Deutsche Bank affiliated hedge fund] is the portfolio selector.....any idea???"¹²⁷⁹ (8/4/2006)
- Email responding to a hedge fund trader at Spinnaker Capital asking about a subprime RMBS security issued by Credit Based Asset Servicing and Securitization, LLC ("cbass"): "That said I can probably short this name to some CDO fool."¹²⁸⁰ (8/30/2006)
- Email responding to a hedge fund trader at Spinnaker Capital asking about MABS 2006-FRE1, a subprime RMBS security that contained Fremont loans and was issued by Mortgage Asset Securitization Transactions Asset-Backed Securities Trust: "This kind of stuff rarely trades in the synthetic market and will be tough for us to cover i.e. short to a CDO fool. That said if u gave us an order at 260 we would take it and try to dupe someone."¹²⁸¹ (9/1/2006)
- Email describing MABS 2006-FRE1, a subprime RMBS security that contained Fremont loans and was issued by Mortgage Asset Securitization Transactions Asset-Backed Securities Trust, as a "crap bond."¹²⁸² (9/01/2006)
- Email describing MSHEL 2006-1 B3, an RMBS security issued by Morgan Stanley as "crap we shorted"; referring to GSAMP 2006-HE3 M9, an RMBS security issued by Goldman Sachs, as "this bond sucks but we are short 20MM"; and noting with regard to ACE, which was created by and associated with Deutsche Bank, that "ace is generally horrible."¹²⁸³ (9/21/2006)
- Email responding to a hedge fund trader at Mast Capital: "Long Beach is one of the weakest names in the market."¹²⁸⁴ (10/20/2006)
- Email to a client selecting bonds to short: "u have picked some crap right away so u have figured it out."¹²⁸⁵ (12/04/2006)

connection with RMBS offerings sponsored and/or underwritten by Deutsche Bank."), PSI-DeutscheBank-31-0004-06.

¹²⁷⁹ 8/23/2006 email from Greg Lippmann to Michael Lamont and Richard D'Albert, DBSI_PSI_EMAIL01605465.

¹²⁸⁰ 8/30/2006 email from Greg Lippmann to Bradley Wickens at Spinnaker Capital, DBSI_PSI_EMAIL01634802.

¹²⁸¹ 9/1/2006 email from Greg Lippmann to Bradley Wickens at Spinnaker Capital, DBSI_PSI_EMAIL02228884.

¹²⁸² 9/1/2006 email from Greg Lippmann to Bradley Wickens at Spinnaker Capital, DBSI_PSI_EMAIL01645016.

¹²⁸³ 9/21/2006 email from Greg Lippmann to Deutsche Bank employee, DBSI_PSI_EMAIL01689001-02. In an October 2006 email, a Deutsche Bank employee wrote to Mr. Lippmann and others that a number of RMBS such as LBMLT, HEAT, INABS, AMSI/ARSI, RAMP/RASC, and CWL "would be impossible to sell to the public" due to their poor quality. 10/2/2006 email from Axel Kunde at Deutsche Bank to Sean Whelan with copy to Mr. Lippmann, DBSI_PSI_EMAIL02255361.

¹²⁸⁴ 10/20/2006 email from Greg Lippmann to Craig Carrozzi at Mast Capital, DBSI_PSI_EMAIL01774820-21.

- Email regarding GSAMP 06-NC2 M8, an RMBS security that contained New Century loans and was issued by Goldman Sachs: “[T]his is an absolute pig.”¹²⁸⁶ (12/8/2006)
- Email describing ABSHE 2006-HE1 M7, a subprime RMBS security issued by Asset Backed Securities Corporation Home Equity Loan Trust, as a “crap deal”; and describing ACE 2006 HE2 M7, a subprime RMBS securitization issued by ACE Securities Corp., as: “[D]eal is a pig!”¹²⁸⁷ (3/1/2007)

When asked about these emails, Mr. Lippmann told the Subcommittee that he generally thought all assets in CDOs were weak, and that his descriptions were often a form of posturing while negotiating prices with his clients. In a number of cases, however, Mr. Lippmann was assisting his clients in devising short strategies or communicating with Deutsche Bank colleagues, rather than negotiating with clients over prices. As will be seen later in this Report, some of the RMBS securities he criticized were, at virtually the same time, being included by his trading desk in Gemstone 7, which was later sold by Deutsche Bank’s CDO Group.

In addition to disparaging individual RMBS securities, Mr. Lippmann expressed repeated negative views about the CDO market as a whole. At times during 2006 and 2007, he referred to CDO underwriting activity by investment banks as the workings of a “CDO machine” or “ponzi scheme.”¹²⁸⁸ In June 2006, for example, a year before CDO credit ratings began to be downgraded en masse, Mr. Lippmann sent an email to a hedge fund trader warning about the state of the CDO market: “[S]tuff is flat b/c [because] the cdo machine has not slowed but I am fielding 2-4 new guys a day that are kicking the tires so we probably don’t go tighter.”¹²⁸⁹ A few months later, in August 2006, Mr. Lippmann wrote about the coming market crash: “I don’t care what some trained seal bull market research person says this stuff has a real chance of massively blowing up.”¹²⁹⁰

When asked about his comments, Mr. Lippmann told the Subcommittee that the CDO market was not really a ponzi scheme, because people did receive an investment return, and asserted that he had used the term because he was “grasping at things” to prove he was right in his short position.¹²⁹¹ Mr. Lippmann also told the Subcommittee that that while he knew that the major credit rating agencies had given AAA ratings to an unusually large number of RMBS and CDO securities and most people believed in the ratings, he did not. He also told the

¹²⁸⁵ 12/4/2006 email from Greg Lippmann to Mark Lee at Contrarian Capital, DBSI_PSI_EMAIL01866336. The acronyms in the email refer to the following lenders: Bear Stearns Asset Backed Securities (“bsabs”), Option One Mortgage Loan Trust (“omlt”), and Ameriquest Mortgage Securities, Inc. (“amsi”).

¹²⁸⁶ 12/8/2006 email from Greg Lippmann to Peter Faulkner at PSAM LLC, DBSI_PSI_EMAIL01882188.

¹²⁸⁷ 3/1/2007 email from Greg Lippmann to Joris Hoedemaekers at Oasis Capital UK, DBSI_PSI_EMAIL02033845.

¹²⁸⁸ In the 1920s, Charles Ponzi defrauded thousands of investors in a speculation scheme that “involves the payment of purported returns to existing investors from funds contributed by new investors.” “Ponzi Schemes – Frequently Asked Questions,” SEC, <http://www.sec.gov/answers/ponzi.htm>.

¹²⁸⁹ 6/8/2006 email from Greg Lippmann to Bradley Wickens at Spinnaker Capital, DBSI_PSI_EMAIL01282551.

¹²⁹⁰ 8/29/2006 email from Greg Lippmann to Bradley Wickens at Spinnaker Capital, DBSI_PSI_EMAIL01628496.

¹²⁹¹ Subcommittee interview of Greg Lippmann (10/18/2010).

Subcommittee that he “told his views to anyone who would listen” but most CDO investors disagreed with him.¹²⁹²

In March 2007, Mr. Lippmann again expressed his view that mortgage related assets were “blowing up”:

“I remain firm in my belief that these are blowing up whether people like it or not and that hpa [housing price appreciation] is far less relevant than these bulls think. Can’t blame them because if this blows up lots of people lose their jobs so they must deny in hope that that will help prevent the collapse. At this price I’m nearly just as short as I’ve ever been.”¹²⁹³

(b) Building and Cashing in the \$5 Billion Short

Mr. Lippmann did not just express negative views of RMBS and CDO securities to his colleagues and clients, he also acquired a significant short position on those assets on behalf of Deutsche Bank. Despite the views of virtually all other senior executives at the bank that RMBS and CDO securities would gain in value over time, Mr. Lippmann convinced the bank to allow him to initiate and build a substantial proprietary short position that would pay off only if mortgage related securities lost value.

Initiating the Short Position. In 2005, Deutsche Bank was heavily invested in the U.S. mortgage market and, by 2007, had accumulated a long position in mortgage related assets that, according to Deutsche Bank, had a notional or face value of \$128 billion and a market value of more than \$25 billion.¹²⁹⁴ These positions had been accumulated and were held primarily by the Deutsche Bank mortgage department, the ABS Trading Desk, and a Deutsche Bank affiliated hedge fund, Winchester Capital, which was based in London.¹²⁹⁵

Mr. Lippmann told the Subcommittee that, despite the bank’s positive view of the mortgage market, in the fall of 2005, he requested permission to establish a proprietary trading

¹²⁹² Subcommittee interview of Greg Lippmann (10/18/2010).

¹²⁹³ 3/4/2007 email from Greg Lippmann to Harvey Allon at Braddock Financial, DBSI_PSI_EMAIL02041351-53. On June 23, 2007, Mr. Lippmann wrote to a Deutsche Bank colleague, “Yup this is the beginning of phase 2 (the bulls still can’t see it), sales by the longs and how do you think the foreign banks will feel when they see that the true mark for what they have is ... this could be the end of the cdo biz.” 6/23/2007 email from Greg Lippmann to Michael George, DBSI_PSI_EMAIL02584591.

¹²⁹⁴ According to Deutsche Bank, as of March 31, 2007, it held a total long position in mortgage related securities whose notional or face value totaled \$127.8 billion, including \$4.3 billion at “ABS Correlation London”; \$5 billion at “CDO Primary Issue/New York”; \$102 billion at “RMBS/New York”; \$7.6 billion at “SPG-Asset Finance/New York”; and \$8.9 billion at “Winchester Capital/London.” 3/2/2011 letter from Deutsche Bank’s counsel to the Subcommittee, PSI-DeutscheBank-31-0004-06. The market value of those positions was substantially lower. For example, according to Deutsche Bank, the \$102 billion long investment held by its RMBS/New York office had a market value of about \$24 billion. 3/21/2011 letter from Deutsche Bank’s counsel to the Subcommittee, PSI-Deutsche_Bank-32-0001-04.

¹²⁹⁵ Id.

position that would short RMBS securities.¹²⁹⁶ He explained that he made this request after reviewing data he received from a Deutsche Bank quantitative analyst, Eugene Xu. He said that this data showed that, in regions of the United States where housing prices had increased by 13%, the default rates for subprime mortgages had increased to 7%.¹²⁹⁷ At the same time, he said, in other regions where housing prices had increased only 4%, the subprime mortgage default rates had quadrupled to 28%.¹²⁹⁸ Mr. Lippmann explained that he had concluded that even a moderate slow down in rising housing prices would result in significant subprime mortgage defaults, that there was considerable correlation among these subprime mortgages, and that the defaults would affect BBB rated RMBS securities. Mr. Lippmann stressed that his negative view of RMBS securities was based primarily on his view that moderating home prices would cause subprime mortgage defaults and was not dependent upon the quality of the subprime loans.¹²⁹⁹

In the fall of 2005, Mr. Lippmann said that he approached his supervisor Richard D'Albert, Global Head of the Structured Products Group, for permission to enter into CDS agreements to short RMBS securities totaling \$1 billion.¹³⁰⁰ He said that he explained at the time that a cost benefit analysis favored a short RMBS position, because the bank would pay a relatively small amount of CDS premiums per year in exchange for a potentially huge payout. Mr. Lippmann said that he estimated at the time that, when the costs were compared to the potential payout if the BBB securities defaulted, the proposed short position offered a potential payout ratio of 8 to 1.

Mr. Lippmann also developed a presentation supporting his position entitled, "Shorting Home Equity Mezzanine Tranches." It made the following points:

- "Over 50% of outstanding subprime mortgages are located in MSAs [metropolitan statistical areas] with double digit 5 year average of annual home price growth rates.
- There is a strong negative correlation between home price appreciation and loss severity.
- Default of subprime mortgages are also strongly negatively correlated with home price growth rates.

¹²⁹⁶ Subcommittee interview of Greg Lippmann (10/18/2010). When asked if the position was a proprietary investment by the bank, Mr. Lippmann told the Subcommittee that it was. *Id.* Deutsche Bank acknowledges in a 20-F filing with the U.S. Securities and Exchange Commission that it conducts proprietary trading, in addition to trading activity that facilitates customer business. Deutsche Bank stated that it trades for its own account (i.e., uses its capital) to exploit market opportunities. See Deutsche Bank Aktiengesellschaft's Form 20-F filed with the Securities and Exchange Commission on March 26, 2008, at 24.

¹²⁹⁷ Subcommittee interview of Greg Lippmann (10/18/2010).

¹²⁹⁸ Subcommittee interview of Greg Lippmann (10/18/2010).

¹²⁹⁹ *Id.*

¹³⁰⁰ *Id.*

- Nearly \$440 billion subprime mortgages will experience payment shocks in the next 3 years.
- Products that may be riskier than traditional home equity/subprime mortgages have become popular.”¹³⁰¹

Mr. Lippmann told the Subcommittee that Mr. D’Albert approved his taking the short position in or around November 2005, but said the trade was so big and controversial that Mr. Lippmann also had to get the approval of Rajeev Misra, Global Head of Credit Trading, Securitization and Commodities, who was based in London.¹³⁰² Mr. Lippmann said that, in or around November 2005, Mr. Misra reluctantly gave his approval for the short position, even though Mr. Misra believed mortgage related securities would continue to increase in value over time.

Building the Short Position. Mr. Lippmann told the Subcommittee that he used some existing short positions that had been undertaken as hedges to begin building his position.¹³⁰³ He said that, throughout 2006, he gradually accumulated a larger short position, which eventually reached \$2 billion. According to Mr. Lippmann, Deutsche Bank senior management reluctantly went along.¹³⁰⁴ He told the Subcommittee that, at one point in 2006, Boaz Weinstein, who reported to Mr. Misra, told him that the carrying costs of his position, which required the bank to pay insurance-like premiums to support the \$2 billion short position, had become so large that he had to find a way to pay for them. According to Mr. Lippmann, the bank’s senior management asked him to persuade them that he was right by demonstrating that others were willing to “short” the market as well. Mr. Lippmann told the Subcommittee he was then motivated to convince his clients that they ought to short the mortgage market, arrange the shorts for them, and make enough in fees from those transactions to pay for the costs of his multi-billion-dollar short.¹³⁰⁵

Mr. Lippmann told the Subcommittee that he spent much of 2006 pitching his clients to short the mortgage market. He said that he often made presentations to prospective clients sharing with them his “strategy on how to cash in on a slowing housing market.”¹³⁰⁶ He said that, in early 2006, he expended approximately 200 hours trying to convince AIG to short single name RMBS, but was unsuccessful. He told the Subcommittee that he also believed that his presentations helped convince AIG to stop buying RMBS and CDO securities and stop selling CDS protection for those deals. In an August 2006 email, Mr. Lippmann wrote: “In 05 for a time, we sold EVERY single one to AIG. They stepped out of the market in March of 06 after speaking with me and our research people (and I don’t doubt other dealers).”¹³⁰⁷ Mr. Lippmann

¹³⁰¹ 9/2005 “Shorting Home Equity Mezzanine Tranches, A Strategy to Cash in on a Slowing Housing Market,” DBSI_PSI_EMAIL00502892-29.

¹³⁰² Subcommittee interview of Greg Lippmann (10/18/2010).

¹³⁰³ Id.

¹³⁰⁴ Id.

¹³⁰⁵ Id.

¹³⁰⁶ Id.

¹³⁰⁷ 8/26/2006 email from Greg Lippmann to Richard Axilrod at Moore Capital, DBSI_PSI_EMAIL01618236.

told the Subcommittee that Mr. Lamont, who co-led Deutsche Bank's CDO Group, was not pleased that Mr. Lippmann had convinced AIG, a very large purchaser of long interest in RMBS and CDO securities, to stop buying them.

The documents indicate that Mr. Lippmann and his trading team were aware at the time that the CDO Trading Desk was expected to promote rather than discourage client interest in purchasing Deutsche Bank's CDO securities. One of Mr. Lippmann's top traders, Rocky Kurita, put it this way in mid-2005: "[W]e have to make money. Customer happiness is a secondary goal but we cannot lose sight of the trading desk's other role of supporting new issue and the customer franchise."¹³⁰⁸ In a 2007 email to a client, Mr. Lippmann wrote: "[P]lease please do not forward these emails outside of your firm. ... I do not want to be blamed by the new issue people for destroying their business."¹³⁰⁹

Although Mr. Lippmann was unsuccessful in convincing AIG to short RMBS and CDO securities, he did convince some of his other clients, usually hedge funds, to undertake such shorts, primarily by purchasing single name CDS contracts referencing specific RMBS securities. Those trades generated substantial sums for the ABS Correlation Trading Desk which acted as a market maker in the CDS market for those clients. Mr. Lippmann told the Subcommittee that the shorts executed by his clients ultimately generated about \$200 million in revenues for his desk in 2006.¹³¹⁰

Defending the Short. According to Mr. Lippmann, in December 2006, he met in London with a senior bank official, Anshu Jain, Head of Global Markets at Deutsche Bank, and suggested that Deutsche Bank's long positions in mortgage related securities created too much exposure for the bank and should be reduced.¹³¹¹ Mr. Lippmann recommended that the bank hedge its risk using his short strategy. His suggestion was not acted upon, but as the market grew more volatile in late 2006 and early 2007, Mr. Lippmann's short position began to gain in value and caught the attention of senior management at the bank.

Mr. Lippmann told the Subcommittee that, in January 2007, he met with Mr. Jain, Mr. Misra, and Mr. D'Albert at a hotel in Lisbon, where all three again challenged him to defend his short position by noting that it had required him to pay out \$20 million in CDS premiums during 2006.¹³¹² Mr. Lippmann told the Subcommittee that he countered by pointing out, while he had paid out \$20 million, his desk made \$200 million from trading in RMBS and CDO shorts for his clients. He said that the three concluded he could keep his short position.¹³¹³ According to Mr. Lippmann, in February 2007, Mr. Jain met with him again to discuss whether or not to keep his short position, because it had gained in value and Deutsche Bank could cash in the position and

¹³⁰⁸ 5/12/2005 email from Rocky Kurita to Greg Lippmann, DBSI_PSI_EMAIL00054826.

¹³⁰⁹ 2/1/2007 email from Greg Lippmann to Wyck Brown at Braddock Financial, DBSI_PSI_EMAIL01969867.

¹³¹⁰ Subcommittee interview of Greg Lippmann (10/18/2010).

¹³¹¹ Subcommittee interview of Greg Lippmann (10/18/2010).

¹³¹² Subcommittee interview of Greg Lippmann (10/18/2010).

¹³¹³ Subcommittee interview of Greg Lippmann (10/18/2010).

take the profits at that time. Mr. Lippmann said that the result of the meeting was that, once again, his position was left in place.

While defending his position within the bank, Mr. Lippmann continued to speak with his outside clients about his negative views of the market, continued to make presentations to potential clients about shorting the market,¹³¹⁴ and continued to execute shorts for them, while building his desk's proprietary short position.

According to Mr. Lippmann, in late February or early March 2007, as the ABX Index showed subprime RMBS securities losing value and subprime mortgages continued incurring delinquencies at record rates, an ad hoc meeting of Deutsche Bank's executive committee took place in London to discuss the bank's risk exposure in mortgage related securities. According to Mr. Lippmann, he happened to be in London at the time and was invited to attend. He estimated that ten to twelve persons were at the meeting in person, and another two to four persons participated by telephone. He said that, at the meeting, Deutsche Bank executives discussed whether the recent market volatility reflected short term or longer term trends and whether the bank should make any changes in its holdings.¹³¹⁵ At that time, Mr. Lippmann held the only large short position on behalf of the bank, then about \$4 to 5 billion in size.¹³¹⁶ In contrast, the Deutsche Bank mortgage group held \$102 billion in long RMBS and CDO securities, and Winchester Capital, Deutsche Bank's hedge fund affiliate, held a net long position of \$8.9 billion.¹³¹⁷ Mr. Lippmann told the Subcommittee that he was the only person at the meeting who argued for the bank to increase its short position.¹³¹⁸

At the time of the London meeting, Mr. Lippmann's position was showing a significant profit. Mr. Misra brought up the alternative of cashing in his position while RMBS prices were down, because he thought prices were in a short term dip and the profits might disappear later on. Mr. Lippmann contended that the bank should not only keep his short position, but increase it, but more senior voices disagreed with him. He told the Subcommittee that the decision at the end of the meeting was for all parties to keep their positions unchanged, including Mr. Lippmann.¹³¹⁹

Cashing In the Short. In July 2007, the major credit rating agencies began issuing downgrades of RMBS and CDO securities, in particular those that incorporated or referenced subprime mortgages. The value of those securities began to plummet. By the end of the summer of 2007, Deutsche Bank initiated efforts to sell off the long positions held by Winchester Capital and other Deutsche Bank entities, reflecting a shift in the bank's strategy, but its sales force had

¹³¹⁴ See, e.g., 2/2007 presentation, "Shorting Home Equity Mezzanine Tranches," prepared by Mr. Lippmann, DBSI_PSI_EMAIL01988773-845.

¹³¹⁵ Subcommittee interview of Greg Lippmann (10/18/2010).

¹³¹⁶ 2/23/2007 email from Greg Lippmann to Anshu Jain, DBSI_PSI_EMAIL02383117-18.

¹³¹⁷ 3/2/2011 letter from Deutsche Bank's counsel to the Subcommittee, PSI-DeutscheBank-31-0004-06.

¹³¹⁸ Subcommittee interview of Greg Lippmann (10/18/2010).

¹³¹⁹ Id.

difficulty due to the lack of customers willing to buy long.¹³²⁰ During 2007 and 2008, at the direction of senior management, Mr. Lippmann gradually cashed in his short position, obtaining a total return of about \$1.5 billion, which Mr. Lippmann told the Subcommittee he believes was the largest profit obtained from a single position in Deutsche Bank history.¹³²¹

Despite the gain from Mr. Lippmann's short position, Deutsche Bank told the Subcommittee that, overall in 2007, it had a long position in mortgage related holdings, with a face value of about \$128 billion and a market value of more than \$25 billion. Deutsche Bank told the Subcommittee that, despite the size of these holdings and their declining value, it lost only about \$4.5 billion on those mortgage related holdings for the year.¹³²² Deutsche Bank also filed a 2007 annual report with the SEC claiming a 2007 profit of €7.2 billion.¹³²³ When asked why its large long position in mortgage holdings did not lose more value, Deutsche Bank told the Subcommittee that it had placed large hedges, using U.S. Treasury bonds, which reduced its losses.¹³²⁴

(4) The “CDO Machine”

From 2006 to 2007, Mr. Lippmann repeatedly cautioned his colleagues and clients that the mortgage market was headed for a downfall, convinced a number of his clients to short RMBS and CDO securities, and built his \$5 billion short position on behalf of Deutsche Bank. Meanwhile, the “CDO machine,” as he described it, continued issuing new CDO securities through the end of 2007. The reasons for this continuing CDO activity, despite a deteriorating mortgage market and waning investor interest, are key to understanding how these complex, high risk, structured finance products ended up in multiple financial portfolios throughout the U.S. financial system.

Mr. Lippmann was frequently asked why, given his negative views, the CDO market was continuing to operate. He pointed to investment bank fees, prestige, and pressure to preserve the CDO jobs involved. In August 2006, for example, Mr. Lippmann wrote:

¹³²⁰ Subcommittee interview of Jordan Milman (10/22/2010). Mr. Milman, one of Mr. Lippmann's top traders, stated that the market first weakened in February 2007, stabilized until June or July 2007, and then it was a “one way train” down from then through 2008. *Id.*

¹³²¹ Subcommittee interview of Greg Lippmann (10/18/2010). See Net Revenues from ABS Products Backed by U.S. Residential Mortgages, DB_PSI_C00000003.

¹³²² According to a chart prepared by Deutsche Bank for the Subcommittee, in 2007 and 2008, its RMBS holdings lost about \$3.4 billion; the CDO Group lost about \$1.0 billion; Winchester Capital lost about \$1.1 billion; and two other trading desks lost nearly \$650 million. These losses were offset by the \$1.5 billion gain from the bank's short position, for total mortgage related losses of about \$4.5 billion. Net Revenues from ABS Products Backed by U.S. Residential Mortgages, DB_PSI_C00000003.

¹³²³ Deutsche Bank stated in its annual report filed with the SEC that it ended 2007 in the black, due to gains in other areas of the bank, including its Corporate and Investment Bank which reported a pre-tax profit of €5.1 billion and its Private Clients and Asset Management division which reported a pre-tax profit of €2.1 billion. See Deutsche Bank's 2007 annual report filed with the SEC, in particular the Executive Summary of Deutsche Bank's Annual Report and the letter from the Chairman of the Board.

¹³²⁴ Subcommittee interview with Deutsche Bank's counsel (3/7/2011). See also 3/21/2011 letter and accompanying chart from Deutsche Bank's counsel to the Subcommittee, PSI-Deutsche_Bank-32-0001-04.

“Why have we done this? It is not without reluctance and we are looking for ways to get out of this risk, but for now the view has been, we like the fees and the league table credit (and dammit we have a budget to make).”¹³²⁵

In January 2007, after a trader asked Mr. Lippmann why the CDO market hadn’t imploded, Mr. Lippmann responded: “league table, fees, never has one blown up yet.”¹³²⁶ The reference to “league table credit” indicates that investment banks considered it prestigious to be listed as the leading producer of a complex structured finance product like CDOs, and used their standing in the tables that tracked total origination numbers as a way of burnishing their reputations, attracting top talent, and generating new business. An October 2006 “Progress Report” on its CDO business, for example, which was prepared internally by the bank, included a slide entitled, “CDO Primary Revenue Forecast and League Tables,” in which a chart ranked Deutsche Bank third in CDO issuance, behind Merrill Lynch and Citigroup.¹³²⁷ The slide indicated that Deutsche Bank had completed 38 CDOs to date, had a 7% share of the CDO market, and “expected to close 50 deals by year end,” with the “pipeline for Q1 and Q2 2007 building.” The final page of the presentation, providing a chart listing the top 20 Deutsche Bank CDO salespersons by region, together with their individual sales credits, identifies some of the bank personnel invested in the continuation of the CDO business.

On the issue of fees, the head of Deutsche Bank’s CDO Group Michael Lamont told the Subcommittee that he estimated the bank received 40-200 basis points for each CDO created, depending upon the complexity of the CDO.¹³²⁸ He indicated those fees translated into about \$5 to \$10 million per CDO.¹³²⁹ When asked what he meant by saying “we have a budget to make,” Mr. Lippmann explained that new CDO deals had to be completed continuously to produce the revenues needed to support the budgets of the CDO desks and departments involved with their creation.¹³³⁰

¹³²⁵ 8/26/2006 email from Greg Lippmann to Richard Axilrod at Moore Capital, DBSI_PSI_EMAIL01618236-42. On August 1, 2006, Mr. Lippmann wrote to Mr. Milman, “who has all this crap and let me know which ones to look at looks like a lot of crappy deals.” 8/1/2006 email from Greg Lippmann to Jordan Milman, DBSI_PSI_EMAIL01510643. Mr. Lippmann’s negative views were shared by his traders. In an email originally sent by one of the traders on his desk, Rocky Kurita, the CDO business is set to a song, “CDO Oh Baby,” by Vanilla Ice with the following lyrics: “Yo vip let’s kick it! CDO oh baby, CDO oh baby. All right, stop, collaborate and listen. Spreads are wide with a technical invasion. Home Eq Subs were trading so tightly. Until Hedge Funds Bot Protection daily and nightly. Will they stop? Yo I don’t know. Turn up the Arb and let’s go. To the extreme Macro Funds do damage like a vandal. Now, BBs are trading with a new handle. Print, even if the housing bubble looms. There are never ends to real estate booms. If there is a problem, yo, we’ll solve it. Check out the spreads while my structurer revolves it. CDO oh baby, CDO oh baby.” 11/8/2005 email from Jordan Milman to Greg Lippmann, DBSI_PSI_EMAIL00686597-601 (forwarding an 11/8/2005 email from Rocky Kurita at Deutsche Bank).

¹³²⁶ 1/5/2007 email from Greg Lippmann to Chris Madison at Mast Capital, DBSI_PSI_EMAIL02333467-68.

¹³²⁷ 10/2006, “CDO Primary Update Progress Report,” DBSI_PSI_EMAIL03970167-72, at 68.

¹³²⁸ Subcommittee interview of Michael Lamont (9/29/2010).

¹³²⁹ Id.

¹³³⁰ Subcommittee interview of Greg Lippmann (10/18/2010).

A similar view as to why the CDO business continued to operate despite increasing market risk was expressed by a former executive at the hedge fund Paulson & Co. in a January 2007 email exchange with another investor. The Paulson executive wrote:

“It is true that the market is not pricing the subprime RMBS wipeout scenario. In my opinion this situation is due to the fact that rating agencies, CDO managers and underwriters have all the incentives to keep the game going, while ‘real money’ investors have neither the analytic tools nor the institutional framework to take action before the losses that one could anticipate based [on] the ‘news’ available everywhere are actually realized.”¹³³¹

At the end of September 2006, the head of Deutsche Bank’s sales force, Sean Whelan, wrote to Mr. Lippmann expressing concern that some CDO tranches were getting increasingly difficult to sell: “[T]he equity and the AAA were the parts we found difficult to place.”¹³³² Mr. Lippmann told the Subcommittee that once firms could not sell an entire CDO to investors, it was a warning that the market was waning, and the investment banks should have stopped structuring new ones.¹³³³ Instead of getting out of the CDO business, however, he said, a new source of CDO demand was found – when new CDOs started buying old CDO securities to include in their assets. One media report explained how this worked:

“As the housing boom began to slow in mid-2006, investors became skittish about the riskier parts of those investments. So the banks created – and ultimately provided most of the money for – new CDOs. Those new CDOs bought the hard-to-sell pieces of the original CDOs. The result was a daisy chain that solved one problem but created another: Each new CDO had its own risky pieces. Banks created yet other CDOs to buy those.”¹³³⁴

Research conducted by Thetica Systems, at the request of ProPublica, found that in the last years before the financial crisis, CDOs had become the dominant purchaser of high risk CDO securities, largely replacing real money investors like pension funds, insurance companies, and hedge funds. The CDO market analysis found that, by 2007, 67% of the high risk mezzanine CDO securities had been purchased by other CDOs, up from 36% in 2004.¹³³⁵

¹³³¹ 1/14/2007 email from Paolo Pellegrini at Paulson to Ananth Krishnamurthy at 3a Investors, PAULSON ABACUS 0234459.

¹³³² 9/27/2006 email from Sean Whelan to Greg Lippmann, DBSI_PSI_EMAIL02255361-63.

¹³³³ Subcommittee interview of Greg Lippmann (10/18/2010). Mr. Lippmann told the Subcommittee that he thought Mr. Lamont’s CDO Group at Deutsche Bank had too many CDOs in the pipeline in the spring of 2007, when it could not sell all of its CDO securities. He reported that he told Mr. Lamont that defaults would increase.

¹³³⁴ “Banks’ Self-Dealing Super Charged Financial Crisis,” *ProPublica*, (8/26/2010), <http://www.propublica.org/article/banks-self-dealing-super-charged-financial-crisis>.

¹³³⁵ *Id.* ProPublica even found that, from 2006 to 2007, nearly half of all the CDOs sponsored by Merrill Lynch bought significant portions of other Merrill CDOs.

Mr. Lippmann told the Subcommittee that he considered it a “shady” practice when, in 2006, difficult-to-sell BBB CDO tranches began to be placed in new CDOs.¹³³⁶ In a June 2007 email to Mr. Lippmann, Richard Kim, a Deutsche Bank Managing Director, described placing unsold CDO tranches into a new CDO to be sold to investors as a “CDO2 balance sheet dump.”¹³³⁷

In addition to placing unsold CDO securities in newly issued CDOs, investment banks turned increasingly to non-U.S. investors to keep the CDO machine going. In August 2006, Mr. Lippmann noted that European and Asian banks were being targeted to buy CDOs:

“Hear what you are saying and in a normal market your logic would be inarguable, but the demand for this crap is virtually entirely technically driven, all cdos. And each person at the cdo table thinks someone else is the fool- cdo equity, ostensibly only two buyers one mutual fund in Australia, and one hedge fund in Chicago, who is actually putting on a bearish correlation trade: bbb sold mostly ponzi-like to other cdos with limited distribution in Europe. AA and Junior AAA sold mostly to high grade cdos and to a certain extent European and Asian banks and lastly the senior AAA, this may ultimately break the cdo market.”¹³³⁸

In a December 2006 email, Mr. Lippmann wrote to a client: “[W]ho owns the cdos...insurance company and german and asian banks...and high grade cdos (can you say ponzi scheme)[?]”¹³³⁹ In early 2007, he wrote:

“[T]he other side is all cdos..so it is the cdo investors who r on the other side who buys cdos: aaa-reinsurance, ws [Wall Street] conduits, European and Asian banks, aa-high grade cdos, European and Asian banks and insurers..some US insurers, bbb other mezz [mezzanine] abs [asset-backed security] cdos (i.e. ponzi scheme), European banks and insurers, equity some US hedge funds, Asian insurance companies, Australian and Japanese retail investors through mutual funds.”¹³⁴⁰

In February 2007, when an investor wrote to Mr. Lippmann inquiring about the status of the “CDO machine,” Mr. Lippmann responded: “[G]etting slower but not dead yet[.] ... 2-5 ramping a day instead of 10-15[.] ... [H]earing of many investors in asia especially shutting down ... but the window is not completely shut yet.”¹³⁴¹ Deutsche Bank emails demonstrate that, in 2007, like other investment banks, it was actively trying to sell CDOs in Asia.¹³⁴²

¹³³⁶ Subcommittee interview of Greg Lippmann (10/18/2010).

¹³³⁷ 6/14/2007 email from Richard Kim at Deutsche Bank to Greg Lippmann, DBSI_PSI_EMAIL02202920.

¹³³⁸ 8/26/2006 email from Greg Lippmann to Richard Axilrod at Moore Capital, DBSI_PSI_EMAIL01618236.

¹³³⁹ 12/4/2006 email from Greg Lippmann to Deutsche Bank employee, DBSI_PSI_EMAIL01867147-49.

¹³⁴⁰ 2/27/2007 email from Greg Lippmann to Fabrizio Wittenburg at Deutsche Bank, DBSI_PSI_EMAIL02027053-55.

¹³⁴¹ 2/20/2007 email from Greg Lippmann to David Homan at Moore Capital, DBSI_PSI_EMAIL02006853-54.

¹³⁴² See, e.g., “I would like these guys to push Asia sales on this..., but also as Ilinca said, the question arises why weren’t they working on this thus far?” 2/21/2007 email from Abhayad Kamat at Deutsche Bank to Michael Lamont and others at Deutsche Bank, DBSI_PSI_EMAIL04056326-36.

Mr. Lippmann had an unrelentingly negative view of the RMBS and CDO securities he traded. He believed the securities would ultimately lose value, but he also believed investment banks would do all they could to sustain the CDO market for as long as possible due to the CDO fees, prestige, market share, and jobs at stake.

(5) Gemstone

To understand how one investment bank, Deutsche Bank, continued to develop and aggressively solicit its clients to purchase CDO securities even as mortgage related securities lost value and the CDO market began collapsing, the Subcommittee examined in detail Gemstone 7, a \$1.1 billion CDO. Gemstone 7 was assembled and marketed by Deutsche Bank, as sole placement agent, from October 2006 to March 2007.¹³⁴³ Gemstone 7 was the last in a series of CDOs sponsored by HBK Capital Management (HBK), a large hedge fund.¹³⁴⁴

Deutsche Bank issued the Gemstone 7 securities in March 2007. Six out of Gemstone's seven tranches received investment grade ratings, including AAA ratings for the top three tranches. Two months later, in July 2007, the major credit rating agencies issued mass rating downgrades of RMBS and CDO securities, including 19 of the 115 RMBS securities included or referenced in Gemstone 7. In November 2007, the credit rating agencies began to downgrade the Gemstone 7 securities. Today, all seven tranches have been downgraded to junk status, and the Gemstone 7 securities are nearly worthless.

(a) Background on Gemstone

Gemstone 7 was a \$1.1 billion hybrid CDO whose assets consisted predominantly of high risk subprime RMBS securities. Nearly 90% of its assets were mid and subprime RMBS securities with 33% carrying non-investment grade ratings.¹³⁴⁵ Of the remaining assets, 4.5% were CDO securities; 3.3% were commercial mortgage backed securities; and 3.5% were securities backed by pools of student loans.¹³⁴⁶ When the deal closed in March 2007, Gemstone 7 had about \$476 million in cash RMBS assets as well as \$625 million in synthetic assets.¹³⁴⁷ Gemstone 7 was constructed as a "partially static" CDO, meaning that while some of its assets were set and could not change, others could be replaced by the collateral manager, HBK.

¹³⁴³ In the Gemstone 7 offering circular, Deutsche Bank is described as the placement agent: "The Notes purchased by the Initial Purchaser, if any, will be privately placed with eligible investors by the Initial Purchaser" where the Initial Purchaser was Deutsche Bank. Gemstone 7 Offering Circular, GEM7-00000427-816 at GEM7-00000640. In contrast, other documents produced by Deutsche Bank indicate that the bank was acting as an underwriter in the Gemstone 7 transaction. See, e.g., 12/20/2006 Gemstone 7 Securitization Credit Report, DB_PSI_00237655-71 and undated Gemstone 7 Securitization Credit Report, MTSS000011-13. For ease of reference but without making a judgment on the matter, this Report uses the term "placement agent" when describing Deutsche Bank's role in Gemstone 7.

¹³⁴⁴ Subcommittee interview of HBK Managing Director Jamiel Akhtar (9/15/2010).

¹³⁴⁵ The intended portfolio composition of Gemstone 7 was disclosed to investors in a Debt Investor Presentation. See 2/2007 Gemstone 7 Debt Investor Presentation, GEM7-00001687-1747 at 1695.

¹³⁴⁶ Id. at 1691.

¹³⁴⁷ 9/14/2010 Gemstone 7 Asset Chart, PSI-Deutsche Bank-17-Gemstone7-0001-03.

HBK is a Dallas based hedge fund that was founded in October 1991, and by 2007, managed approximately \$12 billion in capital.¹³⁴⁸ According to HBK, its Structured Products Group, one of its 21 business units, was “one of the leading purchasers and long-term investors in credit sensitive mortgages ... including RMBS and ABS, a component in HBK’s overall strategy since 2002.”¹³⁴⁹ Deutsche Bank told the Subcommittee that HBK had a reputation as a competent manager of mortgage related assets.¹³⁵⁰ HBK had acted as the collateral manager for seven previous CDO deals (six named Gemstone), choosing to alternate the mandate for the deals between Lehman Brothers and Deutsche Bank.

In October 2006, HBK retained Deutsche Bank to act as the placement agent for Gemstone 7. Under the agreement, HBK was to receive 30 basis points, or 0.3%, per year of the notional amount of Gemstone 7 (approximately \$3.3 million) in return for serving as the collateral manager. Deutsche Bank was slated to receive \$6.79 million in “underwriting fees,” but because the deal did not sell completely, Deutsche Bank ultimately received a lesser amount of \$4.7 million.¹³⁵¹

On October 25, 2006, HBK and Deutsche Bank signed an agreement outlining the terms of Gemstone 7. HBK told the Subcommittee:

“The collateral purchased under the warehouse arrangement was selected by HBK and subject to Deutsche Bank’s right of approval. The warehouse documents originally contemplated a total collateral pool of \$750 million, which was increased to \$1.1 billion in late December 2006.”¹³⁵²

On October 24, 2006, Deutsche Bank opened a warehouse account to store the assets that would serve as the collateral for the CDO when it closed.¹³⁵³ Deutsche Bank and HBK shared the risk

¹³⁴⁸ 1/2007 Gemstone 7 Debt Investor Presentation, at 17, DBSI_PSI_EMAIL01980000-60.

¹³⁴⁹ Id.

¹³⁵⁰ Subcommittee interview of Sean Whelan, co-head of Deutsche Bank sales force (9/22/2010).

¹³⁵¹ See 12/20/2006 Gemstone 7 Securitization Credit Report, DB_PSI_00237655-71; undated Gemstone 7 Securitization Credit Report, MTSS000011-13; 3/15/2007 Gemstone CDO VII Ltd. Closing Memorandum, DB_PSI_00133536-41. According to the Gemstone Offering Circular, HBK was to receive “0.30% per annum on the Quarterly Amount payable in arrears on each distribution date.” 3/15/2007 Offering Circular for Gemstone CDO VII, Ltd., GEM7-00000427-816, “The Management Agreement,” at 168. As opposed to an upfront fee, which Deutsche Bank received, the fee to HBK was paid quarterly. Thus, 0.30% of \$1.1 billion translates to a fee of approximately \$3.3 million for HBK. See 7/11/2007 email from Chehao Lu at Deutsche Bank to Marco Lukesch at HBK, GEM7-00003568. See also email noting HBK’s quarterly collateral management fee of \$826,067.88 as of September 11, 2007. 9/11/2007 email from Eric Martel at HBK to Jamiel Akhtar at HBK, GEM7-00006900.

¹³⁵² 8/20/2010 letter from HBK’s counsel to the Subcommittee, at 2.

¹³⁵³ See chart, “Assets Purchased by Gemstone VII CDO during Warehouse Period,” GEM7-00001831-33 (showing assets purchased during the warehouse period). According to Credit magazine, “The financial press will often make its first mention of a ‘new’ CDO on or around the time of its closing – with the closing date generally the day on which the CDO issues tranches of debt and equity to investors. Prior to that day, however, there will have been a so-called pre-closing or ‘warehousing’ period, typically lasting between three and six months. During that period the asset manager will have acquired (or ‘warehoused’) assets to act as collateral for the securities to be issued by the CDO ... on the closing day.” See “CDO Guide: recovery rates,” Credit (May 2004), <http://db.riskwaters.com/public/showPage.html?page=133193>.

for any change in value of the warehoused assets if the deal failed to close. Pursuant to the risk sharing agreement, if the deal failed to close, HBK would incur the risk for the first \$80 million in losses, and Deutsche Bank would bear the remaining risk.¹³⁵⁴

Deutsche Bank CDO Group. Several departments and desks at Deutsche Bank were involved in designing, marketing, and selling the Gemstone 7 securities. The CDO Group, co-headed by Michael Lamont and Michael Herzig, was responsible for designing its structure, monitoring the purchasing and warehousing of its assets, obtaining its credit ratings, preparing the legal documentation, establishing its administrative structure, obtaining underwriting approval of the deal, designing the marketing materials, and overseeing the issuance of the CDO securities.¹³⁵⁵ Abhayad Kamat within the CDO Group was assigned lead responsibility for structuring Gemstone 7.¹³⁵⁶ The CDO Trading Desk, headed by Greg Lippmann, participated in the CDO approval process once HBK selected assets. The CDO sales force, headed by Sean Whelan and Michael Jones, was responsible for selling the Gemstone 7 CDO securities.

To issue the CDO securities, Deutsche Bank established an offshore corporation in the Cayman Islands called Gemstone CDO VII, Ltd.¹³⁵⁷ To administer the corporation, Deutsche Bank appointed its Cayman Island affiliate, Deutsche Bank Cayman, which is a licensed trust company.¹³⁵⁸ As administrator, Deutsche Bank Cayman provided Gemstone 7 with the administrative services needed to operate the CDO securitization, including but not limited to, providing office facilities and secretarial staff, maintaining the books and records required by Cayman law, naming at least two Cayman directors, and acting as the Share Registrar for Gemstone shares.¹³⁵⁹

HBK's Long Investment in Gemstone. HBK routinely purchased the equity tranche,¹³⁶⁰ also known as the residual interest, in all of its Gemstone deals, including Gemstone 7.¹³⁶¹ HBK told investors in its sales presentation that "HBK has retained 100% of the equity

¹³⁵⁴ 12/20/2006 Gemstone 7 Securitization Credit Report, DB_PSI_00237655-71.

¹³⁵⁵ Subcommittee interview of Michael Lamont (9/29/2010).

¹³⁵⁶ Subcommittee interview of Abhayad Kamat (10/8/2010).

¹³⁵⁷ Gemstone CDO VII Ltd. Certificate of Incorporation and Memorandum and Articles of Association of Gemstone CDO VII Ltd., DB_PSI_00236844.

¹³⁵⁸ Deutsche Bank International Limited is a wholly owned subsidiary of Deutsche Bank AG. It currently has several offices around the world, including one in the Cayman Islands, Deutsche Bank (Cayman) Limited ("DB Cayman"), that was opened in 1983. "Deutsche Bank International Ltd.," Bloomberg Businessweek, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=884191>; "Deutsche Bank in the Cayman Islands," Deutsche Bank, http://www.dboffshore.com/page.php?title=cayman_islands. DB Cayman is a licensed trust company incorporated in the Cayman Islands. Preference Share Paying Agency Agreement, GEM7-00001089-1030, at 1092.

¹³⁵⁹ Amended and Restated Administrative Agreement, GEM7-00001223-31; Preference Share Paying Agency Agreement, GEM7-00001089-1130 at 1095-96.

¹³⁶⁰ An equity tranche is the tranche in an RMBS or CDO structure that is designed to be the first to incur any losses from the securitization. Since it is expected to incur at least some level of losses, the equity tranche is usually not given a credit rating and is often retained by the originator of the securitization. See American Banker definition, <http://www.americanbanker.com/glossary/e.html>.

¹³⁶¹ According to HBK, "HBK's investment process integrates expertise in capital markets, structural analysis, collateral and loan level analysis, due diligence, and in house surveillance. HBK is seen as not as a trader but as a

from CDO transactions resulting in strong alignment of interests between HBK and investors.”¹³⁶² According to Kevin Jenks, HBK’s collateral manager, HBK had a “buy and hold” approach to all of its Gemstone CDOs.¹³⁶³ HBK also told the Subcommittee that it participated in Gemstone 7 with “the objective of obtaining long exposure to the CDO’s collateral, on a leveraged basis, through ownership of the Residual interest.”¹³⁶⁴

HBK deals were known for containing above average concentrations of BB or lower rated assets, but HBK prided itself on its ability to run in-depth analysis and accurate stress tests on assets it selected for its CDOs.¹³⁶⁵ HBK expected to receive a 15% return on its investment in the equity tranche.¹³⁶⁶ In its investor presentation, HBK stated: “The firm strives to provide superior risk-adjusted rates of return with relatively low volatility and relatively low correlation to most major market indices.”¹³⁶⁷ HBK’s presentation also claimed that, as of January 2007, it had only three downgrades in its asset backed security portfolio, and that its upgrade to downgrade ratio was 23 to 3.¹³⁶⁸ Investor M&T Bank, who later purchased Gemstone 7 securities, told the Subcommittee that it had relied on HBK’s assertions when choosing what it thought was an investment with “minimal risk.”¹³⁶⁹

HBK informed the Subcommittee that it had never shorted any of the assets in its seven Gemstone CDOs, that its CDO trade book was evenly matched with long and short CDO assets during the 2006-2007 period,¹³⁷⁰ and that it lost over \$700 million in its Structured Credit business unit during 2007.¹³⁷¹

(b) Gemstone Asset Selection

As the collateral manager, HBK selected the assets for Gemstone 7, subject to approval by Deutsche Bank’s structuring and trading groups before each asset could be placed in the Deutsche Bank warehouse account for the CDO.¹³⁷² According to HBK and Deutsche Bank

vigilant investor that maximizes value through intensive analysis and surveillance.” 1/2007 Gemstone 7 Debt Investor Presentation, DBSI_PSI_EMAIL01980000-60 at 23.

¹³⁶² Id.

¹³⁶³ Subcommittee interview of Kevin Jenks (10/13/2010). Also see 1/2007 Gemstone 7 Debt Investor Presentation, DBSI_PSI_EMAIL01980000-60 at 25.

¹³⁶⁴ 8/20/2010 letter from HBK’s counsel to the Subcommittee.

¹³⁶⁵ Subcommittee interview of Abhayad Kamat (10/8/2010). Mr. Kamat was the individual at Deutsche Bank who was primarily responsible for structuring Gemstone 7.

¹³⁶⁶ Subcommittee interview of Jamiel Akhtar (9/15/2010).

¹³⁶⁷ 1/2007 Gemstone 7 Debt Investor Presentation, DBSI_PSI_EMAIL01980000-60 at 17.

¹³⁶⁸ Id. at 25.

¹³⁶⁹ Subcommittee interview of M&T (9/20/2010).

¹³⁷⁰ According to HBK, “HBK never had a short position in any securities issued by the Gemstone 7 CDO.” HBK also told the Subcommittee staff that it had approximately \$350 million of long exposure in Gemstone 7 and another \$800 million of “additional long exposure to the same assets underlying collateral outside the CDO.” 8/20/2010 letter from HBK’s counsel to the Subcommittee. HBK told the Subcommittee that it did at times take short positions in certain mortgage backed securities unrelated to the Gemstone transactions.

¹³⁷¹ 8/20/2010 letter from HBK’s counsel to the Subcommittee, and exhibit to letter, HBK’s exposure to Gemstone VII Notes, GEM7-00000001-10.

¹³⁷² Subcommittee interview of Abhayad Kamat (10/8/2010).

personnel, the approval process worked in the following manner. First, HBK identified the RMBS, CDO, and other securities it wanted to include or reference in the CDO. HBK then sent an email to Mr. Lippmann or his traders at Deutsche Bank requesting that the identified assets be placed in the warehouse account for Gemstone 7. Deutsche Bank traders, sometimes in consultation with Mr. Lamont's structuring group, would then either approve or voice concerns regarding the proposed assets. If they had concerns, the traders would work with HBK personnel to resolve them. For example, on January 9, 2007, HBK's Jason Lowry sent an email to Mr. Lippmann and his trader, Jordan Milman, with a list of RMBS securities proposed for inclusion in Gemstone 7, and asked: "This is the last BB list for approval. Could you take a look?" On the same day, Mr. Milman wrote back: "approved contingent upon first pay defaults getting bought back on the 2 heat bonds."¹³⁷³

Although the Gemstone 7 offering circular did not describe Deutsche Bank's role in the asset selection process, the private engagement agreement between HBK and Deutsche Bank did.¹³⁷⁴ According to the terms of the engagement agreement, Deutsche Bank agreed to provide, among other items, the following service: "advising the Issuer [Gemstone 7] and the Company [HBK] on the selection and acquisition of the Underlying Assets" and "the scope of due diligence for the Underlying Assets."¹³⁷⁵ Under both the engagement agreement and a separate risk sharing agreement, Deutsche Bank also had the right to reject assets selected by HBK for the Gemstone warehouse account.¹³⁷⁶ When asked about Deutsche Bank's obligations under these agreements, Mr. Lippmann told the Subcommittee that he viewed Deutsche Bank as having an obligation to the entity, Gemstone 7, to price the assets accurately as they were purchased, which included comparing the price of each security or CDS contract on the date it went into the warehouse account to its market price and ensuring that the CDO did not overpay for the assets it purchased.¹³⁷⁷ Mr. Lippmann's trader, Mr. Milman, and Mr. Kamat, of Mr. Lamont's CDO Group, agreed with that assessment.¹³⁷⁸ All three also stated that the engagement agreement did not require Deutsche Bank to analyze the quality of the assets being purchased or how those assets were expected to perform.

On the other hand, documents reviewed by the Subcommittee indicate, in at least a few instances, that Deutsche Bank personnel voiced concerns about an RMBS security being placed in the deal due to performance concerns in addition to price. For example, Mr. Kamat, who also assisted Mr. Lippmann's trading desks, wrote to Mr. Jenks about the quality of an asset being

¹³⁷³ See, e.g., 1/9/2007 email from Jason Lowry to Greg Lippmann, GEM7-00002154; and 12/11/2006 email from Greg Lippmann to Kevin Jenks, GEM7-00002805. The term "heat" refers to an RMBS security issued by Home Equity Asset Trust.

¹³⁷⁴ The Gemstone 7 offering circular states that with regard to the purchase of underlying assets: "The Issuer [Gemstone 7] will acquire Underlying Assets from a warehouse facility (the 'Warehouse Facility') provided by an affiliate of DBSI [Deutsche Bank Securities, Inc.], which provides for the purchase of Asset-Backed Securities at the direction of the Collateral Manager [HBK] on behalf of the Issuer prior to the Closing Date." Gemstone 7 Offering Circular, GEM7-00000427-816 at 494.

¹³⁷⁵ 10/25/2006 signed letter agreement between HBK and Deutsche Bank, GEM7-00000071-89 at 72.

¹³⁷⁶ 10/25/2006 signed letter agreement between HBK and Deutsche Bank, GEM7-00000071-89 at 72; and 10/24/2006 Risk Sharing Agreement, GEM7-00000090-99 at 91.

¹³⁷⁷ Subcommittee interview of Greg Lippmann (10/18/2010).

¹³⁷⁸ Subcommittee interview of Jordan Milman (10/22/2010) and Abhayad Kamat (10/8/2010).

considered for Gemstone 7. Mr. Kamat wrote: “MLMI 2005-HE1 B3 [is] on credit watch – do you want to move this out of the portfolio – investors might question/resist[.]” Mr. Jenks responded: “[N]o let’s leave it in[.]”¹³⁷⁹

On another occasion, Mr. Jenks from HBK exchanged several emails with Mr. Lippmann about several RMBS securities that Mr. Jenks wanted to include in the Gemstone 7 warehouse account. Mr. Jenks sent the list to Mr. Lippmann and wrote: “please approve.” Mr. Lippmann responded: “ok approved but would like to lower these 2 pts each given recent press on fhlt and significant widening in the baa3 cds. Is that cool?” The term “fhlt” referred to RMBS securities issued by Fremont; by saying he wanted to “lower these 2 pts,” Mr. Lippman indicated he wanted to assign them a lower value for warehouse purposes. Mr. Jenks replied: “Greg, Fremont overall is really not trading badly just the ones on downgrade watch,” to which Mr. Lippmann responded: “we have seen the fhlt 05-d bbb-trade wide please work with me on this. ... I am trying to work with you.” Mr. Jenks replied:

“Greg, I have been trying to work with you. Doing trades just with you and not on bid lists. But we play in the higher quality part of the market, I really expected you to approve the list as is. We still have several hundred million of bonds to do in cds form to do [sic].”¹³⁸⁰

This exchange shows that Mr. Lippmann was cognizant of the quality of the assets being included in the CDO, and pushed for lower prices when he thought the assets were of poor quality.

HBK told the Subcommittee that it selected good quality bonds using a very complex model to analyze them.¹³⁸¹ It told investors that it “analyze[d] every bond in the market, providing for a vast range of data [F]rom this data, trends can be observed early regarding the bonds themselves as well as the general economy and the implications on future issuance.”¹³⁸² HBK provided this description for the Subcommittee regarding the tools it used in the asset selection process:

“HBK used a statistically driven mortgage behavior model to help make trading decisions and select assets for inclusion in the Gemstone VII CDO. Three separate database tools were utilized in this process. First, HBK licensed a commercial database called *LP Database*, which contained detailed information and performance history for millions of non-agency mortgages. The *LP Database* was a robust dataset comprising close to 80% of the market, back to the 1996 vintage. Utilizing the data acquired from the *LP*

¹³⁷⁹ 1/5/2007 email from Abhayad Kamat to Kevin Jenks, GEM7-00001977.

¹³⁸⁰ 12/8/2006 and 12/11/2006 emails between Mr. Lippmann and Mr. Jenks, DBSI_PSI_EMAIL01886779-80.

¹³⁸¹ See 1/2007 Gemstone 7 Debt Investor Presentation, DBSI_PSI_EMAIL01980000-60 (“HBK’s investment model utilizes proprietary default, prepay and severity loan level models to make investments in the residential market. ... Transaction performance is tracked monthly via trustee surveillance reports and ongoing loan level information to monitor and analyze parameters such as collateral yields, delinquency and default trends, recoveries, prepayments, and available credit enhancement.”).

¹³⁸² Id. at 42.

Database, HBK then developed a proprietary system called the *Loss Model* that forecasted the likelihood of default, prepayment, delinquency, or timely payment for an individual mortgage monthly over a ten-year time horizon. The *Loss Model* made these forecasts based on a series of 50 loan characteristics, including whether the mortgage was a first or second lien mortgage, the type of mortgage (*e.g.*, fixed or ARM), its geographic location, FICO score, loan-to-value ratio, and level of documentation, and projections of home price appreciation and unemployment rates.

Finally, HBK merged the information from the *Loss Model* into a *Bond Evaluation Engine*, which was based on software licensed from Intex Solutions. The *Bond Evaluation Engine* provided information that assisted HBK traders in pricing mortgage bonds and evaluating how the bonds might perform under certain stresses. ... This portion of the analysis focused on the structure and enhancements of the RMBS and how those structures would contribute to bond performance.”¹³⁸³

Mr. Jenks of HBK told the Subcommittee that HBK “never had a bond that we thought was bad that was put in a CDO.”¹³⁸⁴ Mr. Jenks also told the Subcommittee that he had frequent conversations with Mr. Lippmann, was aware of his “negative housing view,” but disagreed with the magnitude of Mr. Lippmann’s negative views.¹³⁸⁵ Mr. Lippmann told the Subcommittee that although he occasionally suggested bonds to Mr. Jenks for Gemstone 7, and Mr. Jenks at times purchased them, Mr. Jenks had strong views on the assets that should be included in the CDO and was not required to listen to him. HBK and Deutsche Bank emails confirm that Mr. Lippmann or his traders offered at times to sell certain bonds to HBK, which occasionally purchased them.¹³⁸⁶ Deutsche Bank sold five bonds from its inventory, with a value of more than \$27 million, to HBK for inclusion in Gemstone 7.¹³⁸⁷ According to Mr. Lamont, his CDO Group was “agnostic” towards the quality of the assets that HBK purchased for Gemstone 7, and told the Subcommittee that investors had relied on HBK, the collateral manager, to analyze their quality.¹³⁸⁸ Mr. Lamont said that the role of the CDO Group was, not to select the CDO’s assets, but to structure the deal and then use models to conduct stress tests on it.¹³⁸⁹

¹³⁸³ 10/12/2010 letter from HBK’s counsel to the Subcommittee.

¹³⁸⁴ Subcommittee interview of Kevin Jenks (10/13/2010).

¹³⁸⁵ *Id.*

¹³⁸⁶ See, *e.g.*, 12/8/2006 email from Greg Lippmann to Kevin Jenks, DBSI_PSI_EMAIL01883072 (discussing trade they agreed to). See also 2/23/2007 email from Jordan Milman to Greg Lippmann, DBSI_PSI_EMAIL02022054 (“I’d rather just have Ilinca show hbk, he loves bonds like this.”).

¹³⁸⁷ Assets Purchased by Gemstone VII CDO during Warehouse Period, GEM7-00001831-33.

¹³⁸⁸ Subcommittee interview of Michael Lamont (9/29/2010). Kamat also agreed that Deutsche Bank was agnostic with regard to the quality of the assets. Subcommittee interview of Abhayad Kamat (10/8/2010).

¹³⁸⁹ Subcommittee interview of Michael Lamont (9/29/2010).

(c) Gemstone Risks and Poor Quality Assets

Gemstone 7's assets were assembled in late 2006 and early 2007, when the mortgage market was deteriorating and subprime mortgages were experiencing record delinquency rates. The CDO posed a host of risks due to both the state of the market and the poor quality of many of its underlying assets.

Credit Report. In December 2006, Mr. Lamont's CDO Group prepared a Credit Report for Deutsche Bank's credit risk management group to obtain internal approval for the securitization of Gemstone 7.¹³⁹⁰ The Credit Report noted the following business risks for Deutsche Bank regarding Gemstone 7, including the possibility that the bank would be unable to sell \$400 million of the Gemstone securities, which carried "significant" risk:

- "The portfolio is concentrated on RMBS obligations, with 67.6%, 20.2% and 1.9% of the RMBS exposure represented by 2005, 2006, and 2007 vintages, respectively, which results in significant vintage risk."
- "RMBS accounts for ~90.0% of the initial collateral portfolio."
- "All unsold tranches have been taken back by HBK except for the Class A-1B (\$400mm). Currently, we are working with [redacted] to see if they will be interested in taking the tranche. The plan for distribution if [redacted] decides not to take the tranche, will be a senior sequential repack. The Class A-1B will be broken into two tranches. DB will take the senior part (Class A-1B(i) \$200mm) and HBK will take the bottom part (Class A-1B(i) \$200mm). Once the repack is setup, then DB will try to syndicate the Class A-1B(i)." ¹³⁹¹

The business risks described in the internal Deutsche Bank credit report relating to "significant vintage risk" for the 2005, 2006, and 2007 vintage RMBS securities¹³⁹² were not disclosed in the Gemstone 7 offering materials given to investors. Although the March 15, 2007 Offering Circular contained a "Risk Factor" section describing multiple risks associated with an investment in Gemstone 7, including those associated with residential asset backed securities, the Offering Circular was silent with respect to the above risks identified in the Credit Report, which were highlighted for Deutsche Bank management.

¹³⁹⁰ Id. See undated Gemstone 7 Securitization Credit Report, MTSS000011-13 and 12/20/2006 Gemstone 7 Securitization Credit Report, DB_PSI_00237655-71. The 12/20/2006 Credit Report appears to be an earlier version of the document.

¹³⁹¹ Gemstone 7 Securitization Credit Report, MTSS000011-13.

¹³⁹² Id.

The Offering Circular did, however, describe in detail a number of significant risks associated with RMBS securities. For example, it stated:

- “The risk of losses on residential mortgage loans is particularly relevant now. While there is always a risk of defaults or delinquencies in payment, recently losses on residential mortgage loans have been increasing and may continue to increase in the future. The losses have been most significant in respect of subprime mortgage loans but all are affected.
- A number of factors are contributing to the increase in losses. Residential property values that increased for many years are now declining. ... Declining property values also exacerbate the losses due to a failure to apply adequate standards to potential borrowers. Failures to properly screen borrowers may include failures to do adequate due diligence on a borrower (including employment and income history) or the relevant property (including valuation) or failures to follow predatory lending and the other borrower-protection statutes. Increases in interest rates may also contribute to higher rates of loss. ...
- The increase in delinquencies and defaults has contributed to a declining market for mortgage loans. The declining market has, in turn, seriously impacted mortgage originators and servicers. ... The financial difficulties of servicers in particular are likely to result in losses in respect of securities backed by residential mortgage loans. ... At any one time, the portfolio of Residential ABS Securities may be backed by residential loans with disproportionately large aggregate principal amounts secured by properties in only a few states or regions.”¹³⁹³

These disclosures demonstrate that both HBK and Deutsche Bank were well aware of the deteriorating mortgage market and increased risks associated with RMBS and CDO securities, even as they were marketing the Gemstone 7 securities and claiming HBK had applied careful analysis in the asset selection process to ensure good quality CDO securities.

Long Beach-Fremont-New Century Bonds. A substantial portion of the cash and synthetic assets included in Gemstone 7, 30% in all, involved subprime residential mortgages issued by three subprime lenders, Long Beach, Fremont, and New Century, all known for issuing poor quality loans and securities.¹³⁹⁴ Loans by these lenders were among the first to collapse. According to Moody’s, these three originators, plus WMC Corporation, accounted for 31% of

¹³⁹³ 3/15/2007 Offering Circular for Gemstone CDO VII, Ltd., GEM7-00000427-816 at 483-84. While an earlier offering circular for Gemstone 7, dated February 14, 2007, identifies some risks associated with the CDO, the March offering circular contains additional language, quoted above, on the risks associated with the deteriorating mortgage market. 2/14/2007 Offering Circular for Gemstone CDO VII, Ltd., PSI-M&T_Bank-02-0001-370.

¹³⁹⁴ For more information on these three lenders, see sections D(3)(d) and E(2)(c)-(d) of Chapter IV. Mr. Jenks of HBK told the Subcommittee that he saw data showing that Long Beach and Fremont were poor performers, but he thought the performance varied depending upon the tranche, and he believed he could pick the better tranches. He thought he could buy low, structure the deal well, and make money. Subcommittee interview of Kevin Jenks (10/13/2010).

the subprime RMBS securities issued in 2006, but 63% of the rating downgrades issued in the second week of July 2007, when the mass rating downgrades began.¹³⁹⁵

During the period when securities were being assembled for the Gemstone 7 warehouse in late 2006 and early 2007, Mr. Lippmann frequently disparaged many of the same assets he and his traders allowed to be included in Gemstone 7. About \$27 million of these assets came from Deutsche Bank's own inventory. In emails to colleagues and his clients, Mr. Lippmann used words like "crap" and "pig" to describe the assets. Mr. Lippmann brought some of the assets of Gemstone 7 to the attention of some of his clients that shorted these assets.¹³⁹⁶

On October 20, 2006, for example, one of Mr. Lippmann's clients sent him an email seeking advice about certain subprime bonds issued by Long Beach Mortgage Loan and Trust (LBMLT) and other originators. Mr. Lippmann responded:

"LBMLT-06-5 M9-375. Long Beach is one of the weakest names in the market. We shorted this bond to a CDO in the mid-300s on October 13[.] Deal was done before S&P changed their criteria on July 1. Lots of 40 year mortgages Less than half the loans have full documentation and 10% are investor properties. This is a real pig.

LBMLT -06-2 M9 350. See above on Long Beach. This one is already performing poorly with substantial delinquencies Further the FICO is less than the 06-05 and there are fewer full doc loans. This seems a better short than the 06-5. Only reason I can think for my guys showing you a tighter level is that we are short this one and that the June 06 deals have a taint that earlier months don[']t due to the theory that late June deals were crammed with bad stuff in order to beat the S & P revisions."¹³⁹⁷

Despite these negative views of Long Beach, Mr. Lippmann's group raised no concerns when \$25 million in LBMLT 2006-5 M9 securities was purchased by HBK for Gemstone 7's warehouse account, \$20 million of which was purchased on October 24, 2006, four days after Mr. Lippmann's email. Altogether, a total of \$79.5 million in Long Beach bonds went into Gemstone 7.¹³⁹⁸

Mr. Lippmann had similar negative views of RMBS securities containing subprime loans originated by Fremont, yet his group did not object to including Fremont securities in Gemstone 7. For instance, on December 6, 2006, Mr. Lippmann's traders did not object to including \$20 million of an RMBS known as SABR 2005-FR4 B3 for Gemstone 7, which contained Fremont loans.¹³⁹⁹ One week earlier, on November 29, 2006, when asked by a bank colleague about the

¹³⁹⁵ 7/12/2007 Moody's Structured Finance Teleconference and Web Cast: RMBS and CDO Rating Actions, at Moody's SI 2010-0046902, Hearing Exhibit 4/23-106.

¹³⁹⁶ Subcommittee interview of counsel for Deutsche Bank (2/1/2011).

¹³⁹⁷ 10/20/2006 email from Greg Lippmann to Craig Carozzi at Mast Capital, DBSI_PSI_EMAIL01774820-21.

¹³⁹⁸ 9/14/2010 Gemstone 7 Asset Chart, PSI-DeutscheBank-17-Gemstone7-0001-03.

¹³⁹⁹ Id.

same RMBS security, Mr. Lippmann labeled it a “pig.”¹⁴⁰⁰ Two days later, on December 1, 2006, Mr. Lippmann declared in an email to a client that the security was “blowing up.”¹⁴⁰¹

In addition, on November 29, 2006, Mr. Lippmann called still another RMBS security with Fremont loans, FHLT 2005-A M9, a “pig.”¹⁴⁰² Yet a month earlier, on October 30, 2006, approximately \$1 million of FHLT 2005-A M9 had been purchased for Gemstone 7, with no objection from Mr. Lippmann’s trading desk.¹⁴⁰³

Mr. Lippmann made similar negative remarks about RMBS securities containing subprime loans originated by New Century. On November 28, 2006, Mr. Lippmann wrote: “MABS 2005-NC2 M9 ... huge payment shock coming.”¹⁴⁰⁴ Yet six weeks later, on January 17, 2007, \$10 million of this exact asset, MABS 2005-NC2 M9, was purchased by Gemstone 7, without objection from Mr. Lippmann’s traders.¹⁴⁰⁵ On December 8, 2006, Mr. Lippmann wrote about another New Century security underwritten by Goldman Sachs: “GSAMP 06-nc2 m8 this is an absolute pig.”¹⁴⁰⁶ Although Gemstone 7 did not purchase the M8 securities, it did purchase a total of \$30 million in GSAMP 2006-NC2 M9 securities – from a lower tranche in the same securitization with less subordination. It purchased those securities over a month-long period, with \$10 million of the securities on November 13, 2006; another \$10 million on December 8, 2006; and still another \$10 million on December 21, 2006.¹⁴⁰⁷ In addition, on December 18, 2006, Gemstone 7 purchased \$8.8 million worth of a similar security, GSAMP 2006-NC2 B2.¹⁴⁰⁸

Mr. Lippmann was equally critical of New Century loans securitized by ACE, an entity created by and associated with Deutsche Bank. On September 21, 2006, for example, when asked by a Deutsche Bank salesperson for his opinion of ACE 2006-NC1 M9, an RMBS issued by ACE with New Century subprime loans, Mr. Lippmann responded that ACE was “generally horrible.”¹⁴⁰⁹ On March 2, 2007, a client sent an email to Mr. Lippmann stating: “[T]hey are

¹⁴⁰⁰ With regard to the asset, Mr. Lippmann wrote: “pig probably a 400-525 market.” 11/29/2006 email from Greg Lippmann to Francis Blair at Deutsche Bank, DBSI_PSI_EMAIL01853153.

¹⁴⁰¹ See 12/1/2006 email from Greg Lippmann to Tyler Duncan at Wayzata Investment Partners, DBSI_PSI_EMAIL01864446 (Mr. Lippmann wrote: “sabr 05-fr4 b3 another Fremont blowing up we traded in august at 260”). Later in January 2007, Greg Lippmann wrote: “SABR Fr [Fremont] blows.” 1/25/2007 email from Greg Lippmann to Mark Lee at Contrarian Capital, DBSI_PSI_EMAIL01961580.

¹⁴⁰² 11/29/2006 email from Greg Lippmann to Jashin Patel at Deutsche Bank, “Where is this pig marked?,” DBSI_PSI_EMAIL01854608.

¹⁴⁰³ 9/14/2010 Gemstone 7 Asset Chart, PSI-DeutscheBank-17-Gemstone7-0001-03.

¹⁴⁰⁴ 11/28/2006 email from Greg Lippmann to Rocky Kurita, DBSI_PSI_EMAIL01846000.

¹⁴⁰⁵ See 9/14/2010 Gemstone 7 Asset Chart, PSI-DeutscheBank-17-Gemstone7-0001-03.

¹⁴⁰⁶ 12/8/2006 email from Greg Lippmann to Peter Faulkner at PSAM, LLC, DBSI_PSI_EMAIL01882188.

¹⁴⁰⁷ See 9/14/2010 Gemstone 7 Asset Chart, PSI-DeutscheBank-17-Gemstone7-0001-03.

¹⁴⁰⁸ Id.

¹⁴⁰⁹ 9/21/2006 email from Greg Lippmann to Melissa Goldsmith at Deutsche Bank, DBSI_PSI_EMAIL01689001-02. Mr. Lippmann confirmed to the Subcommittee that he believed ACE was “horrible.” Subcommittee interview of Greg Lippmann (10/18/2010). On May 19, 2006, Mr. Lippmann wrote to a Deutsche Bank colleague, “We traded that ACE piece of crap with Ike at 380.” 5/19/2006 email from Greg Lippmann to Rocky Kurita at Deutsche Bank, DBSI_PSI_EMAIL0120552. On May 29, 2007, Mr. Lippmann wrote with regard to ACE 2006-ASP3 M7,

claiming that DB [Deutsche Bank] was one of the last ones to tighten standards on buying loans to securitize. [Y]ou were right - ACE is crap.” Mr. Lippmann responded: “INDEED ... IT IS.”¹⁴¹⁰ Yet on December 19, 2006, Mr. Lippmann’s traders did not object to the purchase of \$10 million of ACE 2006-NC1 M9 for Gemstone 7.¹⁴¹¹

Mr. Lippmann also had negative opinions about other securities purchased for Gemstone 7. On March 1, 2007, for example, Mr. Lippmann wrote that ABSHE 2006-HE1 M7 was “crap.”¹⁴¹² But \$5 million of this same security had been purchased three months earlier by Gemstone 7, on November 16, 2006, without objection from Mr. Lippmann’s trading desk.¹⁴¹³ In still another instance, on March 19, 2007, Mr. Milman described FFML 2006-FF13 as “a piece of crap.”¹⁴¹⁴ Yet over the prior five months, the Lippmann trading desk had approved the purchase of a total of \$38.5 million of this exact bond, FFML 2006-FF13, for inclusion in Gemstone 7: \$11.7 million of the class B1 securities on October 30, 2006; \$16.2 million of the class B2 securities on November 17, 2006 and January 9, 2007; and \$10.6 million of the class M9 securities on March 15, 2007.¹⁴¹⁵

Securities from Deutsche Bank’s Inventory. Gemstone 7 purchased five securities totaling \$27 million directly from Deutsche Bank’s inventory.¹⁴¹⁶ Mr. Lippmann, and his trader Jordan Milman, shared negative views of one of the bonds, ACE 2006-HE1 M10, a security in which over 75% of the loans had been originated by Fremont.¹⁴¹⁷ In an instant message conversation in December 2006, Mr. Lippmann asked Mr. Milman his thoughts on ACE 2006-HE1 M10. Mr. Lippmann asked: “DOESNT THIS DEAL BLOW,” to which Mr. Milman replied: “yes it blows I am seeing 20-40% writedowns.”¹⁴¹⁸ Not only did HBK include \$10 million of this asset in the Gemstone 7 warehouse account, HBK purchased it from Deutsche Bank that same month through one of Mr. Lippmann’s traders.¹⁴¹⁹ Thus, Deutsche Bank allowed Gemstone 7 to acquire a \$10 million asset that its traders believed would perform poorly, and effectively removed the financial risk of this asset from its own inventory, shifting it to its customers.

“this stinks though I didn’t mention it.” 5/29/2007 email from Greg Lippmann to Danielle Pluthero at Deutsche Bank, DBSI_PSI_EMAIL02532365.

¹⁴¹⁰ 3/2/2007 email from Greg Lippmann to Clark Baker at Harbinger Capital, DBSI_PSI_EMAIL02038599.

¹⁴¹¹ 9/14/2010 Gemstone 7 Asset Chart, PSI-DeutscheBank-17-Gemstone7-0001-03.

¹⁴¹² 3/1/2007 email from Greg Lippmann to Joris Hoedemaekers at Oasis Capital, DBSI_PSI_EMAIL02033845.

¹⁴¹³ 9/14/2010 Gemstone 7 Asset Chart, PSI-DeutscheBank-17-Gemstone7-0001-03.

¹⁴¹⁴ 3/19/2007 email from Jordan Milman to Greg Lippmann, DBSI_PSI_EMAIL02412084.

¹⁴¹⁵ 9/14/2010 Gemstone 7 Asset Chart, PSI-Deutsche Bank-17-Gemstone7-0001-03.

¹⁴¹⁶ These five securities were: (1) ACE 2006-HE1 M10, (2) Securitized Asset Backed Receivables (SABR) 2005-OP1 B4, (3) Ameriquet Mortgage Securities Inc. (AMSI) 2005-R11 M10, (4) Deutsche Bank Alt-A Securities, Inc. (DBALT) 2006-AR6 M10, and (5) First Franklin Mtg Loan Asset Backed Certificate (FFML) 2005-1 B4. See Assets Purchased by Gemstone VII CDO during Warehouse Period, GEM7-00001831-33. See also 9/14/2010 Gemstone 7 Asset Chart, PSI-Deutsche Bank-17-Gemstone7-0001-03.

¹⁴¹⁷ 9/14/2010 Gemstone 7 Asset Chart, PSI-Deutsche Bank-17-Gemstone7-0001-03.

¹⁴¹⁸ 12/1/2006 instant message conversation between Greg Lippmann and Jordan Milman, DBSI_PSI_EMAIL01863636.

¹⁴¹⁹ 12/19/2006 email from Jason Lowry at HBK to Greg Lippmann and others at Deutsche Bank, DBSI_PSI_EMAIL01910568; 12/19/2006 email from Greg Lippmann to Jordan Milman and others at Deutsche Bank, DBSI_PSI_EMAIL01910580.

Mr. Lippmann expressed a negative outlook for other assets as well, including SABR 2005-OP1, that was taken from Deutsche Bank's inventory and sold to Gemstone 7. On August 26, 2006, Mr. Lippmann wrote to a client about more securities "blowing up," including SABR 2005-OP1:

"I am encouraged that in spite of the virility of the cdo bid, there are numerous examples of bonds blowing up ... the tripling of serious delinq [delinquencies] in sabr 05-op1 to over 6.5% since feb even though the avg [average] mortgage age is now only 21 months i.e. hasn't reset yet What I'm saying is there is plenty of fundamental evidence that bonds are blowing up even as the new issue and index market are remaining buoyant."¹⁴²⁰

On December 12, 2006, with no objection from Mr. Lippmann's desk, Gemstone 7 purchased \$5.5 million of SABR 2005-OP1 B4 from Deutsche Bank, the same asset that he had described months earlier as incurring "serious delinquencies."¹⁴²¹

A third example involved securities issued by Ameriquest Mortgage Securities Inc. (AMSI), which Gemstone purchased from Deutsche Bank's inventory. On April 6, 2006, Mr. Lippmann called AMSI 2005-R7 M8 a "crap name."¹⁴²² In a June 16, 2006 email, Mr. Lippmann called AMSI generally a "weakish name."¹⁴²³ On December 12, 2006, Gemstone 7 purchased \$5 million of another RMBS, AMSI 2005-R11 M10, with no objection from the Lippmann trading desk.¹⁴²⁴

In still another instance, Deutsche Bank praised its sales force for placing a security it was having difficulty selling as the underwriter, Deutsche Alt-A Securities Inc. (DBALT) 2006-AR6, in Gemstone 7. On November 17, 2006, the Deutsche Bank Option Arms Desk sent the following email, "The Arms Desk would like to express its sincere appreciation to the sales force for an outstanding job in helping us place the bonds off DBALT 06-AR6. Thanks a lot!"¹⁴²⁵ Less than two weeks later, on November 29, 2006, a member of the Deutsche Bank sales force wrote: "Some success in CMO [collateralized mortgage obligation] land today: Sold 9 mm [million] DBALT 06-AR6 M10 (Ba2/BBB-) to HBK. This class was never sold in the new issue

¹⁴²⁰ 8/26/2006 email from Greg Lippmann to Richard Axilrod, DBSI_PSI_EMAIL01618236.

¹⁴²¹ Assets Purchased by Gemstone VII CDO during Warehouse Period, GEM7-00001831-33.

¹⁴²² 4/6/2006 email from Greg Lippmann to himself, DBSI_PSI_EMAIL01075218.

¹⁴²³ 6/16/2006 email from Greg Lippmann to Rocky Kurita, DBSI_PSI_EMAIL01314036.

¹⁴²⁴ Assets Purchased by Gemstone VII CDO during Warehouse Period. GEM7-00001831-33.

¹⁴²⁵ 11/17/2006 email from Deutsche Arms to Deutsche Bank employees, DBSI_PSI_EMAIL01831021; 11/14/2006 email from Deutsche Arms to Deutsche Bank employees, DBSI_PSI_EMAIL01822045. DBALT was "one of Deutsche Bank's own shelf offerings." 3/21/2011 letter from Deutsche Bank's counsel to the Subcommittee, PSI-Deutsche_Bank-32-0001-04.

marketing.”¹⁴²⁶ HBK records indicate that, the next day, it agreed to purchase \$8.8 million of DBALT 2006-AR6 M10.¹⁴²⁷

Many investors would likely have found the negative views of Mr. Lippmann, Deutsche Bank’s top CDO trader, important to their decision as to whether or not to buy Gemstone 7, but his views, as described above, were not disclosed to them. At the time, the traders on his desk as well as other Deutsche Bank CDO personnel knew that many clients valued and relied on Mr. Lippmann’s opinion when making investment decisions, yet did not disclose his views of the specific assets included in Gemstone 7.¹⁴²⁸ M&T Bank told the Subcommittee that had it known about Mr. Lippmann’s views, it might have “thought twice” before purchasing Gemstone 7 securities.¹⁴²⁹

(d) Gemstone Sales Effort

Deutsche Bank began aggressively marketing Gemstone 7 to investors beginning in January 2007.¹⁴³⁰ The bank communicated with potential investors about Gemstone 7 in a variety of ways, including through emails, telephone calls, face to face meetings, and at conferences. Deutsche Bank personnel also went on what they called “road shows” to cities around the world, to meet investors and pitch the CDO to them.¹⁴³¹ Sean Whelan, co-head of the Deutsche Bank CDO sales force, and Ilinca Bogza, a vice president in the Deutsche Bank syndicate group, worked to market Gemstone 7 to investors, including by scheduling road shows and personal meetings with potential investors.

Investors were typically shown a “Debt Investor Presentation” that had been prepared by HBK and Deutsche Bank.¹⁴³² That presentation provided an overview of the transaction, a description of HBK’s organization, and its investment strategy. The presentation highlighted investment considerations, including HBK’s expertise in the capital markets, how its structured products exhibit relatively stable performance, and their low default history. The presentation also contained a description of HBK’s analytical systems and surveillance capabilities, and included an appendix describing the risk factors for the deal. HBK told the Subcommittee that its employees attended investor meetings, and were at times called upon to answer questions, but did not always participate in the Gemstone 7 sales efforts which were led by Deutsche Bank.¹⁴³³

¹⁴²⁶ 11/29/2006 email from Larry Pike to Eleanny Pichardo and others, DB_PSI_01731794.

¹⁴²⁷ 11/30/2006 email from Jason Lowry at HBK to Abhayad Kamat and others, GEM7-00005480. See also Assets Purchased by Gemstone VII CDO during Warehouse Period, GEM7-00001831-33.

¹⁴²⁸ See 7/6/2006 email from Axel Kunde to Greg Lippmann, DBSI_PSI_EMAIL01374694 (“If you tell the sales guy the bond is really bad his investor will use that as an argument against us and demand we buy back his note, because he trusted DB [Deutsche Bank] to pick a good portfolio etc, etc.”).

¹⁴²⁹ Subcommittee Interview of M&T (9/20/2010).

¹⁴³⁰ See, e.g., 1/25/2007 Deutsche Bank internal email chain, DB_PSI_00346491-99, at 99.

¹⁴³¹ Subcommittee interview of Sean Whelan (9/22/2010).

¹⁴³² See, e.g., 1/2007 Gemstone 7 Debt Investor Presentation, DBSI_PSI_EMAIL01980000-60 and 2/8/2007 Gemstone 7 Debt Investor Presentation, GEM7-00001687-1747.

¹⁴³³ Subcommittee interview of Kevin Jenks (10/13/2010).

One Gemstone investor, M&T Bank, told the Subcommittee that, after observing a presentation made by Mr. Jenks and receiving Deutsche Bank's assurances in connection with its solicitation efforts, it believed that Gemstone 7 securities posed minimal investment risk.¹⁴³⁴ According to the transcript of a telephone call on February 5, 2007, Sean Whelan of Deutsche Bank's sales force pitched the Gemstone 7 deal to M&T Bank and stated in part: "If you indicate early, like Gemstone deals go very well, and this deal will all go very well and it will get oversubscribed."¹⁴³⁵ The following day, February 6, 2007, Mr. Whelan again pitched the deal to M&T and stated that Gemstone 7 "was like a lay up."¹⁴³⁶ When asked about these comments, Mr. Whelan told the Subcommittee that what he meant was that working with a quality hedge fund like HBK was a "lay up," not that the Gemstone 7 deal itself was a "lay up."¹⁴³⁷ With regards to his comment about oversubscription, he said he was referring to the tranches that M&T Bank was considering purchasing, which ultimately were fully subscribed.¹⁴³⁸

In early 2007, as the closing date for Gemstone 7 neared, the Deutsche Bank sales force was having difficulty getting commitments from investors to buy Gemstone securities. Many investors who were solicited declined to invest because of concerns about the high concentration in subprime RMBS with BBB or BB ratings.¹⁴³⁹ In the beginning of 2007, there was a general lack of buyer interest in mortgage related securities in the United States, other than from new CDOs purchasing CDO securities from prior deals. It was not the first time, however, that a Gemstone deal involving Deutsche Bank and HBK could not be fully sold. HBK had conditioned Deutsche Bank's participation in Gemstone 7 on its purchasing unsold securities from Gemstone 4 and 5, BB rated securities that HBK still had on its books for \$13.1 million. In an email sent to a colleague, an HBK Managing Director Jamiel Akhtar wrote:

"As a condition for receiving the underwriting mandate, Kevin [Jenks] and I insisted that DB [Deutsche Bank] buy from us the \$13.1mm of BB rated CDO liabilities HBK retained on its own books from Gemstone IV and V. This was a fairly sharp-elbowed tactic on our part, as the BB bonds are the worst part of the capital structure, but I felt like we should be sharp-elbowed with DB right now."¹⁴⁴⁰

The head of Deutsche Bank's CDO Group, Michael Lamont, sent an email to the CDO Group banker assigned lead responsibility for structuring Gemstone 7, acknowledging the risk the bank took on by purchasing the earlier unsold securities, but also noting the "nice" fee being paid to the bank: "[T]hat is part of the risk we took when we were awarded the mandate and we are still making a nice all in fee."¹⁴⁴¹ When Deutsche Bank told HBK that it intended to resell the Gemstone 4 and 5 securities, the HBK official indicated it was "ok with that as long as it is

¹⁴³⁴ Subcommittee interview of M&T (9/20/2010).

¹⁴³⁵ 2/5/2007 telephone transcript between Sean Whelan and Alex Craig of M&T, MTSS000920-25, at 22.

¹⁴³⁶ 2/6/2007 telephone transcript between Sean Whelan, and Alex Craig and David Borchard of M&T, MTSS000929-31, at 31.

¹⁴³⁷ Subcommittee interview of Sean Whelan (9/22/2010).

¹⁴³⁸ Id.

¹⁴³⁹ See spreadsheet containing potential investor feedback regarding Gemstone 7, DBSI_PSI00117568.

¹⁴⁴⁰ 10/5/2006 email from Jamiel Akhtar at HBK to Jon Mosle at HBK, GEM7-00006353.

¹⁴⁴¹ 2/8/2007 email from Michael Lamont to Abhayad Kamat, DBSI_PSI_EMAIL04045219-24.

not blasted out to everyone so as not to affect his current deal [Gemstone 7] in the market.”¹⁴⁴² Deutsche Bank and HBK did not disclose in the Gemstone 7 offering materials both the bank’s purchase of the Gemstone 4 and 5 securities as a precondition to the deal and the bank’s plan to sell the Gemstone 4 and 5 securities contemporaneously with the Gemstone 7 securities.

Struggle to Sell Gemstone. Evidence obtained by the Subcommittee shows that both HBK and Deutsche Bank were concerned about their exposure should Gemstone 7 not be fully subscribed and worked hard to sell the deal in the face of U.S. investor disinterest.¹⁴⁴³ According to the terms of the Gemstone deal, if the securities were not fully sold, the risk of the first \$80 million in losses would fall on HBK, while all remaining losses would fall on Deutsche Bank.¹⁴⁴⁴ On February 27, 2007, Mr. Kamat of Deutsche Bank wrote to Mr. Jenks of HBK about selling the Gemstone 4 and 5 securities and brought up the CDO Group’s need to reduce risk: “[W]e are trying to reduce our exposure right now given internal very senior mgmt review of our business.” Mr. Jenks responded: “We are also trying to reduce exposure.”¹⁴⁴⁵

In January 2007, Michael Lamont, head of Deutsche Bank’s CDO Group, and Mr. Jenks, the HBK collateral manager, discussed the urgency of selling Gemstone 7 in the face of a deteriorating market. On January 9, 2007, Mr. Jenks wrote to Mr. Lamont: “[W]ith this market this way and probably going to get worse we would like to really move on the cdo. Please allocate the resources to expedite this.” Four minutes later Mr. Lamont responded: “[W]e are focused on this as well. We don’t have a deal in the market and you will be first.”¹⁴⁴⁶

Several developments in early 2007 signaled problems in the mortgage industry. On January 29, 2007, subprime lender Fremont Investment & Loan announced that it had “severed ties” with 8,000 brokers whose loans had high delinquency rates.¹⁴⁴⁷ The following week on February 7, 2007, New Century, another major subprime lender, disclosed in a conference call with investors that “the level of early-payment defaults and loan repurchases [had] led to tighter underwriting guidelines,” that its nonprime loan production would be declining, and that it would be restating its earnings.¹⁴⁴⁸ An additional warning to the market that occurred as Gemstone was being marketed to investors was the plunge in the ABX Index that tracked the value of subprime RMBS securities. In February 2007, the ABX Index fell from a high of \$0.90 early in the month

¹⁴⁴² Id. at 24.

¹⁴⁴³ Subcommittee interview of Kevin Jenks (10/13/2010). Mr. Jenks recalled that there were more non U.S. investors in CDOs in 2007, but he believed that was because there was not much of a CDO market in Europe. Subcommittee interview of Kevin Jenks (10/13/2010). Mr. Whelan told the Subcommittee that in 2006 and 2007, CDO subscription was “spotty.” Subcommittee interview of Sean Whelan (9/22/2010).

¹⁴⁴⁴ 12/20/2006 Gemstone 7 Securitization Credit Report, DB_PSI_00237655-71.

¹⁴⁴⁵ 2/27/2007 email between Abhayad Kamat and Kevin Jenks, DB_PSI_00421609 (discussing potential exposure due to purchase of earlier Gemstone 4 and 5 tranches in Gemstone 7).

¹⁴⁴⁶ 1/9/2007 email chain between Michael Lamont and Kevin Jenks, GEM7-00002156.

¹⁴⁴⁷ 2/1/2007 S&P internal email, “Defaults cause Fremont to end ties to 8,000 brokers,” Hearing Exhibit 4/23-93d.

¹⁴⁴⁸ “New Century plunges on loan production,” MarketWatch (2/8/2007), <http://www.marketwatch.com/story/new-century-shares-punished-over-loan-production-warning>. On the day before the New Century conference call, Deutsche Bank received a request from HBK to approve a New Century asset purchase for the Gemstone 7 deal and approved this request on February 9. See 2/9/2007 email from Jordan Milman to Ashley Bonilla at HBK, DB_PSI_00845552.

to \$0.69 by the end of the month, indicating a drop of more than 23% in the value of subprime RMBS securities.¹⁴⁴⁹ These and other events affected both the RMBS and CDO markets, since so many CDOs included or referenced subprime RMBS securities.

Emails reviewed by the Subcommittee show that CDO personnel at Deutsche Bank were well aware of the worsening CDO market and were rushing to sell Gemstone 7 before the market collapsed. On February 7, 2007, Mr. Lippmann, reacting to the New Century developments, raised concerns with Mr. Lamont about the ability of Deutsche Bank to continue to sell CDO securities: “I was calling about warehouse marks and distribution risk b/c [because] hearing rumors about other dealers having big trouble placing this stuff.”¹⁴⁵⁰ The next day, February 8, 2007, Mr. Lamont told Abhayad Kamat, the CDO Group employee structuring Gemstone 7: “[R]egardless we need to sell it [Gemstone 7] now while we still can.”¹⁴⁵¹ The same day, Mr. Lamont wrote to Mr. Jenks at HBK: “Keep your fingers crossed but I think we will price this just before the market falls off a cliff.”¹⁴⁵² The next day, February 9, 2007, Ilinca Bogza, of the Deutsche Bank syndicate group, wrote to Mr. Lamont: “Jenks just called me. ... He is frightened that accounts will pull their orders given the widening in abx today. ... He mentioned he was going to give you a call. He is very nervous.”¹⁴⁵³

On February 13, 2007, the head of Deutsche Bank’s syndicate group, Anthony Pawlowski, wrote to Mr. Lamont: “I am not sure how to push guys upstairs without having them crack. Everyone wants to price this deal asap (Sean Whelan [co-head of Deutsche Bank’s CDO sales force] is pushing for Friday to lock up his guys on the AAA and AA)[.] Let me know.”¹⁴⁵⁴ A week later, on February 20, 2007, Mr. Lamont wrote to Deutsche Bank syndicate to ask:

“[O]n our managed mezz[anine] abs [asset backed security] CDOs last year what was the split by risk tranche across deals between real money and cdo warehouses. The street may be pulling back so this would be good info to have as we think about how we are going to place risk.”¹⁴⁵⁵

¹⁴⁴⁹ On Feb. 23, 2007, MarketWatch announced: “The ABX.HE index that tracks CDS on the riskiest subprime loans, rated BBB-, that were sold in the second half of 2006 fell to \$0.69 on Friday, according to Markit.com, which administers the indexes. That’s down from \$0.72 on Thursday and \$0.79 at the beginning of the week. In early February, this index was above 90.” “Subprime mortgage derivatives index plunges; Bankruptcies, losses in subprime home loan industry spark drop,” MarketWatch (2/23/2007), <http://www.marketwatch.com/story/index-of-subprime-mortgage-derivatives-plunges-on-sector-woes>.

¹⁴⁵⁰ 2/7/2007 email from Greg Lippmann to Michael Lamont, DBSI_PSI_EMAIL02366193-96, at 94. When Mr. Lamont heard about the New Century developments he wrote: “yikes. I think we will stay short a while.” 2/7/2007 email from Michael Lamont to Greg Lippmann, DBSI_PSI_EMAIL02366194.

¹⁴⁵¹ 2/8/2007 email from Michael Lamont to Abhayad Kamat, DBSI_PSI_EMAIL04045219-24.

¹⁴⁵² 2/8/2007 email from Michael Lamont to Kevin Jenks, DBSI_PSI_EMAIL04045360.

¹⁴⁵³ 2/9/2007 email from Ilinca Bogza to Michael Lamont, DBSI_PSI_EMAIL04047421-23.

¹⁴⁵⁴ 2/13/2007 email from Anthony Pawlowski at Deutsche Bank to Michael Lamont, DBSI_PSI_EMAIL04049521.

¹⁴⁵⁵ 2/20/2007 email from Michael Lamont to Ilinca Bogza, DBSI_PSI_EMAIL04054492. On February 20, 2007, a client of Mr. Lippmann’s who was looking to short more RMBS commented in an email to him about the negative news concerning Novastar Financial Inc., which announced losses that day. His client described the situation in the market “like the plague.” 2/20/2007 email from Steven Eisman at Frontpoint Partners to Greg Lippmann, DBSI_PSI_EMAIL02008182.

In one odd instance, Ms. Bogza, from the CDO syndicate, sent an email to the Deutsche Bank sales force suggesting that Gemstone 7 was experiencing greater investor interest than it really was. The February 20, 2007 email by Ms. Bogza stated that the bank had received an “indication of [investor] interest” in 75% of the BBB securities in Gemstone 7.¹⁴⁵⁶ After receiving this email, Mr. Lippmann wrote to Ms. Bogza: “[W]ow that much interest in the bbb? Is that real?? We would take as much as you can oversell.”¹⁴⁵⁷ Ms. Bogza responded: “no, that is definitely not real it is at 50%; can’t oversell any tranche to be honest,” to which Mr. Lippmann responded: “very sneaky.”¹⁴⁵⁸

In late February, as the market continued to deteriorate, Deutsche Bank attempted to motivate its employees to sell Gemstone 7 by providing special incentives to its sales force for selling the deal. On February 21, 2007, Mr. Kamat wrote to Ms. Bogza: “[W]e need help on selling the As and BBBs in the Gemstone CDO 7 transaction – we have nearly 50% unsold on both tranches in the transaction.”¹⁴⁵⁹ In another email the same day, he wrote: “[S]hould we offer more PCs for Gemstone 7 CDO given the market?”¹⁴⁶⁰ “PCs” refers to Production Credits, which were used to boost a salesperson’s compensation including through an end-of-year bonus. Later the same night, Mr. Kamat sent an email to the co-head of the CDO Group seeking to increase the Production Credits that could be awarded for selling Gemstone 7: “[D]ouble digit PCs? I guess my original offer of 300 on single-As and 600 on triple-Bs is too low ... what can we offer?”¹⁴⁶¹

Showing Investors Higher Marks. As the value of mortgage related assets grew more volatile, some potential investors in Gemstone 7 inquired about the mark to market (MTM) value of the CDO’s underlying assets. MTM is a valuation method by which the current value of an asset is recorded on a firm’s books at the price it would sell in the marketplace on the day it is marked. Investors at times inquire about MTM values to determine if the underlying assets of a CDO have dropped in value since their inclusion in the warehouse account. Traders who closely follow buy and sell activity for a particular class of assets are generally best able to provide the most accurate current valuation. At Deutsche Bank, the CDO Trading Desk marked the value of assets monthly as a service to its clients and at times provided this service to HBK for the assets underlying Gemstone 7.¹⁴⁶² HBK also prepared its own internal marks valuing Gemstone’s assets. According to both Deutsche Bank and HBK, assigning a mark is a very complicated process that involves credit analysis of the securities at issue. Both explained it was not unusual for different entities to mark an asset differently.¹⁴⁶³

¹⁴⁵⁶ 2/20/2007 email from Ilinca Bogza to sales force, DBSI_PSI_EMAIL02007608.

¹⁴⁵⁷ 2/20/2007 email from Greg Lippmann to Ilinca Bogza, DBSI_PSI_EMAIL02007608.

¹⁴⁵⁸ 2/20/2007 email between Greg Lippmann and Ilinca Bogza, DBSI_PSI_EMAIL02007794.

¹⁴⁵⁹ 2/21/2007 email from Abhayad Kamat to Ilinca Bogza, DBSI_PSI_EMAIL04055827.

¹⁴⁶⁰ Id.

¹⁴⁶¹ 2/21/2007 email from Abhayad Kamat at Deutsche Bank to Michael Lamont and others at Deutsche Bank, DBSI_PSI_EMAIL04056326-36.

¹⁴⁶² 3/27/2007 email from Richard Leclezio at Deutsche Bank to Jordan Milman noting that HBK has requested marks from Deutsche Bank, DB_PSI_00423053-61.

¹⁴⁶³ Subcommittee interview of Jordan Milman (10/22/2010). Subcommittee interview of Kevin Jenks (10/13/2010).

During the marketing phase of Gemstone 7, documents indicate several potential investors asked Deutsche Bank to provide MTM values for the underlying assets in the CDO. In response, those potential investors were given HBK's marks, rather than the generally lower valuations assigned to the assets by Deutsche Bank's CDO Trading Desk. On January 23, 2007, Mr. Kamat sent an email to HBK explaining that some potential investors had requested marks for the Gemstone 7 assets:

"Some investors are asking for current marks on the Gemstone 7 CDO portfolio. The attached file has the purchase price and the current marks that we got from our desk. There are many bonds where the price difference between purchase price and current mark is more than 4% I have asked Jordan [Milman, a Deutsche Bank trader] to review the marks but it would be great if you could have someone at HBK review also to check if the current marks seem correct. It seems as if the entire portfolio price has dropped since purchase by 1.74% which does not show well to investors."¹⁴⁶⁴

Before he heard back from HBK, Mr. Kamat sent a very similar request to Mr. Milman to review the marks to verify them. He wrote:

"There are many [Gemstone 7] bonds where the price difference between purchase price and the current mark is more than 4% Before we send these over to CDO investors, pls could you review to check if the current marks are correct. It seems as if the entire portfolio price has dropped since purchase by 1.74% which does not show well to investors."¹⁴⁶⁵

The next day, a Deutsche Bank trader verified the marks: "I checked the names that Abhayad [Kamat] highlighted [and] most are marked within the recent color[.] [T]here are 4 which should be tightened."¹⁴⁶⁶

On January 23, 2007, Mr. Kamat learned that HBK's marks showed a loss of 0.9% or \$9.4 million in the Gemstone 7 portfolio, while Deutsche Bank's marks showed a greater loss of 1.7% or \$19 million.¹⁴⁶⁷ On January 24, 2007, Mr. Kamat directed Deutsche Bank's syndicate group to share HBK's marks with investors instead of Deutsche Bank's. He wrote: "[F]or investors who have asked for current marks on the Gemstone CDO 7 portfolio, tell them: HBK says that the overall current portfolio is down USD 9 million."¹⁴⁶⁸

A couple weeks later, a question arose about using Deutsche Bank marks for Gemstone 7. On February 7, 2007, Ms. Bogza from the syndicate group wrote to Mr. Kamat: "Why can we

¹⁴⁶⁴ 1/23/2007 email from Abhayad Kamat to HBK, GEM7-00003101. This document has HBK showing a loss of \$9.4 million in the value of the Gemstone assets, whereas Deutsche Bank showed a loss of \$19 million. In interviews with the Subcommittee, both Mr. Milman and Mr. Lippmann said that a 1.74% drop would not have concerned them because of the relative small dollars involved compared to the \$1.1 billion deal.

¹⁴⁶⁵ 1/23/2007 email from Abhayad Kamat to Jordan Milman, DB_PSI_00465462.

¹⁴⁶⁶ 1/24/2007 email from Jashin Patel to Jordan Milman, DB_PSI_00843917.

¹⁴⁶⁷ 1/23/2007 email from Abhayad Kamat to HBK, GEM7-00003101.

¹⁴⁶⁸ 1/24/2007 email from Abhayad Kamat to Chehao Lu and others at Deutsche Bank, DB_PSI_00741750-52.

not show a priced [marked] portfolio?? We need to show this [to investors].” Mr. Kamat responded: “[T]he marks we got from Jordan are too low ... and it will take quite some time if we try to take on an exercise where we try to get Kevin and Jordan to agree on the correct marks.”¹⁴⁶⁹ Mr. Kamat wrote to another colleague later that day: “[U]se this for the current prices to be sent to investors, but please note to investors that this is from HBK.”¹⁴⁷⁰ HBK also appeared to want to show higher marks to investors. When Mr. Kamat emailed Mr. Jenks seeking marks for the Gemstone 7 portfolio on February 7, Mr. Jenks sent an internal email to an HBK assistant trader. Mr. Jenks wrote: “Need line item marks for cdo portfolio[.] use dec or jan depending on which is better[.]”¹⁴⁷¹

When asked about these documents, Mr. Kamat stated that he advised using HBK’s marks instead of Deutsche Bank’s marks, because HBK’s marks were better due to the collateral manager’s familiarity with the assets.¹⁴⁷² However, Deutsche Bank’s trading desk was one of the biggest traders in RMBS and CDOs on Wall Street, making it unlikely that the desk could not adequately price the assets that it traded. Deutsche Bank also chose not to share both sets of marks with investors; it shared only the HBK marks showing higher asset values.

When HBK was asked about this matter, Mr. Jenks told the Subcommittee that he did not authorize Deutsche Bank to give out HBK’s marks to investors and would be “surprised” if Deutsche Bank had given out HBK’s marks.¹⁴⁷³ Mr. Jenks only recalled one time when an investor asked Deutsche Bank for Gemstone 7 marks. When the Subcommittee asked several of the investors who ultimately purchased Gemstone securities if they had asked for marks showing the current value of the underlying assets, M&T Bank told the Subcommittee that it did not know to ask for marks.¹⁴⁷⁴ Standard Chartered, Wachovia, and Commerzbank told the Subcommittee that they did not ask for the marks and it would have been unusual for them to do so. Eight days before the Gemstone CDO closed and its securities issued, HBK estimated that its portfolio marks were down approximately \$30 million.¹⁴⁷⁵

\$400 Million of Unsold Securities. The mortgage market continued to worsen in March as Deutsche Bank continued to market the Gemstone securities. On March 8, 2007, one week before the Gemstone 7 deal closed, New Century – the subprime lender whose RMBS securities made up part of Gemstone – filed an 8-K with the SEC which said: “The Company has only been able to fund a portion of its loans this week. In addition, its capacity to fund new originations is substantially limited due to its lenders’ restrictions or refusals to allow the Company to access their financing arrangements.”¹⁴⁷⁶ New Century’s financial troubles were

¹⁴⁶⁹ 2/7/2007 emails between Abhayad Kamat and Ilinca Bogza, DB_PSI_00434692-96.

¹⁴⁷⁰ 2/7/2007 email from Abhayad Kamat to Chehao Lu, DB_PSI_00711486.

¹⁴⁷¹ 2/7/2007 email from Kevin Jenks to Jason Lowry, GEM7-00003084.

¹⁴⁷² Subcommittee interview of Abhayad Kamat (10/8/2010).

¹⁴⁷³ Subcommittee interview of Kevin Jenks (10/13/2010).

¹⁴⁷⁴ Subcommittee interview of M&T (9/20/2010).

¹⁴⁷⁵ 3/7/2007 email from Kevin Jenks to Abhayad Kamat, GEM7-00001958.

¹⁴⁷⁶ 3/8/2007 New Century Financial Corporation 8-K filing with the SEC. Even senior Deutsche Bank management was aware of the problems involving New Century and Fremont during this time period. On March 2, 2007, Mr. Lippmann sent an email to Mr. Misra, copying Mr. D’Albert, with a subject line: “Fremont Shut Down Sub-Prime

prominently reported in the financial press on March 11, 2007.¹⁴⁷⁷ On March 15, 2007, the day Gemstone 7 closed, Bear Stearns said that “residential mortgage-related revenue decreased from the prior year period, reflecting weakness in the U.S. residential mortgage-backed securities market. ... New Century Financial Corp., which had been a major provider of loans to people with risky credit, said it has lost support from its financial backers and is being delisted from the NYSE.”¹⁴⁷⁸ New Century comprised 15% of Gemstone 7.

Ultimately \$400 million of Gemstone 7 was unsold. Although not contractually obligated to do so, Deutsche Bank agreed to split the unsold \$400 million of Gemstone 7 securities between itself and HBK.¹⁴⁷⁹ Meetings concerning taking back the \$400 million were held at the highest levels of both Deutsche Bank and HBK.¹⁴⁸⁰ As Mr. Lippmann put it: “[W]e don’t have much choice ... either we repo for them or we take it down.”¹⁴⁸¹

Deutsche Bank and HBK were unable to sell 36% of the securities and instead kept those securities on their books. Mr. Jenks of HBK told the Subcommittee that he always wanted to know if unsold portions of a CDO he was interested in investing in would be bought back by the

business” that contained a number of negative news headlines concerning New Century including, “New Century says U.S. attorney conducting criminal probe ... New Century says NYSE reviewing transactions in its securities ... New Century says SEC requested meeting on restatement.” The next day Mr. Misra replied to Mr. Lippmann, “Well, no regrets. Let’s hold tight on our shorts now. It will be a bumpy market to market ride but we will prevail.” 3/2/2007 and 3/3/2007 email chain between Mr. Lippmann and Mr. Misra, DBSI_PSI_EMAIL02392659-61.

¹⁴⁷⁷ See, e.g., “Crisis Looms In Market for Mortgages,” The New York Times (3/11/2007),

<http://www.nytimes.com/2007/03/11/business/11mortgage.html>. (“On March 1, a Wall Street analyst at Bear Stearns wrote an upbeat report on a company that specializes in making mortgages to cash-poor homebuyers. The company, New Century Financial, had already disclosed that a growing number of borrowers were defaulting, and its stock, at around \$15, had lost half its value in three weeks. What happened next seems all too familiar to investors who bought technology stocks in 2000 at the breathless urging of Wall Street analysts. Last week, New Century said it would stop making loans and needed emergency financing to survive. The stock collapsed to \$3.21.”)

¹⁴⁷⁸ “Bear Stearns 1Q profit rises 8 percent on strong results in bonds, credit,” Associated Press Financial Wire (3/15/2007). Also see “New Century Understated Debt; Faces SEC Probe, Stock Delisting,” Associated Press (3/13/2007),

http://www.cnn.com/id/17590171/New_Century_Understated_Debt_Faces_SEC_Probe_Stock_Delisting; “New Century Subpoenaed, Faces Delisting,” Washington Post (3/13/2007),

<http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13/AR2007031300603.html>.

¹⁴⁷⁹ On 3/14/2007, Fred Brettschneider, head of Deutsche Bank institutional sales, wrote: “We believe that we have reached an acceptable compromise with HBK. We will be restructuring the unsold mezz AAA and we will underwrite the senior portion leaving them [HBK] with the junior piece.” 3/14/2007 email from Fred Brettschneider to Anshu Jain and others, DBSI_PSI_EMAIL02064810-12. On 3/27/2007, Larry Pike of Deutsche Bank wrote with regard to Gemstone 7, “400mm of the unsold bonds were a middle (mezz) AAA class that were expected to be purchased by an investor who backed out at a late stage due to a deteriorating market. HBK was upset about this and wanted DB to take these bonds down, threatening to curtail business globally with HBK if we didn’t.” 3/27/2007 email from Larry Pike to Sean Whelan and others, DB_PSI_00859611.

¹⁴⁸⁰ Subcommittee interview of Michael Lamont (9/29/2010).

¹⁴⁸¹ Apparently, Mr. Lippmann was explaining that either Deutsche Bank could “repo” or loan money to HBK in order for HBK to purchase the unsold Gemstone 7 securities or Deutsche Bank would have to “take it down” – either purchase the securities itself or liquidate the CDO. 2/20/2007 email from Greg Lippmann to Rich Rizzo at Deutsche Bank, DBSI_PSI_EMAIL02377303.

underwriter, but he did not know if everyone asked about this.¹⁴⁸² M&T Bank told the Subcommittee that it would have been useful information, though it would have been more concerned if the tranches it was purchasing were not fully subscribed.¹⁴⁸³

(e) Gemstone Losses

Gemstone 7 closed on March 15, 2007, and received credit ratings from S&P and Moody's on the same day.¹⁴⁸⁴ The top three tranches, representing 73% of the value of the CDO, received AAA ratings. The next three tranches received investment grade ratings of AA, A, and BBB.¹⁴⁸⁵ The CDO received these ratings even though one third of its underlying assets carried non-investment grade ratings.

Eight months later, in November 2007, five of its seven tranches were downgraded, including one of its AAA rated tranches. By July 2008, all seven tranches had been downgraded to junk status, and the Gemstone securities were nearly worthless. This chart, using S&P data, displays the downgrades.¹⁴⁸⁶

Gemstone VII Ratings by Tranche

Tranche	Initial Rating: Date	1st Downgrade: Date	2nd Downgrade: Date	3rd Downgrade: Date
Class A-1a	AAA: March 15, 2007	A+: Feb. 5, 2008	BB+: July 11, 2008	CC: August 19, 2009
Class A-1b	AAA: March 15, 2007	B-: Feb. 5, 2008	CC: July 11, 2008	n/a
Class A-2	AAA: March 15, 2007	AA-: Nov. 21, 2007	CCC-: Feb. 5, 2008	CC: July 11, 2008
Class B	AA: March 15, 2007	BBB: Nov. 21, 2007	CC: Feb. 5, 2008	n/a
Class C	A: March 15, 2007	B-: Nov. 21, 2007	CC: Feb. 5, 2008	n/a
Class D	BBB: March 15, 2007	CCC+: Nov. 21, 2007	CC: Feb. 5, 2008	n/a
Class E	BB+: March 15, 2007	CCC: Nov. 21, 2007	CC: Feb. 5, 2008	n/a
Preference Shares	Not rated			

Source: S&P

Investors contacted by the Subcommittee reported that they had lost all or most of their investments. In June 2008, M&T Bank wrote down the value of its Gemstone 7 securities to

¹⁴⁸² Subcommittee interview of Kevin Jenks (10/13/2010).

¹⁴⁸³ Subcommittee interview of M&T (9/20/2010). In addition, Standard Chartered reported that it didn't know that a portion of the CDO was unsold, and that it would have been information worth knowing but that it wouldn't have ultimately impacted its decision to invest in Gemstone 7. Subcommittee interview of counsel for Standard Chartered (10/14/2010).

¹⁴⁸⁴ 3/15/2007 letter from S&P to Gemstone CDO VII Ltd, GEM7-00001658-61; 3/15/2007 letter from Moody's to Gemstone CDO VII Ltd., GEM7-00001657.

¹⁴⁸⁵ Gemstone 7 ratings from S&P's RatingsDirect on the Global Credit Portal, <https://www.globalcreditportal.com/ratingsdirect/Login.do>, with subscription.

¹⁴⁸⁶ Chart prepared by the Subcommittee using data from S&P's RatingsDirect on the Global Credit Portal, <https://www.globalcreditportal.com/ratingsdirect/Login.do>, with subscription.

about 2% of their original value – from \$82 million to \$1.87 million.¹⁴⁸⁷ Wachovia Bank told the Subcommittee that its \$40 million investment in Gemstone paid out approximately \$3 million from 2007-2010, but is currently worth nothing.¹⁴⁸⁸ Standard Chartered Bank told the Subcommittee that, in 2008, it liquidated its Gemstone investment and received approximately 25-30% of its initial \$224 million investment.¹⁴⁸⁹ Commerzbank told the Subcommittee that its initial \$16 million investment in Gemstone is currently worth nothing.¹⁴⁹⁰

(6) Other Deutsche Bank CDOs

Gemstone 7 was only one of many CDOs that Deutsche Bank assembled and underwrote as the mortgage market deteriorated in 2007. From December 2006 through December 2007, Deutsche Bank issued 15 new CDOs with assets totaling \$11.5 billion.¹⁴⁹¹ The Subcommittee did not examine these CDOs, but a brief discussion of a few shows that the bank's issuance of high risk mortgage related assets was not confined to Gemstone 7.

Magnetar CDOs. Magnetar is a Chicago based hedge fund that, according to press reports, worked with several financial institutions to create CDOs with riskier assets and then bet on those CDOs to fail.¹⁴⁹² Deutsche Bank underwrote one of those CDOs and served as trustee for two other Magnetar CDOs.

According to press reports, Magnetar's investment strategy was to purchase the riskiest portion of a CDO – the equity – and, at the same time, to purchase short positions on other tranches of the same CDO.¹⁴⁹³ Thus, Magnetar would receive a large return on the equity if the security did well, but would also receive a substantial payment from its short positions if the securities lost value. This strategy was dubbed by some as the "Magnetar Trade." It apparently generated large profits for Magnetar. By the end of 2007, when the market was in turmoil, Magnetar's Constellation Fund was up 76% and its Capital Fund was up 26%.¹⁴⁹⁴

Mr. Lippmann disapproved of the Magnetar CDOs.¹⁴⁹⁵ In August 2006, when an investor asked Mr. Lippmann about Magnetar, he responded that it was a "Chicago based hedge

¹⁴⁸⁷ M&T Bank Corporation v. Gemstone CDO VII, (N.Y. Sup.), Complaint (June 16, 2008), DB_PSI_00000027-79, at ¶ 52. For a list of customers and their allocations of Gemstone 7, see Gemstone VII Summary, DB_PSI_00711305.

¹⁴⁸⁸ 11/19/2010, 11/23/2010 emails from counsel of Wachovia to Subcommittee staff.

¹⁴⁸⁹ Subcommittee interview of counsel of Standard Chartered (11/23/2010).

¹⁴⁹⁰ 12/7/2010 email from counsel of Commerzbank to Subcommittee staff.

¹⁴⁹¹ ABS CDOs Issued by DBSI (between 2004 and 2008), PSI-Deutsche_Bank-02-0005-23.

¹⁴⁹² See, e.g., "The Magnetar Trade: How One Hedge Fund Helped Keep the Bubble Going," ProPublica (4/9/2010), <http://www.propublica.org/article/the-magnetar-trade-how-one-hedge-fund-helped-keep-the-housing-bubble-going>.

¹⁴⁹³ *Id.*

¹⁴⁹⁴ "Magnetar's Exit: A Deal So Bad Even a Credit-Rating Agency Balked," ProPublica (4/9/2010), <http://www.propublica.org/article/magnetars-exit-a-deal-so-bad-even-a-credit-rating-agency-balked>.

¹⁴⁹⁵ Subcommittee interview of Greg Lippmann (10/18/2010).

fund that is buying tons of cdo equity and shorting the single names [T]hey are buying equity and shorting the single names ... a bit devious.”¹⁴⁹⁶

In May 2006, Magnetar created its first CDO, Orion 2006-1 Ltd, a \$1.3 billion hybrid CDO with cash and synthetic assets.¹⁴⁹⁷ The CDO closed on May 26, 2006, and was underwritten by Calyon and managed by NIBC Credit Management, Inc.¹⁴⁹⁸ Deutsche Bank’s Special Situations Group purchased equity in Orion, and helped create the CDO.¹⁴⁹⁹ A Deutsche Bank employee, Michael Henriques, who worked on Orion as managing director of the Special Situations Group, left Deutsche Bank and ultimately went to work for Magnetar.¹⁵⁰⁰

Although Orion received investment grade ratings from Fitch and Moody’s in June 2006,¹⁵⁰¹ a little over a year later, on August 21, 2007, Fitch issued the first of several rating downgrades.¹⁵⁰² In November 2007, Moody’s downgraded the Class A notes six notches and the Class B notes seven notches.¹⁵⁰³ By May 2008, every class of Orion’s securities had been downgraded to junk status.¹⁵⁰⁴

START CDOs. Deutsche Bank also underwrote six START CDOs with a combined value of \$5.25 billion from June 2005 to December 2006.¹⁵⁰⁵ In one of the deals, Deutsche Bank worked with Elliot Advisors, a hedge fund that bought the equity tranche in the CDO and

¹⁴⁹⁶ 8/23/2006 email from Jeremy Coon at Passport Management to Greg Lippmann, DBSI_PSI_EMAIL01603121. In another email, when asked how Magnetar distorted the market, Mr. Lippmann responded, “easy but lengthy answer get him on the phone and call me.” 8/31/2006 email from Warren Dowd at Deutsche Bank to Greg Lippmann, DBSI_PSI_EMAIL01641089.

¹⁴⁹⁷ See Loreley Financing v. Credit Agricole Corporate and Investment Bank, (N.Y. Sup.), (10/29/2010). Orion 2006-1 is one of two Magnetar CDOs that are the subjects of this lawsuit filed by Loreley Financing, a European-based investment fund, and Cr dit Agricole, a French bank. See also “Magnetar Deals at Center of New Lawsuit,” ProPublica (10/25/2010), <http://www.propublica.org/article/magnetar-deals-at-center-of-new-lawsuit>.

¹⁴⁹⁸ See Loreley Financing v. Credit Agricole Corporate and Investment Bank, (N.Y. Sup.), (10/29/2010) (alleging Calyon permitted Magnetar to select poor assets for the two Magnetar CDOs and fraudulently induced investors to purchase the securities).

¹⁴⁹⁹ “Magnetar Gets Started,” ProPublica (4/9/2010), <http://www.propublica.org/article/magnetar-gets-started>; Loreley Financing v. Credit Agricole Corporate and Investment Bank, (N.Y. Sup.), (10/29/2010).

¹⁵⁰⁰ Loreley Financing v. Credit Agricole Corporate and Investment Bank, (N.Y. Sup.), (10/29/2010).

¹⁵⁰¹ “Fitch Rates Orion 2006-1, Ltd./LLC.,” BusinessWire (5/26/2006), <http://www.thefreelibrary.com/Fitch+Rates+Orion+2006-1,+Ltd.%2FLLC.-a0146274727>; 6/9/2006 “\$292.5 Million of Debt Securities Rated, \$936 Million of Senior Credit Swap Risk Rated,” Moody’s, http://v3.moodys.com/viewresearchdoc.aspx?docid=PR_109282.

¹⁵⁰² Fitch downgraded the CDO’s Class A notes from AAA to AA, the Class B notes from AA to A-, the Class C notes from A to BB, and the Class D notes from BBB to B+. “Fitch Downgrades \$289MM of Orion 2006-1, Ltd.,” BusinessWire (8/21/2007), <http://www.highbeam.com/doc/1G1-167859601.html>.

¹⁵⁰³ 11/1/2007 “Moody’s takes neg action on Orion 2006-1,” Moody’s, http://v3.moodys.com/viewresearchdoc.aspx?docid=PR_143474.

¹⁵⁰⁴ 10/28/2010 “Moody’s lowers ratings of 95 Notes issued by 56 structured finance CDO transactions,” Moody’s, http://v3.moodys.com/viewresearchdoc.aspx?docid=PR_208444.

¹⁵⁰⁵ They included Static Residential 2005-A for \$1 billion; Static Residential 2005-B for \$1 billion; Static Residential 2005-C for \$500 million; Static Residential 2006-A for \$1 billion; Static Residential 2006-B for \$1 billion; and Static Residential 2006-C for \$750 million. Chart, ABS CDOs Issued by DBSI (between 2004 and 2008), PSI-Deutsche_Bank-02-0005-23.

simultaneously bought CDS protection against the entire structure, essentially shorting the deal and betting that the value of its assets would fall.¹⁵⁰⁶ On four of the deals, Deutsche Bank worked with Paulson Advisors, a hedge fund that bought the equity tranche and apparently shorted the rest of the CDO, while Deutsche Bank sold the rest of the securities.¹⁵⁰⁷ An internal Deutsche Bank email explained one of the 2005 START CDOs as follows:

“The \$1 billion START 2005-B trade was backed by a static pool of CDS on mezzanine RMBS for Paulson Advisors (\$4 bln risk arb hedge fund). Paulson retained the bottom 6% of the trade and we sold the rest of the capital structure. Paulson, who came to us with the strong desire to short the U.S. housing market, wrote CDS on underlying ABS (over 100 names) to DB [Deutsche Bank] and DB intermediated them into the deal.”¹⁵⁰⁸

Mr. Lamont told the Subcommittee that Mr. Paulson shorted the START deals, and he believed investors were aware of that fact. Mr. Lamont told the Subcommittee that Mr. Lippmann also shorted all of the START CDOs, but Mr. Lippmann explained to the Subcommittee that he did not short the CDOs directly, but instead shorted their underlying assets. In an email discussing START with a Deutsche Bank colleague, Mr. Lippmann advised him to buy protection for the bank against START. He wrote: “Start is crap you should short because I bet we’ll have to ... buyback cash ones next year.”¹⁵⁰⁹

Mr. Lippmann told the Subcommittee that Deutsche Bank ended up losing a great deal of money on the START deals. One Deutsche Bank employee wrote to Mr. Lippmann regarding one of the deals in June 2007: “This along with our remaining held inventory if we can’t sell away we repack into a CDO 2 balance sheet dump later this summer. Worst case we hold it but it is probably the lesser of two evils (the greater evil being our held START position).”¹⁵¹⁰

(7) Analysis

Deutsche Bank was the fourth largest issuer of CDOs in the United States. It continued to issue CDOs after mortgages began losing money at record rates, investor interest waned, and its most senior CDO trader concluded that the mortgage market in general and the specific RMBS securities being included in the bank’s own CDOs were going to lose value. Mr. Lippmann derided specific RMBS securities and advised his clients to short them, at the same time his desk was allowing the very same securities to be included or referenced in Gemstone 7, a CDO that the bank was assembling for sale to its clients. In fact, the bank was selling some assets that Mr. Lippmann believed contained “crap.” While the Gemstone CDO was constructed and marketed by the bank’s CDO Desk, which is separate from the trading desk controlled by Mr. Lippmann, both desks knew of Mr. Lippmann’s negative views. The bank managed to sell \$700 million in Gemstone 7 securities which then failed within months, leaving the bank’s clients with worthless investments.

¹⁵⁰⁶ Subcommittee interview of Michael Lamont (9/29/2010).

¹⁵⁰⁷ Subcommittee interview of Greg Lippmann (10/18/2010).

¹⁵⁰⁸ 10/10/2005 email from Michael Raynes at Deutsche Bank to Greg Lippmann, DBSI_PSI_EMAIL00574452.

¹⁵⁰⁹ 12/14/2006 email from Greg Lippmann to Taranjit Sabharwal at Deutsche Bank, DBSI_PSI_EMAIL01895617.

¹⁵¹⁰ 6/14/2007 email from Richard Kim at Deutsche Bank to Greg Lippmann, DBSI_PSI_EMAIL02202920.

This case history raises several concerns. The first is that Deutsche Bank allowed the inclusion of Gemstone 7 assets which its most senior CDO trader was asked to review and saw as likely to lose value. Second, the bank sold poor quality assets from its own inventory to the CDO. Third, the bank aggressively marketed the CDO securities to clients despite the negative views of its most senior CDO trader, falling values, and the deteriorating market. Fourth, the bank failed to inform potential investors of Mr. Lippmann's negative views of the underlying assets and its inability to sell over a third of Gemstone's securities. Each of these issues focuses on the poor quality of the financial product that Deutsche Bank helped assemble and sell. Still another concern raised by this case history is the fact that the bank made large proprietary investments in the mortgage market that resulted in multi-billion-dollar losses – losses that, in this instance, did not require taxpayer relief but, due to their size, could have caused material damage to both U.S. investors and the U.S. economy.

C. Failing to Manage Conflicts of Interest: Case Study of Goldman Sachs

The Goldman Sachs case study shows how one investment bank profited from the collapse of the mortgage market and engaged in troubling and sometimes abusive practices that raise multiple conflict of interest concerns. The first part of this case study shows how Goldman used structured finance products, including CDO, CDS, and ABX instruments, to take a proprietary net short position against the subprime mortgage market. Reaching its peak at \$13.9 billion, Goldman's net short investments realized record gains for the Structured Products Group in 2007 of over \$3.7 billion which, when combined with other mortgage losses, resulted in overall net revenues for Goldman's Mortgage Department of \$1.2 billion. The second half of the case study shows how Goldman engaged in securitization practices that magnified risk in the market by selling high risk, poor quality mortgage products to investors around the world. The Hudson, Anderson, Timberwolf, and Abacus CDOs show how Goldman used these financial instruments to transfer risk associated with its high risk assets, assist a favored client make a \$1 billion gain, and profit at the direct expense of the clients that invested in the Goldman CDOs. In addition, the case study shows how conflicts of interest related to proprietary investments led Goldman to conceal its adverse financial interests from potential investors, sell investors poor quality investments, and place its financial interests before those of its clients.

(1) Subcommittee Investigation and Findings of Fact

During the course of its investigation into the Goldman Sachs case study, the Subcommittee issued 13 document subpoenas as well as multiple document request letters to financial institutions, government agencies, hedge funds, due diligence firms, insurance companies, individuals, and others. The Subcommittee obtained tens of millions of pages of documents, including internal reports, memoranda, correspondence, spreadsheets, and email. The Subcommittee conducted over 55 interviews and one deposition, including interviews with a variety of senior executives and Mortgage Department personnel at Goldman Sachs. The Subcommittee also spoke with agency officials, law enforcement, and industry and academic experts in financial products and securities law. On April 27, 2010, the Subcommittee held a hearing which took testimony from Goldman senior executives and current and former employees of its Mortgage Department, and released 173 hearing exhibits.¹⁵¹¹ After that hearing, the Subcommittee gathered additional information in post-hearing interviews and through post-hearing questions for the record.¹⁵¹²

¹⁵¹¹ "Wall Street and the Financial Crisis: The Role of Investment Banks," before the U.S. Senate Permanent Subcommittee on Investigations, S.Hrg. 111-674 (4/27/2010) (hereinafter "April 27, 2010 Subcommittee Hearing").

¹⁵¹² See, e.g., Responses to Questions for the Record from Goldman Sachs, including Lloyd C. Blankfein; David A. Viniar; Craig W. Broderick; Daniel L. Sparks; Michael J. Swenson; Joshua S. Birnbaum; and Fabrice P. Tourre, PSI_QFR_GS0001-548 [Redacted]. Unredacted version maintained in the files of the Subcommittee [Sealed Exhibit]. (Hereinafter referred to as "Response to Subcommittee QFR.")

In connection with the hearing, the Subcommittee released a joint memorandum from Chairman Levin and Ranking Member Coburn summarizing the investigation to date into the role of the investment banks in the financial crisis. The memorandum contained the following findings of fact, which this Report reaffirms, regarding the Goldman Sachs case study.

- 1. Securitizing High Risk Mortgages.** From 2004 to 2007, in exchange for lucrative fees, Goldman Sachs helped lenders like Long Beach, Fremont, and New Century, securitize high risk, poor quality loans, obtain favorable credit ratings for the resulting residential mortgage backed securities (RMBS), and sell the RMBS securities to investors, pushing billions of dollars of risky mortgages into the financial system.
- 2. Magnifying Risk.** Goldman Sachs magnified the impact of toxic mortgages on financial markets by re-securitizing RMBS securities in collateralized debt obligations (CDOs), referencing them in synthetic CDOs, selling the CDO securities to investors, and using credit default swaps and index trading to profit from the failure of the same RMBS and CDO securities it sold.
- 3. Shorting the Mortgage Market.** As high risk mortgage delinquencies increased, and RMBS and CDO securities began to lose value, Goldman Sachs took a net short position on the mortgage market, remaining net short throughout 2007, and cashed in very large short positions, generating billions of dollars in gain.
- 4. Conflict Between Client Interests and Proprietary Trading.** In 2007, Goldman Sachs went beyond its role as market maker for clients seeking to buy or sell mortgage related securities, traded billions of dollars in mortgage related assets for the benefit of the firm without disclosing its proprietary positions to clients, and instructed its sales force to sell mortgage related assets, including high risk RMBS and CDO securities that Goldman Sachs wanted to get off its books, and utilizing key roles in CDO transactions to promote its own interests at the expense of investors, creating a conflict between the firm's proprietary interests and the interests of its clients.
- 5. Abacus Transaction.** Goldman Sachs structured, underwrote, and sold a synthetic CDO called Abacus 2007-AC1, did not disclose to the Moody's analyst overseeing the rating of the CDO that a hedge fund client taking a short position in the CDO had helped to select the referenced assets, and also did not disclose that fact to other investors.
- 6. Using Naked Credit Default Swaps.** Goldman Sachs used credit default swaps (CDS) on assets it did not own to bet against the mortgage market through single name and index CDS transactions, generating substantial revenues in the process.

(2) Goldman Sachs Background

Goldman Sachs was established in 1869 as an investment bank.¹⁵¹³ Originally a private partnership, in 1999, it became a publicly traded corporation. In 2008, it converted to a bank holding company. Its headquarters are located in New York City, and the firm manages about \$870 billion in assets.¹⁵¹⁴ Goldman employs about 14,000 employees in the United States and 32,500 worldwide. In 2007, it reported net revenues of \$11.6 billion, of which \$3.7 billion was generated by the Structured Products Group in the Mortgage Department, primarily as a result of its subprime investment activities.¹⁵¹⁵

Unlike other Wall Street banks, Goldman has no retail banking operations. It does not accept deposits from, nor lend to, retail customers, nor does its broker-dealer provide advice to or execute trades on behalf of retail customers. Goldman provides services only to so-called “sophisticated” institutional investors, generally large corporations, financial services firms, pension funds, hedge funds, and a few very wealthy individuals.¹⁵¹⁶

For most of its history, Goldman operated exclusively as an investment bank, providing investment advice to corporate clients, arranging and executing mergers and acquisitions, and arranging financing for customers through stock and bond offerings. After the 1999 repeal of the Glass-Steagall Act, which had restricted the activities that could be engaged in by investment banks, Goldman expanded its operations.¹⁵¹⁷

Over the last ten years, traditional investment banking activities have become a small percentage of Goldman’s business. Goldman has instead become primarily a Wall Street trading house, providing broker-dealer services to institutional customers, acting as a prime broker to hedge funds,¹⁵¹⁸ structuring and financing deals for customers from its own capital, and conducting proprietary trading activities for its own benefit. In the years leading up to the financial crisis, Goldman became an active investor and participant in the deals and transactions that it was handling for clients as well as selling to investors.¹⁵¹⁹

¹⁵¹³ The background information about Goldman in this section was taken from several sources. See “Profile, Goldman Sachs,” Reuters.com; “Profile, The Goldman Sachs Group, Inc.,” Hoovers.com; 4/19/2010, “A Brief History of Goldman Sachs – Timeline,” Wall Street Journal; 1/2010, “The Bank Job,” Vanity Fair (written with cooperation of Goldman Sachs).

¹⁵¹⁴ During 2006 and 2007, Goldman’s headquarters were at 85 Broad Street in Manhattan. In 2010, the firm moved its headquarters to 200 West Street in Manhattan. See “Morgan Stanley May Lease Old Goldman Sachs Building,” Bloomberg (10/18/2010).

¹⁵¹⁵ See Goldman Sachs Form 10-K for the fiscal year ending Nov. 30, 2007, filed with the SEC on 1/28/2008, at 64; 11/30/2007 “SPG Trading Mortgages Weekly Metrics 30-November-2007,” GS MBS-E-015646485.

¹⁵¹⁶ See *supra* note 1513.

¹⁵¹⁷ *Id.*

¹⁵¹⁸ “Prime brokers” are generally large broker-dealers that provide a special set of services to special clients, including securities lending, leveraged trade execution, and cash management. See definition of “prime brokerage” at Investopedia.com.

¹⁵¹⁹ See *supra* note 1513.

Goldman Sachs Mortgage Department. In 2006 and 2007, the time period reviewed by the Subcommittee, the most senior Goldman executives were the Chairman of the Board and Chief Executive Officer Lloyd Blankfein; Chief Operating Officer and Co-President Gary Cohn; Co-President Jon Winkelried; and Chief Financial Officer David Viniar. Goldman's Chief Risk Officer, Craig Broderick, was head of the Market Risk Management & Analysis area of the firm, which monitored and measured risk for the firm as a whole and for each business unit. Goldman's Treasurer, Sarah Smith, was in charge of the Controllers area of the firm, which was responsible for financial accounting, profit and loss statements, customer credit, collateral/margin matters, and position valuation verification.¹⁵²⁰

In 2006 and 2007, Goldman Sachs' operating activities were divided into three segments: Investment Banking, Trading and Principal Investments, and Asset Management and Securities Services.¹⁵²¹ The Trading and Principal Investments Segment was divided into three businesses: Fixed Income, Currency and Commodities (FICC); Equities; and Principal Investments.¹⁵²² FICC had five principal businesses: commodities; credit products; currencies; interest rate products; and mortgage related securities and loan products and other asset backed instruments.¹⁵²³

In its mortgage business, Goldman Sachs acted as a market maker, underwriter, placement agent, and proprietary trader in residential and commercial mortgage related securities, loan products, and other asset backed and derivative products.¹⁵²⁴ The Mortgage Department was responsible for buying and selling virtually all of the firm's mortgage related assets. It originated and invested in residential and commercial mortgage backed securities; developed, traded, and marketed structured products and derivatives backed by mortgages; and traded mortgage market products on exchanges.¹⁵²⁵

In 2006 and 2007, the head of the Mortgage Department was Daniel Sparks. Goldman Co-Presidents Gary Cohn and Jon Winkelried, as well as CFO David Viniar, had been involved in Mr. Sparks' earlier career at Goldman, and he maintained frequent, direct contact with them regarding the Mortgage Department.¹⁵²⁶ In 2006, Mr. Sparks formally reported first to Jonathan Sobel, who had run the Mortgage Department prior to Mr. Sparks.¹⁵²⁷ He next reported to Richard Ruzika, who was then co-head of Commodities.¹⁵²⁸ In late 2006, Mr. Sparks began reporting directly to Thomas Montag, who was co-head of Global Securities for the Americas, which included both the FICC Division and the Equities Division.¹⁵²⁹ In mid-2007, Mr. Sparks

¹⁵²⁰ Subcommittee interview of David Viniar (4/13/2010); Craig Broderick (4/9/2010); and Daniel Sparks (4/15/2010).

¹⁵²¹ 2/6/2007 Goldman Sachs Form 10-K filing with the SEC.

¹⁵²² Id.

¹⁵²³ Id.

¹⁵²⁴ Id.

¹⁵²⁵ Id.

¹⁵²⁶ Subcommittee interview of Daniel Sparks (4/15/10).

¹⁵²⁷ Id.

¹⁵²⁸ Id.

¹⁵²⁹ Id.

began reporting to Donald Mullen, who was head of U.S. Credit Sales & Trading, and Mr. Mullen in turn reported to Mr. Montag.¹⁵³⁰

The Mortgage Department was divided into seven different desks: (1) the Residential Whole Loan Trading Desk; (2) the Structured Product Group (SPG) Trading Desk; (3) the CDO Origination Desk, which also handled collateralized loan obligations (CLOs); (4) the Structured Product Syndicate and Asset Backed Security (ABS) Finance Desk; (5) the Collateralized Mortgage Obligations (CMO) and Derivatives Desk; (6) the Advisory Group Desk; and (7) the Commercial Real Estate Loan Trading Desk.¹⁵³¹

The Residential Whole Loan Trading Desk was headed by Kevin Gasvoda.¹⁵³² It bought packages of residential whole loans; issued RMBS securities in the subprime, Alt A and prime categories; originated residential and commercial mortgages; and gave lines of credit to certain selected mortgage lenders in exchange for direct access to pools of mortgages they originated, in so-called “conduit” arrangements.¹⁵³³

The SPG Trading Desk was headed by Michael Swenson.¹⁵³⁴ It was further subdivided into three different desks: the ABS Desk, the Correlation Trading Desk, and the Commercial Mortgage Backed Securities (CMBS) Desk. The ABS Desk was also headed by Michael Swenson and traded mainly synthetic asset backed securities, particularly RMBS and CDO securities and single name CDS contracts related to RMBS and CDOs. The ABS Desk also had an important sub-desk called the ABX Trading Desk, which was headed by Joshua Birnbaum, and traded synthetic mortgage backed securities based on the ABX Index. The Correlation Trading Desk was headed by Jonathan Egol. It structured, marketed, and traded complex synthetic structured finance products, including a series of 23 CDOs known as Abacus.¹⁵³⁵ The CMBS Desk was headed by David Lehman and traded commercial mortgage backed securities. With the exception of the Correlation Desk, the SPG Trading Desk was primarily devoted to “secondary trading,” meaning the buying and selling of pre-existing asset backed securities. The SPG Trading Desk was also sometimes referred to as the “Mortgage Secondary Trading Desk.”

¹⁵³⁰ Id.

¹⁵³¹ “North America Mortgages,” chart prepared by Goldman Sachs, GS MBS-E-007818849 (showing organization of Mortgage Department).

¹⁵³² Id.

¹⁵³³ See, e.g., 6/27/2006 email from Brian O’Brien to John Cassidy, “Conduit Sellers and u’writing guides,” GS MBS-E-004060914.

¹⁵³⁴ Subcommittee interview of Michael Swenson (4/16/2010).

¹⁵³⁵ 4/22/2010 Goldman Sachs Form 8-K filing with the SEC. Of the 23 Abacus CDOs, 16 contained primarily mortgage related assets.

The CDO Origination Desk was headed by Peter Ostrem.¹⁵³⁶ This desk structured and originated most of Goldman's CDOs and CLOs, excluding Abacus. The CDO Desk was primarily an underwriting desk that arranged for the issuance of new securities which had not yet been sold in the marketplace. Because of its underwriting focus, the CDO Desk's activities required a higher level of disclosure to customers regarding newly issued securities than was ordinarily required of a secondary trading desk, which buys and sells only pre-existing securities.¹⁵³⁷ Goldman maintained an inventory of RMBS and CDO securities to carry out activities for its clients and proprietary trading for the firm.

The Structured Product (SP) Syndicate and ABS Finance Desk was headed by Bunty Bohra and Curtis Probst.¹⁵³⁸ This desk was often referred to simply as the "Syndicate." It coordinated Goldman's sales efforts and the issuance of different securities across different desks.

In the middle of 2007, the Mortgage Department was restructured. One key change was that the CDO Origination Desk was moved into the secondary trading area under the SPG Trading Desk. Mr. Lehman was designated as head of the CDO Origination Desk, with assistance from Mr. Swenson.¹⁵³⁹ As a result, the SPG Trading Desk had responsibility for selling new Goldman-originated CDO securities as well as engaging in secondary trading of pre-existing CDOs and RMBS securities, related credit default swaps (CDS), ABX trading, correlation trading, property derivatives, CMBS, and other asset backed securities.¹⁵⁴⁰

In 2006 and 2007, the Residential Whole Loan Trading Desk underwrote 93 RMBS worth \$72 billion.¹⁵⁴¹ The CDO Origination Desk acted as a placement agent and underwrote approximately 27 mortgage based CDOs worth \$28 billion.¹⁵⁴² Of the 27 CDOs, 84% were hybrid CDOs, 15% were synthetic, and only about 1% were cash CDOs with physical assets.¹⁵⁴³ The mortgage-based CDOs included 8 CDOs on the Abacus platform, with \$5 billion in issued securities;¹⁵⁴⁴ a \$2 billion synthetic CDO known as Hudson Mezzanine 2006-1; a \$300 million synthetic CDO known as Anderson Mezzanine 2007-1; and \$1 billion hybrid CDO known as Timberwolf I.

¹⁵³⁶ "North America Mortgages," chart prepared by Goldman, GS MBS-E-007818849 (showing organization of Mortgage Department). In 2006, Mr. Ostrem co-headed the CDO Origination Desk with David Rosenblum, who was primarily involved in the CLO aspects of the desk's activities. Mr. Rosenblum was in the process of leaving the Mortgage Department for a position in the Credit business in late 2006, though he continued to have some responsibilities with respect to the CDO Origination Desk.

¹⁵³⁷ See discussion of the disclosure obligations of broker-dealers, underwriters, and placement agents, above. The Correlation Trading Desk, which also arranged for the issuance of new CDOs had the same obligations as the CDO desk when issuing a new CDO.

¹⁵³⁸ "North America Mortgages," chart prepared by Goldman, GS MBS-E-007818849 (showing organization of Mortgage Department).

¹⁵³⁹ "Mortgages Organizational Structure," chart prepared by Goldman Sachs, GS MBS-E-010872812.

¹⁵⁴⁰ Id.

¹⁵⁴¹ Undated chart prepared by Goldman for the Subcommittee, GS-PSI-00172.

¹⁵⁴² Undated chart prepared by Goldman for the Subcommittee, GS MBS 0000021129 and GS MBS 0000004276.

¹⁵⁴³ Id.

¹⁵⁴⁴ Id.

(3) Overview of Goldman Sachs Case Study

This Report looks at two activities undertaken by Goldman in 2006 and 2007. The first is Goldman's intensive effort, beginning in December 2006 and continuing through 2007, to profit from the subprime mortgage market collapse, particularly by shorting subprime mortgage assets. The second is how, in 2006 and 2007, Goldman used mortgage related CDOs to unload the risk associated with its faltering high risk mortgage assets onto clients, help a favored client make a \$1 billion gain, and profit from the failure of the very CDO securities it sold to its clients.

These activities raise questions related to Goldman's compliance with its obligations to provide suitable investment recommendations to its clients and disclose its material adverse interests to potential investors. They also raise questions about whether some of Goldman's incomplete disclosures were deceptive, and whether some of its activities generated conflicts of interest in which Goldman placed its financial interests before those of its clients. They also raise questions about the high risk nature of some structured finance products and their role in U.S. financial markets.

(a) Overview of How Goldman Shorted the Subprime Mortgage Market

Beginning in December 2006 and continuing through 2007, Goldman twice built and profited from large net short positions in mortgage related securities, generating billions of dollars in gross revenues for the Mortgage Department. Its first net short peaked at about \$10 billion in February 2007, and the Mortgage Department as a whole generated first quarter revenues of about \$368 million, after deducting losses and writedowns on subprime loan and warehouse inventory.¹⁵⁴⁵ The second net short, referred to by Goldman Chief Financial Officer David Viniar as "the big short,"¹⁵⁴⁶ peaked in June at \$13.9 billion. As a result of this net short, the SPG Trading Desk generated third quarter revenues of about \$2.8 billion, which were offset by losses on other mortgage desks, but still left the Mortgage Department with more than \$741 million in profits.¹⁵⁴⁷ Altogether in 2007, Goldman's net short positions from derivatives generated net revenues of \$3.7 billion.¹⁵⁴⁸ These positions were so large and risky that the Mortgage Department repeatedly breached its risk limits, and Goldman's senior management responded by repeatedly giving the Mortgage Department new and higher temporary risk limits to accommodate its trading.¹⁵⁴⁹ At one point in 2007, Goldman's Value-at-Risk measure

¹⁵⁴⁵ See net short chart prepared by the Subcommittee, below; 9/17/2007 Presentation to GS Board of Directors, Residential Mortgage Business at 5, GS MBS-E-001793845, Hearing Exhibit 4/27-41; 3/10/2007 email to Daniel Sparks, "Mortgage Presentation to the board," GS MBS-E-013323395, Hearing Exhibit 4/27-17.

¹⁵⁴⁶ 7/25/2007 email from Mr. Viniar to Mr. Cohn, "Private & Confidential: FICC Financial Package 07/25/07," GS MBS-E-009861799, Hearing Exhibit 4/27-26.

¹⁵⁴⁷ 10/2007 Global Mortgages, Business Unit Townhall at 4-5, GS MBS-E-013703463, Hearing Exhibit 4/27-47.

¹⁵⁴⁸ 4Q07 Fact Sheet prepared for David Viniar, GS MBS-E-009724276, Hearing Exhibit 4/27-159.

¹⁵⁴⁹ See discussion of risk limits, VAR measurements, and risk reports, below.

indicated that the Mortgage Department was contributing 54% of the firm's total market risk, even though it ordinarily contributed only about 2% of its total net revenues.¹⁵⁵⁰

To build its net short positions, Goldman's Mortgage Department personnel used structured finance products to engage in multiple, complex transactions. Its efforts included selling high risk loans, RMBS, CDO, ABX, and other mortgage related assets from its inventory and warehouse accounts; shorting RMBS and CDO securities, either by shorting the assets themselves or by taking the short side of CDS contracts that referenced them, in order to profit from their fall in value; and shorting multiple other mortgage backed assets simultaneously, including different tranches of the ABX Index, tranches of CDOs, and CDS contracts on such assets. To lock in its profits after the short assets fell in value, Goldman often entered into offsetting CDS contracts to "cover its shorts," as explained below. Senior Goldman executives directed and monitored these activities.

The evidence reviewed by the Subcommittee shows that some of the transactions leading to Goldman's short positions were undertaken to advance Goldman's own proprietary financial interests and not as a function of its market making role to assist clients in buying or selling assets. In the end, Goldman profited from the failure of many of the RMBS and CDO securities it had underwritten and sold. As Goldman CEO Lloyd Blankfein explained in an internal email to his colleagues in November 2007: "Of course we didn't dodge the mortgage mess. We lost money, then made more than we lost because of shorts."¹⁵⁵¹

Covering Shorts to Lock In Profits. To understand how Goldman profited from its short positions, it is important to understand references in its internal documents to "covering" or "monetizing" its shorts. When Goldman built its short positions, it generally used CDS contracts to short a variety of mortgage related securities, including individual RMBS and CDO securities and baskets of 20 RMBS securities identified in the ABX indices. Goldman's shorts then gained or lost value over time, depending upon how the underlying referenced assets performed during the same period.

Most CDS contracts expire after a specified number of years. As explained earlier, during the covered period, the short party makes periodic premium payments to the opposing long party in the CDO. The short party is essentially betting that a "credit event" will take place during the covered period that will result in the long party having to provide it with a large

¹⁵⁵⁰ Id. "Value-at-Risk" or VAR is a key risk measurement system used by Goldman. At a 95% confidence level, VAR represents the dollar amount a business unit could expect to lose once every 20 trading days or about once per month. Subcommittee interview of Craig Broderick (4/9/2010). See also Philippe Jorion, "Value at Risk: The New Benchmark for Managing Financial Risk," at 20 (3d ed. 2007).

¹⁵⁵¹ 11/18/2007 email from Lloyd Blankfein, "RE: NYT," GS MBS-E-009696333, Hearing Exhibit 4/27-52.

payment that outweighs the cost of the short party's premium payments.¹⁵⁵² However, the short party does not have to wait for a credit event in order to realize a gain on its CDS contract.

One possible alternative is for the short party simply to sell its short position to another party for a profit. If, however, the short party does not want to sell or has no ready buyer, the short party can still lock in a gain by entering into a second, offsetting CDS contract in which it takes the long position on an offsetting asset, an action often referred to as "covering the short."

In practice, there were several different, technical methods for a party to cover its short positions. The simplest example is if the short party bought a \$100,000 CDS contract whose reference asset is a single RMBS security. Suppose after one month the RMBS security performs so poorly that the market value of the short position increases to \$150,000. If the short party wanted to lock in the \$50,000 gain, it could do so simply by entering into a new offsetting CDS contract, referencing the same RMBS security, in which it takes the long position with a new party who takes the short position at the new higher market value of \$150,000. The result would be that the original short party would own a short position and a long position that offset each other, and would lock in the \$50,000 difference in value as profit.

During 2007, Goldman executives repeatedly directed the Mortgage Department to "cover its shorts" and lock in the gains from the increased value of its short positions. When it covered its short positions by entering into offsetting contracts, the Mortgage Department simultaneously "monetized" its short positions – recorded the locked in profit. That is because, when it covered a short by entering into an offsetting contract, the Mortgage Department's general practice was to record a profit on its books equal to the gain on the original short position. Because the original purchase price of the CDS was known and fixed, and the new higher price obtained in the offsetting transaction was known and fixed, the Mortgage Department was able to capture the difference between the two prices as profit.

Going Past Home: The First Net Short. Because Goldman's activities were so varied and complex during the period reviewed, this overview provides a brief summary of the key events detailed in the following sections. The review begins in mid to late 2006, when Goldman realized that the market for subprime mortgage backed securities was beginning to decline, and the large long positions it held in ABX assets, loans, RMBS and CDO securities, and other mortgage related assets began to pose a disproportionate risk to both the Mortgage Department and the firm.¹⁵⁵³ In October 2006, the Mortgage Department designed a synthetic CDO called

¹⁵⁵² Under standard CDS contracts designed by the International Swaps and Derivatives Association (ISDA), a credit event is defined as a (1) bankruptcy; (2) failure to pay; (3) restructuring; (4) repudiation of or moratorium on payment in the event of an authorized government intervention; or (5) an acceleration of an obligation. Another common credit event is incurring a credit rating loss.

¹⁵⁵³ See, e.g., 10/17/2006-10/18/2006 email from Tom Montag to Daniel Sparks, "3 things," GS MBS-E-010917469 (acquisition of a large net long position described as "slipp[ing] up a bit"). In an email to Goldman Co-President Gary Cohn, Richard Ruzika criticized the accumulation of the large net long position: "You know and I know this position was allowed to get too big – for the liquidity in the market, our infrastructure, and the ability of our traders. That statement would be the same even if we had gotten the market direction correct – although the

Hudson Mezzanine 2006-1, which included over \$1.2 billion of long positions on CDS contracts to offset risk associated with ABX assets in Goldman's own inventory and another \$800 million in single name CDS contracts referencing subprime RMBS securities that Goldman wanted to short; the Mortgage Department then sold the Hudson securities to its clients.¹⁵⁵⁴ While this CDO transferred \$1.2 billion of subprime risk from Goldman's inventory to its clients and gave Goldman an opportunity to short another \$800 million in RMBS securities it thought would perform poorly, the Mortgage Department still held billions of dollars of long positions in subprime mortgage related assets, primarily in ABX index assets.¹⁵⁵⁵

On December 14, 2006, as Goldman's mortgage related assets continued to lose value, Goldman's Chief Financial Officer, David Viniar, held a meeting with key Mortgage Department personnel and issued instructions for the Department to "get closer to home."¹⁵⁵⁶ By "closer to home," Mr. Viniar meant for the Mortgage Department to assume a more neutral risk position, one that was neither substantially long nor short, but actions taken by the Mortgage Department in response to his instructions quickly shot past "home," resulting in Goldman's first large net short position in February 2007.¹⁵⁵⁷

The actions taken by the Mortgage Department included selling outright from its inventory large numbers of subprime RMBS, CDO, and ABX assets, even at a loss, while simultaneously buying CDS contracts to hedge the long assets remaining in its inventory. The Mortgage Department also halted new RMBS securitizations, began emptying its RMBS warehouse accounts, and generally stopped purchasing new assets for its CDO warehouse accounts. It also purchased the short side of CDS contracts referencing the ABX index for a basket of AAA rated subprime residential loans, as a kind of "disaster insurance" in the event that even AAA rated mortgages started defaulting.

Within about a month of the "closer to home" meeting, in January 2007, the Mortgage Department had largely eliminated or offset Goldman's long positions on subprime mortgage related assets. The Mortgage Department then started to build a multi-billion-dollar short position to enable the firm to profit from the subprime RMBS and CDO securities starting to lose value. By the end of the first quarter of 2007, the Mortgage Department had swung from a \$6 billion net long position in December 2006, to a \$10 billion net short position in late February

vultures wouldn't be circling. You also know that we probably would have gotten the position correct had I been involved a year ago – I probably would have gotten short to protect our warehouse and general hedge against the business given our outlook in the space." 2/5/2007 email from Richard Ruzika to Gary Cohn, "Are you living Morgatages? [sic]," GS MBS-E-016165784.

¹⁵⁵⁴ For more information about the Hudson CDO, see below.

¹⁵⁵⁵ See, e.g., 12/7/2006 email from Tom Montag, GS MBS-E-009756572 ("I don't think we should panic regarding ABX holdings").

¹⁵⁵⁶ 12/14/2006 email from Daniel Sparks, "Subprime risk meeting with Viniar/McMahon Summary," GS MBS-E-009726498, Hearing Exhibit 4/27-3.

¹⁵⁵⁷ Subcommittee interview of David Viniar (4/13/2010).

2007, a \$16 billion reversal.¹⁵⁵⁸ A senior Goldman executive later described a net short position of \$3 billion in subprime mortgage backed securities as “huge and outsized.”¹⁵⁵⁹ But Goldman’s net short position in February 2007 was \$10 billion – more than triple that size.

In late February, Goldman’s Operating Committee, a subcommittee of its Firmwide Risk Committee, became concerned about the size of the \$10 billion net short position. The Firmwide Risk Committee (FWRC) was co-chaired by Mr. Vinjar, and Messrs. Cohn and Blankfein regularly attended its meetings.¹⁵⁶⁰ The concern arose, in part, because the \$10 billion net short position had dramatically increased the Mortgage Department’s Value-at-Risk or “VAR,” the primary measure Goldman used to compute its risk. The Committee ordered the Department to lock in its profits by “covering its shorts,” as explained above. The Mortgage Department complied by covering most, but not all, of the \$10 billion net short and brought down its VAR. It then maintained a relatively lower risk profile from March through May 2007.

Attempted Short Squeeze. In May 2007, the Mortgage Department’s Asset Backed Security (ABS) Trading Desk attempted a “short squeeze” of the CDS market that was intended to compel other market participants to sell their short positions at artificially low prices.¹⁵⁶¹ Goldman’s ABS Desk was still in the process of covering the Mortgage Department’s shorts by offering CDS contracts in which Goldman took the long side. The ABS Desk devised a plan in which it would offer those CDS contracts to short parties at lower and lower prices, in an effort to drive down the overall market price of the shorts. As prices fell, Goldman’s expectation was that other short parties would begin to sell their short positions, in order to avoid having to sell at still lower prices. The ABS Desk planned to buy up those short positions at the artificially low prices it had caused, thereby rebuilding its own net short position at a lower cost.¹⁵⁶² The ABS Desk initiated its plan, and during the same period Goldman customers protested the lower values assigned by Goldman to their short positions as out of line with the market. Despite the lower prices, the parties who already held short positions generally kept them and did not try to sell them. In June, after learning that two Bear Stearns hedge funds specializing in subprime mortgage assets might collapse, the ABS Desk abandoned its short squeeze effort and recommenced buying short positions at the prevailing market prices.

The Big Short. In mid-June 2007, the two Bear Stearns hedge funds did collapse, triggering another steep decline in the value of subprime mortgage assets. In response, Goldman immediately went short again, to profit from the falling prices. Within two weeks, Goldman had massed a large number of CDS contracts shorting a variety of subprime mortgage assets. On

¹⁵⁵⁸ 3/10/2007 email to Daniel Sparks, “Mortgage Presentation to the board,” GS MBS-E-013323395, Hearing Exhibit 4/27-17. 12/13/2006 Goldman email, “Subprime Mortgage Risk,” Hearing Exhibit 4/27-2.

¹⁵⁵⁹ 8/23/2007 email from Tom Montag, “Current Outstanding Notional SN ames,” GS MBS-E-010621231.

¹⁵⁶⁰ 11/13/2007 Goldman email, GS MBS-E-010023525 (attachment, 11/14/2007 “Tri-Lateral Combined Comments,” GS MBS-E-010135693-715 at 695).

¹⁵⁶¹ 9/7/2007 Fixed Income, Currency and Commodities Annual Individual Review Book, Self-Review of Deeb Salem, GS-PSI-03157-80 at 72 (hereinafter “Salem 2007 Self-Review”).

¹⁵⁶² Id.

June 22, 2007, Goldman's net short position reached its peak of approximately \$13.9 billion, as calculated by the Subcommittee.¹⁵⁶³ That total included the \$9 billion in AAA ABX assets that Goldman had earlier acquired as "disaster protection," in case the subprime market as a whole lost value. The resulting net short, referred to by Mr. Vinjar as the "big short," was nearly 40% larger than its first net short which had peaked at \$10 billion in February 2007.

To lock in its profits on the \$13.9 billion short, the Mortgage Department began working to cover its shorts, buying long assets and entering into offsetting CDS contracts in which it took the long position. On July 10, 2007, the credit rating agencies issued the first of many mass rating downgrades that affected hundreds and then thousands of RMBS and CDO securities, whose values began to fall even more rapidly.¹⁵⁶⁴ The Mortgage Department was able to purchase long assets at a low cost, managed to cover most of its short positions, and locked in its profits. At the same time, the Mortgage Department maintained a net short position in higher risk subprime RMBS securities carrying credit ratings of BBB or BBB-, betting that those securities would lose still more value and produce still more profits for the firm. In August, however, Goldman senior management again became concerned about the size of the Department's net short position and its VAR levels, which had reached record levels. On August 21, 2007, Goldman's Chief Operating Officer Gary Cohn ordered the Mortgage Department to "get down now."

Big Short Profits. In response, the Mortgage Department began another round of covering its shorts and locking in its profits, including the shorts referencing BBB and BBB- rated RMBS securities. In the third quarter of 2007, the SPG Trading Desk reported record revenues from its short positions totaling \$2.8 billion.¹⁵⁶⁵ By the end of 2007, the SPG Trading Desk in the Mortgage Department recorded year-end net revenues totaling \$3.7 billion, which were used to offset losses on other desks, leaving the Mortgage Department as a whole with record net revenues of over \$1.2 billion for the year.¹⁵⁶⁶ The head of the SPG Desk, Michael Swenson, later wrote that 2007 was "the [year] I am most proud of to date," because of the "extraordinary profits" from the short positions he had advocated.¹⁵⁶⁷ His colleague, Joshua Birnbaum who headed the ABX Desk within SPG, also reviewed the year in terms of the profitable short positions it built. He wrote: "The prevailing opinion within the department was that we should just 'get close to home' and pare down our long," but he decided his ABS Desk should "not only

¹⁵⁶³ See chart entitled, "Goldman Sachs Mortgage Department Total Net Short Position, February-December 2007 in \$ Billions," prepared by the Permanent Subcommittee on Investigations, Hearing Exhibit 4/27-162 (April 2010 version), updated January 2011 (updated version), derived from Goldman Sachs Mortgage Strategies, Mortgage Dept Top Sheets provided by Goldman Sachs (hereinafter "PSI Net Short Chart"), See Section C(4)(g).

¹⁵⁶⁴ For more information about the mass rating downgrades, see Chapter V, above. See also 7/10/2007 Goldman email, "GS Cashflow/Abacus CDOs Mentioned in S&P Report on CDO Exposure to Subprime RMBS," GS MBS-E-001837256.

¹⁵⁶⁵ 10/2007 Global Mortgages, Business Unit Townhall at 4-5, GS MBS-E-013703463, Hearing Exhibit 4/27-47.

¹⁵⁶⁶ Quarterly Breakdown of Mortgage P/L, GS MBS-E-009713204 at 205. Goldman's gross revenues from all derivative products, without deduction of related losses, were apparently \$5.9 billion. 4Q07 Fact Sheet prepared for David Vinjar (FY07 P&L [profit and loss]: . . . derivatives +\$5.9B), GS MBS-E-009724276, Hearing Exhibit 4/27-159.

¹⁵⁶⁷ Swenson self evaluation, Hearing Exhibit 4/27-55b.

... get flat, but get VERY short.”¹⁵⁶⁸ He wrote: “[W]e implemented the plan by hitting on almost every single name CDO protection buying opportunity in a 2-month period. Much of the plan began working by February as the market dropped 25 points and our very profitable year was under way.” When the subprime mortgage market fell further in July after the credit rating mass downgrades, he wrote: “We had a blow-out [profit and loss] month, making over \$1Bln that month.”¹⁵⁶⁹

The \$3.7 billion in net revenues from the SPG’s short positions helped to offset other mortgage related losses, and, at year’s end, at a time when mortgage departments at other large financial institutions were reporting record losses, Goldman’s Mortgage Department reported overall net revenues of \$1.2 billion.¹⁵⁷⁰

(b) Overview of Goldman’s CDO Activities

This Report also examines four CDOs that Goldman originated, underwrote, and marketed in the years leading up to the financial crisis: Hudson Mezzanine 2006-1, Anderson Mezzanine 2007-1, Timberwolf I, and Abacus 2007-AC1. Hudson was conceived in 2006, and issued its securities in December 2006, as Goldman began its concerted effort to sell its mortgage holdings. Anderson, Timberwolf, and Abacus issued their securities in 2007, as RMBS and CDO securities were losing value, and Goldman was shorting the subprime mortgage market.

During 2007, as Goldman built and profited from its net short positions in the first and third quarters of the year, it continued to design, underwrite, and sell CDO securities. Due to waning investor interest, in February 2007, Goldman conducted a review of the CDOs in its pipeline. The Mortgage Department decided to cancel four pending CDOs, downsize another two, and bring all of its remaining CDOs to market as quickly as possible. Also in February 2007, the Mortgage Department limited its CDO Origination Desk to carrying out only the CDO transactions already underway.

“Gameplan” for CDO Valuation Project. In the first quarter of 2007, Goldman’s Mortgage Department worked to sell the warehouse assets from the discontinued CDOs, the securities issued by past Goldman-originated CDOs, and the new securities from CDOs being originated by Goldman in 2006 and 2007. In May 2007, as CDO sales slowed dramatically, Goldman became concerned about the lack of sales prices to establish the value of its CDO holdings. Goldman needed accurate values, not just to establish its CDO sales prices, but also to value the CDO securities for collateral purposes and in compliance with Goldman’s policy of using up-to-date market values for all of its holdings.¹⁵⁷¹ On May 11, 2007, Goldman senior executives, including Mr. Cohn and Mr. Viniar, Mortgage Department personnel, controllers, and

¹⁵⁶⁸ Birnbaum self evaluation, Hearing Exhibit 4/27-55c.

¹⁵⁶⁹ Id.

¹⁵⁷⁰ Quarterly Breakdown of Mortgage P/L, GS MBS-E-009713204 at 205.

¹⁵⁷¹ 5/11/2007 email from Daniel Sparks, “You okay?,” GS MBS-E-019659221.

others held a meeting and developed a “Gameplan” for a CDO valuation project.¹⁵⁷² The Gameplan called for the Mortgage Department, over the course of about a week, to use three different valuation methods to price all of its CDO warehouse assets, unsold securities from past CDOs, and new securities from the CDOs currently being marketed to clients.¹⁵⁷³

While the CDO valuation project was underway, Goldman senior executive Thomas Montag asked Daniel Sparks for an estimate of how much the firm would need to write down the value of its CDO assets. Mr. Sparks responded that “the base case from traders is down [\$]382 [million].” He also wrote: “I think we should take the write-down, but market [the CDO securities] at much higher levels.”¹⁵⁷⁴ Another Goldman senior executive, Harvey Schwartz, expressed concern about selling clients CDO securities at one price and then immediately devaluing them: “[D]on’t think we can trade this with our clients andf [sic] then mark them down dramatically the next day.”¹⁵⁷⁵ At the same time, Goldman’s Chief Credit Risk Officer Craig Broderick told his staff to anticipate deep markdowns and highlighted the need to identify clients that might suffer financial difficulty if Goldman devalued their CDO securities and demanded they post more cash collateral.

On May 20, 2007, the Gameplan results were summarized in an internal presentation.¹⁵⁷⁶ It projected that Goldman would have to take from \$248 to \$440 million in writedowns on unsold CDO securities and warehouse assets, making it clear to Goldman executives that its CDO assets were losing value rapidly.¹⁵⁷⁷ In several drafts of the presentation, the Mortgage Department had also written that Goldman’s CDOs were expected “to underperform,” but that statement was removed from the final presentation given to senior executives.¹⁵⁷⁸

Targeted Sales. The Gameplan also recommended a two-pronged approach to selling the firm’s remaining CDO assets. First, it recommended transfer of the CDO warehouse assets to the Mortgage Department’s SPG Trading Desk for further valuation and sale. Second, it recommended that the Mortgage Department use a “targeted” approach to sell off the existing and

¹⁵⁷² Id.; 5/14/2007 email from David Lehman, “Gameplan – asset model analysis,” GS MBS-E-001865782 (last email in a longer email chain).

¹⁵⁷³ Id.; 5/14/2007 email from Elisha Weisel, “Modelling Approaches for Cash ABS CDO/CDO^2,” GS MBS-E-001863618.

¹⁵⁷⁴ 5/14/2007 email from Tom Montag to Daniel Sparks, GS MBS-E-019642797.

¹⁵⁷⁵ 5/11/2007 email from Harvey Schwartz to Daniel Sparks, Tom Montag, and others, GS MBS-E-010780864.

¹⁵⁷⁶ 5/20/2007 email, “Viniar Presentation - Updated,” GS MBS-E-010965211 (attached file, “Mortgages Department, May 2007,” Goldman presentation, GS MBS-E-010965212); see also 5/19/2007 “Mortgages CDO Origination – Retained Positions & Warehouse Collateral, May 2007,” Goldman presentation, GS MBS-E-010951926.

¹⁵⁷⁷ 5/19/2007 “Mortgages CDO Origination – Retained Positions & Warehouse Collateral, May 2007,” Goldman presentation, GS MBS-E-010951926.

¹⁵⁷⁸ Compare 5/19/2007 “Mortgages CDO Origination – Retained Positions & Warehouse Collateral, May 2007,” Goldman presentation, GS MBS-E-010951926, with 5/20/2007 “Mortgages Department, May 2007,” Goldman presentation, GS MBS-E-010965212.

new securities from Goldman-originated CDOs, naming four hedge funds as the primary targets and providing a list of another 35 clients as secondary targets.¹⁵⁷⁹

At the same time, Mr. Sparks named David Lehman, a commercial mortgage backed securities trader, as the new head of the CDO Origination Desk. Shortly thereafter, Goldman dismantled the CDO Origination Desk and moved all remaining CDO securities to the SPG Trading Desk, where he was based. The SPG Trading Desk, which was a secondary trading desk and had little experience with underwriting, assumed responsibility for marketing the remaining unsold Goldman-originated CDO securities. The SPG Trading Desk's lack of underwriting experience meant that it was less familiar with the obligations of underwriters and placement agents to disclose all material adverse interests to potential investors.

The SPG Trading Desk worked with Goldman's sales force to market the CDO securities. Goldman employed "hard sell" tactics, repeatedly urging its sales force to sell the CDO securities and target clients with limited CDO familiarity.¹⁵⁸⁰ After trying the Gameplan's "targeted" client approach during May, June, and July 2007, the Mortgage Department switched back to issuing sales directives or "axes" to its entire sales force, including sales offices abroad. Axes on CDOs generally went out at weekly or monthly intervals, identified specific CDO securities as top sales priorities, and offered additional financial incentives for selling them. Despite the CDOs' declining value, the sales force succeeded in selling some of the CDO securities, primarily to clients in Europe, Asia, Australia, and the Middle East, but was unable to sell all of them.

The four CDOs that the Subcommittee examined illustrate a variety of conflict of interest issues related to how Goldman designed, marketed, and administered them.

Hudson Mezzanine 2006-1. Hudson Mezzanine 2006-1 (Hudson 1) was a \$2 billion synthetic CDO comprised of \$1.2 billion in ABX assets from Goldman's own inventory, and \$800 million in single name CDS contracts on subprime RMBS and CDO securities that Goldman wanted to short. It was called a "mezzanine" CDO, because the referenced RMBS securities carried the riskier credit ratings of BBB or BBB-. Goldman used the CDO to transfer the risk associated with its ABX assets to investors that bought Hudson 1 securities. Goldman also took 100% of the short side of the CDO, which meant that it would profit if any of the Hudson securities lost value. In addition, Goldman exercised complete control over the CDO by playing virtually every key role in its establishment and administration, including the roles of underwriter, initial purchaser of the issued securities, senior swap counterparty, credit protection buyer, collateral put provider, and liquidation agent.

¹⁵⁷⁹ 5/19/2007 "Mortgages CDO Origination – Retained Positions & Warehouse Collateral, May 2007," Goldman presentation, GS MBS-E-010951926; 5/20/2007 email from Lee Alexander to Daniel Sparks, Donald Mullen, Lester Brafman, Michael Kaprelian, "Viniar Presentation - Updated," GS MBS-E-010965211 (attached file "Mortgages V4.ppt," "Mortgages Department, May 2007," GS MBS-E-010965212).

¹⁵⁸⁰ See discussions of Hudson, Anderson, Timberwolf, and Abacus sales efforts, below.

Goldman began marketing Hudson 1 securities in October 2006, soliciting clients to buy Hudson securities. It did not fully disclose to potential investors material facts related to Goldman's investment interests, the source of the CDO's assets, and their pricing. The Hudson 1 marketing materials stated prominently, for example, that Goldman's interests were "aligned" with investors, because Goldman was buying a portion of the Hudson 1 equity tranche.¹⁵⁸¹ In its marketing materials, Goldman did not mention that it was also shorting all \$2 billion of Hudson's assets – an investment that far outweighed its \$6 million equity share and which was directly adverse to the interests of prospective investors. In addition, the marketing materials stated that Hudson 1's assets were "sourced from the Street" and that it was "not a balance sheet CDO."¹⁵⁸² However, \$1.2 billion of the Hudson assets had been selected solely to transfer risk from ABX assets in Goldman's own inventory.

Goldman also did not disclose in the materials that it had priced the assets without using any actual third party sales. The absence of arm's length pricing was significant, because the Hudson CDO was designed to short the ABX Index using single name RMBS securities, and there was a pricing mismatch between the two types of assets.¹⁵⁸³ Goldman not only determined the pricing for the RMBS securities purchased by Hudson 1, but retained the profit from the pricing differential. The marketing materials did not inform investors of Goldman's role in the pricing, the pricing methodology used, or the gain it afforded to Goldman. In addition, the marketing materials stated Hudson 1 was "not a balance sheet" CDO, without disclosing that Hudson had been designed from its inception to remove substantial risk from Goldman's balance sheet.

The Hudson 1 Offering Circular contained language that may have also misled investors about Goldman's true investment interest in the CDO. The Offering Circular stated:

"[Goldman Sachs International] and/or any of its affiliates may invest and/or deal, for their own respective accounts for which they have investment discretion, in securities or in other interests in the Reference Entities, in obligations of the Reference Entities or in the obligors in respect of any Reference Obligations or Collateral Securities ... , or in credit default swaps ... , total return swaps or other instruments enabling credit and/or other risks to be traded that are linked to one or more Investments."¹⁵⁸⁴

This provision seems to inform investors that Goldman "may invest" for its own account in the CDO's securities, reference obligations, or CDS contracts, while withholding the fact that, by the time the Offering Circular had been drafted, Goldman had already determined to take 100% of the short position in the CDO, an investment which was directly adverse to the interests of Hudson securities investors.

¹⁵⁸¹ 10/2006 Goldman Sachs report, "Hudson Mezzanine Funding, 2006-1, LTD.," at 4, GS MBS-E-009546963, Hearing Exhibit 4/27-87.

¹⁵⁸² Id.

¹⁵⁸³ For more information on this pricing mismatch, see the Hudson discussion, below.

¹⁵⁸⁴ 12/3/2006 Hudson Mezzanine 2006-1, LTD. Offering Circular, GS MBS- E-021821196 at 251 (emphasis added).

Once Hudson issued its securities, Goldman placed a priority on selling them, and delayed the issuance of a CDO on behalf of another client in order to facilitate Hudson sales. Goldman sales representatives reported that clients expressed skepticism regarding the quality of the Hudson assets, but Goldman continued to promote the sale of the CDO.

In 2008, as Hudson's assets lost value and received rating downgrades from the credit rating agencies, Goldman, in its role as liquidation agent, was tasked with selling those assets to limit losses to the long investors. The major Hudson investor, Morgan Stanley, pressed Goldman to do just that. Goldman, however, delayed selling the assets for months. As the assets dropped in value, Goldman's short position increased in value. Morgan Stanley's representative reported to a colleague that when Goldman rejected the firm's request to sell the poorly performing Hudson assets, "I broke my phone."¹⁵⁸⁵ He also sent an email to the head of Goldman's CDO Desk saying: "[O]ne day I hope I get the real reason why you are doing this to me."¹⁵⁸⁶ Morgan Stanley lost nearly \$960 million on its Hudson investment.

Anderson Mezzanine 2007-1. Anderson Mezzanine 2007-1 (Anderson) was another synthetic CDO referencing BBB and BBB- rated subprime RMBS securities. It was issued in March 2007. Among other roles, Goldman served as the CDO's placement agent, initial purchaser, collateral put provider, and liquidation agent. Goldman hired another firm, a New York hedge fund founded by former Goldman employees, GSC Partners, to act as the collateral manager. Goldman took a short position on approximately 40% of the \$305 million in assets underlying Anderson.

Anderson referenced a number of poor quality assets. Those assets had been selected by GSC Partners, with the approval of Goldman. Over 45% of the referenced subprime RMBS securities contained mortgages originated by New Century, a subprime lender known within the industry, including Goldman, for issuing poor quality loans and which was experiencing financial problems while Anderson was being structured and marketed.¹⁵⁸⁷ Inside Goldman, staff were aware of New Century's problems and were taking action to return substantial numbers of substandard loans purchased from New Century and demand repayment for them.¹⁵⁸⁸ Other assets in the Anderson CDO were also performing poorly, and at one point, Goldman personnel estimated

¹⁵⁸⁵ 2/6/2008 email from John Pearce to Michael Petrick, HUD-CDO-00005146.

¹⁵⁸⁶ 2/7/2008 email from John Pearce to David Lehman, HUD-CDO-00005147.

¹⁵⁸⁷ In April 2007, the month after Anderson issued its securities, New Century announced it would have to restate its earnings. It declared bankruptcy soon after. For more information about New Century, see Chapter IV, section E(2)(c).

¹⁵⁸⁸ See, e.g., 3/2007 Goldman internal email, GS MBS-E-002146861, Hearing Exhibit 4/27-77 ("I recommend putting back 26% of the pool....if possible."). See also 2/2/2007 email from Matthew Nichols to Kevin Gasvoda, GS MBS-E-005556331 ("NC is running a 10% drop rate [due diligence drop] at ~6 points / drop and 4% EPD rate at close to 20 points."). 2/8/2007 email from John Cassidy to Joseph Ozment, others, GS MBS-E-002045021 ("Given the current state of the company I am no longer comfortable with the practice of taking loans with trailing docs . . . that we need in order to conduct compliance testing. . .").

its warehouse assets had fallen in value by \$22 million.¹⁵⁸⁹ Due to the asset quality problems, the Mortgage Department head, Daniel Sparks, initially decided to cancel Anderson, but later changed his mind and decided to market the CDO as quickly as possible, using the \$305 million in assets already in its warehouse account, rather than wait to accumulate all of the \$500 million in assets initially planned.

When Anderson issued its securities in March 2007, Goldman placed a high priority on selling them, even delaying another CDO – Abacus 2007-AC1 which was being organized at the request of the Paulson hedge fund – to allow its sales force to concentrate on promoting Anderson. Potential investors raised questions about the quality of its underlying assets, especially the New Century loans, and Goldman provided its sales representatives with talking points to dispel concerns about the New Century assets. When one client asked how Goldman had gotten “comfortable” with the New Century loans, Goldman did not disclose to the client its own negative views of New Century loans or that it had 40% of the short side of the CDO.

Goldman marketed Anderson securities to a number of its clients, including pension funds, and recommended using Anderson securities as collateral security in other CDOs.¹⁵⁹⁰ In the end, Goldman sold only \$102 million or about one third of the Anderson securities.¹⁵⁹¹ Seven months after the securities were issued, they suffered their first credit rating downgrade. Currently, all of the Anderson securities have been reduced to junk status, and the Anderson investors have lost virtually their entire investments.

Timberwolf I CDO. Timberwolf I was a \$1 billion hybrid CDO² transaction that referenced single-A rated securities from other CDOs. Those CDO securities referenced, in turn, RMBS securities carrying lower credit ratings, primarily BBB. Altogether, Timberwolf referenced 56 unique CDO securities that had over 4,500 unique underlying assets. Goldman served as the CDO’s placement agent, initial purchaser, collateral put provider, and liquidation agent. It also hired a hedge fund with former Goldman employees, Greywolf Capital Management, to act as the collateral manager. Greywolf selected the CDO’s assets, with Goldman’s approval. Goldman took a short position on approximately 36% of the \$1 billion in assets underlying Timberwolf.¹⁵⁹²

Timberwolf’s securities began losing value almost as soon as they were purchased. In February 2007, Goldman’s Mortgage Department head told a senior executive that Timberwolf was one of two deals “to worry about.” He also wrote that the assets in the Timberwolf warehouse account had declined so much in value that they had already exhausted Greywolf’s responsibility to pay a portion of any warehouse losses, and any additional losses would be Goldman’s exclusive

¹⁵⁸⁹ 3/16/2007 GSI Risk Committee Memo, “GSI Warehousing for Structured Product CDOs,” GS MBS-E-001806010.

¹⁵⁹⁰ 3/12/2007 email from Robert Black to Matthew Bieber and others, GS MBS-E-000898037.

¹⁵⁹¹ See Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235.

¹⁵⁹² Among other assets, Goldman sold \$15 million in certain Abacus securities to the Timberwolf CDO. Goldman held 100% of the short side of the relevant Abacus CDO. Its sale of the Abacus securities meant that Goldman held the short side of those assets, while Timberwolf investors took the long side.

obligation.¹⁵⁹³ Goldman rushed Timberwolf to market, and it closed on March 27, 2007, approximately six weeks ahead of schedule.¹⁵⁹⁴ Almost as soon as the Timberwolf securities were issued, they too began to lose value.

Despite doubts about its performance and asset quality, Goldman engaged in an aggressive campaign to sell the Timberwolf securities. As part of its tactics, Mr. Lehman instructed Goldman personnel not to provide written information to investors about how Goldman was valuing or pricing the Timberwolf securities, and its sales force offered no additional assistance to potential investors trying to evaluate the 4,500 underlying assets. Mr. Sparks and Mr. Lehman sent out numerous sales directives or “axes” to the Goldman sales force, stressing that Timberwolf was a priority for the firm.¹⁵⁹⁵ In April, Mr. Sparks suggested issuing “ginormous” sales credits to any salesperson who sold Timberwolf securities, only to find out that large sales credits had already been offered.¹⁵⁹⁶ In May, while Goldman was internally lowering the value of Timberwolf, it continued to sell the securities at a much higher price than the company knew it was worth. At one point, a member of the SPG Trading Desk issued an email to clients and investors, advising them that the market was rebounding and the downturn was “already a distant memory.”¹⁵⁹⁷ Goldman also began targeting Timberwolf sales to “non-traditional” buyers and those with little CDO familiarity, such as increasing its marketing efforts in Europe and Asia.

On June 18, 2007, Goldman sold \$100 million worth of Timberwolf securities to an Australian hedge fund, Basis Capital. Just 16 days later, on July 4, Goldman informed Basis Capital that the securities had lost value, and it had to post additional cash collateral to secure its CDS contract. On July 12, Goldman told Basis Capital that the value had dropped again, and still more collateral needed to be posted. In less than a month, the value of Timberwolf had fallen by \$37.5 million. Basis Capital posted the additional capital, but soon after declared bankruptcy. On June 1, Goldman Sachs sold \$36 million in Timberwolf securities to a Korean life insurance company, Hungkuk Life, that had little familiarity with the product. The head of the Korean sales office said his office was willing to sell the company additional securities, if assured the office would receive a 7% sales credit. Goldman agreed, and said “get ‘er done.” The sales office sold another \$56 million in Timberwolf securities to the life insurance company which paid \$76 per share when Goldman’s internal value for the security was \$65. Within ten days of that sale, Thomas Montag, a senior Goldman executive, sent an email to the Mortgage Department head, Daniel Sparks, stating: “boy that timeberwof [Timberwolf] was one shitty deal.”¹⁵⁹⁸ Despite that comment, Goldman continued to market Timberwolf securities to its clients.

¹⁵⁹³ 2/26/2007 email between Tom Montag and Daniel Sparks, GS MBS-E-019164806.

¹⁵⁹⁴ 3/2007 Goldman internal email chain, GS MBS-E-001800634.

¹⁵⁹⁵ See, e.g., 6/2007-8/2007 Goldman internal emails, “Timberwolf Sales Efforts,” Hearing Exhibit 4/27-166; 3/2007 Goldman internal email, “GS Syndicate Structured Product CDO Axes,” Hearing Exhibit 4/27-100.

¹⁵⁹⁶ 4/19/2007 email chain between Daniel Sparks and Bunty Bohra, GS MBS-E-010539324, Hearing Exhibit 4/27-102 (Mr. Bohra responds, “[w]e have done that with Timberwolf already.”).

¹⁵⁹⁷ 5/14/2007 email from Edwin Chin, GS MBS-E-012553986.

¹⁵⁹⁸ 6/2007 Goldman internal email to Daniel Sparks, Hearing Exhibit 4/27-105.

Goldman had also arranged for its subsidiary, Goldman Sachs International (GSI), to act as both the primary CDS counterparty and the collateral put provider in Timberwolf.¹⁵⁹⁹ Although GSI received a fee for serving as the collateral put provider, GSI began to refuse to approve Timberwolf's purchase of new collateral securities whose values might decline below par value and put Goldman at risk of having to make up the difference. Instead, GSI pressured Timberwolf to keep its collateral in cash, even though an internal Goldman analysis had confirmed that cash collateral produced lower returns for Timberwolf investors than collateral securities. When Greywolf objected to this practice, Goldman backed down and allowed the purchase of a narrow range of very safe, short term asset backed securities as collateral.

In the fall of 2007, a Goldman analyst provided executives with a price history for Timberwolf A2 securities. It showed that, in five months, Timberwolf securities had lost 80% of their value, falling from \$94 in March to \$15 in September. Upon receiving the pricing history, the Timberwolf deal captain, Matthew Bieber, wrote that March 27 – the day Timberwolf issued its securities – was “a day that will live in infamy.”¹⁶⁰⁰ Timberwolf was liquidated in 2008.

Abacus 2007-AC1. Abacus 2007-AC1 was a \$2 billion synthetic CDO that referenced BBB rated mid and subprime RMBS securities issued in 2006 and early 2007. It was a static CDO, meaning once selected, its reference obligations did not change. It was the last in a series of 16 Abacus CDOs that referenced primarily mortgage backed assets and were designed by Goldman. Those Abacus CDOs were known as single tranche CDOs, structures pioneered by Goldman to provide customized CDOs for clients interested in assuming a specific type and amount of investment risk. They enabled the client to select the assets, the size of the investment, the amount of subordination or cushion before the securities would be exposed to loss, and could be issued with a single tranche.¹⁶⁰¹ The Abacus CDOs also enabled investors to short a selected group of RMBS or CDO securities at the same time. Goldman used the Abacus CDOs not only to sell short positions to investors, but also as a way for Goldman itself to short mortgage assets in bulk.¹⁶⁰²

Abacus 2007-AC1 was the first and only Abacus transaction in which Goldman allowed a third party client to essentially “rent” its CDO structure and play a direct, principal role in the

¹⁵⁹⁹ In synthetic CDOs, the cash proceeds from the sales of the CDO securities were used to purchase “collateral debt securities.” Later, when cash was needed to make payments to a long or short party, those collateral securities were sold, and the cash was used to make the payments. In the event the collateral securities used to pay the short party (called “default swap collateral”) could not be sold for face (par) value, Goldman, the short party, absorbed the loss, effectively serving as the default swap collateral put provider. For more information, see discussion of Goldman's actions taken while the collateral put provider of Timberwolf, below.

¹⁶⁰⁰ 9/17/2007 email from Matthew Bieber to Christopher Creed, GS MBS-E-000766370, Hearing Exhibit 4/27-106.

¹⁶⁰¹ 6/2007 Goldman document, “CDO Platform Overview,” at 31, GS MBS-E-001918722 (“ABACUS is the Goldman brand name for single-tranche CLN [credit linked note] issuances referencing portfolios comprised entirely of structured products.”); 4/2006 Goldman presentation “Overview of Structured Products,” GS MBS-E-016067482.

¹⁶⁰² 3/12/2007 Goldman internal memorandum to Mortgage Capital Committee, “ABACUS Transaction sponsored by ACA,” GS MBS-E-002406025, Hearing Exhibit 4/27-118.

selection of the assets. Goldman did not itself intend to invest in the CDO.¹⁶⁰³ Instead, it functioned primarily as an agent, earning fees for its roles in structuring, underwriting, and administering the CDO. Those roles included Goldman's acting as the placement agent, collateral securities selection agent, and collateral put provider. Unlike previous Abacus CDOs, Goldman employed a third party to serve as the portfolio selection agent, essentially using that agent to promote sales and mask the role of its client in the asset selection process.

Goldman originated Abacus 2007-AC1 in response to a request by Paulson & Co. Inc. ("Paulson"), a hedge fund that was among Goldman's largest customers for subprime mortgage related assets. Paulson had a very negative view of the mortgage market, which was publicly known, and wanted Goldman's assistance in structuring a transaction that would allow it to take a short position on a portfolio of subprime mortgage assets that it believed were likely to perform poorly or fail. Goldman allowed Paulson to use the Abacus CDO for that purpose. In entering into that arrangement with Paulson and simultaneously acting as the placement agent responsible for marketing the Abacus securities to long investors, Goldman created a conflict of interest between itself and the investors it would be soliciting to buy the Abacus securities.

Paulson established a set of criteria to select the reference assets for the Abacus CDO to achieve its investment objective.¹⁶⁰⁴ After establishing those parameters, Paulson worked with the actual portfolio section agent to select the assets. Documents show that Paulson proposed, substituted, rejected, and approved assets for the reference portfolio. Goldman was aware of Paulson's investment objective, the role it played in the selection of the reference assets, and the fact that the selection process yielded a set of poor quality assets. Of the final set of 90 assets referenced in the Abacus CDO portfolio, 49 had been initially proposed by Paulson. Yet Goldman did not publicly disclose the central role played by Paulson in the asset selection process or the fact that the economic interest held by an entity actively involved in the asset selection process was adverse to the interest of investors who would be taking the long position.

ACA Management LLC, the company hired by Goldman to serve as the portfolio selection agent, told the Subcommittee that, while it knew Paulson was involved, it was unaware of Paulson's true economic interest in the CDO. The ACA Managing Director who worked on the Abacus transaction stated that ACA believed that Paulson was going to invest in the equity tranche of the CDO, thus aligning its interests with those of ACA and other investors.¹⁶⁰⁵ ACA and its parent company both acquired long positions in the Abacus CDO as did a third investor. The Abacus securities lost value soon after purchase. The three long investors together lost more than

¹⁶⁰³ As collateral put provider, which it performed for a fee, Goldman did carry risk in the Abacus 2007-AC1 transaction. In addition, shortly before the Abacus 2007-AC1 transaction closed, Goldman agreed to take the long side of a CDS contract on the performance of a small portion of the underlying assets when Paulson wanted to increase its short position at the last minute. Goldman tried to find an investor to assume its small long position, but was unable to do so.

¹⁶⁰⁴ April 27, 2010 Subcommittee Hearing at 82.

¹⁶⁰⁵ Subcommittee interview of Laura Schwartz (ACA) (4/23/2010). See also *In the Matter of Abacus 2007-AC1 CDO*, File No. HO-10911 (SEC), Statement of Laura Schwartz (January 21, 2010), ACA ABACUS 00004406 at 408. (hereinafter "Statement of Laura Schwartz").

\$1 billion, while Paulson, the sole short investor, recorded a corresponding profit of about \$1 billion. Today, the Abacus securities are worthless.

In addition to not disclosing the asset selection role and investment objective of the Paulson hedge fund, Goldman did not disclose to investors how its own economic interest was aligned with Paulson. In addition to accepting a sizable placement fee paid by Paulson for marketing the CDO securities, Goldman had entered into a side arrangement with the hedge fund in which it would receive additional fees from Paulson for arranging CDS contracts tied to the Abacus CDO that included low premium payments falling within a specified range.¹⁶⁰⁶ While those lower premium payments would benefit Paulson by lowering its costs, and benefit Goldman by providing it with additional fees, they would also reduce the amount of cash being paid into the CDO, disadvantaging the very investors to whom Goldman was marketing the Abacus securities. Goldman nevertheless entered into the arrangement, contrary to the interests of the long investors in Abacus, and failed to disclose the existence of the fee arrangement in the Abacus marketing materials.

On April 16, 2010, the SEC filed a complaint against Goldman and one of the lead salesmen for the Abacus CDO, Fabrice Tourre, alleging they had failed to disclose material adverse information to potential investors and committed securities fraud in violation of Section 17(a) of the Securities Act of 1933 and Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. On July 14, 2010, Goldman reached a settlement with the SEC, admitting:

“[T]he marketing materials for the ABACUS 2007-AC1 transaction contained incomplete information. In particular, it was a mistake for the Goldman marketing materials to state that the reference portfolio was ‘selected by’ ACA Management LLC without disclosing the role of Paulson & Co. Inc. in the portfolio selection process and that Paulson’s economic interests were adverse to CDO investors.”¹⁶⁰⁷

Goldman agreed to pay a \$550 million fine.

The Hudson, Anderson, Timberwolf, and Abacus CDOs provide concrete details about how Goldman designed, marketed, and administered mortgage related CDOs in 2006 and 2007. The four CDOs also raise questions about whether Goldman complied with its obligations to offer suitable investments that it believed would succeed, and provide full disclosure to investors of material adverse interests. They also illustrate a variety of conflicts of interest in the CDO transactions that Goldman resolved by placing its financial interests and favored clients before those of its other clients.

¹⁶⁰⁶ 3/12/2007 Goldman memorandum to Mortgage Capital Committee, “ABACUS Transaction sponsored by ACA,” GS MBS-E-002406025-28, Hearing Exhibit 4/27-118.

¹⁶⁰⁷ Securities and Exchange Commission v. Goldman, Sachs & Co. and Fabrice Tourre, Case No. 10-CV-3229, (S.D.N.Y.), Consent of Goldman Sachs, (July 14, 2010), at 2.

Each of the four CDOs examined by the Subcommittee presents conflict of interest concerns and elements of deception related to how information about the CDO was presented to investors, including disclosures related to the relevant CDO's asset selection process, the quality and value of the CDO's assets and securities, and the nature and size of Goldman's proprietary financial interests. The Subcommittee's investigation raises questions regarding whether Goldman complied with its obligations to disclose material information to investors, including its material adverse interests, and to refrain from making investment recommendations that are unsuitable for any investor by recommending financial instruments designed to lose value and perform poorly. A key issue underlying much of this analysis is the structuring of and disclosures related to financial instruments that enable an investment bank to bet against the very financial products it is selling to clients.

(4) How Goldman Shorted the Subprime Mortgage Market

Having provided an overview of Goldman's shorting activities and CDO activities in the years leading up to the financial crisis, this next section of the Report provides detailed information about how Goldman shorted the subprime mortgage market.

(a) Starting \$6 Billion Net Long

By mid-2006, Goldman's Mortgage Department had a predominantly pessimistic view of the U.S. subprime mortgage market. According to Michael Swenson, head of the Mortgage Department's Structured Products Group: "[D]uring the early summer of 2006 it was clear that the market fundamentals in subprime and the highly levered nature of CDOs [were] going to have a very unhappy ending."¹⁶⁰⁸

\$6 Billion Long. In mid-2006, Goldman held billions of dollars in long subprime mortgage related securities, in particular the long side of CDS contracts referencing the ABX Index. In September 2006, Mortgage Department head Daniel Sparks and his superior, Jonathan Sobel, initiated a series of meetings with Mr. Swenson, head of the Structured Products Group (SPG), and Mr. Birnbaum, the Mortgage Department's top trader in ABX assets, to discuss the Department's long holdings.¹⁶⁰⁹ In those meetings, they discussed whether the Asset Backed Security (ABS) Trading Desk within SPG should get out of its existing positions or "double-down." After the first meeting, Mr. Birnbaum emailed Mr. Swenson:

¹⁶⁰⁸ 9/26/2007 Michael J. Swenson Self-Review, GS-PSI-02396-401 at 398, Hearing Exhibit 4/27-55b. See also 12/14/2006 email from Daniel Sparks to Messrs. Montag and Ruzika, "Subprime risk meeting with Viniar/McMahon Summary," GS MBS-E-009726498, Hearing Exhibit 4/27-3 ("there will be very good opportunities as the market[] goes into what is likely to be even greater distress"); 7/13/2006 email from Stuart Bernstein copied to Mr. Cohn, GS MBS-E-016209254 ("he believes the REIT market is dead. We agreed . . . that as the market got worse, his 'distressed' expertise would be more (not less) interesting to investors"). See also Section 5(a)(iii) below regarding Goldman executives' negative views of the market for subprime mortgages and subprime mortgage backed securities.

¹⁶⁰⁹ 9/19/2006 email chain between Joshua Birnbaum and Daniel Sparks, "ABX," GS MBS-E-012683946.

“Sobel and Sparks want to know if we should exit or double down. We double down if we have a structured place to go with the risk. ... [W]e are going to sit down with the CDO guys and talk about a deal.”¹⁶¹⁰

If the Department’s existing long positions could be transferred off SPG’s books by finding a “structured place to go with the risk,” the ABS Trading Desk would then be free to “double down” by taking on new positions and risk.

That same month, September 2006, the ABS and CDO Desks reached agreement on constructing a new CDO to provide the ABS Desk with a “structured exit” from some of its existing investments. The result was Hudson Mezzanine 2007-1, a CDO designed by Goldman to transfer to Hudson investors the risk associated with \$1.2 billion in net long ABX assets then in Goldman’s inventory. The Hudson CDO was also designed to allow Goldman to short \$800 million in RMBS securities to offset a portion of its long ABX assets.¹⁶¹¹

In December 2006, even after the \$2 billion Hudson CDO was constructed, the Mortgage Department calculated that it still had a \$6 billion net long position in subprime mortgage related assets.¹⁶¹² Goldman’s ABX holdings continued to be a major source of its long assets.

Goldman’s Long ABX Assets. In January 2006, Goldman, Deutsche Bank, and several other Wall Street firms launched the ABX Index which, for the first time, allowed investors to use standardized CDS contracts to invest in baskets of subprime RMBS securities. The ABX Index measured the aggregate performance of a selected basket of 20 RMBS securitizations, producing a single value that rose or fell over time in line with the performance of the underlying RMBS securities.¹⁶¹³ Investors could enter into CDS contracts that used a particular ABX Index as the “reference obligation,” without physically purchasing or holding any of the RMBS securities in the underlying basket. Because the ABX Index itself was synthetic, and did not depend upon the acquisition of large blocks of RMBS securities, it enabled an unlimited number of investors to make unlimited bets on the performance of a group of subprime RMBS securities, using standardized contracts that could be bought and sold. The ABX Index also made it economical for investors to short subprime RMBS securities in bulk.¹⁶¹⁴

¹⁶¹⁰ Id.

¹⁶¹¹ Goldman responses to Subcommittee QFRs at PSI_QFR_GS0239. For more information on Hudson, see section C(5)(b)(ii)AA., below.

¹⁶¹² 3/10/2007 email to Daniel Sparks, “Mortgage presentation to the Board,” GS MBS-E-013323395, Hearing Exhibit 4/27-17 (Mortgage Department was \$6 billion net long at start of the quarter). 12/13/2006 Goldman email, “Subprime Mortgage Risk,” Hearing Exhibit 4/27-2.

¹⁶¹³ The ABX Index actually consisted of five separate indices. Each index tracked a different set of RMBS securities pulled from the 20 RMBS securitizations in the ABX basket. The sets varied according to their assigned credit ratings. One index tracked the 20 RMBS securities with AAA ratings, another tracked the 20 RMBS securities with AA ratings, and so on.

¹⁶¹⁴ Subcommittee interview of Joshua Birnbaum (10/1/2010); Subcommittee interview of Rajiv Kamilla (10/12/2010).

In internal documents, Goldman described itself as “the leader and principal driver in the creation of” the ABX Index.¹⁶¹⁵ In July 2006, Joshua Birnbaum, Rajiv Kamilla, David Lehman, and Michael Swenson from the Mortgage Department nominated Goldman’s role in the creation of both the ABX and CMBX – a similar index based on Commercial Mortgage Backed Securities – for an internal Goldman award, called the “Mike Mortara Award for Innovation.”¹⁶¹⁶ That award “recognize[d] the creative, forward-looking, and entrepreneurial contributions of an individual or team” within the equities or fixed income divisions.¹⁶¹⁷ The Mortgage Department personnel wrote that the new indices “enable[d] market participants to trade risk without ownership of the underlying SP [structured product] security - thereby permitting market participants to efficiently go short the risk of these securities.”¹⁶¹⁸ They also wrote that “Goldman Dominates Client Trading Volume” with “an estimated 40% market share, and also “dominates the inter-dealer market.”¹⁶¹⁹ In 2007, Rajiv Kamilla, the ABS trader who spearheaded Goldman’s efforts to launch the ABX Index, wrote that he “[c]ontinued to enhance our trading dominance in ... ABX indices.”¹⁶²⁰

While Mr. Kamilla led Goldman’s efforts to develop the ABX Index, the firm’s day-to-day ABX trading was conducted primarily by Joshua Birnbaum on the Mortgage Department’s Structured Products Group (SPG) Trading Desk.¹⁶²¹ Mr. Birnbaum had a negative view of the

¹⁶¹⁵ 6/20/2006 email from David Lehman, “Mortara Nomination – ABX/CMBX Indices,” GS MBS-E-014038810 (attached file, “2006 Mike Mortara Award for Innovation Nomination Template for ABX & CMBX Indices,” GS MBS-E-014038811 at 6 (hereinafter “Mortara Award Submission”)).

¹⁶¹⁶ Id. at 8.

¹⁶¹⁷ 6/20/2006 email from “Equities and FICC Communications” to “All Equities and FICC,” Mike Mortara Award for Innovation,” GS MBS-E-010879020 [original email].

¹⁶¹⁸ Mortara Award Submission at 2.

¹⁶¹⁹ Id. at 3–4. See also 8/30/2006 Fixed Income, Currency and Commodities Individual Review Book for Rajiv K. Kamilla, at 20, GS-PSI-04064 (hereinafter “Kamilla 2006 Review”); 9/6/2007 Fixed Income, Currency and Commodities Individual Review Book for Rajiv K. Kamilla, at 19, GS-PSI-04100 (hereinafter “Kamilla 2007 Review”).

¹⁶²⁰ Kamilla 2007 Review at 19. In 2007, Mr. Kamilla was named a Managing Partner at Goldman.

¹⁶²¹ Daniel Sparks, the Mortgage Department head, viewed Mr. Birnbaum as a talented trader, writing in October 2006: “Josh for EMD [Extended Managing Director] – he is an extraordinary commercial talent and a key franchise driver. ... He will make us a lot of money.” 10/17/2006–10/18/2006 emails from Daniel Sparks, “3 things,” GS MBS-E-010917469. Other Goldman senior executives also relied on his trading skills. See, e.g., 2/21/2007 email from David Lehman, “ACA/Paulson Post,” GS MBS-E-003813259 (before approving the Abacus CDO, Mr. Lehman asked Mr. Tourre to “[w]alk josh through the \$, if that makes sense, let’s go”); 6/29/2007 email from David Lehman, “ABS Update,” GS MBS-E-011187909 (during exceptionally bad trading day, Mr. Lehman asked Mr. Swenson, “Is Josh in? Mr. Swenson replied “No he is in Spain – don’t worry I am fine.”).

subprime mortgage market, and favored the firm's building a net short position.¹⁶²² However, during 2006, Goldman's overall ABX position was net long, not net short.

Goldman was net long because, as a market maker that helped launch the ABX Index in 2006, it facilitated ABX trades for a number of clients, and many of those clients – primarily hedge funds – went almost exclusively short, requiring Goldman to take the opposing long side of the CDS contracts referencing the ABX indices.¹⁶²³ These transactions enabled Goldman to amass a 30-40% market share in ABX trading during its first year of existence. But by mid-2006, they had also contributed to the Mortgage Department's net long position in subprime mortgage related assets. When the mortgage market began showing signs of strain in the second half of 2006, the risks associated with the firm's net long ABX position became more of a concern.¹⁶²⁴ Senior

¹⁶²² Subcommittee interview of Joshua Birnbaum (4/22/2010). Throughout 2006, Mr. Birnbaum was also working to develop a new product for Goldman, a suite of home price derivatives that would track the Case/Schiller Home Price Indices. Like the ABX Index, a derivative product tracking the Case/Schiller Indices would enable investors to bet on the rise or fall in home prices in various U.S. markets, and provide another vehicle to short the mortgage market. See 12/18/2006 New Product Memorandum, "Launch of US Property Derivatives Trading," GS MBS-E-013492538. In May 2006, Mr. Swenson forwarded an email to Mr. Birnbaum about another financial firm seeking to develop the same type of home price derivatives as Mr. Birnbaum. A note with the email said: "FYI–The cat is crawling out of the bag," meaning that other firms were thinking about launching similar products. See 5/16/2006 email from Michael Swenson to Joshua Birnbaum, "Housing Futures and Options," GS MBS-E-016087363. Goldman offered the new U.S. property derivatives briefly in 2007, but they did not develop significant trading volumes. Subcommittee interview of Joshua Birnbaum (10/1/2010).

¹⁶²³ The ABX Index began trading in January 2006. Goldman's position in the ABX Index was flat when the Index debuted, but became long and grew considerably longer in the fall of 2006. See, e.g., 10/17/2006-10/18/2006 email exchange between Daniel Sparks and Tom Montag, "3 things," GS MBS-E-010917469; 3/1/2007 email from Daniel Sparks, "Dinner," GS MBS-E-002356757, Hearing Exhibit 4/27-143 ("Most of the synthetic flows were hedge funds getting short and CDO vehicles getting long."). Goldman executives also told the Subcommittee that the firm often took the long side of ABX transactions in which hedge funds were going short. Subcommittee interview of Daniel Sparks (4/15/2010); Subcommittee interview of David Viniar (4/13/2010). See also, e.g., 8/10/2006 email from Goldman salesperson, "Paulson bookings," GS MBS-E-012395893 ("GS sold 550mm protection on ABX.HE.A 06-2 to Paulson"); 12/7/2006 email chain between Daniel Sparks and Tom Montag, "More thorough response," GS MBS-E-010931324 (Goldman had previously handled approximately \$9 billion in transactions for Paulson); Subcommittee interview of Michael Swenson (4/16/2010) ("Paulson [hedge fund] was the biggest counterparty on day 1 [of the ABX Index] and throughout 2006").

¹⁶²⁴ Mr. Birnbaum's acquisition of a large net long position in the ABX was viewed negatively by Goldman senior executives. When Mr. Sparks recommended Mr. Birnbaum for a promotion to managing director in October 2006, Mr. Montag responded: "Josh slipped a bit with the abx position etc. Is that appropriate." Mr. Sparks replied: "Josh ... has had a rough couple of months. But he has handled it very well and is a key person for our franchise. I don't think those 2 months should confuse his value to the firm." 10/17/2006 email exchange between Daniel Sparks and Tom Montag, "3 things," GS MBS-E-010917469. Mr. Birnbaum was named a managing director later that month, but Mr. Montag again raised the issue of his net long ABX position when Mr. Sparks sought to allow Mr. Birnbaum to continue buying equity put options on companies with subprime exposure. Mr. Montag wrote: "Unfortunately trader josh has not demonstrated a track record of controlling his position. ... Instead of these lousy hedges he should just be selling his position." 3/21/2007 email chain between Tom Montag and Daniel Sparks, GS MBS-E-010629379, Hearing Exhibit 4/27-21. See also 2/5/2007 email from Richard Ruzika to Gary Cohn, "Are you living Morgatages [sic]," GS MBS-E-016165784 (Mr. Ruzika: "You know and I know this position was allowed to get too big – for the liquidity in the market, our infrastructure, and the ability of our traders. That statement would be the same even if we had gotten the market direction correct –although the vultures would not be circling.").

Goldman executives expressed the view that the subprime mortgage related market was likely to get much worse, and the firm should prepare for it.¹⁶²⁵

In December 2006, Goldman used the Hudson CDO to transfer the risk associated with \$1.2 billion of its ABX long holdings to Hudson investors. But even after this transfer, Goldman still had billions of dollars in long ABX holdings on its books.

Goldman's Long Mortgage Holdings. In addition to its long ABX holdings, the Mortgage Department's \$6 billion net long position in December 2006 was due to a large inventory of RMBS, CDO, and other mortgage related assets in Goldman's investment and sale inventories and in its CDO warehouses. In 2006, the Mortgage Department conducted numerous RMBS and CDO securitizations that required it to acquire and repackage whole loans, RMBS and CDO securities, and other mortgage related assets. When assembling CDOs, Goldman often worked with third party partners. These strategic partners bought a portion of the equity and bore some of the risk of loss in the CDO. The partners were generally smaller financial firms, such as hedge funds or asset managers with expertise in CDOs or a particular asset class. For a fee, the partners also sometimes served as a CDO's collateral manager, helping to select the assets.¹⁶²⁶

Peter Ostrem, who was head of the CDO Origination Desk from 2006 until May 2007, was aware of substantial problems in the subprime mortgage market, but believed that the market distress was temporary and the market would stabilize.¹⁶²⁷ Mr. Ostrem wanted to continue to increase the CDO Desk's business by producing as many marketable CDOs as possible.¹⁶²⁸ Darryl Herrick, who worked for Mr. Ostrem on the CDO Origination Desk expressed the view that hedge funds were shorting only the worst CDOs: "[CDO] shelves people are shorting are enhanced garbage."¹⁶²⁹

The CDO Origination Desk was a primary contributor to the Mortgage Department's net long position, as Goldman often had to hold or "warehouse" subprime assets until they were

¹⁶²⁵ See, e.g., 12/15/2006 email from David Viniar to Tom Montag, "Subprime Risk Meeting with Viniar/McMahon Summary," GS MBS-E-009726498, Hearing Exhibit 4/27-3 ("there will be very good opportunities as the markets goes into what is likely to be even greater distress"); 2/8/2007 email from Daniel Sparks, "Post," GS MBS-E-002201668, Hearing Exhibit 4/27-7 ("Subprime environment going from bad to worse (think whack a mole)."); 1/9/2007 Goldman Presentation, "Mortgage Department Update," GS MBS-E-002320968 ("Risks, Challenges and Structural Issues: -Very tough going in Resi Credit world - p&l [profit and loss] will be challenging; -Housing price and loan volume declines; -Investing in business in very difficult environment"); cf. 11/1/2006 Goldman Structured Products Strategist memorandum, "Q3 Mortgage Investor Survey," GS MBS-E-006576068-76 ("Clients expect a downturn in housing in 2007, investors worried about high LTV [loan-to-value], low/no doc loans, pay option ARMs, origination volumes to be down 10% in 2007").

¹⁶²⁶ Subcommittee interview of Peter Ostrem (10/5/2010); Subcommittee interview of Darryl Herrick (10/13/2010).

¹⁶²⁷ Subcommittee interview of Peter Ostrem (10/5/2010). See also, e.g., 8/10/2006 email from Peter Ostrem to Daniel Sparks, "Leh CDO Fund," GS MBS-E-010898470 (urging Goldman to "do our own fund. SP CDO desk. Big time.").

¹⁶²⁸ Subcommittee interview of Peter Ostrem (10/5/2010).

¹⁶²⁹ 6/8/2006 email from Darryl Herrick to Peter Ostrem, "***GS ABS** RMBS CDS Lineup," GS MBS-E-016445770.

packaged into a CDO.¹⁶³⁰ Each CDO was designed to include or reference hundreds of millions or billions of dollars in assets, which the CDO Origination Desk and its partners had to locate and acquire, a process called “ramping” that averaged six to nine months per CDO.¹⁶³¹ Goldman and its partners acquired these assets from other large Wall Street broker-dealers, often called “the Street,” or took them from their own inventory of assets.

When assembling a CDO, Goldman generally opened an internal “warehouse account” for the CDO in which it stored the acquired assets until a target amount was achieved, and the CDO was brought to market. While the assets were in the warehouse account, they were included in Goldman’s warehouse balance sheet and contributed to its long or short positions. When the bulk of the target assets were acquired for a particular CDO, perhaps 75% to 95% of the total, in some cases Goldman priced the CDO securities and began selling them to clients who were told what the remaining assets would likely be.¹⁶³² When a CDO transaction “closed” and its securities were issued, Goldman transferred the relevant assets from its warehouse account to the corporation or trust established for the CDO.¹⁶³³ The CDO entity then housed the long assets that had been on Goldman’s warehouse books, and Goldman was left with a corresponding short position which it could keep or sell to the CDO’s short parties.

In 2006 and early 2007, since it was often acquiring assets for several CDOs at once, the CDO Desk generally had a substantial net long position in subprime assets in its CDO warehouse accounts.¹⁶³⁴ For example, as of March 16, 2007, Goldman calculated that its CDO warehouses contained \$4.7 billion in mortgage related assets.¹⁶³⁵ After deducting potential liabilities assumed by Goldman’s partners and making other adjustments, Goldman calculated that it had \$2.3 billion in net long warehouse risk.¹⁶³⁶ In early 2007, Goldman executives began to express concern about the risks posed by the subprime mortgage related assets in the CDO warehouse accounts.¹⁶³⁷

¹⁶³⁰ Subcommittee interview of Daniel Sparks (4/15/2010); Subcommittee interview of Peter Ostrem (10/5/2010).

¹⁶³¹ See 5/19/2007 Goldman presentation, “Mortgages CDO Origination – Retained Positions & Warehouse Collateral, May 2007,” GS MBS-E-010951926 (“average ramp period 6-9 months”).

¹⁶³² See, e.g. 3/7/2007 and 3/13/2007 internal emails, “Timberwolf I, Ltd. Preliminary Offering Circular,” GS MBS-E-001800634 (Collateral manager Greywolf wrote: “We will not be fully ramped and I want to use the remaining bucket strategically. Is it OK if we have 5% ramp post-close?” Goldman responded: “We represented to BSAM [Bear Stearns Asset Management] that deal would be fully ramped upon closing. As long as they’re ok (or get veto rights), I don’t have any issue.”).

¹⁶³³ Subcommittee interview of Daniel Sparks (4/15/2010); Subcommittee interview of David Lehman (4/12/2010).

¹⁶³⁴ See, e.g., 3/16/2007 Goldman memorandum from Mitch Resnick and Peter Ostrem to GSI Risk Committee, “GSI Warehousing for Structured Product CDOs,” GS MBS-E-001806010; 2/8/2007 email from Daniel Sparks to Messrs. Cohn, Montag, Vinier et al., “Post,” GS MBS-E-002201668, Hearing Exhibit 4/27-7 (“Loan business is long by nature and goal is to mitigate.”); Subcommittee interview of Peter Ostrem (10/15/2010).

¹⁶³⁵ 3/16/2007 Goldman memorandum from Mitch Resnick and Peter Ostrem to GSI Risk Committee, “GSI Warehousing for Structured Product CDOs,” GS MBS-E-001806010.

¹⁶³⁶ Id.

¹⁶³⁷ 2/28/2007 email from David Rosenblum to Peter Ostrem, “Pete– pls send me cob 2/28 MTM for SP CDO WH’s first thing in the morning,” GS MBS-E-001800707; 2/28/2007 email from David Rosenblum, “Hedges Status Report,” GS MBS-E-002640538 (new ABX hedges added and other hedges allocated to ensure that CDO warehouse risk was fully hedged); 2/22/2007 email from Peter Ostrem to David Rosenblum, “League Tables,” GS MBS-E-001800683 (“FYI Liquidating 3 warehouses tomorrow.”); 2/22/2007 email from Daniel Sparks to Tom Montag, GS

On December 7, 2006, Daniel Sparks, the Mortgage Department head, exchanged emails with Goldman senior executive Thomas Montag about why Goldman was not doing more to reduce the firm's risk associated with its net long positions.¹⁶³⁸ On the same day, Mr. Montag complained to CFO David Viniar about the Mortgage Department's lack of aggressiveness in trying to reduce its net long ABX position:

“[O]n ABX having numerous conversations—I don't think we should panic out but we certainly didn't do a good job of keeping pressure on ... makes me mad because they should have kept doing it ugh.”¹⁶³⁹

The next week, Mr. Viniar called a meeting with the Mortgage Department to discuss its holdings.

(b) Going Past Home: Goldman's First Net Short

CFO David Viniar told the Subcommittee that, in early December 2006, he received reports showing that the Mortgage Department had lost money on ten successive days.¹⁶⁴⁰

Viniar Meeting. On December 14, 2006, Mr. Viniar convened a meeting in the conference room next to his office on the 30th floor, in which he and other senior Goldman executives met for several hours with Mortgage Department managers, as well as representatives from Market Risk Management & Analysis and from the Controllers group.¹⁶⁴¹ At the meeting, Mr. Viniar and other Goldman executives conducted an in-depth review of the Mortgage Department's holdings. Mr. Viniar concluded the Mortgage Department's position in subprime mortgage related assets was too long, and its risk exposure was too great.¹⁶⁴²

Mr. Viniar and others told the Subcommittee that Mr. Viniar's basic message to the Mortgage Department at the December meeting was not necessarily to go short, but instead to “get closer to home.”¹⁶⁴³ In trading parlance, “home” means a net neutral trading position – a position

MBS-E-010989710 (“There are a few deals that look tough now, including a A-rated CDO of CDOs with Greywolf [Timberwolf]”).

¹⁶³⁸ 12/7/2006 email chain between Daniel Sparks and Tom Montag, “More thorough response,” GS MBS-E-010931324. Mr. Montag also raised the possibility of hiring a trader from the Paulson hedge fund to help Goldman short the mortgage market. In addition, the email exchange indicates that Goldman had previously done \$7 billion in transactions with the Paulson hedge fund, but had not done much with the hedge fund recently. Mr. Sparks wrote: “They had asked us to do another tranching protection trade for them, and seem fine with it being pushed to January.” Id. The tranching protection trade for Paulson that Mr. Sparks mentioned later became the Abacus 2007-AC1 CDO discussed in this Report.

¹⁶³⁹ 12/7/2006 email chain between Tom Montag and David Viniar, GS MBS-E-009756572.

¹⁶⁴⁰ Subcommittee interview of David Viniar (4/13/2010).

¹⁶⁴¹ 12/14/2006 email from Daniel Sparks, “Subprime risk meeting with Viniar/McMahon Summary,” GS MBS-E-009726498, Hearing Exhibit 4/27-3.

¹⁶⁴² Id. See also 12/15/2006 email from David Viniar to Tom Montag, GS MBS-E-009726498, Hearing Exhibit 4/27-3.

¹⁶⁴³ Subcommittee interview of David Viniar (4/13/2010), Daniel Sparks (4/15/2010), and David Lehman (4/12/2010).

that is neither significantly short nor long.¹⁶⁴⁴ Mr. Vinier told the Subcommittee that, by telling the Mortgage Department to “get closer to home,” he meant that it should assume a more neutral risk position.¹⁶⁴⁵ One way to “get closer to home” was for the Department to sell its long assets. Another way to achieve a more neutral risk position was for the Department to take new short positions to offset its existing long positions.¹⁶⁴⁶

Internal documents indicate that the directions given to the Mortgage Department in the December meeting were more detailed than the general instruction to “get closer to home.” In an email sent on the same day by Mr. Sparks to Goldman executives Messrs. Montag and Ruzika entitled, “Subprime risk meeting with Vinier/McMahon Summary,” Mr. Sparks wrote:

“Followups:

1. Reduce exposure, sell more ABX index outright, basis trade of index vs. CDS too large.
2. Distribute as much as possible on bonds created from new loan securitizations and clean previous positions.
3. Sell some more resid[ual]s
4. Mark [the value of assets in] the CDO warehouse more regularly ...
5. Stay focused on the credit of the originators we buy loans from and lend to
6. Stay focused and aggressive on MLN [Mortgage Lending Network] (warehouse customer and originator we have EPDs [early payment defaults] to that is likely to fail)
7. Be ready for the good opportunities that are coming (keep powder dry and look around the market hard).”¹⁶⁴⁷

The next day, December 15, 2006, Mr. Montag forwarded Mr. Sparks’ email to Mr. Vinier asking: “is this a fair summary?”¹⁶⁴⁸ Mr. Vinier replied: “Yes.” Mr. Vinier noted:

“On ABX, the position is reasonably sensible but is just too big. Might have to spend a little to size it appropriately. On everything else my basic message was let’s be aggressive distributing things because there will be very good opportunities as the markets [go] into

¹⁶⁴⁴ Subcommittee interview of David Vinier (4/13/2010).

¹⁶⁴⁵ Id.

¹⁶⁴⁶ Id. In terms of risk reduction, taking on offsetting short positions to reduce long positions does not necessarily offer the same degree of certainty of risk protection as simply selling off the long assets. In many cases, the offsets may not perfectly match, leaving some degree of risk exposure known as “basis risk.” See, e.g., 2/12/2007 email from Mr. Sobel to Mr. Cohn, “Post today,” GS MBS-E-009763506 (“Risk that concerns me is basis between ABX and single names.”); 2/11/2007 email from Tom Montag, GS MBS-E-009688192 (discussing ABX offsets: “There is no est[imated] loss in the basis risk. Big wildcard. They [the traders] think they have correlation right and moves either way should be ok but obviously index assumptions have been wrong starting last may or june when positions were being put on and the gains seduced us to do more.”).

¹⁶⁴⁷ 12/14/2006 email from Daniel Sparks, “Subprime risk meeting with Vinier/McMahon Summary,” GS MBS-E-009726498, Hearing Exhibit 4/27-3. “Residuals” refers to the equity positions that Goldman had retained from the RMBS and CDO securitizations it originated.

¹⁶⁴⁸ 12/14/2006 email from Tom Montag to David Vinier, GS MBS-E-009726498, Hearing Exhibit 4/27-3.

what is likely to be even greater distress and we want to be in a position to take advantage of them.”¹⁶⁴⁹

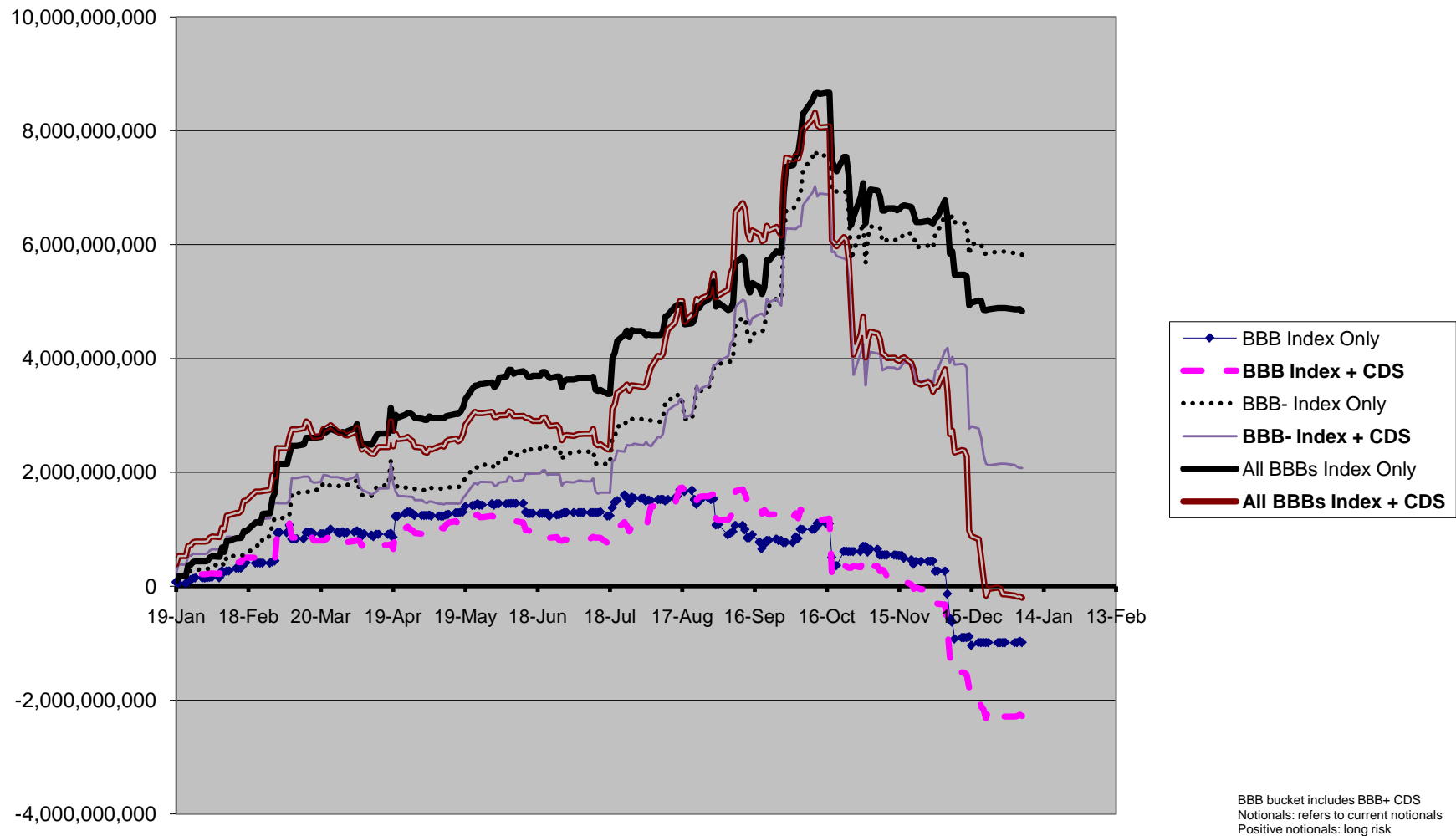
In response to the Viniar meeting, the Mortgage Department took immediate action. It began selling its long ABX positions outright when possible and entering into large single name CDS shorts to offset its remaining long assets. Goldman personnel developed a chart depicting the long positions the Mortgage Department had taken on BBB and BBB- rated ABX assets.¹⁶⁵⁰ This chart also showed how quickly the Mortgage Department moved after the Viniar meeting to offset those long positions by amassing single name RMBS and CDS short positions.

[SEE CHART NEXT PAGE: *Notionals (ABX convention)*, prepared by Goldman Sachs, reformatted by the Permanent Subcommittee on Investigations to be readable in black and white print, GS MBS-E-010214410.]

¹⁶⁴⁹ 12/15/2006 email from David Viniar to Tom Montag, GS MBS-E-009726498, Hearing Exhibit 4/27-3.

¹⁶⁵⁰ See 1/5/2007 “Notionals (ABX Convention)” chart, taken from “Index and Single Name Position History 2006 as of 05Jan07.xls,” attachment to 1/8/2007 email from Joshua Birnbaum to Daniel Sparks, “ABX Subprime Risk by vintages,” GS MBS-E-010214409. The SPG Desk also periodically updated that chart. See, e.g., chart attachments to 2/6/2007 email from Kevin Kao to Joshua Birnbaum, “Index and Single Name Position History 2006 as of 05Feb07.xls,” GS MBS-E-012744553; chart attachments to 2/23/2007 email from Tom Barrett to Kevin Kao, Michael Swenson and Justin Gmelich, “Index and Single Name Position History 2006 As of 22Feb07.xls,” GS MBS-E-012411673; chart attachments to 3/2/2007 email from Kevin Kao to Joshua Birnbaum, “Index and Single Name Position History 2006 As of 01Mar07.xls,” GS MBS-E-012776557.

Notionals (ABX convention)



Prepared by the U.S. Senate Permanent Subcommittee on Investigations, February 2011.
 Derived from Goldman Sachs document, GS MBS-E-010214410.

Within about a month, in January 2007, the Mortgage Department had largely eliminated or offset its long subprime mortgage assets, but it didn't stop there. In January and February, the Mortgage Department began building a multi-billion-dollar short position as part of a plan by the SPG Trading Desk to profit from the subprime RMBS and CDO securities starting to lose value. The plan was discussed with Mr. Sparks and Mr. Ruzika before it was set in motion. By the end of February 2007, the Department had swung from a \$6 billion net long position to a \$10 billion net short position, a \$16 billion reversal in the span of two months.

Selling Assets Outright. On December 14, 2006, the same day as the Viniar meeting, Kevin Gasvoda, head of the Residential Whole Loan Trading group, instructed his staff to begin selling the RMBS securities in Goldman's inventory, focusing on RMBS securities issued from Goldman-originated securitizations. He urged them to "move stuff out" even at a loss:

"[P]ls refocus on retained new issue bond positions and move them out. ... [W]e don't want to be hamstrung based on old inventory. Refocus efforts and move stuff out even if you have to take a small loss."¹⁶⁵¹

In February 2007, to further encourage sales, Mr. Gasvoda issued a sales directive or "axe" to the Goldman sales force to sell the remaining RMBS securities from Goldman-originated RMBS securitizations. On February 9, 2007, the sales force reported a substantial number of sales, and Mr. Gasvoda replied: "Great job syndicate and sales, appreciate the focus."¹⁶⁵²

In February 2007, Goldman CEO Lloyd Blankfein personally reviewed the Mortgage Department's efforts to reduce its subprime RMBS whole loan, securities, and residual equity positions, asking Mr. Montag: "[W]hat is the short summary of our risk and the further writedowns that are likely[?]"¹⁶⁵³ After a short report from Mr. Montag, Mr. Blankfein replied:

"[Y]ou refer to losses stemming from residual positions in old deals. Could/should we have cleaned up these books before and are we doing enough right now to sell off cats and dogs in other books throughout the division?"¹⁶⁵⁴

¹⁶⁵¹ 12/14/2007 email from Mr. Gasvoda, "Retained bonds," GS MBS-E-010935323, Hearing Exhibit 4/27-72.

¹⁶⁵² 2/9/2007 email exchange between Kevin Gasvoda and sales syndicate, "GS Syndicate RMBS Axes (INTERNAL)," GS MBS-E-010370495, Hearing Exhibit 4/27-73.

¹⁶⁵³ 2/11/2007 email exchange between Lloyd Blankfein and Tom Montag, "Mortgage Risk – Credit residential," GS MBS-E-009686838, Hearing Exhibit 4/27-130.

¹⁶⁵⁴ Id.

At the end of February, Goldman's controllers prepared a summary of the changes in Goldman's RMBS and whole loan inventory since December 2006, and reported:

"Residential Credit Loans: The overall loans inventory decreased from \$11bn to \$7bn. ... subprime loans decreased from \$6.3bn to \$1.5bn, Second Liens decreased from \$1.5bn to \$0.7bn and S&D [scratch and dent] Loans remained unchanged at \$0.8bn."¹⁶⁵⁵

This analysis indicates that, in less than three months, Goldman had reduced its subprime loan inventory by over two-thirds, and its second lien inventory by half.

The Mortgage Department reduced its inventory, not only by selling assets outright, but also by reducing its purchase of whole loans and securitization efforts. In March 2007, Goldman informed its Board of Directors and the SEC that it had stopped purchasing subprime loans and RMBS securities through, in its words, the use of "conservative bids."¹⁶⁵⁶ While those presentations did not explain the phrase "conservative bids," an email to Goldman's Chief Credit Officer, Craig Broderick, discussing a March 2007 presentation to Goldman's Audit Committee about the subprime mortgage business, was much more explicit: "Just fyi not for the memo, my understanding is that the desk is no longer buying subprime. (We are low balling on bids)."¹⁶⁵⁷ Still another method to reduce its loan inventory was an ongoing effort by the Mortgage Department to return defaulted or fraudulent loans to the lenders from which it had purchased them.

On April 23, 2007, Mr. Gasvoda reported to Messrs. Montag and Sparks a dramatic reduction in Goldman's inventory of subprime loans and RMBS securities:

"[W]e have \$180mm in loans (unsecuritized) and \$255mm of residuals off old deals. The \$180mm of loans is the smallest we've been since we started the business in 2002. We had been running at an average loan position balance in subprime of around \$4B The \$255mm we have retained is from deals dating back to 2002 and while we've developed some buying partners, it is not a deep market. These have been intentional principal retained positions."¹⁶⁵⁸

¹⁶⁵⁵ 2/23/2007 "Significant Cash Inventory Change (Q1'07 vs. Q4'06)," prepared by Goldman, GS MBS-E-010037310, Hearing Exhibit 4/27-12. "Scratch and dent" loans are loans that are not performing.

¹⁶⁵⁶ 3/26/2007 Goldman presentation to Board of Directors, "Subprime Mortgage Business," GS MBS-E-005565527, Hearing Exhibit 4/27-22 ; 3/14/2007 Goldman Presentation to SEC, "Subprime Mortgage Business 14-Mar-2007," at 7, GS MBS-E-010022328.

¹⁶⁵⁷ 3/2/2007 email from Patrick Welch to Craig Broderick, "Audit Committee Package_Feb 21_Draft_Mortgage_Page.ppt," GS MBS-E-009986805, Hearing Exhibit 4/27-63. In the context of assets offered by a customer to the Correlation Desk, it appears that Mr. Egol also may have returned an unappealing bid: "Many of these assets are garbage. I told her should would not like the level [the price bid by Goldman]" 2/26/2007 email from Jon Egol, "Portfolio for Proposed Transaction 070226 (2).xls," GS MBS-E-002631719.

¹⁶⁵⁸ 4/22/2007 email from Kevin Gasvoda, "Resi credit QTD/YTD P&L and positions," GS MBS-E-010474983.

The subprime loan balance of \$180 million was just over one-tenth of the \$1.5 billion total Goldman had held at the end of February 2007, reflecting a reduction in its subprime inventory over a two-month span by nearly 90%. Overall, the \$180 million loan balance was down from an average subprime loan position balance of \$4 billion, which was a 95% reduction in overall subprime loan inventory levels.

Building the First Short Position. At the same time the Residential Whole Loan Trading Desk was selling loans and RMBS securities, the Structured Product Group (SPG) Trading Desk was working to sell its inventory of long CDS contracts linked to the ABX indices.¹⁶⁵⁹ At first, in December and January, because so many market participants were going short, the SPG's ABX Trading Desk found its long ABX positions difficult to sell.¹⁶⁶⁰ The ABS Desk then decided to offset the long ABX assets in part by purchasing the short side of single name CDS contracts on certain RMBS and CDO securities.¹⁶⁶¹ Within about six weeks, by February 2007, the ABS Desk had acquired a huge net short position in single name CDS contracts referencing RMBS and CDO securities that totaled more than \$5 billion. By then, the ABX market had stabilized somewhat, and the ABS Desk was able to sell outright more of its long ABX positions. Rather than slow down once its \$6 billion long position was offset, however, the ABS Desk used CDS contracts to short RMBS and CDO securities "at every opportunity," in the words of one trader, going increasingly net short.¹⁶⁶²

¹⁶⁵⁹ The Mortgage Department also worked to sell assets from its CDO warehouse accounts, an issue discussed in part below and in part in connection with the Report's section on Goldman's CDO activity.

¹⁶⁶⁰ Subcommittee interview of Michael Swenson (4/16/2010).

¹⁶⁶¹ *Id.* By adopting the strategy of offsetting the long positions with similar, but not necessarily identical short positions, the SPG Desk was incurring a very large amount of basis risk – the risk of a mismatch between the offsetting assets. Mr. Sparks and other senior Goldman executives wanted to reduce that basis risk by paring the positions down on both sides – selling the long assets and covering the short assets. The SPG Desk was not, however, making the progress Mr. Sparks wanted to see in reducing the basis risk. On January 23, 2007, Mr. Sparks wrote to Messrs. Swenson, Birnbaum, and Lehman:

"It does not look like you made any progress on the things we discussed – I want a plan and daily reports on progress. Not to be difficult, but if you 3 are too busy I can add someone who can focus on the issue. My other concern is I want to stay nimble, and not get too wedded to one way positions – getting massively short could be more painful than what we have experienced."

1/23/2007 email from Daniel Sparks, GS MBS-E-010267341. A week later, Mr. Swenson requested a meeting with Mr. Sparks and Mr. Ruzika to discuss the difficulties the traders were encountering in reducing the basis risk. He wrote: "I want to go over the facts of what we are up against." 1/30/2007 email from Michael Swenson to David Lehman, GS MBS-E-011375519. Mr. Swenson and Mr. Birnbaum met with Mr. Ruzika and Mr. Sparks around February 1, 2007. The group apparently discussed the SPG Desk's net short position and the difficulties of reducing the basis risk. On February 5, 2007, Mr. Ruzika wrote to Mr. Cohn about how the short position was "allowed to get too big" and stated: "I don't want to be short – I want to neutralize the risk and shed our basis risk." 2/5/2007 email from Richard Ruzika to Gary Cohn, "Are you living Morgatages [sic]?", GS MBS-E- 016165784. About a week later, when the large net short positions began producing large profits, Mr. Ruzika apparently changed his mind and became supportive of the large net short, though he still wanted to reduce basis risk "whenever possible." 2/13/2007 email from Richard Ruzika to Gary Cohn, "Catch up," GS MBS-E-019794071.

¹⁶⁶² Salem 2007 Self-Review, GS-PSI-03157 at 71-72.

On February 12, 2007, Mr. Sparks reported to senior management on the Mortgage Department's progress and the substantial profits that its new net short position was already showing:

“(1) +20mm [million] P&L [profit and loss] today.

Secondary trading desk is net short risk in the form of single names and structured index vs index longs (some index shorts also). Large move down again today

(2) Possible significant upside in book.

The desk has been moving [marking down] single names about 1/3 of what they feel the correct correlation [to ABX Index] is (around 70%). . . . As the market has moved so much one way, there is the potential for the book to currently have significant upside embedded in it.¹⁶⁶³

(3) Loan & resid[ual] books flat [i.e., already hedged].”¹⁶⁶⁴

¹⁶⁶³ The reference to 70% in the email involves correlation assumptions. Correlation trading depends upon assumptions about the relative values between one asset (such as a CDS contract referencing the ABX Index) and another (such as a CDS contract referencing a single RMBS security). A correlation value of 100% means that the values of both assets move together in the same amounts. With 100% correlation, a 10% decline in the value of one asset implies a 10% decline in the value of the other. The correlation ratios between different assets are a matter of the trading desk's informed judgment. As one Goldman mortgage trader noted: “We should discuss base correlations live . . . there is no market standard for calculating them.” 3/26/2007 email from SPG Trading to Goldman London, “ABX – TABX : Request from [customer],” GS MBS-E-021893369. Once a correlation ratio was set, however, the general practice at Goldman was to change correlation ratios only upon a showing of observable market trade prices supporting the change. Traders, thus, engaged in frequent discussions of “observability.” A change in correlation ratios could result in an immediate markdown or markup of particular positions, which could effect Goldman's profit and loss calculations, collateral calls, and the value of individual customer positions.

In his February 12 email, Mr. Sparks wrote that the SPG Desk had been marking down the value of single name long CDS contracts by only one-third of the amount that would apply if the desk's true calculation of the correlation between single name and ABX CDS contracts was correct – that the two products were more closely correlated than the market recognized. Mr. Swenson told the Subcommittee that, in late 2006 and early 2007, single name long CDS contracts were trading at higher prices than similar ABX CDS contracts, and the observable market prices of single name CDS contracts were not falling as quickly as market professionals thought they should. Subcommittee interview of Michael Swenson (4/16/2010). Nonetheless, in a steeply declining market, Goldman's Mortgage Department assumed that the single name long CDS contracts would eventually fall to the same low values as the long ABX contracts. If that happened, since the SPG Desk was net short single name CDS contracts, the anticipated drop in value would result in an equivalent amount of profit for the desk's short position – hence, Mr. Sparks' reference to the “upside embedded in” the book.

On February 14, 2007, the Mortgage Department actually captured that upside by changing its correlation assumptions to recognize a higher correlation between single name CDS and ABX CDS contracts. Using the new assumptions, Goldman then marked down the value of its customers' single name CDS contracts to levels closer to the ABX Index assets. As the short party to those same CDS contracts, Goldman also realized a profit of \$100 million in a single day. See 2/14/2007 email from Arbind Jha to Michael Swenson, “Mortgages Estimate REVISED,” GS MBS-E-012474685.

¹⁶⁶⁴ 2/12/2007 email from Daniel Sparks, “Post today,” GS MBS-E-009763506.

On February 14, 2007, Mr. Sparks again reported to senior management on the Department's progress, describing how it was neutralizing its net long position:

"[O]ur risk reduction program consisted of: (1) selling index outright (2) buying single name protection and (3) buying protection on super-senior portions of the BBB/BBB-index. ... That is good for us position-wise, bad for accounts who wrote that protection but could hurt our CDO pipeline position as CDOs will be harder to do."¹⁶⁶⁵

"Overall," Mr. Sparks wrote, "as a business we are selling our longs and covering our shorts."¹⁶⁶⁶

With respect to market conditions, Mr. Sparks reported:

"Subprime environment – bad and getting worse. Everyday is a major fight for some aspect of the business (think whack-a-mole). Trading position has basically squared ... plan to play from short side. Loan business is long by nature and goal is to mitigate. Credit issues are worsening on deals and pain is broad (including investors in certain GS-issued deals). Distressed opportunities will be real, but we aren't close to that time yet."¹⁶⁶⁷

In order to "play from the short side," the Mortgage Department continued building a net short position, employing aggressive strategies.¹⁶⁶⁸ Mr. Birnbaum, Goldman's ABX trader, later wrote: "I concluded that we should not only get flat, but get VERY short."¹⁶⁶⁹ He wrote that he then "socialized," or discussed, his proposal with others in the Mortgage Department, and "we all agreed the plan made sense."¹⁶⁷⁰ The ABS Desk began implementing the plan by taking a very

¹⁶⁶⁵ 2/14/2007 email from Daniel Sparks, "Post," GS MBS-E-009635410, Hearing Exhibit 4/27-8.

¹⁶⁶⁶ 3/21/2007 email from Daniel Sparks to Tom Montag, GS MBS-E-010629379, Hearing Exhibit 4/27-21. See also 2/19/2007 email from Mr. Sparks to Mr. Montag, "2 things," GS MBS-E-010378492 ("Please send a short note to Josh Birnbaum, Mike Swenson and David Lehman telling them great week – short singles and short CDOs."); 2/28/2007 email from Michael Sherwood to Messrs. Sparks, Swenson, Birnbaum and Lehman, "ABX/Single name notional/risk history," GS MBS-E-010389296 (Mr. Sherwood, a London managing director and member of the Firmwide Risk Committee, wrote: "Many congrats on last few weeks trading ... keep it up!").

¹⁶⁶⁷ 2/8/2007 email from Daniel Sparks, "Post," GS MBS-E-002201668, Hearing Exhibit 4/27-7.

¹⁶⁶⁸ Id.; see also 3/10/2007 email from Mr. Dinias to Daniel Sparks, "Mortgage Presentation to the board," GS MBS-E-013323395, Hearing Exhibit 4/27-17; 3/11/2007 email from Daniel Sparks, "Risk Changes Over Quarter," GS MBS-E-010400546, Hearing Exhibit 4/27-18; cf. 3/27/2007 Presentation to GS Board of Directors, "Subprime Mortgage Business," GS MBS-E-005565527, Hearing Exhibit 4/27-22.

¹⁶⁶⁹ 9/26/2007 2007 EMD Reviews, Joshua Birnbaum Self-Review, Hearing Exhibit 4/27-55c. In his self-review, Mr. Birnbaum provided a detailed explanation of his reasons for recommending that the SPG Desk go "VERY short": "(1) Given how much ABX we had purchased through the broker market in 2006, the world would think GS was very long for the foreseeable future. We could use that fear to our advantage if we could flip our risk, (2) After unsuccessfully trying to sell our long to some of [a Goldman salesperson's] accounts, I realized traditional distressed buyers were no more likely to buy ABX at 85, 75, 65, etc. than at 95. The cash flow was just too binary, so there would be little support if negative momentum began, (3) The fundamentals for mortgage credit were undeniably deteriorating, (4) CDO managers were in denial ... [their positive market] sentiments would allow us to amass large amounts of cheap single name protection if we desired, and (5) If the market truly tanked, the already large CDO warehouses would have to liquidate, further exacerbating the move and ultimately allowing us to cover." Id.

¹⁶⁷⁰ Id.

large short position in single name CDS contracts referencing RMBS and CDO securities to offset the Department's remaining ABX long position:

“After socializing the plan with [Daniel] Sparks and ultimately [Richard] Ruzika, we implemented the plan by hitting on almost [every] single name CDO protection buying opportunity in a 2-month period. Much of the plan began working by February when the market dropped 25 points and our profitable year was underway.”¹⁶⁷¹

By clearing the plan with Mr. Sparks and Mr. Ruzika first, SPG Trading Desk informed senior management of its intent to use the firm's capital to build the net short position. Mr. Birnbaum also wrote:

“When we were socializing our plan to get short in the beginning of the year, I put together a tool . . . quantifying our position risk and the p&l [profit and loss] under various market level scenarios. I believe this was key for senior management to gain confidence that we were taking controlled and quantifiable risk that was well understood.”¹⁶⁷²

The Mortgage Department's lead trader in single name CDS contracts referencing RMBS securities, Deeb Salem, also described the plan in his 2007 performance self-evaluation:

“Mike [Swenson], Josh [Birnbaum] and I were able to learn from our bad long position at the end of 2006 and layout the game plan to put on an enormous directional short. The results of that are obvious.”¹⁶⁷³

In an interview, Mr. Salem told the Subcommittee that the “obvious” results he was referring to were the desk's resulting profits.¹⁶⁷⁴

The ABS Desk within the Structured Product Group (SPG) used CDS contracts to short RMBS and CDO securities as well as the ABX Index. The Correlation Desk within SPG used a different technique, obtaining approval to use a Goldman-designed CDO platform, Abacus, “to short structured product CDOs in bulk. The ABACUS transactions are currently one of the unique formats available to . . . [short] in large size on this type of structured product risk.”¹⁶⁷⁵

From January to late February, the Mortgage Department continued to pile on short positions in the subprime mortgage market.¹⁶⁷⁶ By the end of the first quarter in 2007, it had built a

¹⁶⁷¹ Id.

¹⁶⁷² Id.

¹⁶⁷³ Salem 2007 Self-Review at GS-PSI-03157 at 71-72.

¹⁶⁷⁴ Subcommittee interview of Deeb Salem (10/6/2010).

¹⁶⁷⁵ 3/12/2007 Mortgage Capital Committee memo, “ABACUS Transaction to be Lightly-Managed by Lion Capital,” at 2, GS MBS-E-002665382, Hearing Exhibit 4/27-150.

¹⁶⁷⁶ See 3/10/2007 email from Mr. Dinias to Daniel Sparks, “Mortgage Presentation to the board,” GS MBS-E-013323395, Hearing Exhibit 4/27-17; 3/11/2007 email from Daniel Sparks, “Risk Changes Over Quarter,” GS MBS-E-010400546, Hearing Exhibit 4/27-18; 3/27/2007 presentation to GS Board of Directors, “Subprime Mortgage

\$10 billion net short position. In a later performance self-evaluation, Mr. Salem described the aggregate \$10 billion net short position as “HUGE” and “enormous.”¹⁶⁷⁷ A Goldman senior executive, Thomas Montag, later referred to a net short position of \$3 billion in subprime mortgage backed securities as “huge and outsized.”¹⁶⁷⁸ Goldman’s net short position in February 2007 was more than three times that size.

Profiting from the First Net Short. In February 2007, Goldman’s senior management decided that the \$10 billion net short position had become too risky, and ordered the Mortgage Department to cover a portion of the short. Covering some of the short not only reduced the risk, but also locked in some of the profit associated with the position.

In late February 2007, the Mortgage Department’s net short position, coupled with added volatility in the subprime mortgage market, caused a sharp increase in the Department’s risk profile, as measured by Value at Risk or “VAR.” Goldman had assigned a VAR limit of \$35 million to the Mortgage Department.¹⁶⁷⁹ In November 2006, the Department’s reported VAR was \$13 million, well below its limit.¹⁶⁸⁰ By late February 2007, however, its VAR had reached \$85 million – an increase of over 550%.¹⁶⁸¹

Goldman senior management closely monitored the Department’s increasing VAR. On February 23, 2007, Goldman risk controllers told senior executives that the Mortgage Department’s increasing VAR was “primarily driven by a combination of increased volatility in ABX market and the [SPG] desk increasing their net short risk in RMBS subprime sector.”¹⁶⁸² On February 14, 2007, Justin Gmelich, a managing director asked to help Mr. Sparks with the Mortgage Department on a short term basis, sent an email to Mr. Montag expressing unease with the Department’s increasing risk profile:

“Abx risk should be working to get closer to home. My opinion, singles v. short index is too big (no news here). Abx correlation trade is good. I think we should be covering a bit of our short. There is a lot to do.”¹⁶⁸³

Business,” at 8, GS MBS-E-005565527, Hearing Exhibit 4/27-22 [footnote omitted].

¹⁶⁷⁷ Salem 2007 Self-Evaluation [emphasis in original].

¹⁶⁷⁸ 8/23/2007 email from Tom Montag, “Current Outstanding Notional SN ames,” GS MBS-E-010621231.

¹⁶⁷⁹ 2/8/2007 email from Bill McMahon, “VaR limit for Mtg SPG,” GS MBS-E-009980807.

¹⁶⁸⁰ 2/23/2007 Goldman internal document, “Mortgage VaR Change (Q1’07 vs. Q4’06),” GS MBS-E-010037310, Hearing Exhibit 4/27-12; 3/8/2007 email from Jha Arbind, “Risk changes over the quarter,” GS MBS-E-010400546, Hearing Exhibit 4/27-18.

¹⁶⁸¹ Id.

¹⁶⁸² 2/23/2007 Goldman internal document, “Mortgage VaR Change (Q1’07 vs. Q4’06),” GS MBS-E-010037310, Hearing Exhibit 4/27-12.

¹⁶⁸³ 2/14/2007 email from Mr. Gmelich to Tom Montag, GS MBS-E-016165580.

Mr. Montag forwarded Mr. Gmelich's email to Goldman's Co-Presidents, Gary Cohn and Jon Winkelried, as well as to Mr. Ruzika, commenting: "clearly need to opportunistically take position down."¹⁶⁸⁴

On February 21, 2007, senior management told Mr. Sparks to reduce the size of the Mortgage Department's \$10 billion net short position by covering \$3 billion.¹⁶⁸⁵ Mr. Sparks communicated the decision to personnel on the SPG Desk:

"We need to buy back \$1 billion single names and \$2 billion of the stuff below [CDO securities] – today. I know that sounds huge, but you can do it – spend bid/offer, pay through the market, whatever to get it done.

It is a great time to do it – bad news on HPA [housing price appreciation], originators pulling out, recent upticks in unemployment, originator pain. . . .

This is a time to just do it, show respect for risk, and show the ability to listen and execute firm directives.

You called the trade right, now monetize a lot of it.

You guys are doing very well."¹⁶⁸⁶

Although some SPG traders disagreed with the decision,¹⁶⁸⁷ the Mortgage Department took immediate action in response to the order. By the end of the day, February 21, 2007, Mr. Sparks reported to senior management that the ABS Desk had covered \$400 million in single name CDS contracts, but had not been able to reach the \$3 billion goal:

"Market sold off significantly (BBB and BBB- indices over 100 bps wider) We covered over \$400mm single names – still significant work to do. ...

"We are net short, but mostly in single name CDS and some tranching index vs the some [sic] index longs. We are working to cover more, but liquidity makes it tough. Volatility is causing our VAR numbers to grow dramatically."¹⁶⁸⁸

¹⁶⁸⁴ Id.

¹⁶⁸⁵ 2/22/2007 email from Daniel Sparks to Messrs. Birnbaum, Swenson and Lehman, "Block size tranche protection offers for Paulson or others," GS MBS-E-010381411.

¹⁶⁸⁶ Id.

¹⁶⁸⁷ Subcommittee interview of Joshua Birnbaum (4/22/2010) (Mr. Birnbaum wanted to continue to hold the short position, rather than cover it, since he thought it would earn additional profit); see also 2007 Birnbaum Self-Review, Hearing Exhibit 4/27-55c (Mr. Birnbaum wrote that he should have argued more forcefully against covering the shorts in February 2007).

¹⁶⁸⁸ 2/21/2007 email chain from Daniel Sparks, "Mortgages today," GS MBS-E-010381094, Hearing Exhibit 4/27-10. In response, Mr. Viniar wrote to Mr. Sparks: "Good start. Keep covering." 2/21/2007 email from David Viniar to Daniel Sparks, "Mortgages today," GS MBS-E-009757841. In another email, Mr. Montag wrote: "How hard are

Mr. Ruzika sent an email to Mr. Montag and Mr. Sparks commenting on the covering efforts:

“I think Dan’s guys are being practical. I know Bill [McMahon] was upset but covering the single name bbb and bbb- is prudent as it cuts vol and var the most. ... Guys didn’t give up bid ask but they also didn’t stand on the bid.”¹⁶⁸⁹

The Mortgage Department found that its single name CDS contracts were difficult to cover, in part because many of the referenced RMBS and CDO securities had already been acquired by securitizers for inclusion in CDOs and so were not for sale.¹⁶⁹⁰ That meant the SPG Trading Desk could not cover its single name short positions simply by buying the offsetting long asset – the RMBS and CDO securities were no longer available for purchase.¹⁶⁹¹ Instead, the SPG Desk had to use offsetting CDS contracts, ones which referenced the same RMBS or CDO securities, but in which Goldman took the long side.¹⁶⁹² The problem with those contracts, however, was that many market participants had already acquired short positions on RMBS and CDO securities and weren’t in the market to buy more. In addition, their purchases had driven up the price of short contracts. Between market saturation and high price levels, Goldman found few buyers when it wanted to cover its shorts.¹⁶⁹³ The Mortgage Department’s inability to cover its single name shorts concerned Messrs. Montag and Ruzika, who continued to press for quick progress.

On February 25, 2007, Mr. Sparks reported to Messrs. Montag and Ruzika on the Mortgage Department’s progress after a week of effort:

“Cover[ed] around [\$]1.55 billion single name subprime BBB- CDS and about \$700mm single name subprime BBB CDS. The desk also net sold over \$400mm BBB- ABX index. Desk is net short, but less than before. Shorts are in senior tranches of indexes sold and in single names. Plan is to continue to trade from short side, cover more single names and sell BBB- index outright.”¹⁶⁹⁴

On February 27, 2007, Mr. Ruzika sent an email to Messrs. Montag, Gmelich and Sparks indicating that the Mortgage Department needed to reduce its net short position by covering even more than \$3 billion in shorts: “There are two issues – first is the size of the short – I want to see

we pushing covering some of singlename. Let’s not be bidoffer foolish. The downside isn’t worth the upside imo.” 2/21/2007 email from Tom Montag to Daniel Sparks, GS MBS-E-017237596. Mr. Sparks replied: “Pushing hard, but need to be realistic with respect to expectation on liquidity. Very hard to force it. Trade has been right, and should continue to run (though there will be bumps). Entire team knows we have to reduce and is focused on it.” Id. Mr. Montag responded: “If you sold it in a bad market u ough[t] to be able to buy it.” Id.

¹⁶⁸⁹ 2/22/2007 email from Richard Ruzika to Tom Montag and Daniel Sparks, GS MBS-E-010381967.

¹⁶⁹⁰ Subcommittee interview of Michael Swenson (4/16/2010).

¹⁶⁹¹ Id.

¹⁶⁹² Id.

¹⁶⁹³ A similar situation existed at the time in the market for commercial mortgage backed securities (CMBS). In a February email to Mr. Lehman, a CMBS trader remarked: “It’s amazing that everyone was lifting [accepting bids on] cmbs 1 and 2 [CMBX indices], but NOBODY will bid single names.” 2/23/2007 email from [CMBS trader] to David Lehman, “CT CDO w/ [Bank],” GS MBS-E-011270138-39 [emphasis in original].

¹⁶⁹⁴ 2/25/2007 email from Daniel Sparks to Tom Montag, “Questions you had asked,” GS MBS-E-010987763.

us getting the short down to 4.5 bil[lion] net. ... Second – the basis in the book needs to be reduced as well.”¹⁶⁹⁵ Less than an hour later, Mr. Ruzika sent Mr. Sparks another email at the conclusion of a meeting of Goldman’s Operating Committee (OpCom), comprised of Goldman’s senior executives. In an email entitled, “OpCom Directive,” Mr. Ruzika wrote:

“Dan. Directly from the opcom we have to pick up the pace of buying back single names even if it costs us some money. I know your guys are trying but we can pay away some if it helps to get size done.”¹⁶⁹⁶

In response, Mr. Sparks immediately sent an email to Mr. Swenson, Mr. Lehman, and Mr. Birnbaum regarding the “Opcom directive.” He wrote: “Buyback single names in size today.”¹⁶⁹⁷ He also sent the SPG and CDO Desk managers a set of “Goals”:

“Reduce risk. That means:

- (1) get m[o]re super-seniors done on CDOs or take other steps to reduce CDO pipeline risk;
- (2) cover more single name shorts BBB- and BBB
- (3) reduce the basis trade between BBB- index and BBB- single names
- (4) reduce the index/index trades in A and AAA.”¹⁶⁹⁸

Mr. Sparks’ list of goals showed that he was closely tracking the SPG Desk’s activities and directed them to reduce rather than eliminate its basis and index trades.

At the end of February, the Mortgage Department’s efforts got a substantial boost when a new hedge fund client, Harbinger, purchased the short side of \$4 billion in single name CDS contracts referencing RMBS securities.¹⁶⁹⁹ By taking the long side in those contracts, the Mortgage Department was able to cover its shorts by the same amount.

¹⁶⁹⁵ 2/27/2007 email from Richard Ruzika to Tom Montag, Justin Gmelich, and Daniel Sparks, GS MBS-E-002204942.

¹⁶⁹⁶ Id.

¹⁶⁹⁷ 2/27/2007 email from Daniel Sparks, “Opcom Directive,” GS MBS-E-017250218.

¹⁶⁹⁸ 2/27/2007 email from Daniel Sparks, “Goals,” GS MBS-E-010387086, Hearing Exhibit 4/27-11.

¹⁶⁹⁹ See, e.g., 2/22/2007 Goldman internal emails, GS MBS-E-018938493, GS MBS-E-018940734; 2/27/2007 email from Michael Swenson to Bill McMahon, GS MBS-E-012502371 (“Bought 1.5bb of sn baa3 risk from harbinger.”); 3/1/2007 email from Daniel Sparks, “SN Protection Offers for Harbinger (50 names),” GS MBS-E-019460848 (“Trade was executed at +725 ”); 3/3/2007 email to Michael Swenson and Daniel Sparks, “Harbinger Update,” GS MBS-E-010707216. As a result, Harbinger became Goldman’s largest hedge fund counterparty credit risk: “Harbinger is our #1 hedge fund exposure globally. We had to explain this to the SEC this month.” 4/20/2007 Goldman internal email, “Harbinger didn’t add the last piece we had spoke of, but are now thinking of adding ~50mm,” GS MBS-E-012523933. Harbinger was also instrumental in Goldman’s second round of short covering efforts in August 2007. See, e.g., 7/30/2007 email to Michael Swenson, “Harbinger Single-A Offerings.xls,” GS MBS-E-012374026; 8/23/2007 email from Michael Swenson, “Harbinger Post,” GS MBS-E-009739009.

On February 28, 2007, Mr. Sparks reported at a Firmwide Risk Committee meeting on the Mortgage Department's progress in reducing its VAR.¹⁷⁰⁰ The committee minutes reflect that Mr. Sparks' report stated the following:

- “–VaR up due to vols. Business working to reduce exposures; a lot of shorts already covered.
- ABX widened 500bp on the week. Business covered \$4BN in single names.
- Noted a lot of negative news in the subprime market with rumors on everyone.
- CDS on CDOs started to widen significantly over the week
- Business continuing to clear out loans.”¹⁷⁰¹

Five days later, on March 5, 2007, Mr. Montag requested another update: “Do we think the business is net short, long or flat right now?” Mr. Sparks responded: “We think the overall business is net short.” Mr. Gmelich added: “I think we have a very modest short across all the businesses at current market levels. I concur with Dan.”¹⁷⁰²

The Mortgage Department's efforts to cover its \$10 billion net short position reduced its VAR; it also allowed the Department to lock in and record large profits from its net shorts. In March 2007, in connection with Goldman's quarterly earnings call with analysts, “Mortgage Talking Points” prepared for Mr. Viniar stated that the Department's revenues were primarily the result of its short positions:

“The Mortgage business' revenues were primarily driven by synthetic short positions concentrated in BBB/BBB- sub prime exposure and single A CDO exposure which benefitted from spread widening.”¹⁷⁰³

At the end of the first quarter of 2007, the Mortgage Department reported total net revenues of \$368 million.¹⁷⁰⁴

The Mortgage Department continued its efforts to cover the rest of its short position. On March 14, 2007, Mr. Sparks reported to Messrs. Cohn and Montag that a Goldman salesperson

¹⁷⁰⁰ 2/28/2006 Goldman internal memorandum, “Firmwide Risk Committee: February 28th FWR Minutes,” GS MBS-E-009687468, Hearing Exhibit 4/27-13 [sic - correct year is 2007].

¹⁷⁰¹ Id. See also 2007 Swenson Self-Review (“we prudently covered \$5bb of single-name shorts at the all time lows at the time back in February”), Hearing Exhibit 4/27-55b.

¹⁷⁰² 3/5/2007 email from Tom Montag, GS MBS-E-010393092. Goldman COO Gary Cohn expressed concern that a positive move in the markets would cause the Mortgage Department to incur large losses due to its net short: “A big plus would hurt the Mortgage business but Justin [Gmelich] thinks he has a big trade lined up for the morning to get us out of a bunch of our short risk.” 3/5/2007 email from Gary Cohn, GS MBS-E-009656525, Hearing Exhibit 4/27-15. The big trade referred to by Mr. Cohn was one of the Harbinger trades that enabled Goldman to cover \$4 billion of its single name CDS short positions.

¹⁷⁰³ 3/9/2007 email to David Viniar, “Mortgage Talking Points for Earnings Call,” GS MBS-E-009762678, Hearing Exhibit 4/27-16.

¹⁷⁰⁴ 9/17/2007 Presentation to GS Board of Directors, Residential Mortgage Business at 5, GS MBS-E-001793840, Hearing Exhibit 4/27-41.

“did a fantastic job for the desk by bringing in \$1.2BB [billion] in A-rated single names today.”¹⁷⁰⁵ Mr. Montag in turn reported to Goldman CEO Lloyd Blankfein: “Covered another 1.2 billion in shorts in mortgages—almost flat—now need to reduce risk.”¹⁷⁰⁶

That same day, March 14, 2007, in response to his request, the Mortgage Department sent Mr. Ruzika a detailed breakdown of its subprime mortgage holdings.¹⁷⁰⁷ It disclosed that, despite offsetting short and long positions in a number of areas, the SPG Desk still held three sizeable net short positions involving about \$2.6 billion in ABX assets, \$2.2 billion in single name CDS contracts, and \$2 billion in mezzanine CDOs.¹⁷⁰⁸

Goldman personnel prepared the following chart tracking the SPG Trading Desk’s efforts to cover its BBB and BBB- net short position from February through mid-May 2007.¹⁷⁰⁹

[SEE CHART NEXT PAGE: *Notionals (ABX convention)*, prepared by Goldman Sachs, reformatted by the Permanent Subcommittee on Investigations to be readable in black and white print, GS MBS-E-012890600.]

AAA Disaster Insurance. Despite all the attention paid to the Mortgage Department’s subprime mortgage holdings beginning in December 2006, one large short position seemed to have escaped the directives of senior management in the first quarter of 2007 to cover the Department’s shorts. It consisted of a massive \$9 billion net short position made up of CDS contracts referencing an ABX index that tracked a basket of 20 AAA rated subprime RMBS securities.¹⁷¹⁰ Goldman representatives could not recall when that short position was acquired, who acquired it, or whether proprietary funds were used,¹⁷¹¹ but the CDS contracts appear to have been held at a relatively constant level of \$9 billion from some time in 2006 until July 2007.¹⁷¹² Mr. Sparks told the Subcommittee that the net short position served as a form of low cost “disaster insurance” that would pay off only in a “worst case” scenario – when even the top tier AAA rated RMBS securities, among the safest of all subprime mortgage investments, lost value.¹⁷¹³

¹⁷⁰⁵ 3/17/2007 email from Daniel Sparks and Tom Montag, “Cactus Delivers,” GS MBS-E-009632839.

¹⁷⁰⁶ Id. Mr. Montag’s comment suggests that he may have wanted the Mortgage Department to reduce the size of both its longs and shorts to reduce its overall risk, or to reduce its basis risk, the risk that arises when two different types of assets are used to offset one another, and the assets are imperfectly matched.

¹⁷⁰⁷ 3/14/2007 email from David Lehman, “ABS Trading - Subprime risk,” GS MBS-E-010397102.

¹⁷⁰⁸ Id.

¹⁷⁰⁹ See “Notionals (ABX Convention),” chart attached to 5/23/2007 email from Kevin Kao to Joshua Birnbaum, “RMBS Subprime risk history as of 18May07,” GS MBS-E-012890599.

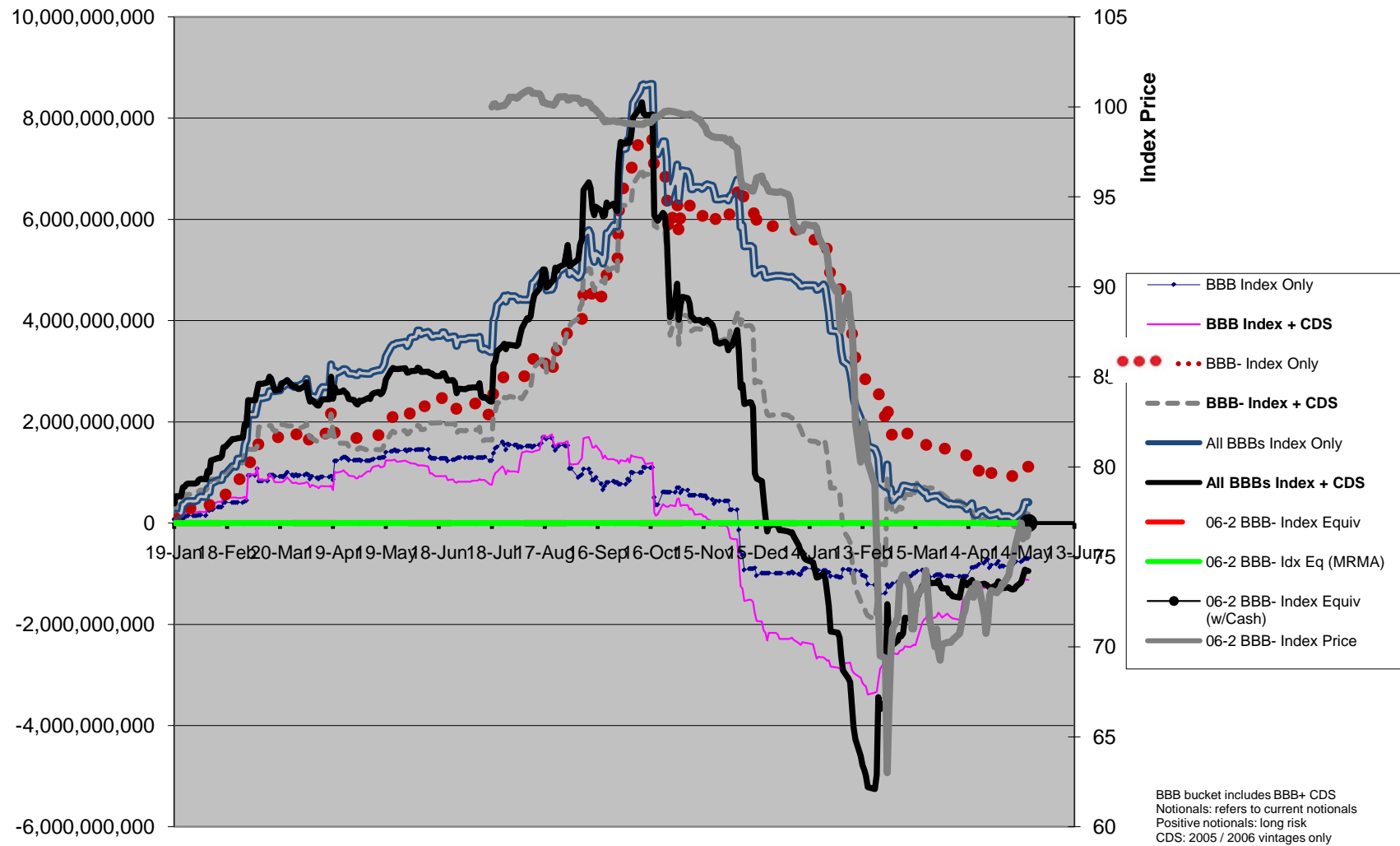
¹⁷¹⁰ See, e.g., 3/8/2007 email from Mr. Sparks, “Mortgage Risk,” GS MBS-E-002206279, Hearing Exhibit 4/27-75 (noting Mortgage Department’s \$9 billion short position on the AAA ABX index).

¹⁷¹¹ Subcommittee interview of Daniel Sparks (4/15/2010), David Lehman (4/12/2010), Joshua Birnbaum (4/22/2010), and Michael Swenson (4/16/2010).

¹⁷¹² See chart entitled “Goldman Sachs Mortgage Department Total Net Short Position, February-December 2007 in \$ Billions,” prepared by the Subcommittee, April 2010, updated January 2011, derived from Goldman Mortgage Strategies and Mortgage Department Top Sheets.

¹⁷¹³ Subcommittee interview of Daniel Sparks (10/3/2010).

Notionals (ABX convention)



Prepared by the U.S. Senate Permanent Subcommittee on Investigations, February 2011.
 Derived from Goldman Sachs document, GS MBS-E-012890600.

The most comprehensive description of the AAA ABX short position located by the Subcommittee was a chart prepared by a Mortgage Department analyst in August 2007. The analyst sent the chart to Mr. Birnbaum at his request, to show the Mortgage Department's overall position in synthetic products, including CDS contracts referencing ABX, RMBS, and CDO assets.¹⁷¹⁴ The chart includes the AAA ABX short position as a long, nearly flat line showing an approximately \$9 billion net short until early July 2007, when the value turned sharply upward.¹⁷¹⁵ The analyst wrote in an August email, after much of the AAA ABX net short position had been covered: "M[ortgage] department is short ABX AAA [\$]8.7b[illion], splitting among ABS/Alt A/prime/conduit in the beginning of fiscal year 2007, and is now long [\$]410m[illion]." While this chart and the covering email do not reveal the origin of the AAA short, they indicate that, by early 2007, it was split between the ABS Trading Desk in the Structured Product Group and three desks in Mr. Gasvoda's Residential Whole Loan Trading area – the Alt A Trading Desk under Genevieve Nestor, the Prime Trading Desk under Clay DeJacinto, and the Conduit for conducting subprime loan pool securitizations under Matt Nichols.

Goldman emails provide additional information about the AAA ABX short. One series of emails, from March 2007, indicates that about \$8 billion of the \$9 billion AAA short was then held by the three desks in Mr. Gasvoda's Residential Whole Loan Trading area, and that he favored maintaining the short, because it provided billions of dollars in coverage and cost only \$5 million per quarter in premiums to maintain. On March 4, 2007, Mr. Gasvoda emailed Mr. Sparks with "Quick Thoughts on ABX AAA risk":

"I talked to [Matt] Nichols and Clay [DeJacinto] about the AAA ABX short. Think it offers a good amount downside protection w/ relatively light pain if we're wrong. Below is a \$8B ABX AAA short #s. It costs us \$5mm/quarter to carry. On the downside, if the market rallies to par ... we drop \$50mm. Taking it to 0 spread we lose \$80mm.

"On the upside front, we get good jump risk. If AAA's widen to current AA levels ... we gain \$70mm and if spreads move up to super senior risk pricing in CDOs ... we're up \$190mm.

¹⁷¹⁴ 8/17/2007 Goldman internal chart, "RMBS Subprime Notional History (Mtg Dept.)," GS MBS-E-012928391, Hearing Exhibit 4/27-56a. The analyst's cover email stated: "The attached spreadsheet covers the single name and ABX positions of the entire mortgage department for the fiscal year 2007. I spot checked the numbers with risk reports they tie out well." See also 8/17/2007 email from Joshua Birnbaum, GS MBS-012928388, Hearing Exhibit 4/27-56b.

¹⁷¹⁵ When shown the chart during his interview, Mr. Sparks told the Subcommittee he was unfamiliar with it and pointed what he believed to be an anomaly related to its depiction of the Mortgage Department's short position involving BBB rated RMBS securities. He also indicated that he could not confirm its depiction of the AAA ABX short position. Since multiple Goldman email messages confirm the existence of the AAA ABX short position during most of Goldman's fiscal year 2007, however, the chart's depiction of that position as a nearly flat line at about \$9 billion short until July 2007 appears consistent with the other evidence.

“Net, think this is a good position to have on given downside protection and relatively light upside pain. If we get an opportunity to buy some back next week, think we should but I’m thinking buy back \$1-2B, not \$8B.”¹⁷¹⁶

Mr. Sparks replied to Mr. Gasvoda: “Good trading response and thought process. We need to consider daily.”¹⁷¹⁷

The next day, March 5, 2007, the Residential Whole Loan Trading Desk under Mr. Gasvoda and the CDO Origination Desk under Peter Ostrem exchanged information about the “ABX hedges” that each business was carrying to reduce the risk associated with its respective long assets.¹⁷¹⁸ The Residential Whole Loan Trading Desk reported: “[b]elow are all our ABX hedges across our Resi Credit + Prime books,” which included approximately \$7 billion in AAA ABX holdings.¹⁷¹⁹ The CDO Origination Desk, in turn, reported holding another \$2.25 billion in AAA ABX “hedges.”¹⁷²⁰ A few days earlier, with respect to the CDO Origination Desk’s holdings, Mr. Egol had remarked: “Love that huge AAA abx short.”¹⁷²¹

Although the \$7 billion figure reported by Mr. Gasvoda’s group on March 5 was \$1 billion less than the \$8 billion reported the day before,¹⁷²² and the \$2.25 billion reported by the CDO Origination Desk was larger than the \$1 billion that the August 2007 email later ascribed to the Structured Product Group, all of the evidence indicates that Goldman had a massive AAA ABX short position in 2007. A few days later, on March 8, 2007, in an email to senior management entitled, “Mortgage Risk,” Mr. Sparks described the AAA ABX short as a hedge against long positions in the Department’s loan books and CDO warehouse accounts:

“[O]verall the department has significant shorts against loan books and the CDO warehouse. The bulk of these shorts (\$9BB) are on the AAA index, so the downside is limited as the index trades at 99.”¹⁷²³

¹⁷¹⁶ 3/4/2007 email from Kevin Gasvoda to Daniel Sparks, “Quick thoughts on ABX AAA risk,” GS MBS-E-010398072.

¹⁷¹⁷ *Id.* Despite Mr. Gasvoda’s suggestion that he might try to cover a portion of the \$8 billion net short, the AAA ABX short position in Mr. Gasvoda’s area appears to have remained unchanged until around July 2007. 8/17/2007 Goldman internal chart, “RMBS Subprime Notional History (Mtg Dept.),” GS MBS-E-012928391, Hearing Exhibit 4/27-56a.

¹⁷¹⁸ Goldman’s hedging practice was that each desk was responsible for its own hedges. Accordingly, different desks would not necessarily share information about their respective hedges, even if both were hedging with the same product, such as an ABX short.

¹⁷¹⁹ 3/5/2007 email from Cyrus Pouraghabagher, “ABX hedges for Resi businesses,” GS MBS-E-012085546.

¹⁷²⁰ *Id.*

¹⁷²¹ 2/28/2007 email from Jonathan Egol to Fabrice Tourre, “Hedges Status Report,” GS MBS-E-002628642.

¹⁷²² The report from Mr. Gasvoda’s group may have inadvertently omitted a particular loan book that was holding the additional \$1 billion in hedges, the figure may be a typographical error, or the group may have chosen not to disclose some of its hedges. The Goldman personnel interviewed by the Subcommittee were unable to explain the discrepancy.

¹⁷²³ 3/8/2007 email from Daniel Sparks, “Mortgage Risk,” GS MBS-E-002206279, Hearing Exhibit 4/27-75.

In this email to senior executives, Mr. Sparks put the size of the AAA ABX short at \$9 billion, which seems to have been the amount most commonly cited for the short.¹⁷²⁴

When asked about the Gasvoda email which described the AAA ABX short as an inexpensive “jump risk,”¹⁷²⁵ Mr. Sparks told the Subcommittee that the email was referring to acquiring “jump insurance” against a sudden, huge loss arising from the total default of an asset.¹⁷²⁶ In this context, the short was acquired as insurance against the unlikely event that a significant portion of the AAA rated RMBS securities identified in the ABX Index defaulted simultaneously.¹⁷²⁷ Since AAA rated RMBS securities were typically the safest of the RMBS securities offered for sale, it was widely believed in 2006 and 2007, that they would remain untouched even if defaulting mortgages harmed riskier RMBS securities. By shorting AAA rated RMBS securities, Goldman was insuring against a “tail risk” – the risk of an event that appeared to have a very small probability of ever actually occurring, but which was likely to cause catastrophic losses if it did occur. Mr. Sparks also explained that, since the subprime mortgage industry considered losses in AAA rated RMBS securities to be exceedingly unlikely, the price of acquiring and holding such a short position was relatively inexpensive.¹⁷²⁸

From the time the \$9 billion AAA ABX short was acquired in 2006 until July 2007, it was not included in Goldman senior management’s directives to cover shorts, and it does not appear to have been part of the Mortgage Department’s efforts to get “closer to home,” build a net short position in early 2007, or cover that net short in February and March.¹⁷²⁹ The \$9 billion AAA ABX short may have been left out of management’s directives on the first net short, because it was serving as a hedge for long subprime mortgage assets held by several Mortgage Department desks.¹⁷³⁰ As those long assets were sold or written down, however, no apparent steps were taken to unwind or remove the \$9 billion AAA ABX hedge.¹⁷³¹ By June 2007, it remained almost entirely intact as a net short. The value, cost, and risk associated with the AAA ABX short had been monitored, but not acted upon, until the short suddenly began approaching profitability and

¹⁷²⁴ Id.; see also 8/23/2007 email from Tom Montag to Lloyd Blankfein, GS MBS-E-009585951, Hearing Exhibit 4/27-37 (Mortgage Department “bought back 9 billion of AAA abx index over last two weeks.”); 8/23/2007 email from Tom Montag to Gary Cohn and David Viniar, “Harbinger Post,” GS MBS-E-009739009.

¹⁷²⁵ 3/4/2007 email Kevin Gasvoda to Daniel Sparks, “Quick thoughts on ABX AAA risk,” GS MBS-E-010398072 (“we get good jump risk . . . Net, think this is a good position to have on given downside protection and relatively light upside pain.”).

¹⁷²⁶ Subcommittee interview of Daniel Sparks (4/15/2010).

¹⁷²⁷ Id.

¹⁷²⁸ Id.

¹⁷²⁹ See 8/17/2007 Goldman internal chart, “RMBS Subprime Notional History (Mtg Dept.),” GS MBS-E-012928391, Hearing Exhibit 4/27-56a.

¹⁷³⁰ The AAA ABX short appears to have served as a hedge for long assets in the Whole Loan and CDO Origination areas in March 2007. Many of those assets were sold during the spring and summer of 2007. If a hedged asset is sold, the hedge is ordinarily unwound commensurately. See, e.g., 5/30/2007 email from David Lehman, “ABX hedges – Buy order,” GS MBS-E-011106690 (directing the unwinding of certain short ABX hedges held against the CDO Origination Desk when the CDO positions were transferred to another desk).

¹⁷³¹ See 8/17/2007 Goldman internal chart, “RMBS Subprime Notional History (Mtg Dept.),” GS MBS-E-012928391, Hearing Exhibit 4/27-56a.

began contributing to high VAR levels for the Mortgage Department. It then drew the attention of Goldman senior management which included the AAA ABX short in its directive to cover the firm's second big net short. Covering the AAA ABX net short contributed to the multi-billion-dollar profits realized by Goldman in the third and fourth quarters of 2007.

Report To Board. On March 26, 2007, Mr. Sparks and Goldman senior executives gave a presentation to Goldman's Board of Directors regarding the firm's subprime mortgage business.¹⁷³² The presentation recapped for the Board the various steps the Mortgage Department had taken since December 2006, in response to the deterioration of the subprime mortgage market.¹⁷³³ The presentation noted, among other measures, the following steps:

- “– GS reduces CDO activity
- Residual assets marked down to reflect market deterioration
- GS reverses long market position through purchases of single name CDS and reductions of ABX
- GS effectively halts new purchases of sub-prime loan pools through conservative bids
- Warehouse lending business reduced
- EPD [early payment default] claims continue to increase as market environment continues to soften.”¹⁷³⁴

By the time this presentation was given to the Board of Directors, Goldman's Mortgage Department had swung from a \$6 billion net long position in December 2006, to a \$10 billion net short position in February 2007, and then acted to cover much of that net short. Despite having to sell billions of dollars in RMBS and CDO securities and whole loans at low prices, and enter into billions of dollars of offsetting long CDS contracts, Goldman's mortgage business managed to book net revenues for the first quarter totaling \$368 million.¹⁷³⁵

In a section entitled, “Lessons Learned,” the presentation stated: “Capital markets and financial innovation spread and increase risk,”¹⁷³⁶ an acknowledgment by Goldman that “financial innovation,” which in this context included ABX, CDO, and CDS instruments, had magnified the risk in the U.S. mortgage market.

¹⁷³² 3/26/2007 Goldman presentation to Board of Directors, “Subprime Mortgage Business,” GS MBS-E-005565527, Hearing Exhibit 4/27-22. While the final version of the presentation indicated Goldman had an overall net long position in subprime assets by about \$900 million, a near-final draft of the presentation indicated that Goldman had an overall net short position of \$2.8 billion. 3/16/2007 draft presentation to Board of Directors by Daniel Sparks, “Subprime Mortgage Business,” GS MBS-E-002207710. The primary difference between the two figures appears to be the inclusion in the final version of Goldman's net long holdings of Alt A mortgages, even though Alt A assets are not usually considered to be subprime mortgages. Subcommittee interview of David Viniar (4/13/2010).

¹⁷³³ Id. at 4.

¹⁷³⁴ Id. at 8 [footnotes defining CDO and CDS omitted].

¹⁷³⁵ 9/17/2007 Presentation to Goldman Sachs Board of Directors, Residential Mortgage Business, at 5, GS MBS-E-001793840, Hearing Exhibit 4/27-41.

¹⁷³⁶ 3/26/2007 Goldman Sachs presentation to Board of Directors, “Subprime Mortgage Business,” GS MBS-E-005565527, Hearing Exhibit 4/27-22.

(c) Attempted Short Squeeze

In May 2007, Goldman's Structured Product Group (SPG) continued to work to cover the Mortgage Department's short position by offering to take the long side of CDS contracts referencing RMBS and CDO securities, but found few buyers. Many market participants had already shorted subprime mortgage assets, driving the price relatively high, and few wanted to buy additional short positions at the prevailing price. In order to turn the situation to its benefit, SPG's traders attempted to carry out a "short squeeze" of the subprime CDS market in May 2007.¹⁷³⁷

The ABS Desk's traders were already offering single name CDS contracts in which Goldman would take the long position, in order to cover the Mortgage Department's short position.¹⁷³⁸ To effectuate a short squeeze, they appear to have decided to offer the short positions on those contracts at lower and lower prices, in order to drive down the market price of subprime CDS shorts to artificially low levels. Once prices fell below what the existing CDS holders had paid for their short positions, the CDS holders would have to record a loss on their holdings and might have to post additional cash collateral with their opposing long parties. Goldman hoped the CDS holders would react by selling their short positions at the lower market price. When the sell off was large enough and the price low enough, Goldman planned to move in and buy more shorts for itself at the artificially low price.

This short-squeeze strategy was later laid out in a 2007 performance self-evaluation by one of the traders on Goldman's ABS Desk who participated in the activity, Deeb Salem. In the self-evaluation he provided to senior management, Mr. Salem wrote:

"In May, while we were remain[ing] as negative as ever on the fundamentals in sub-prime, the market was trading VERY SHORT, and susceptible to a squeeze. We began to encourage this squeeze, with plans of getting very short again, after the short squeezed [sic] cause[d] capitulation of these shorts. This strategy seemed do-able and brilliant, but once the negative fundamental news kept coming in at a tremendous rate, we stopped waiting for the shorts to capitulate, and instead just reinitiated shorts ourselves immediately."¹⁷³⁹

When interviewed by the Subcommittee, Mr. Salem denied that the ABS Desk ever intended to squeeze the market, and claimed that he had wrongly worded his self-evaluation.¹⁷⁴⁰ He said that reading his self-evaluation as a description of an intended short squeeze put too much emphasis on "words."¹⁷⁴¹

¹⁷³⁷ See, e.g., Salem 2007 Self-Review.

¹⁷³⁸ See, e.g. 4/5/2007 email from Deeb Salem, "let's sell ~200mm in Baa2 protection . . .," GS MBS-E-004516519 (Mr. Swenson's reply: "Make that 500mm").

¹⁷³⁹ Deeb Salem 2007 Self-Review [emphasis in original].

¹⁷⁴⁰ Subcommittee interview of Deeb Salem (10/6/2010).

¹⁷⁴¹ Id.

Mr. Salem's description of an attempted short squeeze by Goldman's Structured Product Group (SPG) is supported by other evidence. In May 2007, Michael Swenson, the head of both SPG and ABS Desks and Mr. Salem's supervisor, wrote emails that appear to confirm the attempted short squeeze. In the first email, dated May 25, 2007, Mr. Swenson wrote:

"We should be offering sn [single name] protection down on the offer side to the street on tier one stuff to cause maximum pain."¹⁷⁴²

Four days later, on May 29, 2007, Mr. Swenson followed up with another email:

"We should start killing the sn [single name] shorts in the street – let's pick some high quality stuff that guys are hoping is wider today and offer protection tight – this will have people totally demoralized."¹⁷⁴³

When asked about these emails, Mr. Swenson also denied that Goldman had attempted to squeeze the CDS short market. He claimed that the cost of single name CDS shorts had gone too high, and the purpose behind Goldman's actions was to restore balance to the market.¹⁷⁴⁴ Mr. Swenson could not explain, however, why in an effort to restore balance to the market, he used the phrases "cause maximum pain," and "this will have people totally demoralized."

Goldman documents show there was a plan and an attempt to conduct a short squeeze, despite the harm that might be caused to Goldman's clients. Contemporaneous emails further show that clients were complaining about a sudden markdown by Goldman in the value of their short positions, especially compared to prevailing market prices and the worsening of the subprime market itself.¹⁷⁴⁵

On May 18, 2007, a Friday, the ABS Desk marked down the value of many of its clients' CDS short positions. On Monday, May 21, Mr. Salem sent an email to Mr. Swenson and Edwin Chin entitled, "A few things . . . pain-related."¹⁷⁴⁶

"Guys r gonna complain about their marks [hedge fund] already emailed me. I would talk about the recent flow of OWICS [offers] and the levels ... they have been trading as the

¹⁷⁴² 5/25/2007 email from Michael Swenson to Edwin Chin and Deeb Salem, GS MBS-E-012443115.

¹⁷⁴³ 5/29/2007 email from Michael Swenson to Deeb Salem, "they want to think about doing this again," GS MBS-E-012561798.

¹⁷⁴⁴ Subcommittee interview of Michael Swenson (10/8/2010).

¹⁷⁴⁵ Goldman's CDS collateral agreements were usually bilateral, meaning collateral could flow either way, to the short or long party, depending upon price movements in the underlying assets. Subcommittee interview of Michael Swenson (10/18/2010). Clients wrote emails to Goldman questioning how they could owe collateral on CDS contracts they had only recently purchased from Goldman.

¹⁷⁴⁶ 5/21/2007 email from Deeb Salem to Michael Swenson and Edwin Chin, "A few things pain-related," GS MBS-E-021887795 [ellipses in original].

reason we moved marks on Friday. ... [Another customer] lost 6 pct based on fridays moves.”¹⁷⁴⁷

That same day, a Goldman sales representative sent Mr. Chin a complaint from a hedge fund customer named Stanfield Capital regarding the lower values assigned to its CDS short positions. The sales representative wrote:

“Stanfield feels we are marking them tighter than other dealers with whom they have similar protection. ...

“In addition, 14 of the 25 names below were marked over 100 bps [basis points] tighter week-on-week. That is a massive move and is creating major stress at the clients, as we can’t see a similar move in the broader market. ...

“Finally, be aware that Stanfield may look for you to offer protection very close to your mark. ... I’m hoping your attention to the marks below will defuse a situation in which they think we’re messing with them via our marks on their protection.”¹⁷⁴⁸

Mr. Chin forwarded the email to Mr. Swenson and Mr. Salem. Mr. Swenson replied: “We are ok with that they do not have much more gun powder.”¹⁷⁴⁹ Mr. Swenson’s response suggested that Goldman did not have to be concerned about Stanfield’s threat to buy CDS shorts at the same low price Goldman had applied to his CDS holdings, since Stanfield did not have the financial resources – the “gun powder” – to make a large purchase.

On May 24, 2007, the Stanfield trader wrote to Goldman that he had thought the purchase of the CDS contract signaled the beginning of a partnership between Stanfield and Goldman, but he had lost credibility with his company because of the CDS contracts and expressed concern that he may have been “naive to trust the pitch” from Goldman:

“When we put on the Single A protection trade the underlying names were suppose[d] to have a large similarity to the index. ... The indexes are up only a couple of points since we did the trade. Looking at the mid’s on our Single A trades we have tightened roughly 33%. ... I’m just trying to figure out how we can reverse some of the losses we have incurred.

Also, from where our BBB trade was marked last Friday ...[t]his trade is tighter by 35% as well. ...

I had always thought that these trades were meant to be the start of a partnership building of future business between Stanfield and Goldman Sachs. I know we are big boys and we did the trade there is no doubt of that. What I am attempting to do is either cut our losses and

¹⁷⁴⁷ Id.

¹⁷⁴⁸ 5/21/2007 email to Edwin Chin, “Edwin–Important–Stanfield levels,” GS MBS-E-012570169.

¹⁷⁴⁹ Id.

get out or determine what I can say to keep this trade on I've lost a lot of credi[b]ility on the desk with this trade. Maybe I was naive to trust the pitch on the trade. It has cost me a lot.”¹⁷⁵⁰

A week later, on May 31, 2007, Stark Investments indicated interest in buying a short on certain RMBS securities backed by home equity loans. The Goldman sales representative trying to close the sale emailed SPG personnel that the client was hesitating due to Goldman's valuations which were “drastically different” from other dealers:

“Stark has an interest in looking at this trade; but there is an obstacle we need to address: They feel Goldman is very inconsistent in the single name HEL [Home Equity Loan] CDS marks that we provide them. We are drastically different in marking positions versus other dealers. It is an annoyance that would potentially limit their interest in putting on incremental CDS trades. I can name specific examples if you would like. Please advise.”¹⁷⁵¹

Mr. Salem replied: “you couldn't be more wrong,” while Mr. Swenson replied:

“Frankly, we believe we are best in class and have numerous data from controllers, collateral posting and markit (the company, not market) that reflect upon this. This process is thoroughly reviewed by all levels of senior management at GS. ...

“Unlike other dealers we stand by our marks and are willing to transact in the context of our marks. ...

We also don't mark our book wide if we are long protection and tight if we are short. we mark to market.”¹⁷⁵²

When the salesman replied: “I am trying to work with you guys,” Mr. Swenson chided him: “You need to manage their opinions on marks – that has been fully vetted over here.”¹⁷⁵³

On June 7, 2007, Mortgage Department personnel learned that two Bear Stearns hedge funds specializing in subprime mortgage assets were in financial distress.¹⁷⁵⁴ In response, the ABS Desk immediately decided to buy more shorts at the prevailing market price to take advantage of the possible collapse of the Bear Stearns hedge funds, which would send subprime mortgage prices

¹⁷⁵⁰ 5/24/2007 email from Stanfield, “Our thoughts on single-name RMBS CDS,” GS MBS-E-012891722.

¹⁷⁵¹ 5/31/2007 email from sales to Edwin Chin and Deeb Salem, “Stark CDO CDS potential trade 5/31,” GS MBS-E-012443662.

¹⁷⁵² Id.; see also, e.g., “Valuation & Pricing Related to Transactions with AIG,” prepared by Goldman in response to inquiry by the Financial Crisis Inquiry Commission, GS MBS 0000039096.

¹⁷⁵³ 5/31/2007 Goldman email chain, “Stark CDO CDS potential trade 5/31,” GS MBS-E-012443675. Mr. Swenson made no mention of his email from two days earlier in which he recommended lowering CDS values to “have people totally demoralized.” 5/29/2007 email from Michael Swenson to Deeb Salem, GS MBS-E-012561798.

¹⁷⁵⁴ 6/7/2007 Goldman internal email chain, “BSAM Post,” GS MBS-E-011184213.

still lower. To do so meant the ABS Desk had to sacrifice its “short squeeze” play. On June 7, 2007, Mr. Salem emailed Messrs. Swenson and Chin:

“We need to go to magnetar [a hedge fund] and see if we can buy a bunch of the cdo protection. ... Can tell them we have a protection buyer, who is looking to get into this trade now that spreads have tightened back in.”¹⁷⁵⁵

Raising no concerns about the proposed deception, Mr. Swenson replied “Great idea.”¹⁷⁵⁶ Mr. Salem continued:

“Should we also send an email to select sales people in the mtg [mortgage] sales force saying that we r looking to buy a block of single name protection vs a cdo OUT OF COMP [in a private, off-market transaction]? It’s a no lose situation . . . either we get some sn [single name] protection that we want or we gave these guys a chance and nobody can say we aren’t working with them.”¹⁷⁵⁷

Mr. Swenson responded: “We need to be careful.” Mr. Chin wrote that he knew of another CDO collateral manager that might also be willing to sell some shorts: “I mentioned there was a hedge fund on the side and he was very axed to do something.”¹⁷⁵⁸

Having decided to start buying shorts outright, the ABS Desk also stopped offering to sell CDS short positions to Goldman customers, effectively abandoning the attempted short squeeze. On June 8, 2007, Mr. Swenson told his traders: “[w]ant to slow down on protection offers.”¹⁷⁵⁹ On June 10, 2007, in response to a customer inquiry about a CDS short, Mr. Salem wrote: “Not sure if we have any to offer any more.”¹⁷⁶⁰ Mr. Swenson was less equivocal: “Really don’t want to offer any.”¹⁷⁶¹ On June 13, 2007, a Goldman salesman emailed SPG personnel: “[Customer] is looking to buy protection on cdos.”¹⁷⁶² Mr. Salem replied: “too late!”

Once it began buying CDS shorts, the SPG Desk immediately changed its CDS short valuations and began increasing their value. Clients with long positions began to complain that the marks were too high, and internal Goldman business units also raised questions. For example, on June 11, 2007, a Goldman valuation specialist sent an email to Mr. Swenson, with copies to Compliance and the Controller’s Office noting that “Client challenging marks,” followed by

¹⁷⁵⁵ 6/7/2007 email from Deeb Salem to Michael Swenson and Edwin Chin, GS MBS-E-012444252.

¹⁷⁵⁶ Id.

¹⁷⁵⁷ Id.

¹⁷⁵⁸ Id.

¹⁷⁵⁹ 6/8/2007 email from Michael Swenson to Benjamin Case, Edwin Chin, and Deeb Salem, “CDO CDS protection offers,” GS MBS-E-012551726.

¹⁷⁶⁰ 6/10/2007 email from Michael Swenson to Deeb Salem, Edwin Chin, and salesman, “CDSs on CDOs,” GS MBS-E-012551460.

¹⁷⁶¹ Id.

¹⁷⁶² 6/13/2007 email from sales, “CDO protection,” GS MBS-E-012445931.

“Trading has agreed to change ... marks.”¹⁷⁶³ The next day, June 12, 2007, a Goldman representative from the Controller’s Office sent an email to Mr. Salem, asking: “Given recent gyrations in the ABX and CDS markets, when can I come by to discuss how you are marking the book tonight?”¹⁷⁶⁴ The following week, on June 19, 2007, the Controller’s office sent an email to Mr. Swenson raising questions about values assigned to certain CDS contracts: “These levels look quite wide. Do you have any specific market color that points this direction?”¹⁷⁶⁵

The May 2007 attempted short squeeze described in Mr. Salem’s performance self-evaluation did not succeed in compelling existing CDS holders to sell their short positions. In Subcommittee interviews, Mr. Salem and Mr. Swenson denied that an attempted short squeeze even took place. Any attempt that did take place was apparently abandoned in June 2007, when Goldman stopped offering to sell CDS short positions. Trading with the intent to manipulate market prices, even if unsuccessful, is a violation of the federal securities laws.¹⁷⁶⁶ Given the novelty of credit default swaps and their use in the mortgage field, however, the Subcommittee is unaware of any enforcement action or case applying an anti-manipulate prohibition to the CDS market. Because Goldman is a registered broker-dealer subject to the supervision of the Financial Industry Regulatory Authority (FINRA), the conduct of its ABS traders raises questions about their compliance with FINRA’s Rule 2010, which provides: “A member, in the conduct of his or her business, must observe high standards of commercial honor and just and equitable principles of trade.”

(d) Building the Big Short

In the months of June and July 2007, Goldman’s Mortgage Department went short again. This time, it built an even larger net short position than earlier in the year, reaching a peak of \$13.9 billion in late June,¹⁷⁶⁷ which Mr. Vinjar later referred to as “the big short.”¹⁷⁶⁸ This net short

¹⁷⁶³ 6/11/2007 Goldman email chain, “Please advise – Client challenging marks,” GS MBS-E-018947548.

¹⁷⁶⁴ 6/12/2007 email from controllers, “CDS,” GS MBS-E-012445404.

¹⁷⁶⁵ 6/19/2007 email from controllers, “A3 subprime bonds in transition account,” GS MBS-E-012458169. Mr. Swenson replied: “Tier 4 bonds talk to Deeb [Salem].”

¹⁷⁶⁶ See *Markowski v. SEC*, 274 F.3d 525, 527-28 (D.C. Cir. 2001) (Congress determined that “‘manipulation’ may be illegal solely because of the actor’s purpose”); *In re IPO Litigation*, 241 F. Supp. 2d 281, 391 (S.D.N.Y. 2003) (no additional requirements aside from manipulative intent); H.R. Rep. No. 1383, 73rd Cong., 2d Sess. 20 (1934) (under Securities Exchange Act, “if a person is merely trying to acquire a large block of stock for investment, or desires to dispose of his holdings, his knowledge that in doing so he will affect the market price does not make his actions unlawful. His transactions become unlawful only when they are made for the purpose of raising or depressing the market price.”); but see *GLF Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 205 (3d Cir. 2001) (requiring, in addition to manipulative intent, “that the alleged manipulator injected inaccurate information into the market or created a false impression of market activity”). Single name CDS contracts referencing RMBS and CDO securities appear to qualify as “security-based swap agreements” subject to anti-manipulation and anti-fraud prohibitions under the federal securities laws.

¹⁷⁶⁷ PSI Net Short Position Chart; 8/17/2007 Goldman chart, “RMBS Subprime Notional History (Mtg Dept.),” GS MBS-E-012928391, Hearing Exhibit 4/27-56a.

¹⁷⁶⁸ 7/25/2007 email from Mr. Vinjar to Mr. Cohn, “Private & Confidential: FICC Financial Package 07/25/07,” GS MBS-E-009861799, Hearing Exhibit 4/27-26.

position included the \$9 billion AAA ABX short which had suddenly begun gaining value as the subprime market worsened. In June, two Bear Stearns hedge funds specializing in subprime mortgage assets collapsed. In July 2007, the credit rating agencies began downgrading ratings for hundreds and then thousands of RMBS and CDO securities. Soon after, the subprime mortgage backed securities market froze and then collapsed. Each of these events increased the value of Goldman's net short position.

Bear Stearns Hedge Fund Collapse. The collapse of the Bear Stearns hedge funds in mid-June triggered Goldman's effort to rebuild its net short position. On June 7, 2007, the Mortgage Department learned that the Bear Stearns hedge funds were seeking quietly to sell some of their subprime portfolio to meet client redemption requests, which Goldman interpreted as a signal of serious financial distress.¹⁷⁶⁹ After reviewing the hedge funds' assets, one Goldman employee remarked:

“In total these two portfolios add up to roughly \$17bil in total exposure after leverage. It goes without saying that if this portfolio were to be released into the market the implications would be pretty severe.”¹⁷⁷⁰

¹⁷⁶⁹ See 6/7/2007 Goldman email chain, “BSAM Post,” GS MBS-E-011184213.

¹⁷⁷⁰ Id. Some have suggested that the financial problems experienced by the Bear Stearns hedge funds were caused in part by severe markdowns taken by Goldman on assets held in the funds' portfolios, and that Goldman caused the funds to collapse. In its final report, the Financial Crisis Inquiry Commission (“FCIC”) briefly addressed these allegations. See The Financial Crisis Inquiry Report 2010 at 237-40, 244 (hereinafter “Final Report”). Goldman denied the allegations with respect to its April and May 2007 marks in filings with the FCIC. See 11/1/2010 letter from Goldman counsel Janet Broecke to FCIC, “FCIC Requests for Documents and Information” and Appendices A-G, available at www2.goldmansachs.com. The FCIC's Final Report was critical of Goldman's marks in general as being significantly lower than those of other banks and noted in particular its collateral dispute with AIG. See Final Report at 243-44, 265-71. With respect to the Bear Stearns hedge funds, however, the Final Report merely noted that Bear Stearns had disputed marks from Goldman and three other banks and cited the testimony of the funds' portfolio manager, Ralph Cioffi, that “a number of factors contributed to the April revision [in the hedge funds' values, which ultimately led to the funds' collapse], and Goldman's marks were one factor.” Final Report at 240.

In addition to the markdowns in April and May, Goldman also marked down certain CDO securities held by the Bear Stearns funds in June 2007, but it appears those June markdowns did not play a significant role in the hedge funds' collapse. That month, Goldman marked down their positions in four Goldman CDOs by two points each. See, e.g., 6/8/2007 email from Jonathan Egol to Daniel Sparks, “BSAM mark recap,” GS MBS-E-001920339 (Mr. Egol emailed Mr. Sparks a recap of the Bear Stearns markdowns and stated: “We lowered the marks on 4 bonds down 2 pts each.”).

Mr. Swenson had urged larger markdowns, but his advice was not followed. On June 7, 2007, Mr. Egol had first marked down the funds' holdings in a single Abacus CDO by 2 points, from 89 to 87. Mr. Egol emailed Mr. Sparks a spreadsheet with a cover note: “GS exposure to BSAM [Bear Stearns Asset Management] as of today. ABACUS mark corrected to 87 to handle.” 6/7/2007 email from Mr. Egol to Mr. Sparks GS MBS-E-003375593. Since Abacus was only one of four Goldman CDOs in which the Bear Stearns funds held positions, Mr. Swenson emailed Mr. Lehman recommending further markdowns:

Mr. Swenson: I am on the same page [as] egol we n[e]ed to mark him [Ralph Cioffi, Portfolio Manager of the Bear Stearns funds]

On June 8, 2007, Mr. Sparks received an urgent early morning email from Goldman's Japan office regarding "unprecedented overnight [rates] market volatility," suggesting that he call in the ABX traders early.¹⁷⁷¹ "Given the recent correlation of risk assume this is not a good sign for RMBS/ABS spreads."¹⁷⁷² Later that day, when another trader complained about "getting crushed" in the ABX market, Mr. Birnbaum replied: "Patience, patience. The CDO unwind has only begun."¹⁷⁷³

Around June 12, 2007, public news accounts indicated that the two Bear Stearns funds were unable to meet collateral calls on their subprime mortgage backed securities holdings.¹⁷⁷⁴ The funds also devalued their Net Asset Valuations (NAVs) to significantly lower levels, which effectively triggered the funds' total collapse.¹⁷⁷⁵

Mr. Lehman: Told Ego I'm comfortable w/ the prices, especially when u include the 5 pt [percent] HC [haircut.] Don't think mar[k]ing him down 1 or 2 pts makes sense or sends the right message I wud run it by Dan [Sparks] and get his take ... [M]y opinion is that the Firm is appropriately protected w/ current HC [haircut] and mark.

Mr. Swenson: We need to mark him he is the biggest elephant by far and it has an impact on the m\$arket[.]

Mr. Lehman: How much do u [sic] want to mark him by?

Mr. Swenson: A lot[.]

Mr. Lehman: I disagree on this one . . . Let's talk tomorrow[.]

Mr. Swenson: He is done[.]

6/7/2007 email exchange between Mr. Swenson and Mr. Lehman, "BSAM Post," GS MBS-E-011184213.

The next day, Friday, June 8, 2007, Mr. Ego reported he had marked down all four CDO positions by two points. 6/8/2007 email from Jon Ego to Daniel Sparks, "BSAM mark recap," GS MBS-E-001920339. Upon reviewing the marks the following Monday, Mr. Sparks wrote: "The marks look stale." 6/11/2007 email from Daniel Sparks, "BSAM Exposure Summary," GS MBS-E-010798675. A Mortgage Department employee replied: "Marks for everything but the correlation positions are taken from work ego did last thurs. Correlation marks are as of friday's cob [close of business]." Id.

On June 12, Bear Stearns announced that it would be changing the hedge funds' Net Asset Valuations (NAVs). 6/12/2007 email to Craig Broderick, "BSAM Bullet Points," GS MBS-E-009967117 ("BSAM is currently in the process of restating their performance figures for April, from down 5% to down 10%. This was due to many dealers changing the way they are marking their Repo positions"). The Mortgage Department later marked down two Timberwolf tranches owned by the Bear Stearns hedge funds by another 2 points and 5 points, respectively, to 95 and 89, before it bought them back from Bear Stearns at 96 and 90 on June 19, 2007, in a negotiated unwind of the Bear funds' positions with Goldman. See 6/22/2007 emails from Mr. Lehman, "BSAM Repo Summary," GS MBS-E-001916435. See also 6/18/2007 email from Mr. Lehman, "Today's Bear Stearns Prices," GS MBS-E-001919600; 6/27/2007 email from Mr. Sparks to Mr. Viniar, "CDO^2s," GS MBS-E-009747489.

¹⁷⁷¹ 6/8/2007 email to Daniel Sparks, "Heads Up – rates market volatile," GS MBS-E-010796702.

¹⁷⁷² Id.

¹⁷⁷³ 6/8/2007 email from Joshua Birnbaum, "** ABX Markets 07-1, 06-2, 06-1: 11:00 a.m.," GS MBS-E-012900708.

¹⁷⁷⁴ 6/12/2007 email to Craig Broderick, "BSAM Bullet Points," GS MBS-E-009967117.

¹⁷⁷⁵ Id. A month later, on July 17, 2007, Mr. Sparks reported to Mr. Mullen and Mr. Montag that the Bear Stearns funds were "returning 9 cents and 0 cents on the dollar in the less-levered and more-levered funds." 7/17/2007 email from Daniel Sparks, "Mortgages Estimate," GS MBS-E-010857498.

The failure of the Bear Stearns hedge funds triggered another decline in the value of subprime mortgage related assets. The ABX Index, which was already falling, began a steep, sharp decline. The collapse had further negative effects when the hedge funds' massive subprime holdings were suddenly dumped on the market for sale, further depressing prices of subprime RMBS and CDO assets.

The creditors of the Bear Stearns hedge funds met with Bear Stearns management in an attempt to organize a "workout" solution to stabilize the funds.¹⁷⁷⁶ While those efforts were underway, Goldman and Bear Stearns agreed to an unwind in which Goldman bought back \$300 million of two AAA CDO tranches of Goldman's Timberwolf CDO, which the hedge funds had purchased two months earlier in April 2007. Goldman paid Bear Stearns 96 and 90 cents on the dollar, respectively, for the two Timberwolf tranches.¹⁷⁷⁷ Goldman also bought a few other RMBS and CDO assets, which it immediately sold.¹⁷⁷⁸ The attempt to organize a workout solution for the funds was ultimately unsuccessful. Large blocks of subprime assets from the Bear Stearns hedge funds' inventory began flooding the market, further depressing subprime asset values.¹⁷⁷⁹

Goldman's Structured Product Group (SPG) took the collapse of the Bear Stearns hedge funds as the signal to begin rebuilding its net short position. As Joshua Birnbaum, the head ABX trader on the SPG Desk, later wrote:

"[T]he Bear Stearns Asset Management (BSAM) situation changed everything. I felt that this mark-to-market event for CDO risk would begin a further unraveling in mortgage

¹⁷⁷⁶ 6/12/2007 email to Craig Broderick, "BSAM Bullet Points," GS MBS-E-009967117.

¹⁷⁷⁷ See 6/22/2007 emails from David Lehman, "BSAM Repo Summary," GS MBS-E-001916435. See also 6/18/2007 email from David Lehman, "Today's Bear Stearns Prices," GS MBS-E-001919600; 6/27/2007 email from Daniel Sparks to David Viniar, "CDO^2s," GS MBS-E-009747489. The prices Goldman paid to Bear Stearns on the A1B and A1C tranches of Timberwolf were approximately one cent (or 100 basis points) above its own internal marks on the Timberwolf tranches in the week of June 18, which were then at 95 and 89 points, respectively. *Id.* In May 2007, Goldman had completed a re-evaluation of its CDO assets, which suggested on a preliminary basis that the AAA Timberwolf securities should be marked down dramatically in value. Accordingly, Goldman may have been generous toward Bear Stearns in buying back the Timberwolf positions at 96 and 90. On the other hand, repurchasing the Timberwolf securities near its own low internal marks might have reduced the price Goldman could obtain in reselling the tranches, which it identified in a June 22 sales directive to its sales force and recommended selling at 98.5 and 95, respectively. When asked about the buyback of the Timberwolf tranches, Mr. Viniar told the Subcommittee that Goldman had financed the purchase of both tranches and may have been legally entitled to seize them, but there are circumstances in which Goldman voluntarily settles a dispute on agreed terms, rather than going through the legal process entailed in seizing and selling collateral. Subcommittee interview of David Viniar. (4/13/2010).

¹⁷⁷⁸ 6/22/2007 email from Tom Montag to Daniel Sparks, "Few Trade Posts," GS MBS-E-010849103 (Mr. Montag: "Can I get a complete rundown on everything we bought from BSAM and what's left?" Mr. Sparks: "Yes – main thing left is 300mm timberwolves Other large positions were tmts - gone, octan - gone, abacus - we will collapse against short There were some small rmbs positions.").

¹⁷⁷⁹ At the time, a trader from another bank stated in a market update: "[T]he BSAM [Bear Stearns Asset Management] story will dictate the tone in the market in the short term, as a continued liquidation of their holdings will put further downward price pressure on ... ABX trading." 6/18/2007 email to Edwin Chin, "ABX Open," GS MBS-E-021890868.

credit. Again, when the prevailing opinion in the department was to remain close to home, I pushed everyone on the [SPG] desk to sell risk aggressively and quickly. We sold billions of index and single name risk.”¹⁷⁸⁰

In a later internal presentation for Goldman senior executives which Mr. Birnbaum drafted for another purpose,¹⁷⁸¹ Mr. Birnbaum wrote that, after the Bear Stearns funds collapsed, SPG’s Trading Desks went net short outright and that the shorts were not a hedge for long positions:

“By June, all retained CDO and RMBS positions were identified already hedged. ... SPG trading reinitiated shorts post BSAM [Bear Stearns Asset Management] unwind on an outright basis with no accompanying CDO or RMBS retained position longs. In other words, the shorts *were not a hedge*.”¹⁷⁸²

On June 29, 2007, the ABX Index and the value of single name CDS contracts referencing RMBS and CDO securities plummeted in value and continued dropping until mid-July. Mr. Swenson, head of the SPG Trading Desk, exchanged emails with Mr. Lehman and other Goldman executives about that day’s trading: “There is absolutely no support at the lower levels from the street. CDOs are wider by 50 bps or more.” Mr. Lehman responded: “[W]e r in the middle of a mkt meltdown.”¹⁷⁸³

On July 10, 2007, the two primary ratings agencies, Standard & Poor’s and Moody’s, began the first of many mass ratings downgrades for subprime RMBS and CDO securities.¹⁷⁸⁴ The downgrades sent another negative shockwave through the subprime mortgage market as investors scrambled to assess the impact of the downgrades on their RMBS and CDO holdings.¹⁷⁸⁵ On July 12, 2007, when still more RMBS and CDO ratings downgrades were announced, Mr. Birnbaum

¹⁷⁸⁰ 9/26/2007 2007 MD Reviews, Joshua Birnbaum Self-Review, GS-PSI-01956, Hearing Exhibit 4/27-55c. The SPG Desk’s ABX shorting efforts caught the attention of another Goldman trader who was apparently unaware of Mr. Birnbaum’s strategy. The trader emailed: “yo-who the F- is getting short the ABX at these levels.” 6/21/2007 email to Deeb Salem, GS MBS-E-021905440.

¹⁷⁸¹ This presentation was drafted to support a proposal that the SPG traders be compensated in a manner similar to hedge fund managers. 10/3/2007 “SPG Trading – 2007,” presentation by Joshua Birnbaum, GS MBS-E-015654036. Mr. Birnbaum had drafted the presentation on behalf of the SPG Trading Desk as a whole. Mr. Swenson and Mr. Lehman reviewed and commented upon the presentation, and Mr. Birnbaum revised it to make the changes they suggested. See, e.g., 10/2/2007 email from David Lehman to Joshua Birnbaum, “SPG Trading - 2007.ppt,” GS MBS-E-015653681 (providing comments and suggesting text for presentation). Mr. Birnbaum replied and copied Mr. Swenson on the email chain as well: “I added your bullet and one more.” Id. See also 10/4/2007 email from Joshua Birnbaum to Michael Swenson and David Lehman, “How’s this?,” GS MBS-E-015712249 (forwarding another revised bullet point for presentation). Mr. Birnbaum told the Subcommittee, however, that the SPG Trading Desk ultimately did not use the presentation. See Birnbaum responses to Subcommittee QFRs at PSI_QFR_GS0509.

¹⁷⁸² 10/3/2007 “SPG Trading – 2007,” presentation by Joshua Birnbaum, GS MBS-E-015654036 [emphasis in original]. See also Birnbaum responses to Subcommittee QFRs at PSI_QFR_GS0509.

¹⁷⁸³ 6/29/2007 emails between Michael Swenson and David Lehman, “ABS Update,” GS MBS-E-011154528.

¹⁷⁸⁴ 7/10/2007 Goldman internal email, “GS Cashflow/Abacus CDOs Mentioned in S&P Report on CDO Exposure to Subprime RMBS,” GS MBS-E-001837256.

¹⁷⁸⁵ See id.

wrote to his colleagues: “Seen massive flows recently. Many accounts ‘throwing in the towel’. Anybody who tried to call the bottom left in bodybags.”¹⁷⁸⁶

On July 27, 2007, a Goldman senior sales executive summarized the state of the market:

“Whether you remember ‘94, ‘98, or ‘03, the general themes/patterns are consistent. An initial dislocation to the market (in this instance a credit deterioration in sub prime mortgages) acts as a tipping point and leads to spread widening in other sectors. This in turn quickly becomes a liquidity crunch/crisis. It appears this is where the structured product market is now – searching for liquidity. This has produced numerous capitulation/liquidation situations and forced customers to trade. . . . The impact of this week leaves the account base in three camps: The Paralyzed . . . The Wounded (some fatally) . . . The Opportunistic.”¹⁷⁸⁷

Although the July subprime market meltdown was a disaster for many investors, the value of Goldman’s net short positions climbed rapidly. Senior management at all levels were aware of the Mortgage Department’s net short and the profits it was generating. On July 20, 2007, CEO Lloyd Blankfein and COO Gary Cohn received a profit and loss report showing that the Mortgage Department was up \$72.7 million for the day, across almost every mortgage trading desk. Mr. Cohn wrote to Mr. Blankfein: “There is a net short.”¹⁷⁸⁸ On July 24, 2007, the Mortgage Department posted a profit of \$83 million for the day, while the firm’s overall net revenue for the day was only \$74 million.¹⁷⁸⁹ Mr. Viniar forwarded the report to Mr. Blankfein with a note saying: “Mergers, overnight asia and especially short mortgages saved the day.” On July 29, 2007, Mr. Sparks reported to Messrs. Montag and Mullen:

“Department-wide P&L [Profit & Loss] for the week was \$375mm (this is after adjusting for the \$100mm [error] discussed today). Correlation P&L on the week was \$234mm, with CMBS, CDOs, and RMBS/ABX shorts all contributing.”¹⁷⁹⁰

Mr. Birnbaum later recapped the SPG Trading Desk’s profits during this period: “[W]hen the [ABX] index dropped 25 pts in July, we had a blow-out p&l month, making over \$1Bln that month.”¹⁷⁹¹

¹⁷⁸⁶ 7/12/2007 email from Joshua Birnbaum, “ABX Markets 07-1, 06-2, 06-1: 12:00 p.m.,” GS MBS-E-012944742, Hearing Exhibit 4/27-146.

¹⁷⁸⁷ 7/27/2007 email to Tom Montag, Daniel Sparks, and Donald Mullen, “Structured Products Weekly Update – 7/27/07,” GS MBS-E-010876357.

¹⁷⁸⁸ 7/20/2007 email from Gary Cohn to Lloyd Blankfein, “Private & Confidential: FICC Financial Package 07/20/07,” GS MBS-E-009648405, Hearing Exhibit 4/27-24.

¹⁷⁸⁹ 7/24/2007 email from David Viniar to Lloyd Blankfein, “Daily Estimate 07-24-07 – Net Revenues \$74M,” GS MBS-E-009690033, Hearing Exhibit 4/27-25.

¹⁷⁹⁰ 7/29/2007 email from Daniel Sparks to Tom Montag, “Correlation information you asked for,” GS MBS-E-010876594, Hearing Exhibit 4/27-27.

¹⁷⁹¹ 9/26/2007 2007 EMD Reviews, Joshua Birnbaum Self-Review, GS-PSI-01975, Hearing Exhibit 4/27-55c.

Covering the Big Short to Lock in Profits. Starting in July and throughout August 2007, Goldman undertook an intensive effort to cover its \$13.9 billion net short and lock in its profits. To do so, the Mortgage Department bought long assets, offered CDS contracts in which it took the long side, and even sold some short positions.

The Mortgage Department was particularly focused on purchasing long AAA assets to cover Goldman's \$9 billion AAA ABX short, to lock in the unexpected profits on that position. In August 2007, Mr. Lehman, co-head of the SPG Desk, wrote: "[A]s swenny/deeb/josh have done an awesome job sourcing risk, the CDO transition book AAA ABX short decreased from 1.55bb to 250m over the past two weeks – we love covering that trade."¹⁷⁹² On August 23, 2007, Mr. Montag reported to Messrs. Cohn and Viniar: "We ... bought back almost 9 billion of aaa abx over last two weeks."¹⁷⁹³

From mid-July through the end of August, the Mortgage Department also covered a range of other shorts.¹⁷⁹⁴ On August 5, 2007, Mr. Swenson reported a "phenomenal week":

"In summary, a phenomenal week for covering our Index shorts on the week. The ABS Desk bought \$3.3bb of ABX Index across various vintages and ratings over the past week. \$1.5 billion was retained by the ABS desk to cover shorts in ABX (\$900mm in ABX 06-1 As being the most significant) and \$1.0 billion was sold to internal desks across the mortgage department (\$925mm in triple-As)."¹⁷⁹⁵

Mr. Swenson also reported that the Mortgage Department was still \$8.3 billion net short across all subprime asset classes, including \$4 billion of AAA ABX assets.¹⁷⁹⁶

On August 8, the market rallied for a short period, and the Mortgage Department's net short position suffered a \$100 million loss. Mr. Swenson explained: "Market rallied especially at the top end of the capital structure – AAA (up 2 pts), AA (up 3 pts), and A (up 2 pt.)." He reported that the Department still held a \$3.1 billion net short in AAA rated subprime mortgage assets.¹⁷⁹⁷ Mr. Montag replied: "now on to the 3 billion short."¹⁷⁹⁸ The next day, August 9, 2007, Mr. Montag reported to his colleagues: "mortgages bought back 1 billion of 3 billion short in AAA indices at ½ to 1 point better than yesterday."¹⁷⁹⁹

¹⁷⁹² 8/11/2007 email from David Lehman, "Japan exposure to CDOs," GS MBS-E-001929202.

¹⁷⁹³ 8/23/2007 email from Tom Montag to Gary Cohn and David Viniar, "Harbinger Post," GS MBS-E-009739009. See also 8/21/2007 email from Michael Swenson, "Mortgage Commentary for Firmwide Risk Committee," GS MBS-E-010619375 ("Current SPG Trading Desk Position Summary: – RMBS AAA – long \$2.2bb").

¹⁷⁹⁴ The one short position the Mortgage Department did not attempt to cover was its \$3 billion net short in BBB and BBB- rated RMBS securities, as discussed below.

¹⁷⁹⁵ 8/5/2007 email from Michael Swenson, "great week," GS MBS-E-012376888, Hearing Exhibit 4/27-28.

¹⁷⁹⁶ Id.

¹⁷⁹⁷ Id.

¹⁷⁹⁸ 8/8/2007 email from Tom Montag to Michael Swenson and David Lehman, GS MBS-E-011088957.

¹⁷⁹⁹ 8/9/2007 email from Tom Montag, GS MBS-E-009640293.

On August 11, 2007, reports of firms having to sell CDO securities in Asia prompted Mr. Mullen to ask: “Did we cover to[o] soon? Looks like more selling at the higher end of cap stack”¹⁸⁰⁰ Mr. Lehman replied: “Don’t th[in]k so – we haven’t covered any CDO risk (we have gone the other way by 1.44bb since June 1st) and that is where the market still has bad longs – th[in]k AAA rmbs is a very different trade.”¹⁸⁰¹

On August 20, 2007, Mr. Sparks reported on the Mortgage Department’s progress in covering its net short, telling Mr. Montag: “[L]oan books had been heavily net short (still are some – especially ... in alt a) and I have been forcing them to cover over the past 2 weeks.” Mr. Montag responded: “[H]eavily isn’t the half of it – we have bought back 4 - 5 billion and still short.”¹⁸⁰²

Buying More AAA RMBS Securities. In August 2007, the Mortgage Department proposed buying \$10 billion in AAA rated RMBS securities, but did not receive permission to initiate the investment.

By August 2007, AAA rated RMBS and CDO securities were available from many financial firms at a very low price. On August 14, 2007, in summarizing the prior week’s trading Mr. Swenson wrote: “Top of the capital structure is where all the action is. AAAs are extremely cheap [W]ant to scale into a large long.”¹⁸⁰³ Mr. Sparks agreed: “[T]he AAA ABX index is a great opportunity and we continue to like it.”¹⁸⁰⁴ On August 19, 2007, Mr. Lehman reported that the Mortgage Department had purchased \$1.6 billion of the long side of CDS contracts referencing the ABX Index for AAA RMBS securities, and that its value had increased 1.5 percent over the prior week. Given Goldman’s dominant market share and recent large purchases, however, Mr. Montag was skeptical: “How much of the aaa outperforming was us buying?”¹⁸⁰⁵ Mr. Birnbaum responded: “On the AAA outperformance question, I think AAAs would have performed similarly without our adding.”¹⁸⁰⁶ He also wrote that the “likelihood of loss on ‘real’ RMBS AAAs (i.e., not AAA CDOs),” was “remote.”¹⁸⁰⁷

¹⁸⁰⁰ 8/11/2007 emails between Donald Mullen and David Lehman, “Japan exposure to CDOs,” GS MBS-E-001929202.

¹⁸⁰¹ Id. See also 8/11/2007 email from Daniel Sparks to Tom Montag and Donald Mullen, “GSC ms prop/Paulson swap,” GS MBS-E-010673306 (“We need to keep buying AAA ABX, and now we can start looking to cover some CDO CDS”).

¹⁸⁰² 8/20/2007 email exchange between Daniel Sparks and Tim Montag, “Hsbc loans,” GS MBS-E-010681855.

¹⁸⁰³ 8/14/2007 email from Michael Swenson, “ABS Summary for Week Ended August 10th,” GS MBS-E-010678428.

¹⁸⁰⁴ Id.

¹⁸⁰⁵ 8/19/2007 email from Tom Montag, “Mtg Department Weekly Update,” GS MBS-E-010681647.

¹⁸⁰⁶ Id.

¹⁸⁰⁷ Id. Not everyone at Goldman agreed that the risk of loss on AAA was “remote.” On July 29, 2007, Mr. Rosenblum circulated an email to Mortgage Department managers and research analysts with a series of questions about how AAA subprime RMBS securities would be affected by other market developments. 6/29/2007 email from David Rosenblum, GS MBS-E-010060183. The head of Goldman’s Structured Product Strategies area, Alan Brazil, responded: “Well, as is becoming clearer to the market is [sic] that the subprime issue is really a triple-a issue, either directly as a aaa subprime or indirectly in a aaa cdo. As a rough guide, over 90% of a subprime deal are in aaas. ... And once you start downgrading bbb/bbb- you will ultimately be start [sic] downgrading aaas. And, in my view, that

According to Mr. Birnbaum, a key reason for buying the AAA rated assets was that Mr. Birnbaum and others in the Mortgage Department wanted to maintain a large short position in ABX assets referencing BBB and BBB- rated RMBS securities, because they believed the ABX Index for those securities would fall even further.¹⁸⁰⁸ Mr. Birnbaum told the Subcommittee that covering the BBB/BBB- net short position in August would have amounted to leaving money on the table.¹⁸⁰⁹ He explained that the Mortgage Department thought that buying a proportionate amount of AAA ABX long positions could be used to offset the risks of continuing to hold the BBB/BBB- short until the ABX Index bottomed out.¹⁸¹⁰

On August 14, 2007, Mr. Sparks updated Goldman senior executives on the success of the Mortgage Department's efforts to cover its shorts and added that the Department was interested in increasing its purchase of AAA rated RMBS securities: "we will likely come to you soon and say we'd like to get long billions[.]"¹⁸¹¹ Senior executives reacted with skepticism.¹⁸¹² Mr. Sparks responded: "We're continuing to cover some shorts and we may cover some BBB with AAA, but I got the message clearly that we shouldn't get long without Gary [Cohn]/Tom [Montag]/Don [Mullen] all saying OK."¹⁸¹³

On August 20, 2007, Mr. Sparks pitched the idea again to Mr. Montag and other senior executives in an email entitled, "Big Opportunity":

"We are seeing large liquidations - we bought \$350mm AAA subprime RMBS from ... SIV unwinds today. ... We think it is now time to start using balance sheet and it is a unique opportunity with real upside - specifically for AAA RMBS. We've sold over \$100mm of what we bought today - most up 1-2 points.

That's a great trade - buy and flip up 1-2 points, however, we're not always going to be able to do that - and there's the opportunity for us to make 5-10 points if we have a longer term hold."¹⁸¹⁴

is a significant escalation of the subprime meltdown. ... At its heart, the main shoe to fall will be when the rating agencies downgrade to the aaa level. I don't see as they have much of a choice. Mez[zanine] aaa cdo trade in the 20 and 30s cannot be overlooked even by the agencies." Id.

¹⁸⁰⁸ Subcommittee interview of Joshua Birnbaum (4/22/2010).

¹⁸⁰⁹ Id.

¹⁸¹⁰ Id.

¹⁸¹¹ 8/14/2007 email from Daniel Sparks, "Fw: Post," GS MBS-E-010678053, Hearing Exhibit 4/27-30.

¹⁸¹² See 8/14/2007 email from Gary Cohn to Daniel Sparks, "Fw: Post," GS MBS-E-010678053, Hearing Exhibit 4/27-30 ("Talk to me before you go long."); 8/14/2007 email from Tom Montag, "Post," GS MBS-E-009741145 ("We will not be going long billions. Lots of risk to clean up first imo").

¹⁸¹³ 8/15/2007 email from Daniel Sparks, "Post," GS MBS-E-009740784, Hearing Exhibit 4/27-32.

¹⁸¹⁴ 8/20/2007 email from Daniel Sparks to Gary Cohn, David Viniar, Jon Winkelried, Tom Montag, and Donald Mullen, "Big Opportunity," GS MBS-E-009739836. See also 8/20/2007 email exchange between Daniel Sparks and Tom Montag, "Hsbc loans," GS MBS-E-010681855 (Mr. Sparks pitched the plan again to Mr. Montag separately: "As a overall business, we're not short AAA's anymore. We are putting on the long index (mostly AAA)/short single name mezz trade on We are planning to continue to play offense. . . . Discussions on the up the quality trade (top cap stack and top quality collateral) were had in various times with don [Mullen], gary [Cohn] and bill

On August 21, 2007, Mr. Birnbaum presented the Mortgage Department's plan to buy up to \$10 billion in AAA rated RMBS securities.¹⁸¹⁵ The plan had dual objectives, to profit from the intrinsic financial value of the proposed assets and to use those assets to preserve, rather than cover, the Department's existing \$3.5 billion BBB/BBB- net short:

“– The mortgage department thinks there is currently an extraordinary opportunity for those with dry powder to add AAA subprime risk in either cash or synthetic form.

– We would like to be opportunistic buyers of up to \$10Bln subprime AAAs in either cash or synthetic (ABX) form and run that long against our \$3.5Bln in mezzanine subprime shorts.

– Mortgage dept VAR would be reduced by \$75mm and Firmwide VAR would be reduced by \$25mm.

– At current dollar prices, the implied losses at the AAA level are 2.5x higher than the implied losses at the BBB level where we have our shorts (the ratio is even cheaper for cash due to technicals). If AAAs were priced consistent with BBB implied loss levels, they would be trading 5-10pts higher in synthetics and 10-15 points higher in cash. ...

– On the demand side, we plan to share this trade quietly with selected risk partners. We began doing so yesterday when we sold 1/3 of the AAAs purchased off the [seller] list to [customer] and 100% of the AAAs from [seller] to [customer] and [customer].”¹⁸¹⁶

Mr. Montag responded that he wanted to discuss the concept further.¹⁸¹⁷ Mr. McMahon wrote: “What are we holding against the 3.5b mezz shorts right now? Why don't we just cover the shorts?”¹⁸¹⁸ Co-President Gary Cohn emailed Messrs. Mullen, Winkelried, and Montag: “I do like the idea but you[r] call.”¹⁸¹⁹ Before any further discussion took place, however, events overtook the debate.

[McMahon]. We aren't going crazy with it, just being opportunistic. Before we get large, we are going to lay out a strategy for the four of you.”).

¹⁸¹⁵ 8/21/2007 email from Joshua Birnbaum, “Potential large subprime trade and impact on firmwide VAR,” GS MBS-E-016359332, Hearing Exhibit 4/27-34; 8/21/2007 email from Joshua Birnbaum, “For 2 p.m. meeting,” GS MBS-E-010608145 (graphs in support of plan to go long up to \$10 billion in AAA ABX index).

¹⁸¹⁶ Id.

¹⁸¹⁷ See 8/21/2007 email from Mr. Montag to Mr. Birnbaum, GS MBS-E-010682736 (“FYI. I think it would be much better for all concerned that we all discuss this and any strategy and have agreem[e]nt before we go to the presidents and cfo Secondly, I think we should be reducing our basis trades to reduce var as is Let's sit down”).

¹⁸¹⁸ 8/21/2007 email from Bill McMahon, “Potential large subprime trade and impact on Firmwide VAR,” GS MBS-E-012606879.

¹⁸¹⁹ 8/21/2007 email from Joshua Birnbaum, “Potential large subprime trade and impact on firmwide VAR,” GS MBS-E-016359332, Hearing Exhibit 4/27-34

(e) “Get Down Now”

Despite direction from senior management to cover its \$13.9 billion net short position, the Mortgage Department continued to maintain several large net shorts, including at least \$3 billion in single name CDS contracts referencing BBB and BBB- rated RMBS securities that it expected to gain in profits. In August 2007, Co-President Gary Cohn finally issued an order to “get down now.”¹⁸²⁰

Excessive VAR. By late August, a combination of the large net short and volatility in the subprime mortgage market had driven the Mortgage Department’s VAR to an all-time high. When the AAA ABX short position was far out-of-the-money, it entailed little market risk, as it was not actively traded and had little likelihood of ever paying off. Once the AAA ABX short became profitable, however, the \$9 billion position was so large that it had a major impact on the firm’s risk measurements. Even a small percentage change in \$9 billion can cause substantial changes in a profit and loss statement. As Mr. Sparks explained: “The combination of our large AAA ABX index shorts and the relatively new volatility in the AAA part of the index will result in much larger daily swings in P&L [profit and loss] both ways.”¹⁸²¹

As predicted, due to the \$9 billion short, the Mortgage Department’s daily profit and loss reports began to show much larger swings.¹⁸²² For example, while the Mortgage Department showed a profit of \$71 million on July 21,¹⁸²³ it showed a loss of \$100 million on August 8.¹⁸²⁴ Upon hearing of that loss, Mr. Montag asked “so who lost the hundy?”¹⁸²⁵ Mr. Birnbaum wrote to a colleague: “I’m sure the AAA ABX is being blamed as the reason the dept was down 100 yest[erday].”¹⁸²⁶ While some in the Mortgage Department disagreed with the use of VAR as a

¹⁸²⁰ 8/15/2007 email from Gary Cohn, “Trading VaR \$165mm,” GS MBS-E-009778573.

¹⁸²¹ 7/21/2007 email from Daniel Sparks to Donald Mullen, Tom Montag, and others, “Mortgages Estimate,” GS MBS-E-009640287.

¹⁸²² See *id.* (noting \$50 million down trading day, followed by a day in which the AAA index accounted for half of the day’s profit).

¹⁸²³ *Id.*

¹⁸²⁴ 8/9/2007 email from Joshua Birnbaum to Deeb Salem, GS MBS-E-012927140.

¹⁸²⁵ 8/8/2007 email from Tom Montag to Michael Swenson and David Lehman, GS MBS-E-011311633. Mr. Swenson explained that the approximately \$100 million loss was split between the Residential Whole Loan Trading Desk, the SPG Trading Desk, and the CDO Origination Desk. *Id.*

¹⁸²⁶ 8/9/2007 email from Joshua Birnbaum to Deeb Salem, GS MBS-E-012927140.

measure of risk,¹⁸²⁷ the gyrations in daily profit and loss figures demonstrated that the \$9 billion net short posed real risk to Goldman.

VAR depends primarily on the aggregate size of net asset positions and the volatility of the relevant market. Goldman was holding several large net short positions, the subprime market had become extremely volatile, and the Department's efforts to cover its shorts further complicated matters. Although Goldman's covering of its \$9 billion net short AAA position would ordinarily be expected to reduce risk, the massive size of the position, combined with unprecedented levels of volatility in the market, the speed of Goldman's covering, and the size of the trades involved, resulted in steep increases in the Department's VAR.

The Mortgage Department's VAR had increased from around \$13 million in mid-2006, well under the Department's permanent limit of \$35 million, to \$85 million in February 2007, to a high of around \$113 million in August 2007.¹⁸²⁸ The \$113 million figure exceeded the Department's \$35 million permanent VAR limit by more than 350%. Moreover, the Mortgage Department, which had never contributed more than about 2% of firmwide net revenue prior to 2007, was generating some 54% of all the risk incurred by the firm in August 2007. The Mortgage Department's risk level, however profitable, was of increasing concern from a firmwide perspective.¹⁸²⁹

In an effort to maximize the profit potential from its net short positions, SPG personnel in the Mortgage Department argued against indiscriminately covering all of the Department's shorts.¹⁸³⁰ But the Mortgage Department's VAR level proved to be both intractable and highly unpredictable.¹⁸³¹ It also contributed to record high levels of firmwide VAR, a figure carefully

¹⁸²⁷ 8/9/2007 email from Joshua Birnbaum to Deeb Salem, "MarketRisk: Mortgage Risk Report (cob 08/08/2007)," GS MBS-E-012927200 ("These VAR numbers are ludicrous, btw. Completely overestimated for SPG trading, underestimated for other mortgage desks."). See also 8/21/2007 email from Joshua Birnbaum to Bill McMahon, "Potential large subprime trade and impact on Firmwide VAR," GS MBS-E-012606879 ("We have the 13.5Bln IO which makes us less short by \$1-1.5 Bln . . .") (IO is an asset arising from differences in the duration and timing of CDS premium payment streams); 8/21/2007 email from Michael Dinias, "Trading VaR Analysis," GS MBS-E-009993267 ("the mortgage desk has questioned the size of the implied short exposure (i.e. desk believes they are less short than implied by the VaR model). We are reviewing the current VaR methodology with the mortgage traders/strategists and assessing the impact of various potential enhancements."); Subcommittee interview of Joshua Birnbaum (10/1/2010).

¹⁸²⁸ For more information on the Mortgage Department's VAR levels, see below.

¹⁸²⁹ On August 7, 2007, a senior risk executive wrote to Messrs. Cohn, Viniar, and McMahon: "We are doing a detailed analysis of mortgage and credit trading var contributors to see where we might get the most efficient var reduction." 8/7/2007 email from Bruce Petersen, "VaR," GS MBS-E-009775575.

¹⁸³⁰ See, e.g., 8/21/2007 email from Joshua Birnbaum, "Potential large subprime trade and impact on firmwide VAR," GS MBS-E-016359332, Hearing Exhibit 4/27-34 (favoring preservation of the \$3.5 billion BBB/BBB-short).

¹⁸³¹ Risk controller Robert Berry explained to Messrs. Viniar, McMahon, and Broderick that VAR was becoming acutely sensitive to estimates of correlation implicit in the data used in the VAR computation: "[T]here will be days where 'nothing happened' – positions didn't change, markets were quiet, but small changes in correlation will mean the difference between 140 and 160. It will really be difficult to explain to you and to the desks why we were under [VAR limits] yesterday but over today." 8/15/2007 email from Robert Berry, "MarketRisk: End of Day Summary –

monitored by the firm's most senior management. The Mortgage Department and its risk controllers tried unsuccessfully to reduce the Department's VAR, and were discussing new alternatives,¹⁸³² when Goldman's Co-President Gary Cohn intervened. On August 15, 2007, the same day that Goldman's firmwide VAR hit a then-record high of \$165 million, Mr. Cohn emailed the Mortgage Department's senior managers, risk analysts and controllers: "There is no room for debate – we must get down now."¹⁸³³

The Mortgage Department took immediate action. To reduce its VAR, the Department had to sell at least some of its BBB/BBB- net short position.¹⁸³⁴ On August 23, 2007, Mr. Swenson reported that Harbinger had bought a large block of single name CDS contracts shorting BBB/BBB- rated RMBS securities which allowed Goldman to take the long side: "We just printed \$400mm of Singles with Harbinger. 130mm of BBB and 270mm BBB-." Mr. Montag passed the message on to Messrs. Cohn and Viniar: "Finally actual[y] covering singles." Mr. Cohn responded: "Great."¹⁸³⁵

But even after that \$400 million sale, Mr. Sparks reported to Mr. Montag: "[W]e are short ... about \$3BB single names."¹⁸³⁶ Mr. Montag responded that the \$3 billion net short position was "huge and outsized" and \$800 million had to be sold: "[I]f I make you sell a whopping 800 [million] out of 3 billion which is less than 30% how can anyone complain—the position is huge

cob 8/10/07," GS MBS-E-009779885. Mr. McMahon responded: "var can swing between 140 and 160 without any changes in the complexion of our trading books – essentially it is just noise." 8/15/2007 email from Bill McMahon to Gary Cohn and David Viniar, "Trading VaR \$165mm," GS MBS-E-009778573.

¹⁸³² See, e.g., 8/15/2007 email from Michael Dinias, "Hedge Analysis cob 8/13/07," GS MBS-E-010678553 (analyzing 6 potential VAR-reducing trading scenarios featuring different proposed transactions); 8/21/2007 email from Michael Dinias, "Trading VaR Analysis," GS MBS-E-009993267 (analyzing the VAR-reducing impact of going long in various classes of assets); 8/22/2007 email from Daniel Sparks to Tom Montag and Donald Mullen, "VAR reduction possibilities," GS MBS-E-010619824 (proposed transactions in single name CDS protection to reduce VAR).

¹⁸³³ 8/15/2007 email from Gary Cohn, "Trading VaR \$165mm," GS MBS-E-009778573. Mr. Viniar agreed. Two days earlier, after seeing a daily risk report showing Firmwide VAR at \$159 million, Mr. Viniar emailed senior risk executives: "No comment necessary. Get it down." 8/13/2007 email from David Viniar to Bill McMahon, Craig Broderick, and Robert Berry, "MarketRisk: End of Day Summary – cob 8/10/2007," GS MBS-E-009779885. Even after Mr. Cohn's order to "get down now," Firmwide VAR continued to increase. On August 16, Firmwide VAR rose from \$165 million to \$171 million. 8/16/2007 email from Michael Dinias, "Trading VAR \$171mm," GS MBS-E-009775568. On August 17, it rose to \$174 million. 8/17/2007 email to David Viniar, Gary Cohn, Jon Winkelried, Tom Montag, Bill McMahon, Craig Broderick et al., "Weekly Market Risk Summary as of 8/17/07," GS MBS-E-009756424.

¹⁸³⁴ On August 22, 2007, Mr. Montag emailed Mr. Blankfein: "[W]e are covering a number of shorts in mortgages today and tomorrow—probably \$1.5 billion worth—will reduce mortgages [VAR] hopefully to below 80." 8/22/2007 email from Tom Montag to Lloyd Blankfein, "Trading VaR \$144mm," GS MBS-E-009605812, Hearing Exhibit 4/27-36. The next morning Mr. Montag emailed Mr. Blankfein that the Department "covered about 700 million in shorts in mtgs last night—500 million in single names . . . lots more to go—but they fortunately had bought back 9 billion of AAA abx index over last two weeks." 8/23/2007 email from Tom Montag to Lloyd Blankfein, GS MBS-E-009585951, Hearing Exhibit 4/27-37.

¹⁸³⁵ 8/23/2007 email from Michael Swenson, "Harbinger Post," GS MBS-E-009739009.

¹⁸³⁶ 8/23/2007 email from Daniel Sparks, "Current Outstanding Notional SN ames," GS MBS-E-010621231.

and outsized.”¹⁸³⁷ At the end of the trading day on August 23, Mr. Montag asked Mr. Sparks: “How much did we cover—shooting for \$1 billion.” Mr. Sparks responded: “Not much more today - trying.”¹⁸³⁸

Although the Mortgage Department did not cover its shorts as quickly as Mr. Montag wanted, within days of Mr. Cohn’s August 15 order to “get down,” Goldman’s firmwide trading VAR had dropped by \$40 million and the Mortgage Department’s VAR had dropped below \$100 million.¹⁸³⁹ On August 23, 2007, Mr. Cohn forwarded a VAR report to CEO Lloyd Blankfein: “The message got through.” Mr. Blankfein responded: “Good job.” Mr. Cohn wrote: “Down 40 in 2 days.”¹⁸⁴⁰

Although the Mortgage Department’s VAR measure fell substantially, it remained well above its permanent risk limit of \$35 million throughout the rest of 2007.¹⁸⁴¹ In addition, although Goldman senior executives rejected the Mortgage Department’s plan to buy \$10 billion in AAA rated RMBS securities,¹⁸⁴² the Department ultimately purchased over \$2.2 billion in AAA rated RMBS securities¹⁸⁴³ and continued to hold and strategically sell off its BBB and other short positions through the end of 2007.¹⁸⁴⁴

¹⁸³⁷ Id.

¹⁸³⁸ 8/23/2007 email exchange between Tom Montag and Daniel Sparks, “Current Outstanding Notional SN ames,” GS MBS-E-010621324.

¹⁸³⁹ 8/23/2007 email exchange between Gary Cohn and Lloyd Blankfein, “Trading VaR \$133mm,” GS MBS-E-009643469.

¹⁸⁴⁰ Id. Goldman senior executives continued to monitor the Mortgage Department’s actions. For example, on August 31, 2007, Mr. Montag emailed Mr. Lehman: “abx hurting us today? Mkt over reacting?” 8/31/2007 email from Tom Montag, “Structured Products Weekly Update – 08/30/07 (Internal Use only),” GS MBS-E-009589083. Mr. Birnbaum responded: “Based on the markets we are making, we would be ok in this move. We are +50mm in AAAs alone right now.” Mr. Montag forwarded the emails to Mr. Blankfein who wrote: “Thanks. Appreciate the posts, I’m watching the financial news.”

¹⁸⁴¹ 12/2007 Quarterly Market Risk Review, GS MBS-E-009586222, Hearing Exhibit 4/27-54f (third quarter mortgages average VAR was \$68 million; fourth quarter mortgages average VAR was \$75 million).

¹⁸⁴² Subcommittee interview of David Viniar (4/13/2010); Subcommittee interview of Daniel Sparks (4/15/2010); Subcommittee interview of Joshua Birnbaum (4/22/2010).

¹⁸⁴³ 8/21/2007 email from Michael Swenson, “Mortgage Commentary for Firmwide Risk Committee,” GS MBS-E-010619375 (“Current SPG Trading Desk Position Summary: – RMBS AAA – long \$2.2bb”); Michael J. Swenson, responses to Subcommittee QFRs at PSI_QFR_GS0474.

¹⁸⁴⁴ In the week of December 6, 2007, the Mortgage Department’s risk managers noted “an increase in net short position in the residential sector.” 12/7/2007 email to David Viniar, “Weekly Market Risk Summary as of 12/06/07,” GS MBS-E-009708911, Hearing Exhibit 4/27-53. See also 9/5/2007 email from Michael Swenson to Tom Montag, “ABS Update,” GS MBS-E-012386239, Hearing Exhibit 4/27-39; 9/23/2007 email to David Viniar, “Mortgage P&L for the Week Ended 9/21,” GS MBS-E-009732431, Hearing Exhibit 4/27-43 (Finance division reported that, in week of September 21, the Mortgage Department reported \$63 million from “short synthetic positions including SPG Trading (+\$40M), CDO (+22M) and Residential Credit (+12M).”).

(f) Profiting from the Big Short: Making “Serious Money”

Goldman’s short positions continued to produce profits for the firm, as mortgage related assets continued to lose value. In September 2007, one of the key traders in the Mortgage Department, Deeb Salem, summarized four key short-side trading strategies that enabled the Mortgage Department to profit from the collapse of the subprime mortgage market:¹⁸⁴⁵

- (a) a “dispersion trade,” in which Goldman took advantage of “mispriced” single name CDS contracts that referenced very poorly performing RMBS securities, but were not priced much lower than better performing RMBS securities, resulting in profits of \$750 million “so far”;
- (b) a massive purchase of single name CDS contracts referencing a variety of RMBS securities, taking advantage of Goldman’s estimated 33% “dominant” market share in single name CDS to make a “HUGE directional bet” against the subprime mortgage market, resulting in profits of \$1.7 billion;¹⁸⁴⁶
- (c) the purchase “at a discount” of single name CDS contracts referencing Alt A and A rated RMBS securities, which “others don’t want/know where to price,” resulting in profits of \$400 million “so far”; and
- (d) the purchase of single name CDS contracts on A, AA and AAA rated CDO securities “in size,” amassing an “enormous” market share whose profits had “exceeded all of our high expectations” at \$900 million “so far.”¹⁸⁴⁷

¹⁸⁴⁵ Salem 2007 Self-Review.

¹⁸⁴⁶ Id. [emphasis in original].

¹⁸⁴⁷ Id. Mr. Salem described the trading strategies as follows:

“a. The Dispersion Trade

More than a year ago, Edwin [Chin] and I realized that the dispersion amongst single-name subprime CDS was grossly mispriced. Bad names (tier 4), that the market almost universally disliked traded only 50 bps wider than securities that we all agreed were superior. ... So for the past year, we bought protection on tier 4 names at every chance possible . . . When we wanted to flatten out the book, we just wrote protection on the tier 1 names. Amazingly we did this for most of the year without a usable model to value different single names. ... We were very aggressive with pricing and only shared risk with smart guys if they gave us insight on names to go short or go long in return. Even when the dispersion widened out . . . by the end of February, Edwin and I refused to monetize the trade With 3-4bb of notional in this dispersion trade, we have recognized \$750mm of P&L so far on this trade.

“b. Our single name market share:

Having traded over \$200bb of notional in SN [single name] CDS, GS is the dominant market-maker in single name CDS. We approximate our market share to be greater than 33%. ... This market share and willingness to trade size proved invaluable in November, December and January when we decided to make the HUGE directional bet of being long SN CDS protection [or “short risk,” i.e., taking the short side of a CDS transaction]. ... If we did not have such presence in the SN CDS market, it is unlikely that we would have achieved the size short that we desired and eventually put on. We’re up \$1.7bb in RMBS SN CDS!

In October 2007, after the credit rating agencies downgraded hundreds of CDO securities,¹⁸⁴⁸ Mr. Swenson wrote to Mr. Mullen that the downgrades would eventually cause defaults in many CDO securities that Goldman had shorted, meaning that Goldman's "CDS protection premiums paid out will go to zero,"¹⁸⁴⁹ and Goldman would receive substantial CDS payments on those CDOs from the long parties. Mr. Mullen responded: "Looks like we're going to make some serious money." Mr. Swenson replied: "Yes, we are well-positioned."¹⁸⁵⁰

Indeed, the Mortgage Department made \$110 million the very next day.¹⁸⁵¹ Mr. Swenson explained: "65mm was from yesterday's downgrades which lead to the selloff." Mr. Mullen replied: "Great day!"¹⁸⁵² By the end of 2007, the Mortgage Department had brought in approximately \$3.7 billion in net revenues from its SPG Trading Desk.¹⁸⁵³

(g) Goldman's Records Confirm Large Short Position

In addition to contemporaneous emails, presentations, and reports, Goldman's large net short position is reflected in its own financial records, including its Mortgage Department Top Sheets.¹⁸⁵⁴ Goldman's Mortgage Department kept records of its overall net short positions across

"c. Willingness to put on trades that others don't want/know where to price

The 2 most successful trades in this regard have been our \$70mm long Alt-A protection and our \$1-2bb long sub-prime Single-A protection [i.e., being "short risk" or taking short side in a CDS transaction]. When CDOs wanted to sell Alt-A and single-A protection ... the rest of the street was tentative. ... We viewed this as a tremendous opportunity to buy cheap out-of-the-money options at a significant discount to fair-value. Our exit strategy was always that if sub-prime fundamentals got bad enough, and they did, that the contagion would have to spread up the capital structure because cum loss vol/uncertainty has to go up thus. . . . \$400mm so far for the desk

"d. CDO CDS trade:

This trade has made \$900mm so far, which exceeded all of our high expectations for the trade. I had the confidence and desire for the desk to buy A, AA, and AAA CDO CDS protection in size during the fall of 2006 for several reasons: ... [T]he rating agencies' correlation assumptions were out of whack with the growing concern about the housing market and the remarkable similarity between the bonds in a CDO, the difficulty that GS was having in placing such mezzanine liabilities and the complexity of such securities scared hedge funds from buying the protection themselves. Edwin and I used the same aggressive strategies in purchasing protection that we used to dominate the SN CDS market. Our market share was enormous ... and we did every ... trade possible." Id.

¹⁸⁴⁸ See, e.g., 10/11/2007 email from Michael Swenson to Donald Mullen, "Early post on P and L," GS MBS-E-016031234, Hearing Exhibit 4/27-69. For more information about this downgrade, see Chapter V.

¹⁸⁴⁹ Id.

¹⁸⁵⁰ Id.

¹⁸⁵¹ 10/12/2007 email exchange between Michael Swenson and Donald Mullen, "P and L," GS MBS-E-018936577, Hearing Exhibit 4/27-68.

¹⁸⁵² Id.

¹⁸⁵³ See 10/3/2007 Goldman presentation, "SPG Trading – 2007," GS MBS-E-015654036. See also 11/16/2007 Goldman chart, "Mortgages Weekly Metrics 16-November-2007," GS MBS-E-015863620 ("P&L YTD Annl 3,742,461").

¹⁸⁵⁴ See, e.g., 4/2010 "Goldman Sachs Mortgage Department Total Net Short Position, February - December 2007 in \$ Billions," chart prepared by the Subcommittee, Hearing Exhibit 4/27-162 (compiled from Top Sheets); examples of Top Sheets include GS MBS-E-010369585 and GS MBS-E-010850895, Hearing Exhibit 4/27-162.

various subprime asset classes on a daily basis throughout most of 2007.¹⁸⁵⁵ Those records indicate that the Mortgage Department had large net short positions in the subprime mortgage market throughout most of 2007. Goldman's documents reveal that it had a \$10 billion net short position at the end of February 2007, and a \$13.9 billion net short position in mid-June 2007.¹⁸⁵⁶

(i) Top Sheets

Daniel Sparks told the Subcommittee that, in 2006 and earlier, he was frustrated because he felt Goldman had inadequate systems to track and aggregate the daily positions of the various desks in the Mortgage Department.¹⁸⁵⁷ At the end of each trading day, he had to review up to a dozen separate reports from the desks to develop a composite mental picture of the Mortgage Department's overall positions. To remedy this shortcoming, in February 2007, Mr. Sparks and the Department's strategic analysts, sometimes called "strats," developed a single-page report called the Mortgage Department Top Sheet.¹⁸⁵⁸

The Mortgage Department Top Sheet became the primary report through which the Mortgage Department tracked its daily positions in various classes of mortgage related assets. It provided a comprehensive listing of the Mortgage Department's long and short positions in different asset classes across all desks at the end of each trading day. The Top Sheet drew data from up to a dozen separate reports generated by Goldman's electronic systems. Mr. Sparks told the Subcommittee that the Top Sheet evolved over time to become a good tool that provided a comprehensive record of the Department's positions.¹⁸⁵⁹ The Goldman Controller's office told the Subcommittee that Goldman did not maintain any other type of comprehensive daily report regarding the Mortgage Department's net positions in various asset classes.¹⁸⁶⁰

¹⁸⁵⁵ Id.

¹⁸⁵⁶ See 2/26/2007 Mortgage Department Top Sheet, GS MBS-E-010388545, and 6/25/2007 Mortgage Department Top Sheet, GS MBS-E-010850895, Hearing Exhibit 4/27-162.

¹⁸⁵⁷ Subcommittee interview of Daniel Sparks (4/15/2010).

¹⁸⁵⁸ Subcommittee interview of Daniel Sparks (4/15/2010); 2/26/2007 email to Daniel Sparks, Michael Swenson, and others, "New cross desk Top Sheet risk report," GS MBS-E-010386051.

¹⁸⁵⁹ Subcommittee interview of Daniel Sparks (4/15/2010).

¹⁸⁶⁰ Subcommittee discussions with Goldman Controller staff on Responses to Questions for the Record and related documents. Despite the fact that the Mortgage Department Top Sheet was the primary comprehensive position report available to Mortgage Department managers, some more senior Goldman executives appeared to be unaware of its existence. Chief Risk Officer Craig Broderick, for example, testified that he was unaware of a Mortgage Department Top Sheet and he thought the "top sheet" concept might not be suitable for the Mortgage Department. Subcommittee interview of Craig Broderick (4/9/2010). His risk office produced its own daily risk reports that translated the Mortgage Department's electronic trading data directly into risk measures, such as "VAR." Id.; see also, e.g., 8/9/2007 email from risk manager, "MarketRisk: Mortgage Risk Report (cob 08/08/2007)," GS MBS-E-010674894 (attached Goldman report, "Mortgage Risk Report – 8/9/07," GS MBS-E-010674895). The Controller's office also produced its own reports based on the Mortgage Department's electronic trading data, such as the daily profit and loss report for the Mortgage Department. Subcommittee discussions with Goldman Controller staff on responses to Subcommittee QFRs and related documents. See also 7/20/2007 email from controllers, "Mortgages Estimate," GS MBS-E-009640287.

The Top Sheet was literally the top sheet, or cover page, to a comprehensive report distributed daily to Mr. Sparks and other Mortgage Department managers.¹⁸⁶¹ The top line of the Top Sheet listed the aggregate total amounts held by the Mortgage Department in various asset classes, including AAA, AA, BBB, and BBB- rated assets.¹⁸⁶² During most of 2007, the Top Sheet also provided an overall net short or long figure that summed across the top line totals for each of the respective asset classes, providing an overall figure by which the Mortgage Department was net long or net short across all asset classes each day. By plotting this overall net figure for each daily Top Sheet, the Subcommittee developed a graph of the Mortgage Department's net position during 2007, as indicated on the chart on the following page.¹⁸⁶³

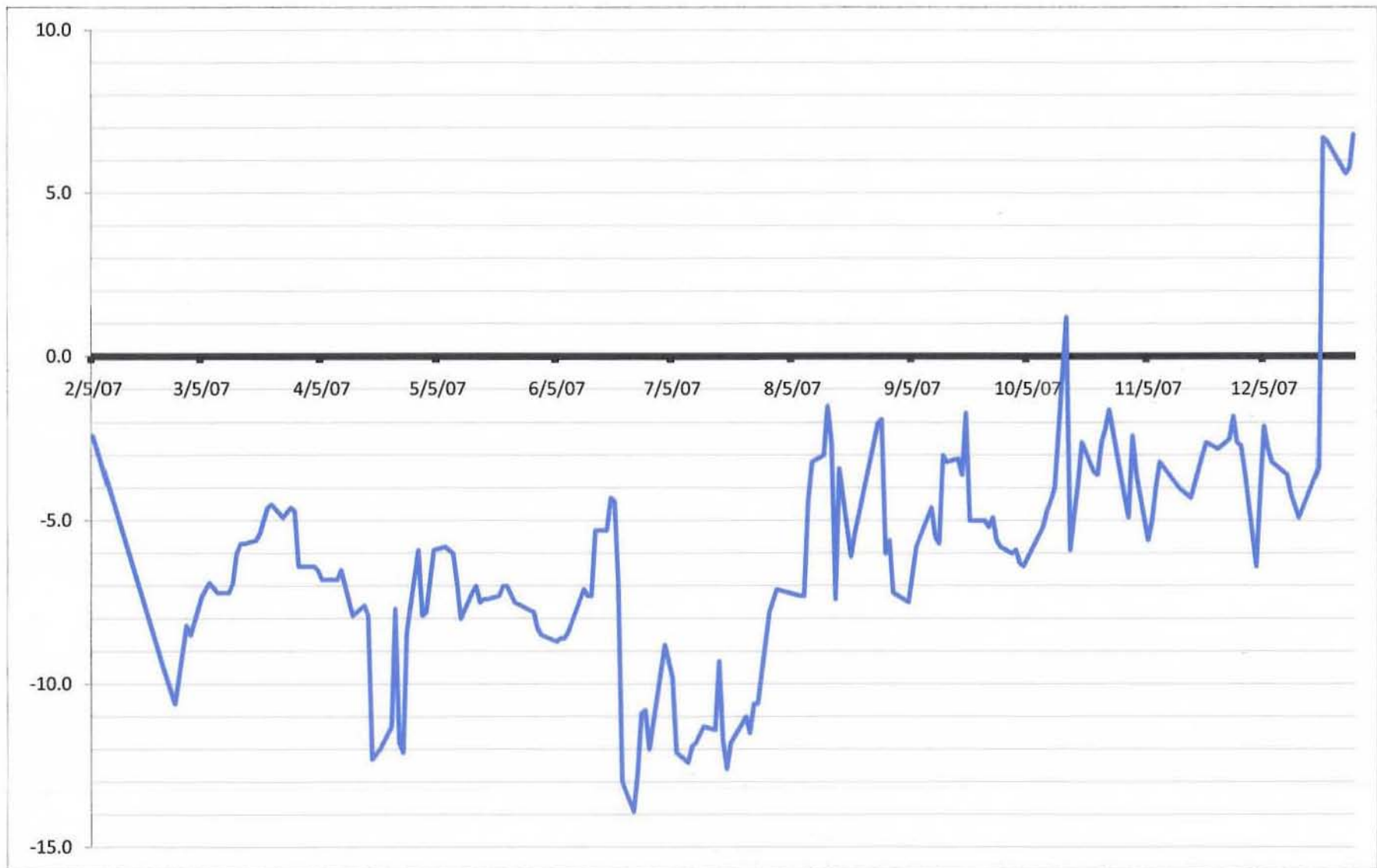
[SEE CHART NEXT PAGE: *Goldman Sachs Mortgage Department Total Net Short Position*, prepared by the Permanent Subcommittee on Investigations.]

¹⁸⁶¹ 2/26/2007 email to Daniel Sparks, Michael Swenson, and others, "New cross desk Top Sheet risk report," GS MBS-E-010386051. The Mortgage Department shared its Top Sheet and several sub-reports for September 25, 2007, with Mr. Viniar around October 1, 2007, in a presentation that summarized the changes in the Mortgage Department's long/short positions across all desks and all assets since the initiation of the Gameplan in May 2007. 10/1/2007 Goldman internal document, "September Risk Pack Viniar," GS MBS-E-013693128 (attached to 10/1/2007 email, "Viniar Risk Pack - Sept," GS MBS-E-013693127).

¹⁸⁶² The balance of the page provided detail regarding the amount of each asset class held by each of the Mortgage Department's desks or business units. Behind the top sheet, the report provided detailed data regarding the various desks and provided different data analyses, such as changes in position from week to week. The last page of each report listed all of the electronic data sources and separate reports from which the Top Sheet was compiled. See, e.g., 2/5/2007 Mortgage Department Top Sheet, GS MBS-E-010369585, Hearing Exhibit 4/27-162.

¹⁸⁶³ See chart entitled, "Goldman Sachs Mortgage Department Total Net Short Position, February-December 2007 in \$ Billions," prepared by the Permanent Subcommittee on Investigations, Hearing Exhibit 4/27-162 (April 2010 version), updated January 2011 (updated version), derived from Goldman Sachs Mortgage Strategies, Mortgage Dept Top Sheets provided by Goldman Sachs (hereinafter "PSI Net Short Chart").

Goldman Sachs Mortgage Department Total Net Short Position, February - December 2007 in \$ Billions
(Market Value, Including All Synthetic and Cash Positions in Mortgage Related Products)



Prepared by the U.S. Senate Permanent Subcommittee on Investigations, April 2010. Updated January, 2011.
Derived from Goldman Sachs Mortgage Strategies, Mortgage Dept Top Sheets provided by Goldman Sachs.

The Subcommittee's net short chart is generally consistent with a Goldman chart that Mr. Birnbaum asked one of the Mortgage Department's analysts to prepare for him in August 2007, which can be seen on the following page.

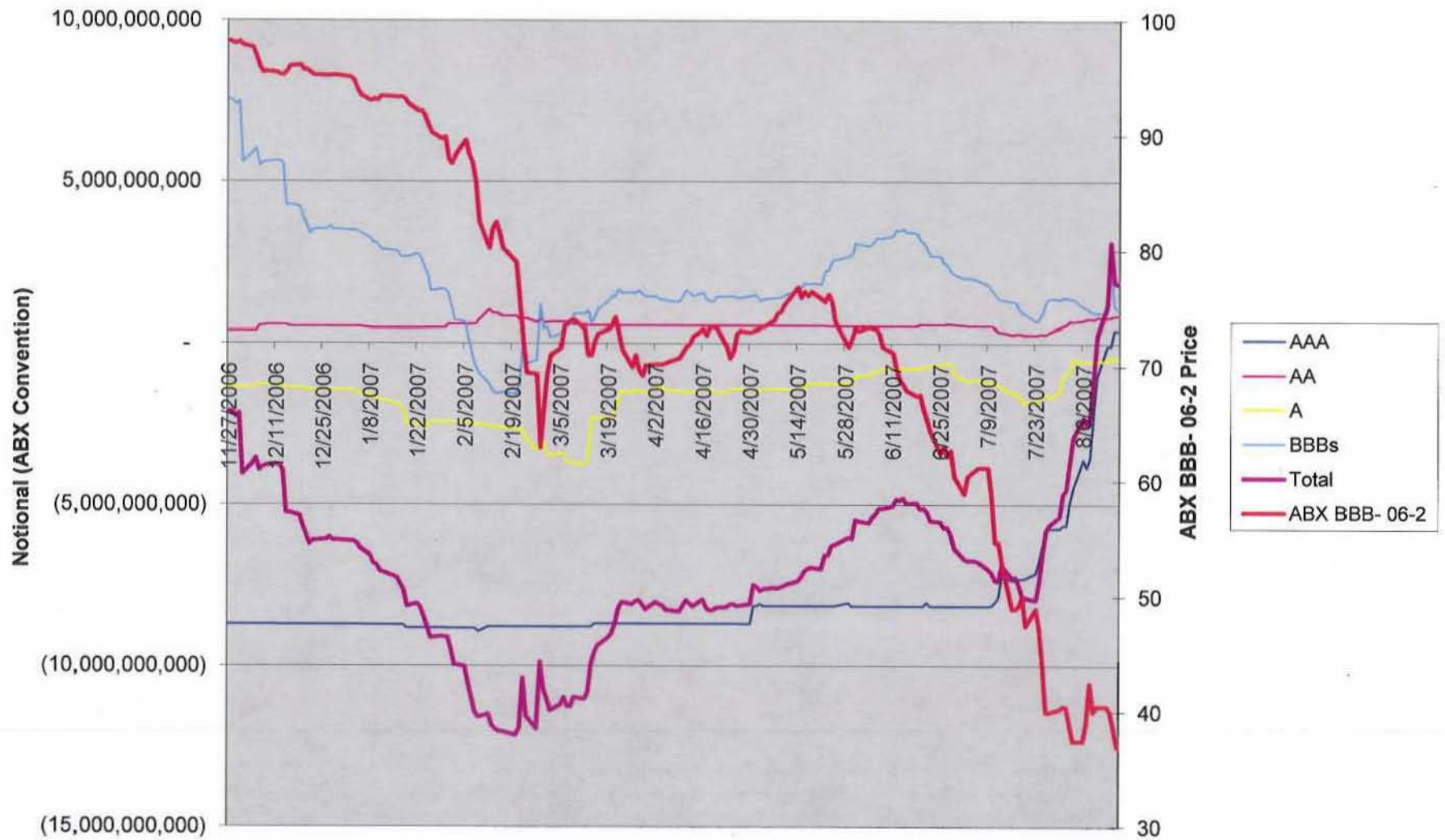
[SEE CHART NEXT PAGE: *RMBS Subprime Notional History*, prepared by Goldman Sachs.]¹⁸⁶⁴

The "zero" line in the middle of the chart represents a neutral trading position that is neither net long nor net short. To use Mr. Viniar's description, the zero line represents "home." The area below the zero line represents net short positions; the area above the line represents net long positions. The chart shows that the Goldman Mortgage Department was net short throughout 2007, with a total net short position that reached \$13.9 billion in July.

¹⁸⁶⁴ 8/17/2007 Goldman internal chart, "RMBS Subprime Notional History (Mtg Dept - Mtg NYC SPG Portfolio)," GS MBS-E-012928391, Hearing Exhibit 4/27-56a. The title of the Goldman chart, "NYC SPG Trading" is confusing, as Mr. Birnbaum asked the analyst, Kevin Kao, for a chart of all synthetic positions across the entire Mortgage Department (including areas other than SPG Trading). In an email to Mr. Birnbaum, Mr. Kao confirmed that despite the title, the chart actually included all synthetic positions across the entire Mortgage Department, and not just the SPG Trading Desk positions. 8/17/2007 email from Mr. Kao to Mr. Birnbaum, GS MBS-E-012929469. Mr. Kao explained that his chart did not include cash positions, meaning long positions in mortgage loans or RMBS from any remaining warehouse inventory. *Id.* That omission was not significant, however, since Goldman had rapidly sold off the vast bulk of its cash inventory starting in November 2006. 4/2010 "Goldman Sachs Long Cash Subprime Mortgage Exposure, Investments in Subprime Mortgage Loans, and Investments in Subprime Mortgage Backed Securities November 24, 2006 vs. August 31, 2007 - in \$ Billions," chart prepared by the Subcommittee, Hearing Exhibit 4/27-163. In any event, the Subcommittee's net short chart includes the Department's cash positions and demonstrates that any long cash positions were insufficient to offset the shorts, as the Mortgage Department was massively net short throughout most of 2007. See PSI Net Short Chart.

In his Supplemental Responses to Questions for the Record from the Subcommittee, Mr. Birnbaum conceded that the Subcommittee's net short chart includes cash positions and therefore fixed the problem of being limited to synthetics as was the case with Goldman's own net short chart. See 8/17/2007 Goldman internal chart, "RMBS Subprime Notional History (Mtg Dept - Mtg NYC SPG Portfolio)," GS MBS-E-012928391, Hearing Exhibit 4/27-56a; Birnbaum responses to Subcommittee QFRs at PSI_QFR_GS0509. Mr. Birnbaum maintained his objection that the Subcommittee's net short chart improperly summed the notional amounts of different asset classes. *Id.* However, as noted in the text, the Mortgage Department's Top Sheet actually converted the notional amounts of each asset class into their market values, making it fair to sum across all asset classes.

**RMBS Subprime Notional History
(Mtg Dept - "Mtg NYC SPG Portfolio")**



Gsmbs-E-012928391

Some Goldman representatives told the Subcommittee that they objected to both the Subcommittee's net short chart, and Goldman's own similar chart, on the grounds that the charts are too simplistic and fail to account for the relative "weight" or value of short positions in differing asset classes.¹⁸⁶⁵ For example, in a 2010 interview with the Subcommittee, Mr. Birnbaum said that because of their differing "weights" or values relative to one another, the notional amounts in each asset class could not simply be summed up together. For example, he said the notional amount of AAA assets cannot be added to the notional amount of BBB assets, because the market assigns each of those positions different weights or values relative to each other.¹⁸⁶⁶ He said that these relative weights or values are often expressed as specific "hedge ratios" which Goldman traders can call up on their computer screens in real time to tell them, for example, the amount of AAA assets they should buy long to hedge a given net short position in BBB assets.¹⁸⁶⁷ Each class also poses a different level of risk than the others. For example, short positions in AAA assets were relatively inexpensive, as the risk of loss in that tier was considered relatively low, while short positions in BBB assets would have higher prices, because the risk of loss was considered high. Mr. Birnbaum said the only chart of Goldman's net short position that he would accept as fairly representative would be one that was "Beta-adjusted" to account for differences in the relative weights, but he admitted that he was unaware of any such charts or reports created by Goldman during 2007.¹⁸⁶⁸ Without considering these relative weights (which continually change based on market price movements in various asset tiers), Mr. Birnbaum said it would be impossible to say that Goldman was ever "net short" at all or in what amount.¹⁸⁶⁹

Goldman's own documents provide a different picture, however. The Top Sheet was the primary comprehensive record used by the Mortgage Department to track all net positions across the Mortgage Department. Goldman did not keep any other records that identified the Mortgage Department's net positions in various asset classes,¹⁸⁷⁰ and did not keep any records that used the "Beta-adjustment" method advocated by Mr. Birnbaum. By early March 2007, the Top Sheet generally expressed the market values of positions in different asset classes, rather than the

¹⁸⁶⁵ See Birnbaum responses to Subcommittee QFRs at PSI_QFR_GS0509. Subcommittee interview of Joshua Birnbaum (10/1/2010).

¹⁸⁶⁶ Subcommittee interview of Joshua Birnbaum (10/1/2010); Subcommittee interview of Michael Swenson (10/8/2010).

¹⁸⁶⁷ Subcommittee interview of Joshua Birnbaum (10/1/2010).

¹⁸⁶⁸ Subcommittee interview of Joshua Birnbaum (10/1/2010).

¹⁸⁶⁹ Id. Mr. Swenson made similar statements in his second Subcommittee interview. "Were we ever net short? It's hard to say what 'net short' means really." Subcommittee interview of Michael Swenson (10/8/2010). Mr. Swenson had no such difficulty, however, in his first Subcommittee interview. When asked the greatest amount by which he remembered his desk being net short, Mr. Swenson replied: "\$9 billion." Subcommittee interview of Michael Swenson (4/16/2010).

¹⁸⁷⁰ As noted above, the risk management and controller areas at Goldman kept their own daily reports based on the Mortgage Department's electronic trading data, but they did not track Goldman's aggregate positions in each asset class on either a notional or market value basis. Rather, the risk area converted the Mortgage Department data into risk measures, while the controllers' area converted the data into profit and loss reports. Though based on the Mortgage Department's reported daily trading, these reports did not directly reflect specific net positions in subprime mortgage assets.

notional amount of the positions.¹⁸⁷¹ By using the market values of positions in each asset class on a given day, the Mortgage Department did, in fact, create a reasonable method for summing across all asset classes in a single common denominator – the amount of cash the assets would bring in the market that day. Since the Subcommittee’s net short chart relies on the Department’s daily Top Sheet figures as expressed in market values rather than notional amounts, it does not suffer from the incompatibility defect pointed out by Mr. Birnbaum.

Mr. Birnbaum’s position that the notional amounts of each asset class cannot be summed up together is also inconsistent with what Goldman’s Mortgage Department did on a day-to-day basis in 2007. Mr. Sparks, the Mortgage Department head who helped design the Top Sheet, used it to measure the Department’s daily position. Mortgage Department personnel and other Goldman executives also discussed the Department’s being “net short” – either overall or in specific asset classes – on a daily basis.¹⁸⁷²

Indeed, the phrase “net short” appears more than 3,400 times in the documents produced to the Subcommittee by Goldman.¹⁸⁷³ Since Mr. Birnbaum claimed that one could never really say whether Goldman was truly “net short,” the Subcommittee asked him why the phrase “net short” appeared so many times in Goldman’s documents. Mr. Birnbaum said that the use of the phrase “net short” was a “shorthand” that was used internally in the Mortgage Department.¹⁸⁷⁴ In fact, neither Mr. Birnbaum, Goldman, nor the Subcommittee could identify any specific document or instance from 2007 in which the weighting exercise advocated by Mr. Birnbaum in his September 2010 interview was ever used or suggested.

Aside from the Top Sheet that summed up totals across different asset classes to obtain an aggregate total, there are also many documents in which Goldman personnel described the total amounts by which Goldman was net short in respective asset classes. For example, Mr. Swenson, and later Mr. Lehman, compiled an email summary each week that described each Mortgage Department desk’s net position in different asset classes. A typical format was as follows:

“Current [SPG Trading] Desk Position Summary:

- RMBS Single-As - net short 900mm 100% in single-name CDS

¹⁸⁷¹ In general, positions were expressed in market values for all liquid assets and in “hedge equivalents” of illiquid assets, meaning the market value of a position that could be used to hedge that asset. See e.g., 3/5/2007 Mortgage Department Top Sheet, GS MBS-E-010630691 (Legend: “Market Value (MM\$)(Hedge Equiv MV for CDS)”); 9/11/2007 email, GS MBS-E-010690522, attaching 9/10/2007 Mortgage Department Top Sheet, GS MBS-E-010690523 (“Market value of bonds/loans, bond equiv mkt val for synthetics.”).

¹⁸⁷² See e.g., 3/5/2007 email from Daniel Sparks to Tom Montag and others, GS MBS-E-010646842 (“We think the overall business is net short”); 3/8/2007 email from Daniel Sparks to Jon Winkelried and others, “Mortgage Risk,” GS MBS-E-002211242 (“We are still net short”); 7/21/2007 email from Daniel Sparks to Donald Mullen and others, “Mortgages Estimate,” GS MBS-E-009640287 (“There is also a large net short that we are chipping away to cover”).

¹⁸⁷³ 1/10/2011 Concordance search of all documents produced to the Subcommittee by Goldman for the phrase “net short.”

¹⁸⁷⁴ Subcommittee interview of Joshua Birnbaum (10/1/2010).

- RMBS BBB/BBB- - net short 3,000mm (80% in single-name CDS - 50% 2005 vintage
- Correlation Desk - net short \$400mm of ABX 06-1 BBB and BBB-
- Mortgage Department short approx \$4bb AAA ABX”¹⁸⁷⁵

Mr. Swenson’s email summaries were forwarded to Mr. Montag and other senior executives to keep them apprised of the Department’s positions.¹⁸⁷⁶ While these documents did not provide an aggregate overall net short position for the Mortgage Department, they did establish net short positions in each of the various specific asset classes described, and they were apparently acceptable to and relied upon by various Goldman executives. Throughout most of 2007, these weekly reports clearly show very large net short positions in mortgage related assets.¹⁸⁷⁷

Email correspondence among Goldman’s senior executives also routinely referred to the Mortgage Department’s net short positions in “billions.”¹⁸⁷⁸ CFO David Viniar told the Subcommittee that a loss (or gain) in the amount of even \$25 million was considered “large” and would immediately be brought to his attention.¹⁸⁷⁹ By that standard, net revenues of \$2 billion from the Mortgage Department’s net short positions in the third quarter of 2007 would have been considered significant and monitored by senior management, as indeed they were.

In testimony before the Subcommittee and other public statements, Goldman attempted to minimize the size of its net short position by suggesting to the Subcommittee that the short positions held by the Mortgage Department were hedges for other, unidentified long assets.¹⁸⁸⁰ Mr. Blankfein even made that argument to his colleagues in September 2007: “The short position wasn’t a bet. It was a hedge.”¹⁸⁸¹ But Mr. Birnbaum contradicted that position just a few days later. On October 4, 2007, Mr. Birnbaum prepared on behalf of the SPG Trading Desk a

¹⁸⁷⁵ 8/5/2007 email from David Lehman to Tom Montag, “Mtg Department Weekly Update,” GS MBS-E-010671564.

¹⁸⁷⁶ Id.

¹⁸⁷⁷ Id.

¹⁸⁷⁸ See, e.g., 8/23/2007 email from Tom Montag to Daniel Sparks, “Current Outstanding Notional in SN ames,” GS MBS-E-010621231 (Mr. Montag said, “so if I make you sell a whopping 800 out of 3 billion which is less than 30% how can anyone complain- -the position is huge and outsized.”); 3/14/2007 email from Tom Montag to Lloyd Blankfein, “Cactus Delivers,” GS MBS-E-009632839 (“Covered another 1.2 billion in shorts in mortgages”); 8/23/2007 email from Tom Montag to Gary Cohn and David Viniar, “Harbinger post,” GS MBS-E-009739009 (“We had bought back almost 9 billion of aaa abx over last two weeks though”); 2/27/2007 email from Richard Ruzika to Tom Montag, GS MBS-E-002204942 (“I want to see us getting the short down to 4.5 bil[lion] net”).

¹⁸⁷⁹ Subcommittee interview of David Viniar (4/13/2010).

¹⁸⁸⁰ See, e.g., Testimony of David Viniar, April 27, 2010, Subcommittee Hearing at 98, 99-100; 4/7/2010 Blankfein & Cohn Letter to Shareholders (quoted in 4/2010 Goldman report, “Risk Management and the Residential Mortgage Market,” at 12, Hearing Exhibit 4/27-161).

¹⁸⁸¹ 9/26/2007 email from Lloyd Blankfein, “Fortune: How Goldman Sachs Defies Gravity,” GS MBS-E-009592726. Mr. Blankfein went on to explain what he meant by “hedge”: “Ie, the avoidance of a bet. Which is why for a part it subtracted from var, not added to var.” Mr. Blankfein did not explain the “part” in which the big short subtracted from VAR. In February and August 2007, most of Goldman’s senior management expressed concern that the large net short positions added to VAR, rather than subtracted from it, and indeed, pushed the firmwide VAR to record levels.

presentation entitled, “SPG Trading – 2007,” in which he advocated that SPG Trading Desk personnel should be compensated like hedge fund managers and not as ordinary participants in Goldman’s traditional bonus pool system.¹⁸⁸² The presentation, which Mr. Birnbaum prepared to anticipate and refute counter-arguments that might be made by Goldman senior executives, explicitly addressed and rejected the contention that the profitable net short positions managed by the SPG Trading Desk were hedges for long assets held by other desks. Mr. Birnbaum, one of the chief architects of Goldman’s big short, stated:

“By June [2007], all retained CDO and RMBS positions were identified as already hedged. ... SPG trading re-initiated shorts post BSAM [Bear Stearns Asset Management] unwind on an outright basis with no accompanying CDO or RMBS retained position longs. In other words, the shorts *were not a hedge*.”¹⁸⁸³ (Emphasis in original).

In response to Questions for the Record from the Subcommittee, Mr. Birnbaum once again stated that SPG Trading initiated the “shorts on an outright basis with no accompanying CDO or RMBS retained position longs following the Bear Stearns Asset Management unwind in 2007, and that these positions were not a hedge.”¹⁸⁸⁴

Mr. Birnbaum’s statement that “all retained CDO and RMBS positions were identified as already hedged” by June 2007 is also supported by other documents provided by Goldman’s Mortgage Department. On February 28, 2007, for example, David Rosenblum, Co-Head of the CDO/CLO Origination Desk, initiated a project to ensure that all of the CDO Origination Desk’s warehouse accounts were “fully hedged.”¹⁸⁸⁵ As a result, the CDO Origination Desk initiated new hedges and specifically allocated others to cover all the desk’s warehouse risk. Learning of these actions, Mr. Rosenblum responded: “Great. Getting pretty nailed down.”¹⁸⁸⁶ In addition, in a February 12, 2007 email, Mr. Sparks reported to senior management: “Loan and residual books flat,” and indicated that the Department’s long positions were fully hedged with the short ABX

¹⁸⁸² 10/3/2007 Goldman presentation, “SPG Trading – 2007,” GS MBS-E-015654036. Mr. Swenson and Mr. Lehman reviewed and commented upon the “SPG Trading – 2007 ” presentation. Mr. Birnbaum revised the presentation to make the changes Mr. Swenson and Mr. Lehman suggested. See, e.g., 10/2/2007 email from David Lehman to Joshua Birnbaum, “SPG Trading - 2007.ppt,” GS MBS-E-015653681 (providing comments and suggesting text for presentation). Mr. Birnbaum replied and copied Mr. Swenson on the email chain as well: “I added your bullet and one more.” Id. See also 10/4/2007 email from Joshua Birnbaum to Michael Swenson and David Lehman, “How’s this?,” GS MBS-E-015712249 (forwarding revised bullet point for presentation). This collaboration indicates the presentation was made on behalf of the SPG Trading Desk as a whole. Mr. Birnbaum, however, told the Subcommittee that the SPG Trading Desk ultimately did not use the presentation in connection with its proposal for 2007 compensation. See Birnbaum responses to Subcommittee QFRs at PSI_QFR_GS0509.

¹⁸⁸³ 10/3/2007 Goldman presentation, “SPG Trading – 2007,” GS MBS-E-015654036 [emphasis in original].

¹⁸⁸⁴ See Birnbaum responses to Subcommittee QFRs at PSI_QFR_GS0509.

¹⁸⁸⁵ 2/28/2007 email from David Rosenblum to Peter Ostrem, “Pete– pls send me cob 2/28 MTM for SP CDO WH’s first thing in the morning,” GS MBS-E-001800707; 2/28/2007 email from David Rosenblum, “Hedges Status Report,” GS MBS-E-002640538 (new ABX hedges added and other hedges allocated to ensure that CDO warehouse risk was fully hedged).

¹⁸⁸⁶ Id.

positions.¹⁸⁸⁷ In a third example, after conclusion of the CDO valuation project, all of the remaining CDO assets were transferred from the CDO Origination Desk to the SPG Trading Desk in May 2007. Even after the transfer of those long assets, the SPG Trading Desk remained short, suggesting again that the CDO assets may have already been hedged.¹⁸⁸⁸ These Goldman documents all support Mr. Birnbaum's statement that all retained CDO and RMBS positions were identified as already hedged when the SPG desk started rebuilding its net short position in June 2007.

(ii) Risk Reports

The Mortgage Department's large net short positions were also demonstrated by the periodic risk reports that recorded Goldman's key risk measure, "Value at Risk" or "VAR," throughout 2007. At a 95% confidence level, VAR represents the dollar amount a business unit, here the Mortgage Department, could expect to make or lose once every 20 trading days – or about once a month.¹⁸⁸⁹

The Mortgage Department's VAR skyrocketed during 2007, climbing far beyond the Mortgage Department's permanent VAR limit of \$35 million and hitting a record high of \$113 million in mid-August 2007.¹⁸⁹⁰ In 2007, with notable exceptions discussed below, whenever the Mortgage Department's trading exceeded its risk limits, Goldman's risk managers simply assigned the department a new, higher "temporary" risk limit to accommodate the Department's trading.¹⁸⁹¹

At the same time, the higher VAR did signal the presence of a large net short position and functioned to limit the size of that position. Twice during 2007, in late February and again in late August, Goldman's senior executives ordered the Mortgage Department to reduce its large short positions in order to bring the firm's overall VAR measure down.¹⁸⁹² The senior executives were aware of the Mortgage Department's large net short positions, in part, because those positions had contributed to increases in Goldman's firmwide or trading VAR.

¹⁸⁸⁷ 2/12/2007 email from Daniel Sparks, "Post today," GS MBS-E-002202310.

¹⁸⁸⁸ Id.; PSI Net Short Chart.

¹⁸⁸⁹ Subcommittee interview of Craig Broderick (4/9/2010). See also Philippe Jorion, "Value at Risk: The New Benchmark for Managing Financial Risk," at 20, (3d ed. 2007).

¹⁸⁹⁰ See Mortgage Department Quarterly Average VAR. (Third Quarter 2006 - \$13 million; Fourth Quarter 2006 - \$14 million; Second Quarter 2007 - \$63 million; Third Quarter 2007 - \$68 million; Fourth Quarter 2007 - \$75 million). See 9/2007 Quarterly Market Risk Review, "Market Risk Management and Analysis," GS MBS-E-009590673, Hearing Exhibit 4/27-54e; see also 12/2007 Quarterly Market Risk Review, "Market Risk Management and Analysis," GS MBS-E-009586222, Hearing Exhibit 4/27-54f.

¹⁸⁹¹ 8/9/2007 email from Joshua Birnbaum to Deeb Salem, "MarketRisk: Mortgage Risk Report (cob 08/08/2007)," GS MBS-E-012927202.

¹⁸⁹² 2/27/2007 email from Richard Ruzika to Tom Montag and others, GS MBS-E-002204942; 8/15/2007 email from Gary Cohn, "Trading VaR \$165mm," GS MBS-E-016344758; Subcommittee interview of Joshua Birnbaum (10/1/2010).

The firm tolerated the exceptionally high levels of VAR generated by the Mortgage Department, despite the risks reflected in those high VAR levels.¹⁸⁹³ On the few days when the market rallied, the Mortgage Department incurred huge losses from its net short position that were immediately reported up the chain to senior management. For example, upon hearing of a \$100 million loss in a single day, Mr. Montag asked: “Okay, who lost the hundy?”¹⁸⁹⁴ Mr. Viniar told the Subcommittee that he was notified of even a \$25 million loss in a single day.¹⁸⁹⁵ Allowing the Mortgage Department to maintain high VAR levels meant that Goldman’s large net short positions left the firm exposed to large losses, which in some instances did occur, though not as often as its VAR predicted they might.¹⁸⁹⁶

Risk Management at Goldman. Every business unit and trading desk at Goldman had a counterpart in the firm’s risk management area.¹⁸⁹⁷ Risk managers were assigned to “shadow” the relevant business unit and trading desk operations to ensure that their respective trading activities did not exceed pre-determined risk limits.¹⁸⁹⁸ Separate VAR limits were set for the firm as a whole and for each division. The division then allocated its VAR limit among each department or

¹⁸⁹³ Subcommittee interview of Craig Broderick (4/9/2010).

¹⁸⁹⁴ 8/8/2007 email from Tom Montag to David Lehman and Michael Swenson, GS MBS-E-011311633.

¹⁸⁹⁵ Subcommittee interview of David Viniar (4/13/2010).

¹⁸⁹⁶ Mr. Birnbaum frequently argued that VAR, or at least Goldman’s then-current model of VAR, was an inappropriate risk measure for the Mortgage Department’s shorting activities. 8/9/2007 email from Joshua Birnbaum to Deeb Salem, “MarketRisk: Mortgage Risk Report (cob 08/08/2007),” GS MBS-E-012927200 (“These VAR numbers are ludicrous, btw. Completely overestimated for SPG trading, underestimated for other mortgage desks.”). He contended that for various reasons, the Mortgage Department was not actually as short as the VAR measure reflected. See, e.g., 9/26/2007 2007 MD Reviews, Joshua Birnbaum Self-Review, GS-PSI-01956, Hearing Exhibit 4/27-55c. In arguing for a special compensation model for the SPG Trading Desk, Mr. Birnbaum pointed out that the desk never lost as much money as the firm’s VAR measure predicted it would. 10/3/2007 Goldman presentation, “SPG Trading – 2007,” GS MBS-E-015654036. Accordingly, Mr. Birnbaum may have been correct that the firm’s VAR measure did not accurately measure risk to the firm. *Id.* On the other hand, since VAR rests on probability theory which is based on a “normal” distribution of profits and losses (the typical “bell curve”), the Mortgage Department may have benefitted from the extraordinary and continual one-way movement downward in the subprime mortgage markets.

One risk management expert testified before Congress: “It is well known that VaR cannot measure crisis risk. During periods of crisis the relationship between securities changes in strange and seemingly unpredictable ways. VaR, which depends critically on a set structure for volatility and correlation, cannot provide useful information in this situation. It contains no mechanism for predicting the type of crisis that might occur, and does not consider the dynamics of market crises. This is not to say that VaR has no value or is hopelessly flawed. Most of the time it will provide a reasonable measure of risk – indeed the vast majority of the time this will be the case. If one were forced to pick a single number for the risk of a portfolio in the near future, VaR would be a good choice for the job.” Prepared statement of Richard Bookstaber, “The Risks of Financial Modeling: VaR and the Economic Meltdown,” before the U.S. House of Representatives Committee on Science and Technology, Subcommittee on Investigations and Oversight, H.R. Hrg. 111-48 (9/10/2009), at 4.

¹⁸⁹⁷ Subcommittee interview of Craig Broderick (4/9/2010).

¹⁸⁹⁸ The Mortgage Department had other risk limits aside from VAR, including Credit Spread Widening or “CSW,” which seeks to measure what would happen if credit spreads suddenly widened by large amounts (called “shocks”); “dv01,” which measures the dollar amount by which a security’s value would change based on a 1 basis point change in the relevant index or interest rate; and balance sheet limits, meaning the amount of Goldman’s balance sheet the relevant business unit would be permitted to consume. Subcommittee interview of Craig Broderick (4/9/2010).

business area within a division. Some trading desks within a department also had assigned risk limits.

At the end of a typical trading day, Goldman's Risk Department prepared risk reports containing some or all of the risk measures used for the Mortgage Department. The Risk Department prepared daily, weekly, and quarterly risk reports, as well as reports for the Board of Directors and various management committees.¹⁸⁹⁹ Goldman's Firmwide Risk Committee ("FWRC") was co-chaired by David Viniar and its weekly meetings were often attended by Co-President Gary Cohn and CEO Lloyd Blankfein.¹⁹⁰⁰ In preparation for a meeting with regulators, Goldman senior executives noted that the Mortgage Department was discussed at every meeting of the FWRC throughout 2007.¹⁹⁰¹ Goldman also noted that risk "[l]imits are set by the FWRC. Decisions regarding, e.g., short positions in mortgages taken by business units but with full knowledge of the 30th floor."¹⁹⁰²

Goldman executives told the Subcommittee that, in general, risk limits were firm and compliance was mandatory.¹⁹⁰³ At the end of each day, department and divisional personnel, their respective risk managers, and other executives were provided with risk reports from which they could readily see whether a trading desk had breached its limits. In the event of a violation, the desk would be directed to curtail its activities or to take whatever steps were necessary to bring its trading within the applicable limits. Once a desk was notified of its breach of a limit, it was generally required to act immediately to comply with the existing limits.¹⁹⁰⁴

At times, the Mortgage Department proposed various modifications or alternatives to its existing risk measures. Some of these proposals were adopted and some were not.¹⁹⁰⁵ But from

¹⁸⁹⁹ 9/2006-12/2007 Goldman Sachs Quarterly Market Risk Review, "Market Risk Management & Analysis," Hearing Exhibits 4/27-54a-f and GS MBS-E-010674895.

¹⁹⁰⁰ 11/13/2007 Goldman email, GS MBS-E-010023525 (attachment, 11/14/2007 "Tri-Lateral Combined Comments," GS MBS-E-010135693-715). In November 2007, Goldman's Chief Risk Officer, Craig Broderick, Controller Sarah Smith, and senior members of their staffs met with the Tri-Lateral Review Group, which included representatives of the Federal Reserve Bank, the SEC, and the United Kingdom's Financial Services Authority, to discuss risk management during the financial crisis. The "Trilateral Combined Comments" are the talking points prepared by Goldman senior executives for that meeting, in order to respond to specific written questions Goldman and other firms had received from the Trilateral Review Group.

¹⁹⁰¹ *Id.*

¹⁹⁰² *Id.* The reference to the 30th floor was to the floor on which Goldman's senior executives then had their offices in Goldman's New York headquarters. Goldman also noted that "sr mgmt participated actively in all of the significant exposure management including when / how to reduce positions." 11/13/2007 Goldman email, GS MBS-E-010023525 (attachment, 11/14/2007 "Tri-Lateral Combined Comments," GS MBS-E-010135693-715 at 695).

¹⁹⁰³ Subcommittee interview of Joshua Birnbaum (10/1/2010); Subcommittee interview of Craig Broderick (4/9/2010).

¹⁹⁰⁴ Subcommittee interview of Joshua Birnbaum (10/1/2010).

¹⁹⁰⁵ See, e.g., 2/8/2007 email from Michael Dinias to Robert Berry, and Craig Broderick, GS MBS-E-009980807; 2/24/2007 email from Robert Berry to David Viniar, Craig Broderick and Bill McMahon, "Mortgage VaR," GS MBS-E-009778897 (recommending model parameters for VAR calculations); 4/18/2007 email from Jeremy Primer to Joshua Birnbaum, "Resolution from MRMA meeting?," GS MBS-E-012868698 (discussing further adjustment to

the perspective of the firm's most senior executives, VAR appeared to have been the predominant risk measure by which the Department's activities were judged.¹⁹⁰⁶

VAR Levels Show Net Short. The primary factors that influence VAR are: (1) the relative size and correlation of positions, and (2) the volatility of trading.¹⁹⁰⁷ While VAR is computed by applying a complex algorithm to trading data, the VAR measure directly reflects position size and correlation, and volatility – or a combination of both factors.¹⁹⁰⁸ Changes in VAR levels over time can also provide information about the general magnitude and direction of trading positions.

In the fourth quarter of 2006, the Mortgage Department's permanent VAR limit was \$20 million, of which it consumed only \$13 million.¹⁹⁰⁹ Early the next year, on February 5, 2007, the Mortgage Department exceeded its limit with a VAR of \$20.5 million.¹⁹¹⁰ On February 8, 2007, a senior risk manager recommended that the Mortgage Department's permanent VAR limit be increased to \$30 million to accommodate anticipated increased price volatility in the mortgage markets that year.¹⁹¹¹ A senior manager concurred and increased the Mortgage Department's permanent VAR limit to \$35 million, which remained the Mortgage Department's "permanent" limit throughout 2007.¹⁹¹²

Almost immediately, however, the Mortgage Department breached its new limit, and its VAR continued to climb. Over the course a single quarter, the Mortgage Department's VAR jumped from \$13 million at the end of 2006, to \$85 million in the first quarter of 2007 – a 550%

VaR calculation); 4/23/2007 email from Robert Berry to Daniel Sparks and SPG Trading Desk, "Mortgage VaR," GS MBS-E-009708690 (adjustments to VAR calculations).

¹⁹⁰⁶ See, e.g., 8/21/2007 email from Tom Montag to Gary Cohn, GS MBS-E-016344758; 8/21/2007 email from Michael Dinias, "Trading VaR Analysis," GS MBS-E-009742070; Subcommittee interview of David Vinjar (4/13/2010) and Joshua Birnbaum (10/1/2010); 2/24/2007 email from Robert Berry to David Vinjar and others, "FW: Mortgage VaR," GS MBS-E-009778897.

¹⁹⁰⁷ See generally "The Risks of Financial Modeling: VaR and the Economic Meltdown," before the U.S. House of Representatives Committee on Science and Technology, Subcommittee on Investigations and Oversight, H.R. Hrg. 111-48 (9/10/2009), at 4 (Written Testimony of Richard Bookstaber); Philippe Jorion, "Value at Risk: The New Benchmark for Managing Financial Risk (3d ed. 2007) at 64.

¹⁹⁰⁸ See *id.* Based on these factors, VAR is generally lower if a desk has many small and non correlated (well diversified) positions that are trading at steady and predictable price levels. By contrast, VAR is higher if a desk is holding a small number of very large and highly correlated positions that are trading at volatile and unpredictable price levels. The position size/correlation and volatility factors may also operate independently. Thus, even if the desk has a large number of relatively small and non correlated positions, VAR tends to rise as the volatility of trading rises. Similarly, even if there is little volatility in trading, VAR tends to rise as the desk's position sizes become larger and increasingly correlated. The two factors also reinforce one another – large position sizes combined with high volatility tend to increase VAR dramatically.

¹⁹⁰⁹ Market Risk Management & Analysis, Quarterly Market Risk Review, December 2006, GS MBS-E-009583144, Hearing Exhibit 4/27-54; see also 2/6/2007 email from MarketRisk, "MarketRisk: Mortgage Risk Report (cob 02/06/07)," GS MBS-E-009980807 (Mortgage SPG VaR Limit 20).

¹⁹¹⁰ 2/8/2007 email from Michael Dinias, "VaR limit for Mtg SPG," GS MBS-E-009980807.

¹⁹¹¹ *Id.*

¹⁹¹² *Id.*

increase. Goldman's Chief Risk Officer, Craig Broderick, told the Subcommittee that he would be concerned about any breach of a VAR limit, and would certainly investigate the doubling of a business unit's VAR, but he admittedly took no action when the Mortgage Department's VAR more than quintupled over the course of a single quarter. Mr. Broderick attributed the steep rise in VAR almost exclusively to unprecedented market volatility,¹⁹¹³ although other Goldman officials stated that the VAR levels were being driven by Goldman's large net short positions.¹⁹¹⁴

For the most part, Goldman's risk managers ignored the Mortgage Department's VAR violations and did not demand immediate compliance with the last applicable limit, as would ordinarily be the case.¹⁹¹⁵ With notable exceptions in late February and late August 2007, Goldman's risk managers continually assigned the Mortgage Department new "temporary" VAR limits large enough to accommodate whatever risk levels resulted from the Department's trading. Mr. Birnbaum later described this pattern as the risk area's "policy to just keep increasing ou[r] limit."¹⁹¹⁶

The first quarter of 2007 is illustrative of the pattern. During that quarter, the Mortgage Department's trading activities exceeded three new VAR limits in as many weeks. The Mortgage Department received its new permanent VAR limit of \$35 million on February 8, 2007.¹⁹¹⁷ Four days later, on February 12, the Department's VAR hit \$49 million.¹⁹¹⁸ On February 14, the

¹⁹¹³ Subcommittee interview of Craig Broderick (4/9/2010).

¹⁹¹⁴ 2/27/2007 email from Richard Ruzika to Tom Montag, others, GS MBS-E-002204942; Subcommittee interview of Joshua Birnbaum (4/22/2010); Subcommittee interview of Daniel Sparks (4/15/2010); 8/9/2007 email from Joshua Birnbaum to Deeb Salem, "MarketRisk: Mortgage Risk Report (cob 08/08/2007)," GS MBS-E-012927202; 8/16/2007 email from Michael Dinias, "mortgage var contribution," GS MBS-E-011247689 ("Mortgage Trading has 53.8% marginal contribution to Firmwide VaR and removing the entire mortgage business reduces Firmwide VaR by \$53mm (from \$165mm to \$112mm). ... As expected SPG Trading desk dominates this risk with 56% contribution and adds \$49mm to Firmwide VaR. This is primarily driven by ABS Synthetics and Correlation book which have the bulk of the mortgage shorts."); 8/21/2007 email from Michael Dinias, "Trading VaR Analysis," GS MBS-E-009742070 (Mortgage VAR "primarily driven by mortgage shorts on the ABS Synthetics and Correlation desks."); 8/22/2007 email from Tom Montag to Lloyd Blankfein, "Trading VaR \$144mm," GS MBS-E-009605812, Hearing Exhibit 4/27-36 ("we are covering a number of shorts in mortgages today and tomorrow—probably 1.5 billion worth—will reduce mortgages [VAR] hopefully to below [\$]80 [million]").

¹⁹¹⁵ Subcommittee interview of Joshua Birnbaum (10/1/2010).

¹⁹¹⁶ 8/9/2007 email from Joshua Birnbaum to Deeb Salem, "MarketRisk: Mortgage Risk Report (cob 08/08/2007)," GS MBS-E-012927198. It is unclear the extent to which Goldman's regulators were aware of the Mortgage Department's VAR levels. In November 2007, Goldman met with the Tri-Lateral Review Group, which included the Federal Reserve Bank, the SEC, and the United Kingdom's Financial Services Authority, regarding its risk management during the financial crisis. Talking points prepared by Goldman personnel for that meeting stated that with respect to VAR: "Exposures were managed responsibly by the business units within agreed limits. Highs were set in Mortgages Benign P&L allowed for a disciplined but measured response." 11/13/2007 Goldman email, GS MBS-E-010023525 (attachment, 11/14/2007 "Tri-Lateral Combined Comments," GS MBS-E-010135693-715 at 707). This description did not disclose that the Mortgage Department, for nearly the entire year, had routinely exceeded its \$35 million VAR limit by significant amounts for months on end.

¹⁹¹⁷ 2/8/2007 email from Michael Dinias, "FW: VaR limit for Mtg SPG," GS MBS-E-009980807.

¹⁹¹⁸ 2/13/2007 email, "MarketRisk: End of Day Summary - cob 02/12/2007," GS MBS-E-009716432; see also 2/14/2007 Goldman internal email, "Increase in Mortgage VaR," GS MBS-E-010374687 ("MTG SPG Desk VaR increase from \$21 mm to \$48mm from cob Feb 6 to cob Feb 13, driven primarily by SPG Trading desk").

Department was assigned a new “temporary” limit of \$50 million that would expire on February 20.¹⁹¹⁹ By February 20, however, the Department’s VAR was \$63 million, well in excess of its temporary limit of \$50 million.¹⁹²⁰ So the Department was assigned a new temporary limit of \$60 million – a level it was already exceeding – until February 27.¹⁹²¹ Instead of dropping below the new temporary limit of \$60 million, the Mortgage Department’s VAR continued to rise until it hit a quarter-high level of \$85 million on February 23 and February 26.¹⁹²² In response, on February 27, the Department was given yet another temporary limit of \$90 million through the end of the month.¹⁹²³ But the precipitous rise in VAR apparently alarmed Goldman’s Operating Committee, which ordered the Department to reduce the size of its net short position to \$4.5 billion.¹⁹²⁴ The Department responded immediately and, by February 28, had reduced its VAR to \$81 million.¹⁹²⁵

The pattern created by the Mortgage Department’s increasing VAR levels, and the lagged reaction of Goldman’s risk managers in setting new “temporary” limits over the course of 2007 is shown in the chart on the next page.

[SEE CHART NEXT PAGE: *Goldman Sachs Mortgage Department Value at Risk (VaR)*, prepared by Permanent Subcommittee on Investigations.]

The continual increases in the Mortgage Department’s VAR also had an impact on VAR for all of Goldman’s trading activities, called “Trading VAR” or “Firmwide VAR.” Goldman carefully tracked the amount of its trading VAR that was attributable to the activities of each of its trading desks or units. During the first quarter of 2007, its records show that the firm’s Trading VAR rose from \$119 million in the prior quarter to \$154 million.¹⁹²⁶ Goldman has stated that its Mortgage Department’s activities have historically resulted in only about 2% of the firm’s net revenues.¹⁹²⁷ At the end of 2006, the Mortgage Department’s VAR of \$14 million contributed only about 3% of the Firmwide Trading VAR of \$119 million, which is roughly consistent with or proportionate to the 2% contribution to firmwide net revenues that Goldman has reported.¹⁹²⁸

¹⁹¹⁹ 2/14/2007 email, “MarketRisk: End of Day Summary - cob 02/13/2007,” GS MBS-E-009763394 (“Mortgages VAR is over its \$35mm limit. Temporary \$50mm limit was granted until cob 02/20/2007.”).

¹⁹²⁰ 2/20/2007 email, “MarketRisk: End of Day Summary - cob 02/16/2007,” GS MBS-E-009724779. 2/22/2007 email, “MarketRisk: End of Day Summary - cob 02/21/2007,” GS MBS-E-009762741 (Mortgages VAR on 2/20 was 63 million).

¹⁹²¹ Id. (“Mortgages VAR has a temporary \$60mm limit until cob 2/27/2007.”).

¹⁹²² 2/26/2007 email, “MarketRisk: End of Day Summary - cob 2/23/2007,” GS MBS-E-009720057; 2/27/2007 email, “MarketRisk: End of Day Summary - cob 2/26/2007,” GS MBS-E-009764685.

¹⁹²³ 2/27/2007 email, “MarketRisk: End of Day Summary - cob 2/26/2007,” GS MBS-E-009764685 (“Mortgages VAR has a temporary \$90mm limit until cob 03/06/07.”). 2/28/2007 email, “MarketRisk” End of Day Summary - cob 2/27/2007,” GS MBS-E-009762239.

¹⁹²⁴ 2/27/2007 email from Richard Ruzika to Tom Montag, others, GS MBS-E-002204942.

¹⁹²⁵ 3/1/2007 email, “MarketRisk: End of Day Summary - cob 02/28/2007,” GS MBS-E-009757430.

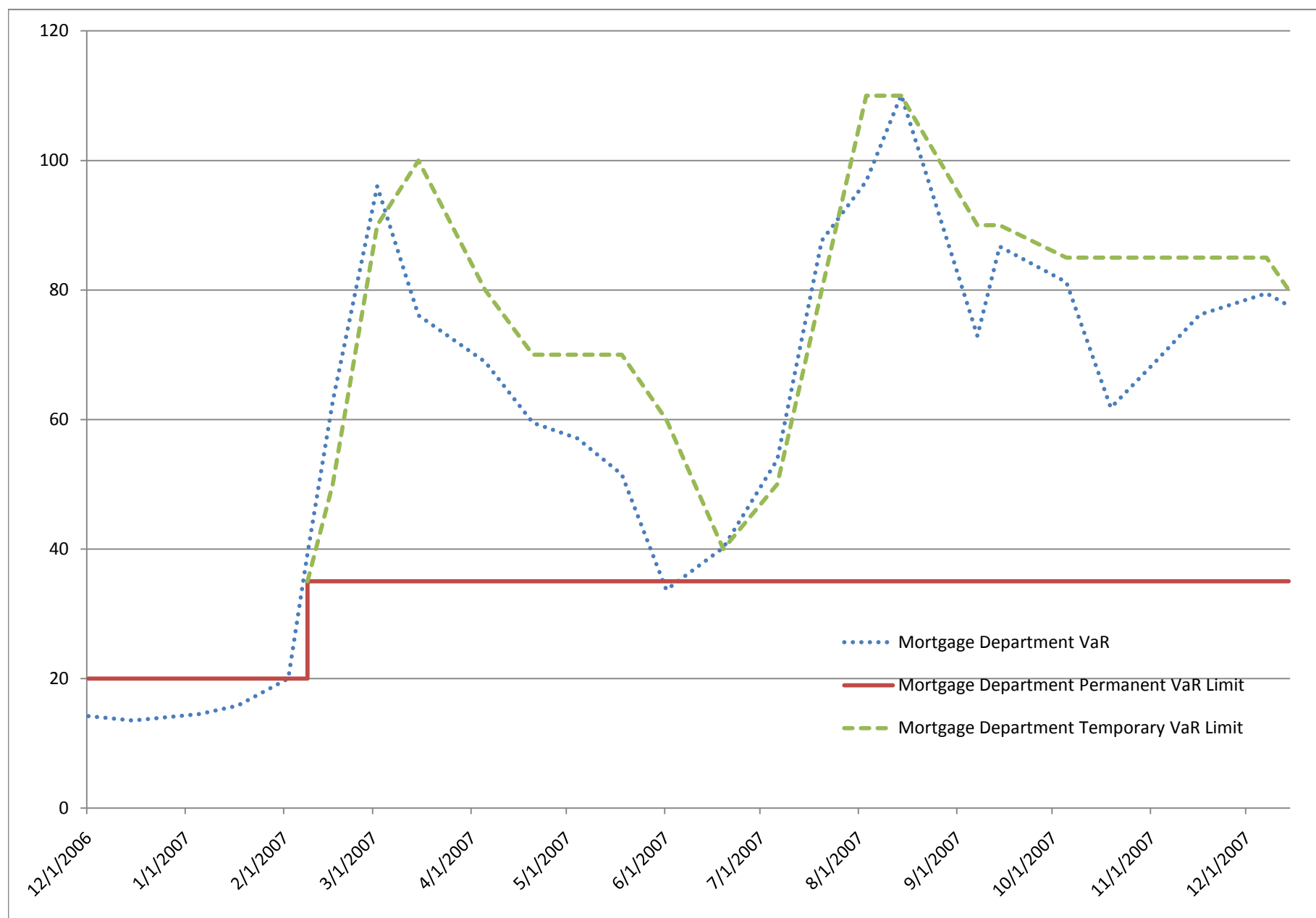
¹⁹²⁶ 3/2007 Goldman “Quarterly Market Risk Review, Market Risk Management & Analysis,” GS MBS-E-009685934, Hearing Exhibit 4/27-54c.

¹⁹²⁷ 4/2010 Goldman report, “Risk Management and the Residential Mortgage Market,” Hearing Exhibit 4/27-161.

¹⁹²⁸ 12/2006 Goldman “Quarterly Market Risk Review, Market Risk Management & Analysis,” GS MBS-E-009583144, Hearing Exhibit 4/27-54b.

Goldman Sachs Mortgage Department Value at Risk (VaR)

December 2006 - December 2007 (in \$ Millions)



Derived from Goldman Sachs Firmwide Risk Committee Appendices and Market Risk End of Day Summaries provided by Goldman Sachs.
Prepared by the U.S. Senate Permanent Subcommittee on Investigations, April 2010.

At the end of the first quarter in 2007, however, the Mortgage Department's VAR of \$85 million was contributing a total of 23% to the Firmwide VAR.¹⁹²⁹ During the rest of 2007, the Mortgage Department's percentage contribution to Firmwide VAR continued to rise until it hit an all-time high of 54% on August 14, 2007, when the Mortgage Department's VAR reached \$110 million on a Firmwide VAR of \$165 million.¹⁹³⁰

The 54% contribution rate to firmwide VAR means that the Mortgage Department's trading alone accounted for a 54% of total firmwide risk, while all of Goldman's other trading activities combined – including all equities, commodities, foreign exchange, and interest rate instruments – accounted for the rest. Given the serious financial ramifications of such a large and highly concentrated position, the decision to allow the Mortgage Department to incur such a high level of firmwide risk would have required approval at the highest levels of firm management. Indeed, it was Goldman's Operating Committee and its Co-President, Mr. Cohn, who decided in February and August 2007, respectively, that the Mortgage Department's VAR had risen too high and had to be brought down.¹⁹³¹

Because of the net short's impact on the Mortgage Department and firmwide VAR levels, Goldman's senior executives not only knew about the "big short," but made frequent inquiries and exercised frequent control over the Mortgage Department's activities.¹⁹³² On August 16, 2007, for example, Jon Winkelried, who served as Co-President with Mr. Cohn, asked Mr. Sparks: "Do you still feel we are being conservative with our marks Good time to make sure we're conservative." Mr. Sparks replied:

"I try, but it is much harder than you think with all the things we are dealing with – completely dislocated markets with little price transparency, systems/tools that are not where they should be, focused controllers (who I think are doing a very good job in a tough market) and many cooks in the kitchen who like to micro-manage. ... But I hear your message."

Mr. Winkelried replied: "I think you should drop the micro manage theme in this environment."¹⁹³³

¹⁹²⁹ 3/2007 Goldman Quarterly Risk Review, "Market Risk Management and Analysis," GS MBS-E-009685958, Hearing Exhibit 4/27-54.

¹⁹³⁰ 8/14/2007 Market Risk Report, Mortgage Portfolio Summary, GS MBS-E-012380294, Hearing Exhibit 4/27-35 (Mortgage Structured Products, VAR 110.1 on 8/14/07, Percentage Contribution to Firmwide VaR 53.8%).

¹⁹³¹ 2/27/2007 email from Richard Ruzika to Tom Montag and Daniel Sparks, GS MBS-E-002204942; 8/15/2007 email from Gary Cohn, "Trading VaR \$165mm," GS MBS-E-016344758.

¹⁹³² 8/16/2007 email from Jon Winkelried to Daniel Sparks, "Mort P&L Explanation," GS MBS-E-010680327-330; 7/25/2007 email from David Viniar to Gary Cohn, "Private & Confidential: FICC Financial Package 07/25/07," GS MBS-E-009861799, Hearing Exhibit 4/27-26; 2/27/2007 email from Richard Ruzika to Tom Montag, others, GS MBS-E-002204942; 8/15/2007 email from Gary Cohn, "Trading VaR \$165mm," GS MBS-E-016344758.

¹⁹³³ 8/16/2007 email from Jon Winkelried to Daniel Sparks, "Mort P&L Explanation," GS MBS-E-010680327-330.

Mr. Mullen also expressed concern that the Mortgage Department's practice of skirting the normal decisionmaking channels and communicating directly with the Co-Presidents Gary Cohn and Jon Winkelried, among other very senior officers, could create problems. When Mr. Birnbaum drafted the Mortgage Department's proposal to buy \$10 billion in AAA RMBS securities, he sent it directly to Mr. Cohn and Mr. Winkelried, as well to his more immediate superiors, Mr. Mullen, Mr. Montag, and Mr. Sparks, among others. Mr. Mullen wrote to Mr. Cohn and Mr. Winkelried, the Co-Presidents of Goldman: "It would help to manage these guys if u would not answer these guys and keep bouncing them back to Tom and I." Mr. Cohn replied: "Got that and am not answering," but then added: "I do like the idea but you[r] call."¹⁹³⁴

For his part, Mr. Montag was also aware that he and Mr. Mullen were taking a more active role in the management of the Mortgage Department than they normally would. Mr. Montag, for example, was Global Co-Head of Securities for the Americas, which encompassed both the FICC Division and the Equities Division, and was responsible for numerous departments. Nonetheless, he was involved in management decisions regarding the Mortgage Department on a near-daily basis in 2007. In August of that year, Mr. Lehman reported to Mr. Sparks that Mr. Montag had asked:

"how the desk thought about him and mullen being very involved. I told him we understood the scrutiny on the business given the overall pressure on our market, large P+L [profit and loss] and risk swings, etc."¹⁹³⁵

Given the scrutiny by senior executives, the fact that the Mortgage Department's VAR was permitted to reach over \$113 million in mid-August 2007 – more than three times its permanent limit – suggests that senior management knew and approved of the magnitude of the risk the Department incurred. It also suggests that the net short positions the Mortgage Department took were proprietary.¹⁹³⁶ Goldman's senior executives would have no reason to take such large risks if they were seeking only the small spread arbitrage available from market-making activities for customers.

On February 26, 2007, the Mortgage Department's VAR reached a quarterly high of \$85.4 million.¹⁹³⁷ On February 22, Mr. Sparks had told Messrs. Swenson, Lehman, and Birnbaum that they would have to cover \$2 billion in subprime mortgage related net short positions that same

¹⁹³⁴ 8/21/2007 email from Joshua Birnbaum, "Potential large subprime trade and impact on firmwide VAR," GS MBS-E-016359332, Hearing Exhibit 4/27-34

¹⁹³⁵ 6/28/2007 email from David Lehman to Daniel Sparks, GS MBS-E-010623720.

¹⁹³⁶ See 8/16/2007 email from Jon Winkelried to Daniel Sparks, "Mort P&L Explanation," GS MBS-E-010680327-330; 7/25/2007 email from David Viniar to Gary Cohn, "Private & Confidential: FICC Financial Package 07/25/07," GS MBS-E-009861799, Hearing Exhibit 4/27-26. 2/27/2007 email from Richard Ruzika to Tom Montag, others, GS MBS-E-002204942; 8/15/2007 email from Gary Cohn, "Trading VaR \$165mm," GS MBS-E-016344758.

¹⁹³⁷ 2/26/2007 Market Risk Report, Mortgage Risk Portfolio Summary, GS MBS-E-010388177.

day.¹⁹³⁸ On February 27, 2007, Mr. Ruzika wrote Mr. Sparks and others: “I want to see us getting the short down to 4.5 bil[lion] net.”¹⁹³⁹ Later that day, Mr. Ruzika forwarded the “OpCom Directive” to Mr. Sparks: “Dan. Directly from the opcom we need to step up the pace of buying back single names even if it costs us some money.”¹⁹⁴⁰ Mr. Birnbaum told the Subcommittee that the SPG Trading Desk’s actions in February were taken to reduce the level of VAR.¹⁹⁴¹

On August 9, 2007, Mr. Birnbaum received a note from the Department’s risk managers indicating that the Department’s temporary VAR limit might not be extended, which would reverse the prior policy of continually extending temporary limits:

“–Temporary MTG [Mortgage Department] SPG VaR limit of \$110mm expired on 8/7/2007[.]
–MTG SPG is over its permanent VaR limit of \$35mm.”¹⁹⁴²

Mr. Birnbaum told the Subcommittee that he read the note as an indication that the temporary trading limit would not be renewed, and he was being directed to reduce his net short positions to bring VAR under the permanent limit of \$35 million.¹⁹⁴³ On the same day, August 9, Mr. Birnbaum sent an email to the ABS Desk trader, Mr. Salem:

“Are you getting any more heat to cut/cover risk? These VAR numbers are ludicrous, btw. Completely overestimated for SPG trading, underestimated for other mortgage desks.”¹⁹⁴⁴

Mr. Salem replied that he had “waved in ~120mm in bbb and bbb- protection in the last 2 days,” which covered shorts, so he felt no heat about covering.¹⁹⁴⁵ Mr. Birnbaum said:

“I just asked b/c I saw the note about mortgages dropping back down to a permanent limit of 35mm (which we are way over). This would mark a change of their recent policy to just keep increasing ou[r] limit. Makes me a little nervous that we may be told to do something stupid.”¹⁹⁴⁶

¹⁹³⁸ 2/22/2007 email from Daniel Sparks, “FW: Block size tranche protection offers for [redacted] or others,” GS MBS-E-010381411.

¹⁹³⁹ 2/27/2007 email from Richard Ruzika to Tom Montag, Justin Gmelich, and Daniel Sparks, GS MBS-E-002204942.

¹⁹⁴⁰ Id.

¹⁹⁴¹ Subcommittee interview of Joshua Birnbaum (10/1/2010); see also 2/22/2007 email from Mr. Ruzika to Mr. Montag and Mr. Sparks, GS MBS-E-010381967 (Mr. Ruzika: “covering the single name bbb and bbb- is prudent because it cuts vol and var the most”).

¹⁹⁴² 8/9/2007 email from Deeb Salem to Joshua Birnbaum, “MarketRisk: Mortgage Risk Report (cob 08/08/2007),” GS MBS-E-012927200.

¹⁹⁴³ Id.; Subcommittee interview of Joshua Birnbaum (10/1/2010).

¹⁹⁴⁴ 8/9/2007 email from Joshua Birnbaum to Deeb Salem, “MarketRisk: Mortgage Risk Report (cob 08/08/2007),” GS MBS-E-012927200.

¹⁹⁴⁵ Id.

¹⁹⁴⁶ Id.

Mr. Birnbaum continued: “I do think it is a real concern. How quickly can you work with strats to get them to revise our VAR to a more realistic number?”¹⁹⁴⁷

Mr. Birnbaum explained to the Subcommittee that by the phrase, “be told to do something stupid,” he meant being ordered by senior Goldman leadership to cover all of the desk’s lucrative BBB and BBB- short positions immediately.¹⁹⁴⁸ Mr. Birnbaum and others were reluctant to cover all of SPG Trading’s BBB/BBB- shorts, because they believed the ABX Index for BBB and BBB-rated RMBS securities would fall further in coming months, so covering the entire short immediately would amount to leaving significant money on the table.¹⁹⁴⁹ The Department’s traders, analysts, and risk managers designed and executed specific transactions over the month of August to lower VAR, but they were unsuccessful.¹⁹⁵⁰

For a week between August 14 and August 21, 2007, the Mortgage Department’s VAR hovered around \$100 million.¹⁹⁵¹ The Department’s record-high VAR contributed to a record Firmwide VAR of \$167 million on August 17, 20, and 21, all of which exceeded the firmwide VAR limit of \$150 million.¹⁹⁵² On August 15, 2007, Goldman’s Co-President Gary Cohn issued his order: “[G]et down now.”¹⁹⁵³ In response, the Mortgage Department began selling and covering a portion of its BBB/BBB- net short position, and its VAR quickly dropped to \$68 million by August 31. The Mortgage Department was allowed to keep a substantial net short in certain assets, and was granted renewed “temporary” VAR limits at levels between \$80 and \$110 million through the end of Goldman’s fiscal year 2007.¹⁹⁵⁴ The Risk Reports recording these VAR levels throughout 2007 further demonstrate Goldman’s net short position. By 2010, the Mortgage Department’s permanent VAR limit had increased from \$35 million to only \$40 million.¹⁹⁵⁵

¹⁹⁴⁷ Id.

¹⁹⁴⁸ Subcommittee interview of Joshua Birnbaum (10/1/2007).

¹⁹⁴⁹ Id.

¹⁹⁵⁰ 8/15/2007 email from Daniel Sparks, “Trading VaR \$165mm,” GS MBS-E-016344758; See, e.g., 8/15/2007 email from Michael Dinias, “Hedge Analysis cob 8/13/07,” GS MBS-E-010678553 (analyzing 6 potential VAR-reducing trading scenarios featuring different proposed transactions); 8/21/2007 email from Mr. Dinias, “Trading VaR Analysis,” GS MBS-E-009993267 (analyzing the VAR-reducing impact of going long in various classes of assets); 8/22/2007 email from Daniel Sparks to Tom Montag and Donald Mullen, “VAR reduction possibilities,” GS MBS-E-010619824 (proposed transactions in single name CDS protection to reduce VAR).

¹⁹⁵¹ See, e.g., 8/14/2007 Goldman Market Risk Report, GS MBS-E-010679220; 8/21/2007 email from MarketRisk, “MarketRisk: End of Day Summary - cob 8/20/07,” GS MBS-E-009740158.

¹⁹⁵² 8/21/2007 email from MarketRisk, “MarketRisk: End of Day Summary - cob 8/20/07,” GS MBS-E-009740158.

¹⁹⁵³ 8/15/2007 email from Gary Cohn, “Trading VaR \$165mm,” GS MBS-E-016344758.

¹⁹⁵⁴ See, e.g., 8/28/2007 email from MarketRisk, “MarketRisk: End of Day Summary - cob 8/28/07,” GS MBS-E-009716460 (Mortgages temporary VAR limit was \$110 million); 9/14/2007 email from MarketRisk, “MarketRisk: End of Day Summary - cob 9/13/07,” GS MBS-E-009714807 (Mortgages temporary VAR limit was \$90 million); 9/27/2007 email from MarketRisk, “MarketRisk: End of Day Summary - cob 9/27/07,” GS MBS-E-009708872 (Mortgages temporary VAR limit was \$90 million); 10/3/2007 email from MarketRisk, “MarketRisk: End of Day Summary - cob 10/2/07,” GS MBS-E-009717721 (Mortgages temporary VAR limit was \$85 million); 10/19/2007 email from MarketRisk, “MarketRisk: End of Day Summary - cob 10/18/07,” GS MBS-E-009724040 (Mortgages temporary VAR limit was \$85 million); 12/13/2007 email from MarketRisk, “MarketRisk: End of Day Summary - cob 12/12/07,” GS MBS-E-009707379 (Mortgages temporary VAR limit was \$80 million).

¹⁹⁵⁵ Subcommittee interview of Craig Broderick (4/9/2010).

The dates on which Goldman senior executives ordered the Mortgage Department to reduce its VAR – on February 21 and August 21 – were within two weeks before the end of Goldman’s fiscal quarters. In each case, the result was an immediate drop in VAR through the end of the quarter. In February 2007, the department’s VAR dropped from \$92 million to \$81 million by the end of the quarter. In August 2007, the department’s VAR dropped even more sharply, from a record high of over \$110 million to \$79.7 million by the end of the quarter.¹⁹⁵⁶ The lower Firmwide VAR figures that resulted from the Mortgage Department’s VAR reductions were publicly reported in Goldman’s quarterly financial reports.¹⁹⁵⁷

(h) Profiting From the Big Short

In the third quarter of 2007, Goldman posted financial results showing that it had shorted the subprime mortgage market and profited from its net short position. After posting those third quarter financial results, Goldman continued to trumpet its success, both inside and outside the firm.

Third Quarter Financials. On September 20, 2007, Goldman announced record net revenues of \$12.3 billion for its third quarter.¹⁹⁵⁸ On September 19, 2007, in a conference call with financial analysts on Goldman’s third quarter results, Goldman’s CFO, David Viniar, highlighted the performance of the Mortgage Department:

“Let me also address Mortgages specifically. The mortgage sector continues to be challenged and there was a broad decline in the value of mortgage inventory during the third quarter. As a result, we took significant markdowns on our long inventory positions during the quarter, as we had in the previous two quarters. However, our risk bias in that market was to be short and that net short position was profitable.”¹⁹⁵⁹

Goldman also issued a press release about its third quarter earnings that mentioned mortgages:

“Net revenues in mortgages were also significantly higher, despite continued deterioration in the market environment. Significant losses on non-prime loans and securities were more than offset by gains on short mortgage positions.”¹⁹⁶⁰

¹⁹⁵⁶ 9/28/2007 Goldman Market Risk Report, GS MBS-E-009926240.

¹⁹⁵⁷ See 4/3/2007 Goldman Sachs Group Inc. Form 10-Q at 79 (first quarter 2007 Average Daily VAR reported as \$127 million); 10/9/2007 Goldman Sachs Group, Inc. Form 10-Q at 86 (third quarter 2007 Average Daily VAR reported as \$139 million).

¹⁹⁵⁸ See 10/9/2007 Goldman Sachs Group Inc. Form 10-Q at 66. See also, e.g., “How Goldman Sachs Defies Gravity,” *Fortune* (9/20/2007).

¹⁹⁵⁹ 9/19/2007 Goldman internal document, “Third Quarter 2007 Earnings Call Script for David Viniar,” GS MBS-E-009779213, Hearing Exhibit 4/27-45.

¹⁹⁶⁰ 9/17/2009 email to Daniel Sparks, “Mortgage commentary on Q3 earnings call,” GS MBS-E-009853301, Hearing Exhibit 4/27-44.

Internal Statements. In September 2007, Goldman summarized its third quarter results for its Board of Directors, highlighting the Mortgage Department's record profits: "[W]e were overall net short the mortgage market and thus had very strong results."¹⁹⁶¹

In early October, the Mortgage Department held an internal Global Townhall to discuss its third quarter profits in detail. In a draft of the presentation he prepared for the Townhall, Mortgage Department head Daniel Sparks reported that global mortgages generated aggregate net revenues of \$741 million, a 152% increase over the same quarter in the prior year, while benefitting from a "proprietary short."¹⁹⁶² Under the heading of "Performance Drivers (Net Revenues)," Mr. Sparks wrote:

"SPG Trading: +2.04bn [up] \$1.92bn vs. Q3 2006
 – The desk benefited from a proprietary short in CDO and RMBS single names
 – Additionally, we captured P&L [profit & loss] on spread widening [price declines] in various indices"¹⁹⁶³

To put the SPG Trading Desk's performance in perspective, it had generated \$80 million in the third quarter of 2006, a big year for mortgage related products, but in the third quarter of 2007, an exceptionally poor year for mortgage related products, Goldman's SPG Trading Desk generated \$2.04 billion in net revenues – nearly 25 times more. SPG Trading's \$2.04 billion in net revenues was offset by other mortgage related losses, including losses from the CDO Origination, Residential Credit, and Residential Prime Desks, but left an aggregate net profit of \$741 million for the Mortgage Department as a whole – more than twice the comparable quarter net profit of \$294 million in the prior year.¹⁹⁶⁴ The \$2.04 billion in net revenues from the SPG Desk accounted for over 16% of Goldman's overall net revenues of \$12.3 billion in the third quarter of 2007. The \$741 million in net revenues for the Mortgage Department as a whole contributed about 6% of the firm's total net revenues of \$12.3 billion for the third quarter, which was three times the department's historical average contribution of about 2% to net revenue.¹⁹⁶⁵

In his draft presentation, Mr. Sparks wrote that the "desk benefited from a proprietary short in CDO and RMBS single names."¹⁹⁶⁶ In industry parlance, a "proprietary" position is one acquired with the firm's own capital, solely for the benefit of the firm and not related to customer orders or the firm's role as a market maker. In a later version of the presentation, Mr. Sparks

¹⁹⁶¹ 9/17/2007-9/18/2007 Goldman Sachs Board of Directors Meeting, "Financial Summary, Quarter Ended August 31, 2007," GS MBS-E-009776900, Hearing Exhibit 4/27-42.

¹⁹⁶² 10/5/2007 Goldman presentation, "Global Mortgages Business Unit Townhall Q3 2007," GS MBS-E-013703463, Hearing Exhibit 4/27-47.

¹⁹⁶³ Id.

¹⁹⁶⁴ Id.

¹⁹⁶⁵ 4/2010 "Goldman Sachs: Risk Management and the Residential Mortgage Market," report prepared by Goldman Sachs, Hearing Exhibit 4/27-161.

¹⁹⁶⁶ 10/5/2007 Goldman presentation, "Global Mortgages Business Unit Townhall Q3 2007," GS MBS-E-013703463, Hearing Exhibit 4/27-47.

revised the line to read that the desk benefitted from “strong results from trading long correlation and net short bias.”¹⁹⁶⁷ When asked why he had originally written that “the desk benefitted from a proprietary short,” Mr. Sparks told the Subcommittee that the language was inaccurate.¹⁹⁶⁸

Later in October 2007, Goldman’s Chief Risk Officer, Craig Broderick, discussed the Mortgage Department’s performance before an internal Goldman audience:

“So what happened to us? A quick word on our own market and credit risk performance in this regard. In market risk – you saw in our 2nd and 3rd qtr results that we made money despite our inherently long positions. – because starting early in ‘07 our mortgage trading desk started putting on big short positions, mostly using the ABX index, which is a family of indices designed to replicate cash bonds. And did so in enough quantity that we were net short, and made money (substantial money in the 3rd quarter) as the subprime market weakened. (This remains our position today).”¹⁹⁶⁹

Goldman’s net short positions were also featured in the internal self-evaluations that Mortgage Department personnel were required to prepare and which they expected to be read by their supervisors. In these self-evaluations, which were completed in September 2007, two months before Goldman’s fiscal year end on November 30, 2007, several Mortgage Department traders who were active in its shorting activities described the profits produced by the Department’s net shorts. Mr. Birnbaum, the senior ABX trader, wrote:

“As a co-head of ABS and SPG trading, my performance in 2007 has been my best ever by any objective measure: 1. P&L. YTD: ABS synthetics: \$2.5Bln, ABS: \$2.0Bln, SPG Trading: \$3.0Bln, all #1 on the street by a wide margin, #2 in the world trading subprime risk (behind Paulson Partners).”¹⁹⁷⁰

His self-evaluation showed that the SPG Trading Desk alone generated profits of \$3 billion.¹⁹⁷¹

¹⁹⁶⁷ “Global Mortgages Business Unit Townhall Q3 2007,” Final version, GS MBS-E-013668603.

¹⁹⁶⁸ Subcommittee interview of Daniel Sparks (10/4/2010). In his subsequent responses to the Subcommittee’s Questions for the Record, Mr. Sparks said: “The presentation should have used the words ‘net short position,’ not ‘proprietary position.’” Daniel L. Sparks responses to Subcommittee QFRs, PSI_QFR_GS0452 at 470 (Question 6). Mr. Sparks’ response did not resolve the question of whether the position was proprietary or undertaken on behalf of customers, as a “net short position” could be either.

¹⁹⁶⁹ 10/29/2007 “Contagion and Crowded Trades,” Goldman Sachs Tax Department Presentation, GS MBS-E-010018511, Hearing Exhibit 4/27-48 [emphasis in original].

¹⁹⁷⁰ Joshua Birnbaum Self-Review, Hearing Exhibit 4/27-55c. The figures cited for ABS synthetics and ABS (both cash and synthetics) are apparently both included within the total of \$3 billion profit cited for the SPG Trading Desk as a whole.

¹⁹⁷¹ Id. Mr. Birnbaum also wrote: “During this period, I would also add that the ABS team contributed significantly to the Correlation desk[]’s \$800+mm in YTD p&l by dissuading that desk from externalizing their shorting opportunities to the likes of Paulson Partners, even when significant risk-free p&l was available at the time.” Id.

Mr. Swenson, the head of the SPG and ABS trading desks, wrote:

“It should not be a surprise to anyone that the 2007 year is the one that I am most proud of to date. ... I ... [built] a number one franchise that was able to achieve extraordinary profits (nearly \$3bb to date). ... The contributions to the \$3bb of SPG Trading profits and \$2bb of ABS trading p & l are spread out across various trades and strategies.”¹⁹⁷²

Mr. Salem, one of the ABS traders, wrote:

“Obviously the most important aspect of my 2007 and my contribution to the firm has been the desk’s P&L. Mike, Josh, and I were able to learn from our bad long position at the end of 2006 and layout the game plan to put on an enormous directional short. The results of that are obvious.”¹⁹⁷³

Mr. Salem went on to outline estimated profits from four specific trading strategies pursued by the ABS Desk that generated profits totaling \$3.75 billion.¹⁹⁷⁴

In these three internal documents, key Mortgage Department personnel involved in constructing the Department’s net short positions describe the profits generated by those net shorts as “#1 on the street by a wide margin,” “extraordinary,” and “an enormous directional short” that produced \$3.7 billion in profits for the firm.

Statements to Regulators. Goldman also described its short positions and the profits they produced to its regulators. In October 2007, Goldman sent a letter to the Securities and Exchange Commission answering questions about its trading activities and reporting that it had been “net short” during “most of 2007”:

“[W]e are active traders of mortgage securities and loans and . . . we may choose to take a directional view of the market For example, during most of 2007, we maintained a net short sub-prime position and therefore stood to benefit from declining prices in the mortgage market.”¹⁹⁷⁵

¹⁹⁷² Michael Swenson Self-Review, Hearing Exhibit 4/27-55b. The \$2 billion profit figure attributed to ABS trading is apparently included within the \$3 billion figure cited as the year-to-date profit for the SPG Trading Desk.

¹⁹⁷³ Salem 2007 Self-Review.

¹⁹⁷⁴ See description of Mr. Salem’s single name trading strategies, above.

¹⁹⁷⁵ 10/4/2007 letter from Goldman Sachs to the SEC, GS MB S-E-009758287, Hearing Exhibit 4/27-46 [emphasis added].

In November 2007, in another letter to the SEC, Goldman explained further:

“During most of 2007, we maintained a net short subprime position with the use of derivatives, including ABX index contracts and single name CDS which hedged [our] long cash exposure.”¹⁹⁷⁶

Also in November 2007, in talking points prepared for a meeting with the Tri-Lateral Review Group, which included the Federal Reserve Bank, the SEC, and the United Kingdom’s Financial Services Authority, Goldman wrote: “[W]e were able to maintain a short throughout the year.”¹⁹⁷⁷ Goldman also wrote:

“The press and others have discussed an anticipated Q4 [2007 fourth quarter] write-down for GS. Our remaining long subprime exposure totals \$695 million, inclusive of whole loans and CDO positions. However, we’re net short – as we have been throughout 2007. Accordingly, we have nothing to write down.”¹⁹⁷⁸

Public Statements. Goldman also discussed its net short and related profits in public settings. In November 2007, the Bloomberg news service reported that Goldman’s CEO, Lloyd Blankfein, told a public audience at a securities industry conference that Goldman was, and would continue to be, net short the subprime markets:

“[Mr. Blankfein] said the firm is still betting that mortgage-backed assets and collateralized debt obligations will drop. ... ‘Given that point of view, we continue to be net short in these markets.’”¹⁹⁷⁹

In reaction to another November 2007 news report on how Goldman “dodged the mortgage mess,”¹⁹⁸⁰ Mr. Blankfein sent an email to his colleagues stating: “Of course we didn’t dodge the mortgage mess. We lost money, then made more than we lost because of shorts.”¹⁹⁸¹

Goldman also prepared for public use a corporate statement entitled, “How Did GS Avoid the Mortgage Crisis? Our Response.”¹⁹⁸² The statement was prepared for Mr. Viniar’s use in

¹⁹⁷⁶ 11/7/2007 letter from Goldman Sachs to the SEC, GS MBS-E-015713460, Hearing Exhibit 4/27-50.

¹⁹⁷⁷ 11/13/2007 Goldman email, GS MBS-E-010023525 (attachment, 11/14/2007 “Tri-Lateral Combined Comments,” GS MBS-E-010135693-715 at 694).

¹⁹⁷⁸ Id.

¹⁹⁷⁹ “Goldman Doesn’t Plan Significant Mortgage Writedown,” Bloomberg (11/13/2007); see also 11/13/2007 email to Lloyd Blankfein, GS MBS-E-009601759 (forwarding Bloomberg article regarding Mr. Blankfein’s remarks at conference sponsored by Merrill Lynch & Co. in New York City on Nov. 13, 2007).

¹⁹⁸⁰ “Goldman Sachs Rakes in Profit in Credit Crisis,” New York Times (11/19/2007).

¹⁹⁸¹ 11/18/2007 email from Lloyd Blankfein, “RE: NYT,” GS MBS-E-009696333, Hearing Exhibit 4/27-52.

Goldman’s Co-President, Gary Cohn, replied to Mr. Blankfein’s message, adding, “We were just smaller in the toxic products” Id.

¹⁹⁸² 11/7/2007 Goldman document, “How Did GS Avoid the Mortgage Crisis?,” GS MBS-E-009713204, Hearing Exhibit 4/27-51.

responding to questions about the Mortgage Department's performance in a fourth quarter conference call with analysts. Goldman's public statement outlined the steps it took to reduce its subprime mortgage inventory and related subprime risks in late 2006 and early 2007, characterizing these "proactive" steps as part of its ordinary risk management efforts. Goldman went on to state: "[O]ne should not be led to believe that we went through this period unscathed and somehow significantly profited from a 'bet' on the downturn in mortgage markets."¹⁹⁸³ After noting that significant writedowns in the value of its long mortgage inventory had resulted in a "weak" second quarter for mortgages, Goldman wrote:

"[D]uring the third quarter we were able to make money on mortgages as a result of our net short position. As a consequence, we believe that we are well-positioned to opportunistically participate in the inevitable restructuring of the mortgage market."¹⁹⁸⁴

Despite denying earlier in its statement that it significantly profited from a "bet" against a downturn in mortgage markets, Goldman wrote that, in the third quarter of 2007, it had profited from a "net short position" on mortgages. A "net short position" is, in essence, a bet on a downturn in the relevant market, and Goldman's bet was "able to make money."

2007 Year-End Results. The SPG Trading Desk's net revenues for the full fiscal year 2007 were approximately \$3.7 billion.¹⁹⁸⁵ In fiscal year 2007, Goldman's total net revenues were approximately \$46 billion, and its net earnings (after tax) were approximately \$11.6 billion.¹⁹⁸⁶

At the Subcommittee hearing, Goldman's Chief Financial Officer, David Viniar, stated that the Mortgage Department's net revenue for 2007 was "less than \$500 million, approximately 1 percent of Goldman Sachs's overall net revenues."¹⁹⁸⁷ He insisted that its 2007 net short position in the mortgage market "was not a large short,"¹⁹⁸⁸ and was largely offset by its long positions, omitting that, in 2007, the Mortgage Department's SPG Trading Desk generated a record \$3.7 billion in net revenues for the Department as a whole from its net shorts.¹⁹⁸⁹ Those profits sustained the Mortgage Department and Goldman through the harsh financial environment of the subprime mortgage market meltdown and the global credit crisis in 2007. While much of those revenues were offset by other losses, they were a bulwark of profitability in what would otherwise have been a disastrous year for Goldman's mortgage business.

¹⁹⁸³ Id.

¹⁹⁸⁴ Id.

¹⁹⁸⁵ See 11/30/2007 "SPG Trading Mortgages Weekly Metrics 30-November-2007," GS MBS-E-015646485.

¹⁹⁸⁶ See Goldman Sachs Form 10-K for the fiscal year ending Nov. 30, 2007, filed on 1/28/2008, at 64; see also Goldman presentation, "Overview of Goldman Sachs," at 5, available at <http://www2.goldmansachs.com/our-firm/investors/creditor-information/creditor-presentation-3-1-11.pdf>.

¹⁹⁸⁷ April 27, 2010 Subcommittee Hearing at 96. See also 235, 252, 345.

¹⁹⁸⁸ Id. at 98.

¹⁹⁸⁹ 11/30/2007 "SPG Trading Mortgages Weekly Metrics 30-November-2007," GS MBS-E-015646485.

In contrast, other major Wall Street banks reported losses in the third quarter of 2007, primarily due to multi-billion-dollar writedowns in the value of their subprime mortgage related assets.¹⁹⁹⁰ Goldman had not only profited from its net shorts, but had also sold off the bulk of its subprime mortgage assets earlier and at higher prices than many other banks. After observing the losses and writedowns suffered by other Wall Street banks, Mr. Viniar wrote: “Tells you what might be happening to people without the big short.”¹⁹⁹¹

At one point, Mr. Birnbaum also contrasted Goldman’s performance with its competitors:

“Results out of DB, Citi, UBS, Bear, Lehman etc. all bear evidence that we were far ahead of our competition in marking down positions and moving CDO risk before the market cratered and came to a standstill post-BSAM [Bear Stearns Asset Management].”¹⁹⁹²

All of these explanations point to actions taken by Goldman to transfer the risks of its own subprime mortgage inventory to others, including many of its own customers, before they became fully aware of the risks entailed in the products Goldman was marketing to them.

Goldman Denials. In late 2007, Goldman spoke openly of shorting the subprime mortgage market and that its net short position was profitable. Afterward, as mortgage losses erupted into a full blown financial crisis in the United States and abroad, Goldman began to downplay and even deny the size of its short position, its proprietary nature, and the profits it generated for the firm.¹⁹⁹³

Goldman had not been the only market participant to profit from a large net short position in mortgage related products. Other investors also aggressively shorted the mortgage market and profited from their short positions. A particularly large short position taken by one hedge fund – Goldman’s customer, the Paulson Credit Opportunity Fund of Paulson & Co. Inc. – netted billions of dollars in what was later characterized as “the greatest trade ever.”¹⁹⁹⁴ Mr. Birnbaum, however, had described Goldman’s own massive net short position as the “greatest trade ever” as early as July

¹⁹⁹⁰ In the third quarter of 2007, for example, Lehman Brothers had \$700 million in loan and mortgage writedowns. 9/23/2007 email to Lloyd Blankfein and others, “Weekly Competitor, EM and Regulatory News – Week Ending 9/21/07,” GS MBS-E-009653853. Morgan Stanley had \$940 million in loan writedowns. *Id.* Bear Stearns had \$250 million in loan writedowns and \$450 million in mortgage writedowns. *Id.* Citibank had approximately \$1.6 billion in mortgage writedowns and a \$636 million loss in credit trading. 10/21/2007 email to Lloyd Blankfein and others, “Weekly Competitor, EM and Regulatory News – Week Ending 10/19/07,” GS MBS-E-009631348. JPMorgan Chase had \$1.3 billion in loan writedowns and \$339 million in mortgage writedowns. *Id.*

¹⁹⁹¹ 7/25/2007 email from David Viniar to Gary Cohn, “Private & Confidential: FICC Financial Package 07/25/07,” GS MBS-E-009861799, Hearing Exhibit 4/27-26.

¹⁹⁹² 10/3/2007 Goldman presentation, “SPG Trading – 2007,” GS MBS-E-015654036.

¹⁹⁹³ Goldman also highlighted losses it suffered in 2008, related to its mortgage business, particularly mortgage related products associated with prime and Alt A residential loans. The Subcommittee did not investigate Goldman’s use of short positions in 2008, nor its involvement with prime and Alt A loan products.

¹⁹⁹⁴ Gregory Zuckerman, *The Greatest Trade Ever* (2009); Michael Lewis, *The Big Short* (2010).

2007.¹⁹⁹⁵ Earlier in the year, Mr. Birnbaum had also described Goldman as the market leader in shorting the housing market, but by July 2007, Mr. Birnbaum conceded that Paulson was “definitely the man in this space, up 2-3 bil on this trade. We were giving him a run for his money for a while but now are a definitive #2.”¹⁹⁹⁶ When preparing his case for SPG traders to be paid additional compensation for their 2007 efforts, Mr. Birnbaum again made a comparison to Paulson: “RMBS-related revenues: #1 on the street by a wide margin. #2 in the world behind Paulson Partners.”¹⁹⁹⁷

In the aftermath of the financial crisis, however, Goldman no longer claimed credit for its market-leading performance during the subprime meltdown. After many of its customers suffered major losses, and several had declared bankruptcy during the financial crisis,¹⁹⁹⁸ Goldman began to downplay the size of its short position and the impact on its profits.¹⁹⁹⁹ In particular, Goldman attempted to dispel the perception that it sold its own customers CDOs it knew were destined to fail, and then profited by betting against them, as discussed in the next section.²⁰⁰⁰

In April 2010, Goldman posted a statement on its website entitled, “Goldman Sachs: Risk Management and the Residential Mortgage Market.”²⁰⁰¹ In the statement’s Executive Summary, Goldman made the following assertions, among others:

–“Goldman Sachs did not take a large directional ‘bet’ against the U.S. housing market, and the firm was not consistently or significantly net ‘short the market’ in residential mortgage-related products in 2007 and 2008, as the performance of our residential mortgage-related products business demonstrates.

– Goldman Sachs did not engage in some type of massive ‘bet’ against our clients. The risk management of the firm’s exposures and the activities of our clients dictated the firm’s overall action, not any view of what might or might not happen to any security or market.”²⁰⁰²

¹⁹⁹⁵ 7/20/2007 email from Joshua Birnbaum, “ABX Markets 07-02, 07-01, 06-2, 06-1: 3:00 p.m.,” GS MBS-E-012962076 (Mr. Birnbaum: “greatest trade ever . . . I have a huge short . . .”).

¹⁹⁹⁶ 7/12/2007 email from Joshua Birnbaum, “ABX Markets 07-1, 06-2, 06-1: 12:00 p.m.,” GS MBS-E-012944742, Hearing Exhibit 4/27-146.

¹⁹⁹⁷ 10/3/2007 Goldman presentation, “SPG Trading – 2007,” GS MBS-E-015654036; Birnbaum Self-Review, Hearing Exhibit 4/27-55c.

¹⁹⁹⁸ See 9/17/2007 Goldman presentation to Board of Directors, “Residential Mortgage Business, Global Impact of the Mortgage Crisis,” at 2, GS MBS-E-001793840, Hearing Exhibit 4/27-41 (noting bankruptcies of Goldman clients IKB and Basis Capital). See also 8/10/2007 Goldman internal memorandum, “Summary of German Bank US Sub Prime Exposure,” GS MBS-E-009994305; 11/27/2007 email from Mr. Lehman to Mr. Sparks, “ACA” (discussing “what would happen upon an ACA bankruptcy (which is the most likely scenario in our opinion).”), GS MBS-E-013746511.

¹⁹⁹⁹ See, e.g., April 27, 2010 Subcommittee Hearing, testimony of Lloyd Blankfein at 132 and David Viniar at 98.

²⁰⁰⁰ 4/7/2010 Blankfein & Cohn, Letter to Shareholders (quoted in Hearing Exhibit 4/27-161 at 12).

²⁰⁰¹ 4/2010 Goldman report, “Risk Management and the Residential Mortgage Market,” Hearing Exhibit 4/27-161.

²⁰⁰² Id.

On April 7, 2010, Goldman CEO Lloyd Blankfein and Co-President Gary Cohn made similar assertions in a letter to shareholders contained in Goldman's Annual Report:

– “The firm did not generate enormous net revenues or profits by betting against residential mortgage-related products, as some have speculated; rather our relatively early risk reduction resulted in our losing less money than we otherwise would have when the residential housing market began to deteriorate rapidly

–Although Goldman Sachs held various positions in residential mortgage-related products in 2007, our short positions were not a ‘bet against our clients.’ Rather, they served to offset our long positions.”²⁰⁰³

At the Subcommittee hearing, Mr. Blankfein repeated the same claims. He testified:

“Much has been said about the supposedly massive short Goldman Sachs had on the U.S. housing market. The fact is, we were not consistently or significantly net short the market in residential mortgage-related products in 2007 and 2008. Our performance in our residential market-related business confirms this. During the 2 years of the financial crisis, while profitable overall, Goldman Sachs lost approximately \$1.2 billion from our activities in the residential housing market. We didn't have a massive short against the housing market and we certainly did not bet against our clients. Rather, we believe that we managed our risk as our shareholders and our regulators would expect.”²⁰⁰⁴

Mr. Viniar, Goldman's Chief Financial Officer, testified:

“[A]cross 2007, we were primarily, although not consistently short, and it was not a large short. ... The short positions themselves made a lot of money in 2007, but they offset long positions that lost a lot of money in 2007.”²⁰⁰⁵

Goldman's denials of its net short positions in the subprime mortgage market, and the large profits produced by those net short positions, are directly contradicted by its own financial records and internal communications, as well as its own public statements in 2007, and are not credible.

(5) How Goldman Created and Failed to Manage Conflicts of Interest in its Securitization Activities

In the years leading up to the financial crisis, Goldman was an active trader in the mortgage market, buying and selling a variety of mortgage related assets, including RMBS, CDO, ABX, and

²⁰⁰³ 4/7/2010 Blankfein & Cohn, Letter to Shareholders (quoted in 4/2010 Goldman report, “Risk Management and the Residential Mortgage Market,” at 12, Hearing Exhibit 4/27-161).

²⁰⁰⁴ April 27, 2010 Subcommittee Hearing at 132.

²⁰⁰⁵ Id. at 98.

CDS instruments, as described in the prior section. In addition, Goldman was one of the leaders in mortgage related securitizations, helping to originate both CDO and RMBS securities. Goldman's 2006 and 2007 securitization activities are the focus of this section.

In 2006 and 2007, Goldman originated 27 CDOs and 93 RMBS securitizations with a total value of about \$100 billion.²⁰⁰⁶ Goldman designed the structure of each securitization, including the number of tranches, how the payments would be allocated, and the projected rate of return or "coupon rate" that would be paid to investors. In some, Goldman selected the assets to be securitized; in others, it hired a portfolio selection agent or collateral manager to help select the assets and manage the portfolio. For each securitization, Goldman typically housed all of the assets to be securitized in a "warehouse" account until the transaction was ready to go to market. The assets in the warehouse accounts were then included in Goldman's balance sheet. Goldman also typically worked with one or more credit rating agencies to obtain favorable credit ratings for the proposed securities.

In addition, Goldman typically established a domestic and an offshore corporation to act as the nominal owners of the securitization's incoming cash, assets, and collateral securities; to serve as the actual issuers of the securities; and to perform certain administrative services. Goldman also established arrangements for the servicing of any underlying mortgages. In some CDOs, Goldman or its affiliate provided additional services as well, acting in such roles as the collateral securities selection agent, the collateral put provider, or the liquidation agent charged with selling impaired assets. Goldman also used its global sales force to market its securities to investors around the world, typically selling Goldman-issued CDO securities through a private placement and RMBS securities through a public offering.

In late 2006, when subprime residential mortgages began to incur higher than expected rates of delinquency, fraud, and default, and its inventory of mortgage related assets began to lose value, Goldman took a number of actions. It sold the mortgage related assets in its inventory; returned poor quality loans to the lenders from which they were purchased and demanded repayment; limited new RMBS securitizations; sold or securitized the assets in its RMBS warehouse accounts; limited new CDO securitizations to transactions already in the pipeline; and sold assets from discontinued CDOs.

Throughout this process, Goldman made a concerted effort to sell securities from the CDO and RMBS securitizations it had originated, even when those securities included or referenced poor quality assets and began losing value. Many of the CDO and RMBS securities that Goldman sold to its clients incurred substantial losses. The widespread losses caused by CDO and RMBS securities originated by investment banks are a key cause of the financial crisis that affected the global financial system in 2007 and 2008.

²⁰⁰⁶ The 27 CDOs securitized about \$28 billion in assets. See undated chart prepared for Subcommittee by Goldman Sachs, GS MBS 0000004276. The 93 RMBS securitized about \$72 billion in home loans. See undated chart prepared for Subcommittee by Goldman Sachs, GS-PSI-00172.

This section of the Report examines how Goldman originated, marketed, and sold its mortgage related securities, in particular CDO securities, during late 2006 and in 2007, as the mortgage market deteriorated and as Goldman was profiting from its own net short positions. The section begins with general information about Goldman's securitization activities, followed by detailed case studies of four Goldman-originated CDOs: Hudson 1, Anderson, Timberwolf I, and Abacus 2007-AC1.

The evidence discloses troubling and sometimes abusive practices which show, first, that Goldman knowingly sold high risk, poor quality mortgage products to clients around the world, saturating financial markets with complex, financially engineered instruments that magnified risk and losses when their underlying assets began to fail. Second, it shows multiple conflicts of interest surrounding Goldman's securitization activities, including its use of CDOs to transfer billions of dollars of risk to investors, assist a favored client make a \$1 billion gain at the expense of other clients, and produce its own proprietary gains at the expense of the clients to whom Goldman sold its CDO securities.

Under Goldman's sales policies and procedures, an affirmative action by Goldman personnel to sell a specific investment to a specific customer constituted a recommendation of that investment.²⁰⁰⁷ Under federal securities law, when acting as an underwriter, placement agent, or broker-dealer recommending an investment to a customer, Goldman had an obligation to sell investments that were suitable for any investor and were not designed to fail. When acting in those roles and affirmatively soliciting clients to buy securities, Goldman also had an obligation to disclose material information that a reasonable investor would want to know, including material conflicts of interest or adverse interests in connection with its sale of a security.²⁰⁰⁸

In 2006 and 2007, when selling subprime CDO securities to customers, Goldman did not always disclose that the securities contained or referenced assets Goldman believed would perform poorly, and that the securities themselves were rapidly losing value. Goldman also did not disclose that the firm had built a large net short position betting that CDO and RMBS securities similar to the ones it was selling would lose value. In the case of the Hudson, Anderson, and Timberwolf CDOs, Goldman failed to disclose to potential investors that it was shorting the very securities Goldman was selling to them. In the case of the Abacus CDO, Goldman failed to disclose to potential investors that it had allowed an interested party to help select the CDO assets and act as the sole short party, with the expectation that the selected assets would lose value and that party would make money at the expense of the long investors to whom Goldman had sold the securities. Goldman created these and other conflicts of interest with its clients in connection with its CDO activities.

²⁰⁰⁷ See Goldman Sachs response to Subcommittee QFR at PSI_QFR_GS0252, at 0262.

²⁰⁰⁸ For a detailed discussion of these obligations under federal securities laws, see Section (6)(a), below.

(a) Background

To understand Goldman's securitization activities, this section provides general background about its CDO and RMBS business and how Goldman changed its securitization activities when the mortgage market began to deteriorate in late 2006.

(i) Goldman's Securitization Business

The Goldman Mortgage Department originated CDOs through two different desks within the Department. Approximately half of Goldman's CDOs were originated by its CDO Origination Desk, which assembled the assets, structured the CDOs, and worked with the Goldman sales force to market the resulting securities to a broad range of investors. The CDO Origination Desk was headed by Peter Ostrem from 2006 until May 2007, after which all remaining Goldman-originated CDOs were transferred to the Structured Product Group (SPG) Trading Desk and were overseen by David Lehman.

Goldman's other CDOs, which were part of a series issued under the name of Abacus, were originated by the Correlation Trading Desk, which was a sub-desk of the SPG Trading Desk. The Correlation Trading Desk specialized in arranging customized trades for investors and used the Abacus series of CDOs as one of its investment alternatives. The Correlation Trading Desk was headed by Jonathan Egol. The CDO Origination and Correlation Trading Desks were located on the same floor as the other SPG Trading Desks.

RMBS securitizations were handled by the Residential Whole Loan Trading Desk, headed by Kevin Gasvoda. Sub-desks within the Residential Whole Loan Trading area oversaw the purchase of residential loan pools, constructed the RMBS securitizations, and worked with the Goldman sales force to sell the resulting securities to investors.

After a desk originated a CDO or RMBS securitization and sold the Goldman-originated securities for the first time, all secondary trading of the securities was handled by the Structured Products Group's Asset-Backed Security (ABS) Desk. In mid-2007, Goldman shut down its CDO Origination Desk and directed the ABS Desk to sell all remaining Goldman-originated CDO securities, in addition to conducting the secondary trading it normally handled.

Daniel Sparks, as head of the Mortgage Department, oversaw all of Goldman's CDO and RMBS origination activities. Mr. Sparks reported at times to Jonathan Sobel, the prior department head, and Richard Ruzika, then head of Commodities Trading. He also worked with Justin Gmelich, a managing director asked to help him run the Department on a short term basis. Mr. Sparks also had frequent contact with more senior Goldman executives, including Thomas Montag, then global co-head of Securities Trading, and Donald Mullen, then head of Credit Trading. On occasion, he also received directives from Chief Financial Officer David Viniar and Co-Presidents Gary Cohn and Jon Winkelried.

(ii) Goldman's Negative Market View

As established earlier in the Report, all of Goldman's securitization activities from 2006 to 2007 took place against the backdrop of a subprime mortgage market that, in Goldman's view, was in distress and worsening.

On December 7, 2006, for example, Mr. Sparks sent this gloomy assessment to senior executive Thomas Montag:

"Generally, originators are struggling with EPDs [early payment defaults] which require them to buy back loans and take losses – thinly capitalized firms can't take much of it. Lower margins and volumes are also causing pain. Ownit [a mortgage originator] ... closed Monday. Premiums for these originators – all of whom are for sale – are rapidly falling. ... Likely fall-out – more originators close and spreads in related sectors widen."²⁰⁰⁹

A week later, on December 13, 2006, Mr. Sparks repeated his negative view of the subprime mortgage market before senior Goldman executives on the Firmwide Risk Committee. The committee minutes described his report as follows:

"Dan Sparks: Noted the stress in the subprime market; Concern around '06 originators, as two more failed last week; Concern around early payment defaults, \$5BN in loans to subprime borrowers, warehouse lines to 6 subprime lenders, and \$16MM in '06 residual positions and alt-a and subprime residual positions from '04-'05; Street aggressively putting back early payment defaults to originators thereby affecting the originator's business. Rumors around more failures are in the market."²⁰¹⁰

On December 14, 2006, CFO David Viniar held a meeting with senior Mortgage Department executives, reviewed their mortgage related holdings, and directed them to offset the risk posed by declining values.²⁰¹¹ The Mortgage Department then initiated its first multi-billion-dollar net short positions in 2007, essentially betting that subprime mortgage related assets would fall in value.

In early 2007, Mr. Sparks made increasingly dire predictions about the decline in the subprime mortgage market and issued emphatic instructions to his staff about the need to get rid of subprime loans and other assets. On February 8, 2007, for example, Mr. Sparks wrote:

²⁰⁰⁹ See 12/7/2006 email from Daniel Sparks to Tom Montag, "Subprime Volatility," GS MBS-E-010931233.

²⁰¹⁰ 12/13/2006 Firmwide Risk Committee December 13 Minutes, GS MBS-E-009582963-64.

²⁰¹¹ For more information about this December 14 meeting, see discussion in Section C(4)(b), above.

“Subprime environment – bad and getting worse. Everyday is a major fight for some aspect of the business (think whack-a-mole). . . . [P]ain is broad (including investors in certain GS-issued deals).”²⁰¹²

On February 14, 2007, Mr. Sparks wrote some notes to himself:

“Bad week in subprime

collateral performance on loans was poor – we took a write-down on second lien deals and on the scratch and dent book last week

Synthetics market got hammered – around 150 [basis points] wider

Originators are really in a bad spot. Thinly capitalized, highly levered, dealing with significant loan putbacks, some with retained credit risk positions, now having trouble selling loans above par when it cost them 2 points to produce.

What is the next area of contagion.”²⁰¹³

That same day, February 14, 2007, Mr. Sparks exchanged emails with Goldman’s Co-President Jon Winkelried about the deterioration in the subprime market:

Mr. Winkelried: “Another downdraft?”

Mr. Sparks: “Very large – it’s getting messy Bad news everywhere. Novastar bad earnings and 1/3 of market cap gone immediately. Wells [Fargo] laying off 300 subprime staff and home price appreciation data showed for first time lower prices on homes over year broad based.”²⁰¹⁴

On February 26, 2007, when Mr. Montag asked him about two CDO² transactions being assembled by the CDO Origination Desk, Timberwolf and Point Pleasant, Mr. Sparks expressed his concern about both:

Mr. Montag: cdo squared—how big and how dangerous

Mr. Sparks: Roughly 2bb, and they are the deals to worry about.”²⁰¹⁵

²⁰¹² 2/8/2007 email from Daniel Sparks, “Post,” Hearing Exhibit 4/27-7.

²⁰¹³ 2/14/2007 email from Daniel Sparks to himself, “Risk,” GS MBS-E-002203268.

²⁰¹⁴ 2/21/2007 email exchange between Daniel Sparks and Jon Winkelried, “Mortgages today,” GS MBS-E-010381094, Hearing Exhibit 4/27-10.

²⁰¹⁵ 2/26/2007 emails between Tom Montag and Daniel Sparks, “Questions you had asked,” GS MBS-E-019164799.

On March 3, 2007, Mr. Sparks made notes after a telephone call: “Things we need to do Get out of everything.”²⁰¹⁶ On March 7, 2007, Mr. Sparks again reported to Goldman’s Firmwide Risk Committee on accelerating problems in the subprime mortgage market:

- “– ‘Game Over’ – accelerating meltdown for subprime lenders such as Fremont and New Century.
- The Street is highly vulnerable Current strategies are to ‘put back’ inventory and liquidate positions.
- The Mortgage business is currently closing down every subprime exposure possible.”²⁰¹⁷

On March 8, 2007, Mr. Sparks emailed several senior executives, including Mr. Viniar and Mr. Cohn about “Mortgage Risk”: “[W]e are trying to close everything down, but stay on the short side.”²⁰¹⁸

Other Mortgage Department personnel gave similarly bleak assessments of the subprime mortgage market. As early as January 2007, Jonathan Egol, head of the Correlation Trading Desk, wrote to a colleague expressing his clients’ views: “The mkt is dead.”²⁰¹⁹ In February 2007, when discussing plans to issue an Abacus CDO with a Correlation Desk Trader, Fabrice Tourre, Mr. Egol repeated that assessment as his own:

Mr. Egol: [T]he paulson trade may already be dead (although given it is baa2 it may still have a decent shot).

Mr. Tourre: Don’t think the Paulson trade is dead. Supersenior pretty much done with ACA, AAAs could be placed in 2 shots, this is sufficient. Remember we make \$\$\$ per tranche placed. ...

Mr. Egol: You know I love it all I’m saying is the cdo biz is dead we don’t have a lot of time left.²⁰²⁰

²⁰¹⁶ 3/3/2007 email from Daniel Sparks, “Call,” Hearing Exhibit 4/27-14.

²⁰¹⁷ 3/12/2007 Goldman Firmwide Risk Committee, “March 7th FWR Minutes,” GS MBS-E-00221171, Hearing Exhibit 4/27-19; see also 3/7/2007 email from Daniel Sparks to himself, “Risk Comm,” GS MBS-E-002212223.

²⁰¹⁸ 3/8/2007 email from Daniel Sparks, “Mortgage risk,” Hearing Exhibit 4/27-75.

²⁰¹⁹ 1/29/2007 email from Jon Egol to Fabrice Tourre, GS MBS-E-002620292. Mr. Tourre responded: “‘The market is dead’??? Ouahhh, what do you mean by that? Do you have any insight I don’t?” Mr. Egol replied: “LDL [let’s discuss live] tomorrow.” Id. Mr. Egol later wrote: “This is not my personal opinion – just a synopsis of the views of the customers we have seen today.” 1/29/2007 email from Jon Egol to Daniel Sparks, GS MBS-E-003249991.

²⁰²⁰ 2/11/2007 email from Jon Egol, “Index Tranche Pricing Study - 08Feb07.xls,” GS MBS-E-002640951. See also 2/20/2007 email from Fabrice Tourre to Jon Egol, GS MBS-E-009332408 (Mr. Tourre: “By the way, quote from an ABS correlation trader (non-GS): “the mezz ABS CDO business is dead.” Mr. Egol responded: “who.” Mr. Tourre replied: “LDL.” “LDL,” which means “let’s discuss live,” is an abbreviation that appears throughout the Goldman documents produced to the Subcommittee.); 3/27/2007 email from a Goldman analyst, GS MBS-E-009685430 (“The housing slowdown has the risk now not be[ing] offsetting [sic] by stronger capital spending. Both

On March 8, 2007, in an email to senior management, Mr. Sparks listed a number of “large risks I worry about.”²⁰²¹ At the top of the list was “CDO and Residential loan securitization stoppage – either via buyer strike or dramatic rating agency change.” Mr. Sparks was referring to the possibility that Goldman would be unable to securitize and sell its remaining subprime mortgage related inventory by repackaging it into RMBS and CDOs for sale to customers. His concern was either that buyers would refuse to purchase such products (“buyer strike”), or that the ratings agencies might realize the poor quality and high risks associated with these products and downgrade them so they could not be sold with AAA ratings (“dramatic rating agency change”). In essence, Mr. Sparks was worried about Goldman’s being left with a large inventory of unsold and unsaleable subprime mortgage related assets when the market finally collapsed.²⁰²²

At the same time Goldman personnel were expressing these negative views of the securitization business, the Mortgage Department was building its large net short positions in the first and third quarters of the year.

(iii) Goldman’s Securitization Sell Off

In response to the December 14, 2006 meeting at which CFO David Viniar ordered the Mortgage Department to offset the risk associated with its mortgage related holdings, the Department initiated an intensive effort to sell off the subprime RMBS and CDO securities and other assets in its inventory and warehouse accounts.²⁰²³

AA. RMBS Sell Off

As described earlier, on the same day as the Viniar meeting, December 14, 2006, Kevin Gasvoda, head of the Mortgage Department’s Residential Whole Loan Trading Desk, instructed his staff to undertake an immediate, concerted effort to sell the whole loans and RMBS securities in Goldman’s inventory and warehouse accounts, focusing on RMBS securities from Goldman-originated securitizations.²⁰²⁴ By February 9, 2007, the Goldman sales force reported a substantial

growth and the market are DEAD if that’s the case.”) [emphasis in original].

²⁰²¹ 3/8/2007 email from Daniel Sparks, “Mortgage risk,” Hearing Exhibit 4/27-75.

²⁰²² See also emails expressing concerns about the CDO market in particular. 6/27/2007 email from Jonathan Sobel, “Citi feedback on debt mkts,” GS MBS-E-010807091 (reporting a conversation with the head of the mortgage desk at Citibank: “He is very nervous. ... Some Citi people think the CDO market is dead - a potential result of [subprime] contagion.”); 8/30/2007 email from Daniel Sparks, “RAIT,” GS MBS-E-010626401 (“the business model pursued by these guys (taking junior parts of the . . . capital structure and obtaining further leverage via the CDO market) is dead for the foreseeable future.”).

²⁰²³ See also Section C(4)(b) of this chapter, above.

²⁰²⁴ 12/14/2007 email from Kevin Gasvoda, “Retained bonds,” GS MBS-E-010935323, Hearing Exhibit 4/27-72. See also 2/8/2007 email from Kevin Gasvoda to Tom Montag, “Mortgage risk – credit residential,” at 2, GS MBS-E-010372233, Hearing Exhibit 4/27-74 (seven weeks later, Mr. Gasvoda reported transferring the remaining Goldman-originated RMBS securities to the mortgage trading desk to sell: “moving retained bonds out of primary desk hands and into 2ndry desk.”).

number of sales,²⁰²⁵ and by the end of February, Goldman's controllers reported that Goldman's inventory of whole loans had "decreased from \$11bn to \$7bn" with "subprime loans decreased from \$6.3bn to \$1.5bn," a reduction of more than two-thirds.²⁰²⁶

In addition, during the first quarter of 2007, the Mortgage Department drastically slowed its RMBS origination business and its purchase of whole loans and RMBS securities.²⁰²⁷ Those actions meant that Goldman was not only reducing its inventory, but also reducing its intake of what had previously been a constant inflow of billions of dollars in whole loans and RMBS securities purchased as part of its securitization business.

In addition to selling whole loans and RMBS securities, the Mortgage Department wrote down the value of its remaining subprime mortgage portfolio. On February 8, 2007, for example, Mr. Gasvoda recommended that certain whole loan pools and RMBS securities be marked down by \$22 million.²⁰²⁸ On February 9, 2007, Mr. Sparks reported a \$30 million writedown on non performing loans.²⁰²⁹ Mr. Ruzika responded: "Ok, you've been communicating the write down was coming. Let's go through the residual risk and make sure we get to the correct number for the quarter."²⁰³⁰ Residual risk referred to the non rated equity tranches that underwriters like Goldman often retained from the RMBS securitizations they originated; those tranches were also written

²⁰²⁵ 2/9/2007 email exchange between Kevin Gasvoda and sales syndicate, "GS Syndicate RMBS Axes (INTERNAL)," GS MBS-E-010370495, Hearing Exhibit 4/27-73.

²⁰²⁶ 2/23/2007 "Significant Cash Inventory Change (Q1'07 vs. Q4'06)," datasheet prepared by Goldman, GS MBS-E-010037311, Hearing Exhibit 4/27-12.

²⁰²⁷ See, e.g., 3/8/2007 email from Daniel Sparks, "Mortgage risk," GS MBS-E-002206279, Hearing Exhibit 4/27-75 ("[f]or residential loans, we have not bought much lately"); 3/26/2007 Goldman presentation to Board of Directors, "Subprime Mortgage Business," GS MBS-E-005565527, Hearing Exhibit 4/27-22 (reporting that Mortgage Department is using "conservative bids" on loans); 3/14/2007 Goldman Presentation to SEC, "Subprime Mortgage Business 14-Mar-2007," at 7, GS MBS-E-010022328; 3/2/2007 email to Craig Broderick, "Audit Committee Package_Feb 21_Draft_Mortgage_Page.ppt," GS MBS-E-009986805, Hearing Exhibit 4/27-63 (we are "lowballing" bids on loans).

²⁰²⁸ 2/8/2007 email from Kevin Gasvoda to Daniel Sparks, "Post," GS MBS-E-002201668, Hearing Exhibit 4/27-7 ("monthly performance analysis completed this morning on what can be securitized vs will be foreclosed tells us we should mark down around \$22mm"). See also 2/2/2007 email from Daniel Sparks, "Second lien deal performance and write-down," GS MBS-E-002201050, Hearing Exhibit 4/27-92 ("Gasvoda alerted me last night that we will take a write-down to some retained positions next week as the loan performance data from a few second lien sub-prime deals just came in (comes in monthly) and it is horrible."); 2/8/2007 email from Kevin Gasvoda to Tom Montag, "Mortgage risk – credit residential," at 2, GS MBS-E-010372233, Hearing Exhibit 4/27-74. Mr. Gasvoda summarized the other write-downs as follows:

- 2nd lien residual – took \$20-25mm write-downs over last 3 months (could lose \$5-15 mm more)
- 2nd lien retained bonds—took \$18mm write-down this week (could lose \$5-15 more)
- Subperforming loan book – taking \$28mm write-down this week (could lose \$20-40mm more)

What do all these areas have in common? – most HPA [housing price appreciation] sensitive sectors. They've crumbled under HPA slowdown as these are the most levered borrowers.

What have we done to mitigate?

- we stopped buying subprime 2nd liens in the summer of '06 and have focused on alt-a and prime."

²⁰²⁹ 2/9/2007 email from Daniel Sparks, "Scratch & dent loan write down \$30mm," GS MBS-E-009760380.

²⁰³⁰ Id.

down in value. Those writedowns not only implemented Goldman's policy of using current market values for its assets, but also effectively reduced the size of Goldman's "long" position in subprime mortgage related assets. As Mr. Ruzika wrote to Mr. Cohn: "working with Dan to uncover exactly what else needs to be written down so that we can pnl [profit and loss] it this quarter and be clean going into next quarter."²⁰³¹

Loan Repurchase Campaign. In addition to its sales and writedowns, the Mortgage Department intensified its efforts to identify and return defaulted or otherwise deficient loans to the originating lender from which they had been purchased in exchange for a refund of the purchase price. Altogether in 2006 and 2007, Goldman made about \$475 million in repurchase claims for securitized loans, and recovered about \$82 million.²⁰³² It also made about \$40 million in repurchase claims for unsecuritized loans, and recovered about \$17 million.²⁰³³

In the years leading up to the financial crisis, most subprime loan purchase agreements provided that if a loan experienced an early payment default (EPD), meaning the borrower failed to make a payment within three months of the loan's purchase, or if the loan breached certain representations or warranties, such as representations related to the loan's characteristics or documentation, the loan could be returned or "put back" to the seller which was then obligated to repurchase it. In late 2006, as subprime loans began to experience accelerated rates of EPDs and fraud,²⁰³⁴ Wall Street firms began to intensify their efforts to return those loans for refunds. Some subprime lenders began to experience financial distress due to unprecedented waves of repurchase requests that drained their cashflows.²⁰³⁵

Although Goldman, either directly or through a third party due diligence firm, routinely conducted due diligence reviews of the mortgage loan pools it bought from lenders or third party brokers for use in its securitizations, those reviews generally examined only a sample of the loans

²⁰³¹ 2/13/2007 email from Richard Ruzika to Gary Cohn, "Catch Up," GS MBS-E-019794071. Mr. Cohn forwarded Mr. Ruzika's report to Messrs. Blankfein and Winkelried. Id. See also 6/8/2007 email from Kevin Gasvoda, "Project Omega - Mortgages MTM of Resids," GS MBS-E-013411815 (working on potential deal to sell marked-down mortgage residuals).

²⁰³² See Goldman Sachs response to Subcommittee QFR at PSI_QFR_GS0039.

²⁰³³ Id.

²⁰³⁴ Using loan data, the U.S. mortgage industry had developed anticipated default rates, including EPDs, for different mortgage classes, such as subprime, Alt A, and prime loans. These default rates, however, were based in large part on past loan underwriting practices and loan types that bore little resemblance to the loans issued in the years leading up to the financial crisis, as explained in Chapter V of this Report. In 2006, subprime loans began to experience higher than anticipated EPD rates, and lenders were hit by unanticipated repurchase demands they could not afford to pay. The first EPD-related mortgage lender failures occurred in late 2006, and bankruptcies continued throughout 2007.

²⁰³⁵ See, e.g., 3/26/2007 "Subprime Mortgage Business," Goldman presentation to Board of Directors, at 3-5, GS MBS-E-005565527 at 532, Hearing Exhibit 4/27-22 (timeline showing Ownit, a subprime lender, filed for bankruptcy on December 28, 2006, and list of subprime related businesses bankrupted, suspended, closed, sold, or put up for sale).

and did not attempt to identify and weed out all deficient mortgages.²⁰³⁶ Instead, Goldman purchased loan pools with the expectation that they would incur a certain rate of defaults. In late 2006, however, like other Wall Street firms, Goldman began to see much higher than anticipated delinquency and default rates in the loan pools in its inventory and warehouse accounts, and in the subprime RMBS and CDO securitizations it originated.²⁰³⁷ Defaulted loans generally could not be sold or securitized, and had to be terminated through foreclosure proceedings or sold in so-called “scratch and dent” pools that generally produced less money than the loans cost to buy. In addition, defaulted loans meant that the borrowers who took out those loans stopped making loan payments to the securitized loan pool, reducing the cashflow into the related securities. RMBS and CDO securities whose underlying assets incurred high rates of loan delinquencies and defaults experienced reduced cashflows, lost value, and sometimes failed altogether, resulting in substantial losses for investors.

In early 2007, Goldman’s Mortgage Department initiated an intensive review of the loans in its inventory, warehouse accounts, and RMBS and CDO securitizations, to identify deficient loans and return them for refunds. On February 2, 2007, Mr. Sparks reported to senior Goldman executives Messrs. Viniar, Montag, and Ruzika that obtaining refunds from the loan originators would be “a battle”:

“The team is working on putting loans in the deals back to the originators (New Century, WAMU, and Fremont – all real counterparties), as there seem to be issues potentially including some fraud at origination, but resolution will take months and be contentious. ... The put backs will be a battle.”²⁰³⁸

²⁰³⁶ Goldman or a third party due diligence firm it hired typically examined a sample of the loans. Based on the number of problem loans found in the sample, Goldman or the due diligence firm extrapolated the total percentage of problem loans likely to be contained in the pool. This information was then factored into the price Goldman paid for the pool. Any specific loans identified in the sampling process as deficient were generally returned to the lender for repurchase, but it was rare for an investment bank to review 100% of a pool to identify all of the deficient loans and return them. Subcommittee interview of Clayton Holdings (11/9/2010).

²⁰³⁷ See, e.g., 1/8/2007 email from Daniel Sparks, “Color on the Sub Prime Market,” GS MBS-E-002195434 (after receiving a report on potential EPD problems, Mr. Sparks wrote: “I just can’t see how any originator in the industry is worth a premium. I’m also a bit scared of accredited and new century, and I’m not sure about taking on a bunch of new exposures.”); 2/8/2007 email from FICC analyst to Mr. Sparks, Mr. Gasvoda, and others, “2006 Subprime 2nds Deals Continue to Underperform,” GS MBS-E-003775340, Hearing Exhibit 4/27-167d (“2006 vintage Subprime closed-end seconds (CES) issuance has continued to deteriorate. ... [N]on-GS Subprime CES deals are categorically experiencing similar negative behavior across shelves, originators, and servicers. ... Outlook: 2006 vintage ... could eventually reach 4-5+ times that of 2004/early 2005 vintages (more than double that of RA expected losses).”).

²⁰³⁸ 2/2/2007 email from Daniel Sparks to Messrs. Montag, Ruzika, and Viniar, GS MBS-E-002201050, Hearing Exhibit 4/27-92. See also 2/2/2007 email from Michelle Gill, “Warehouse policy,” GS MBS-E-005556331 (discussing proposal to charge higher warehouse fees to mortgage originators with higher EPD and “drop-out” rates, including Fremont and New Century).

To manage its loan repurchase campaign, Goldman expanded an operations center in St. Petersburg, Florida,²⁰³⁹ and made extensive use of third party due diligence firms hired to review its securitized loan pools.²⁰⁴⁰ Goldman instructed the firms to “re-underwrite” every loan in pools of mortgages purchased from specific lenders, including New Century, Fremont, Long Beach, and later Countrywide.²⁰⁴¹

By March 2007, the average EPD rate for subprime loans in Goldman’s inventory had climbed from 1% of aggregate volume to 5%, a dramatic increase.²⁰⁴² On March 7, 2007, Mr. Sparks described Goldman’s exposure as follows:

“As for the big 3 originators – Accredited, New Century and Fremont, our real exposure is in the form of put-back claims. Basically, if we get nothing back we would lose around \$60mm vs loans on our books (we have a reserve of \$30mm) and the loans in the [CDO and RMBS] trusts could lose around \$60mm (we probably suffer about 1/3 of this in ongoing exposures). ... Rumor today is that the FBI is in Accredited.”²⁰⁴³

Five days later, on March 12, 2007, Mr. Sparks wrote: “The street is aggressively putting things back, like a run on the bank before there is no money left to fulfill the obligations.”²⁰⁴⁴

One of the lenders that was an initial focus of Goldman’s loan repurchase effort was New Century, a subprime lender whose loans Goldman had used in many Goldman-originated RMBS securitizations. After completing a review of one New Century loan pool, an analyst recommended “putting back 26% of the pool ... if possible.”²⁰⁴⁵ A putback rate of 26% meant that about one in

²⁰³⁹ 2/27/2007 email from Christopher Gething, “Our Expansion,” GS MBS-E-010387242 (expansion of St. Petersburg office to accommodate staff for loan repurchase effort).

²⁰⁴⁰ See, e.g. 3/2007 Goldman email chain, “RE: NC Visit,” GS MBS-E-002048050 (mentioning four different third party “vendors” conducting loan reviews for the loan repurchase effort and stating: “We’re off to other vendors at this point.”).

²⁰⁴¹ See 3/9/2007 email from Kevin Gasvoda, “priorities,” GS MBS-E-002211055 (listing priority mortgage originators as Accredited, Fremont, New Century, and Novastar); 3/14/2007 Goldman email, “NC Visit,” GS MBS-E-002048050 (identifying New Century, Fremont and Long Beach); 6/29/2007 email from Ed Chavez, “Countrywide Investigation Review Update,” GS MBS-E-002134411.

²⁰⁴² 3/2/2007 email to Craig Broderick, “Audit Committee Package_Feb 21_Draft_Page.ppt,” GS MBS-E-009986805, Hearing Exhibit 4/27-63.

²⁰⁴³ 3/7/2007 email from Daniel Sparks, “Originator exposures,” GS MBS-E-002206279, Hearing Exhibit 4/27-75.

²⁰⁴⁴ 3/12/2007 email from Daniel Sparks, “Subprime Opportunities,” GS MBS-E-004641002. See also 4/15/2007 email, “March 2007 Counterparty Surveillance,” GS MBS-E-002135667 (forwarding report to loan repurchase team, “Please find attached the March counterparty surveillance report (and boy, is it a doozy).”); 3/26/2007 “Subprime Mortgage Business,” Goldman presentation to Board of Directors, at 5, GS MBS-E-005565527, Hearing Exhibit 4/27-22 (list of subprime related businesses bankrupted, suspended, closed, sold, or put up for sale).

²⁰⁴⁵ 3/13/2007 email from Manisha Nanik, “New Century EPDs,” GS MBS-E-002146861, Hearing Exhibit 4/27-77. The review of the New Century loan pool found:

- approx 7% of the pool has material occupancy misrepresentation where borrowers took out anywhere from 4 to 14 loans at a time and defaulted on all. ...
- approx 20% of the pool has material compliance issues. These are mainly missing HUDs. ...
- approx 10% of the pool is flagged as potential REO [Real Estate Owned by lender] or potential unsecured

four of the loans in the New Century pool had EPDs, were fraudulent, or otherwise breached New Century's contractual warranties. It also implied that about 25% of the expected mortgage payments might not be made to the relevant RMBS securitization. Unless the problem loans could be successfully "put back" to New Century in exchange for a refund, a fail rate of that magnitude would likely impair the performance of all of the securities dependent upon that pool of mortgages.

Goldman made a total of about \$67 million in repurchase requests to New Century, which was among the five mortgage originators to whom Goldman directed the most repurchase requests in 2006 and 2007.²⁰⁴⁶ In March 2007, however, New Century stopped paying Goldman's claims due to insufficient cash, and the loan repurchase team sought advice from Mr. Gasvoda:

"As you know, we have an extensive re-underwrite review underway on 06 NC2 [New Century second lien loans] and also other NC loans in the 2nds deals that are in the pipeline for scrubs. Should we change course at all here given the fact NC can't pay?"²⁰⁴⁷

Mr. Gasvoda responded:

"Yes I think priority s/b [should be] on Fremont and Long Beach on 2nd lien deals. Fremont first since they still have cash but may not for long. ... [O]n NC2 we need not halt that entirely but should pull back resources there. We should also move 06FM2 [Fremont second lien loans] up the priority list."

Goldman made a total of about \$46 million in repurchase requests to Fremont, another subprime lender for whom Goldman had underwritten multiple securities and which was also among the five mortgage originators to whom Goldman made the most repurchase requests in 2006 and 2007.²⁰⁴⁸ When Goldman personnel reviewed a loan pool purchased from Fremont, the results were even worse than for the New Century loans. Goldman concluded that "on average, about 50% of about 200 files look to be repurchase obligations."²⁰⁴⁹ Later, Goldman came to a similar

(if 2nd liens). ...

– approx 5% of the pool was possibly originated fraudulently based on the dd [due diligence] results. Main findings: possible ID theft, broker misrepresentations, straw buyer, and falsification of information in origination docs. ...

"approx 62% of the pool has not made any payments (4% were reversed pymts/nsf [non-sufficient funds]) ...

"approx 38% of the loans are out of [loan to value] tolerance."

²⁰⁴⁶ See Goldman Sachs response to Subcommittee QFR at PSI_QFR_GS0040.

²⁰⁴⁷ 3/14/2007 Goldman email, "NC Visit," GS-MBS-E-002048050. See also 3/21/2007 email from Daniel Sparks to Tom Montag, GS MBS-E-002207114 (noting progress in cutting down funding commitments to mortgage originators to \$300 million, including closeout of all funding to New Century in exchange for loans).

²⁰⁴⁸ See Goldman Sachs response to Subcommittee QFR at PSI_QFR_GS0040.

²⁰⁴⁹ 3/14/2007 Goldman email, "NC Visit," GS-MBS-E-002048050; see also 8/10/2007 email from Michelle Gill, "Fremont - Incremental Information," GS MBS-E-009860358 (Goldman's repurchase claims against Fremont would have amounted to a 9% ownership stake in Fremont after a proposed buyout by investor group; Goldman was not the largest purchaser of Fremont loans but its repurchase claims were 3-4 times larger than the claims of the nearest counterparty).

conclusion after reviewing certain loans purchased from Countrywide, again finding that about 50% of the loans reviewed were candidates for return to the lender.²⁰⁵⁰

Goldman made a total of about \$34 million in repurchase requests to Long Beach, a subprime lender for whom Goldman had underwritten billions of dollars in RMBS securities and which was also among the five mortgage originators to whom Goldman made the most repurchase requests in 2006 and 2007.²⁰⁵¹ Goldman pressed both Long Beach and its parent Washington Mutual for repayment of millions of dollars in refunds. At one point, a Goldman executive involved in the repurchase effort sent an email to the head of Washington Mutual Home Loans Division, David Schneider. After noting that Long Beach second lien loans were “performing dramatically worse” than other 2006 RMBS securities, the Goldman executive wrote: “As you can imagine, this creates extreme pressure, both economic and reputational, on both organizations.”²⁰⁵²

Goldman’s loan repurchase campaign recovered substantial funds from some lenders,²⁰⁵³ but little or none from others.²⁰⁵⁴ Non performing loans that were not repurchased by the lender generally remained in Goldman’s inventory or the relevant securitized loan pool. Many other securitizers engaged in similar loan repurchase efforts which continued in 2011.²⁰⁵⁵

Poor Quality RMBS Securities. As a result of its loan repurchase and writedown efforts, the Mortgage Department was keenly aware of the poor quality of many of the loan pools in its warehouse accounts. Nevertheless, during this time period, Goldman continued securitizing many of those loans and selling the resulting RMBS securities to clients.

In March 2007, for example, Goldman securitized over \$1 billion in subprime loans that it had purchased from Fremont, originating an RMBS securitization called GSAMP Trust 2007-FM2.²⁰⁵⁶ Goldman underwrote the security in the same month that it was attempting to return

²⁰⁵⁰ 6/29/2007 email from Ed Chavez, “Countrywide Investigation Review Update,” GS MBS-E-002134411.

²⁰⁵¹ See Goldman Sachs response to Subcommittee QFR at PSI_QFR_GS0040. The five mortgage originators to which Goldman directed the most repurchase requests were First Franklin, New Century, Fremont, Greenpoint, and Long Beach. *Id.*

²⁰⁵² 2/15/2007 email from Loren Morris of Goldman Sachs to David Schneider of WaMu and others, GS MBS-E-002142424, Hearing Exhibit 4/13-69b.

²⁰⁵³ See, e.g., Goldman response to Subcommittee QFR at PSI_QFR_GS0040; 3/8/2007 email from Daniel Sparks to Jon Winkelried and others, “Mortgage risk,” GS_MBS-E-002206279, Hearing Exhibit 4/27-75 (“Accredited ... plan to send us \$21mm”); 6/25/2007 email from Deana Knox, “Option One,” GS MBS-E-019645932 (“Option One has agreed to settle the entire claim, paying \$2.5M (repurchase and monitor) and \$3M will be rescinded.”).

²⁰⁵⁴ New Century, for example, declared bankruptcy in April 2007. *In re New Century TRS Holdings, Inc.*, Case No. 07-10416 (KJC) (US Bankruptcy Court, District of Delaware). See also 6/7/2007 email from Loren Morris, “WFALT 05-2 Repurchase demand,” GS MBS-E-002131857.

²⁰⁵⁵ See, e.g., 1/3/2011 Bank of America press release, “Bank of America Announces Fourth-Quarter Actions,” bankofamerica.com (announcing agreements to pay \$3 billion to Freddie Mac and Fannie Mae to resolve residential mortgage repurchase claims related to loans originated by Countrywide).

²⁰⁵⁶ See 2/2/2007 Goldman memorandum to the Mortgage Capital Committee, “Agenda for Monday, February 5, 2007,” GS MBS-E-002201064; 2/5/2007 Mortgage Capital Committee Memorandum regarding GSAMP Trust 2007-FM2, GS MBS-E-002201055-58.

millions of dollars in deficient loans to the lender,²⁰⁵⁷ and regulators ordered Fremont to stop issuing subprime loans.²⁰⁵⁸ Goldman marketed and sold the RMBS securities to clients. Within seven months, by October 2007, the rating downgrades began; by August 2009, every tranche of the GSAMP securities had been downgraded to junk status.²⁰⁵⁹

On March 26, 2007, the Mortgage Department sought permission from Goldman's Mortgage Capital Committee to securitize and underwrite a new RMBS called GSAMP Trust 2007-HE2, which contained nearly \$1 billion in subprime mortgage loans in a Goldman warehouse account, over 70% of which had been purchased from New Century.²⁰⁶⁰ Goldman approved this securitization even though it knew at the time that New Century's subprime loans were performing poorly, many of the New Century loans in Goldman's inventory were problematic, and New Century was in financial difficulty.²⁰⁶¹ The securitization was approved for issuance in April 2007, the same month New Century declared bankruptcy.²⁰⁶² Goldman marketed and sold the RMBS securities to its clients. The securities first began to be downgraded in October of 2007, and all of the securities have since been downgraded to junk status.²⁰⁶³

Had Goldman not securitized the \$2 billion in Fremont and New Century loans, the Mortgage Department would likely have had to liquidate the warehouse accounts containing them and either sell the loan pools or keep the high risk loans on its own books.

On April 11, 2007, a Goldman salesman forwarded to Mr. Egol a scathing letter from a customer, a Wachovia affiliate, which had purchased \$10 million in RMBS securities backed by Fremont loans and underwritten by Goldman. The client wrote that it was "shocked" by the poor performance of the securities "right out of the gate," and concerned about Goldman's failure to have disclosed information about the poor quality of the underlying loans in the deal termsheet:

²⁰⁵⁷ See discussion of Goldman's loan repurchase effort, above. In addition, in the prior month, a Goldman employee in the mortgage credit trading department sent senior Mortgage Department officials a lengthy email on the deteriorating subprime mortgage market and observed: "Subprime originators, large and small, ha[ve] exhibited a notable increase in delinquencies and defaults, however, deals backed by Fremont and Long Beach collateral have generally underperformed the most." 2/8/2007 email from Fabrice Tourre, "FW: 2006 Subprime 2nds Deals Continue to Underperform **INTERNAL ONLY**," at GS MBS-E-003775340, Hearing Exhibit 4/27-167d.

²⁰⁵⁸ In re Fremont Investment & Loan, Docket No. FDIC-07-035b, Order to Cease and Desist (March 7, 2007).

²⁰⁵⁹ See Standard & Poor's www.globalcreditportal.com.

²⁰⁶⁰ 3/23/2007 Goldman memorandum to members of the Mortgage Capital Committee, "Agenda for Monday, March 26, 2007," Hearing Exhibit 4/27-79 ("GSAMP 2007-HE2 – Goldman to securitize \$960 million of subprime mortgage loans purchased by Goldman Sachs from New Century (71.9%)" and other mortgage originators. "The securitization is scheduled to be completed by April 12, 2007.").

²⁰⁶¹ See discussion of Goldman's loan repurchase effort, above. Earlier in March, a Goldman review of a different New Century loan pool had found that 26% of the loans were deficient and ought to be returned to New Century for a refund. 3/13/2007 email from Manisha Nanik, "New Century EPDs," GS MBS-E-002146861, Hearing Exhibit 4/27-77. In addition, New Century had already informed Goldman that it had insufficient cash to pay any loan repurchase requests. 3/14/2007 Goldman email, "NC Visit," GS-MBS-E-002048050.

²⁰⁶² In re New Century TRS Holdings, Inc., Case No. 07-10416 (KJC) (US Bankruptcy Court, District of Delaware).

²⁰⁶³ See Standard & Poor's www.globalcreditportal.com.

“ As you know, we own \$10mm of the GSAMP 06-S3 M2 bond We are shocked by how poorly this bond has performed right ‘out of the gate’ and had asked [Goldman] to send us the attached ProSupp [Prospectus Supplement]. After having read the ProSupp and compared it to the termsheet we have several concerns:

* According to the Prosupp, approximately \$2.2mm ... of loans were delinquent when they were transferred to the trust. However, there is no mention of delinquent loans anywhere in the termsheet that was sent to investors when the deal was priced.

* According to the Prosupp, approximately \$3.3mm ... are re-performing loans. However, there is no mention of reperforming loans anywhere in the termsheet.

* Approx. 53.14% of the loans in the deal allow for a Prepayment Premium and that all Prepayment Premiums collected from borrowers are paid to the Class P certificateholders. None of this was disclosed in the termsheet and my concerns are two-fold: (1) The presence of Prepayment Premiums effects prepayment speeds which affects ... [the deal’s performance]; (2) Prepayment Premiums are not staying inside the deal for the benefit of all investors but are being earmarked for the Class P holder (which is not mentioned in the termsheet). Note that ... \$1.2mm in Prepayment Premiums has already been paid out to the Class P holder.

* ... [T]he servicer must charge off any loan that becomes 180 days delinquent, giving rise to a Realized Loss inside the deal. Currently losses are at 9.71% of the original deal balance, or approximately \$48mm despite the fact that the deal is only 11 months old (note that this figure already exceeds Moody's expect[ta]tion for cumulative losses for the deal over the ENTIRE LIFE of the deal). I will also note that there are an additional \$57.5mm of loans in the delinquency pipeline. This seems to indicate significant fraud at either the borrower or lender level

* ... [A]ny subsequent recoveries on the charged-off loans do not inure to the benefit of all investors in the deal but ONLY to the Class X1 certificateholder. This is not mentioned anywhere in the termsheet. Who owns the Class X1 notes? Is that Goldman or an affiliate? How much has been recovered so far? This is a material fact to me especially considering that loss severities are coming in at around 105% on the charged-off loans.”²⁰⁶⁴

Reduced RMBS Business. By the end of 2007, Goldman had substantially reduced its RMBS securitization business. In November 2007, in response to a request, Goldman provided specific data to the SEC about the decrease in its inventory of subprime mortgage loans and RMBS securities. Goldman informed the SEC that the value of its subprime loan inventory had dropped from \$7.8 billion on November 24, 2006, to \$462 million on August 31, 2007. Over the same time period, the value of its inventory of subprime RMBS securities had dropped from \$7.2 billion to

²⁰⁶⁴ 4/11/2007 email to Jon Ego, “GSAMP 2006-S3 – Computational Materials for Wachovia (external),” GS MBS-E-003322028 [emphasis in original].

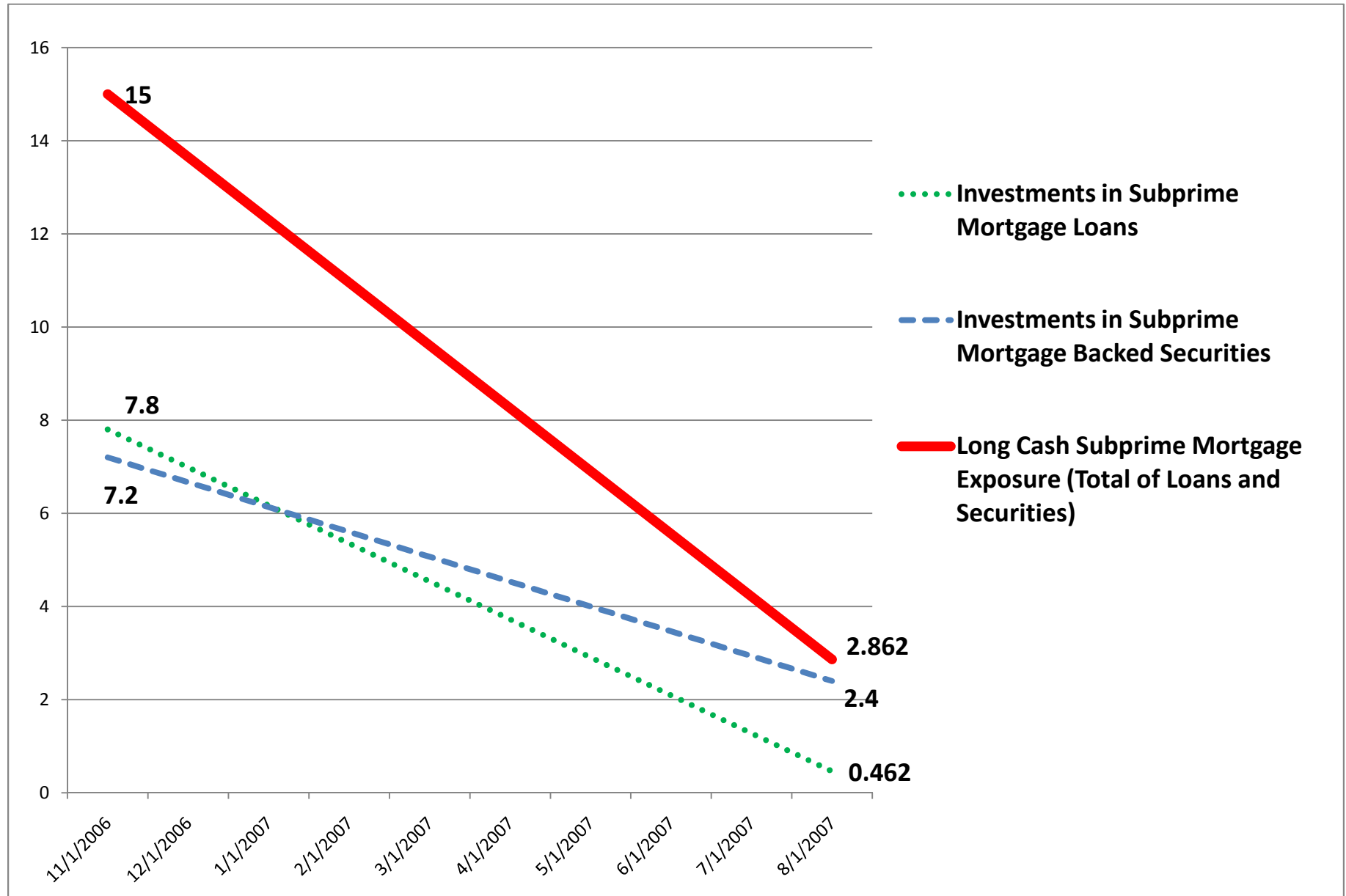
\$2.4 billion, a two-thirds reduction.²⁰⁶⁵ The graph below, which was prepared by the Subcommittee using the data provided by Goldman to the SEC, illustrates the rapid decline in Goldman's subprime holdings.²⁰⁶⁶

[SEE CHART NEXT PAGE: *Goldman Sachs Long Cash Subprime Mortgage Exposure*, prepared by the Permanent Subcommittee on Investigations, Hearing Exhibit 163.]

²⁰⁶⁵ 11/7/2007 letter from Sarah Smith, Controller and Chief Accounting Officer to SEC, at 5, GS MBS-E-015713460, Hearing Exhibit 4/27-50. Goldman issued its final RMBS securitization for the year in August 2007.

²⁰⁶⁶ 4/2010 "Goldman Sachs Long Cash Subprime Mortgage Exposure, Investments in Subprime Mortgage Loans, and Investments in Subprime Mortgage Backed Securities November 24, 2006 vs. August 21, 2007 in \$ Billions," chart prepared by the Subcommittee, Hearing Exhibit 4/27-163.

Goldman Sachs Long Cash Subprime Mortgage Exposure,
Investments in Subprime Mortgage Loans, and
Investments in Subprime Mortgage Backed Securities
November 24, 2006 vs. August 31, 2007 - in \$ Billions



Prepared by the U.S. Senate Permanent Subcommittee on Investigations, April 2010.

Data from Nov. 7, 2007, letter from Goldman Sachs to the Securities and Exchange Commission, GS MBS-E-015713460, at 5 (Exhibit 50).

BB. CDO Sell Off

Goldman reduced its inventory of subprime loan pools and RMBS securities through outright sales, writedowns, and its loan repurchase campaign. It was equally aggressive in reducing its subprime CDO warehouse inventory.

In January 2007, after the CDO Origination Desk worked to sell securities from a CDO called Camber 7, Mr. Sparks wrote to Mr. Montag: “Need you to send message to peter ostrem and darryl herrick telling them what a great job they did. They structured like mad and traveled the world, and worked their tails off to make some lemonade out of some big old lemons.”²⁰⁶⁷

In February 2007, the Mortgage Department conducted a review of the CDOs in its origination pipeline.²⁰⁶⁸ As part of that review, Mr. Sparks cancelled four pending CDOs that had acquired some but not all of the assets needed for the CDOs to go to market.²⁰⁶⁹ On February 25, 2007, Mr. Sparks reported to Mr. Montag and Mr. Ruzika:

“The CDO business liquidated 3 warehouses for deals of \$530mm (about half risk was subprime related). Business also began liquidation of \$820mm [redacted] warehouse – all synthetics done, cash bonds will be sold in the next few days.”²⁰⁷⁰

The Mortgage Department rushed several remaining CDOs to market, including Anderson, Timberwolf, and Point Pleasant, which issued their securities in March and April 2007.²⁰⁷¹ In May and June 2007, the Mortgage Department began closing all of its remaining CDO warehouse accounts and transferring the assets to the SPG Trading Desk for sale.²⁰⁷² On June 22, 2007, Mr. Lehman reported that the ABS Desk had just sold another \$50 million in RMBS securities from the CDO warehouse accounts for a profit of \$1 million, and that: “[o]nly 40mm RMBS A3/A- remain in the WH [warehouse] accounts, ½ of which is Long Beach paper - continue to work.”²⁰⁷³

²⁰⁶⁷ 1/31/2007 email from Daniel Sparks to Tom Montag, “MTModel,” Hearing Exhibit 4/27-91.

²⁰⁶⁸ See, e.g., 2/25/2007 emails between Daniel Sparks and Tom Montag, “Questions you had asked,” GS MBS-E-019164799.

²⁰⁶⁹ See 2/23/2007 email from Daniel Sparks, “Mortgages today,” GS MBS-E-009759477 (“We liquidated 3 CDO warehouses today and started the liquidation of another.”); 2/26/2007 emails between Daniel Sparks and Tom Montag, “Questions you had asked,” GS MBS-E-019164799; 2/22/2007 email from Peter Ostrem to David Rosenblum, “League Tables,” GS MBS-E-001800683 (“FYI Liquidating 3 warehouses tomorrow. And Dan [Sparks] wants to liquidate Greywolf.”).

²⁰⁷⁰ 2/25/2007 emails between Daniel Sparks and Tom Montag, “Questions you had asked,” GS MBS-E-019164799.

²⁰⁷¹ See, e.g., 3/8/2007 email from Daniel Sparks to Mr. Winkelried and others, GS MBS-E-002206279, Hearing Exhibit 4/27-75 (Mortgage Department is “rushing to get deals rated”). See also discussions of Anderson and Timberwolf CDOs, below.

²⁰⁷² See 6/1/2007 email from David Lehman, “CDO Update,” GS MBS-E-001866889 (referring to “liquidated warehouses”); 5/30/2007 email from David Lehman, “ABX hedges – Buy order,” GS MBS-E-011106690 (directing trading desk to unwind hedges for CDO warehouse accounts). Some of the assets were accounted for in a separate “CDO Transition book,” but the sale of the assets became the responsibility of the SPG trading desk.

²⁰⁷³ 6/22/2007 email from David Lehman, “Few trade posts,” GS MBS-E-010848985.

Throughout 2007, Goldman sought to sell all of its remaining subprime assets from the CDO warehouse accounts as well as the new securities issued by Goldman-originated CDOs.²⁰⁷⁴

Aggressive Sales Efforts. On March 9, 2007, Mr. Sparks emailed a call for “help” to Goldman’s top sales managers around the world to “sell our new issues – CDOs and RMBS – and to sell our other cash trading positions.”²⁰⁷⁵ In response, Mr. Sparks and key sales managers had a dialogue about “reaching the next wave of players here and abroad.”²⁰⁷⁶

The Goldman sales manager for Europe and the Middle East suggested that Mr. Sparks focus the CDO sales efforts abroad, because the clients there were not involved in the U.S. housing market and therefore were “not feeling pain”:

“The key to success in the correlation melt-down 2 years ago was getting new clients/capital into the opportunity quickly. Saved/made us a lot of money. Lots of banks and real money clients in Europe and middle east and lots of macro hedge funds are not involved and not feeling pain. In Europe we need a summary of key opportunities/axes and I will get the team to focus on. 2-3 most important things plus sales talking points rather than laundry list.”²⁰⁷⁷

Mr. Ostrem, head of the CDO Origination Desk, agreed with expanding Goldman’s CDO sales efforts in Europe and the Middle East: “I agree with [sales manager’s] comments on new clients. Middle east, french banks, macro hedge funds could and are making these deals ‘work’ currently.”²⁰⁷⁸ The following week, Mr. Lehman issued three new sales directives or “axes” to the Goldman sales force placing a priority on selling securities from the Anderson, Timberwolf, and Hudson CDOs.²⁰⁷⁹

“As per [European/Middle East sales manager’s] suggestion last Friday, below are the three main focus areas for SP CDOs/SPG Trading, including Anderson Mezzanine, Timberwolf CDO² and secondary CDO positions (Hudson Mezzanine and high grade BBBs).”

Goldman’s New York sales office forwarded the axe sheet to the European/Middle East sales office saying: “London – this is for you.”²⁰⁸⁰

²⁰⁷⁴ Between the fall of 2006 and mid-2007, Goldman originated 14 CDOs, which included or referenced many assets that were from or similar to Goldman’s own inventory. The Subcommittee examined seven of those CDOs, and found that 57% of the CDO assets had come from Goldman, including over \$3 billion in synthetic assets in which Goldman was the short party, and therefore stood to profit from a decline in the value of the underlying assets. Goldman had unsold securities from a number of these CDOs on its books.

²⁰⁷⁵ 3/9/2007 email exchange between Daniel Sparks and sales managers, “help,” GS MBS-E-010643213, Hearing Exhibit 4/27-76.

²⁰⁷⁶ Id.

²⁰⁷⁷ Id.

²⁰⁷⁸ Id.

²⁰⁷⁹ 3/12/2007 email from David Lehman, “***Internal** Three focus axes for SP CDOs/SPG Trading,” GS MBS-E-021895601.

²⁰⁸⁰ Id.

In an additional effort to expand Goldman's sales effort, the Mortgage Department's sales syndicate provided a list of "non-traditional buyers" to the CDO and SPG Trading Desks:

"We have pushed credit sales to identify accounts in the credit space that would follow yield into the ABS [asset-backed security] CDO market, and tried to uncover some non-traditional buyers. ... Below is a list of higher delta accounts uncovered so far; and we continue to push for leads. We are working with sales on these accounts to push our axes."²⁰⁸¹

Goldman personnel worked diligently to pitch CDO securities to various clients, internal documents show. On March 30, 2007, for example, Fabrice Tourre reported to senior Mortgage Department executives about his efforts and plans to sell the CDO securities:

"This transaction [Abacus 2007-AC1] has been showed to selected accounts for the past few weeks. Those selected accounts had previously declined participating in Anderson mezz, Point Pleasant and Timberwolfe. ... Plan would still be to ask sales people to focus on Anderson mezz, Point Pleasant and Timberwolfe, but if accounts pass on these trades, steer them towards available tranches in ABACUS 07-AC1 since we make \$\$\$ proportionately with the notional amount of these tranches sold. Wanted to make sure everyone is comfortable with this plan."²⁰⁸²

In April 2007, the Mortgage Department issued a new directive to its sales force with a list of new and old CDO securities in its inventory that it wanted sold, including Timberwolf and Anderson as well as CDOs known as Point Pleasant and Altius.²⁰⁸³ Dissatisfied with the pace of sales, Mr. Sparks suggested issuing a separate axe for each CDO and offering additional sales credits: "Why don't we go one at a time with some ginormous credits - for example, let's double the current offering of credit for timberwolf."²⁰⁸⁴ A sales manager responded: "We have done that with timberwolf already. Don't want to roll out any more focus axes until we get some traction there but at the same time, don't want to stop showing inventory."

"Gameplan" for CDO Valuation Project. By May 2007, CDO sales had slowed significantly. Goldman executives became concerned about the lack of sales prices to establish the

²⁰⁸¹ 3/21/2007 email from syndicate, "Non-traditional Buyer Base for CDO AXES," GS MBS-E-003296460, Hearing Exhibit 4/27-78.

²⁰⁸² 3/30/2007 email from Fabrice Tourre to Daniel Sparks, David Lehman, and others, GS MBS-E-002678071, Hearing Exhibit 4/27-80.

²⁰⁸³ 4/11/2007 email from syndicate, "GS Syndicate Structured Product CDO Axes (INTERNAL)," GS MBS-E-010533482, Hearing Exhibit 4/27-101. Mr. Sparks forwarded the directive to global senior sales executives with a note: "Your focus on this ax would be very helpful - we are trying to clean up deals and this is our priority."

²⁰⁸⁴ 4/19/2007 email from Daniel Sparks to Bunty Bohra, GS MBS-E-010539324, Hearing Exhibit 4/27-102. Mr. Sparks authorized large sales credits on at least one other occasion as well - for sales to cover the Department's \$9 million AAA ABX net short position in September 2007. See 9/27/2007 email from Tom Montag to Daniel Sparks, GS MBS-E-010703744 (Mr. Montag asked: "Did we really pay sixty million in gcs [gross credits] on the aaa short covering? Why so high?" Mr. Sparks responded: "It was a very big ax, but sales credits have become such a contentious point that trading team doesn't debate it anymore. The politics around sales credits had become unbelievable and were a hinderance [sic] to business." Mr. Montag replied: "so you overpay?").

value of its CDO holdings.²⁰⁸⁵ Goldman needed accurate values, not just to establish its CDO sales prices, but also to value the CDO securities for collateral purposes and to comply with Goldman's policy of using up-to-date market values for all of its holdings. Mr. Sparks expressed concern that the value of the remaining CDO assets were rapidly declining, warning one senior executive: "We are going to have a very large mark down – multiple hundreds. Not good."²⁰⁸⁶

On May 11, 2007, Goldman senior executives, including Mr. Cohn and Mr. Viniar, held a lengthy meeting with Mortgage Department personnel, their risk controllers, and others to develop a "Gameplan" for a CDO valuation project.²⁰⁸⁷ The Gameplan called for the Mortgage Department, over the course of about a week, to use three different valuation methods to price all of its remaining CDO warehouse assets and unsold securities from the Goldman-originated CDOs then being marketed to clients.²⁰⁸⁸

A few days later, on May 14, 2007, while the CDO valuation project was underway, Mr. Montag asked Mr. Sparks for an estimate of how much the firm would need to write down the value of its CDO assets. Mr. Sparks responded that the "base case from traders is down [\$]382 [million]." He also wrote:

"I think we should take the write-down, but market [the CDO securities] at much higher levels. I'm a little concerned we are overly negative and ahead of the market, and that we could end up leaving some money on the table."²⁰⁸⁹

The valuation project's results were summarized in a presentation dated Sunday, May 20, 2007, prepared for a 9:00 p.m. conference call that night with Mr. Viniar, in which Mr. Mullen, Mr. Sparks, Mr. Lehman, and others also participated.²⁰⁹⁰ Using the three valuation methods, the

²⁰⁸⁵ See, e.g., 5/11/2007 email from Tom Montag to Daniel Sparks, GS MBS-E-019648100.

²⁰⁸⁶ 5/11/2007 email from Daniel Sparks to Richard Ruzika, "You okay?," GS MBS-E-019659221.

²⁰⁸⁷ Id. ("We had a meeting today with viniar, don [Mullen], mcMahon, my team, controllers, gary [Cohn] on the phone to walk through situation. The market has seized up so much that levels are very hard to determine for the complex products – which also are difficult to model for value due to market changes."); 5/14/2007 email from David Lehman, "Gameplan – asset model analysis," GS MBS-E-001865782 (last email in a longer email chain).

²⁰⁸⁸ 5/14/2007 email from David Lehman, "Gameplan – asset model analysis," GS MBS-E-001865782 (last email in a longer email chain) ("Following up from this afternoon's meeting. We are going to better evaluate the CDO^2 risk using three distinct frameworks: 1) Blended scenario analysis using HPA [housing price appreciation;] ... 2) Risk neutral/correlation framework, consistent with our current synthetic ABS CDOs[;] 3) Simplistic loss assumptions on the underlyings / Market Value Coverage"); 5/14/2007 email from Elisha Weisel, "Modelling Approaches for Cash ABS CDO/CDO^2," GS MBS-E-001863618. See also 3/6/2007 email from Elisha Weisel to Daniel Sparks, "Property Derivs," GS MBS-E-010649734 (discussing lack of model or models to consistently value subprime assets).

²⁰⁸⁹ 5/14/2007 email from Tom Montag to Daniel Sparks, GS MBS-E-019642797.

²⁰⁹⁰ 5/20/2007 email from Lee Alexander to Daniel Sparks, Donald Mullen, Lester Brafman, and Michael Kaprelian, "Viniar Presentation - Updated," GS MBS-E-010965211 (attached file "Mortgages V4.ppt," "Mortgages Department, May 2007," GS MBS-E-010965212). This document is identified in the relevant correspondence as "v.4," and appears to be the final version of a draft presentation prepared earlier that day, "Mortgages Department, May 2007," GS MBS-E-001863651, which bears a time and date stamp of May 20, 2007, 2:58 p.m. See also 5/20/2007 Goldman document, "Mortgage Presentation to David Viniar – Dial In Information," GS MBS-E-

presentation estimated that the loss in value and the total writedowns required for the firm's CDO assets were between \$237 and \$448 million.²⁰⁹¹ The executive summary of the presentation also expressed concern about Goldman-originated CDO securities, especially its two CDO² transactions, Timberwolf and Point Pleasant, since "[t]he complex structure of these positions makes them difficult to value and distribute."²⁰⁹² The presentation estimated that the market value of those CDO securities, plus the equity and super senior tranches that had been retained by Goldman, was \$4.3 billion. The executive summary also estimated the market value of the remaining assets from the CDO warehouse accounts at \$1.5 billion, and expressed particular concern about selling \$742 million in CDO securities from non Goldman originated CDOs due to "limited liquidity and price transparency in this space." The executive summary stated that since "securitization is no longer a viable exit, the warehouse collateral will be marked to market on an individual basis."²⁰⁹³

The presentation also presented "Next Steps." It recommended that Goldman "unwind the warehouses" and use "[i]ndependent teams to continue to value" the CDO securities, equity tranches, and super senior tranches from the Goldman-originated securitizations. It also recommended that sales of the Goldman-originated CDO securities be targeted, first, at four hedge fund customers, Basis Capital, Fortress, Polygon, and Winchester Capital.²⁰⁹⁴ The presentation also attached a list of 35 other target customers with notes regarding the status of efforts to sell them CDO securities in the past.²⁰⁹⁵

010787603. The final document, "Mortgages V4.ppt" was emailed to Mr. Sparks and Mr. Mullen, and also messengered to Mr. Mullen's home, at 8:31 p.m. on May 20, immediately before the scheduled call. 5/20/2007 email to Daniel Sparks and Donald Mullen, "Viniar Presentation – Updated," GS MBS-E-010971156.

Goldman also produced a similar document prepared the day before, which may have been an earlier draft of the final presentation. 5/19/2007 Goldman presentation, "Mortgages CDO Origination – Retained Positions & Warehouse Collateral, May 2007," GS MBS-E-010951926. This document is identified in the relevant correspondence as "Mortgages CDO Origination," and the file name is "Mortgages V3.ppt." This presentation was forwarded to Mr. Sparks for comment on May 19, 2007 at 12:32 a.m., and Mr. Sparks replied with comments at 5:57 p.m. Mr. Sparks forwarded the file "Mortgages V3.ppt" to himself at home on Sunday, May 20, 2007 at 8:07 a.m.

²⁰⁹¹ The writedowns were required, in part, because the assets in the CDO warehouses had generally been marked at cost when purchased or at a value related to the final securitized structure, called "mark-to-securitization-exit." Those valuation methods generally resulted in values well above what the assets would bring if sold individually in a declining mortgage market.

²⁰⁹² Id.

²⁰⁹³ 5/20/2007 email from Lee Alexander to Daniel Sparks, Donald Mullen, Lester Brafman, Michael Kaprelian, "Viniar Presentation - Updated," GS MBS-E-010965211 (attached file "Mortgages V4.ppt," "Mortgages Department, May 2007," GS MBS-E-010965212). By May 2007, Goldman had ceased originating any new CDO securitizations.

²⁰⁹⁴ Id. The four identified customers appear to be ones which the sales force felt it had the greatest likelihood of success in selling the CDO assets. Two of the customers, Basis Capital and Polygon, had already made recent purchases of Point Pleasant and Timberwolf securities, respectively, from Goldman. See Goldman Sachs response to Subcommittee QFR at PSI_QFR_GS0226.

²⁰⁹⁵ The client list drawn up pursuant to the Gameplan was a stark example of actions taken by Goldman to target specific clients for CDO sales, but different Mortgage Department desks maintained their own "target lists" that focused on specific types of products, specific transactions, and specific types of cross-selling opportunities with other Goldman departments. See, e.g., 3/1/2007 email from Michael Swenson, "names," GS MBS-E-012504595 (SPG Trading target list tiered according to likelihood of purchasing); 2/14/2007 email to Matthew Bieber, "Timberwolf I, Ltd. – Target Account List," GS MBS-E-001996121 (list of U.S. accounts "we should be directly targeting" for Timberwolf sales); 3/2/2007 email from David Lehman, "ABX/Mtg Credit Accts," GS MBS-E-

The CDO valuation project undertaken in May provided clear notice to Goldman senior management at the highest levels that its CDO assets had fallen sharply in value, and that despite their lower value, the Mortgage Department planned to aggressively market them to customers. In an earlier draft of the presentation, the Mortgage Department had also stated that it expected Goldman's CDO and CDO² securities "to underperform":

"The complexity of the CDO² product and the poor demand for CDOs in general has made this risk difficult to sell and the desk expects it to underperform."²⁰⁹⁶

Mr. Sparks reviewed that draft language and made comments about other items on the same page, but did not change the phrase, "the desk expects it to underperform."²⁰⁹⁷ The same phrase appeared

011057632 (mortgage credit business shared with SPG Trading Desk "a fairly lengthy list of accounts that are considered to be 'key'"). In December 2006, the Correlation Trading Desk drew up a list of target customers for 2007: the "proposed top 20 correlation customer list." 12/29/2006 email from Fabrice Tourre, "Last call—any other comments on the proposed top 20 correlation customer list," GS MBS-E-002527843, Hearing Exhibit 4/27-61. Mr. Tourre issued a "last call" for comments on the list and suggested focusing on "buy-and-hold rating-base buyers" who might be more profitable for the desk than more sophisticated and demanding hedge fund customers:

"[T]his list might be a little skewed towards sophisticated hedge funds with which we should not expect to make too much money since (a) most of the time they will be on the same side of the trade as we will, and (b) they know exactly how things work and will not let us work for too much \$\$\$, vs. buy-and-hold rating-based buyers who we should be focused on a lot more to make incremental \$\$\$ next year."

The proposed top 20 list identified a number of European accounts, as well as customers who had purchased asset backed security products from Goldman in the past.

The reference to "buy and hold, ratings-based buyers" was to conservative financial institutions, often insurance companies or pension funds, that tended to hold their investments indefinitely or until maturity, some of which were limited to holding investments with AAA or other investment grade credit ratings. Many of these buyers tended to rely on the AAA rating as a "seal of approval" signaling that the rated instrument offered predictable, safe returns. Many viewed the AAA rating as, in effect, all these buyers thought they needed to know about the CDO securities they were purchasing. See, e.g., 11/13/2007 Goldman email, GS MBS-E-010023525 (attachment, 11/14/2007 "Tri-Lateral Combined Comments," GS MBS-E-010135693-715 at 713) ("Investors in subprime related securities, especially higher rated bonds, have historically relied significantly on bond ratings particularly when securities are purchased by structured investing vehicles."). But as one press article explained: "CDO ratings may mislead investors because they can obscure the risk of default, especially compared with similar ratings for bonds, says Darrell Duffie, a professor of finance at Stanford Graduate School of Business in California, who's paid by Moody's to advise the company on credit risk. 'You can't compare these CDO ratings with corporate bond ratings,' Duffie says. 'These ratings mean something else – entirely.'" See 5/31/2007 email to David Lehman and others, "CDO Boom Masks Subprime Losses," GS MBS-E-001865723 at 733. The article pointed out that the lowest grade of corporate bonds rated by Moody's had a default rate of 2.2%, while the default rate for CDOs with the same rating was 24%. *Id.*

²⁰⁹⁶ 5/19/2007 Goldman presentation, "Mortgages CDO Origination – Retained Positions & Warehouse Collateral, May 2007," GS MBS-E-010951926.

²⁰⁹⁷ 5/19/2007 email from Daniel Sparks, "Mortgages CDO Origination Presentation," GS MBS-E-010973174 (Mr. Sparks: "p. 5 again 'marked to securitization exit' [re marked to model language]. . . some A and BBB were sold on the deals [re demand only for the supersenior tranche language]").

in several earlier versions of the presentation as well, but was removed from the final version sent to Mr. Viniar.²⁰⁹⁸

CDO Desk Shutdown. In May 2007, Goldman decided to stop issuing new CDOs, and the head of its CDO Origination Desk, Peter Ostrem, left the firm.²⁰⁹⁹ Mr. Sparks named as his replacement David Lehman, who was a senior member of the Structured Product Group (SPG) and head of its CMBS Trading Desk, but had little experience in either underwriting or CDOs.²¹⁰⁰ On May 19, 2007, Mr. Lehman received an email from a former Goldman managing director who wrote: “Congratulations, but seems like you have a lot of work [sic] ahead of you.”²¹⁰¹ Mr. Lehman asked Mr. Egol: “What do u th[in]k he means by ‘lot of work to do?’”²¹⁰² Mr. Egol responded:

“I know what he means. If you talk to people knowledgeable about cdos, you will find that external perception of GS franchise in this space is much lower than Sparks and Sobel believed. Over the last 2 years, GS [Goldman Sachs] is perceived to be a bottom quartile abs [asset-backed security] cdo underwriter and to have done several poor deals. There is a reason [the CDO desk] didn’t sell much paper. The fact that [the CDO desk] was basically giving money away in these no-fee principal deals and could still only get TCW, GSC (both street wh—e managers) and some start up managers to work with GS is a stain that will take time to remove. The HG [high-grade] deals in particular are very poor. I thought the alladin deals had some potential but fortius 2 is going to be a real mess.

“These are not just my views – they are from customers whose views resonate in the market. Sales people have just been too timid internally or not engaged enough with their accounts to provide accurate feedback. It pains me to say it but citi, ubs, db [Deutsche Bank], lehman and ms [Morgan Stanley] have much stronger franchises – among large dealers only ML [Merrill Lynch] is more reviled than [Goldman’s] business. ...

“I should add altius 3 is a doozy as well. I’ll spare you the detailed list.”²¹⁰³

That May 19, 2007 email provided Mr. Lehman with additional notice of the poor quality of the CDO securities he was charged with selling.

²⁰⁹⁸ See 5/19/2007 email from Dan Sparks to Lee Alexander, others, GS MBS-E-010973174 (attached file “Mortgages V3.ppt,” GS MBS-E-010973175); and 5/20/2007 9:52 a.m. draft “Mortgages V4.ppt,” GS MBS-E-010952331; compared to final version, 5/20/2007 email from Lee Alexander to Daniel Sparks, Donald Mullen, Lester Brafman, and Michael Kaprelian, “Viniar Presentation - Updated,” GS MBS-E-010965211 (attached file “Mortgages V4.ppt,” “Mortgages Department, May 2007,” GS MBS-E-010965212).

²⁰⁹⁹ 5/17/2007 email from Daniel Sparks to Tom Montag, “Ostrem is resigning,” GS MBS-E-019654926.

²¹⁰⁰ 5/11/2007 email from Daniel Sparks, “You okay?,” GS MBS-E-019659221 (“I’m going to make a change in the responsibility of the business away from Ostrem to david lehman (with Swenson helping).”).

²¹⁰¹ 5/19/2007 email to David Lehman, “congratulations, but seems like you have a lot of work ahead of you,” GS MBS-E-018921924.

²¹⁰² Id.

²¹⁰³ 5/19/2007 email from Jon Egol to Daniel Sparks, GS MBS-E-018921924.

The CDO valuation project presentation given the next day, May 20, 2007, recommended that all assets from the CDO warehouse accounts be transferred to the SPG Trading Desk for sale. A CDO “transition book” was created to account for profits and losses from some of the assets, and the transfer took place the following week.²¹⁰⁴ In addition, by June 1, 2007, Goldman eliminated the CDO Origination Desk as a separate entity, and moved all of the remaining Goldman-originated CDO securities to the SPG Trading Desk, where Mr. Lehman was based.²¹⁰⁵ As a result, the SPG Trading Desk, which was a secondary trading desk and had little experience with the greater disclosure obligations involved with selling newly minted securities, became solely responsible for selling all Goldman-originated CDO securities.

Renewed Sales Efforts. After the transfer of the CDO assets, the SPG Trading Desk began to work with the Goldman sales force to identify potential customers and sell the CDO products. On May 24, 2007, a Goldman salesperson contacted Messrs. Sparks and Lehman regarding two potential customers interested in Timberwolf and Point Pleasant securities.²¹⁰⁶ With respect to one customer, the salesman wrote that it was “[n]ot experts in this space at all but [I] made them a lot of money in correlation dislocation and will do as I suggest.” With respect to the second customer, the Goldman salesperson wrote that the customer had “just raised another \$1bln for their ABS [asset backed security] fund and they are very short the ABX so are natural buyers of our axe.”²¹⁰⁷

A couple of weeks before the CDO valuation project, Goldman’s Australia sales representative, George Maltezos, announced he had found a potential Australian buyer for a Goldman CDO being constructed by the Correlation Desk: “I think I found white elephant, flying pig and unicorn all at once.”²¹⁰⁸ On the same day the project identified Basis Capital as a primary target for CDO sales, May 11, 2007, Mr. Maltezos sent Mr. Lehman an email saying he would contact the Basis principals as soon as they returned from a business trip the following day.²¹⁰⁹

On May 24, 2007, the CDO sales dry spell ended, when Paramax Capital Group, a U.S. investment adviser, purchased \$40 million in AA Timberwolf securities.²¹¹⁰ On May 30, Mr. Lehman announced the sale of \$20 million in AAA Timberwolf securities to Tokyo Star Bank in Japan.²¹¹¹

²¹⁰⁴ 5/20/2007 email from David Lehman, “ABX hedges – Buy order,” GS MBS-E-011106690 (“begin unwinding certain ABX hedges vs. the CDO WH [warehouse] and transition book”); 6/1/2007 email from Mr. Lehman, “CDO Update,” GS MBS-E-001866889 (“liquidated warehouses and the trading books”).

²¹⁰⁵ Subcommittee interview of David Lehman (9/27/2010).

²¹⁰⁶ 5/24/2007 email from Yusuf Aliredha to Mr. Sparks, Mr. Lehman, and others, “Priority Axes,” GS MBS-E-001934732.

²¹⁰⁷ Id.

²¹⁰⁸ 4/27/2007 email from George Maltezos, Goldman Australia sales, to Jon Egol, “utopia,” GS MBS-E-003305101.

²¹⁰⁹ 5/20/2007 email from George Maltezos to David Lehman, “T/wolf and Basis,” GS MBS-E-001863555.

²¹¹⁰ See Goldman Sachs response to Subcommittee QFR at PSI_QFR_GS0226.

²¹¹¹ 5/30/2007 email from David Lehman, “Timberwolf – Order from Tokyo Star Bank,” GS MBS-E-001934058. Tokyo Star Bank was not on the list of “targeted” customers, but had been solicited previously by the Japan sales team pursuant to an earlier sales directive listing Timberwolf as a priority.

CDO Sales in Asia. On June 11, 2007, Mr. Lehman received a note from the Mortgage Department's sales syndicate desk asking whether the directive listing high priority CDO sales could be sent to the Japan sales office, which oversaw sales throughout Asia:

“Know there was sensitivity w/ sending this out, but asia sales management is asking again. Do you want to consider sending more broadly for asia sales or do you want to stick with the more targeted approach?”²¹¹²

The Japan sales group wrote that the head of the Japan office “is saying that we need it to go more broadly to all Sales at least in Japan. Given her request twice now and her help in getting focus, think we should at least push this in Japan.”²¹¹³ Mr. Lehman responded: “Fine – let’s send to all Japan sales then.”²¹¹⁴

The Japan sales office responded to the new directive with several quick sales. On June 13, 2007, the Japan sales office sent out this celebratory note:

“We have moved over \$250mm of SP CDO axes to account in Japan, Australia and Korea over the past 2+ weeks. These are HUGE orders for the firm as they have helped reduce balance sheet risk and further exhibits the importance of the Asia franchise to the global Structured Products Group business. **Note that in line with these trades we have paid out over \$14mm of gross credits** – this is clearly the top focus for us now in SP [Structured Product] CDO space. ... Call the SPG Asia desk in Tokyo for updated axes and offer levels. We hope to trade another \$20mm of CDO² risk with a Japanese account in the coming week+. Thanks.”²¹¹⁵

Mr. Lehman replied: “Thx for sending this out.”²¹¹⁶

A few days later, Mr. Lehman reported to senior management that the Japan sales office had been successful in selling another \$20 million in CDO securities. Mr. Lehman wrote:

“Great job by [Japan sales] (again) on our CDO² axes. Tonight we will trade \$20mm Point Pleasant A1s @90.7 to Tokyo Star Bank We hope to trade another \$20mm of these bonds next week w/ this account.”²¹¹⁷

²¹¹² 6/11/2007 email from syndicate, “GS Syndicate Structured Product CDO Axes (INTERNAL USE ONLY),” GS MBS-E-001914921-24.

²¹¹³ Id.

²¹¹⁴ Id. See also “New Investors Board the Asian CDO Train,” Creditflux (6/1/2007) (noting that while non bank investors had previously been barred from buying CDO assets in most Asian countries, regulators increasingly allowed life insurance companies and other financial firms to buy them within prescribed limits).

²¹¹⁵ 6/13/2007 email from Goldman Sachs Japan sales, “**GS SP CDO Axes** – Asia Trade Update (INTERNAL USE ONLY),” GS MBS-E-010803888 [emphasis in original].

²¹¹⁶ 6/13/2007 email from Goldman Sachs Japan sales, “**GS SP CDO Axes** – Asia Trade Update (INTERNAL USE ONLY),” GS MBS-E-011212260.

²¹¹⁷ 6/18/2007 email from David Lehman, “\$20mm Point Pleasant trade w/ TK Star Bank,” GS MBS-E-011136832.

Mr. Lehman sent an email to the head of the Japan sales office letting him know that Goldman's senior management was aware of the sales effort: "Montag ve[r]y involved in this fyi." The Japan sales manager responded: "Yes – he made that clear when he spent almost 20 minutes on the desk with me in TKO [Tokyo] last week going through every potential lead."²¹¹⁸ That same day, the Japan sales manager sent out a new email urging the trading team to bring in another \$20 million from Tokyo Star Bank and promising them additional sales incentives:

"To reward your strong effort and in hopes of the follow on 20mm order from the client on this deal, we plan on paying you a **total bonus GC payment of \$40 / bond** (double our \$20/bond for AAA's on our axes that are not lower mezz AAA). We look forward to additional trades from Tokyo Star Bank on our CDO axes."²¹¹⁹

During June and July, additional sales took place in Japan, Korea, Taiwan, and Australia.²¹²⁰ Goldman also made sales to customers in Europe and the Middle East.²¹²¹

Despite the sales in June and July, Goldman continued to have a significant inventory of unsold CDO securities. On August 15, 2007, Mr. Mullen even made a casual reference to "our cdo business which remains unsaleable."²¹²² If Goldman's CDOs remained unsaleable, however, it was not for lack of trying. In August and September 2007, Goldman switched from its targeted customer approach to issuing broad directives to its entire sales force in the United States and abroad urging them to concentrate on its CDO securities. On August 17, 2007, for example, the SPG Trading Desk issued a new directive to certain salespersons asking them to place a priority on selling interests in two Timberwolf super senior tranches.²¹²³ These tranches were first in line to receive payments within the CDO and so had the lowest risk. Super senior CDO positions were often sold through CDS contracts, sometimes called super senior swaps, in which the customer took the long side and the CDO originator took the short side, and that's what Goldman wanted the sales force to market. But the following week, on August 23, 2007, Goldman sent a new directive to the sales force urging them to find customers willing to take the short side of the super senior tranches, so the Mortgage Department could take the long side and cover some of its shorts.²¹²⁴ When asked his opinion of the directive, the head of Japan sales office expressed skepticism about sales to Asian customers:

"The only question in my mind is that we have not seen many accounts pushing hard to find ways to get short (typically they are long only). That being said, the reality of the current

²¹¹⁸ Id.

²¹¹⁹ 6/18/2007 email from Goldman Sachs Japan sales, "Point Pleasant 07-A1 // Tokyo Star Bank (internal use only)," GS MBS-E-001920459 [emphasis in original].

²¹²⁰ See Goldman Sachs response to Subcommittee QFR at PSI_QFR_GS0226; 7/24/2007 email from [Taiwan], "7/23 CDO/RMBS requests from Taiwan," GS MBS-E-011198375, Hearing Exhibit 4/27-67.

²¹²¹ Id.

²¹²² 8/15/2007 email from Donald Mullen, "Post," GS MBS-E-009740784, Hearing Exhibit 4/27-32.

²¹²³ 8/17/2007 email from Michael Swenson, "Twolf super seniors," GS MBS-E-001927791.

²¹²⁴ 8/23/2007 email from Jon Egol, "**** SP CDO/Correlation Desk Super Senior Axes *** (INTERNAL USE ONLY)," GS MBS-E-011310717.

market may have finally sunk in and investors may be able to convince their boards [n]ow to put on this sort of trade.”²¹²⁵

On September 5, 2007, notwithstanding “the reality of the current market,” the SPG Trading Desk issued a “Refresh of Axe Priorities” to its entire sales force.²¹²⁶ The directive placed a priority on selling Goldman’s residual CDO equity tranches as well as a variety of other assets to help Goldman cover and lock in the profits from its big short. Mr. Sparks emailed senior sales executives:

“Please let me know how these are going. I am personally going to work to do a better job making sure you understand the things we are trying to achieve as a business. In addition to this, the super-senior ABX trade [Jonathan] egol sent around and general securities financing trades are priorities for us.”²¹²⁷

Mr. Sparks forwarded this email to Mr. Cohn, who responded “Great to see.”²¹²⁸ On September 6, Mr. Sparks emailed the syndicate desk about the “Refresh of Axe Priorities”: “Want to get you to send out daily 1-3 priority axes for department – let’s discuss.”²¹²⁹

Goldman has at times suggested that many of its CDO sales were not the result of affirmative client solicitations and recommendations made by the firm, but were in response to client requests—generally known as “reverse inquiries.” In a letter to the Financial Crisis Inquiry Commission, for example, Goldman’s General Counsel, Gregory Palm, made the following statement about Goldman’s role as an underwriter of synthetic CDOs:

“Goldman Sachs’ CDOs containing primarily residential mortgage-related synthetic assets were initially created in response to the request of a sophisticated institutional investor that approached the firm specifically seeking that particular exposure. Reverse inquiries from clients were a common feature of this market. ... These transactions often are initiated by our clients, and when proposed by us are often in response to previously expressed

²¹²⁵ Id. Around the same time, a Goldman managing director who ran Corporate / PWM [Private Wealth Management] Sales in Japan and sold investments to wealthy individuals, inquired: “Do you have any cdo secondary inventory.” 8/21/2007 email from PWM Managing Director, GS MBS-E-010619382. He was advised by the SPG Trading Desk that Goldman was “prohibited from offering cdo paper to all pw [private wealth] clients, even [qualified institutional] pw clients. ... To change this, we would have to petition the committee that oversees such things [the Structured Investment Product Committee].” Id. Mr. Lehman added: “Spoke with Sparks about this. Given the complexity of the product, we would like to handle this on a client by client basis.” Id. After receiving information that potential clients had previously purchased ABS CDOs from other firms, Mr. Lehman asked Goldman compliance: “What do we need to do on our end to get this approved.” 8/28/2007 email from David Lehman, “Japan PWM Client Interest in ABS CDO (internal use only),” GS MBS-E-011090928. One of Mr. Lehman’s team members in the Mortgage Department replied: “Ldl [let’s discuss live]. Have info on this.” Id. Mr. Lehman replied “xoxo.” Id.

²¹²⁶ 9/5/2007 email from Michael Swenson, “Refresh of Axe Priorities,” GS MBS-E-010684858.

²¹²⁷ Id.

²¹²⁸ Id.

²¹²⁹ 9/6/2007 email from Daniel Sparks to syndicate desk, “Refresh of Axes Priorities,” GS MBS-E-010685200.

investment interests of the client. We are responding to our clients' desires either to establish, or to increase or decrease, their exposure to a position based on their own investment views."²¹³⁰

Mr. Palm's characterization of Goldman as playing only a passive, responsive role is at odds with the firm's documented and concerted efforts to market its CDO securities in the face of investor disinterest and falling values. Throughout 2007, Goldman issued directives to its sales force to sell specific CDO securities on a "first priority" basis. It expanded its selling efforts to "nontraditional buyers" as well as to banks, hedge funds, and other clients in Asia, Europe, and the Middle East. It offered its sales force substantial incentives, such as "ginormous" sales credits, to push the sales to clients.²¹³¹ Under its CDO Gameplan, Goldman "targeted" four primary and 35 secondary clients for CDO sales, and celebrated selling CDO securities to several of them. The weight of this evidence demonstrates that Goldman was soliciting sales rather than responding solely to client inquiries.

CC. CDO Marks

One issue that gained intensity as the mortgage market continued its decline was Goldman's practice of selling CDO securities to customers at one price only to mark down the value substantially within days or weeks of the sale, where Goldman had an ongoing client relationship.

Goldman used a mark-to-market process to manage its risk, which required valuing its holdings on a daily basis to reflect their current market value.²¹³² In practice, many of its mortgage related assets were marked on a monthly rather than daily basis, including many of its CDO securities.²¹³³ Nonetheless, Goldman appears to have been more active in re-marking the value of its mortgage related assets than other Wall Street firms and to have used lower marks than many of its competitors.²¹³⁴ Goldman also had a process for automatically marking down its internal value of any asset held longer than a specified period of time, in order to encourage its trading desks to sell their aged assets.²¹³⁵

²¹³⁰ 3/1/2010 letter from Goldman Sachs to the Financial Crisis Inquiry Commission, GS-PSI-01310 at 16.

²¹³¹ 4/19/2007 email from Daniel Sparks, "**UPDATE* GS Syndicate Structured Product CDO Axes," GS MBS-E-010539324, Hearing Exhibit 4/27-102.

²¹³² Subcommittee interview of David Viniar (4/13/2010) and Craig Broderick (4/9/2010).

²¹³³ See, e.g., 2/2007 Goldman email chain, "FYIs," GS MBS-E-002339552 (regarding residential credit scratch & dent loan book: "Has the biz agreed with controllers about how frequently each book is to be marked? Daily? Weekly? Monthly?"; Mr. Sparks' response: "For this book I think monthly is the right way as the data comes monthly on performance. Dramatic mkt moves could change things."). CDOs were often marked monthly, as hedge fund clients generally needed month-end valuations of CDOs in their portfolios to enable them to report hedge fund Net Asset Values (NAVs) to clients. See, e.g., 6/28/2007 email from Bear Stearns, "Missing Marks (15).xls," GS MBS-E-001965860 (portfolio manager requesting month-end marks: "I need the 4 bonds marked for 5/31/07 we still need to report an NAV."); 6/19/2007 email from Lester Brafman to Jon Egol, GS MBS-E-003373736 (regarding Abacus CDO securities, Mr. Egol wrote: "We mark them monthly").

²¹³⁴ See, e.g., 2/12/2007 email from Daniel Sparks, "Post today," GS MBS-E-009763506 (New Century "claim[s] we are the only ones being harsh. C-Bass claims we are the only one margin calling. Our marks are appropriate for moves in the market. More margin calls going out today.").

²¹³⁵ Subcommittee interview of David Lehman (4/12/2010).

During 2007, Goldman's markdowns of the value of its CDO securities became a source of dispute with its customers.²¹³⁶ Some clients were negatively affected in a variety of ways when lower values were assigned to Goldman's CDO securities. Some had purchased their CDO securities through "repo" financing arrangements with Goldman; under those arrangements, a decline in the value of the CDO securities being financed required the client to post more cash margin with Goldman. In a few other instances, clients had invested in CDO securities through a CDS contract with Goldman. If the CDO securities declined in value, the CDS contracts required those clients to post more cash collateral with Goldman. In other cases, clients did not have to post additional cash collateral, they simply incurred losses from the lower values.²¹³⁷

Lower marks also had significance for Goldman internally, since a CDO security with a marked down value might reduce the firm's profits and reduce its long position. Alternatively, if Goldman held the short side of an investment, a lower mark might increase the firm's profits, increase the value of its short position, and bring in more cash from the long parties. When the firm held a proprietary position in opposition to the position held by a client, the fact that Goldman was marking the value of its own position created a conflict of interest, since Goldman would benefit as the client lost money.

²¹³⁶ Mr. Broderick explained in his interview with the Subcommittee that because of the volatility in the subprime market, Goldman had an unusually large number of disputes with customers over marks or collateral valuation during 2007. Subcommittee interview of Craig Broderick (4/9/2010). See also 8/2/2007 email from Stacy Bash-Polley, "Marks Summary," GS MBS-E-013349723 (transmitting complaints from eight clients that Goldman's marks were far lower than those of other dealers); 2/12/2007 email from Daniel Sparks, "Post today," GS MBS-E-009763506 (New Century "claim[s] we are the only ones being harsh. C-Bass claims we are the only one margin calling."); 8/10/2007 Goldman memorandum, "Summary of German Bank US Sub Prime Exposure," GS MBS-E-009994305. This memorandum was generated by Goldman's European Investment Banking Division, FICC Sales and Credit. It highlighted losses incurred by many German banks due to markdowns in the value of U.S. subprime assets, necessitating several European Central Bank bailouts. The memorandum stated: "We understand from clients that valuation marks provided by Goldman Sachs on ABS are substantially lower than the competition's valuations. As a result, clients are irritated by the valuation difference."

Goldman's dispute with AIG FP is another example. The two companies disagreed over both the marks and the amount of collateral and margin that AIG had to post with Goldman in connection with various mortgage products. At one point in the dispute, Co-President Jon Winkelried wrote to his colleagues: "[O]ne thing we're not going to do is compromise on what we think the right marks are and our margin process." 8/2/2007 email from Jon Winkelried, "Aig collateral call," GS MBS-E-010055302. Goldman's dispute with AIG continued for over a year until the Federal Reserve, through the Maiden Lane III transaction, ultimately ensured that Goldman and its customers received 100 cents on the dollar on the bulk of their disputed claims against AIG. Subcommittee interview of David Viniar (4/13/2010). Goldman later told regulators that it had more collateral disputes than anticipated during the financial crisis. 11/13/2007 Goldman email, GS MBS-E-010023525 (attachment, 11/14/2007 "Tri-Lateral Combined Comments," GS MBS-E-010135693-715 at 695). According to Goldman documents, as late as October 30, 2007, its Mortgage Department generated approximately 66% of all derivative collateral disputes by Goldman customers. 10/30/2007 Goldman presentation, "Derivative Collateral Dispute Summary," GS MBS-E-009882064.

²¹³⁷ See, e.g., 8/10/2007 Goldman memorandum, "Summary of German Bank US Sub Prime Exposure," GS MBS-E-009994305 (highlighting losses incurred by many German banks due to markdowns in the value of U.S. subprime assets, necessitating several European Central Bank bailouts).

Gameplan Markdowns. When, on May 11, 2007, Goldman executives and the Mortgage Department decided to embark upon a CDO valuation project, Goldman's Chief Risk Officer, Craig Broderick, sent an email to his team to discuss the consequences of lower CDO values for Goldman's clients. He wrote:

"Sparks and the Mtg [Mortgage] group are in the process of considering making significant downward adjustment to the marks on their mortgage portfolios esp[ecially] CDOs and CDO squared. This will potentially have a big P&L [profit and loss] impact on us, but also on our clients due to the marks and associated margin calls on repos, derivatives and other products. We need to survey our clients and take a shot at determining the most vulnerable clients, knock on implications, etc."²¹³⁸

Mr. Broderick called for a client survey to identify which clients were "most vulnerable" to financial difficulty if Goldman's CDO securities were marked down in value, and they either incurred losses or were required to post more cash margin or collateral. He also wrote: "This is getting lots of 30th floor attention right now."²¹³⁹

Some Goldman managing directors also raised the issue of selling CDO securities to clients at a price that would be marked down almost immediately. In a May 11 email to colleagues, for example, Goldman senior executive, Harvey Schwartz, wrote: "[D]on't think we can trade this with our clients andf [sic] then mark them down dramatically the next day."²¹⁴⁰ Later that day, in an exchange of emails with Mr. Schwartz, Mr. Montag, and Mr. Sparks, Don Mullen acknowledged Mr. Schwartz's concern "about the representations we may be making to clients as well as how we will price assets once we sell them to clients."²¹⁴¹ The Goldman executives also agreed, however, not to "slow or delay" efforts to sell the CDO securities, if the sales force received "strong bids."²¹⁴²

The May 2007 CDO valuation project resulted in lower values for many of Goldman's CDO assets. While those internal markdowns were taken at month's end, around May 25, 2007, Goldman continued to price the CDO securities it was selling at much higher levels, creating the potential for a rapid markdown after an asset was sold.²¹⁴³

"Monster CDO Re-Mark." Six weeks later, in mid-June, the Mortgage Department learned that two Bear Stearns hedge funds with a \$17 billion portfolio of subprime assets were in

²¹³⁸ 5/11/2007 email from Craig Broderick, "CDOs - Mortgages," Hearing Exhibit 4/27-84.

²¹³⁹ Id. The reference to the "30th floor" was the floor on which Goldman's most senior executives had office space in its New York headquarters.

²¹⁴⁰ 5/11/2007 email from Harvey Schwartz to Daniel Sparks, Tom Montag, and others, GS MBS-E-010780864. As explained earlier, some clients were affected by Goldman's marks even after completing purchase of CDO securities, due to repo financing margin requirements, CDS collateral requirements, or other arrangements.

²¹⁴¹ 5/11/2007 chain of email exchanges among Messrs. Mullen, Schwartz, Montag, and Sparks, GS-MBS-E-010780849, Hearing Exhibit 4/27-103.

²¹⁴² Id.

²¹⁴³ See, e.g., discussion of Timberwolf CDO, below.

financial distress. The Mortgage Department immediately initiated an effort to build a new, large short position to take advantage of the expected drop in the value of subprime mortgage assets.²¹⁴⁴ Within two weeks, Goldman had amassed a large number of CDS contracts shorting a variety of subprime mortgage assets. By June 22, 2007, Goldman's short position reached its peak size of approximately \$13.9 billion.²¹⁴⁵

The Bear Stearns hedge funds failed in mid-June, subprime assets plummeted in value, and Goldman established its big short by the end of the month. After its new net short was in place, the Mortgage Department implemented a series of large markdowns in the value of its RMBS and CDO assets. The markdowns had the dual effect of increasing the value of Goldman's net short position, while reducing the value of many of its customers' holdings. Due to their financing arrangements or CDS contracts, the lower values meant that some of the affected clients also had to post more margin or cash collateral with the firm. Goldman issued broad and deep markdowns of its clients' positions at month's end in June, July and August 2007, as well as on intermittent dates in response to mass ratings downgrades of specific RMBS securities in July and August or to individual customer credit issues.

One of the markdowns took effect on July 25, 2007,²¹⁴⁶ which Mr. Sparks called "the CDO monster remark."²¹⁴⁷ In an email to Mr. Mullen, Mr. Sparks wrote: "We made massive mark adjustments this week, pushed them through because of basis and counterparty exposure."²¹⁴⁸ In a separate email to Mr. Montag, Mr. Sparks made clear that by "basis," he meant Basis Capital, an Australian hedge fund that had financed the purchase of Timberwolf and other CDO securities using Goldman funds and defaulted on its margin and collateral obligations. Goldman then repurchased those securities at a low price and adjusted its marks for other clients.²¹⁴⁹

The CDO markdown drew an immediate negative reaction from Goldman's customers. On July 31, 2007, an internal report was sent to a dozen Goldman senior executives and Mortgage Department personnel regarding pending "mortgage derivative collateral disputes," meaning customers who were disputing the lower valuations and resulting cash margin and collateral calls.²¹⁵⁰ The email identified the "10 largest disputes," naming AIG Financial Products, Morgan

²¹⁴⁴ See Section (3)(a), above.

²¹⁴⁵ 4/2010 "Goldman Sachs Mortgage Department Total Net Short Position, February - December 2007 in \$ Billions (including All Synthetic and Cash Positions in Mortgage Related Products)," Hearing Exhibit 4/27-162.

²¹⁴⁶ See 7/25/2007 email from Arbind Jha to Kevin Kao, "Cash bonds," GS MBS-E-011128623 ("huge changes in marks today").

²¹⁴⁷ 7/29/2007 email from Daniel Sparks to Tom Montag, "Problem," GS MBS-E-010876595 ("[w]e probably should have taken more time to put through the CDO monster remark").

²¹⁴⁸ 7/29/2007 email from Daniel Sparks to Mr. Mullen, "Problem," GS MBS-E-010876565.

²¹⁴⁹ 7/29/2007 email from Daniel Sparks to Tom Montag, "Problem," GS MBS-E-010876595 ("we rushed it because of Basis and a desire to protect ourselves against counter-parties"). See also 7/13/2007 email from John McHugh to Michael Swenson and David Lehman, "Talking Points Needed for Gary Cohn," GS MBS-E-010853931 ("BSAM [Bear Stearns Asset Management] & other hedge fund managers (most recently Basis Capital) announced they were halting fund redemptions and/or liquidating holdings, with some likely to fail.").

²¹⁵⁰ See 7/31/2007 email chain between Tom Montag and Lloyd Blankfein, "Mortgage Derivative Collateral Disputes - 7/31 Update (COB 7/27 marks)," GS MBS-E-009691545.

Stanley, and Deutsche Bank, among others. It stated: “The overall derivative collateral dispute amount is now \$7.0 billion.”²¹⁵¹ The email also noted that the total in dispute from the prior week had been \$3 billion, which suggests that the July 25 markdowns had caused the amount in dispute to more than double in a week. Mr. Montag immediately forwarded the report to Mr. Blankfein: “7 billion of collateral disputes!!!”²¹⁵²

Mr. Blankfein responded: “Make sure they prioritize weaker credits where our risk is threatening.”²¹⁵³ In other words, Mr. Blankfein directed Goldman personnel to focus on disputes with clients that had the weakest credit, and might have fewer resources to pay the amounts owed to Goldman as a result of the downward marks. The same markdowns causing losses for those clients were simultaneously increasing the profitability of Goldman’s net short.

Two weeks later, the Mortgage Department implemented another large markdown, this time related to Goldman’s Abacus CDOs. This markdown took place on August 16, 2007, after the Correlation Trading Desk adjusted its correlation assumptions in a way that resulted in steep markdowns for Abacus CDO customers and a corresponding \$94 million increase in the value of the Correlation Trading Desk’s net short positions on the same CDOs.²¹⁵⁴ The Mortgage Department as a whole reported a \$121 million profit that same day. Mr. Sparks reported to senior management: “94mm ... is from correlation adjustment in ABX (from 50 to 70%) as market observability better recently, rest is from outright shorts.”²¹⁵⁵ Also on August 16, 2007, Mr. Egol listed the Correlation Trading Desk’s Top Ten Winners and Losers due to Goldman’s markdowns and calculated that “[t]he aggregate P&L in the book is \$405mm (ie net markdown to customers), much of this is scattered across a bunch of cashflow CDOs.”²¹⁵⁶

DD. Customer Losses

Goldman’s internal marks demonstrate that, at the time it sold its CDO securities, Goldman’s senior management knew its sales force was selling CDO securities at inflated prices and that the CDO securities were also rapidly losing value. In addition, soon after selling the CDO securities, Goldman marked down their value, causing some customers to incur substantial losses

²¹⁵¹ Id.

²¹⁵² Id. By late August, Goldman had instituted a system that required senior management pre-approval for large markdowns. On August 28, 2007, Mr. Lehman sent Mr. Sparks a list of “Mark changes which are greater than 5% / greater than 10%” for his approval. 8/28/2007 email from David Lehman to Daniel Sparks, GS MBS-E-010623779. Mr. Lehman asked whether he should ask Mr. Mullen for approval of the changes greater than 10%, and Mr. Sparks told him to do so. Id.

²¹⁵³ Id.

²¹⁵⁴ 8/16/2007 email from Daniel Sparks, “Mort P&L explanation,” GS MBS-E-010680327. Since Goldman took the entire net short side in many of its Abacus CDOs, the customers’ losses translated directly into gains for Goldman.

²¹⁵⁵ Id. The Correlation Trading Desk reported \$145 million in total profits, which were then offset by losses on other mortgage desks.

²¹⁵⁶ 8/16/2007 email from Jon Egol to Michael Swenson, “Projected Corr Customers winners/losers from single-name mark changes,” GS MBS-E-011092473, Hearing Exhibit 4/27-33.

within days or weeks of a purchase and undergo substantial margin and collateral calls that caused additional financial distress.²¹⁵⁷

One Goldman salesperson expressed remorse over the impact on their customers of CDO sales followed by large markdowns within days or weeks of the client's purchase:

“Real bad feeling across European sales about some of the trades we did with clients. The damage this has done to our franchise is significant. Aggregate loss for our clients on just ... 5 trades alone is 1bln+.”²¹⁵⁸

At the same time, the salesperson thought the sales force deserved a bigger share of the profits generated for the firm:

“In addition team feels that recognition (sales credits and otherwise) they received for getting this business done was not consistent with the money it ended up making/saving the firm.”²¹⁵⁹

A Goldman salesperson in Taiwan sought help in explaining Goldman's markdowns to a bank whose CDO investment had been marked down from about 97 to about 45 cents on the dollar in a matter of weeks:

“[B]ank just bought the altius deal from gs [Goldman Sachs] 5 weeks ago and the mtm [mark-to-market] dropped over 50%. We understand the liquidity is thin, but I really need some info to support this price. ... This is very important as this transaction has a lot to do with our reputation in taiwan market. I understand all deals are down and spread is trading wider now. Unless the principal is at risk now, the mtm is not supposed to drop so quickly during such short period of time.”²¹⁶⁰

On August 2, 2007, Stacy Bash-Polley, a Goldman senior sales executive, sent an email to Messrs. Montag, Mullen, Schwartz, and Sparks outlining eight specific instances in which clients had complained that Goldman's marks were significantly lower than those of other dealers.²¹⁶¹ Her summary of client concerns included the following:

²¹⁵⁷ See, e.g., 5/11/2007 email from Craig Broderick, “CDOs - Mortgages,” GS MBS-E-009976918, Hearing Exhibit 4/27-84; see also 8/10/2007 Goldman internal memorandum, “Summary of German Bank US Sub Prime Exposure,” GS MBS-E-009994305.

²¹⁵⁸ 10/12/2007 email to Daniel Sparks, “US ABS SS Intermediation Trades,” GS MBS-E-013706095, Hearing Exhibit 4/27-70.

²¹⁵⁹ Id.

²¹⁶⁰ 7/24/2007 email from [Taiwan], “7/23 CDO/RMBS requests from Taiwan,” GS MBS-E-011198375, Hearing Exhibit 4/27-67.

²¹⁶¹ 8/2/2007 email from Stacy Bash-Polley to Messrs. Montag, Mullen, Schwartz, and Sparks, “Marks Summary,” GS MBS-E-013349723.

“—They have not agreed with our process and recently asked other dealers to analyze – say that we are off significantly from where other dealers are modeling this

—We took their mark on Fort Denison from 93.16 to 40.00[.] They admit the AAA CDO mkt is off substantially but feel that this particular bond [has objective characteristics that should make it] ... perform better than the junior AAA market as a whole. Meanwhile, we took Hudson Mezz ... AAA from 80.4 to 65. They would like our thoughts as to why Fort Den[ison] was marked down so much more. ...

—The Alt-A marks were particularly punitive. ... Our offerings are still 10-20 points higher than the marks. Look at GSAMP 2007-7. On financing, [customer] said our HC [haircuts] ... were by far the most onerous of all dealers. ...

—They bought AAA cdos They have communicated to sales that GS is by far an outlier and they will never be able to buy another cdo from us based on their lack of confidence in understanding how we are coming up with marks. ...

—Issues with their CDO marks. Said we were many many points behind where other dealers were marking similar positions.”²¹⁶²

Even before this email, Goldman’s sales force had been vocal in its criticism of Goldman’s low marks which were making their sales job more difficult. On June 21, 2007, Mr. Sparks stated in an email: “sales is making significant noise about gs notable conservatism in marking and haircuts.”²¹⁶³ Mortgage Department personnel dismissed such criticisms out of hand. One managing director responded: “Would have tho[ugh]t that bsam event [failure of Bear Stearns Asset Management hedge funds] would provide reasonable explanation as to why our marking and haircuts r ok.” Mr. Sparks replied: “Kind of stunning – but we are hearing it.”

Goldman generally declined to offer any written explanations of its marks to clients, and rarely offered any financial accommodation or compromise regarding the marks or related collateral calls.²¹⁶⁴ On one occasion, when a sales representative asked about providing information about the

²¹⁶² Id.

²¹⁶³ 6/21/2007 email from Mr. Sparks to Lester Brafman, “Repo,” GS MBS-E-010847490.

²¹⁶⁴ The Subcommittee did identify at least one instance of a mark change. Goldman’s China sales representative contacted the ABS Desk to request an increase in a mark on an RMBS security:

“[C]an we try our best to show ‘better’ indicative prices for [client]? ... [C]lient is under pressure of being questioned that they bought something looks really bad. ... [W]e showed a price of LBMLT 06 A A1 as of 95-00 . . . this is something hard for client to believe [W]e need them to think of GS as the best firm, and we need them to be our best client when next biz boom comes. ... We would highly appreciate if a slightly aggressive price can be showed from trading desk.”

5/21/2007 email from China sales representative to Edwin Chin and others, “Mark to market prices,” GS MBS-E-011068490. Mr. Chin moved the mark in question from 95 to 98, and wrote:

firm's CDO marks to a customer, Mr. Lehman wrote: "We cannot put this on paper - It concerns me they want something specifically in writing."²¹⁶⁵ When told that other dealers had provided the customer with marks and a written description of their CDO pricing methodologies, Mr. Lehman responded: "Our marking policy is a market price (bid and/or offer) – We do not have a written methodology for pricing and we should tell them that."²¹⁶⁶ In another instance, when a client asked for marks for the two prior months related to a CDO it was considering buying, Mr. Lehman wrote: "Verbal only Want to give them our tho[ugh]ts on market levels, not 'marks.'"²¹⁶⁷ In his 2007 performance self-evaluation, the head of the SPG Trading Desk, Michael Swenson, wrote:

"I spent numerous hours on conference calls with clients discussing valuation methodologies for GS issued transactions in the subprime and second lien space I said 'no' to clients who demanded that GS should 'support the GSAMP' program [Goldman RMBS securities] as clients tried to gain leverage over us. Those were unpopular decisions but they saved the firm hundreds of millions of dollars."²¹⁶⁸

In November 2007, Goldman analysts issued a research report to clients about the crisis in the mortgage market.²¹⁶⁹ Goldman predicted that the mortgage market crisis was likely to continue and would have serious implications for a significant number of financial institutions: "Write-downs and losses will continue to mount . . . [M]anagements will need to repair some seriously damaged balance sheets."²¹⁷⁰ Goldman estimated that industry-wide losses reflecting markdowns in subprime mortgage CDOs would approach \$150 billion, of which about \$40 billion would be taken in the third and fourth quarters of 2007.²¹⁷¹

Customers who purchased CDO assets from Goldman in 2007 generally suffered substantial losses from those investments, and several went bankrupt, including IKB, a German bank, and Basis Capital, the Australian hedge fund.²¹⁷² Goldman was not only aware of its clients' predicaments,

"After much discussion internally, we will improve our bid to 98-00 given the market color we have observed in the past two days. The markdown was mostly a reaction to rating agency downgrade and partly reflected the illiquidity of the position, but upon further analysis we have gotten more comfortable with the risk position and agree it should be marked at a higher price."

Id.

²¹⁶⁵ 8/6/2007 email from David Lehman to Japan sales, "RE: Tokyo Star," GS MBS-E-001927891.

²¹⁶⁶ Id.

²¹⁶⁷ 6/6/2007 email from David Lehman to Japan sales, "Point Pleasant Marks – request from Tokyo Star Bank," GS MBS-E-001912408-10 at 9.

²¹⁶⁸ 9/26/2007 Goldman Sachs 2007 Performance Review for Michael Swenson, "Reviewee's Feedback," GS-PSI-02399, Hearing Exhibit 4/27-55b.

²¹⁶⁹ 11/20/2007 email from Thomson IFR - ABS, "ABS: Market Tense as Goldman Predicts RMBS CDO Problems to Drag On," GS MBS-E-013782989.

²¹⁷⁰ Id.

²¹⁷¹ Id.

²¹⁷² See 9/17/2007 Goldman presentation to Board of Directors, "Residential Mortgage Business, Global Impact of the Mortgage Crisis," at 2, GS MBS-E-001793840, Hearing Exhibit 4/27-41 (noting bankruptcies of Goldman clients IKB and Basis Capital). See also 8/10/2007 Goldman internal memorandum, "Summary of German Bank US Sub Prime Exposure," GS MBS-E-009994305; 11/27/2007 email from David Lehman to Daniel Sparks, "ACA,"

but in some cases, Goldman purchased CDS protection or equity puts on its clients' stock, essentially betting that the stock price would fall or the company would lose value. For example, after ACA Financial Guaranty Corp., the parent company of ACA Management which acted as the collateral manager of Abacus 2007-AC1, purchased Abacus securities, Goldman purchased the short side of a CDS contract that referenced ACA Financial Guaranty. ACA Financial Guaranty encountered extreme financial distress in late 2007.²¹⁷³

At the Subcommittee hearing, Goldman executives were asked about the four Goldman-originated CDOs highlighted in this Report, Hudson 1, Anderson, Timberwolf, and Abacus 2007-AC1.²¹⁷⁴ Senator John Tester noted Mr. Birnbaum's testimony that, in 2007, Goldman could "see some things happening,"²¹⁷⁵ and that Goldman itself was betting against the mortgage market. Senator Tester asked Mr. Sparks, in light of those developments, "how [he] got comfortable with sales," and how he "in good faith" sold the CDO securities to Goldman's customers – how he could "sell them out and collect the fees and make the dough?"²¹⁷⁶ Senator Tester and Mr. Sparks then had the following exchange:

Senator Tester: Every one of these [CDOs] were – it looks like a wreck waiting to happen because they were all downgraded to junk in very short order.

Mr. Sparks: Well, Senator, at the time we did those deals, we expected those deals to perform.

Senator Tester: Perform in what way?

Mr. Sparks: To not be downgraded–

Senator Tester: Perform to go to junk, so that the shorts made out?

Mr. Sparks: To not be downgraded to junk in that short a time frame. In fact, to not be downgraded to junk." ...

Senator Tester: Do you feel confident that the information about each one of these [CDOs] ... was given to the investors, all of the information that was out there, and the credit rating agencies too?

GS MBS-E-013746511 (discussing "what would happen upon an ACA bankruptcy (which is the most likely scenario in our opinion).").

²¹⁷³ See 6/21/2007 email from Fabrice Tourre, "Post on ACA," GS MBS-E-002562148. See also ACA Financial Guaranty Corp. v. Goldman, Sachs & Co., Complaint (filed 1/6/2011, Sup. Ct. N.Y) at ¶ 7 (ACA now "operates as a run-off insurance company."), available at <http://www.aca.com/press/pdfs/2011/20110106-GoldmanComplaint.pdf>.

²¹⁷⁴ April 27, 2010 Subcommittee Hearing at 66.

²¹⁷⁵ Id.

²¹⁷⁶ Id.

Mr. Sparks: Well, I generally feel that the disclosure for the new issues that Goldman Sachs brought was good.”²¹⁷⁷

While Mr. Sparks testified that, in 2007, the Mortgage Department expected its CDOs “to perform,” a contemporaneous draft presentation that he helped prepare in May 2007 stated that the “desk expects [the CDOs] to underperform.”²¹⁷⁸ Many other emails provide his negative views of the CDO market at the time, including emails in which Mr. Sparks described the subprime market as “bad and getting worse,”²¹⁷⁹ and directed Goldman’s mortgage traders to “get out of everything,”²¹⁸⁰ and “stay on the short side.”²¹⁸¹ He wrote, among other things: “Game over,”²¹⁸² “bad news everywhere,” and “the business is totally dead.”²¹⁸³ As Senator Tester noted, many of Mr. Sparks’s dire predictions were made before three of the four CDOs discussed at the hearing were even offered to customers.²¹⁸⁴

Mr. Sparks also testified that the Mortgage Department did not expect the Goldman-issued CDOs to be downgraded, but all were within a year of issuance. In April 2007, for example, six of the 20 RMBS deals that comprised the ABX Index were downgraded,²¹⁸⁵ and the Hudson CDO that referenced them followed soon after. Many of the RMBS securities referenced in the other three CDOs were downgraded within three months of the issuance of the last CDO in April 2007, making the downgrade of the CDOs themselves all but inevitable.²¹⁸⁶ For example, when Moody’s and S&P announced their first mass downgrades of RMBS securities on July 10, 2007, the S&P downgrade affected 35% of the assets in Timberwolf.²¹⁸⁷ Ultimately, all of the CDOs discussed at the Subcommittee’s hearing were downgraded to junk status. On October 26, 2007, a Goldman employee sent an email about Abacus 2007-AC1, even noting this dubious distinction:

²¹⁷⁷ Id. Mr. Sparks went on to say: “I mentioned we made some bad business decisions. These deals performed horribly. That is bad. ... [T]hat said, just because one person in my business unit or a few people might have had one view, I can tell you there were a lot of people in my business unit that had a very different view, and there were a lot of investors that had a very different view.” Id.

²¹⁷⁸ See 5/19/2007 draft Goldman presentation, “Mortgages CDO Origination – Retained Positions & Warehouse Collateral, May 2007,” GS MBS-E-010951926.

²¹⁷⁹ 2/8/2007 email from Mr. Sparks, “Post,” Hearing Exhibit 4/27-7.

²¹⁸⁰ 3/3/2007 email from Mr. Sparks, “Call,” Hearing Exhibit 4/27-14.

²¹⁸¹ 3/8/2007 email from Mr. Sparks, Mortgage risk,” Hearing Exhibit 4/27-75.

²¹⁸² 3/12/2007 Goldman memorandum to Firmwide Risk Committee, “March 7th FWR Minutes,” GS MBS-E-00221171, Hearing Exhibit 4/27-19.

²¹⁸³ 2/21/2007 email from Daniel Sparks to Jon Winkelried, “Mortgages today,” GS MBS-E-010381094, Hearing Exhibit 4/27-10.

²¹⁸⁴ April 27, 2010 Subcommittee Hearing at 66. The Anderson, Timberwolf, and Abacus 2007-AC1 CDOs were issued in March and April 2007.

²¹⁸⁵ 4/27/2007 email from Deeb Salem to Michael Swenson, GS MBS-E-012432706 (6 of 20 deals in ABX Index put on watch or downgraded).

²¹⁸⁶ 7/10/2007 email to George Maltezos, “GS Cashflow/ABACUS CDOs Mentioned in S&P Report on CDO Exposure to Subprime RMBS,” GS MBS-E-001837256; 7/10/2007 email from Goldman Sachs analyst to Goldman Sachs Japan salesman, “GS Cashflow/ABACUS CDOs Mentioned in S&P Report on CDO Exposure to Subprime RMBS,” GS MBS-E-001990255 (updating percentage exposure from 25% to 35%).

²¹⁸⁷ Id.

“This deal was number 1 in the universe of CDO’s that were downgraded by Moody’s and S&P. 99.89% of the underlying assets were downgraded.”²¹⁸⁸

(b) Goldman’s Conflicts of Interest

In late 2006 and 2007, Goldman’s securitization business was marked, not just by its hard sell tactics, but also by multiple conflicts of interest in which Goldman’s financial interests were opposed to those of its clients. The following examples illustrate the problem.

(i) Conflicts of Interest Involving RMBS Securities

In 2006 and 2007, Goldman originated 27 CDO and 93 RMBS securitizations. Beginning in December 2006, Goldman originated and aggressively marketed some of these securities at the same time that subprime and other high risk loans were defaulting at alarming rates, the subprime and CDO markets were deteriorating, and Goldman was shorting subprime mortgage assets. At times, Goldman originated and sold RMBS securities that it knew had poor quality loans that were likely to incur abnormally high rates of default. At times, Goldman went further and sold RMBS securities to customers at the same time it was shorting the securities and essentially betting that they would lose value. Two examples illustrate how Goldman constructed and sold poor quality RMBS securities and profited from the decline of the very securities it had sold to its clients.

Long Beach RMBS. The first example involves Washington Mutual Bank (WaMu) and its subprime lender, Long Beach Mortgage Corporation. WaMu, Long Beach, and Goldman had collaborated on at least \$14 billion in loan sales and securitizations.²¹⁸⁹ In February 2006, Long Beach had a \$2 billion warehouse account with Goldman, which was the largest of Goldman’s warehouse accounts at that time.²¹⁹⁰

Long Beach was known within the industry for originating some of the worst performing subprime mortgages in the country. As explained in Chapter III, in 2005, a surge of early payment defaults in its subprime loans required Long Beach to repurchase over \$837 million of nonperforming loans from investors, as well as book a \$107 million loss.²¹⁹¹ Similar EPD problems affected its loans in 2006 and 2007. WaMu reviews and audits of Long Beach, as well as examinations by the Office of Thrift Supervision, repeatedly identified serious deficiencies in its lending practices, including lax underwriting standards, unacceptable loan error and exception rates, weak risk management, appraisal problems, inadequate oversight of third party brokers selling loans to the firm, and loan fraud. While these reviews were not available to the public, the performance of Long Beach paper was. Long Beach securitizations had among the worst credit losses in the

²¹⁸⁸ 10/26/2007 email from Goldman salesman to Michael Swenson, “ABACUS 2007-AC1 – Marketing Points (INTERNAL ONLY) [T-Mail],” GS MBS-E-016034495.

²¹⁸⁹ See “List of WaMu-Goldman Loans Sales and Securitizations,” Hearing Exhibit 4/13-47b.

²¹⁹⁰ 2/13/2006 Goldman chart, “Current Warehouse Facilities and Funded Balances,” GS MBS-E-001157934.

²¹⁹¹ See Chapters III and IV, above.

industry from 1999-2003; in 2005 and 2006, Long Beach securities were among the worst performing in the market.²¹⁹²

Nevertheless, in May 2006, Goldman acted as co-lead underwriter with WaMu to securitize about \$532 million in subprime second lien mortgages originated by Long Beach. Long Beach Mortgage Loan Trust 2006-A (“LBMLT 2006-A”) issued approximately \$495 million in RMBS securities backed by those Long Beach mortgages. The top three tranches, representing about 66% of the principal loan balance, received AAA ratings from S&P, even though the pool contained subprime second lien mortgages – loans which could recover funds in the event of a default only after the primary loan was repaid — and even though the loans were issued by one of the nation’s worst performing mortgage lenders. Yet Goldman was able to use two-thirds of that extremely risky debt to issue AAA rated securities which Goldman then sold to its customers.

In less than a year, the Long Beach loans began incurring delinquencies. In February 2007, a Goldman analyst reported internally that all of Goldman’s 2006 subprime second lien RMBS securities were deteriorating in performance, but “deals backed by Fremont and Long Beach collateral have generally underperformed the most.”²¹⁹³ The analyst predicted “lifetime losses in the teens, and over 20% in some deals.” By May 2007, the cumulative net loss on the LBMLT 2006-A mortgage pool had climbed to over 12%, eliminating most of the financial cushion protecting the investment grade securities from loss. That month, S&P downgraded six out of the seven credit ratings for the mezzanine tranches of the securitization. The Long Beach securities plummeted in value.

Goldman held some of the unsold Long Beach mezzanine securities on its books, meaning LBMLT 2006-A securities that carried credit ratings of BBB or BBB-. Goldman had also purchased the short side of a CDS contract that would pay off if those same securities lost value. On May 17, 2007, Deeb Salem, a trader on the Mortgage Department’s ABS Desk, learned of additional losses in the Long Beach securitization and wrote to his supervisor Michael Swenson with the news:

“[B]ad news ... [The loss] wipes out the m6s [mezzanine tranches] and makes a wipeout of the m5 imminent. ... [C]osts us about 2.5 [million dollars]. ... [G]ood news ... [W]e own 10 [million dollars] protection at the m6 ... [W]e make \$5 [million].”²¹⁹⁴

In other words, Goldman lost \$2.5 million from the unsold Long Beach securities still on its books, but gained \$5 million from the CDS contract shorting those same securities. Overall, Goldman profited from the decline of the same type of securities it had earlier sold to its customers.

²¹⁹² See, e.g., 4/14/2005 OTS email, “Fitch,” OTSWME05-012 0000806, Hearing Exhibit 4/13-8a.

²¹⁹³ 2/8/2007 email from Goldman analyst to Mr. Sparks, Mr. Gasvoda, and others, “2006 Subprime 2nds Deals Continue to Underperform **INTERNAL ONLY**,” GS MBS-E-003775340, Hearing Exhibit 4/27-167d.

²¹⁹⁴ 5/17/2007 email from Deeb Salem to Michael Swenson, “FW: LBML 06A,” GS MBS-E-012550973, Hearing Exhibit 4/27-65.

By May 2008, even the AAA securities in LBMLT 2006-A had been downgraded to default status. By March 2010, the securities recorded a cumulative net loss of over 66%.²¹⁹⁵

Fremont RMBS. The second example involves Fremont Loan & Investment, another subprime lender notorious for issuing poor quality loans.²¹⁹⁶ In March 2007, Fremont reported in an 8-K filing with the SEC that the FDIC filed a cease and desist order to which the company consented. Among other matters, it order Fremont to stop “[m]arketing and extending adjustable-rate mortgage products to subprime borrowers in an unsafe and unsound manner that greatly increases the risk that borrowers will default on the loans or otherwise causes losses.”²¹⁹⁷

Even before the actions taken by regulators in March 2007, Goldman was aware of the poor quality of at least some of Fremont’s loans. In a November 2006 exchange of emails, for example, two Goldman sales representatives were discussing trying to sell Fremont RMBS securities to a client. One salesperson forwarded to the other the client’s explanation of why it did not want to buy the securities and its low opinion of Fremont’s loan pools: “Fremont refused to make any forward looking statements so we really got nothing from them on the crap pools that are out there now.”²¹⁹⁸ In March 2007, Goldman initiated a detailed review of its Fremont loan inventory to identify deficient loans that it could return to the lender for a refund. Mr. Gasvoda placed a priority on reviewing Fremont loans “since they still have cash but may not for long.”²¹⁹⁹ One loan pool review conducted on March 14, 2007, found that “on average, about 50% of about 200 files look to be repurchase obligations,” meaning that fully half of the reviewed loans should be returned to the lender.²²⁰⁰ Goldman eventually made about \$46 million in repurchase requests to Fremont, which was one of the top five mortgage originators from whom Goldman made repurchase requests in 2006 and 2007.²²⁰¹

Despite these and other indications of Fremont’s poor quality loans, Goldman continued to underwrite and market securities backed by Fremont loans. In an internal February 2007 memorandum to its Mortgage Capital Committee, Goldman wrote that it had a “significant relationship with Fremont,” based upon past securitizations, whole loan purchases, and warehouse fees.²²⁰² In March 2007, at the same time it was sending millions of dollars in loan repurchase requests to Fremont, Goldman securitized over \$1 billion in Fremont subprime loans in one of its

²¹⁹⁵ See wamusecurities.com.

²¹⁹⁶ For more information about Fremont, see Chapter IV, Section D(2)(d).

²¹⁹⁷ 3/7/2007 Fremont General Corporation 8-K filing with the SEC.

²¹⁹⁸ 11/16/2006 Goldman internal email, “ACA and Freemont [sic] deal,” Hearing Exhibit 4/27- 173.

²¹⁹⁹ 3/14/2007 Goldman email, “NC Visit,” GS-MBS-E-002048050.

²²⁰⁰ Id.; see also 8/10/2007 email from Michelle Gill, “Fremont - Incremental Information,” GS MBS-E-009860358 (Goldman’s repurchase claims against Fremont would have amounted to a 9% ownership stake in Fremont after a proposed buyout by investor group; Goldman was not the largest purchaser of Fremont loans but its repurchase claims were 3-4 times larger than the claims of the nearest counterparty).

²²⁰¹ See Goldman Sachs response to Subcommittee QFR at PSI_QFR_GS0040.

²²⁰² 2/20/2007 Goldman memorandum to Mortgage Capital Committee, “Request for renewal of the existing \$1 billion ... 1-year revolving warehouse facility,” GS MBS-E-001157942. Goldman wrote the Fremont produced “revenues totaling \$13.38 million in 2006 of which \$620,000 came in the form of warehouse usage and commitment fees.”

warehouse accounts, originating GSAMP Trust 2007-FM2.²²⁰³ At Goldman's request, Moody's and S&P rated the securities, even though analysts at both rating firms expressed concern about the quality of Fremont loans. At S&P, for example, in a January 2007 email to his supervisor, a credit ratings analyst wrote: "I have a Goldman deal with subprime Fremont collateral. Since Fremont collateral has been performing not so good, is there anything special I should be aware of?"²²⁰⁴ One supervisor told him: "No, we don't treat their collateral any differently," while another wrote that, as long as the analyst had current FICO scores for the borrowers, he was "good to go."²²⁰⁵ Both agencies gave AAA ratings to the top five tranches of the securitization.²²⁰⁶

Goldman marketed and sold the Fremont securities to its customers, while at the same time purchasing \$15 million in CDS contracts referencing some of the Fremont securities it underwrote.²²⁰⁷ Seven months later, by October 2007, the ratings downgrades had begun; by August 2009, every tranche in the GSAMP securitization had been downgraded to junk status.²²⁰⁸

In both examples involving Long Beach and Fremont RMBS securities, Goldman obtained CDS protection and essentially bet against the very securities it was selling to clients. In each case, Goldman profited from the fall in value of the same securities it sold to its clients and which caused those clients to suffer substantial losses.

(ii) Conflicts of Interest Involving Sales of CDO Securities

As with some of its RMBS securities, Goldman at times originated CDO securities using assets that it believed were of poor quality and would lose value, and sold the securities at higher prices than it believed they were worth.²²⁰⁹ In addition, Goldman took steps that created multiple conflicts of interest with the clients to whom it sold the CDO securities, and placed its financial interests ahead of those of its clients. Four examples involving the Hudson 1, Anderson, Timberwolf, and Abacus 2007-AC1 CDOs illustrate the problems. Those problems include troubling and sometimes abusive practices related to how Goldman designed the CDOs and selected

²²⁰³ See 2/2/2007 Goldman memorandum to the Mortgage Capital Committee, "Agenda for Monday, February 5, 2007," GS MBS-E-002201064; 2/5/2007 Mortgage Capital Committee Memorandum regarding GSAMP Trust 2007-FM2, GS MBS-E-002201055 - 58.

²²⁰⁴ 1/24/2007 S&P internal email, "Quick Question: Fremont," Hearing Exhibit 4/23-93b. See also 2/1/2007 S&P internal email, "Defaults cause Fremont to end ties to 8,000 brokers," Hearing Exhibit 4/23-93d (S&P analysts circulated an article about how Fremont had stopped using 8,000 brokers due to loans with some of the highest delinquency rates in the country).

²²⁰⁵ 1/24/2007 S&P internal email, "RE: Quick Question: Fremont," Hearing Exhibit 4/23-93c.

²²⁰⁶ 4/17/2010 S&P downgrade of GSAMP Trust 2007-FM2 containing Fremont mortgages, Hearing Exhibit 4/23-93f.

²²⁰⁷ See 3/21/2007 Goldman spreadsheet, "RMBS CDS Trade History 19Jan06 - 19Mar07 v3," GS MBS-E-013648130.

²²⁰⁸ See Standard & Poor's www.globalcreditportal.com.

²²⁰⁹ In some cases, Goldman used assets from its own inventory or warehouse accounts, so that it could transfer assets with falling value to the CDO and the investors who purchased the CDO securities. The Subcommittee examined seven of those CDOs, and of those, 57% of the CDOs' assets were sourced from Goldman, including over \$3 billion in synthetic assets in which Goldman was the short party, and therefore stood to profit from a decline in the value of the underlying assets.

their assets; marketed and sold the CDO securities; designated the value of the CDO securities pre- and post-sale; and executed its duties as liquidation agent and collateral put provider.

AA. Hudson Mezzanine Funding 2006-1

Hudson Mezzanine Funding 2006-1 (Hudson 1) was a \$2 billion synthetic CDO that referenced mezzanine subprime RMBS assets²²¹⁰ and assets linked to the ABX Index.²²¹¹ This CDO was the second in a series of three “Hudson” branded CDOs, which according to Goldman marketing materials were intended “to create a consistent, programmatic approach to invest in attractive relative value opportunities in the RMBS and structured product market.”²²¹² One key feature of the three Hudson CDOs was that Goldman itself, without any third party participation, selected the CDO’s assets, which were supposed to remain with the CDO until they reached maturity or were deemed “credit risk assets,” at which point Goldman, acting as the liquidation agent for the CDO, was responsible for selling them.²²¹³ In each of the Hudson CDOs, Goldman played multiple roles in its formation and administration, including selecting assets and serving as the underwriter, initial purchaser of the CDO securities, collateral put provider,²²¹⁴ senior swap counterparty, and credit protection buyer.²²¹⁵ In Hudson 1, Goldman took 100% of the short side of the CDO, and when the Hudson 1 securities declined in value, Goldman made a \$1.35 billion profit at the expense of the clients to whom it had sold the Hudson 1 securities.

²²¹⁰ Mezzanine subprime RMBS assets are RMBS securities that carry a credit rating of BBB or BBB- or CDS contracts that reference those types of RMBS securities. Mezzanine RMBS assets are riskier than AAA, AA, and A rated RMBS securities, but less risky than those that carry, for example, BB, B, or CCC ratings.

²²¹¹ The ABX Index tracks the performance of a designated basket of 20 subprime RMBS securitizations. It consists of five separate indices, each of which tracks a different subset of the RMBS basket, divided according to credit ratings. The indices that track the mezzanine RMBS securities, for example, track the 20 RMBS securities that carry BBB and BBB- credit ratings. In ABX assets, investors enter into CDS contracts in which one party takes the long side, essentially betting that the ABX indices tracking the mezzanine RMBS securities will increase in value, while the other party takes the short side, essentially betting that the indices will fall in value. Prior to establishing the Hudson CDO, Goldman had taken the long side in a number of CDS contracts linked to the ABX indices tracking mezzanine RMBS securities.

²²¹² 10/2006 Goldman document, “Hudson Mezzanine Funding 2006-1, Ltd.,” Hearing Exhibit 4/27-87. The first Hudson CDO, Hudson High Grade, was issued in September 2006. The second, discussed here, was Hudson Mezzanine 2006-1, issued in October 2006. The third was Hudson Mezzanine 2006-2, issued in February 2007.

²²¹³ *Id.* For more information about Goldman’s role as the liquidation agent in Hudson, see Section C(5)(b)(iii)AA, below.

²²¹⁴ In synthetic CDOs, the cash proceeds from the sales of the CDO securities were used to purchase “collateral debt securities.” Later, when cash was needed to make payments to a long or short party, those collateral securities were sold, and the cash was used to make the payments. In the event the collateral securities could not be sold for face (par) value, the collateral put provider paid the difference to the CDO. For more information about the role of collateral put providers, see Section C(5)(b)(iii)BB, below.

²²¹⁵ See 2/18/2008 Goldman document, “CDO Transactions (July 1, 2006 - December 31, 2007) in which Goldman Sachs acted as underwriter,” GS MBS 0000004337 at 4338. Acting as the “senior swap counterparty” meant that Goldman served as an intermediary between the Hudson CDO and the super senior investor. Acting as “credit protection buyer” meant that Goldman initially took the short side of the CDO and, in the case of Hudson 1, kept 100% of the short side during the life of the CDO.

Transferring Risk. Hudson 1 was conceived and designed by Goldman to transfer the risk associated with a large collection of ABX assets in its inventory, in which Goldman held the long side of CDS contracts referencing mezzanine subprime RMBS securities that were tracked by the ABX and that might go down in value. The objective of the CDO was to transfer the risk of unwanted financial assets off of Goldman's books. In response to questions from the Subcommittee, Goldman explained that Hudson 1 was "initiated by the firm as the most efficient method to reduce long ABX exposures."²²¹⁶ Contemporaneous notes from Goldman's Firmwide Risk Committee meetings also stated that Hudson 1 was an "exit for our long ABX risk."²²¹⁷ Goldman records show that the firm used Hudson 1 to short \$1.2 billion worth of the ABX assets in the firm's inventory as well as \$800 million in single name CDS contracts referencing subprime RMBS securities carrying mostly BBB or BBB- credit ratings. Hudson 1 was one of several methods Goldman used to transfer its risk associated with its subprime mortgage holdings during the fall of 2006.²²¹⁸

Conceiving Hudson 1. In the months leading up to the creation of Hudson 1, Goldman had accumulated billions of dollars in ABX assets referencing mezzanine subprime RMBS securities.²²¹⁹ By August 2006, Goldman management had decided that this ABX trade had "run its course," and directed the Mortgage Department's ABS Desk to sell off its ABX holdings.²²²⁰ After several weeks of effort, however, the ABS Desk was unable to find many buyers, and its ABX mezzanine assets, which were dropping in value, were losing millions of dollars for the firm.²²²¹

On September 19, 2006, Jonathan Sobel and Daniel Sparks called an 8:00 a.m. meeting to discuss the ABX problem with Joshua Birnbaum, head of ABX trading, and Michael Swenson, head of both the Structured Product Group (SPG) Trading Desk and ABS Trading Desk.²²²² Mr. Swenson was unable to attend, and in a later email from Mr. Birnbaum who recounted the meeting to him, Mr. Sobel and Mr. Sparks wanted to know whether the Mortgage Department should sell all

²²¹⁶ See Goldman response to Subcommittee QFR at PSI_QFR_GS0239.

²²¹⁷ 9/20/2006 email from Arbind Jha to Josh Birnbaum, GS MBS-E-012685289. See also 9/20/2006 Firmwide Risk Committee Minutes, GS MBS 0000004472.

²²¹⁸ See 10/24/2006 email from Jonathan Sobel to Tom Montag, Dan Sparks, and others, GS MBS-E-010919930 ("CDO should price tomorrow and is in good shape. ... We also are starting to see some short covering, which we will sell into to further reduce our risk toward your 50% goal.").

²²¹⁹ Subcommittee interview of Michael Swenson (4/16/2010). Mr. Swenson told the Subcommittee that Goldman had been long "several billion" in ABX in September 2006.

²²²⁰ 8/9/2006 Firmwide Risk Committee Minutes, GS MBS-E-009682590; Subcommittee interview of Joshua Birnbaum (10/1/2010). Mr. Birnbaum recalled a "directive" to reduce ABX exposure in the summer of 2006.

²²²¹ See, e.g., 9/21/2006 email from Jonathan Sobel to Tom Montag, "ABX wider again today," GS MBS-E-009739145 ("Down about \$10mm."); 9/12/2006 email from Jonathan Sobel to Michael Swenson and Daniel Sparks, "ABX," GS MBS-E-012681410 ("The last post you gave me was this morning when you thought things were 'firm'. Now I find out that we're down \$6mm on the day. I understand things move, but you need to post me. Also, I want to reduce this position."); 9/9/2006 Firmwide Risk Committee Minutes, GS MBS 0000004468 ("Business continuing to reduce volatile ABX position."); 8/23/2006 Firmwide Risk Committee Minutes, GS MBS-E-009615593 ("Mortgages sold down another net 15% of their large ABX position.").

²²²² 9/19/2006 email from Jonathan Sobel to Daniel Sparks, Michael Swenson, and Josh Birnbaum, GS MBS-E-012683946.

of its ABX mezzanine holdings or “double down” the ABX holdings, which could happen only if it found a “structured place to go with the risk.”²²²³

Later that day, Mr. Sparks approached Peter Ostrem, who headed the desk that originated CDOs for Goldman, and asked “if there was something [the CDO Desk] could do with ABX.”²²²⁴ Mr. Ostrem spoke with Darryl Herrick, who worked for him on the CDO Desk and who eventually became the Hudson 1 deal captain, about crafting a CDO to reduce the firm’s ABX risk. The two brainstormed a structure that became the foundation of Hudson 1.²²²⁵

That same evening, September 19, 2006, Mr. Swenson scheduled a meeting with several traders on the ABS Desk he oversaw, Joshua Birnbaum from the ABX Desk, and Mr. Ostrem and other personnel from the CDO Origination Desk to discuss “ABX and Single-Name Opportunities.”²²²⁶ After the meeting, around 8:00 p.m., Mr. Ostrem sent his CDO team an email announcing “Hudson Mezz - new”:

“We have been asked to do a CDO of \$2bln [billion] for the ABS desk. Approx. \$1.2bln will be CDS off single-names referenced from the AB[X] index 06-1 and 06-2. This is a trade we need to execute for the desk over the next 4-6 weeks and involves selling half the equity (at least 30mm to sell) and the seniors and the mezz (at least half of the BBBs to get true sale). I would like everyone to work together on this one. We expect to charge ongoing 10bp [basis point] liquidation agent fees and 1-1.5pts upfront. ... Obviously important to overall SP [Structured Product] floor and Sobel and Sparks are focused on this happening.”²²²⁷

Also that evening, Mr. Swenson emailed Mr. Sobel to inform him they were “proceeding with the CDO solution, the CDO team has 60 single-names that they will be able to begin to build a deal around.”²²²⁸

The next day, Mr. Sobel reported to senior executives at Goldman’s Firmwide Risk Committee that the CDO Desk was working on the first ever ABX CDO, which would function as an exit for the firm’s long ABX position.²²²⁹ Later that same afternoon Mr. Sobel sent an email to Goldman senior executive Thomas Montag, discussing the Mortgage Department’s ABX losses and

²²²³ 9/19/2006 email from Josh Birnbaum to Michael Swenson, GS MBS-E-012683946. Mr. Sobel also informed Mr. Swenson later that day: “We need to reach a conclusion on the viability of a structured exit.” 9/19/2006 email from Jonathan Sobel to Michael Swenson, GS MBS-E-012328199.

²²²⁴ Subcommittee interview of Peter Ostrem (10/5/2010).

²²²⁵ Id.; Subcommittee interview of Darryl Herrick (10/13/2010).

²²²⁶ 9/19/2006 calendar invite from Michael Swenson, GS MBS-E-012328194.

²²²⁷ 9/19/2006 email from Peter Ostrem, GS MBS-E-01818608, Hearing Exhibit 4/27-86. Goldman later told the Subcommittee that Hudson actually offset \$1.39 billion in ABX assets on its books. Goldman response to Subcommittee QFR, PSI_QFR_GS0239.

²²²⁸ 9/20/2006 email from Michael Swenson to Jonathan Sobel, GS MBS-E-012328203. See discussion of selection of 60 single names by Mr. Herrick and Mr. Salem, below.

²²²⁹ 9/20/2006 Firmwide Risk Committee Minutes, GS MBS 0000004472; 9/20/2006 email from Arbind Jha to Josh Birnbaum, GS MBS-E-012685289.

stating: “I think most hedge funds have been right on this (i.e. they’ve been short). ... The synthetic CDO seems like a viable takeout here.”²²³⁰

A Goldman risk officer, Arbind Jha, began contacting Goldman mortgage traders and CDO personnel for regular Hudson updates.²²³¹ In fact, the day after the ABS and CDO teams came up with the Hudson 1 concept, Mr. Jha emailed Mr. Birnbaum asking about the CDO: “Sobel this morning mentioned in the Firmwide Risk Committee meeting that we are looking at CDO exit for our long ABX risk. Wanted to get some color on this.”²²³² On another occasion, Mr. Jha asked Darryl Herrick:

“Do we really have scenario risk on \$2bn [billion] not’l [notional]? \$1.2bn of not’l is being sourced from ABX desk - this risk is already being captured in our risk number for SPG Trading desk. ... The remaining \$0.8bn will be composed of single name CDS. Since we do not have any pre-existing long (credit), we will be going short after we price this CDO and therefore will have a risk mitigating impact on our risk. Please correct me if I am getting this wrong.”²²³³

Designing Hudson 1. At the time Hudson 1 was conceived, no other investment bank had issued a CDO in which the majority of assets referenced ABX assets.²²³⁴ Prior to that, the major credit rating agencies refused to rate any CDO with more than a 5% exposure to credit default swaps (CDS) using an ABX index as the reference obligation.²²³⁵ CDS that used an ABX index as the reference obligation allowed the parties to the CDS to make a pure bet on the composite performance of a basket of 20 RMBS securities. Credit rating agencies were concerned that the inclusion of ABX assets in CDOs would increase market-wide correlation and make CDO performance more volatile.

In order to get around that limitation and create a CDO that the credit rating agencies would be willing to rate, Goldman took several steps. First, it decided Hudson 1 would reference the two ABX 06-1 indices and the two ABX 06-2 indices that referenced RMBS securities with BBB and BBB- ratings. Since each of those four indices tracked 20 subprime mezzanine RMBS securities, altogether they tracked 80 RMBS securities.²²³⁶ Next, Goldman created 80 single name CDS

²²³⁰ 9/21/2006 email from Jonathan Sobel to Tom Montag, GS MBS-E-009739145.

²²³¹ See, e.g., 10/16/2006 email from John Li to Darryl Herrick, “Call Arbind Jha,” GS MBS-E-018209595 (“Regarding Hudson Mezz Risk issue”).

²²³² 9/20/2006 email from Arbind Jha to Josh Birnbaum, GS MBS-E-012685289. When asked about this email and Hudson 1 in general, Mr. Birnbaum told the Subcommittee that he had no specific recollection of any involvement with the Hudson 1 CDO. Subcommittee interview of Joshua Birnbaum (10/1/2010).

²²³³ 10/12/2006 email from Arbind Jha, “Re: Risk Issue,” Hearing Exhibit 4/27-88.

²²³⁴ 9/20/2006 Firmwide Risk Committee Minutes, GS MBS 0000004472.

²²³⁵ See, e.g., 3/23/2007 “CDO Rating Factors: Inclusion of Tranching ABX Indices in ABS CDOs,” Moody’s, Document No. SF95049.

²²³⁶ The ABX 06-1 Index and the ABX 06-2 Index each tracked a completely different set of 20 RMBS securitizations. Each Index also had its own subset of five indices tracking individual securities issued by those 20 securitizations, divided by credit rating. For example, one of the RMBS securitizations tracked by the ABX 06-2 Index was called CWL 2006-8. One of the sub-indices within the ABX 06-2 Index tracked BBB rated securities that

contracts, each of which used as its reference obligation one of the subprime mezzanine RMBS securities tracked by the ABX indices.²²³⁷ Goldman's ABS Desk took the short position in each of those 80 contracts, while Goldman's CDO Origination Desk took the long position.²²³⁸ By taking the short position in the 80 single name CDS contracts, the ABS Desk essentially offset its long position in the corresponding ABX contracts. Next, the CDO Origination Desk entered into a CDS contract with Hudson 1, taking the short side while the Hudson CDO assumed the long side of the 80 single name CDS contracts. The end result was that Hudson 1 took the long side and assumed the risk associated with the long position for \$1.2 billion worth of CDS single name contracts referencing the RMBS securities comprised the ABX 06-1 and 06-2 BBB and BBB- indices.²²³⁹ By transferring the long CDS position to Hudson, Goldman effectively transferred the risk associated with its ABX long assets to any investors who bought the Hudson securities.

In order to attract investors and convince them to buy the Hudson securities, Goldman decided to make use of a pricing difference between CDS contracts referencing the ABX Index versus single name RMBS securities.²²⁴⁰ In 2006, at the time Hudson was being constructed, the price of CDS contracts that used an ABX index as the reference obligation was lower than the price of CDS contracts that used an individual RMBS security as its reference obligation. Because Goldman exercised complete control over the CDO and created CDS contracts referencing assets from its own inventory, Goldman also exercised complete control over the pricing of those contracts. When Goldman set up the 80 single name CDS contracts, and sold the long side of those contracts to Hudson 1, Goldman decided internally what it would charge the CDO to acquire the long side of those contracts. Goldman decided to price the contracts, not according to the cost of a single name CDS contract on the market, but instead according to the cost of a CDS contract for the long side of the relevant ABX index that day.²²⁴¹ By using this pricing method, Goldman enabled Hudson to purchase the single name CDS contracts at the lower ABX prices, which meant it could

were issued as part of the 20 securitizations, including the M8 tranche of CWL 2006-8 which carried a BBB rating. Another of the five indices tracked the securities carrying a BBB- rating, including the M9 tranche of CWL 2006-8 which carried that credit rating. The CWL 2006-8 M8 and CWL 2006-M9 securities were just two of the 40 BBB and BBB- rated securities issued by the 20 RMBS securitizations in the ABX 06-2 Index. The ABX 06-1 Index functioned the same way; its sub-indices tracked another 40 mezzanine RMBS securities from the 20 RMBS securitizations that composed that Index.

²²³⁷ A "single name CDS" contract uses a single security as its reference obligation, such as a specific RMBS security.

²²³⁸ For simplicity, all 20 assets in each of the ABX baskets were given the same weighted price in Hudson 1.

²²³⁹ See, e.g., 4/27/2007 email from Fabrice Tourre to Michael Swenson, Deeb Salem, and Edwin Chin, GS MBS-E-012432742.

²²⁴⁰ Mr. Swenson described this situation in his testimony before the Subcommittee: "Throughout 2006, numerous clients wanted to sell the ABX in order to express a negative view on the U.S. residential housing market. As a result of these trades, we took on long positions. In order to hedge those positions, we began to increase our short position in single-names. By November 2006, volatility in the ABX increased, pushing prices down. Because our positions in single names did not match identically the basket of securities that comprised the ABX, the positions moved at different rates and even different directions, resulting in losses for the ABS desk." Prepared statement of Michael Swenson, April 27, 2010 Subcommittee Hearing, at 208-09.

²²⁴¹ Goldman decided to price the single name assets at one point below the median ABX trading price. See 9/21/2006 email from Darryl Herrick to Deeb Salem, Michael Swenson, Joshua Birnbaum, Peter Ostrem, and Edwin Chin, GS MBS-E-012685645.

tell investors that, by purchasing Hudson securities, they would be purchasing the single name CDS contracts at the discount price at which Hudson acquired them.²²⁴²

The pricing differential also benefitted Goldman's ABS Desk in two ways. First, it created a modest incentive for investors to buy Hudson securities and take the long position needed to offset Goldman's ABX risk. Second, it left Goldman with a short position in the form of CDS single name contracts, which Goldman expected to become more valuable than a short position in CDS contracts that referenced ABX indices. The ABS Desk kept both its long ABX positions and its short single name CDS positions in the same dedicated account. Over time, the short position in single name CDS did gain in value and boosted the overall value of the portfolio of assets held by the ABS Desk by more than \$1 million, producing additional profits for Goldman.²²⁴³

In addition to the \$1.2 billion in single name CDS contracts to offset Goldman's ABX risk, Mr. Herrick from the CDO Origination Desk and Deeb Salem from the ABS Desk worked together to select \$800 million in additional single name CDS contracts to include in the Hudson CDO.²²⁴⁴ Mr. Herrick told the Subcommittee that he gave Mr. Salem a specific set of criteria for selecting these CDS contracts, including a list of RMBS names that he wanted to be included, a list of RMBS names that he did not want to be included, and an acceptable price range for each CDS contract. Since Goldman planned to take 100% of the short side of Hudson 1, these lists were presumably used to identify RMBS contracts that Goldman expected to offset Goldman's long positions. Mr. Herrick told the Subcommittee that Mr. Salem responded with an initial list of 60 possible RMBS reference obligations, 52 of which were ultimately included in Hudson 1.²²⁴⁵

²²⁴² See 10/2/2006 email from Darryl Herrick to Michael Swenson, Joshua Birnbaum, Deeb Salem, Peter Ostrem, and Daniel Sparks, GS MBS-E-010913416 ("We plan to announce Hudson Mezzanine Funding tomorrow in the am for Europe, Asia and the US[.] I'm circulating around to everyone the CDO portfolio and spreads we will be showing investors and agencies, based on our agreed upon amounts and levels from last week."). Mr. Swenson responded: "Darryl we should use the 265 and 245 spread for the ABX2 and ABX1 triple-B minus spreads and 145 and 130 for triple-B ABX2 and ABX1 triple-B spreads." Id.

²²⁴³ The gain generated by the CDS single name contracts was retained on the books of the ABS Desk, and created a favorable "basis" compared to the cost of the ABX long position held by the desk. See 4/27/2007 email from Fabrice Tourre to Michael Swenson, Deeb Salem, and Edwin Chin, GS MBS-E-012432742; Goldman response to Subcommittee QFR at PSI_QFR_GS0239. See also 9/19/2006 email from Michael Swenson to Thomas Cornacchia and Joshua Birnbaum, GS MBS-E-012684557 ("[ABX] Index to single-name basis is at the wides[t] (ie 40 bp at BBB- level). Index to cash is even more extreme at 70bp. Bids for cash deals remain strong and have barely widened."); Performance Review for Michael Swenson, GS-PSI-02396, Hearing Exhibit 4/27-55b (describing the mortgage trading desk's strategy of shorting single-name RMBS to offset long ABX positions: "[D]uring the early summer of 2006 it was clear that the market fundamentals in subprime and the highly levered nature of CDOs was going to have a very unhappy ending. The beauty of the CDO short was that it allowed for a very efficient method for capturing the value in the ABX to single-name basis from the short side.").

²²⁴⁴ Subcommittee interview of Darryl Herrick (10/13/2010). See also 10/8/2006 email from Darryl Herrick to a Goldman salesperson, GS MBS-E-017502983 (discussing Hudson 1: "Omar, I realize lack of manager may be tough hurdle for them [investors]. May be helpful to let Deeb and I get on a call with the investor and discuss our asset selection criteria and I can go through asset sale criteria.").

²²⁴⁵ See 9/19/2006 email from Darryl Herrick to Deeb Salem, Peter Ostrem, others, GS MBS-E-011402123, with attachment GS MBS-E-011403442 (Mr. Salem wrote to Mr. Herrick: "Attached are 60 RMBS Ref Obs ... for the CDO we're discussing. On the RMBS side, we chose 30 Baa2 and 30 Baa3 CUSIPs evenly split btw 2005 and 2006 vintage. We can add a few alt-a names as well. How many of those would you like?"). When interviewed by the

According to Goldman's contemporaneous records and its responses to Subcommittee questions, 100% of the CDS contracts included in Hudson 1 were supplied by Goldman's Mortgage Department.²²⁴⁶ Because Hudson 1 contained only CDS contracts, it was entirely "synthetic"; it contained no loan pools or RMBS securities that directed actual cash payments to the CDO. Instead, the only cash payments made to Hudson 1 consisted of the cash paid by investors making initial purchases of the Hudson securities and the premiums that Goldman paid into Hudson 1 as the sole short party.²²⁴⁷

Marketing Hudson. After establishing its basic characteristics and selecting the CDS assets to be included in Hudson 1, Goldman began to look for investors. A key development took place early on, when near the end of September 2006, Morgan Stanley's proprietary trading desk committed to entering into a CDS agreement with Goldman referencing the "super senior" portion of Hudson 1, meaning the CDO's lowest risk tranche that would be the first to receive payments to the CDO.²²⁴⁸ Morgan Stanley agreed to take the long side of a CDS that represented \$1.2 billion of the \$2 billion CDO, while Goldman took the short side.²²⁴⁹ As part of its agreement to invest in Hudson 1, Morgan Stanley was permitted to review the \$800 million in single name CDS contracts to be included in the CDO and, in fact, vetoed the proposed inclusion of certain CDS contracts referencing commercial mortgage backed securities.²²⁵⁰

After getting the commitment from Morgan Stanley, Goldman turned its focus to selling the remaining Hudson securities. On September 27, 2007, Mr. Swenson, the SPG Trading Desk and ABS Desk head, sent an email to set up a meeting, which later became a conference call, on "Marketing Strategy for the ABX CDO Trade."²²⁵¹ The invitees included Daniel Sparks, Jon Sobel, Peter Ostrem, Darryl Herrick, and others. Mr. Herrick circulated a draft copy of the Hudson 1 termsheet and transaction overview for review in advance of the call.²²⁵²

Goldman's CDO marketing strategy typically involved its sales personnel sending clients a marketing booklet outlining different features of a particular CDO. Mr. Herrick drafted the marketing booklet for Hudson 1, and circulated it for review to Mr. Ostrem and other members of

Subcommittee, Mr. Salem had no specific recollection of how assets were selected for Hudson 1 and little specific recollection about Hudson 1 as a whole. Subcommittee interview of Deeb Salem (10/6/10).

²²⁴⁶ See, e.g., Goldman response to Subcommittee QFR, PSI_QFR_GS0192.

²²⁴⁷ Goldman used the cash paid into Hudson 1 to purchase "collateral securities," as discussed further below.

²²⁴⁸ See 10/30/2006 email from Peter Ostrem, GS MBS-E-0000057886, Hearing Exhibit 4/27-90 ("Super senior note (\$1.2bln in size) was executed in the first week of the transaction and was a key driver of this deal[']s success.").

²²⁴⁹ The \$1.2 billion investment made by Morgan Stanley did not correspond to the CDO's \$1.2 billion in CDS contracts referencing RMBS securities in the two ABX indices. Rather, Morgan Stanley was investing in the top tier of the CDO as a whole, which included CDS contracts referencing both the ABX and other RMBS securities.

²²⁵⁰ Subcommittee interview of Darryl Herrick (10/13/2010). See further discussion of Morgan Stanley investment in Section C(5)(b)(iii)AA, below.

²²⁵¹ 9/27/2006 email from Michael Swenson to Crystal Young, GS MBS-E-012328848. Mr. Swenson told the Subcommittee that he had no recollection of this conference call, and that it would have been unusual for him to be involved in the marketing efforts of a CDO. Subcommittee interview of Michael Swenson (10/8/2010).

²²⁵² 9/28/2006 email from Darryl Herrick, GS MBS-E-014042217, with attachments GS MBS-E-014042218 and GS MBS-E-014042220.

the CDO Origination Desk including Benjamin Case and Matthew Bieber.²²⁵³ The executive summary of the marketing booklet described Goldman's Hudson CDO program generally and Hudson 1 in particular:

"Goldman Sachs developed the Hudson CDO program in 2006 to create a consistent, programmatic approach to invest in attractive relative value opportunities in the RMBS and structured product market[.]

-We successfully launched Hudson High Grade in September. This is a continuation of the program using mezzanine Baa2/Baa3 quality RMBS[.]

Hudson CDOs are non-managed and static in nature and provide term non-recourse funding where Goldman Sachs acts as Liquidation Agent on an ongoing basis. The Liquidation Agent will be responsible for efficiently selling credit risk assets ...

Goldman Sachs has aligned incentives with the Hudson program by investing in a portion of equity and playing the ongoing role of Liquidation Agent."²²⁵⁴

The marketing booklet also described the Hudson 1 assets, and the selection process for those assets:

"The portfolio composition of Hudson Mezzanine Funding 2006-1 will consist of 100% CDS on RMBS.

- 60% of the RMBS will be single name CDS on all 40 obligors in ABX 2006-1 and ABX 2006-2

- 40% of the RMBS will consist of single name CDS on 2005 and 2006 vintage RMBS ...

Goldman Sachs' portfolio selection process:

- Assets sourced from the Street. Hudson Mezzanine Funding is not a Balance Sheet CDO
 - Goldman Sachs CDO desk pre-screens and evaluates assets for portfolio suitability
 - Goldman Sachs CDO desk reviews individual assets in conjunction with respective mortgage trading desks (Subprime, Midprime, Prime, etc.) and makes decision to add or decline[.]"²²⁵⁵

²²⁵³ 9/30/2006 email from Darryl Herrick to Peter Ostrem, Benjamin Case, and Matthew Bieber, GS MBS-E-014367160, with attachment GS MBS-E-014367161; 9/30/2006 Goldman internal email chain among Darryl Herrick, Peter Ostrem, Benjamin Case, and Matthew Bieber, GS MBS-E-017504075.

²²⁵⁴ 10/2006 Hudson Mezzanine Funding 2006-1, LTD., GS MBS-E-009546963, at 966, Hearing Exhibit 4/27-87.

²²⁵⁵ Id. at 966, 978.

The marketing booklet statement that “Goldman Sachs had aligned incentives with the Hudson program by investing in a portion of equity,” was misleading. Goldman did, in fact, purchase approximately \$6 million in Hudson equity.²²⁵⁶ However, that \$6 million equity investment was outweighed many times over by Goldman’s \$2 billion short position, which made Goldman’s interest adverse to, rather than aligned with, the Hudson investors. Neither the marketing booklet nor other offering materials disclosed to investors the size or nature of Goldman’s short position in Hudson 1.

The marketing booklet also stated that Hudson’s assets were “sourced from the Street,” and that it was “not a Balance Sheet CDO,” even though all of the CDS contracts had been produced and priced internally by Goldman and \$1.2 billion of the contracts offset Goldman ABX holdings. The plain meaning of the phrase, “sourced from the Street,” is that the Hudson 1 assets were purchased from several broker-dealers on Wall Street.²²⁵⁷ Indeed, a former Goldman salesperson who sold Hudson 1 securities to investors told the Subcommittee that he thought “sourced from the Street” referred to assets being acquired from a variety of different broker-dealers at the best prices, and was surprised to learn that all of the Hudson assets had been provided by Goldman’s ABS Desk.²²⁵⁸ A Hudson 1 investor told the Subcommittee that it had also interpreted the phrase “sourced from the Street” to mean assets acquired from a variety of different broker-dealers.²²⁵⁹

The Subcommittee asked several Goldman traders involved in Hudson 1 to explain their understanding of the phrase, and received inconsistent answers. Darryl Herrick, who drafted the Hudson marketing booklet, stated that “sourced from the Street” meant the assets were “sourced from a street dealer at street prices.” His supervisor, CDO Managing Director Peter Ostrem, stated that “sourced from the Street” referred to the fact the underlying RMBS securities were not originated or underwritten by Goldman.²²⁶⁰ Deeb Salem, a Goldman mortgage trader who selected 40% of the assets in Hudson 1, described “the Street” as simply “short hand for all broker-dealers.”²²⁶¹ David Lehman, who became the head of the CDO Origination Desk after Mr. Ostrem, and Matthew Bieber, who worked for Mr. Ostrem and later Mr. Lehman, claimed that it was accurate to say the Hudson assets were “sourced from the Street,” even though all the assets were acquired from the Goldman ABS Desk, because Goldman was part of “the Street.”²²⁶²

²²⁵⁶ See Goldman response to Subcommittee QFR, at PSI_QFR_GS0223.

²²⁵⁷ Barron’s Dictionary of Finance and Investment Terms defines “the Street” as “referring to the financial community in New York City and elsewhere. It is common to hear ‘The Street likes XYZ.’ This means there is a national consensus among securities analysts that XYZ’s prospects are favorable.”

²²⁵⁸ Subcommittee interview of Andrew Davilman (9/30/2010).

²²⁵⁹ Subcommittee interview of Morgan Stanley (6/24/2010).

²²⁶⁰ The Subcommittee asked Mr. Ostrem whether he considered the Hudson 1 assets to be the RMBS securities or the credit default swaps referencing those securities, and Mr. Ostrem responded that the assets in the CDO were the RMBS securities which had been originated by a variety of financial institutions on Wall Street. When asked why it would be important to indicate to investors that not all the underlying RMBS securities were underwritten by Goldman, given that this information would be clear to a professional reviewing the names of the reference assets in Hudson 1, Mr. Ostrem replied that he didn’t know. Subcommittee interview of Peter Ostrem (10/5/2010).

²²⁶¹ Subcommittee interview of Deeb Salem (10/6/2010).

²²⁶² Subcommittee interview of David Lehman (9/27/2010); Subcommittee interview of Matthew Bieber (10/21/2010).

By using the phrase, “sourced from the Street,” Goldman may have misled investors into thinking that the referenced assets had been purchased from several broker-dealers and obtained at arms-length prices, rather than simply taken directly from Goldman’s inventory and priced by its own personnel. Moreover, this phrase also appears to hide the fact that Goldman had an adverse interest to investors and was seeking to transfer unwanted risk from its own inventory to the clients it was soliciting. By claiming it was “not a Balance Sheet CDO,” Goldman may have misled investors into believing that Goldman had little interest in the performance of the referenced assets in Hudson, rather than having selected the assets to offset risks on its own books.

In addition to the Hudson marketing booklet, in December 2006, Goldman issued an Offering Circular which it distributed to potential investors.²²⁶³ The Offering Circular contained the statement that no independent third party had reviewed the prices at which the CDS contracts were sold to Hudson 1.²²⁶⁴ In addition to lacking third party verification, no external counterparty had participated in any aspect of the CDS contracts – all of the CDS contracts had been produced, signed, and priced internally by two Goldman trading desks which exercised complete control over the Hudson CDO.

Internally, while Hudson 1 was being constructed, Goldman personnel acknowledged that they were using a novel pricing approach.²²⁶⁵ At one point, Mr. Swenson sent an email to Mr. Birnbaum, raising questions about how they could explain some of the pricing decisions. Mr. Swenson wrote that he was: “concerned that the levels we put on the abx cdo for single-a and triple-bs do not compare favorably with the single-a off of a abx 1 + abx 2 trade,” telling Mr. Birnbaum “[w]e need a goo[d] story as to why we think the risk is different.”²²⁶⁶ The prices that Goldman established for the CDS contracts that Hudson “bought” affected the value of the CDO and the Hudson 1 securities Goldman sold to investors, but the Offering Circular failed to disclose the extent to which Goldman had single-handedly controlled the pricing of 100% of the CDO’s assets.

Perhaps the most serious omission from the marketing booklet and other offering materials was Goldman’s failure to disclose the fact that it would be the sole short party in the entire \$2 billion CDO. The Goldman materials told investors that an affiliate, Goldman Sachs International (GSI), would be the “credit protection buyer” or initial short party for the Hudson 1 CDO.²²⁶⁷ It was

²²⁶³ 12/3/2006 Hudson Mezzanine 2006-1, LTD. Offering Circular, GS MBS-E-021821196.

²²⁶⁴ Id. at 021821241.

²²⁶⁵ See, e.g., 9/19/2006 email from Michael Swenson to Thomas Cornacchia and Joshua Birnbaum, GS MBS-E-012684557 (“we are going to price an innovative full capital structure \$1+bb CDO deal with 60% of the risk in ABX (no one has done this before).”); 9/21/2006 email from Darryl Herrick to Deeb Salem, Michael Swenson, Joshua Birnbaum, Peter Ostrem, and Edwin Chin, GS MBS-E-012685645.

²²⁶⁶ 9/27/2006 email from Michael Swenson to Joshua Birnbaum, GS MBS-E-012689798.

²²⁶⁷ 12/3/2006 Hudson Mezzanine 2006-1, LTD. Offering Circular, GS MBS-E-021821196, at 021821229. This disclosure related to the master credit default swap, where Goldman Sachs International served as the credit protection buyer facing the Hudson Mezzanine 2006-1, Ltd., the legal entity that issued the Hudson 1 securities. See 12/1/2006 ISDA Master Agreement, GS MBS-E-021822056. In this role, Goldman was serving as an intermediary, and was protecting the CDO from credit risk by placing the Goldman Sachs name on the transaction and assuring investors that a single credit-worthy entity would be making all required payments to the Hudson 1 trust. Having one

common practice for underwriters to act as the initial short party in a CDO, acting as an intermediary between the CDO vehicle and broker-dealers offering competitive bids in order to short the assets referenced in the CDO.²²⁶⁸ The disclosure provided by Goldman contained boiler plate language suggesting that would be the role played by GSI in the Hudson transaction. Goldman never disclosed that it had provided all of Hudson's assets internally, GSI was not acting as an intermediary, and GSI would not be passing on any portion of the short interest in Hudson to any other party, but would be keeping 100% of the short position. The Hudson disclosures failed to state that, rather than serving as an intermediary, Goldman was making a proprietary investment in the CDO which placed it in a direct, adverse position to the investors to whom it was selling the Hudson securities.

The Offering Circular contained a section entitled, "Certain Conflicts of Interest," which included a subsection entitled, "The Credit Protection Buyer and Senior Swap Counterparty," in which Goldman could have disclosed its short position. Rather than disclose that short position, however, Goldman stated in part:

"GSI and/or any of its affiliates may invest and/or deal, for their own respective accounts for which they have investment discretion, in securities or in other interests in the Reference Entities, in obligations of the Reference Entities or in the obligors in respect of any Reference Obligations or Collateral Securities (the "Investments"), or in credit default swaps (whether as protection buyer or seller), total return swaps or other instruments enabling credit and/or other risks to be traded that are linked to one or more Investments."²²⁶⁹

This disclosure indicates that GSI or an affiliate "may invest and/or deal" in securities or other "interests" in the assets underlying the Hudson CDO, and "may invest and/or deal" in securities that are "adverse to" the Hudson "investments." The Offering Circular, however, misrepresented Goldman's investment plans. At the time it was created in December 2006, Goldman had already determined to keep 100% of the short side of the Hudson CDO and act as the sole counterparty to the investors buying Hudson securities, thereby acquiring a \$2 billion financial interest that was directly adverse to theirs.

Tracking Hudson. Once it constructed the Hudson CDO, Goldman personnel were focused on completing and selling the Hudson 1 securities as quickly as possible. At least one other CDO was pushed back to facilitate the execution of Hudson 1.²²⁷⁰

broker-dealer intermediate between the market and a CDO vehicle was desirable to credit rating agencies in order to minimize risk in the CDO, and Goldman clearly disclosed this role to investors.

²²⁶⁸ Goldman intermediated between other broker-dealers and the CDO vehicle in Anderson Mezzanine Funding 2007-1, Camber 7, Hudson Mezzanine 2006-1, Hudson Mezzanine 2006-2, and Timberwolf I, among several other CDOs. See Goldman response to Subcommittee QFR, at PSI_QFR_GS0192.

²²⁶⁹ 12/3/2006 Hudson Mezzanine 2006-1, LTD. Offering Circular, GS MBS- E-021821196, at 021821251.

²²⁷⁰ 10/16/2006 email exchange between Daniel Sparks and Peter Ostrem, GS MBS-E-010916991 ("Cambridge is upset that we are delaying their deal. They know that Hudson Mezz (GS prop deal) is pushing their deal back.").

Goldman senior executives closely followed Hudson's development and sale. Hudson was discussed, for example, at five different Firmwide Risk Committee meetings attended by senior Goldman executives.²²⁷¹ Mortgage Department executives also sent progress reports to the senior executives on Hudson 1. On October 25, 2006, for example, Mr. Sobel sent an email to COO Gary Cohn and CFO David Viniar alerting them to Hudson sales efforts and the pricing of its securities.²²⁷² During discussions over the best price at which to market the CDO's equity tranche, a senior executive emailed Peter Ostrem and others: "keep in mind the overall objective - this is not about one trade - having said that, I agree that [the proposed price] may be too low."²²⁷³ On October 26, 2006, Mr. Jha, a Goldman risk officer, circulated a Mortgage Department Risk Report to a number of Goldman executives, including CEO Lloyd Blankfein and COO Gary Cohn, noting in the forwarding email: "Risk reduction [in the Mortgage Department] is primarily due to pricing of \$2bn Hudson Mez synthetic CDO."²²⁷⁴

Selling Hudson. Once the Hudson CDO was ready for sale, the Goldman sales force had difficulty selling Hudson securities to investors due to its reliance on BBB and BBB- rated subprime RMBS securities. Allied Irish Bank (AIB), for example, apparently referred to the Hudson securities as "junk."²²⁷⁵ One Goldman employee emailed the CDO team and asked:

"[D]o we have anything talking about how great the BBB sector of RMBS is at this point in time ... a common response I am hearing on both Hudson & HGS1 is a concern about the housing market and BBB in particular? We need to arm sales with a bit more."²²⁷⁶

²²⁷¹ Firmwide Risk Committee meetings were often chaired by David Viniar and frequently attended by Lloyd Blankfein and Gary Cohn. See 9/20/2006 Firmwide Risk Committee Minutes, GS MBS 0000004472; 9/27/2006 Firmwide Risk Committee Minutes, GS MBS 0000004474; 10/4/2006 Firmwide Risk Committee Minutes, GS MBS 0000004476; 10/11/2006 Firmwide Risk Committee Minutes, GS MBS 0000004478; 11/1/2010 Firmwide Risk Committee Minutes, GS MBS 0000004484. See also 10/11/2006 email from Arbind Jha to Joshua Birnbaum, GS MBS-E-012695030 ("Sobel this morning in the firmwide risk committee mentioned that we have circled up the junior and some of the equity tranches").

²²⁷² 10/25/2006 email from Jonathan Sobel to David Viniar and Gary Cohn, GS MBS-E-009757821.

²²⁷³ 10/12/2006 email from Thomas Cornacchia to Peter Ostrem and others, GS MBS-E-0000066413.

²²⁷⁴ 10/26/2006 email from Arbind Jha, "MarketRisk: Mortgage Risk Report (cob 10/25/2006)," GS MBS-E-0000056041, Hearing Exhibit 4/27-89. That same day, October 26, 2006, Mr. Swenson also described the risk transfer to Goldman executive Bill McMahon when updating him on the trading desk's ABX position: "In addition to \$2bb of risk that was placed into the CDO, we have sold to retail since 4pm yesterday \$2bb of BBB- risk."

10/26/2006 email from Michael Swenson to Bill McMahon, others, GS MBS-E-0000054856.

²²⁷⁵ 10/11/2006 Goldman internal email, "FW: Hudson Mezz," GS MBS-E-017502610, Hearing Exhibit 4/27-170c. (A Goldman employee asked a sales associate: "what specifically did AIB say was 'junk' about the hudson mezz deal?" The employee then forwarded the email to Mr. Herrick saying: "You may want to ask [the sales associate] about this when she's there tomorrow and Friday. ... She said 'AIB are too smart to buy this kind of junk.'").

²²⁷⁶ 10/19/2006 email from Mitchell Resnick to Jonathan EgoI, Darryl Herrick, and David Rosenblum, GS MBS-E-009557391. "HGS1" refers to Abacus HGS1, a CDO² where Goldman, as in Hudson 1, held 100% of the short interest.

Another Goldman salesman emailed Mr. Herrick on the CDO Desk, telling him:

“The guy at Schrodgers looking at this deal has one main issue h[e] has to get over: He is worried about how he is going to convince his boss to invest in a pool of sub prime mortgages with probably their greatest exposures in California and Florida. He is nervous on US house prices. ... Anything else we could offer? He is not a big believer in the Moody’s data and rating system. **I WANT THIS GUY THERE AND IN SIZE! Please help if you can - just three bullet points would help.**”²²⁷⁷

Mr. Herrick kept the SPG Trading Desk posted on the progress of sales. On October 11, 2006, Mr. Herrick informed the group: “This [sale] clears the team of majority the senior risk Equity and BBs we are hammering away on and hope to get traction tomorrow/Friday.”²²⁷⁸ Mr. Swenson responded: “you are doing an awesome job, keep it up.” Mr. Swenson emailed the sales team manager: “I am extremely impressed by darryl [a]nd the rest of your team.”²²⁷⁹

On October 25, 2006, Mr. Sobel sent a Hudson update to COO Gary Cohn and CFO David Viniar: “\$1.6bn of the \$2bn sold, with the majority of the unsold bonds being investment grade. Equity more than 85% sold.”²²⁸⁰

The Goldman sales force sold most of the Hudson securities prior to the CDO’s closing in December 2006, and continued its sales efforts after the closing as well. Two months after the closing, in February 2007, Goldman had \$296 million in unsold Hudson securities, not including the \$6 million equity investment Goldman had announced in the Hudson marketing material that it would purchase and hold. Over the following months, Goldman sold an additional \$38 million worth of securities to investors, and received bids on several other securities but decided the bid prices were too low and kept the securities on its books instead.²²⁸¹ The unsold Hudson securities were split between the CDO Origination Desk and ABS Trading Desk.²²⁸²

Overall, Goldman sold Hudson securities to 25 investors. Morgan Stanley made the largest investment, taking \$1.2 billion of the super senior portion of the CDO. Other investors included the National Australia Bank, which purchased \$80 million worth of the AAA rated securities; Security

²²⁷⁷ 10/20/2006 email from Paul Carrett to Darryl Herrick, GS MBS-E-018321286 [emphasis in original].

²²⁷⁸ 10/11/2006 email from Darryl Herrick to Michael Swenson, David Lehman, and Josh Birnbaum, GS MBS-E-0000030518. Mr. Swenson told the Subcommittee he had no recollection of being involved in the marketing of Hudson 1. Mr. Swenson said he did not work on CDOs and would not typically be involved in the marketing of CDOs. Subcommittee interview of Michael Swenson (10/8/2010).

²²⁷⁹ 10/12/2006 email from Michael Swenson to David Rosenblum and Peter Ostrem, GS MBS-E-0000030518.

²²⁸⁰ 10/25/2006 email from Jonathan Sobel to David Viniar and Gary Cohn, GS MBS-E-009757821.

²²⁸¹ Subcommittee interview of Darryl Herrick (10/13/2010).

²²⁸² Subcommittee interview of Darryl Herrick (10/13/2010). When asked if it was common to divide unsold securities between the CDO Desk and the ABS Desk, Mr. Herrick said unsold securities were usually split with the sponsor of a CDO. His response suggests that Goldman viewed the ABS Desk as the sponsor of Hudson 1, since it was designed to offset the risk associated with the ABS Desk’s ABX assets. See also 2/28/2007 email from David Rosenblum to Peter Ostrem, GS MBS-E-001800707 (“are we still sharing 50pct of ups and downs on [Hudson].”).

Benefit Mutual, which bought \$10 million of the AA rated securities; and Bear Stearns, which bought \$5 million of the equity tranche.

Profiting from Hudson. On October 30, 2006, after Hudson 1 was presented to investors and pre-sold most of its securities, Peter Ostrem, the head of the CDO Origination Desk, sent a celebratory email to the ABS and CDO teams with Hudson highlights. He wrote: “Goldman was the sole buyer of protection on the entire \$2.0 billion of assets,” meaning Goldman had kept 100% of the short position. By shorting Hudson, Goldman had transferred \$1.2 billion worth of risky ABX assets Goldman wanted off its books, and shorted another \$800 million in RMBS securities. Mr. Ostrem also listed these “highlights”:

- “P&L [Profit and Loss] booked of \$8.5mm Plus, ongoing P&L to GS for acting as liquidation agent equal to \$2.5mm per year for the next 4 years
- Hudson Mezz went long \$1.2bln of BBB/BBB- ABX from ABS trading desk at market wide 4 weeks ago
- Fastest execution of a SP [Structured Product] CDO done at Goldman (4 weeks from inception to pricing)
- Over half the Equity was sold by Andy Davilman
- ... Super senior note (\$1.2bln in size) was executed in the first week of the transaction and was a key driver of this deal[']s success (covered by Nicole Martin).”²²⁸³

Over the next year, Goldman pocketed nearly \$1.7 billion in gross revenues from Hudson 1, all of which was at the expense of the Hudson investors.²²⁸⁴ As the value of the RMBS securities referenced in the ABX indices declined, Goldman, as the sole short party in Hudson, collected \$1.393 billion in gains directly from the investors to whom it had sold the Hudson securities. Goldman’s \$1.393 billion gains were, in turn, offset internally at the firm by the ABX losses recorded on the books of its ABS Desk. Goldman made another \$304 million in gains due to its short of the other \$800 million in single name CDS contracts included in Hudson 1.²²⁸⁵ That \$304 million gain was also at the expense of the investors to whom Goldman had sold the Hudson securities.

Goldman also profited in other ways. It received substantial fees from the roles it played in underwriting and administering Hudson 1, including \$31 million in underwriting fees, \$3.1 million for serving as the liquidation agent, and \$1 million for serving as the collateral put provider.²²⁸⁶ The ABS Desk warehouse account that contained both the long ABX assets and the 80 offsetting single

²²⁸³ 10/30/2006 email from Peter Ostrem, “Great Job on Hudson Mezz,” GS MBS-E-0000057866, Hearing Exhibit 4/27-90.

²²⁸⁴ Goldman told the Subcommittee that Hudson experienced a gross gain of \$1.697 billion offset by a loss of \$1.39 billion (rather than \$1.2 billion) in ABX assets on its balance sheet. 8/4/2010 email from Goldman to the Subcommittee, PSI_QFR_GS0243.

²²⁸⁵ See Goldman response to Subcommittee QFR at PSI_QFR_GS0239.

²²⁸⁶ Id.

name CDS contracts reported a gain of approximately \$1.2 million due to the higher value of the single name CDS compared to the ABX CDS.²²⁸⁷

Goldman also incurred some losses in connection with Hudson 1. Although Goldman sold some additional Hudson securities several months after the CDO closed, it incurred a \$267 million loss from the Hudson 1 securities that it was unable to sell at the prices it wanted and instead retained in its inventory. Goldman lost another \$111 million from serving as the collateral put provider for Hudson collateral securities which also lost value.²²⁸⁸ Overall, however, Goldman recorded a profit from Hudson 1 of more than \$1.35 billion.

In contrast to Goldman, Hudson 1 investors suffered substantial losses. In March 2007, less than three months after the issuance of the Hudson securities, when asked to analyze how a holder of Hudson securities could hedge against a drop in their value, a Goldman trader wrote: “their likelihood of getting principal back is almost zero.”²²⁸⁹ Six months later, the credit rating downgrades began. In September 2007, Moody’s downgraded several Hudson 1 securities and followed with additional downgrades in November 2007. S&P began downgrades of Hudson 1 in December 2007, and by February 2008, had downgraded even the AAA rated securities.²²⁹⁰

Morgan Stanley, the largest Hudson investor, lost \$930 million.²²⁹¹ As other investors incurred increasing losses, they sold their securities back to Goldman at rock bottom prices. In September 2007, for example, nine months after the Hudson securities were first issued, Goldman repurchased \$10 million worth of Hudson securities from Greywolf Capital at a price of five cents on the dollar; in October 2007, another hedge fund sold \$1 million in Hudson securities back to Goldman at a price of 2.5 cents on the dollar.²²⁹² In November 2008, Hudson 1 was completely liquidated by Goldman. Today, Hudson securities are worthless.

Analysis. Goldman constructed Hudson 1 as a way to transfer its ABX risk to the investors who bought Hudson securities. When marketing the Hudson securities, Goldman misled investors by claiming its investment interests were aligned with theirs, when it was the sole short party and was betting against the very securities it was recommending. Goldman also implied that Hudson’s assets had been purchased from outside sources, and failed to state that it had selected the majority of the assets from its own inventory and priced the assets without any third party participation. By holding 100% of the short position at the same time it solicited clients to buy the Hudson securities, Goldman created a conflict of interest with its clients, concealed the conflict from them, and profited at their expense.

²²⁸⁷ Id.

²²⁸⁸ Id., at PSI_QFR_GS_0280.

²²⁸⁹ 3/4/2006 email from Fabrice Tourre to George Maltezos, others, GS MBS-E-006638833.

²²⁹⁰ See Goldman response to Subcommittee QFR, at PSI_QFR_GS0211.

²²⁹¹ 11/21/2008 letter from Goldman to Morgan Stanley, HUD-CDO-00005125.

²²⁹² See Goldman response to Subcommittee QFR, at PSI_QFR_GS0223 and PSI_QFR_GS0235.

BB. Anderson Mezzanine Funding 2007-1

In the summer of 2006, Goldman began work on Anderson Mezzanine Funding 2007-1 (Anderson), a synthetic CDO whose assets were single name CDS contracts referencing subprime RMBS securities with mezzanine credit ratings.²²⁹³ To execute the Anderson CDO, Goldman partnered with GSC Partners (“GSC”), a New York hedge fund. Goldman personnel working on the CDO included Peter Ostrem, head of the CDO Origination Desk, and Matthew Bieber, a CDO Origination Desk employee assigned to be deal captain for the Anderson CDO.

The CDO was originally conceived as part of the Hudson series of non-managed, proprietary CDOs in which Goldman acted as the principal.²²⁹⁴ But Goldman decided to enlist GSC to take part in structuring the \$500 million CDO.²²⁹⁵

Partnering on Anderson. GSC Partners was founded by Alfred C. Eckert, III, a former partner and former head of private equity, distressed debt investing, and corporate finance at Goldman.²²⁹⁶ Goldman had a longstanding relationship with GSC. In addition to Mr. Eckert, at least five other former Goldman Managing Directors were employed by GSC, and at least eight other former and current Managing Directors had invested in one or more of GSC’s funds.²²⁹⁷ In the spring of 2006, GSC circulated information through Goldman about raising money for its Elliot Bridge Fund, a “fixed income arb[itrage] fund focusing primarily on ABS using cash and synthetics, long/short strategies.”²²⁹⁸ When discussing the fund with other Goldman employees, Curtis Willing, the Goldman sales representative responsible for covering GSC wrote: “They are a strategic partner with the Synthetic desk and have handed us multiple CDO/CLO mandates.”²²⁹⁹ After being informed of the internal conversations almost a month later, Mr. Sparks informed Mr. Willing that it was a “[m]istake not to involve me from early on,” telling Mr. Willing, “I’ve run a bunch of traps for [GSC] in the past.”²³⁰⁰

²²⁹³ “Mezzanine” CDS assets reference securities that carry a credit rating of BBB or BBB-. Mezzanine assets are riskier than AAA, AA, and A rated assets, but less risky than those that carry, for example, BB, B, or CCC ratings.

²²⁹⁴ Some documents indicate the CDO was slated to be Hudson Mezzanine 2006-2. But in December 2006, Goldman delayed Anderson in favor of issuing an ABX based CDO named Hudson Mezzanine 2006-2. Several of the documents cited in this section use the terms “Hudson” or “Hudson Mezz” when in fact they refer to Anderson. None of the Goldman employees interviewed by the Subcommittee could recall the reason for changing the name of the CDO to Anderson.

²²⁹⁵ 9/25/2006 Goldman memorandum to the Mortgage Capital Committee, GS MBS-E-013475756-62 (hereinafter “9/25/2006 MCC Memorandum”). The MCC Memorandum states that Goldman was approached by GSC, but may be using standard language reused in many MCC Memoranda. In an interview with the Subcommittee, Edward Steffelin, a Senior Trader at GSC, stated that Goldman approached GSC about partnering in the transaction, and the memorandum language was “probably backward.” Subcommittee interview of Edward Steffelin (12/10/2010).

²²⁹⁶ 9/25/2006 MCC Memorandum, GS MBS-E-013475756-62.

²²⁹⁷ See Goldman response to Subcommittee QFR at PSI_QFR_GS0434. Goldman noted in its QFR response that the information used for its response had been voluntarily provided by Goldman employees.

²²⁹⁸ 5/10/2006 email from Curtis Willing to David Solomon and Dan Holland, GS MBS-E-013870906-7. The Elliot Bridge Fund eventually invested in Anderson.

²²⁹⁹ 4/17/2006 email from Curtis Willing to David Solomon and Dan Holland, GS MBS-E-013870906-7.

²³⁰⁰ 5/14/2006 and 5/10/2006 emails from Dan Sparks to Curtis Willing, GS MBS-E-013870906-7.

GSC agreed to partner with Goldman on the Anderson CDO and to share in the associated risk, including by splitting the equity tranche and sharing the risk with Goldman that the Anderson assets would lose value while being warehoused.²³⁰¹ GSC also participated in selecting the assets for the CDO.²³⁰² Later on, Goldman consulted with GSC on whether to liquidate or underwrite Anderson,²³⁰³ and allowed GSC to participate in pricing issues,²³⁰⁴ while GSC at times assisted in marketing Anderson.²³⁰⁵

Goldman offered to let GSC take a short interest in the CDO by offering to “sell protection on BBBs to GSC at market for 0.75% times notional,” and agreeing to “source assets via GSC,” meaning GSC could propose assets for the CDO that GSC wanted to get rid of or short.²³⁰⁶ GSC responded by shorting a select group of RMBS securities to hedge its risk while those assets were in the Anderson warehouse account.²³⁰⁷ For instance, at one point in October 2006, GSC sought to add \$56 million in assets to the Anderson CDO, while also taking a short position on \$9 million of those assets, which it described as “GSC Hedge Amount.”²³⁰⁸

Designing Anderson. GSC and Goldman participated together in the selection of assets for Anderson. Anderson was designed to be a synthetic CDO whose assets would consist solely of CDS contracts referencing RMBS securities whose average credit ratings would be BBB or BBB-. GSC proposed some of the referenced RMBS securities, but it is unclear how many were included in Anderson.²³⁰⁹ GSC and Goldman employees interviewed by the Subcommittee had no specific

²³⁰¹ 9/25/2006 MCC Memorandum, GS MBS-E-013475756-62.

²³⁰² 8/8/2006 email from Edward Steffelin to Peter Ostrem and others, “GS/GSC EB Prop deal,” GS MBS-E-000904603. 8/8/2006 email from Peter Ostrem to Edward Steffelin, Joshua Bissu and others, GS MBS-E-000904603 (Mr. Ostrem writes: “Happy to source assets via GSC.”). See e.g., 9/26/2006 email from Mr. Bissu to Matthew Bieber, “Names for tomorrow,” GS MBS-E-014335388.

²³⁰³ Subcommittee interview of Edward Steffelin (12/10/2010).

²³⁰⁴ See 3/5/2007 emails between Matthew Bieber and Joshua Bissu, GS MBS-E-014605918.

²³⁰⁵ See 3/6/2007 email from Joshua Bissu to Matthew Bieber and Peter Ostrem, GS MBS-E-014597705.

²³⁰⁶ 8/8/2006 email from Edward Steffelin to Peter Ostrem and others, “GS/GSC EB Prop deal,” GS MBS-E-000904603. GSC frequently executed trades with Goldman’s Correlation Trading Desk, and was known to have a “long/short strategy” in which it shorted assets it considered expensive and went long assets it thought were undervalued. See 9/15/2006 email from Geoffrey Williams to Correlation Trading Desk, GS MBS-E-009471708. See e.g., 10/31/2006 email from Shelly Lin to Joshua Bissu, and Matthew Bieber, GS MBS-E-016473768.

²³⁰⁷ 10/31/2006 email from Curtis Willing, GSC Trades, GSC-CDO-FCIC-0029698; 10/31/2006 email from Deeb Salem, “Re: GSC-Hudson Mezz 2,” GS MBS-E-000905571. A former GSC employee interviewed by the Subcommittee also indicated that the short positions were taken on Anderson assets in an effort to hedge GSC’s warehouse risk. Subcommittee interview of Edward Steffelin (12/10/2010).

²³⁰⁸ 10/31/2006 email from Shelly Lin to Joshua Bissu and Matthew Bieber, GS MBS-E-016473768. See also 10/31/2006 email from Shelly Lin to Deeb Salem, Edwin Chin, and Matthew Bieber, GS MBS-E-000905571 (“GSC wants to short into the deal the amounts listed below. They’d like to trade the ones they want to hedge with your desk as well. I think they also did this with your desk a few weeks ago.”). When Mr. Bieber was shown this document during his 10/21/2010 interview with the Subcommittee he stated he didn’t know if GSC had shorted assets and that he didn’t know what Ms. Lin meant by her statement. Subcommittee interview of Matthew Bieber (10/21/2010).

²³⁰⁹ Subcommittee interview of Matthew Bieber (10/20/2010); Subcommittee interview of Edward Steffelin (12/10/2010).

recollection of the asset selection process, beyond each party selecting some RMBS securities and the other having veto rights.²³¹⁰

Anderson's assets were purchased from 11 different broker-dealers from September 2006 to March 2007. Goldman was the source of 28 of the 61 CDS contracts in Anderson, and Goldman retained the short side. The next largest short party was Lehman Brothers which sold six CDS contracts to Anderson and retained the short side. Goldman also served as the sole credit protection buyer to the Anderson CDO, acting as the intermediary between the CDO and the various broker-dealers selling its assets.²³¹¹

By February 2007, the Anderson warehouse account contained \$305 million out of the intended \$500 million worth of single name CDS, many of which referenced mortgage pools originated by New Century, Fremont, and Countrywide, subprime lenders known within the industry for issuing poor quality loans and RMBS securities. Approximately 45% of the referenced RMBS securities contained New Century mortgages.²³¹²

Falling Mortgage Market. During the same time period in which the Anderson single name CDS contracts were being accumulated, Goldman was becoming increasingly concerned about the subprime mortgage market, was reacting to bad news from the subprime lenders it did business with,²³¹³ and was building a large short position against the same types of BBB rated RMBS securities referenced in Anderson.²³¹⁴ By February 2007, the value of subprime RMBS securities was falling, and the Goldman CDO Origination Desk was forced to mark down the value of the long single name CDS contracts in its CDO warehouse accounts, including Anderson.

Goldman was also aware that its longtime customer, New Century, was in financial distress. On February 7, 2007, New Century announced publicly it would be restating its 2006 earnings, causing a sharp drop in the company's share price. On February 8, 2007, Goldman's Chief Credit Officer Craig Broderick sent Mr. Sparks and others a press clipping about New Century and warned:

“[T]his is a materially adverse development. The issues involve inadequate [early payment default] provisions and marks on residuals [I]n a confidence sensitive industry it will be

²³¹⁰ Id.

²³¹¹ See Goldman response to Subcommittee QFR at PSI_QFR_GS0192.

²³¹² This number was compiled using a list of referenced securities supplied by Goldman at QFR_PSI_GS0192 and registration statements available at www.sec.gov. When looking at all mortgages underlying each reference security, New Century originated 48% by value of the underlying mortgages. However, each mortgage may have a different weight in the Anderson CDO based on the size of the reference security it is held in. Therefore, the economic effect of the New Century mortgages could be greater than or less than 48%. The next largest mortgage originator by value was Countrywide at 8%.

²³¹³ See, e.g., 1/4/2007 Goldman presentation, “Sub-Prime Mortgage Lenders - Update,” GS MBS-E-009978840-59, Hearing Exhibit 4/27-169.

²³¹⁴ See discussion of Goldman's net short position, Section C(4), above.

ugly even if all problems have been identified. ... We have a call with the company in a few minutes (to be led by Dan Sparks).”²³¹⁵

On some occasions, Mr. Sparks addressed negative news about New Century in the same email he discussed liquidating assets in warehouse accounts for upcoming CDOs. On March 8, 2007, for example, Mr. Sparks noted in an email to senior executives: “New Century remains a problem” due to loans experiencing early payment defaults, and informed them that the Mortgage Department had “liquidated a few deals and could liquidate a couple more.”²³¹⁶

On February 23, 2007, Mr. Sparks sent an email to senior Goldman executives estimating that Goldman had lost \$72 million on the holdings in its CDO warehouse accounts, due to falling prices.²³¹⁷ He directed Mortgage Department personnel to liquidate rather than securitize the assets in certain warehouse accounts. Two days later, on February 25, 2007, Mr. Sparks informed senior executives of the possibility of liquidating Anderson:

“[T]he CDO business liquidated 3 warehouses for deals of \$530mm (about half risk was subprime related). ... One more CDO warehouse may be liquidated this week - approximately \$300mm with GSC as manager.”²³¹⁸

Three days later, David Rosenblum, head of Goldman’s Collateralized Loan Obligations activities, emailed Mr. Ostrem, head of the CDO Origination Desk, stating: “Dan tells me that SP [Structured Product] CDO desk has reported -77 [million dollars] from retained debt (Hmezz 1+2, etc), and -129 [million dollars] from unrealized and realized CDO WH [warehouse] markdowns.”²³¹⁹

On February 24, 2007, a Saturday, several persons from the Mortgage Department worked to analyze the costs of unwinding and liquidating the assets collected for the Anderson CDO. Deeb Salem, a trader on the ABS Desk, estimated that unwinding Anderson would result in a \$60 million loss due to the falling value of its single name CDS.²³²⁰ On the same day, Mr. Ostrem sent his colleagues this explanation of why the losses in the CDO warehouse accounts were growing so rapidly:

“Each warehouse is marked by either (a) MTM [mark-to-market] on each asset or (b) mark to model [MTModel] which involves taking the portfolio through the expected CDO execution and calculating Goldman’s P&L [profit and loss] given current market yields on debt and equity. MTM is preferred if CDO execution is highly uncertain or portfolio is

²³¹⁵ 2/8/2007 email from Craig Broderick to Daniel Sparks, David Viniar, others, GS MBS-E-002201486.

²³¹⁶ 3/8/2007 email from Daniel Sparks to senior executives, GS MBS-E-002206279, Hearing Exhibit 4/27-75.

²³¹⁷ 2/23/2007 email from Daniel Sparks to senior executives, GS MBS-E-009759477.

²³¹⁸ 2/25/2007 email from Daniel Sparks to Tom Montag, GS MBS-E-019164799. See also 2/23/2007 email from Daniel Sparks to senior executives, GS MBS-E-009759477 (“We liquidated 3 CDO warehouses today and started the liquidation of another. We may liquidate one more next week.”).

²³¹⁹ 2/28/2007 email from David Rosenblum to Peter Ostrem, GS MBS-E-001800707.

²³²⁰ 2/24/2007 email from Deeb Salem to Michael Swenson, Edwin Chin, and Josh Birnbaum, GS MBS-E-018936137-38.

small. Both the MTM and the MTModel take into account risk sharing arrangements with 3rd parties.

As CDO execution has become more uncertain we have moved a couple warehouses closer to their MTM which has significantly increased our losses. Also, our MTModel results have shown losses as expected liability spreads have widened significantly and the overall strength of the CDO market has waned due to fundamental credit decline in 06/07 in RMBS subprime (90+% of assets) and increased co[r]relation between ABX/TABX levels and mezz debt levels in CDOs. We expect this co[r]relation to increase volatility in our warehouse marks for the [sic] a while (this series of events have happened quickly within the last month and the co[r]relation is getting closer to 1 as global markets get more familiar with fundamentals in subprime and trading levels in ABX/TABX).

Additional losses have also resulted from the liquidation of 3 warehouses. In each case, the realized loss from the sale of assets has been higher than our MTM or MTModel. This is attributable to both volatility in subprime markets and that our competitors are closing their CDO warehouse accounts from buying our subprime or CDO positions. The buyer base has suddenly shrunk significantly. As this continues, we expect this lack of liquidity to further weaken our MTMs and feed into our losses in our remaining warehouse marks.”²³²¹

At about 11:00 p.m. that Saturday night, February 24, 2007, Mr. Sparks seemed to reach a decision to liquidate Anderson. He sent an email to Mr. Ostrem, Mr. Bieber, and several others stating: “I want to liquidate Anderson Monday - we should begin the discussion with gsc asap.”²³²²

After Mr. Sparks relayed this decision, Mr. Ostrem and Mr. Bieber began to strategize ways to convince Mr. Sparks to reverse his decision.²³²³ Messrs. Ostrem and Bieber assembled a list of likely buyers of the Anderson securities to present to Mr. Sparks, and brainstormed about other CDOs that could potentially buy Anderson securities for their asset pools.²³²⁴ Mr. Ostrem also proposed allowing a hedge fund to short assets into the deal as an incentive to buy the Anderson securities, but Mr. Bieber thought Mr. Sparks would want to “preserve that ability for Goldman.”²³²⁵

At some point, Mr. Sparks changed his mind and decided to go forward with underwriting the Anderson CDO. None of the Goldman personnel interviewed by the Subcommittee could recall why the final decision was made to go forward with Anderson. In one email on March 2, 2007, Jonathan Egol, head of the Goldman Correlation Trading Desk, suggested adding \$195 million more in assets to Anderson, with Goldman selecting the assets internally and shorting them.²³²⁶ Mr.

²³²¹ 2/24/2007 email from Peter Ostrem to colleagues, GS MBS-E-010383828-29.

²³²² 2/24/2007 email from Daniel Sparks to Peter Ostrem, others, GS MBS-E-001996601, Hearing Exhibit 4/27-95.

²³²³ 2/25/2007 Goldman internal email chain, GS MBS-E-001996601, Hearing Exhibit 4/27-97.

²³²⁴ Id.

²³²⁵ Id.

²³²⁶ 3/2/2007 email from Jon Egol to Daniel Sparks and others, GS MBS-E-010637566, Hearing Exhibit 4/27-97.

Sparks rejected any expansion of Anderson, responding: “we are not ramping - execute deal as is.”²³²⁷

The Anderson CDO closed on March 20, 2007. As finally constructed, 100% of its assets were CDS contracts referencing \$307 million in mezzanine subprime RMBS securities, meaning RMBS securities carrying BBB or BBB- credit ratings. About 45% of the subprime mortgages in the referenced RMBS securities were issued by New Century. Another 8% were issued by Countrywide, and almost 7% were issued by Fremont. Goldman took about 40% of the short side of the Anderson CDO. Ten other investors held the rest of the short interest in the CDO.

Selling Anderson. During March, selling Anderson securities became a top priority for Goldman. Goldman even put another deal on hold, the Abacus 2007-AC1 deal with the Paulson hedge fund, to promote Anderson. As Mr. Egol advised Goldman personnel: “Given risk priorities, subprime news and market conditions, we need to discuss side-lining [Abacus 2007-AC1] in favor of prioritizing Anderson in the short term.”²³²⁸

On March 13, 2007, Goldman issued internal talking points for its sales force on the Anderson CDO. Among the points highlighted were:

“Portfolio selected by GSC. Goldman is underwriting the equity and expects to hold up to 50%. ... Low fee structure[.] ... No reinvestment risk.”²³²⁹

The talking points described Goldman as holding up to 50% of the equity tranche in the CDO – worth about \$21 million, without mentioning that Goldman would also be holding 40% – about \$135 million – of the short side of Anderson, placing its investment interests in direct opposition to the investors to whom it was selling Anderson securities.

The large number of poor assets referenced in Anderson raised investor questions and was an impediment to sales.²³³⁰ One potential investor wrote to a Goldman sales representative explaining its decision not to purchase the Anderson securities:

“We’re going to pass on this deal for a number of reasons: Two bonds . . . have been downgraded or are on negative watch; Another 12 bonds in the portfolio are negatively impacted by the downgrades lower in the capital structure; 28% of the portfolio is failing

²³²⁷ 3/2/2007 email from Daniel Sparks to Jon Egol and others, GS MBS-E-010637566, Hearing Exhibit 4/27-97.

²³²⁸ 3/2/2007 email from Jon Egol to colleagues, “Re: Abacus AC1,” GS MBS-E-002676413, Hearing Exhibit 4/27-64.

²³²⁹ 3/13/2007 email from Peter Ostrem to Scott Wisenbaker and Matthew Bieber, GS MBS-E-000898410, Hearing Exhibit 4/27-172.

²³³⁰ In mid-March, Mr. Ostrem informed the GSI Risk Committee that Goldman’s estimated losses on the assets in the Anderson warehouse account had reached \$22.9 million. 3/16/2007 Goldman Sachs International Risk Committee memorandum, “GSI Warehousing for Structured Product CDOs,” GS MBS-E-001806010-16.

delinquency triggers; We show that a lot of these bonds will take principal hits; Not crazy about the deal structure given the quality of the portfolio.”²³³¹

Other investors expressed concerns that the CDO would be downgraded.²³³² Goldman did not disclose to these investors that it had almost canceled the CDO, due to its assets’ falling values.

Of particular concern for investors was the concentration of New Century mortgages in Anderson.²³³³ On March 13, 2007, a potential investor, Rabobank, asked Goldman sales representatives: “how did you get comfortable with all the new century [sic] collateral in particular the new century serviced deals - considering [sic] you are holding the equity and their servicing may not be around is that concerning for you at all?”²³³⁴ Goldman and GSC prepared a list of talking points with which to respond to the investor:

- “- Historically New Century has on average displayed much better performance in terms of delinq[ue]ncy and default data
- Prepayments have tended to be higher lowering the extension risk
- Losses and REO [Real Estate Owned by a lender taking possession of a property] are historically lower than the rest of the market
- Traditionally the structures have strong enhancement/subordination.”²³³⁵

The talking points did not disclose that, in fact, Goldman, too, was uncomfortable with New Century mortgages. On March 8, 2007, five days before receiving the investor’s inquiry, Mr. Sparks had reported to senior Goldman executives, including Co-President Gary Cohn and CFO David Viniar, that New Century mortgages “remain[ed] a problem for [early payment default].”²³³⁶ On March 13, the same day as the investor inquiry, Goldman personnel completed a review of New Century mortgages with early payment defaults that were on Goldman’s books and found fraud, “material compliance issues,” and collateral problems. The review found that “62% of the pool has not made any pmts [payments]” and recommended “putting back 26% of the pool” to New Century

²³³¹ 5/31/2007 email from Goldman client to Andrew Davilman, GS MBS-E-015550857-58. Andrew Davilman relayed the message to Matthew Bieber, who suggested the client might be interested in higher rated securities. Mr. Davilman responded: “I’ll check, but given the portfolio I suspect he’s looking for a cleaner start.”

²³³² 3/16/2007 email from Russell Brocato to Scott Wisenbaker, GS MBS-E-000902498, Hearing Exhibit 4/27-172. Mr. Bieber and Mr. Ostrem were also informed by a salesperson that the client was “out on Anderson - they feel like the deal will be dow[n]graded and have interest coverage issues.” Mr. Ostrem instructed the Goldman salesperson to “[f]ix the miscommunication so the probability [of sale] goes up.”

²³³³ 3/14/2007 email from Matthew Bieber to Scott Wisenbaker and others, GS MBS-E-000908336, Hearing Exhibit 4/27-172 (“Looking like both dcp and terwin out. New Century issues.”).

²³³⁴ 3/13/2007 email from Wendy Rosenfeld at Rabobank to Olivia Ha at Goldman, GS MBS-E-000898417, Hearing Exhibit 4/27-172.

²³³⁵ 3/6/2007 email from Joshua Bissu to Matthew Bieber and Peter Ostrem, GS MBS-E-014597705.

²³³⁶ 3/8/2007 email from Daniel Sparks to senior executives, GS MBS-E-002206279, Hearing Exhibit 4/27-75.

for repurchase “if possible.”²³³⁷ Goldman also did not disclose to the investor that it was shorting 40% of the Anderson CDO.

Some Goldman clients also had questions about GSC’s involvement in Anderson. An Australian sales representative wanted “more color on asset selection process, especially with respect to GSC involvement.”²³³⁸ This clarification was necessary, because although GSC’s role was mentioned in numerous internal Goldman documents, the official Anderson marketing materials did not mention GSC’s role in asset selection.²³³⁹ In previous drafts of the marketing materials, for example, Goldman stated that “Goldman Sachs and GSC Group co-selected the assets”; “GSC pre-screens and evaluates assets for portfolio suitability”; the CDO was “co-sponsored by Goldman and GSC Eliot Bridge Fund”; and “Goldman Sachs and GSC ha[ve] aligned incentives with Anderson Funding by investing in a portion of equity.”²³⁴⁰ But all of the references to GSC were removed from the final documents.²³⁴¹ Mr. Bieber told the Subcommittee that he did not recall specifically why the references to GSC were removed, but recalled GSC having an issue with disclosing its name in the offering documents.²³⁴² Edward Steffelin, a Senior Trader at GSC, also did not recall the specifics regarding why the references to GSC were removed, but told the Subcommittee that he felt GSC’s role in the Anderson CDO did not rise to the level of “co-selecting.”²³⁴³ Mr. Steffelin said that although GSC had the ability to suggest assets and veto others, he felt that “co-selecting” implied a level of control over the portfolio that GSC didn’t have.²³⁴⁴

²³³⁷ 3/13/2007 email from Manisha Nanik to Loren Morris, “New Century EPDs,” at GS MBS-E-002146861, Hearing Exhibit 4/27-77. See also 2/2/2007 email from Matthew Nichols to Kevin Gasvoda and others, GS MBS-E-005556331 (“NC is running a 10% drop rate [due diligence drop] at ~6 points / drop and 4% EPD rate at close to 20 points.”); 2/8/2007 email from John Cassidy to Joseph Ozment, others, GS MBS-E-002045021 (“Given the current state of the company I am no longer comfortable with the practice of taking loans with trailing docs . . . that we need in order to conduct compliance testing.”).

²³³⁸ 3/1/2007 email from Scott Wisenbaker to Peter Ostrem and Matthew Bieber, GS MBS-E-000893661, Hearing Exhibit 4/27-172.

²³³⁹ 2/2007 Anderson Mezzanine Funding 2007-1, Ltd. Debt Marketing Book, GS MBS-E-000855351.

²³⁴⁰ 2/2007 Anderson Mezzanine Funding 2007-1, Ltd. Equity Marketing Book, GS MBS-E-000892557-598 at 560, 569.

²³⁴¹ 2/2007 Anderson Mezzanine Funding 2007-1, Ltd. Debt Marketing Book, GS MBS-E-000855351. Anderson Mezzanine Funding 2007-1, Ltd. Debt Marketing Book, GSC-CDO-FCIC-0031712 at 726. Around the time Goldman was deciding whether to underwrite Anderson, Fred Horton, head of CDOs at GSC, left the firm. While discussing whether to issue or underwrite the CDO with Matthew Bieber, Mr. Ostrem commented: “Will need disclosure on Horton. This looks bad.” 2/25/2007 email from Peter Ostrem to Matthew Bieber, GS MBS-E-001996601, Hearing Exhibit 4/27-95.

²³⁴² Subcommittee interview of Matthew Bieber (10/21/2010).

²³⁴³ Subcommittee interview of Edward Steffelin (12/10/2010). The marketing materials also stated that the Anderson assets were “sourced from the Street.” Mr. Steffelin described this as a “weird phrase,” but felt it implied “it would be open, sourced from all over.” See discussion of the phrase, “sourced from the Street,” in the prior section on Hudson 1.

²³⁴⁴ Id. Despite GSC’s not being listed as having helped select the Anderson assets, some investors appeared to be aware of its involvement, perhaps from talking to Goldman personnel. See 3/28/2007 email from Matthew Bieber to Edward Steffelin, “ACA Meeting,” GS MBS-E-014419176 (“Questions on [Anderson] - but also want to do manager due diligence. They’ve heard the GSC team shows well - so want to meet you in person.”).

Despite the poor reception by investors, Goldman continued “pushing the axe” with its sales force to sell Anderson securities.²³⁴⁵ Mr. Bieber identified and monitored potential investors and attempted to sell Anderson securities to pension funds and place Anderson securities in other Goldman CDOs as collateral securities.²³⁴⁶ On March 20, 2007, when Mr. Bieber reported selling \$20 million in Anderson securities, his supervisor, Mr. Ostrem, responded with the single word: “Profit!”²³⁴⁷ In a separate email a week later, Mr. Ostrem told Mr. Bieber he did “an excellent job pushing to closure these deals in a period of extreme difficulty.”²³⁴⁸

After several months of effort, Goldman was able to sell only a third, or about \$102 million of the \$307 million in Anderson securities.²³⁴⁹ The nine investors included Beneficial Life, Moneygram, and GSC which purchased the entire \$11 million class D portion of the CDO.²³⁵⁰

Losing Money from Anderson. Due to its inability to sell two-thirds of the Anderson securities, Goldman lost money overall on the CDO. Goldman’s biggest gain came from holding 40% of the short position on certain Anderson assets, which produced a \$131 million gain at the direct expense of the investors to whom Goldman had sold the Anderson securities. Goldman was also paid \$200,000 for serving as the liquidation agent,²³⁵¹ and collected \$2 million in CDS premiums while it warehoused Anderson assets.²³⁵²

Despite those gains, Goldman incurred a \$185 million loss from the Anderson securities it was unable to sell and had to keep on its books. It incurred another \$122 million loss due to the decreased value of the securities Goldman had purchased as collateral for the CDO.

Anderson’s nine investors suffered more substantial losses. Seven months after its issuance, in November 2007, Anderson securities experienced their first ratings downgrades. At that point, 27% of the assets underlying Anderson were downgraded below a B- rating.²³⁵³ GSC then sold back to Goldman a portion of the Anderson securities it had purchased at a price of 3 cents on the dollar.²³⁵⁴ Within a year, Anderson securities that were originally rated AAA had been downgraded to BB. In the end, the Anderson investors were wiped out and lost virtually their entire investments.

Analysis. Goldman constructed the Anderson CDO using CDS contracts referencing subprime RMBS securities, the majority of which were issued by subprime lenders like New

²³⁴⁵ 3/12/2007 email from Robert Black to Matthew Bieber, others, GS MBS-E-000898037.

²³⁴⁶ Id.

²³⁴⁷ 3/20/2007 email from Peter Ostrem to Matthew Bieber and others, GS MBS-E-000906269, Hearing Exhibit 4/27-172.

²³⁴⁸ 3/27/2007 email from Peter Ostrem to Matthew Bieber, GS MBS-E-000907935, Hearing Exhibit 4/27-172.

²³⁴⁹ See Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235.

²³⁵⁰ GSC paid a price of 108.21% for the securities. See Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235.

²³⁵¹ See Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235.

²³⁵² See Goldman response to Subcommittee QFR at PSI_QFR_GS0239.

²³⁵³ 1/3/2008 email from Shelly Lin to Mr. Sparks, GS MBS-E-021880171 (attached file, “Deal Summary,” Excel Spreadsheet showing credit ratings for Anderson).

²³⁵⁴ See Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235.

Century who were known for issuing poor quality loans. When potential investors asked how Goldman was able to “get comfortable” with the New Century mortgage pools referenced in Anderson, Goldman attempted to dispel concerns about the New Century loans, withheld information about its own discomfort with New Century, and withheld that it was taking 40% of the short side of the CDO, essentially betting against the very securities it was selling to its clients. Instead, Goldman instructed its sales force to tell potential investors that Goldman was buying up to 50% of the equity tranche. Goldman also did not disclose to potential investors that it had almost cancelled the CDO due to the falling value of its assets.

CC. Timberwolf I

Timberwolf I was a \$1 billion hybrid CDO² transaction that Goldman constructed, underwrote, and sold. It contained or referenced A rated CDO securities which, in turn, referenced primarily BBB rated RMBS securities. The assets in Timberwolf were selected by Greywolf Capital Management, a registered investment adviser, with the approval of Goldman. Greywolf served as the collateral manager of the CDO.²³⁵⁵ Goldman effectively served as the collateral put provider.²³⁵⁶ Timberwolf was initiated in the summer of 2006, and closed in March 2007.

Partnering with Greywolf. Greywolf Capital Management was founded by a team of former employees of Goldman’s fixed income trading division.²³⁵⁷ It had experience in constructing and investing in CDOs. In the summer of 2006, Peter Ostrem, head of Goldman’s CDO Origination Desk, approached Greg Mount, a former Goldman trader working for Greywolf, and asked if Greywolf would be interested in managing a CDO² transaction.²³⁵⁸ Goldman and Greywolf negotiated a risk sharing agreement, and worked through the profitability of the CDO² under expected market conditions. Greg Mount, as well as Joseph Marconi, another former Goldman trader, obtained approval from Greywolf’s Chief Investment Officer to manage the CDO.

Greywolf agreed to purchase half of the Timberwolf equity tranche, sharing that risk with Goldman.²³⁵⁹ In addition, Greywolf agreed to share with Goldman the risk of the assets being purchased for the CDO falling in value before the CDO issued its securities. Greywolf also accepted the responsibility of selecting the assets with the approval of Goldman, which would then keep them in a warehouse account for the Timberwolf CDO. Greywolf agreed to provide ongoing surveillance of the performance of the assets in the CDO and liquidate any assets deemed to be impaired.

Constructing Timberwolf. In September 2006, Greywolf began identifying, purchasing, and warehousing CDO securities or single name CDS referencing CDO securities for Timberwolf.

²³⁵⁵ 2/2007 Timberwolf I, Ltd. Marketing Book, GS MBS-E-000676809, Hearing Exhibit 4/27-99a.

²³⁵⁶ For more information about Goldman’s actions as the collateral put provider for Timberwolf, see Section (iii)(BB), below.

²³⁵⁷ 2/2007 Timberwolf I, Ltd. Marketing Book, GS MBS-E-000676809, Hearing Exhibit 4/27-99a.

²³⁵⁸ Subcommittee interview of Joseph Marconi (10/19/2010).

²³⁵⁹ Greywolf eventually purchased the entire equity tranche in Timberwolf. See Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235.

Before selecting an asset for inclusion in Timberwolf, Greywolf did a detailed credit analysis of the relevant CDO security, including examining its underlying mortgage portfolio, the CDO's cashflow structure, and the mortgage servicer.²³⁶⁰ Once Greywolf finished its credit analysis, it submitted its choices to Goldman's CDO Origination Desk for review by Mr. Ostrem and Matthew Bieber, who was assigned to be the Goldman deal captain for Timberwolf. Goldman had the right to approve each asset going into the Timberwolf warehouse account and thus onto Goldman's warehouse balance sheet.

Once an asset was approved by both Greywolf and Goldman, it was acquired in one of two ways. In most instances, Greywolf circulated a list of the CDO securities or reference CDO securities that it was interested in buying to the broker-dealer community to get bids. To buy a single name CDS, Goldman wrote the CDS contract, taking the long side on behalf of Greywolf, while the broker-dealer who provided the best bid took the short side. The CDS contract would then be held by Goldman in the Timberwolf warehouse account until the CDO was ready to close.²³⁶¹ In some instances, after circulating a list for bids, a broker-dealer responded to Greywolf's request with a price for a single name CDS on a similar CDO security, which Greywolf analyzed and sometimes agreed to acquire.²³⁶²

Timberwolf's single name CDS and CDO securities were acquired from 12 different broker-dealers.²³⁶³ Goldman was the single largest source of assets, providing 36% of the assets by value, including \$15 million in single name CDS contracts naming Abacus securities.²³⁶⁴ As a result, Goldman held 36% of the short interest in Timberwolf.²³⁶⁵ Altogether, Timberwolf contained 56 different assets, of which 51 were single name CDS contracts referencing CDO securities and five were cash CDO securities.²³⁶⁶ The 51 single name CDS contracts referenced both CDO and CDO² securities, and each CDO or CDO² security contained or referenced its own RMBS, CMBS, or CDO securities or other assets. In total, Timberwolf had over 4,500 unique underlying securities and a grand total of almost 7,000 securities.²³⁶⁷ This process was further complicated by the fact that the CDO assets in Timberwolf were privately issued and often had little or no publicly available information on the underlying assets they contained.

²³⁶⁰ Subcommittee interview of Joseph Marconi (10/19/2010).

²³⁶¹ In some cases, Goldman was permitted to "top-up" the deal, taking the short side on an additional \$5 million in the same CDO security at the same price paid by the auction winner. Greywolf's goal was for each reference asset to be \$20 million in size, but often asked for bids on only \$10-15 million worth of CDS protection in order to get a better spread. Goldman would then have the option of providing the remaining \$5-10 million in CDS protection at the transaction price, resulting in a total position size of \$20 million on the Timberwolf balance sheet.

²³⁶² Joseph Marconi told the Subcommittee that well over half the assets were obtained through auctions, while just a few were negotiated. Subcommittee interview of Joseph Marconi (10/19/2010).

²³⁶³ See Goldman response to Subcommittee QFR at PSI_QFR_GS0192.

²³⁶⁴ The Abacus securities were cash assets. However, due to the synthetic nature of the Abacus CDOs, Goldman retained a short interest in \$15 million in Abacus securities.

²³⁶⁵ Timberwolf had about one dozen short parties of which Goldman was the largest. See Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235.

²³⁶⁶ A total of 84 CDS contracts produced the 51 unique reference assets. See Goldman response to Subcommittee QFR at PSI_QFR_GS0192.

²³⁶⁷ 8/23/2007 email from Jay Lee to Matthew Bieber, David Lehman, and others, GS MBS-E-001927784.

By the time Greywolf and Goldman were nearing completion of the acquisition of the Timberwolf assets in the spring of 2007, Goldman was becoming increasingly concerned about the deteriorating subprime mortgage market and the falling value of the assets in its CDO warehouse accounts. In February 2007, Mr. Sparks, the Mortgage Department head, and Goldman senior executive Thomas Montag exchanged emails about the warehouse risk posed by Timberwolf and another pending CDO² called Point Pleasant. Mr. Montag asked Mr. Sparks: “cdo squared—how big and how dangerous?”²³⁶⁸ Mr. Sparks responded: “[R]oughly 2bb [billion], and they are the deals to worry about.” Mr. Sparks also told Mr. Montag that, due to falling subprime prices, the assets accumulated in the warehouse account for the \$1 billion Timberwolf CDO had already incurred significant losses, those losses had eaten through all of Greywolf’s portion of the warehouse risk sharing agreement, and any additional drops in value would be Goldman’s exclusive obligation.²³⁶⁹

In March 2007, due to the falling values of subprime RMBS and CDO securities, Goldman decided against completing several CDOs under construction, and liquidated the assets in their warehouse accounts. Goldman decided, in contrast, to accelerate completion of Timberwolf.²³⁷⁰

Timberwolf I closed on March 27, 2007, approximately six weeks ahead of schedule.²³⁷¹ The final CDO had \$1 billion in cash and synthetic assets, including \$960 million in single name CDS referencing CDO securities, and \$56 million in cash CDO securities.

Selling Timberwolf. Selling Timberwolf securities became a high priority for Goldman. Mr. Sparks worked with senior sales managers to review ideas, telling them: “I can’t over state the importance to the business of selling these positions and new issues.”²³⁷²

During the spring and summer of 2007, the Goldman Syndicate²³⁷³ emailed the CDO sales force a list of “Senior CDO Axes” or sales directives on a weekly and sometimes daily basis, many of which placed a priority on selling Timberwolf securities.²³⁷⁴ As early as February, the Goldman sales force developed “broader lists” of clients to target for Timberwolf sales.²³⁷⁵ After exhausting

²³⁶⁸ 2/26/2007 email exchange between Tom Montag and Daniel Sparks, GS MBS-E-019164799.

²³⁶⁹ 2/26/2007 email exchange between Tom Montag and Daniel Sparks, GS MBS-E-010989241.

²³⁷⁰ 3/7/2007 email from Gaelyn Sharp, GS MBS-E-001800634.

²³⁷¹ 3/2007 email chain, “Timberwolf I, Ltd. Preliminary Offering Circular,” GS MBS-E-001800634.

²³⁷² 3/9/2007 email from Daniel Sparks, “Re: Help,” GS MBS-E-010643213, Hearing Exhibit 4/27-76.

²³⁷³ According to Goldman personnel interviewed by the Subcommittee, the Syndicate coordinated sales efforts between the CDO Origination Desk and the CDO sales force.

²³⁷⁴ See, e.g., 4/11/2007 Goldman internal email, “GS Syndicate Structured Product CDO Axes (INTERNAL),” Hearing Exhibit 4/27-101; 4/19/2007 Goldman internal email, Hearing Exhibit 4/27-102; 6/22/2007 Goldman internal email, Hearing Exhibit 4/27-166. These “axe sheets” contained directives for selling Goldman issued securities and other financial products, as well as congratulatory and motivational notes. Some Goldman traders had a negative view of the axe sheets. One trader wrote, for example, that he was “guessing sales people view the syndicate ‘axe’ email we have used in the past as a way to distribute junk that nobody was dumb enough to take first time around.” 10/24/2006 Goldman internal email, GS MBS-E-009557699, Hearing Exhibit 4/27-170d.

²³⁷⁵ 2/14/2007 email from Robert Black to Matthew Bieber and others, GS MBS-E-001996121.

those initial lists, Goldman sales personnel began to target “non-traditional” buyers²³⁷⁶ as well as clients outside of the United States.²³⁷⁷ The sales force had some early successes. On March 28, 2007, for example, the Syndicate included a note in one of the axe sheets:

“Great job Cactus Raazi trading us out of our entire Timberwolf Single-A position – \$16mm. Sales - Good job over the last two weeks moving over \$66mm of risk off the axe sheet. Please stay focused on trading these axes.”²³⁷⁸

As sales began to flag in April, Mr. Sparks sent emails reminding Goldman sales personnel that Timberwolf “is our priority.”²³⁷⁹ On one occasion, on April 19, 2007, Mr. Sparks suggested to a sales manager offering “ginormous credits” as an incentive to sell Goldman’s CDO securities: “for example, let’s double the current offering of credits for [T]imberwolf.”²³⁸⁰ Mr. Sparks was informed in response: “[W]e have done that with timberwolf already.”

On March 9, 2007, Harvey Schwartz, a senior executive at Goldman Sachs, expressed concern to Mr. Sparks and others about what Goldman sales personnel were telling clients: “Seems to me ... one of our biggest issues is how we communicate our views of the market – consistently with what the desk wants to execute.”²³⁸¹ Mr. Sparks responded by outlining several concerns and the need for the sales team and traders to work together.²³⁸² He wrote:

“3 things to keep in mind:

- (1) The market is so volatile and dislocated that priorities and relative value situations change dramatically and constantly.
- (2) Liquidity is so light that discretion with information is very important to allow execution and avoid getting run over.
- (3) The team is working incredibly hard and is stretched.”

He concluded: “Priority 1 – sell our new issues and our cash positions.”

Pricing Timberwolf Securities. Despite the urgency communicated by Goldman management, Timberwolf sales slowed. By May 11, 2007, only one Timberwolf sale had taken place in the previous several weeks.²³⁸³ Goldman personnel also knew that the value of the Timberwolf securities, and the value of their underlying assets, were falling.²³⁸⁴

²³⁷⁶ 3/21/2007 email from Robert Black, “Non-tradition Buyer Base for CDO AXES,” GS MBS-E-003296460, Hearing Exhibit 4/27-78.

²³⁷⁷ 3/2007 Goldman internal email chain, GS MBS-E-010643213, Hearing Exhibit 4/27-76.

²³⁷⁸ 3/28/2007 Goldman email from the Syndicate, GS-MBS-E-000740958, Hearing Exhibit 4/27-100.

²³⁷⁹ See, e.g., 4/11/2007 email from Daniel Sparks, GS MBS-E-010533482, Hearing Exhibit 4/27-101.

²³⁸⁰ 4/19/2007 email from Daniel Sparks to Bunty Bohra, GS MBS-E-010539324, Hearing Exhibit 4/27-102.

²³⁸¹ 3/8/2007 email from Harvey Schwartz, GS MBS-E-010643213, Hearing Exhibit 4/27-76.

²³⁸² 3/9/2007 email from Daniel Sparks, GS MBS-E-010643213, Hearing Exhibit 4/27-76.

²³⁸³ See Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235.

²³⁸⁴ In fact, the decline had begun within a month after Timberwolf closed in late March. 9/17/2007 email from Christopher Creed, “RE: Timberwolf,” GS MBS-E-000766370, Hearing Exhibit 4/27-106 (showing price for Timberwolf securities carrying an AAA credit rating had fallen from \$94 on 3/31/2007 to \$87 on 4/30/2007).

On May 11, 2007, Mr. Sparks notified Goldman senior executives that marking down the value of the unsold CDO securities so that, internally, the firm understood their current market value had become a “real issue”:

“Cdo positions and market liquidity and transparency have seized. I posted senior guys that I felt there is a real issue. ... We are going to have a very large markdown – multiple hundreds. Not good.”²³⁸⁵

That same evening, Mr. Lehman sent out a “Gameplan” to colleagues in the Mortgage Department announcing that Goldman was going to undertake a detailed valuation of its CDO² securities using three different valuation methods, and would also take “a more detailed look” at the values of the assets in the CDO warehouse accounts and in Goldman’s own inventory.²³⁸⁶

Also on May 11, Chief Credit Officer Craig Broderick sent an email to his team to set up a survey of Goldman clients who might encounter financial difficulty if Goldman lowered the value of the CDO securities they had purchased.²³⁸⁷ As explained earlier, some Goldman clients had purchased their CDO securities with financing supplied by Goldman that required them to post more cash margin if the financed securities lost value. Other clients had invested in the CDO securities by taking the long side of a CDS contract with Goldman and also had to post more cash collateral if the value of the CDO securities declined. All of these clients would also have to record a loss on their books due to the lowered valuations.

With respect to the CDO securities that had yet to be sold, Goldman senior executive Harvey Schwartz raised another issue related to lowering the values of the CDO securities Goldman was selling to clients: “[D]on’t think we can trade this with our clients andf [sic] then mark them down dramatically the next day. ... Needs to be a discussion if that risk exists.”²³⁸⁸ In an email to Mr. Sparks, Mr. Montag, and Mr. Schwartz, Goldman senior executive Donald Mullen acknowledged concerns “about the representations we may be making to clients as well as how we will price assets once we sell them to clients.”²³⁸⁹ The executives also agreed, however, not to “slow or delay” efforts to sell Timberwolf securities if they got “strong bids.”²³⁹⁰

The CDO valuation project generated many comments on how to price the firm’s unsold CDO securities, including Timberwolf. One Goldman employee, who was applying Goldman’s most common valuation method to Timberwolf, wrote that the price should be dramatically lower:

²³⁸⁵ 5/11/2007 email from Daniel Sparks to Richard Ruzika, GS MBS-E-019659221. Mr. Sparks also noted that he had a meeting with David Viniar, Don Mullen, and Gary Cohn to discuss the issue.

²³⁸⁶ 5/11/2007 email from David Lehman, GS MBS-E-003361238. For more information on this CDO valuation project, see Section C(5)(a)(iii)BB, above.

²³⁸⁷ 5/11/2007 email from Craig Broderick, “CDO’s - Mortgages,” GS MBS-E-009976918, Hearing Exhibit 4/27-84.

²³⁸⁸ 5/11/2007 email from Harvey Schwartz to Daniel Sparks, Tom Montag, and others, GS MBS-E-010780864.

²³⁸⁹ 5/11/2007 email from Donald Mullen to Daniel Sparks, GS MBS-E-010780849, Hearing Exhibit 4/27-103.

²³⁹⁰ Id. at GS MBS-E-010780848-49.

“Based on current single-A CDO marks, the A2 tranche of Timberwolf would have a price of 72 cents on the dollar.”²³⁹¹ He also noted:

“Based on a small sample of single-A CDOs for which we have a complete underlier marks, we believe that the risks of the RMBS underliers are frequently not fully reflected in the marks on the CDOs. If the trends in this small sample are extrapolated, the fair spread on the CDOs could even be double where they are marked now; if that were the case, the price of the A2 tranche of Timberwolf would actually be 35-41 cents on the dollar, depending on the correlation.”²³⁹²

Several days later, in preparation for a meeting with senior executives on the valuation issue, the same Goldman employee calculated that, for the A2 tranche of Timberwolf, the “price based on CDO marks” was 66 cents on the dollar, while the “price based on RMBS marks” was 24 cents on the dollar.²³⁹³

Throughout the valuation process, senior management, including Co-President Gary Cohn, was kept posted on how the Mortgage Department planned to value the firm’s CDO assets.²³⁹⁴ On Sunday, May 20, 2007, the Mortgage Department presented its findings in a 9:00 p.m. conference call with CFO David Viniar and others.²³⁹⁵ The presentation’s executive summary expressed concern about valuing a range of CDO assets, including unsold securities from Goldman-originated CDOs.²³⁹⁶ The presentation stated: “[T]he desk is most concerned about the CDO² positions, comprised of the recent Timberwolf and Point Pleasant transactions. The lack of liquidity in this space and the complexity of the product make these extremely difficult to value.”²³⁹⁷

The presentation recommended unwinding and selling the assets in the CDO warehouse accounts and using “independent teams” to continue to value the unsold CDO securities from Goldman originations. It also recommended switching to a targeted sales effort for the unsold

²³⁹¹ 5/13/2007 email from Paul Bouchard to David Lehman, Daniel Sparks, and others, GS MBS-E-003361238.

²³⁹² Id.

²³⁹³ 5/20/2007 email from Paul Bouchard, “Materials for Meeting,” GS MBS-E-001863725.

²³⁹⁴ 5/14/2007 email from Elisha Weisel, “Modeling Approaches for Cash ABS CDO/CDO²,” GS MBS-E-001863618.

²³⁹⁵ 5/20/2007 email from Lee Alexander to Daniel Sparks, Donald Mullen, Lester Brafman, and Michael Kaprelian, “Viniar Presentation - Updated,” GS MBS-E-010965211 (attached file “Mortgages V4.ppt,” “Mortgages Department, May 2007,” GS MBS-E-010965212).

²³⁹⁶ Id. At least two drafts of the presentation also stated about Timberwolf and Point Pleasant that “the complexity of the CDO² product and the poor demand for CDOs in general has made this risk difficult to sell and the desk expects it to underperform.” This assessment was removed from the final version provided to senior executives. See 5/19/2007 email from Dan Sparks to Lee Alexander, and others, GS MBS-E-010973174 (attached file “Mortgages V3.ppt,” GS MBS-E-010973175); 5/20/2007 9:52 a.m. draft presentation, “Mortgages V4.ppt,” GS MBS-E-010952331; 5/20/2007 email from Lee Alexander to Daniel Sparks, Donald Mullen, Lester Brafman, and Michael Kaprelian, “Viniar Presentation - Updated,” GS MBS-E-010965211 (final version) (attached file, “Mortgages Department,” GS MBS-E-010965212).

²³⁹⁷ 5/20/2007 email from Lee Alexander to Daniel Sparks, Donald Mullen, Lester Brafman, and Michael Kaprelian, “Viniar Presentation - Updated,” GS MBS-E-010965211 (attached file “Mortgages V4.ppt,” “Mortgages Department, May 2007,” GS MBS-E-010965212 at 14).

CDO² securities, focused on four hedge fund clients: Basis Capital, Fortress, Polygon, and Winchester Capital.²³⁹⁸ The Goldman sales force apparently felt those four hedge funds were the clients most likely to buy the CDO² securities, and two of them, Basis Capital and Polygon, did subsequently purchase Timberwolf securities.²³⁹⁹ An appendix to the presentation identified another 35 clients for targeted sales efforts and provided an assessment of the CDO sales efforts for each.²⁴⁰⁰ Several of those clients later purchased Timberwolf securities.²⁴⁰¹

Despite Goldman's internal analysis that the value of the Timberwolf securities was in rapid decline, the firm did not lower the prices at which it marketed the securities to clients. In a May 14 email, Mr. Sparks explained his Timberwolf pricing strategy to Mr. Mullen and Mr. Montag:

"I think we should take the write-down, but market at much higher levels. I'm a little concerned we are overly negative and ahead of the market, and that we could end up leaving some money on the table – but I'm not saying we shouldn't find and hit some bids."²⁴⁰²

As a result of the CDO valuation project, Goldman took substantial writedowns on the value of its CDO inventory on May 25, 2007.²⁴⁰³ For example, Goldman marked down the AAA rated Timberwolf A2 securities to a value of \$80.²⁴⁰⁴ At the same time, Goldman continued to market them at inflated prices, selling Timberwolf A2 securities to clients at \$87.00 on May 24, at \$83.90 on May 30, and at \$84.50 on June 11.²⁴⁰⁵ On May 25, Goldman also marked the AA rated Timberwolf B securities to an internal value of \$65.00. Over a month later, Goldman sold \$9

²³⁹⁸ Id. at 24.

²³⁹⁹ Polygon had already purchased Timberwolf securities prior to the drafting of the presentation, and was apparently targeted for additional Timberwolf or Point Pleasant sales. See Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235. Goldman had an existing relationship with Basis Capital. Goldman had engaged Basis Capital several months earlier as a collateral manager of a CDO Goldman was underwriting called Fort Denison. Mr. Ostrem, head of the CDO Origination Desk, apparently had a low opinion of the firm, describing the firm in an email to Mr. Bieber as "paranoid" and "not very sharp." He told Mr. Bieber that Goldman should "be nice and just sell them stuff going forward." 1/15/2007 email from Peter Ostrem to Matthew Bieber, GS MBS-E-001125549.

²⁴⁰⁰ 5/20/2007 email from Lee Alexander to Daniel Sparks, Donald Mullen, Lester Brafman, and Michael Kaprelian, "Viniar Presentation - Updated," GS MBS-E-010965211 (attached file "Mortgages V4.ppt," "Mortgages Department, May 2007," GS MBS-E-010965212 at 31).

²⁴⁰¹ See Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235.

²⁴⁰² 5/14/2007 email from Daniel Sparks to Tom Montag and Donald Mullen, GS MBS-E-019642797.

²⁴⁰³ 5/26/2007 email from Michael Swenson to others, GS MBS-E-012443166 (attached file, "ABS Sec_0525," GS MBS-E-012443167).

²⁴⁰⁴ These prices indicate a percentage of security's face (par) value. A price of \$80 would be 80% of par or 80 cents on the dollar.

²⁴⁰⁵ See Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235; 6/1/2007 email from David Lehman to Daniel Sparks, GS MBS-E-001866889 (indicating Goldman sold Timberwolf securities to Tokyo Star Bank for \$83.90, when Goldman's own mark was 80). Goldman took similar action with respect to its other CDO², Point Pleasant, marking down the internal value of its A2 securities to \$82.50 on May 25, 2007, while on May 24, 2007, selling \$40 million of the A2 securities to a client at a price of \$91.00, a difference in market value of \$3.4 million. See 5/26/2007 email from Michael Swenson to others, GS MBS-E-012443166 (attached file, "ABS Sec_0525," GS MBS-012443167).

million of those AA rated securities to Bank Hapoalim at a price of \$78.25, but by then Goldman's internal valuation had fallen to \$55, a difference of more than 30% of the market value.²⁴⁰⁶

In addition to marketing its CDOs at inflated prices compared to its internal valuations, the Mortgage Department told some clients that the mortgage market was strengthening. On May 14, 2007, for example, Edwin Chin, a trader on the Mortgage Department's ABS Desk, sent this upbeat commentary to both Goldman traders and clients:

"Incredible as it may seem, the subprime mortgage slump is already [a] distant memory for some. It's been two months since the ABX market plunged amid worries about a housing meltdown, and already investors (and some dealers) are beginning to get 'complacent' again. Blame it on the CDO bids, but with subprime production projected down 40-60% from last year's level, appetite for spread products triumphs any risk concern in the marketplace right now. ABX Index is trading higher as dealers short cover their single name positions after a month of range-bound trading. Flows continue to weigh toward better seller of protection - longs outpace shorts by 3 to 1 as CDO demand has been robust the last two weeks. While warehouse activities might be slow, many CDOs are still looking to finish up their ramp post-closing."²⁴⁰⁷

Daniel Sparks responded to Edwin Chin's commentary by asking senior ABS traders, David Lehman, Mike Swenson, and Joshua Birnbaum: "Is this a head fake or does this make you bullish on all spread product?" Mr. Lehman responded: "[G]iven the sizable short interest in ABS/subprime mkt it does not surprise me that short covering is pushing spds [spreads] tighter. Not sure I would enter new longs here." Mr. Swenson responded: "I would characterize this as a great opportunity to be constructive on the market."²⁴⁰⁸

²⁴⁰⁶ See 7/12/2007 "Goldman Warehouse SP CDO positions and hedges_7-12-07," GS MBS-E-001866482; See also Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235. In an interview with the Subcommittee, David Lehman explained that the bid/offer spread (the difference between the price at which a security is offered for sale ["offer price"] and the price at which a bank would buy the same security ["bid price"]) was the reason for the difference between Goldman's internal valuation of the price of the AA rated securities and price at which it sold them to Bank Hapoalim. However, in many instances during this period, it appeared as if Goldman's internal valuation price had no relationship to the bid and offer prices quoted to clients. For example, at the end of June 2007, Goldman provided Timberwolf investor Moneygram with an offer price of \$86 for Timberwolf A2 securities and bid price of \$83, indicating a bid/offer spread of 3 points. Meanwhile, Goldman had an internal valuation of \$75 for the same securities, far different from \$83 and \$86 quoted to Moneygram. See Moneygram valuation, 7/5/2007 email from Goldman Sachs Operations, "MoneyGram Marks from GS as of 06/29/07," GS MBS-E-022023387; Goldman internal evaluations see "Warehouse SP CDO positions and hedges_6-29-07," GS MBS-E-010809241. See also 6/6/2007 email from Sheara Fredman, GS MBS-E-010795808 and attachment GS MBS-E-010795809. Goldman's pricing in such situations seemed consistent with the strategy articulated earlier by Mr. Sparks, the head of the Mortgage Department, that Goldman should write down the value of the assets, "but market [the CDO securities] at much higher levels," because he was concerned that Goldman was "overly negative and ahead of the market, and that [Goldman] could end up leaving some money on the table." 5/14/2007 email from Tom Montag to Daniel Sparks, GS MBS-E-019642797.

²⁴⁰⁷ 5/14/2007 email from Edwin Chin, GS MBS-E-012553986.

²⁴⁰⁸ Mr. Birnbaum responded directly to Mr. Swenson: "what a beautiful quote." Id.

A few weeks later, Mr. Lehman forwarded an email to Goldman executives informing them “the market feels that GS is being more aggressive than other dealers moving CDO² paper,” and marking down clients more than their competitors.²⁴⁰⁹ Don Mullen responded: “Does this give any one pause about our selling prices?” Mr. Swenson responded to Mr. Mullen: “[N]o pause[.] [E]veryone else is afraid to execute at these levels and they will be wishing for these prices by the end of the summer.” Mr. Sparks added: “There is real market meltdown potential (although far from certain).”²⁴¹⁰

Timberwolf Sales to Basis Capital. At the conclusion of the CDO valuation project, which found that Timberwolf and Goldman’s other CDO securities had lost significant value, the Mortgage Department resumed its efforts to push Timberwolf sales.

On Sunday, May 20, 2007, the same day the Mortgage Department made its valuation presentation to Mr. Viniar and recommended targeting Basis Capital for CDO sales, George Maltezos, the Goldman sales representative responsible for Basis Capital, emailed Mr. Lehman saying he would contact the Basis Capital principals immediately upon their return from a business trip the following day.²⁴¹¹

Mr. Maltezos began pressing Basis Capital to buy the securities. On May 22, Mr. Maltezos urged Basis Capital to consider buying the securities before the end of the quarter:

“I appreciate you are flat chat [busy] at the moment, but pls [please] keep in mind GS is an aggressive seller of risk for QTR [quarter] end purposes (last day of quarter is this Friday). We would certainly appreciate your support, and equally help create something where the return on invested capital for Basis is over 60%.”²⁴¹²

At the same time Mr. Maltezos was claiming that a Timberwolf investment could provide over a 60% return on invested capital, Goldman’s internal marks were showing that Timberwolf was continuing to fall in value.

Basis Capital indicated that it was interested in the Timberwolf securities, but had several issues it needed to work through. First, Basis Capital indicated that Goldman would have to help it

²⁴⁰⁹ 6/6/2007 email from David Lehman, GS MBS-E-001936955.

²⁴¹⁰ 6/6/2007 email from Daniel Sparks, GS MBS-E-001922156. Mr. Lehman further responded: “thk abt this - if we establish a defined + healthy supply/demand dynamic in this product we can always create more CDO² at a significant profit vs current levels,” meaning that since Goldman’s internal marks were so much lower than the bids it was providing clients, if a client chose to buy additional securities at Goldman’s bid price, Goldman could sell the securities by taking a short position on a CDS facing the client, and make money on the trade. 6/6/2007 email from David Lehman, GS MBS-E-001936955.

²⁴¹¹ 5/20/2007 email from George Maltezos, Goldman Australia sales, to David Lehman, “T/wolf and Basis,” GS MBS-E-001863555 (“FYI – basis are back from their 2 week business trip on Monday. My focus will go to timberwolf 100mm AAA and AA block trade with them. . . . Pls confirm you are willing to trade this at [then-current marks] and that you are not marking these bonds any wider at moment for month end May.”).

²⁴¹² 5/22/2007 email from George Maltezos to John Murphy of Basis Capital Management, JUL 000685.

find financing for the purchase price.²⁴¹³ Second, Basis Capital was concerned about the value of its existing CDO² investment with Goldman. On April 19, 2007, Basis Capital had purchased BBB rated Point Pleasant securities at a price of \$81.72.²⁴¹⁴ Goldman had provided the financing for this purchase. Two weeks later, Goldman had marked down the value of the securities to \$76.72, and asked Basis Capital to post additional cash collateral totaling \$700,000.²⁴¹⁵ When Basis Capital asked how the value of the security had fallen \$5 in just two weeks, Goldman responded that the price had gone back up to \$81.72, and no additional cash was required.²⁴¹⁶

In May and June 2007, Mr. Maltezos worked to convince Basis Capital to purchase \$100 million in Timberwolf securities. At one point Basis Capital pressed for a lower sales price, but was told by Mr. Maltezos: “I don’t think the trading desk shares the sentiment with regard to such spread levels [lower prices].”²⁴¹⁷ During the negotiations over the Timberwolf sale, on June 12, 2007, Goldman again marked down the value of the Point Pleasant securities to \$75, and again asked Basis to post more cash collateral.²⁴¹⁸ When Basis Capital asked Mr. Maltezos to justify the lower value, Mr. Maltezos wrote:

“[T]here has been further softening in the market since the Point Pleasant trade was put on 8 weeks ago. We have infact [sic] traded some Point Pleasant BBBs at this level in the last 2 weeks.”²⁴¹⁹

²⁴¹³ See, e.g., 5/30/2007 email from George Maltezos to John Murphy and Stuart Fowler, JUL 002032.

²⁴¹⁴ See Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235.

²⁴¹⁵ See 5/1/2007 email from Macdara Molloy to Phillipa Chen, GS MBS-E-002003102.

²⁴¹⁶ Id.

²⁴¹⁷ 5/30/2007 email from George Maltezos to John Murphy and Stuart Fowler at Basis Capital, JUL 002032.

“From a pricing perspective, we have been trading Timberwolf AAA and AA bonds. 550 dm on AAAs and north of 700dm on AAs is considered too wide for Timberwolf. . . . To be constructive, however, I know the desk is entertaining block size trades at the moment from real money accounts in the US and Asia at wide levels (much wider than what they have traded before). To give you a sense, I think these represent 400-450dm and 650-700dm respectively (for size) at the widest level of such enquiries.” The notation “dm” refers to “discount margin.” Higher discount margins correspond to lower par prices on investments. See e.g. Timberwolf I, Price-DM Table 05-16-2007.xls, GS MBS-E-001810225. Basis Capital eventually accepted the 450 and 650 prices suggested by Mr. Maltezos. See 6/13/2007 email from David Lehman to Tom Montag, GS MBS-E-001914580.

²⁴¹⁸ 6/12/2007 email from Sahil Sachdev to George Maltezos, GS MBS-E-001912398.

²⁴¹⁹ 6/12/2007 email from George Maltezos, PSI-Basis_Capital_Group-03-0001. Mr. Maltezos emailed Mr. Lehman and Mr. Egol about Point Pleasant pricing, asking them “does the 75 mark reflect actual trading or overall softness in the market? I know you had indicated 70 was more like the number.” 6/12/2007 email from George Maltezos to David Lehman, Jonathan Egol, and Omar Chaudhary, GS MBS-E-002002522. The Subcommittee was unable to locate Goldman’s response to his question.

In fact, no such sales had taken place, and the lower value could not be justified by any sales transactions.²⁴²⁰ The lower mark was instead related to Goldman's CDO valuation project in May, which had concluded that its CDO² securities had lost significant value.²⁴²¹

Stuart Fowler at Basis Capital brought up the valuation issue in the context of the Timberwolf securities, and asked Mr. Maltezos: "I need to be very clear on this and are we going to see a similar problem on [T]imberwolf?"²⁴²² Mr. Maltezos responded: "Stuart - I assure you no foul here," and offered to set up some "1-on-1 time with the trading desk" to discuss pricing.²⁴²³

Mr. Sparks was closely monitoring Mr. Maltezos' ongoing effort to sell the Timberwolf securities to Basis Capital and, on June 13, 2007, sent this email to Mr. Maltezos:

"Let me know if you need help tonight - or feel free to wake up [Mr. Lehman and Mr. Ego] in [S]pain. I'd love to tell the senior guys on 30 at risk comm[itee] Wednesday morning that you moved 100mm [\$100 million]."²⁴²⁴

In response, Mr. Maltezos coordinated a call between Basis Capital and Mr. Lehman to "clarify any and all questions you have on the marking policy of Goldman, the actual marking of Point Pleasant, and the overall trading that has been seen by the [Goldman] desk in the last 1-6 months."²⁴²⁵ In that telephone call with Basis Capital, Mr. Lehman apparently corrected Mr. Maltezos' misstatement about recent Timberwolf sales, and Mr. Maltezos followed up with an email to Basis Capital:

"[P]lease accept my sincerest apologies for the mis-information below. As David mentioned, the 75 mark on Pt Pleasant BBB was more reflective of an interpretation of softer AAA-AA rated CDO-sqd paper translating to BBB part of the curve."²⁴²⁶

Later that same day, June 13, 2007, Mr. Lehman reported that Goldman had reached agreement on \$100 million in Timberwolf sales to Basis Capital. The sale consisted of the hedge fund taking the long side of a CDS contract with Goldman, referencing \$50 million in AAA rated

²⁴²⁰ The most recent Point Pleasant sale had been \$40 million worth of the AAA rated A2 securities, which sold on May 24, 2007, for a price of \$91. The next most recent sale had been \$20 million worth of the A2 securities on April 24, 2007, for a price of \$91.30. See Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235.

²⁴²¹ Internally, Goldman had marked down the value of the Point Pleasant securities to \$50.00. The much higher bid provided to Basis appears consistent with Goldman's strategy to "market at much higher levels." Goldman consistently offered investors bid prices that were much higher than its internal marks during the months of May and June as it attempted to sell its CDO inventory. See 5/26/2007 email from Michael Swenson to others, GS MBS-E-012443166 (attached file, "ABS Sec_0525," GS MBS-012443167).

²⁴²² 6/12/2007 email from Stuart Fowler to George Maltezos, GS MBS-E-001912398.

²⁴²³ Id.

²⁴²⁴ 6/13/2007 email from Daniel Sparks to George Maltezos, David Lehman, and Jon Ego, GS MBS-E-002006149. The reference to the "senior guys on 30" is to Goldman's senior executives who had offices on the 30th floor of the Goldman headquarters in New York.

²⁴²⁵ 6/13/2007 email from George Maltezos to Stuart Fowler and John Murphy at Basis Capital and others, GS MBS-E-001918603.

²⁴²⁶ 6/13/2007 email from George Maltezos, PSI-Basis_Capital_Group-02-0001.

Timberwolf securities and \$50 million in AA rated Timberwolf securities.²⁴²⁷ Mr. Lehman told Mr. Montag that the CDS premiums that Basis Capital had agreed to accept implied a cash price of \$84 for the AAA securities and \$76 for the AA securities. Mr. Montag asked what Goldman's internal mark was for the Timberwolf AA securities, and Mr. Lehman responded: "\$65."²⁴²⁸

The Timberwolf sale to Basis Capital was finalized on June 18, 2007.²⁴²⁹ Goldman provided the financing. Just two weeks later, Goldman informed Basis Capital that the Timberwolf securities had lost value and required the hedge fund to post additional cash collateral.²⁴³⁰ Basis Capital immediately questioned the new value and asked to see a "comparable market data point for the Timberwolf marks."²⁴³¹ In response, Mr. Lehman complained internally: "I would like to know what the precedent there is here - does GS need (outside of the client issue) to provide the below info to justify our prices???"²⁴³² After Goldman provided additional information, Basis Capital appeared to agree to post the additional collateral.

Eight days later, on July 12, Goldman again marked down the value of the Timberwolf securities to prices of \$65 and \$60, after having sold them to Basis Capital one month earlier at \$84 and \$76.²⁴³³ This repricing resulted in a \$37.5 million movement in the value of the securities, and required Basis Capital to post substantially more cash collateral with the firm.²⁴³⁴ On July 13, 2007, Basis Capital told Goldman that one of its funds was "in real trouble."²⁴³⁵ On July 16, Goldman again marked down Basis Capital's securities to prices of \$55 for AAA and \$45 for AA.²⁴³⁶ These prices matched Goldman's internal valuations.²⁴³⁷ By the end of July, Basis Capital was forced to liquidate its hedge fund.²⁴³⁸ Goldman bought back the Timberwolf securities from Basis Capital on July 31, at prices of \$30 and \$25.²⁴³⁹

Other Timberwolf Sales. Basis Capital was only one of several clients that Goldman contacted in connection with Timberwolf. On May 24, 2007, a Goldman sales associate told Mr. Lehman and Mr. Sparks that he wanted more information to send to a European hedge fund that was "not experts in the space at all but [I] made them a lot of money in correlation dislocation and will

²⁴²⁷ 6/13/2007 email from David Lehman to Tom Montag, GS MBS-E-001914580.

²⁴²⁸ Id.

²⁴²⁹ Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235.

²⁴³⁰ 7/4/2007 email exchange among David Lehman, George Maltezos, and others, GS MBS-E-001990127.

²⁴³¹ Id.

²⁴³² 7/4/2007 email from David Lehman, GS MBS-E-001990127.

²⁴³³ 7/12/2007 email from Jon Ego, GS MBS-E-001866391. On the same day, Goldman's internal marks for the securities were even lower, at \$60 for the AAA securities and \$55 for the AA securities. As Basis Capital's financial situation became worse, Goldman responded by marking Basis Capital's securities to levels that were closer to Goldman's own internal evaluations.

²⁴³⁴ 7/13/2007 email from David Lehman, "Re: Basis," GS MBS-E-001866391 at 93.

²⁴³⁵ Id. at 91.

²⁴³⁶ 7/16/2007 email from Jon Ego, "Re: Basis," GS MBS-E-010169281. Goldman also marked down Basis Capital's Point Pleasant securities to \$10, from an initial purchase price of \$81.72.

²⁴³⁷ 7/12/2007 Goldman datasheet, "Warehouse SP CDO positions and hedges_7-12-07," GS MBS-E-001866482.

²⁴³⁸ 7/24/2007 email from David Lehman to others, GS MBS-E-013449641.

²⁴³⁹ 7/31/2007 letter from Goldman Sachs International to Basis Capital, "Event of Default Under ISDA Master Agreement," JUL 003958.

do as I suggest. Would like to show stuff today if possible.”²⁴⁴⁰ Mr. Lehman told the sales associate that he was available to get on the telephone with the clients, and forwarded him the Timberwolf offering circular and marketing materials.²⁴⁴¹

On June 5, 2007, Goldman trader Benjamin Case emailed Mr. Lehman with a “[g]ameplan for distribution” or sales of Goldman’s remaining CDO² securities.²⁴⁴² The plan was to target “institutional buyers that can take larger bite size than traditional CDO buyers ... for example Asian banks and insurance companies.”²⁴⁴³ Mr. Case also noted that Goldman was shorting “51 CDO names in the two portfolios [Timberwolf and Point Pleasant] and we have been aggressively sourcing further protection in the CDS market on names in the two portfolios recently.”²⁴⁴⁴

In early June, Goldman targeted a Korean insurance company called Hungkuk Life for Timberwolf sales. According to a Goldman employee in the Japan sales office, Jay Lee, “the largest hurdle from the client perspective is whether or not they can get the mandate to buy something backed by synthetically sourced CDO’s [sic], as they have never bought CDO² before.”²⁴⁴⁵ Mr. Lee was also concerned that the value of the securities would drop soon after the office sold the Timberwolf securities to the insurance company. Mr. Lee stated:

“[T]he largest hurdle from a sales’ perspective is MTM [mark to market]. It is an important client, and if the mark widens out more than 1pt immediately after selling the asset to them, sales cannot sell it. Understanding that it is a volatile asset, sales wants to know that where we sell it to the client will not be more than 1pt less than where the mark would be, provided no new market information.”²⁴⁴⁶

It is unclear how his valuation concern was addressed. Later the same day, on June 1, Mr. Lee reported that Hungkuk Life had purchased \$36 million in AAA rated Timberwolf securities. Mr. Sparks responded “good job - keep going.”²⁴⁴⁷

Six days later, on June 7, 2007, the head of the Goldman Japan sales office, Omar Chaudhary, contacted Mr. Sparks and Mr. Lehman about a possible additional sale of Timberwolf securities to Hungkuk Life. Mr. Chaudhary wrote that the head of Goldman’s Korean sales office was “pushing on our personal relationships” to make the sale and wanted to be assured he’d be paid more if he “got it done”:

²⁴⁴⁰ 5/24/2007 email from Yusuf Aliredha to Mr. Sparks, Mr. Lehman, and others, “Priority Axes,” GS MBS-E-001934732.

²⁴⁴¹ Id.

²⁴⁴² 6/5/2007 email from Benjamin Case to David Lehman, GS MBS-E-001919861.

²⁴⁴³ Id.

²⁴⁴⁴ Id.

²⁴⁴⁵ 6/1/2007 email from Jay Lee to David Lehman, Matthew Bieber, and others, GS MBS-E-010958182.

²⁴⁴⁶ Id.

²⁴⁴⁷ Id.

“Jay and I spoke to the head of Korea Sales today. He said that he feels we can push for H[ungkuk] Life to increase their size from the 36mm of AAA’s and wanted to see if we would pay more GC’s [sales credits] if he got it done. Told him that if we sell ~45-50mm+ [\$45-50 million more] that we would honor the 7.0% even if we trade at the 84.5 dollar px [expected price]. Trust you will support this as we are pushing on our personal relationships to get this done.”²⁴⁴⁸

Mr. Lehman and Mr. Sparks told Mr. Chaudhary to “go for it” and “[g]et ‘er done.”²⁴⁴⁹ The Korean office did get it done, and Goldman sold another \$56 million in Timberwolf securities to Hungkuk Life at a price of \$84.50.²⁴⁵⁰ The sales representative was awarded the 7% sales credit.²⁴⁵¹ Mr. Sparks wrote to the sales office: “you boys are awesome and many people are noticing.”²⁴⁵² Mr. Montag, a senior Goldman executive monitoring the Timberwolf sales, told the mortgage team it had done an “incredible job – just incredible.”²⁴⁵³

On June 11, 2007, Mr. Lehman received an email from the Goldman Syndicate asking whether the CDO axe sheet, which included directives to sell Timberwolf securities, could be sent to the Japan sales office for re-distribution to sales representatives across Asia. Mr. Lehman agreed: “let’s send to all Japan sales.”²⁴⁵⁴ Two days later, on June 13, 2007, the Japan sales office reported over \$250 million in new sales of Goldman’s CDO securities, including Timberwolf.²⁴⁵⁵

Mr. Montag continued to monitor the sales of Timberwolf as well as other CDO securities in Goldman’s inventory and warehouse accounts. On June 22, 2007, Mr. Sparks reported to him on the completion of a number of sales of CDO and RMBS securities that Goldman had purchased from the two failed Bear Stearns hedge funds. Mr. Montag asked Mr. Sparks to provide him with a “complete rundown” on “what[’]s left.”²⁴⁵⁶ Mr. Sparks responded that the “main thing left” was \$300 million in Timberwolf securities. Mr. Montag responded: “boy that timeberwo[l]f was one shitty deal.”²⁴⁵⁷

Despite Mr. Montag’s assessment of Timberwolf, he continued to press for the sale of Timberwolf securities to Goldman clients. On June 25, 2007, Mr. Sparks emailed Mr. Montag and others with another update on selling Goldman’s remaining CDO assets.²⁴⁵⁸ Mr. Sparks informed the group that Goldman would probably have to lower the values of the CDO assets over the next

²⁴⁴⁸ 6/7/2007 email from Omar Chaudhary to Daniel Sparks, David Lehman, and Bunty Bohra, GS MBS-E-001866450, Hearing Exhibit 4/27-104.

²⁴⁴⁹ 6/7/2007 emails from Daniel Sparks and David Lehman, GS MBS-E-001866450, Hearing Exhibit 4/27-104.

²⁴⁵⁰ See Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235.

²⁴⁵¹ See Goldman response to Subcommittee QFR at PSI_QFR_GS0223.

²⁴⁵² 6/10/2007 email from Daniel Sparks to Omar Chaudhary and Bunty Bohra, GS MBS-E-010971809.

²⁴⁵³ 6/11/2007 email from Tom Montag, GS MBS-E-001866144.

²⁴⁵⁴ 6/11/2007 email exchange between Syndicate and David Lehman, GS MBS-E-001914921-24.

²⁴⁵⁵ 6/13/2007 email from Japan sales office, GS MBS-E-011212260.

²⁴⁵⁶ 6/22/2007 email exchange between Tom Montag and Daniel Sparks, “Few Trade posts,” Hearing Exhibit 4/27-105.

²⁴⁵⁷ Id.

²⁴⁵⁸ 6/25/2007 email from Daniel Sparks to Tom Montag, and others, GS MBS-E-010952698.

few days, but that the net effect for Goldman would be positive, since its short position was larger than its long. In fact, the Mortgage Department made \$42.5 million that day.²⁴⁵⁹ Mr. Montag remained focused on Timberwolf, responding: “[h]ow are twolf sales doing?”²⁴⁶⁰

On July 12, 2007, another Goldman sales representative, Leor Ceder, reported selling \$9 million in Timberwolf securities to Bank Hapoalim at a price of \$78.25.²⁴⁶¹ Goldman trader Mitchell Resnick asked Mr. Lehman “to pay him well on this.”²⁴⁶² Mr. Ceder was paid an 8% sales credit.²⁴⁶³ That was Goldman’s last Timberwolf sale, even though its Syndicate continued to list the CDO as a top sales priority for months afterward.

Goldman ultimately sold about \$853 million of the \$1 billion in Timberwolf securities to about 12 investors. The unsold securities, with a face value of about \$150 million, remained on Goldman’s books.

Limited Disclosures. Despite their aggressive sales efforts, Goldman sales personnel typically did not help potential investors analyze the Timberwolf securities and the 4,500 unique assets underlying the CDO. One Goldman employee told his colleagues: “In terms of telling customers. I prefer to give them the general idea of the trade. Then give them the excel spread sheet with our info on ref obs [reference obligations] and let them draw their own conclusions.”²⁴⁶⁴ Another Goldman employee, discussing a potential buyer of Timberwolf, warned:

“[H]e is going to want to look at the TWOLF trade on a fundamental basis with a lot of supporting runs to back up any additional mark downs we have - telling him we are busy when it comes to month end and we can’t run that analysis because we are resource-constrained will not be good enough.”²⁴⁶⁵

²⁴⁵⁹ 6/26/2007 email from Deeb Salem to Michael Swenson, GS MBS-E-012371112.

²⁴⁶⁰ Id.

²⁴⁶¹ Goldman’s internal price was then \$55, 23% less. See 7/12/2007 Goldman datasheet, “Warehouse SP CDO positions and hedges_7-12-07,” GS MBS-E-001866482; see Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235.

²⁴⁶² 7/6/2007 email from Mitchell Resnick to David Lehman, GS MBS-E-001866752.

²⁴⁶³ See Goldman response to Subcommittee QFR at PSI_QFR_GS0223 and PSI_QFR_GS0235.

²⁴⁶⁴ 5/7/2007 Goldman email chain between Elisha Wiesel and others, “RE: Timeberwolf Analysis,” GS MBS-E-003334218. Elisha Wiesel worked with Goldman’s legal department on issues related to disseminating information to potential investors. On May 20, 2007, the same day the Mortgage Department presented the conclusions of its CDO valuation project to Mr. Viniar and others, Mr. Wiesel sent an email to Mr. Bieber underscoring concerns about its valuation process: “[G]iven how complex the data is for a CDO^2, there’s little chance we’ll ever get fully ‘comfortable’ beyond a shadow of a doubt that there’s nothing materially misleading in the data cuts we provide. Is best outcome in this situation to just get a big-boy letter drafted?” 5/20/2007 email from Elisha Wiesel, GS MBS-E-001980637.

²⁴⁶⁵ 7/16/2007 email to David Lehman, “Carlyle,” GS MBS-E-011050254.

Still another Goldman employee stated with respect to Timberwolf and Point Pleasant: “The trickiest part about sharing this [pricing] analysis with customers [customers] is that it shows just how rudimentary our own understanding of these positions actually is.”²⁴⁶⁶

Goldman also in many instances refused to provide investors with its pricing methodology or specific prices or values for the CDO securities it was selling. After its securities began to lose value, Basis Capital emailed George Maltezos, David Lehman, and others asking: “How many times do we have to request data points and scenarios by email. These were read out to us on the call and it was agreed that GS would send them through. I am getting weary of continually hearing about transparency and yet an obvious avoidance of ‘putting things to paper.’”²⁴⁶⁷

Similarly, when Hungkuk Life requested additional information about the underlying Timberwolf assets, Goldman sent an asset report, but only after removing all of its pricing and valuing information related to those assets.²⁴⁶⁸ In August 2007, Jay Lee from Goldman’s Japan sales office told a sales associate who was seeking information about Goldman’s marks for Tokyo Star Bank:

“[U]nder no circumstances are we going to be able to provide materials specific to Timberwolf ... or even use the word ‘mark’ in written materials. ... Everything will be described in general terms, and if what we provide is too vague or general, the medium for further clarification must be oral, not written.”²⁴⁶⁹

Mr. Lehman added: “[W]e should be clear that the information we are providing is not our pricing methodology but rather some thoughts on the current market.”²⁴⁷⁰

In an interview with the Subcommittee, Mr. Lehman defended Goldman’s aggressive markdowns by noting that Goldman would buy or sell at the prices it quoted to a customer. He explained that if a client thought Goldman’s mark was too low, the client could buy more of the securities from Goldman at the low price, then resell them for a profit. Since Goldman’s internal valuations were much lower than the price quoted to clients, however, such sales would still produce a profit for the firm.²⁴⁷¹ Furthermore, as Goldman marked down the values in the summer of 2007, it began to decrease the volume of the securities it was willing to buy or sell at the prices it quoted to clients. Goldman was initially willing to buy or sell CDO securities in blocks of \$10 million, but by July, it lowered the maximum size to \$3 million for some securities and \$1 million for others: “Given current market environment, we would like our bid for size for CDO valuations

²⁴⁶⁶ 5/7/2007 email from Elisha Wiesel, GS MBS-E-004735378.

²⁴⁶⁷ 7/7/2007 email from Stuart Fowler, GS MBS-E-011183045.

²⁴⁶⁸ 7/31/2007 email from Matthew Bieber to David Lehman, “FW: Requesting Compliance Approval,” GS MBS-E-001920215.

²⁴⁶⁹ 8/7/2007 email from Jay Lee to others, GS MBS-E-001927858.

²⁴⁷⁰ 8/7/2007 email from David Lehman to others, GS MBS-E-001927858.

²⁴⁷¹ See 6/6/2007 email from David Lehman, GS MBS-E-001936955. Mr. Lehman stated: “thk abt this - if we establish a defined + healthy supply/demand dynamic in this product we can always create more CDO^2 at a significant profit vs current levels.”

to be MAX \$3mm for AAA to AA and \$1mm for A and below. No valuations should go out with a bid for \$10mm.”²⁴⁷²

“A Day That Will Live In Infamy.” The Timberwolf securities issued by Goldman steadily lost money from the day they were issued. Less than four months after they were issued, on July 16, 2007, Mr. Lehman instructed the Timberwolf deal captain, Mr. Bieber, to “create an ‘unwind’ spreadsheet ... where we can input CDS spds [spreads]/prices and liability prices so we can determine if unwinding these deals makes sense.”²⁴⁷³ The analysis appeared to show that it would cost Goldman \$140 million to unwind Timberwolf, and the conclusion was to “Hold Off.”²⁴⁷⁴ Instead of unwinding, Goldman continued its sales push.

In September 2007, Mr. Montag asked for data tracking the drop in prices for a Goldman CDO that experienced a dramatic fall in value, such as Timberwolf.²⁴⁷⁵ In response, a Goldman employee provided prices for the A2 tranche of the Timberwolf securities using a combination of Goldman’s internal marks and the bids provided to investors, from the issuance of the CDO on March 27, 2007 through September. The data showed that, in six months, prices for Timberwolf’s AAA rated A2 security had fallen from \$94 per security to \$15, a drop of almost 80%:

“3/31/07	94-12
4/30/07	87-25
5/31/07	83-16
6/29/07	75-00
7/31/07	30-00
8/31/07	15-00
Current	15-00.” ²⁴⁷⁶

After receiving this pricing history, Mr. Bieber, the Timberwolf deal captain, described March 27, the Timberwolf issuance date, as “a day that will live in infamy.”²⁴⁷⁷

The chart on the next page shows how, between mid-June 2007 and early August 2007, the value of Timberwolf securities dropped precipitously, and that Goldman personnel were aware of its falling value while selling the securities to clients.

[SEE CHART NEXT PAGE: *Timberwolf Marks, Axes, and Sales*, prepared by the Permanent Subcommittee on Investigations.]

²⁴⁷² 7/11/2007 email from David Lehman, “CDO Marks,” GS MBS-E-013427046 [emphasis in original].

²⁴⁷³ 7/16/2007 email from David Lehman to Matthew Bieber, GS MBS-E-001913775.

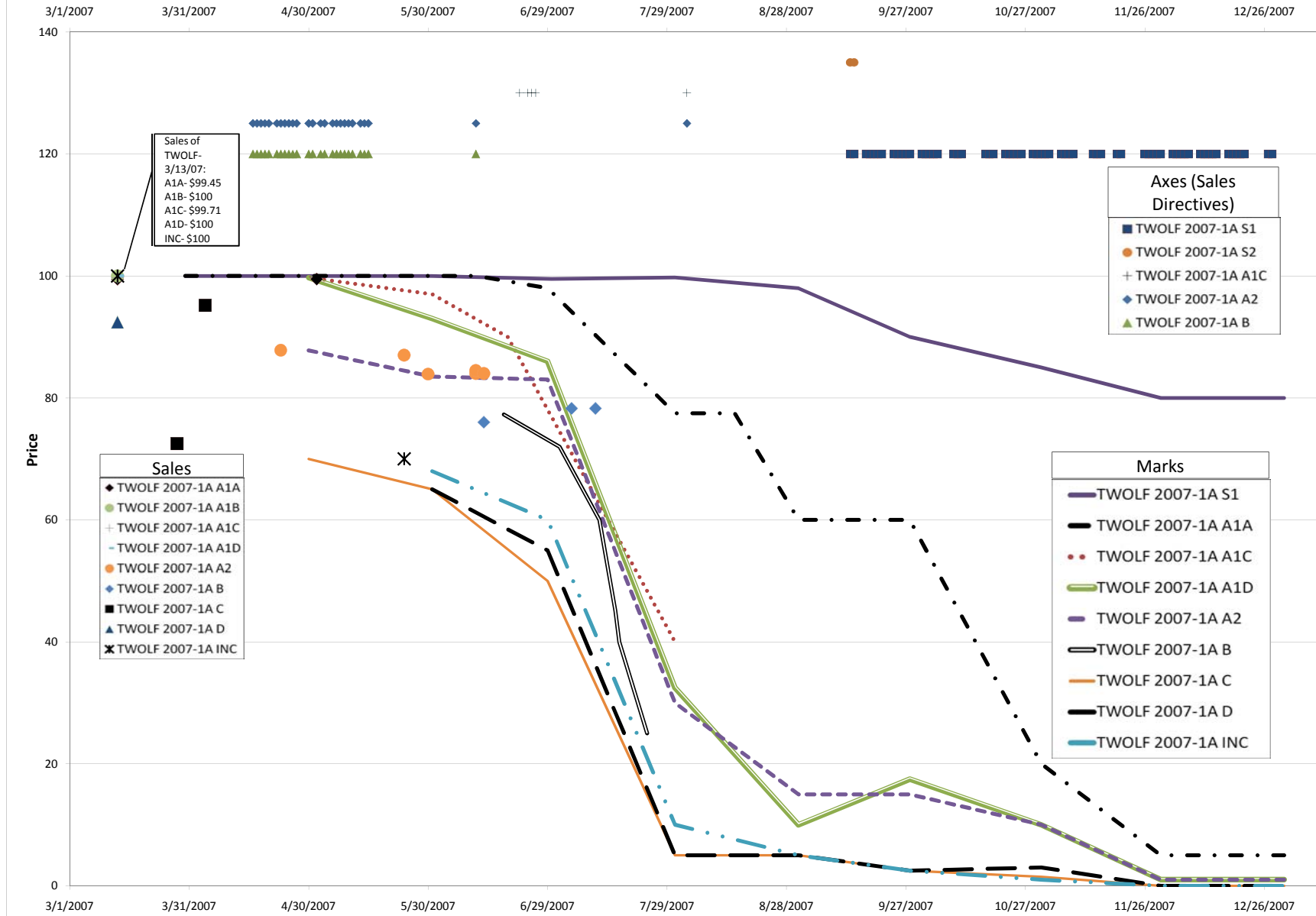
²⁴⁷⁴ See 7/17/2007 email from David Lehman to Daniel Sparks, GS MBS-E-010857643 (with attachment GS MBS-E-010857644).

²⁴⁷⁵ 9/17/2007 email from Tom Montag, GS MBS-E-000766371, Hearing Exhibit 4/27-106.

²⁴⁷⁶ 9/17/2007 email from Christopher Creed, GS MBS-E-000766370, Hearing Exhibit 4/27-106.

²⁴⁷⁷ Id.

Timberwolf Marks, Axes, and Sales



Goldman profited in part from Timberwolf's decline in value due to its 36% short interest in the CDO. In addition, June was the month that Goldman built its \$13.9 billion big short, which meant that the decline in most mortgage related assets translated into increasing profits for Goldman.²⁴⁷⁸

Timberwolf experienced its first credit rating downgrades in November 2007, just eight months after the CDO closed and issued its securities. The downgrades included the AAA rated securities. In March 2008, one year after Timberwolf was issued, its AAA securities were downgraded to junk status. In June 2008, a controlling class of debt investors voted to liquidate Timberwolf, and the deal was terminated in October 2008.²⁴⁷⁹

Goldman's 36% short position in Timberwolf produced about \$330 million in revenues at the direct expense of the clients to whom Goldman had sold the Timberwolf securities. Goldman also made \$3 million in interest while the Timberwolf assets were in Goldman's warehouse account. At the same time, because Goldman was unable to sell about a third of the Timberwolf securities and had to keep the unsold securities on its books, it ended up losing \$562 million from them. Goldman also lost \$226 million from the decline in the value of the collateral securities securing the CDO. When offset by the profits from its Timberwolf short, Goldman ended up with a total loss of about \$455 million.²⁴⁸⁰

Timberwolf's investors lost virtually their entire investments. Basis Capital ended up declaring bankruptcy and has filed suit against Goldman.²⁴⁸¹

Analysis. Goldman constructed Timberwolf using CDO assets that began to fall in value almost as soon as the Timberwolf securities were issued, yet solicited clients to buy the securities. Timberwolf contained or referenced CDO assets with more than 4,500 unique mortgage related securities, but Goldman offered potential investors little help in understanding those securities, and targeted clients with limited or no experience in CDO investments. When marketing Timberwolf, Goldman withheld its internal marks showing the securities losing value and did not mention its short position. Senior Goldman executives knew the firm was selling poor quality assets at inflated prices. Within six months of issuance, AAA Timberwolf securities lost almost 80% of their value. Due to its short position, Goldman profited at the expense of the clients to whom it sold the Timberwolf securities, but it lost money overall because Goldman was forced to retain so many of the unsold Timberwolf securities on its books.

²⁴⁷⁸ Performance Review for Joshua Birnbaum, GS-PSI-01972, Hearing Exhibit 4/27-55c. See also 6/26/2007 email from Deeb Salem to Michael Swenson, GS MBS-E-012371112.

²⁴⁷⁹ See Goldman response to Subcommittee QFR at PSI_QFR_GS0030.

²⁴⁸⁰ Id. at PSI_QFR_GS0239.

²⁴⁸¹ Id. at PSI_QFR_GS0030.

DD. Abacus 2007-AC1

Abacus 2007-AC1 was a \$2 billion synthetic CDO whose reference obligations were BBB rated mid and subprime RMBS securities issued in 2006 and early 2007.²⁴⁸² It was a static CDO, meaning once selected, its reference obligations did not change.²⁴⁸³ It was the last in a series of 16 Abacus CDOs referencing RMBS securities designed by Goldman. Goldman served as the underwriter or placement agent,²⁴⁸⁴ the lead manager,²⁴⁸⁵ and the protection buyer,²⁴⁸⁶ and also acted in other roles related to the CDO.²⁴⁸⁷ Unlike previous Abacus CDOs, Abacus 2007-AC1 used a third party to select its assets, referring to it as the portfolio selection agent.²⁴⁸⁸

Designing Single Tranche CDOs. Abacus CDOs were known as single tranche CDOs, a structure pioneered by Goldman through its Abacus platform.²⁴⁸⁹ Goldman used this structure to design customized CDOs for clients interested in assuming a specific type and amount of investment risk. An Abacus CDO could be issued with a single tranche, designed in coordination with a client who could select the assets the client wished to reference, the size of the investment, and the amount of subordination or cushion before the single tranche of securities would be exposed

²⁴⁸² See 3/23/2007 Goldman document, “Abacus 2007-AC1,” at 11, GS MBS-E-002807082, Hearing Exhibit 4/27-120; Securities and Exchange Commission v. Goldman Sachs, Case No. 10-CV-3229 (S.D.N.Y.), Complaint (April 16, 2010), at 1, 6 (hereinafter “SEC Complaint against Goldman Sachs”).

²⁴⁸³ 4/2/2007 email from Fabrice Tourre, “ABACUS 07-AC1,” GS MBS-E-002011152 (Abacus 2007-AC1 assets are “fully-identified, with no reinvestment, removals, substitutions or discretionary trading”).

²⁴⁸⁴ Goldman internal documents sometimes describe it as the underwriter for Abacus 2007-AC1, and sometimes as the placement agent. Compare 2/18/2008 Goldman document, “CDO Transactions (July 1, 2006 - December 31, 2007) in which Goldman Sachs acted as underwriter,” GS MBS 0000004337, to 3/12/2007 Goldman memorandum to Mortgage Capital Committee, “ABACUS Transaction sponsored by ACA,” at 2, GS MBS-E-002406025, Hearing Exhibit 4/27-118 (“Goldman is solely working as agent but retains the option to underwrite the risk as principal.”).

²⁴⁸⁵ 2/27/2007 email from Curtis Willing, “ABACUS 2007 AC1, Ltd. -- New Issue Announcement (144a/RegS),” GS MBS-E-009209654.

²⁴⁸⁶ 3/12/2007 Goldman memorandum to Mortgage Capital Committee, “ABACUS Transaction sponsored by ACA,” at 6, GS MBS-E-002406025, Hearing Exhibit 4/27-118 (“Goldman is acting as principal as a protection buyer . . . as well as taking other principal roles.”).

²⁴⁸⁷ Goldman’s additional roles included acting as the basis swap counterparty, the basis swap calculation agent, the collateral put provider, the collateral put calculation agent, the collateral disposal agent, the credit default swap calculation agent, and the initial purchaser. 2/18/2008 Goldman document, “CDO Transactions (July 1, 2006 - December 31, 2007) in which Goldman Sachs acted as underwriter,” GS MBS 0000004337; 3/12/2007 Goldman Sachs memorandum to Mortgage Capital Committee, “ABACUS Transaction sponsored by ACA,” GS MBS-E-002406025, Hearing Exhibit 4/27-118.

²⁴⁸⁸ 3/12/2007 Goldman memorandum to Mortgage Capital Committee, “ABACUS Transaction sponsored by ACA,” GS MBS-E-002406025, Hearing Exhibit 4/27-118; April 27, 2010 Subcommittee Hearing at 421.

²⁴⁸⁹ Goldman considered its Abacus platform, which commenced in 2004, to be “market-leading.” 4/2/2007 email from Fabrice Tourre, “ABACUS 07-AC1,” GS MBS-E-002011152; 2/27/2007 Goldman email, “ABACUS-2007-AC1 – Marketing Points (INTERNAL ONLY) [T-Mail],” GS MBS-E-008042545, Hearing Exhibit 4/27-116. See also 6/2007 Goldman document, “CDO Platform Overview,” at 31, GS MBS-E-001918722 (“ABACUS is the Goldman brand name for single-tranche CLN [credit linked note] issuances referencing portfolios comprised entirely of structured products.”); 4/2006 Goldman presentation “Overview of Structured Products,” GS MBS-E-016067482.

to loss.²⁴⁹⁰ Abacus also enabled investors to short a selected group of RMBS or CDO securities at the same time. Goldman used the Abacus CDOs not only to sell short positions to investors, but also to carry out its own shorts. As summarized in one Goldman Mortgage Capital Committee Memorandum, the Abacus design allowed “Goldman to short spreads in our core structured products business in large size.”²⁴⁹¹ Between 2004 and 2007, Goldman issued 16 Abacus deals referencing RMBS securities, including Abacus 2007-AC1, which together had an aggregate value of \$13 billion.²⁴⁹²

Responding to Paulson Inquiry. In mid to late 2006, Goldman was approached by the hedge fund Paulson & Co. Inc. (“Paulson”), and asked to structure a transaction that would enable the hedge fund to short multiple RMBS securities.²⁴⁹³ Goldman had previously worked with Paulson and was aware that Paulson held strong negative views of the residential mortgage market and was making investments based on that view. The Goldman Mortgage Capital Committee Memorandum seeking approval of Abacus 2007-AC1, for example, stated:

“Paulson is a macro hedge fund that has taken directional views on the subprime RMBS market for the past few months. In 2006 the Desk worked an order for Paulson to buy protection on a supersenior tranche off a portfolio similar to the Reference Portfolio selected by ACA, and the AC1 Transaction is another means for Paulson to accomplish their trading objective: buying protection in tranching format on the subprime RMBS market.”²⁴⁹⁴

An email sent to Daniel Sparks, head of the Mortgage Department, by Fabrice Tourre, a Correlation Trading Desk employee who led the effort on the Abacus CDO for Paulson, was even more blunt:

²⁴⁹⁰ “Subordination” is “[t]he measure of losses that must occur within a portfolio before a tranche is at risk to loss.” Tranche size “[r]eflects the notional (value-at-risk) of a structured credit investment” and “is also a measure of leverage.” 7/2006 Goldman presentation, “Structured Credit Investments,” at 54, GS MBS-E-002055378; 4/2006 Goldman presentation, “Overview of Structured Products,” GS MBS-E-016067482. Goldman contended that, in a single-tranche CDO, investors could customize the tranche risk/return profile by specifying the tranche subordination and tranche size, and that investors could create “credit enhanced” credit exposure through the use of subordination. 4/2006 Goldman presentation, “Overview of Structured Products,” at 52, GS MBS-E-016067482. “Combined with tranche size, varying levels of subordination enable investors to tailor both the structural leverage and the risk/return profile of their investment.” “Investors are “[n]ot limited by new issuance calendar and bond allocations,” are “[n]ot limited by cash bonds in dealer inventory,” can “customize[] by sector (e.g. RMBS, CMBS, ABS), rating, vintage, servicer, etc.,” and can “meet various investment objectives via structure.” 7/2006 Goldman presentation, “Structured Credit Investments,” at 54, GS MBS-E-002055378.

²⁴⁹¹ 3/12/2007 Goldman memorandum to Mortgage Capital Committee, “ABACUS Transaction sponsored by ACA,” GS MBS-E-002406025, Hearing Exhibit 4/27-118.

²⁴⁹² Goldman trading datasheet, GS MBS 0000004276 (showing closing dates and trade details on various CDOs, including Abacus).

²⁴⁹³ 3/12/2007 Goldman memorandum to Mortgage Capital Committee, “ABACUS Transaction sponsored by ACA,” GS MBS-E-002406025, Hearing Exhibit 4/27-118.

²⁴⁹⁴ Id.

“Gerstie and I are finishing up engagement letters ... for the large RMBS CDO Abacus trade that will help Paulson short senior tranches off a reference portfolio of Baa2 subprime RMBS risk selected by ACA.”²⁴⁹⁵

These documents make it clear that Goldman knew Paulson’s investment strategy was to identify a reference portfolio of assets for the Abacus CDO that Paulson believed would perform poorly or fail, so that its short position would profit at the expense of the long investors.²⁴⁹⁶ In addition, during his Subcommittee interview, Mr. Tourre made it clear that he was aware of the Paulson investment strategy.²⁴⁹⁷

In response to the inquiry from Paulson, Goldman proposed structuring an Abacus CDO.²⁴⁹⁸ Fabrice Tourre was given lead responsibility for organizing and structuring the Abacus transaction. Goldman’s primary role was to act as an agent and administrator of the CDO, obtaining its profit from the fees it charged for the services rendered, rather than from any investment in the CDO itself. In effect, Goldman “rented” the Abacus platform to the Paulson hedge fund and served as Paulson’s agent in carrying out the hedge fund’s investment objectives. Mr. Tourre had been suggesting that Goldman employ such an approach and supported the arrangement.²⁴⁹⁹

Finding a Portfolio Selection Agent. According to Mr. Tourre, Paulson suggested that Goldman employ an outside portfolio selection agent for the CDO.²⁵⁰⁰ However, Paolo Pellegrini, Paulson’s Managing Director who led Paulson’s selection of the reference assets for the Abacus 2007-AC1 transaction, told the SEC that it was Goldman’s idea to have a portfolio selection agent.²⁵⁰¹ At the same time, Goldman internal communications made it clear that the objective was to select a portfolio selection agent that would comply with Paulson’s suggestions for the assets to be referenced in the CDO. In an email to colleagues discussing the matter, Mr. Tourre suggested finding a manager that:

²⁴⁹⁵ 2/7/2007 email from Fabrice Tourre, GS MBS-E-003277939, Hearing Exhibit 4/27-114.

²⁴⁹⁶ See also 12/18/2006 email from Fabrice Tourre, “Re: Paulson,” GS MBS-E-003246145 (a series of email communications regarding the Abacus 2007-AC1 CDO in which Mr. Tourre referred to the asset portfolio that Paulson was proposing for the CDO as “a weak quality portfolio.”).

²⁴⁹⁷ Subcommittee interview of Fabrice Tourre (4/24/2010). Mr. Tourre also told the SEC that he believed Paulson’s selection criteria, such as interest-only mortgages and high loan-to-value ratios, were based on Paulson’s view that securities meeting those criteria were “weaker from the credit quality standpoint than other obligations that did not have those characteristics.” SEC deposition of Fabrice Tourre (3/3/2009), GS MBS 0000022785, at 813-14.

²⁴⁹⁸ Subcommittee interview of Fabrice Tourre (4/24/2010).

²⁴⁹⁹ See, e.g., 12/10/2006 email from Fabrice Tourre to David Lehman, GS MBS-E-003453843, Hearing Exhibit 4/27-142.

²⁵⁰⁰ Subcommittee interview of Fabrice Tourre (4/24/2010); 2/21/2007 email from Fabrice Tourre to David Lehman, GS MBS-E-011359460-61, Hearing Exhibit 4/27-115.

²⁵⁰¹ SEC deposition of Paolo Pellegrini (12/3/2008), PSI-Paulson-04 (Pellegrini Depo)-0001, at 82-85, 175.

“will be flexible w.r.t. [with respect to] portfolio selection (i.e. ideally we will send them a list of 200 Baa2-rated 2006-vintage RMBS bonds that fit certain criteria, and the portfolio selection agent will select 100 out of the 200 bonds).”²⁵⁰²

In the early part of January 2007, Mr. Tourre sent an email to prospective selection agents describing their anticipated role in the CDO. One of his points was the following:

“Reference Portfolio: static, fully identified upfront, and consisting of approx 100 equally-sized mezzanine subprime RMBS names issued between Q4 [the fourth quarter of] 2005 and today. Starting portfolio would be ideally what the Transaction Sponsor shared, but there is flexibility around the names.”²⁵⁰³

Goldman’s internal communications also suggest that Goldman was, in fact, more interested in identifying cooperative portfolio selection agents for its own transactions, rather than locating one for the Paulson CDO. In an email chain discussing a portfolio selection agent for Abacus 2007-AC1, a Goldman employee wrote to a colleague that Mr. Tourre “suggested Fxator was a potential portfolio selection agent [for Paulson] since they are relatively inexpensive and easy to work with.” The colleague responded: “We already have a portfolio in front of Fxator; they probably will be willing to structure a short that I believe we would want to keep for ourselves ... not sure if this is the best fit.”²⁵⁰⁴

Jonathan Egol, chief architect of the Abacus structure and head of the Correlation Trading Desk, suggested that Goldman approach GSC Partners, a New York hedge fund that Goldman had worked with on other CDOs, including Anderson. Mr. Tourre sent an email to colleagues asking:

“Do you think gsc is easier to work with than fxator? They will never agree to the type of names paulson wants to use, I don’t think steffelin [a senior trader at GSC] will be willing to put gsc’s name at risk for small economics on a weak quality portfolio whose bonds are distributed globally.”²⁵⁰⁵

A colleague replied:

“There are more managers out there than just GSC / Fxator. The way I look at it, the easiest managers to work with should be used for our own axes. Managers that are a bit more

²⁵⁰² 12/18/2006 email from Fabrice Tourre, “Paulson,” GS MBS-E-003246145; 12/20/2006 email from Fabrice Tourre, GS MBS-E-002534649.

²⁵⁰³ 1/10/2007 Goldman internal email, GS MBS-E-002480520, Hearing Exhibit 4/27-108; 1/9/2007 email from Fabrice Tourre, “For ACA,” GS MBS-E-002480516.

²⁵⁰⁴ 12/18/2006 Goldman internal email, GS MBS-E-003246145-46.

²⁵⁰⁵ Mr. Egol also suggested HBK as a possible portfolio selection agent. 12/18/2006 email from Fabrice Tourre, “Re: Paulson,” GS MBS-E-003246145.

difficult should be used for trades like Paulson given how axed Paulson seems to be (i.e. I'm betting they can give on certain terms and overall portfolio increase)."²⁵⁰⁶

On January 4, 2007, on behalf of Paulson, Goldman approached GSC Partners as well as two other companies to act as the portfolio selection agent for the Abacus CDO.²⁵⁰⁷ Following a meeting among representatives of Goldman, Paulson, and GSC, Mr. Tourre sent an email to his colleagues summarizing the meeting and indicating that Paulson was also looking for a portfolio selection agent that would be willing to accept many of the reference assets it identified:

"At the end of the meeting, the Paulson team told us that they were happy to have met GSC and assuming that (1) GSC could get comfortable with a sufficient number of obligations that Paulson is looking to buy protection on in ABACUS format, (2) GSC could get comfortable being in the market as early as end of January with a transaction under which Gsc is disclosed as Portfolio Selection Agent (without any credit risk removal rights), and (3) Paulson, Goldman, and GSC agree[] on GSC's required compensation for a transaction like this, then Paulson will want to proceed with gsc as soon as possible and be in the market as soon as possible."²⁵⁰⁸

Subsequently, Mr. Tourre reported to his colleagues that GSC had declined the offer to act as the Abacus portfolio selection agent due to its negative views of the assets Paulson wanted to include in the CDO:

"As you know, a couple of weeks ago we had approached GSC to ask them to act as portfolio selection agent for that Paulson-sponsored trade, and GSC declined given their negative views on most of the credits that Paulson had selected."²⁵⁰⁹

Later, when Goldman began to market Abacus 2007-AC1 securities, Edward Steffelin, a senior trader at GSC, sent an email to Peter Ostrem, head of Goldman's CDO Origination Desk saying: "I do not have to say how bad it is that you guys are pushing this thing."²⁵¹⁰ When asked by the Subcommittee what he meant, Mr. Steffelin responded that he believed that particular Abacus CDO created "reputational risk" for GSC as the collateral manager and for the whole market.²⁵¹¹

Goldman and Paulson eventually settled on ACA Capital Management, LLC, a company with experience in selecting assets for CDOs. Goldman employees expressed the hope that ACA's

²⁵⁰⁶ Id. An email indicates that, in late December 2006, Mr. Tourre was contemplating several possible portfolio selection agents, including "Aladdin, DRCM, Greywolf, and . . . GSC." He also suggested Investec and TCW as possible candidates. 12/18/2006 email from Fabrice Tourre, "Re: Paulson," GS MBS-E-003246145.

²⁵⁰⁷ See, e.g., 1/4/2007 email from Fabrice Tourre to Daniel Sparks, "Paulson post," GS MBS-E-002526707 (On January 4, 2007, Goldman "reached out [to] GSC, Greywolf and ACA today re: acting as portfolio selection agent for a Paulson-sponsored trade.").

²⁵⁰⁸ 1/6/2007 Goldman email, GS MBS-E-003445985, Hearing Exhibit 4/27-152.

²⁵⁰⁹ 1/29/2007 email from Fabrice Tourre, GS MBS-E-003248998, Hearing Exhibit 4/27-112.

²⁵¹⁰ 2/27/2007 email from Ed Steffelin to Peter Ostrem, "FW: ABACUS 2007-AC1, Ltd. -- New Issue Announcement (144a/RegS)," GS MBS-E-009209654.

²⁵¹¹ Subcommittee interview of Edward Steffelin (12/10/2010).

involvement would improve the sales of the Abacus securities. In an internal memorandum seeking approval of the CDO, for example, Goldman personnel wrote: “We expect to leverage ACA’s credibility and franchise to help distribute this Transaction.”²⁵¹²

Selecting Assets. During January, February, and March 2007, the Abacus reference assets were selected. The Paulson hedge fund initiated the asset selection process by providing Goldman with criteria for choosing RMBS securities for the CDO.²⁵¹³ According to Mr. Tourre, Goldman’s subsequent identification of candidate assets was essentially ministerial, as Paulson’s specified criteria had restricted the scope of the RMBS securities that could be proposed.²⁵¹⁴ For example, Paulson wanted RMBS securities that had adjustable rate mortgages, low borrower FICO scores, and mortgages in states with slowing home price appreciation, like Arizona, California, Florida, and Nevada.²⁵¹⁵ Paulson specifically required 2006-vintage or 2007-vintage subprime RMBS that were

²⁵¹² 3/12/2007 Goldman memorandum to Mortgage Capital Committee, “ABACUS Transaction sponsored by ACA,” GS MBS-E-002406025, Hearing Exhibit 4/27-118 (The memorandum also stated: “We expect the strong brand-name of ACA as well as our market-leading position in synthetic CDOs of structured products to result in a successful offering.” “Partnering with ACA on this innovative, franchise-building transaction will enhance our leadership in the market for structured product synthetic CDOs. We expect that the role of ACA as Portfolio Selection Agent will broaden the investor base for this and future ABACUS offerings.” “We intend to target suitable structured product investors who have previously participated in ACA-managed cashflow CDO transactions or who have previously participated in prior ABACUS transactions.”). See also SEC Complaint against Goldman at 8. When asked to confirm that Mr. Tourre “suggested that it would be easier to market or to find sort of a counterparty to [Paulson’s] short trade if there was a portfolio selection agent involved,” Mr. Pellegrini responded, “Right.” SEC deposition of Paolo Pellegrini (12/3/2008), PSI-Paulson-04 (Pellegrini Depo)-0001, at 113. Mr. Tourre told the Subcommittee that having an agent gives comfort to potential investors. Subcommittee interview of Fabrice Tourre (4/24/2010).

²⁵¹³ At the Subcommittee hearing, Mr. Tourre testified that Paulson produced the portfolio selection criteria. Senator Levin then asked Mr. Tourre, “And did those criteria which Paulson gave to you, were they plugged into your model? Did they generate a list of possible reference securities for that portfolio?” Mr. Tourre responded: “Yes.” They “were used to actually trim down the universe of RMBS.” April 27, 2010 Subcommittee Hearing at 82.

²⁵¹⁴ Subcommittee interview of Fabrice Tourre (4/24/2010).

²⁵¹⁵ Paolo Pellegrini told the SEC that Paulson’s selection criteria for Abacus 2007-AC1 included RMBS with a maximum weighted average FICO score of 640 and a minimum percentage (80%) of adjustable rate mortgages. Paulson also sought a minimum portfolio size of \$750 million. SEC deposition of Paolo Pellegrini (12/3/2008), PSI-Paulson-04 (Pellegrini Depo)-0001, at 140-142. Sihan Shu, an analyst working for Paulson on the Abacus 2007-AC1 reference asset selection, told the Subcommittee that Paulson’s selection criteria generally included large percentages of adjustable rate mortgages; high concentrations of mortgages in areas such as California and Florida, where Paulson believed the housing bubble was greater than in other areas; and limited due diligence. Subcommittee interview of Sihan Shu (2/24/2010). See also SEC deposition of Sihan Shu (12/4/2008), PSI-Paulson-04 (Shu Depo)-0001, at 26-28. Similarly, the SEC Complaint listed Paulson’s selection criteria as favoring “RMBS that included a high percentage of adjustable rate mortgages, relatively low borrower FICO scores, and a high concentration of mortgages in states like Arizona, California, Florida and Nevada that had recently experienced high rates of home price appreciation.” SEC Complaint against Goldman Sachs at 9. However, Goldman’s initial submission to the SEC listed Paulson’s criteria as only 2006-vintage subprime RMBS rated Baa2 by Moody’s. In the Matter of Abacus 2007-AC1 CDO, File No. HO-10911 (SEC), Submission on behalf of Goldman Sachs (September 10, 2009), at 11 (hereinafter “Goldman Sachs Submission”). Goldman’s supplemental submission disclosed that Goldman did use additional criteria listed in draft engagement letters between Goldman and Paulson “to guide Goldman Sachs’ preliminary search for potential reference securities” that complied with Paulson’s criteria, which confirms what Mr. Tourre told the Subcommittee in his testimony at the April 27, 2010 Subcommittee Hearing. In the Matter of ABACUS CDO, File No. HO-10911 (SEC), Supplemental Submission on behalf of

rated BBB by S&P or Baa2 by Moody's.²⁵¹⁶ Goldman sent Paulson a database and spreadsheet listing the securities that met Paulson's criteria.²⁵¹⁷ Paulson used that database to select 123 securities, and Goldman forwarded the resulting list to ACA.²⁵¹⁸ Over the next two months, a series of negotiations and meetings took place to finalize selection of the reference assets and the structure of the CDO.

On March 22, 2007, ACA and Paulson agreed on the final \$2 billion reference portfolio for Abacus 2007-AC1.²⁵¹⁹ The assets consisted of 90 Baa2 rated mid and subprime RMBS securities issued after January 1, 2006.²⁵²⁰ The RMBS securities were "equally-sized," each with a \$22.22 million notional value.²⁵²¹ Each asset in the final reference portfolio was approved by both Paulson and ACA. Of the final 90 RMBS securities, 49 had been initially proposed by Paulson, and 41 had been initially proposed by ACA.²⁵²²

Goldman Sachs (September 25, 2009), at 3, 4 (hereinafter "Goldman Supp. Submission"). A January 3, 2007 draft engagement letter listed the following portfolio selection criteria: Baa2 ratings; RMBS issued after March 1, 2006; weighted average FICO scores between 600 and 675; and at least 80% adjustable rate mortgages underlying the RMBS. 1/3/2007 draft engagement letter, PAULSON-ABACUS 0252736, at 40. See also 1/6/2007 email from Fabrice Tourre to Ed Steffelin and others, GS MBS-E-002754054 (listing criteria for the Abacus portfolio as 2006 vintage bonds underwritten after March 1, 2006; Baa2 rated bonds; average FICO score between 600 and 675; RMBS transaction size greater than \$500 million; and percentage of adjustable rate mortgages greater than 80%).

²⁵¹⁶ 1/29/2007 email from Fabrice Tourre to Peter Ostrem and others, GS MBS-E-003248998, Hearing Exhibit 4/27-112; Goldman Sachs Submission at 12 (citing Gerst Tr. 13-14).

²⁵¹⁷ See 1/9/2007 email from Gail Kreitman to Laura Schwartz, GS MBS-E-007974381.

²⁵¹⁸ *Id.*

²⁵¹⁹ See 3/22/2007 email from Sihan Shu to Fabrice Tourre and David Gerst, GS MBS-E-003010587.

²⁵²⁰ 3/12/2007 Goldman memorandum to Mortgage Capital Committee, "ABACUS Transaction sponsored by ACA," GS MBS-E-002406025, Hearing Exhibit 4/27-118; 3/23/2007 Goldman presentation, "ABACUS 2007-AC1," GS MBS-E-002807082, Hearing Exhibit 4/27-120; SEC Complaint against Goldman Sachs at 11; Goldman Sachs Submission at 13.

²⁵²¹ 3/12/2007 Goldman internal memorandum to Mortgage Capital Committee, "ABACUS Transaction sponsored by ACA," GS MBS-E-002406025, Hearing Exhibit 4/27-118.

²⁵²² See "Abacus 2007-AC1 Reference Portfolio," chart prepared by Subcommittee. See also 1/5/2007 email from Sihan Shu to Ed Steffelin, Fabrice Tourre, and others, GS MBS-E-002483408; 1/6/2007 email from Fabrice Tourre to Ed Steffelin and others, GS MBS-E-002754054; 1/9/2007 email from Gail Kreitman to Laura Schwartz, GS MBS-E-007974381; 1/22/2007 email from Laura Schwartz to Fabrice Tourre and others, GS MBS-E-002522389; 1/22/2007 email from David Gerst to Paolo Pellegrini and Sihan Shu, GS MBS-E-002480574; 1/28/2007 email from Fabrice Tourre to Gail Kreitman and David Gerst, GS MBS-E-002444359; 1/31/2007 email from David Gerst to Laura Schwartz, GS MBS-E-002620419; 2/1/2007 email from Laura Schwartz to David Gerst, GS MBS-E-003026086; 2/2/2007 email from Paolo Pellegrini to Laura Schwartz and Sihan Shu, GS MBS-E-002483499; 2/2/2007 email from Laura Schwartz to Paolo Pellegrini and Sihan Shu, GS MBS-E-002483496; 2/5/2007 email from Paolo Pellegrini to Laura Schwartz, GS MBS-E-003062009; 2/5/2007 email from Laura Schwartz to Paolo Pellegrini and others, GS MBS-E-002856966; 2/5/2007 email from David Gerst to Paolo Pellegrini and Sihan Shu, PAULSON-ABACUS 0253248; 2/26/2007 email from Fabrice Tourre to Keith Gorman, GS MBS-E-002444961; 3/22/2007 email from Sihan Shu to Fabrice Tourre and David Gerst, GS MBS-E-003010587; 3/23/2007 Goldman document, "ABACUS 2007-AC1," GS MBS-E-002807082, Hearing Exhibit 4/27-120. Goldman asserted: "The record in this investigation is clear that the overwhelming majority of the securities were identified by ACA." Goldman Supp. Submission at 13. However, the Goldman and Paulson documents reviewed by the Subcommittee show otherwise.

Goldman characterized Paulson's participation in the asset selection process as one in which the hedge fund merely "express[ed] [its] views" about the reference portfolio,²⁵²³ which often happens in synthetic CDO transactions.²⁵²⁴ The evidence indicates, however, that Paulson did more than express its views; it played an active and determinative role in the asset selection process. Paulson established the criteria used to identify the initial list of RMBS securities, proposed a majority of the reference assets in the final portfolio, and approved 100% of the reference assets. Moreover, the "views" expressed by Paulson directly conflicted with the interests of the investors to whom Goldman was marketing the Abacus 2007-AC1 deal. Mr. Pellegrini was quite clear about Paulson's intentions in a deposition with the SEC:

Question: Your portfolio analysis was designed in large part to identify bonds that weren't going to perform, right?

Answer: Right.

Question: Because you wanted to short those bonds?

Answer: Right.²⁵²⁵

Goldman documents reviewed by the Subcommittee contain conflicting information on exactly who was involved in the asset selection process. Goldman's Mortgage Capital Committee Memorandum on the Abacus CDO, the key internal Goldman document describing the new CDO, stated: "The Reference portfolio has been selected and mutually agreed upon by ACA and Goldman."²⁵²⁶ In an email to a colleague, however, Mr. Tourre wrote that the portfolio had been selected by "ACA/Paulson."²⁵²⁷ The Abacus Marketing book identified ACA as the portfolio selection agent for the CDO, and stated that the portfolio selection agent had selected the reference assets.²⁵²⁸ The Abacus Offering Memorandum stated: "The Initial Reference Portfolio will be selected by ACA Management, L.L.C."²⁵²⁹

Another email exchange, between Mr. Tourre and his colleague Mr. Egol, demonstrates the strong influence Paulson had in the selection process. IKB, a German bank that was a frequent investor in past Abacus CDOs and was considering purchasing securities issued by Abacus 2007-AC1, apparently asked to have certain RMBS securities removed from the portfolio and sent the following email to a Goldman sales representative:

²⁵²³ Goldman Supp. Submission at 10, 13.

²⁵²⁴ Id. at 10.

²⁵²⁵ SEC deposition of Paolo Pellegrini (12/3/2008), PSI-Paulson-04 (Pellegrini Depo)-0001, at 175-76.

²⁵²⁶ 3/12/2007 Goldman memorandum to Mortgage Capital Committee, "ABACUS Transaction sponsored by ACA," at 3, GS MBS-E-002406025, Hearing Exhibit 4/27-118.

²⁵²⁷ 5/8/2007 email from Fabrice Tourre to Josh Birnbaum, GS MBS-E-003611826, Hearing Exhibit 4/27-123.

²⁵²⁸ 3/23/2007 Goldman document, "Abacus 2007-AC1," at 11-12, GS MBS-E-002807082, Hearing Exhibit 4/27-120.

²⁵²⁹ 4/26/2007 Goldman Sachs Offering Circular, "Abacus 2007-AC1, Ltd.," at 2, GS MBS-E-001918034.

“[D]id you hear something on my request to remove Fremont and New Century serviced bonds? I would like to try to [sic] the advisory com[m]it[t]ee this week and would need consent on it.”²⁵³⁰

The IKB email was forwarded to Mr. Tourre, who sent it to Mr. Egol with the following message: “Paulson will likely not agree to this unless we tell them that nobody will buy these bonds if we don’t make that change.”²⁵³¹ Mr. Tourre expressed concern, not about what ACA, the portfolio selection agent, might or might not agree to, but only about what the Paulson hedge fund might agree to.

Failing to Disclose Key Information. Evidence obtained by the Subcommittee indicates that Paulson’s role in the Abacus asset selection process and its investment objectives for the CDO were not fully or accurately disclosed to key parties or investors at the time the CDO was being structured and sold.

Moody’s, one of the credit rating agencies asked to rate the Abacus securities, was not informed of Paulson’s role or investment objectives. At a Subcommittee hearing on the role of the credit rating agencies in the financial crisis, Eric Kolchinsky, a former Moody’s managing director who oversaw its CDO ratings and was familiar with Abacus 2007-AC1, provided sworn testimony that he had not known of Paulson’s involvement with the CDO at the time it was rated, did not know of Paulson’s role in selecting the referenced assets, and believed his staff did not know either. He testified that allowing an entity that wants a CDO to “blow up” to pick its assets “changes the whole dynamic,” and was information that he would have wanted to know when rating the securities:

Senator Levin: And were you or your staff aware at the time that Moody’s was working on the ABACUS rating that Paulson was shorting the assets in ABACUS and playing a role in selecting referenced assets expected to perform poorly?

Mr. Kolchinsky: I did not know, and I suspect, I am fairly sure, that my staff did not know either.

Senator Levin: And are these facts that you or your staff would have wanted to know before rating ABACUS?

Mr. Kolchinsky: From my personal perspective, it is something that I would have wanted to know because it is more of a qualitative not a quantitative assessment if someone who intends the deal to blow up is picking the portfolio. But, yes, that is something that I would have personally wanted to know. It changes the incentives in the structure.

²⁵³⁰ 3/12/2007 email from Jorg Zimmerman (IKB) to Michael Nartey, GS MBS-E-002683134.

²⁵³¹ 3/12/2007 email from Fabrice Tourre to Jonathan Egol, GS MBS-E-002648826.

Senator Levin: Are people usually putting deals together that want the deal to succeed? Isn't that the usual assumption?

Mr. Kolchinsky: That is the basic assumption, yes.

Senator Levin: And if the person wanting the deal to blow up is picking the assets, that would run counter to what the usual assumption is?

Mr. Kolchinsky: It just changes the whole dynamic of the structure where the person who is putting it together, choosing it, wants it to blow up.²⁵³²

Moody's assigned AAA ratings to two tranches of the Abacus CDO.²⁵³³

ACA told the Subcommittee that, throughout the asset selection process, it was not informed and remained unaware of Paulson's true investment objective, which was to identify and short a set of assets that it believed would not perform and would lose value.²⁵³⁴ According to ACA, it believed that Paulson was going to be a long investor in the CDO through its purchase of the equity share that would incur the first losses in the CDO. Contemporaneous ACA documents support that position. An internal ACA Commitments Committee Memorandum on Abacus 2007-AC1 dated February 12, 2007, for example, stated: "The hedge fund is taking the 0-9% equity tranche."²⁵³⁵ Ten days later, on February 23, 2007, the ACA Managing Director who worked on the Abacus transaction spoke with a Goldman representative, and took notes of the conversation which stated in part: "Paulson taking 0-10%."²⁵³⁶ In April 2007, the same ACA Managing Director sent an email to the CEO and President of ACA's parent company, ACA Capital Holdings Inc., which was considering buying Abacus securities for itself. Her email stated: "We did price \$192 million in total of Class A1 and A2 today to settle April 26th. Paulson took down a proportionate amount of equity (0-10% tranche)."²⁵³⁷

In addition, on January 10, 2007, a few days after ACA was first approached by Goldman about working on the Abacus CDO, Mr. Tourre sent ACA a "Transaction Summary" describing the proposed transaction. The Transaction Summary identified the Paulson hedge fund as the "Transaction Sponsor," described the "Contemplated Capital Structure" of the CDO, and indicated that the lowest tranche, "[0]%-[9]%, cant was "pre-committed first loss."²⁵³⁸ The ACA Managing Director told the Subcommittee that the "[0]%-[9]%" tranche identified in the Transaction

²⁵³² April 23, 2010 Subcommittee Hearing at 63-64.

²⁵³³ See 3/23/2007 Goldman document, "Abacus 2007-AC1," at 14, GS MBS-E-002807082, Hearing Exhibit 4/27-120. Moody's rating of Aaa is equivalent to a AAA rating. Standard and Poor's also rated the Abacus Class A-1 notes and the Class A-2 notes as AAA.

²⁵³⁴ Subcommittee interview of Laura Schwartz (ACA) (4/23/2010).

²⁵³⁵ 2/12/2007 "CDO Asset 'Management' Proposal for Abacus 2007-AC1," submitted to ACA Commitments Committee, at 2, ACA-ABACUS-0000121560-66.

²⁵³⁶ 2/23/2007 handwritten notes of Laura Schwartz, ACA Managing Director of CDO asset management, ACA ABACUS 00004171 at 173.

²⁵³⁷ 4/10/2007 email from ACA Managing Director Laura Schwartz, ACA-ABACUS-0000006327.

²⁵³⁸ 1/10/2007 email from Fabrice Tourre to Laura Schwartz, GS MBS-E-002480520, Hearing Exhibit 4/27-108.

Summary matched the general description of an equity tranche, and the wording suggested that someone had already committed to buy it.²⁵³⁹ She explained that it was typical for a CDO sponsor to purchase the equity tranche, and she believed that Paulson, as the Abacus “sponsor,” had committed to buy that tranche.²⁵⁴⁰ The Abacus Marketing book also specified that the “First Loss” tranche of the CDO, of a “[+10%]” size, was “Not Offered” for sale.²⁵⁴¹ The ACA Managing Director declared in a statement to the SEC that she had interpreted the phrase, “Not Offered,” to indicate the equity tranche had been “pre-placed” and “ha[d] already been committed to purchase by an investor and [would] not be marketed.”²⁵⁴² She thought that investor was the Paulson hedge fund.

When asked about the Transaction Summary description of the lowest tranche in the Abacus CDO, Mr. Tourre told the Subcommittee that the phrase “pre-committed first loss” normally indicated that the tranche had been sold. He stated that he actually meant to communicate that the tranche had not been sold, and that portion of the Transaction Summary was poorly worded.²⁵⁴³

In his prepared statement at the Subcommittee hearing, Mr. Tourre testified that he never told ACA that the Paulson hedge fund would be a long investor in the Abacus CDO:

“I never told ACA, the portfolio selection agent, that Paulson and Company would be an equity investor in the AC-1 transaction or would take any long position in the deal. Although I don’t recall the exact words that I used, I recall informing ACA that Paulson’s fund was expected to buy credit protection on some of the senior tranches in this deal. This necessarily meant that Paulson was expected to take some short position in the transaction.”²⁵⁴⁴

In addition, Mr. Tourre testified that he informed ACA that the Paulson hedge fund was going to invest only on the short side of the transaction:

Senator Levin: You did not disclose to ACA that Paulson was on the short side of this deal. Is that correct?

Mr. Tourre: I did mention to ACA that the expectation was that Paulson was going to buy protection on senior layers of risk in the transaction.

Senator Levin: That they were going to be only on the short side.

²⁵³⁹ Subcommittee interview of Laura Schwartz (4/23/2010). See also Statement of Laura Schwartz, ACA ABACUS 00004406 at 408.

²⁵⁴⁰ Id. See also 1/10/2007 email from Fabrice Tourre to Laura Schwartz, “Transaction Summary,” GS MBS-E-002480520, Hearing Exhibit 4/27-108; SEC Complaint against Goldman Sachs at 14, 15; Goldman Sachs Submission at 32 (citing 1/10/2007 email from Fabrice Tourre to Laura Schwartz, “Transaction Summary,” GS MBS-E-003504901).

²⁵⁴¹ 3/23/2007 ACA/Goldman document, “Abacus 2007-AC1,” ACA-ABACUS-002807082, Hearing Exhibit 4/27-120; Statement of Laura Schwartz, ACA ABACUS 00004406 at 408.

²⁵⁴² Statement of Laura Schwartz, ACA ABACUS 00004406 at 408.

²⁵⁴³ Subcommittee interview of Fabrice Tourre (4/24/2010).

²⁵⁴⁴ April 27, 2010 Subcommittee Hearing at 44.

Mr. Tourre: Yes.²⁵⁴⁵

ACA has since filed a civil lawsuit against Goldman asserting that Goldman did not inform ACA that “Paulson intended to take an enormous short position” in Abacus and is seeking to recover \$30 million in compensatory damages and \$90 million in punitive damages for fraudulent inducement, fraudulent concealment, and unjust enrichment.²⁵⁴⁶

Regardless of the communications between Goldman and ACA, it is clear that the Abacus marketing material and offering documents provided by Goldman to investors contained no mention of Paulson’s short position in the CDO nor the significant role it played in the selection of the CDO’s reference assets. This was confirmed by Mr. Tourre at the Subcommittee hearing:

Senator Levin: And was it reflected in the Goldman Sachs security offering to investors that Paulson had been part of the selection process? Was that represented in that document?

Mr. Tourre: Paulson was not disclosed in the Abacus 07 AC-1 transaction, Mr. Chairman.

Senator Levin: It was not?

Mr. Tourre: No, it was not.²⁵⁴⁷

Still another troubling omission was Goldman’s failure to advise potential Abacus investors that the firm’s own economic interests were aligned with those of the Paulson hedge fund. As part of the Abacus CDO arrangement, Paulson agreed to pay Goldman a higher fee if Goldman could provide Paulson with CDS contracts containing premium payments below a certain level.²⁵⁴⁸ The

²⁵⁴⁵ Id. at 86.

²⁵⁴⁶ ACA Financial Guaranty Corp. v. Goldman Sachs & Co., Index No. 650027/2011 (N.Y. Sup.), Complaint (January 6, 2011), at 1, 23 (hereinafter “ACA Complaint against Goldman Sachs”).

²⁵⁴⁷ April 27, 2010 Subcommittee Hearing at 86.

²⁵⁴⁸ See 3/12/2007 Goldman memorandum to Mortgage Capital Committee, “ABACUS Transaction sponsored by ACA,” GS MBS-E-002406025, Hearing Exhibit 4/27-118 (“Goldman will receive an upfront premium from Paulson for distributing risk at or within specified strike spreads.” “If Goldman succeeds in placing a given Targeted Tranche inside the related Strike Spread, Goldman will receive from Paulson a fee on the notional amount of such Targeted Tranche distributed. Such fee will have a floor component (the ‘Minimum Fee Rate’) and an upside sharing component, under which Goldman will share with Paulson any execution delivered at levels tighter than the Strike Spreads.”). See also 1/18/2007 email from Fabrice Tourre to David Lehman and others, GS MBS-E-002483446 (detailing the additional fees Goldman could earn by executing trades within the strike spread of each tranche); 3/14/2007 email from Paolo Pellegrini to Sihan Shu with “ACA ABACUS Paulson Fee Illustration” spreadsheet attached (the spreadsheet provides details of the incentive-based fees paid to Goldman, including for Goldman’s pricing of spreads), PAULSON-ABACUS 0250401. Mr. Pellegrini told the SEC that Goldman and Paulson had discussions regarding Goldman’s compensation, resulting in “a formula that tied their compensation to sort of kind of the spread that they sort of presented to or that they would present to us.” SEC deposition of Paolo Pellegrini (12/3/2008), PSI-Paulson-04 (Pellegrini Depo)-0001, at 118-19. Mr. Tourre described the compensation agreement in an email to Mr. Sparks, writing that if Goldman could place super senior risk inside a certain spread, Paulson would pay Goldman an upfront fee and periodic fees reflecting the money Goldman saved Paulson. 9/8/2006 email from Fabrice Tourre to Dan Sparks, GS MBS-E-009516671. Mr. Tourre told the SEC that Paulson was

problem with the fee incentive offer was that, while lower premiums would result in lower costs to Paulson, it would also result in lower premium payments to the CDO, directly reducing the amount of cash available to the long investors. The Paulson-Goldman compensation arrangement, thus, created a direct conflict of interest between Goldman and the investors to whom it was selling the Abacus securities.

Selling Abacus Securities. Abacus 2007-AC1 closed, and its securities were issued on April 26, 2007. They were issued later than the securities from the Hudson, Anderson, and Timberwolf CDOs and hit the market as subprime mortgages were hitting record delinquency and default rates. Goldman sold the Abacus 2007-AC1 securities to just three investors: IKB, the German bank; ACA, the portfolio selection agent; and ACA Financial Guaranty Corp., the owner of ACA and a wholly owned subsidiary of ACA Capital Holdings Inc.²⁵⁴⁹ IKB bought \$150 million of the AAA rated Abacus securities. ACA bought about \$42 million in the AAA securities for placement in another CDO it was managing.²⁵⁵⁰ ACA Financial Guaranty Corp. was by far the largest investor, taking the long side of a \$909 million CDS contract referencing the super senior portion of the CDO.²⁵⁵¹ Goldman took the short side of the CDS contract, which it then transferred to Paulson.²⁵⁵²

“comfortable buying protection only to the extent that the spreads they were paying were less than a certain level.” SEC deposition of Fabrice Tourre (3/3/2009), GS MBS 0000022785, at 899-900.

²⁵⁴⁹ SEC Complaint against Goldman Sachs at 18. See Credit Default Swap Insurance Policy, ACA ABACUS 00001593. ACA complaint against Goldman Sachs at 15, 16.

²⁵⁵⁰ See Goldman trading datasheet, GS MBS 0000004276 (showing closing dates and details on various deals, including Abacus).

²⁵⁵¹ 5/8/2007 email exchange between Joshua Birnbaum and Fabrice Tourre, “Post on Paulson and ABACUS 07-AC1,” GS MBS-E-003352815; 4/13/2007 email exchange between Fabrice Tourre and Charlie Remnant, “ABACUS 07-AC1,” GS MBS-E-002485172; 5/9/2007 email to Fabrice Tourre, “ABN Amro,” GS MBS-E-002461503. ABN AMRO Bank N.V. (ABN), a large European bank, intermediated the swap between Goldman and ACA Financial Guaranty Corp.

²⁵⁵² The CDS contracts were executed between Goldman Sachs International and Paulson Credit Opportunities Master II Ltd., one of the Paulson hedge funds. 4/9/2007 email from Nicholas Friedman to Fabrice Tourre and others, “Re: ABACUS 07-AC1,” GS MBS-E-002449178.

Shortly before the Abacus 2007-AC1 transaction closed, Goldman agreed to take the long side of a CDS contract on the performance of a small portion of Abacus’ underlying assets when Paulson wanted to increase its short position at the last minute. Although Goldman ended up retaining this long investment, it did so only because it could not find an investor who would buy it. Mr. Tourre admitted this fact in the April 27, 2010 Subcommittee Hearing.

Senator Levin: Did Goldman intend to keep a long stake in that transaction when the deal was structured? I know it ended up with a piece. Was it intended that it end up with a piece of that deal?

Mr. Tourre: We tried to hedge our risk by selling that piece as well, but were not successful in doing so.

Senator Levin: So it was intended to sell that piece?

Mr. Tourre: For prudent risk management reasons, we were trying –

Senator Levin: Oh, I am sure for all the right reasons. But it was intended that Goldman not have any long stake on that piece. Is that correct?

Mr. Tourre: Yes.

See also 6/5/2007 email from David Gerst to Jonathan Egol, GS MBS-E-002469912, Hearing Exhibit 4/27-126.

Within months, the high risk subprime mortgages underlying the RMBS securities referenced in the Abacus portfolio incurred steep rates of default, and the Abacus securities began to lose value. According to the SEC, by October 2007, six months after the securities were issued, 83% of the underlying assets had received a credit rating downgrade and 17% of the underlying assets had been placed on a negative credit watch.²⁵⁵³ On October 26, 2007, a Goldman employee sent an email about Abacus 2007-AC1 with an assessment even more negative than that of the SEC:

“This deal was number 1 in the universe of CDO’s that were downgraded by Moody’s and S&P. 99.89% of the underlying assets were downgraded.”²⁵⁵⁴

The three long investors in Abacus 2007-AC1 together lost more than \$1 billion. As the sole short investor, Paulson recorded a corresponding profit of about \$1 billion.²⁵⁵⁵

On April 16, 2010, the SEC filed a complaint against Goldman and Mr. Tourre, alleging their actions constituted securities fraud.²⁵⁵⁶ The SEC specifically alleged violations of Section 17(a) of the Securities Act of 1933, as well as Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934.²⁵⁵⁷ The SEC contended that Goldman had failed to disclose to potential investors materially adverse information, that the party shorting the reference assets was the same party that had played a significant role in selecting those assets.²⁵⁵⁸ On July 14, 2010, Goldman reached a \$550 million settlement with the SEC.²⁵⁵⁹ In connection with the settlement, Goldman acknowledged:

“[T]he marketing materials for the ABACUS 2007-AC1 transaction contained incomplete information. In particular, it was a mistake for the Goldman marketing materials to state

²⁵⁵³ SEC Complaint against Goldman Sachs at 3.

²⁵⁵⁴ 10/26/2007 email from Goldman salesman to Michael Swenson, “ABACUS 2007-AC1 – Marketing Points (INTERNAL ONLY) [T-Mail],” GS MBS-E-016034495.

²⁵⁵⁵ SEC Complaint against Goldman Sachs at 3.

²⁵⁵⁶ See SEC Complaint against Goldman Sachs.

²⁵⁵⁷ Pursuant to 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5, the SEC alleged that Goldman and Mr. Tourre, “in connection with the purchase or sale of securities or securities-based swap agreements, by the use of means or instrumentalities of interstate commerce or of the mails, directly or indirectly (a) employed devices, schemes or artifices to defraud; (b) made untrue statements of material facts or omissions of material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) engaged in transactions, practices or courses of business which operated or would operate as a fraud or deceit upon persons.” SEC Complaint against Goldman Sachs at 20-21. The SEC alleged that Goldman and Mr. Tourre “knowingly or recklessly misrepresented in the term sheet, flip book and offering memorandum for ABACUS 2007-AC1 that the reference portfolio was selected by ACA without disclosing the significant role in the portfolio selection process played by Paulson, a hedge fund with financial interests in the transaction adverse to IKB, ACA Capital and ABN. Goldman&Co and Tourre also knowingly or recklessly misled ACA into believing that Paulson invested in the equity of ABACUS 2007-AC1 and, accordingly, that Paulson’s interests in the collateral selection process were closely aligned with ACA’s when in reality their interests were sharply conflicting.” SEC Complaint against Goldman Sachs at 21. Similar charges were filed pursuant to 15 U.S.C. § 77q(a)(1), (2) and (3). See SEC Complaint against Goldman Sachs at 19.

²⁵⁵⁸ SEC Complaint against Goldman Sachs at 2, 20, 21.

²⁵⁵⁹ Securities and Exchange Commission v. Goldman, Sachs & Co. and Fabrice Tourre, Case No. 10-CV-3229, (S.D.N.Y.), Consent of Goldman Sachs, (July 14, 2010), at 1, 2, 10 (hereinafter “Consent of Goldman Sachs”).

that the reference portfolio was ‘selected by’ ACA Management LLC without disclosing the role of Paulson & Co. Inc. in the portfolio selection process and that Paulson’s economic interests were adverse to CDO investors.’²⁵⁶⁰

Analysis. Goldman constructed Abacus 2007-AC1 to help a hedge fund short multiple RMBS securities. Goldman allowed the hedge fund to play a significant role in the selection of the CDO’s referenced assets, while employing an outside portfolio agent to give the impression that the CDO assets were selected by a disinterested third party. Goldman failed to disclose the hedge fund’s investment objective and asset selection role to a credit rating agency that assigned AAA ratings to two tranches of the Abacus securities. Goldman also failed to provide full disclosure to the long investors to whom it sold the Abacus securities. In addition, Goldman failed to disclose to the investors a compensation arrangement that provided incentives for Goldman to minimize the premium payments into the CDO. Within six months, the Abacus securities began incurring losses and ratings downgrades. Goldman watched the long investors to whom it had sold the securities lose virtually all the funds they had invested, while the hedge fund it had assisted walked away with a profit of approximately \$1 billion.

(iii) Additional CDO Conflicts of Interest

In addition to creating and failing to manage conflicts of interest arising from its design and sale of CDO securities, Goldman at times allowed conflicts of interest to affect how it carried out key roles in the administration of its CDOs.²⁵⁶¹ Two examples, in which Goldman acted as the liquidation agent in Hudson 1 and the collateral put provider in Timberwolf, illustrate the problems. In both cases, Goldman used its administrative roles to promote and enhance its own financial interests at the expense of the clients to whom it had sold the CDO securities.

AA. Liquidation Agent in Hudson 1

In 2006 and 2007, several Goldman CDOs included provisions establishing a “liquidation agent” to sell any poorly performing assets in the CDO. This feature appeared in Hudson Mezzanine 2006-1, which is examined in this Report, as well as Hout Bay 2006-1, Hudson High

²⁵⁶⁰ Consent of Goldman Sachs at 2. Despite this acknowledgment by Goldman as part of the settlement, when asked during the Subcommittee hearing if “a non-biased person [could] look at the facts [of Abacus 2007-AC1] as you see them and say there is a question of unethical behavior here,” David Viniar, the executive vice president and chief financial officer for Goldman, stated he “didn’t believe so.” April 27, 2010 Subcommittee Hearing at 125.

²⁵⁶¹ Some of the administrative roles that Goldman filled in its CDOs, as described in its CDO agreements, included: Initial Purchaser, Synthetic Security Counterparty, Senior Swap Counterparty, Credit Protection Buyer, Liquidation Agent, Calculation Agent under U.S. Dollar Cash Flow Swap Transaction, Collateral Put Provider, CP Note Placement Agent, Portfolio CDS Counterparty, Hedge Counterparty - Cashflow Swap, Collateral Disposal Agent, Credit Default Swap Calculation Agent, Basis Swap Counterparty, and Basis Swap Calculation Agent. 2/18/2008 document prepared by Goldman Sachs, outlining the parties serving each role in Goldman underwritten CDOs, GS MBS 0000004337.

Grade 2006-1, Hudson Mezzanine 2006-2, and Anderson Mezzanine 2007-1.²⁵⁶² In each instance, Goldman served as the initial liquidation agent, although in several CDOs, it later transferred the role to a third party. In Hudson 1, Goldman's dual roles as liquidation agent and sole short party in the CDO created a direct conflict of interest between Goldman and the clients to whom it sold the Hudson securities, which Goldman exploited by placing its own financial interests ahead of those of its clients.

Designing the Liquidation Agent Role. According to Goldman, appointing a CDO liquidation agent was a "fairly novel idea" that was first implemented in the 2006 Hout Bay CDO.²⁵⁶³ Peter Ostrem, then head of the CDO Origination Desk, oversaw the drafting of the liquidation agent feature.²⁵⁶⁴ He told the Subcommittee that Goldman wanted to issue static portfolio CDOs, meaning CDOs whose assets did not change over time, but also wanted to protect investors from poorly performing assets. He explained that the liquidation agent feature was intended to be triggered by a specified event and provided the liquidation agent with "no discretion" other than to sell the poorly performing asset, which was referred to as a "Credit Risk Asset." He explained that, without such a feature, poorly performing assets would "just stay there" in a CDO, further harming investors.²⁵⁶⁵ The CDO Origination Desk also favored the approach, because it could be performed by Goldman itself at a lower cost than retaining a traditional collateral manager.²⁵⁶⁶

The liquidation agent provisions established criteria for identifying "Credit Risk Assets" and removing them from the CDO. In a July 2006 memorandum to the Goldman Mortgage Capital Committee, the CDO Origination Desk described the liquidation agent role as follows:

"As Liquidation Agent, Goldman will liquidate assets determined by the Trustee to be 'Credit Risk Assets' based on specific guidelines. Goldman will have 12 months to sell these assets. Sales will be made under a competitive bidding process, whereby we will solicit three outside bids and select the highest. Prior to executing Hout Bay 1, in which we also played the Liquidation Agent role, we spoke to multiple counterparties as to our role as Liquidation Agent. We received approval for our role in this transaction from legal and accounting. ... Finally, we spoke with outside counsel, Wilmer Cutler, about potential issues related to the Investment Advisor Act. They are of the opinion that our role of Liquidation Agent does not cause us to be deemed an Investment Advisor based on the exception to the Advisors Act for a 'limited grant of discretion.'"²⁵⁶⁷

²⁵⁶² 2/18/2008 Goldman presentation, "CDO Transactions (July 1, 2006 - December 31, 2007) in which Goldman Sachs acted as underwriter," GS MBS 0000004337, at 4340; 7/19/2007 Goldman document, "GS Liquidation Agent Role in ABS CDOs," GS MBS-E-014055117.

²⁵⁶³ Subcommittee interview of Darryl Herrick (10/13/2010).

²⁵⁶⁴ Subcommittee interview of Peter Ostrem (10/5/2010).

²⁵⁶⁵ *Id.* Although Mr. Ostrem helped design the liquidation agent feature, he was not employed by Goldman when its CDO assets were downgraded and triggered its liquidation agent duties.

²⁵⁶⁶ See 7/17/2006 Goldman memorandum to the Mortgage Capital Committee, "Placing debt and equity on a static high grade structured product CDO Squared with Investec (UK) Limited," GS MBS-E-013458155.

²⁵⁶⁷ *Id.*

One key issue discussed in the memorandum was whether, by assuming the role of liquidation agent, Goldman would trigger registration and disclosure obligations under the Investment Advisers Act of 1940. The CDO Origination Desk wrote:

“We have discussed Goldman’s role as Liquidation Agent internally with Tim Saunders [counsel in Goldman’s legal department] and externally with outside counsel, Wilmer Cutler. One concern about that role was whether Goldman would be viewed as an Investment Advisor. We specifically crafted Goldman’s role in Hout Bay 1 and in this case to eliminate both internal and external counsel’s concern about Goldman being treated as an Investment Advisor. The main factors that made Tim Saunders and Wilmer Cutler comfortable that Goldman will not be treated as an Investment Advisor were:

- Goldman’s role is Liquidation Agent and not Collateral Manager. Goldman is engaged by the CDO to liquidate Credit Risk Assets and will receive an ongoing Liquidation Agent Fee for such services;
- Goldman does not determine whether an asset is a Credit Risk Asset. Such determination is made by the CDO based on specific rules . . . ;
- Goldman must liquidate such Credit Risk Assets within 12 months of such determination and the price received on such liquidation must be in the context of a three-bid process;
- Goldman does not receive additional compensation and or control of the CDO for acting as a Liquidation Agent. ...

We will build a provision in the deal documents to allow Goldman to resign as Liquidation Agent if appropriate notice is given and a replacement Liquidation Agent is in place.”²⁵⁶⁸

This memorandum indicates that, from its inception, the liquidation agent function was designed as a narrow, ministerial role, in part to avoid the legal obligations applicable under federal law to investment advisers.

The memorandum also indicated that “Credit Risk Assets” would be identified through objective criteria. For example, in the CDO under review, the memorandum stated that Credit Risk Assets would be defined as “[a]ny asset that is downgraded by Moody’s or S&P below Ba2” and “[a]ny asset that is defaulted.”²⁵⁶⁹

Credit Rating Downgrades. One year later, on July 19, 2007, after Mr. Ostrem had left Goldman and Mr. Lehman had assumed responsibility for all Goldman-originated CDOs, he held a conference call with members of the CDO team and Goldman in-house legal counsel Tim Saunders,

²⁵⁶⁸ Id.

²⁵⁶⁹ Id.

to discuss how to carry out Goldman's CDO liquidation agent responsibilities. The prior week, Moody's and S&P had suddenly downgraded hundreds of RMBS and CDO securities in the first of many mass downgrades. Those downgrades suddenly caused a number of assets in Goldman's CDOs to qualify as Credit Risk Assets that had to be liquidated.

In advance of the conference call, Mr. Lehman's staff prepared a two-page summary of Goldman's liquidation agent duties, the liquidation procedures specified in the CDO documents, the CDOs affected, and the assets that Goldman anticipated would be affected by the downgrades.²⁵⁷⁰

Four days after the conference call, on July 23, 2007, Benjamin Case, who had been assigned lead responsibility for carrying out Goldman's liquidation agent functions, circulated a draft document describing Goldman's role. It stated that Goldman's goal as liquidation agent was:

"to attempt to maximize proceeds on the unwind of credit risk assets pursuant to the liquidation process governed by the CDO documents, rather than to liquidate at an arbitrary pre-specified time without regard to market conditions."²⁵⁷¹

It identified the assets that had been classified as Credit Risk Assets and provided Goldman's "Current Strategy" for handling them:

"– wait and continue to evaluate market conditions, rather than liquidating now.
 - upside is that continued short-covering by hedge funds anxious to monetize profits could cause minor rally (5-10 points)[.]
 - downside is that speed up of foreclosure process vs. current timeline expected by market could decrease IO value, or significant forced selling of similar names by CDO vehicles could push levels wider [lower prices]."

Hudson Liquidation Agent. Although the liquidation agent role was originally designed for use in Goldman's "high grade" CDOs, where "there is substantially less credit risk in the assets vs. a mezzanine structured product CDO portfolio," the feature was also added to some of its riskier mezzanine CDOs, including Hudson Mezzanine 2007-1 (Hudson 1).²⁵⁷² Hudson 1 was a synthetic CDO whose assets consisted entirely of CDS contracts referencing subprime RMBS or ABX assets with BBB or BBB- ratings. Goldman had selected 100% of the reference assets and held 100% of the short side of the CDO.

Hudson 1's marketing materials outlined Goldman's liquidation agent role. The Hudson marketing booklet, for example, told potential investors:

²⁵⁷⁰ 7/19/2007 Goldman document, "GS Liquidation Agent Role in ABS CDOs," GS MBS-E-014055117.

²⁵⁷¹ 7/23/2007 email from Mr. Case to Mr. Bieber, "CDO Liquidation Agent Role - Draft Talking Points - INTERNAL USE ONLY," GS MBS-E-015240358.

²⁵⁷² 7/17/2006 Goldman memorandum to Mortgage Capital Committee, GS MBS-E-013458155, at 57. A "mezzanine" CDO is one in which the underlying assets carry credit ratings such as BBB or BBB-.

“Hudson CDOs are non-managed and static in nature and provide term non-recourse funding where Goldman Sachs acts as Liquidation Agent on an ongoing basis. The Liquidation Agent will be responsible for efficiently selling credit risk assets.”²⁵⁷³

The Hudson term sheet provided additional information about the liquidation agent role and the “Credit Risk Assets” that would have to be liquidated:

“Goldman as Liquidation Agent, will liquidate any asset determined to be a ‘credit risk’ within 12 months of said determination. Credit Risk assets will include: any asset downgraded by Moody’s or S&P below Ba3 or BB-, any asset that is defaulted or would be experiencing a credit event as defined by the PAUG [Pay As You Go] confirm. There will be no reinvestment, substitution, discretionary trading or discretionary sales. After closing, assets that are determined to be ‘credit risk’ securities will be sold by the Liquidation Agent within one year of such determination.”²⁵⁷⁴

The Hudson Offering Circular repeated that information and added:

“The Liquidation Agent will not have the right, or the obligation, to exercise any discretion with respect to the method or the price of any assignment, termination or disposition of a CDS Transaction; the sole obligation of the Liquidation Agent will be to execute such assignment or termination of a CDS Transaction in accordance with the terms of the Liquidation Agency Agreement. ... [T]he Liquidation Agent shall have no responsibility for, or liability relating to, the performance of the Issuer or any CDS Transaction, Reference Obligation, Collateral Security or Eligible Investment.”²⁵⁷⁵

Goldman charged a 10 basis point ongoing fee for serving as the Hudson Liquidation Agent,²⁵⁷⁶ which resulted in its being paid a total fee of approximately \$3.1 million.²⁵⁷⁷

While Goldman was marketing Hudson in 2007, a client asked why the liquidation agent was “afforded up to 12 months to sell a credit risk asset.”²⁵⁷⁸ The Subcommittee was unable to find Goldman’s contemporaneous response, but when asked the same question, Darryl Herrick, the Hudson deal captain, told the Subcommittee that there was “headline risk” associated with the downgrade of an asset, and twelve months gave Goldman “flexibility to try to get a better price later.”²⁵⁷⁹ When asked whether the “flexibility” to delay a sale violated Hudson’s prohibition against discretionary trading by the liquidation agent, Mr. Herrick said that Goldman had

²⁵⁷³ 10/2006 “Hudson Mezzanine 2006-1 Flipbook,” GS MBS-E-009546963, Hearing Exhibit 4/27-87.

²⁵⁷⁴ Goldman Sachs Hudson Mezzanine Funding 2006-1, LTD Preliminary Termsheet, GS MBS-E-001557869.

²⁵⁷⁵ 12/3/2006 Hudson Mezzanine 2006-1, LTD. Offering Circular, GS MBS-E-021821196 at 234.

²⁵⁷⁶ 10/2006 “Hudson Mezzanine 2006-1 Flipbook,” GS MBS-E-009546963, Hearing Exhibit 4/27-87.

²⁵⁷⁷ See Goldman Sachs response to Subcommittee QFR at PSI_QFR_GS0239.

²⁵⁷⁸ 10/6/2006 email from Michael Halevi to Olivia Ha, GS MBS-E-014338525.

²⁵⁷⁹ Subcommittee interview of Darryl Herrick (10/13/2010).

“discretion based on a rule,” and that the liquidation agent provisions had been vetted with the credit rating agencies which “probably wanted the deal to avoid forced sales.”²⁵⁸⁰

Failure to Liquidate. In July 2007, after the credit rating agencies began the mass downgrades of RMBS securities, the first RMBS securities underlying the Hudson CDO lost their investment grade ratings, and the CDS contracts referencing those assets qualified as Credit Risk Assets requiring liquidation.²⁵⁸¹ Within three months, by October 15, 2007, over 28% of the Hudson assets qualified as Credit Risk Assets.²⁵⁸² As liquidation agent, Goldman should have begun issuing bids to sell the assets at the best possible price and remove them from the Hudson CDO, but it did not.

In October 2007, Goldman began to contact Hudson investors to discuss transferring its liquidation agent responsibilities to a third party. That transfer required investor consent. Benjamin Case took notes of two telephone conversations he had with a Hudson investor, National Australia Bank (NAB), discussing the issues.²⁵⁸³ In the calls, Mr. Case explained why Goldman had yet to liquidate any of the Credit Risk Assets, explaining that Goldman was waiting for asset prices to improve.²⁵⁸⁴ He also reported that Goldman was considering an amendment to the Hudson transaction that would extend the maximum liquidation period, as well as make other structural changes to the Hudson deal.²⁵⁸⁵

According to his notes, Mr. Case informed NAB that Goldman was seeking to transfer its liquidation role to a third party with more liquidation experience, because that change:

“will be in the best interest of investors - the credit obligation term was originally written with the expectation that was unlikely to happen. ...

Good for several reasons:

1. Large institutional assets manager will be able to access more liquidity b/c [because] they can access other broker dealers and get good pricing[.]

²⁵⁸⁰ Id. Mr. Herrick was not employed by Goldman when its CDO assets were downgraded and triggered its liquidation agent duties.

²⁵⁸¹ 1/3/2008 email from Shelly Lin to Mr. Sparks, GS MBS-E-021880171 (attached file, “Deal Summary,” GS MBS-E-021880172).

²⁵⁸² Id.

²⁵⁸³ 10/15/2007 email from Naina Kalavar, “NAB/Hudson Mezz Update 2,” GS MBS-E-015738973. Mr. Case used this email to circulate his notes of the two telephone conversations.

²⁵⁸⁴ Id. at 2. The notes included the following: “[C]urrent distressed nature of the assets has been fully priced in and has not moved over the past 2 months - if unwound those cds would be at 80-90 points, that is % points to be paid up front to unwind swap - equiv of 20 cents to dollar in cash bond terms ... Across entire universe of loans already in liquidation - been generally se[e]n 50-60-70 % recovery rates. Rates are not coming back high enough to make the market opt[i]mistic that bonds will come back to recover princi[pa]l. ... Our view that there is upside in waiting an[d] evaluating mkt conditions before liquidating. ... We think that the shorts may get impatient – minor rallies from short covering – domino effect/momentum creates a rally b/c shorts get nervous at little rally – this provides potential upside to waiting to liquidate.”

²⁵⁸⁵ Id. at 3. Such an amendment would require investor consent.

2. Even keeping the deal the way it is, the decision of when in the 12 month period to liquidate could be better handled by an experienced manager[.]
3. Potential amendment could be made to benefit the deal by giving more flexibility to agent.²⁵⁸⁶

These notes indicate that, although Goldman was the architect of the Hudson CDO and selected itself to serve as liquidation agent at a fee of \$3.1 million, when Goldman was called upon to execute its role, it believed the decision of when to liquidate the impaired assets “could be better handled by an experienced manager.”

According to Mr. Case’s notes, NAB sent Mr. Case an email asking if Goldman held any of the Hudson investments: “does GS hold any of this?” Mr. Case responded:

“def own equity and different pieces of various tranches no [sic] exactly, but decent size and numbers of cl[a]sses on our books.”²⁵⁸⁷

Mr. Case apparently did not disclose that, in addition to its \$6 million equity tranche, Goldman also held 100% of the short position in the \$2 billion CDO, and that its short investment would increase in value as the Hudson assets lost value.

According to Mr. Case’s notes, NAB replied by asking Goldman to provide more specific information about Goldman’s holdings in the transaction: “Could you please follow up with what Goldman holds?”²⁵⁸⁸ When Mr. Case asked why NAB wanted that information, NAB responded: “Want to make sure you [Goldman] are making restructuring decisions for the right reasons - make sure serving the right interests.” According to his notes, Mr. Case replied: “Our intended goal of liquidation agent is to serve the best interests of the CDO - that is the duty of the liquidation agent - it is a policy and process.”²⁵⁸⁹

In November 2007, Goldman took initial steps to transfer its liquidation agent responsibilities to a third party.²⁵⁹⁰ At that point, Goldman had yet to liquidate any of the Hudson Credit Risk Assets.²⁵⁹¹ The nine assets that had become Credit Risks in July had already dropped significantly in value. One asset which, on July 16, had a value of 61% of its face (par) value, had fallen by November 1 to 16% of par.²⁵⁹² Another asset that, on July 16, had a value of 43% of par, had fallen in value by November 1 to 7% of par.²⁵⁹³

²⁵⁸⁶ 10/15/2007 email from Naina Kalavar, “NAB/Hudson Mezz Update 2,” GS MBS-E-015738973.

²⁵⁸⁷ Id. at 75.

²⁵⁸⁸ Id. at 76.

²⁵⁸⁹ Id.

²⁵⁹⁰ 11/9/2007 email from Mr. Case to Mr. Lehman, GS MBS-E-021876334.

²⁵⁹¹ 2/29/2008 letter from Morgan Stanley to Goldman, HUD-CDO-00006877.

²⁵⁹² Reference asset OOMLT 2006-2 M8. See 1/3/2008 email from Shelly Lin to Mr. Sparks, GS MBS-E-021880171 (attached file, “Deal Summary,” GS MBS-E-021880172).

²⁵⁹³ Reference asset MSAC 2006-WMC2 B3. See 1/3/2008 email from Shelly Lin to Mr. Sparks, GS MBS-E-021880171 (attached file, “Deal Summary,” GS MBS-E-021880172).

At the end of November, Goldman reached an agreement with Trust Company of the West (TCW), subject to investor approval, in which Goldman would assign its liquidation agent duties to TCW, and TCW would “share back” 30% of the fees with Goldman.²⁵⁹⁴ Mr. Lehman told the Subcommittee that Goldman’s decision to assign the liquidation agent rights to a third party was because liquidation was a non core business for Goldman, and TCW was better suited to liquidate the Credit Risk Assets.²⁵⁹⁵ On December 18, 2007, while Goldman was still seeking investor approval to assign the liquidation agent role to TCW, a Goldman representative explained to an investor the firm’s thinking:

“GS [Goldman Sachs] is soliciting consent to assign GS role as liquidation agent to TCW bec[ause] when liquidation agent role was designed, it was very ‘out of the money’; now when the risk is very real, it is much more efficient to have a sophisticated collateral manager bec[ause]

(i) TCW can access better liquidity than GS, ie get bids from the entire street

(ii) real asset manager can pursue further amendments to the doc to make liquidation more efficient bec[ause] is not an asset [manager] under the investment act in 1940 and cannot act [sic] investment advisory services and can’t act with optimal discretion.”²⁵⁹⁶

On December 19, 2007, Morgan Stanley, the largest Hudson long investor with a \$1.2 billion interest encompassing the entire super-senior tranche,²⁵⁹⁷ was presented with a consent form to assign the liquidation agent rights to TCW.²⁵⁹⁸ Morgan Stanley told the Subcommittee that it had declined to consent to the transfer, because the liquidation agent role was ministerial, had no discretionary authority, and could quickly and easily be accomplished by Goldman.²⁵⁹⁹ Morgan Stanley told the Subcommittee that it instead asked Goldman to begin liquidating the \$596.5 million in Credit Risk Assets immediately, some of which had been designated as Credit Risks for five months, and all of which had declined in value.²⁶⁰⁰

On January 3, 2008, Daniel Sparks, the Mortgage Department head, was given a spreadsheet listing the Credit Risk Assets in each of the CDOs in which Goldman was serving as the liquidation agent, including Hudson 1. The spreadsheet showed that, in Hudson, 44 assets were Credit Risks with a face value of \$635 million, totaling about 30% of the asset pool.²⁶⁰¹

[SEE CHART NEXT PAGE: *Credit Risk Assets*, prepared by Goldman Sachs.]

²⁵⁹⁴ See 11/29/2007 email from Mr. Case to Mr. Sparks, Mr. Lehman, and others, GS MBS-E-021876502.

²⁵⁹⁵ Subcommittee interview of David Lehman (9/27/2010).

²⁵⁹⁶ 12/18/2007 email from Lira Lee to [investor], GS MBS-E-021878556.

²⁵⁹⁷ See discussion of Hudson 1, above.

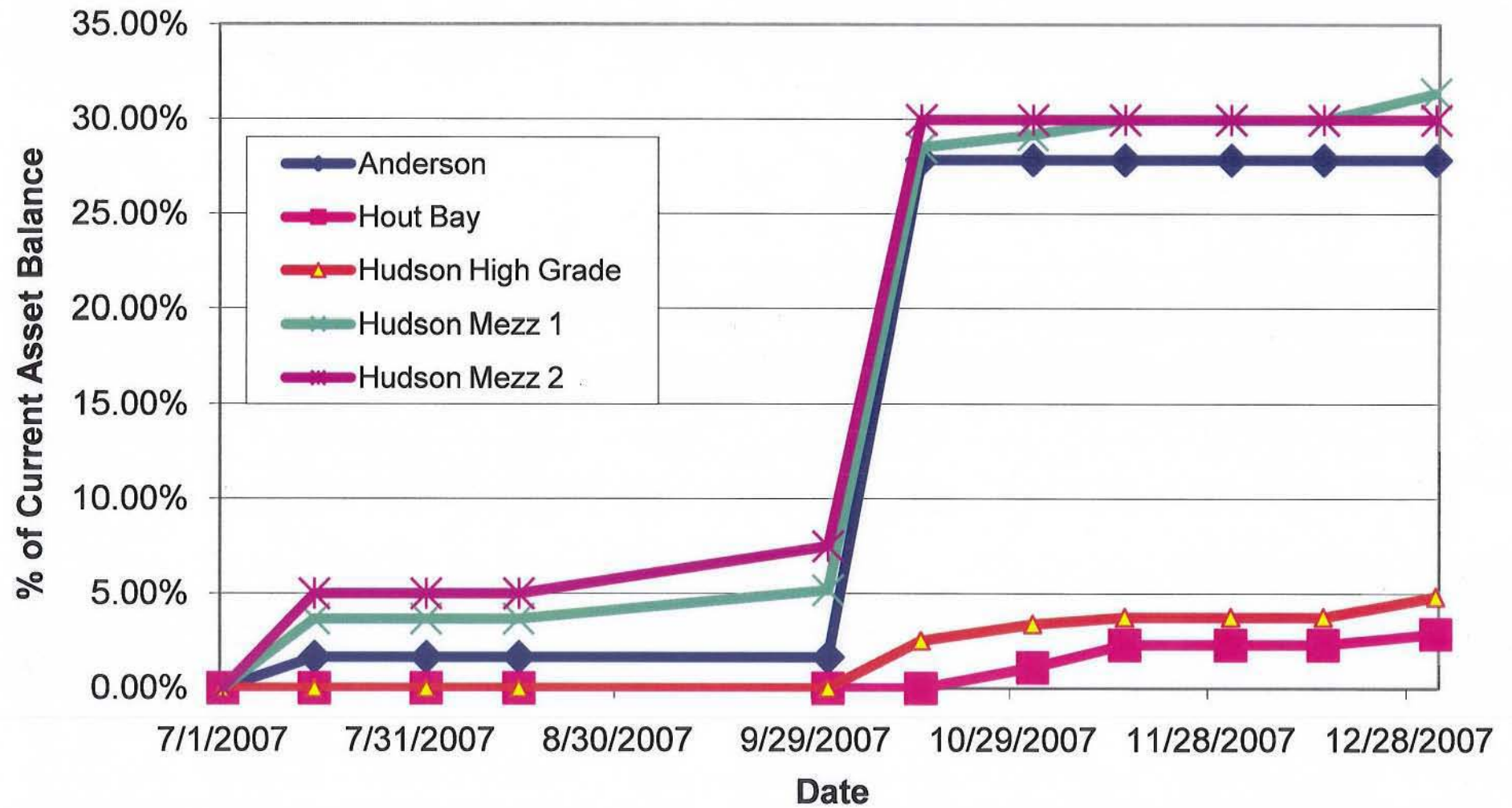
²⁵⁹⁸ 12/19/2007 email from Mr. Case to Nicole Martin of Morgan Stanley, GS MBS-E-021876172.

²⁵⁹⁹ Subcommittee interview of Morgan Stanley (8/6/2009).

²⁶⁰⁰ Id.

²⁶⁰¹ 1/3/2008 email from Shelly Lin to Mr. Sparks, GS MBS-E-021880171 (attached file, “Deal Summary,” GS MBS-E-021880172).

Credit Risk Assets (%)



The spreadsheet also showed that the weighted average values of the Hudson assets had fallen dramatically, causing losses that could have been avoided had Goldman liquidated them sooner. The weighted average values had fallen from 45% of face (par) value in July, to a low of 15% on November 1, 2007, and were about 20% of par value on January 2, 2008.²⁶⁰²

[SEE CHART NEXT PAGE: *Weighted Average Levels*, prepared by Goldman Sachs.]

Hudson Conflict of Interest. Despite the falling values and Morgan Stanley's ongoing request to initiate liquidation of the Credit Risk Assets as set out in the Hudson 1 agreement, Goldman still did not begin liquidating.

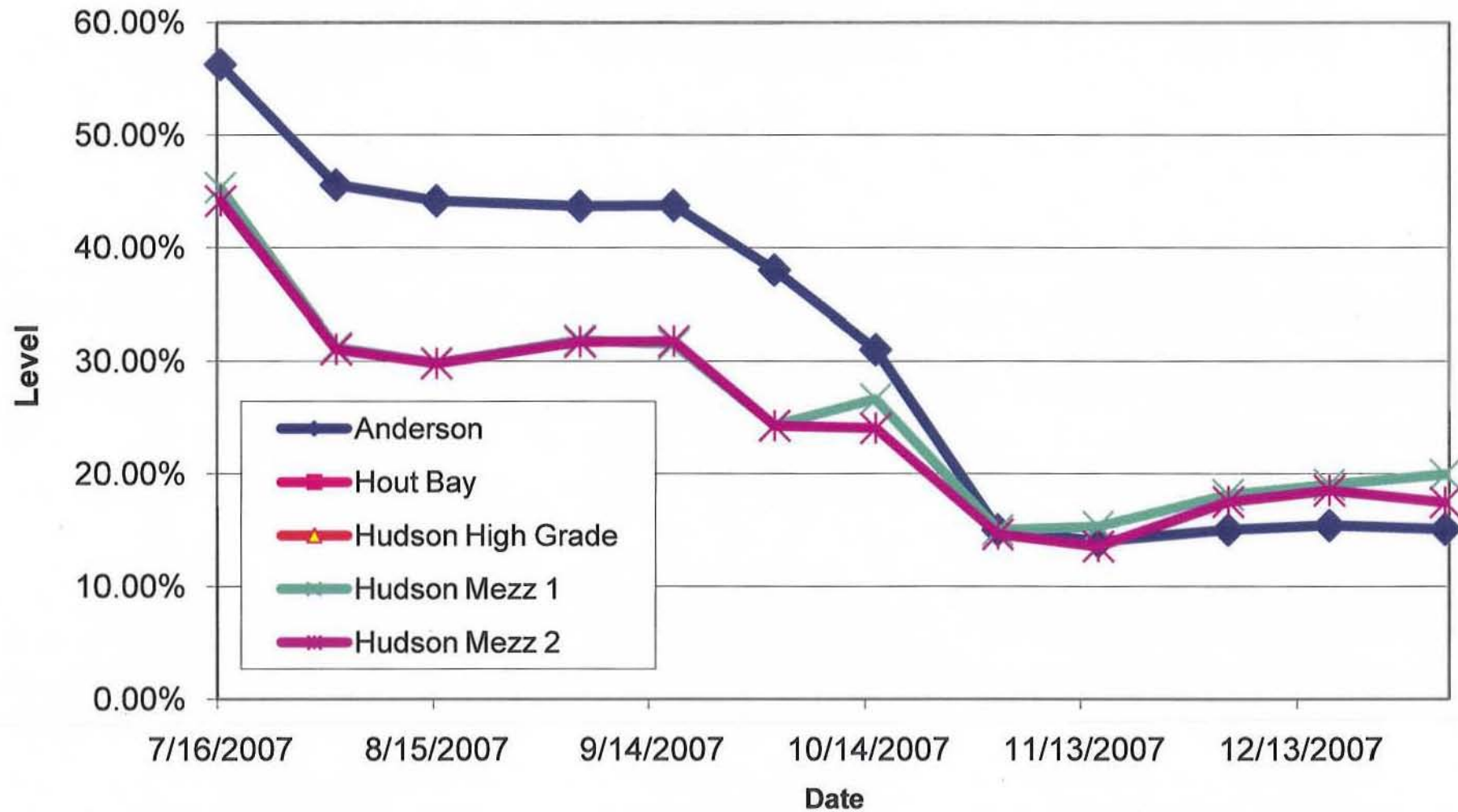
During January and February 2008, Morgan Stanley engaged in frequent communications with Goldman personnel, including Mr. Lehman who oversaw Goldman's CDOs, and Mr. Case who oversaw the liquidation agent function, to initiate liquidation of the Hudson assets.²⁶⁰³ The falling value of the Hudson assets caused sharp losses in Morgan Stanley's \$1.2 billion investment, leading Morgan Stanley to press for the Credit Risk Assets to be liquidated and removed from the CDO as soon as possible. In contrast, as the Hudson assets fell in value, Goldman, as the CDO's sole short party, saw its short position become increasingly profitable. Goldman had little financial incentive to liquidate the Credit Risk Assets, because the more they fell in value, the more Goldman was able to maximize the profits from its short position in the CDO. Goldman's dual roles as liquidation agent and short party, thus, created a conflict of interest that disadvantaged the long investors in the Hudson CDO, such as Morgan Stanley.²⁶⁰⁴

²⁶⁰² Id.

²⁶⁰³ See, e.g., 1/16/2008 email from Nicole Martin to Mr. Lehman, GS MBS-E-022164848.

²⁶⁰⁴ Due to the extensive losses experienced by Hudson 1, by January 2008, Morgan Stanley was likely the only long investor whose investment was not completely extinguished.

Weighted Average Levels



Morgan Stanley personnel expressed increasing frustration with Goldman's failure to liquidate the Hudson Credit Risk Assets, in both internal communications and with Goldman representatives. On January 16, 2008, for example, the key trader on Morgan Stanley's Proprietary Trading Desk dealing with Hudson wrote to a colleague: "Had another call with [Goldman's] sr. trader about GS's liquidation agent role in the \$1.2bn HUDSON deal. They insist they are NOT acting as a fiduciary per the docs in this deal."²⁶⁰⁵ On February 5, he sent Mr. Lehman an email: "[P]lease call when possible - \$969mm now eligible to be liquidated post S&P do[w]ngrades."²⁶⁰⁶

On February 6, the Morgan Stanley trader wrote to a colleague:

"[W]ent down the road with Goldman on liquidation agent assets (now ~\$1bb of eligible assets post downgrades). They told me they will 'continue to take my opinion under advisement' but provided no course of action. I broke my phone. Will talk to [Morgan Stanley legal counsel] tomorrow but don't think there is any probable way for us to force them to liquidate assets."²⁶⁰⁷

On February 7, the Morgan Stanley trader sent another email to Mr. Lehman:

"Spoke with Ben [Case] re: Hudson today.

Goes without saying I remain very frustrated by the way GS is handling the liquidation agent role. There is almost \$1bb of eligible assets in that deal now, every one of which has lost value since it was downgraded.

No good reason to wait other th[a]n to devalue our position. It's a shame [O]ne day I hope I get the real reason why you are doing this to me."²⁶⁰⁸

According to Morgan Stanley, Goldman continued to explain its seven-month delay in liquidating the Credit Risk Assets by asserting that the market would rebound during a rally to cover shorts, and it should wait to liquidate until asset prices rose. In a February 13, 2008 telephone call between Morgan Stanley and Goldman, for example, which was recorded and transcribed, Mr. Case stated:

"So I think, as we see the short covering wave kind of continue to proceed ... it's gonna get to the point where it's in the best interest of the deal to start liquidating then. ... I know we've talked about this twelve month period ... it doesn't seem like it's gonna take till late in the twelve month process for the majority of these assets to get to that point."²⁶⁰⁹

Morgan Stanley asked if there was anything beyond the "technical nature of the markets," such as government intervention, to produce "any kind of real pop" that would improve the underlying

²⁶⁰⁵ 1/16/2008 email from John Pearce of Morgan Stanley to Michael Petrick, HUD-CDO-00004851.

²⁶⁰⁶ 2/5/2008 email from Mr. Pearce to Mr. Lehman and Nicole Martin, HUD-CDO-00004852.

²⁶⁰⁷ 2/6/2008 email from Mr. Pearce to Michael Petrick, HUD-CDO-00005146.

²⁶⁰⁸ 2/7/2008 email from Mr. Pearce to Mr. Lehman, HUD-CDO-00005147.

²⁶⁰⁹ Transcript of 2/13/2008 telephone call between Morgan Stanley and Goldman, HUD-CDO-00006894. See also 2/28/2008 email from Sue Fertel-Kramer to Mr. Case and others, GS MBS-E-021881029.

fundamentals in the mortgage market. Mr. Case responded: “The chance that it could move in that direction, at least in the next few months . . . is de minimis I’d say.”²⁶¹⁰ During the call, Morgan Stanley’s representative again urged Goldman to begin the liquidation process: “Just so you know, my opinion stays the same, I’d like to see a bid list before three o’clock today.”²⁶¹¹

Morgan Stanley told the Subcommittee that the Hudson assets had been in near continuous decline, and Goldman’s refusal to liquidate assets shortly after they became Credit Risk Assets allowed them to decline further, rather than limiting losses for bondholders. By February 21, 2008, Morgan Stanley had calculated that the liquidation delay had cost it \$130.5 million; the next week it calculated the losses had increased to \$150 million.²⁶¹²

Morgan Stanley told Goldman that by delaying the liquidation of the Credit Risk Assets, Goldman was in violation of the terms in the Hudson 1 offering circular, in particular the provision: “The Liquidation Agent will not have the right, or the obligation, to exercise any discretion with respect to the method or the price of any assignment, termination or disposition of a . . . Credit Risk Obligation.”²⁶¹³ On February 29, 2008, Morgan Stanley sent Goldman a letter demanding that it immediately initiate liquidation of \$1 billion in Hudson Credit Risk Assets:

“As Liquidation Agent, [Goldman] is currently responsible for liquidating approximately \$1,000,000,000 of Credit Risk Obligations. The transaction documents clearly state that [Goldman] would not exercise investment discretion in its role as Liquidation Agent. [Goldman] has not yet liquidated a single Credit Risk Obligation, notwithstanding that some date back to August of 2007. The [Goldman] employee handling the liquidation has explained this by stating that he believes the price for these obligations will increase in the future and it is better for the deal to liquidate these obligations at a later date. . . .

The Liquidation Agency Agreement states that “the Liquidation Agent . . . **shall not provide investment advisory services to the Issuer or act as the “collateral manager” for the Pledged Assets.** . . .

While the Liquidation Agency Agreement provides that the Liquidation Agent must complete the process of liquidating the relevant assets within twelve months, it does not provide the Liquidation Agent with any right to delay the liquidation process based on the exercise of Investment discretion. To the contrary, the Liquidation Agency Agreement and the [Offering Circular] clearly state that no discretion or investment advisory services are ever to be provided by the Liquidation Agent.”²⁶¹⁴

²⁶¹⁰ Transcript of 2/13/2008 telephone call between Morgan Stanley and Goldman, HUD-CDO-00006894.

²⁶¹¹ *Id.*

²⁶¹² 2/21/2008 email from Vanessa Vanacker to Mr. Pearce, HUD-CDO-00004882. 2/29/2008 letter from Morgan Stanley to Goldman, HUD-CDO-00006877.

²⁶¹³ 12/3/2006 Hudson Mezzanine 2006-1, LTD. Offering Circular, section entitled, “Disposition of CDS Transactions by the Liquidation Agent Under Certain Circumstances,” GS MBS- E-021821196 at 241. See 2/29/2008 letter from Morgan Stanley to Goldman, HUD-CDO-00006877.

²⁶¹⁴ 2/29/2008 letter from Morgan Stanley to Goldman, HUD-CDO-00006877 [emphasis in original].

Morgan Stanley concluded by “demanding only that [Goldman] fulfill its contractual duties as required by the Liquidation Agency Agreement and assign, terminate or otherwise dispose of the relevant CDS transaction forthwith.”

On March 10, 2008, Goldman responded:

“[Y]our letter is entirely mistaken in its suggestion that Goldman Sachs has somehow breached its obligations under the Liquidation Agency Agreement. As [Morgan Stanley’s] letter recognizes, Section 2(b) of the Liquidation Agency Agreement specifically provides that Goldman, acting as Liquidation Agent, has up to twelve months in which to assign, terminate or otherwise dispose of Credit Risk Obligations assigned to it for that purpose. Obviously, establishment of a liquidation period of that duration contemplates - and, indeed, embodies Hudson’s informed consent - that the Liquidation Agent will necessarily exercise judgement in determining when and how to dispose of Credit Risk Obligations assigned to it for that purpose. ...

Nor does this expressly intended contractual latitude transform Goldman Sachs into a *de facto* ‘investment adviser’ to Hudson, as you suggest. The Agreement ... in fact categorically disclaims that Goldman Sachs or its affiliates will be providing investment advisory services or otherwise acting as an adviser or fiduciary to Hudson by virtue of its liquidation services. That disclaimer is perfectly consistent with discretion routinely accorded to securities brokers in seeking to fulfill their obligation to obtain the best execution possible for their clients without making them ‘investment advisors.’”²⁶¹⁵

Several days before Goldman’s response letter was sent to Morgan Stanley, however, Goldman began liquidating the Credit Risk Assets in Hudson 1. On March 7, 2008, Goldman liquidated eight assets, followed by more on March 20 and 28, liquidating nearly one third of the eligible assets over the course of the month.²⁶¹⁶ In its role as liquidation agent, Goldman was required to solicit bids from at least three independent dealers for the Credit Risk Assets, and Morgan Stanley was given an opportunity to bid on many of the liquidated assets.²⁶¹⁷ Liquidation proceeded over the next two months, from April through June.²⁶¹⁸ On July 22, 2008, Hudson’s realized losses exceeded \$800 million, and Hudson 1 went into default. Hudson’s remaining assets

²⁶¹⁵ 3/10/2008 letter from Goldman to Morgan Stanley, HUD-CDO-00006881. The letter also states: “Morgan Stanley’s lack of standing even to advance many positions that are within the exclusive province of Hudson, and the preclusive effect on Morgan Stanley’s contentions of the Agreement’s broad exculpation and conflict waiver provisions provide sufficient response.”

²⁶¹⁶ See 3/27/2008 email from Morgan Stanley to Goldman, HUD-CDO-00004378. On March 24, 2008, Goldman offered to unwind the Hudson 1 trade with Morgan Stanley by paying it 9% of the face (par) value of the Hudson securities. 3/24/2008 email from Goldman to Morgan Stanley, GS MBS-E-022012805.

²⁶¹⁷ See, e.g., 3/27/2008 email from Morgan Stanley to Goldman, HUD-CDO-00004378. See also 3/20/2008 email from Mr. Case, GS MBS-E-021880596.

²⁶¹⁸ See 6/6/2008 letter from Goldman as liquidation agent, “Hudson Mezzanine Funding 2006-1, Ltd. - Certain Dispositions of Assets,” HUD-CDO-00003155.

were liquidated in November 2008. Morgan Stanley's losses from its Hudson investment exceeded \$930 million.²⁶¹⁹

Analysis. In several of the CDOs it constructed, Goldman established a new position of liquidation agent and appointed itself to play that role for a substantial fee. In the case of Hudson 1, by taking on the role of liquidation agent at the same time it was the sole short party in the CDO, Goldman created a conflict of interest. When the Hudson 1 assets began falling in value, the long investors wanted the poorly performing assets liquidated as soon as possible; Goldman, on the other hand, benefitted financially the farther the assets fell in value since that allowed Goldman to maximize the value of its short position.

Goldman delayed liquidating the Credit Risk Assets, despite urgent requests from the largest Hudson investor, Morgan Stanley, placing its own financial interests ahead of the client to whom it had sold a \$1.2 billion Hudson investment.

BB. Collateral Put Provider in Timberwolf

The second example of a conflict of interest affecting how Goldman carried out a CDO administrative function involves Goldman's role as the collateral put provider in Timberwolf I. Synthetic CDOs like Timberwolf collected cash from the long investors that purchased its securities as well as from the short parties that paid CDS premiums to the CDO. A portion of the cash collected from the long investors was placed by the CDO into a "default swap collateral account" to be used if the CDO performed poorly and payments had to be made to the short parties.²⁶²⁰ At one time, many CDOs used the cash in the default swap collateral account to purchase Guaranteed Investment Contracts (GICs), which guaranteed repayment of the principal and a fixed or floating interest rate for a fixed period of time. But in the years leading up to the financial crisis, CDO issuers sought to use the cash in the default swap collateral account to make investments that generated higher returns, in order to improve financial performance, obtain better credit ratings, and attract investors. To obtain those higher returns, CDO issuers began to invest the incoming cash in "default swap collateral securities."

Goldman's synthetic CDOs generally invested in default swap collateral securities, and its CDO agreements typically set out parameters for the types of default swap collateral securities that could be purchased with investor funds, often requiring them to be high quality, low risk, liquid

²⁶¹⁹ See 11/21/2008 letter from Goldman to Morgan Stanley, HUD-CDO-00005125.

²⁶²⁰ The amount of assets in the default swap collateral account was required to equal the total face ("notional") value of the CDS entered into by the CDO. This arrangement provided assurance to the short parties that funds would be available if and when payments were due to them under the CDS. CDO agreements often required that the cash placed in the default swap collateral account be kept in very secure, short term, cash-like instruments such as Treasury notes or Certificates of Deposit (called "Eligible Investments") until the cash was used to acquire default swap collateral or make payments to a short party. If any credit event resulted in payments from the default swap collateral account to the short parties under the CDS contracts, the long parties might not receive all of their principal investment at the maturity of the deal.

investments.²⁶²¹ If the CDO had a collateral manager, the manager often selected the CDO's default swap collateral securities. The returns earned by the default swap collateral securities often became an important component of the CDO's income. The principal proceeds of the default swap collateral securities were typically re-invested in similar securities until the CDO matured or the proceeds were needed to make payments to short parties.

Goldman's Dual Roles. In its synthetic CDOs, Goldman often took on two roles that affected the default swap collateral securities, acting as both the CDO's primary CDS counterparty²⁶²² and its collateral put provider. Goldman's synthetic CDOs typically followed industry practice by making one entity the sole counterparty for all of the CDS contracts issued by the CDO. In Goldman CDOs, that party was generally Goldman Sachs International (GSI), a United Kingdom subsidiary that was wholly owned by Goldman. Typically, GSI was the sole party that entered into a CDS contract directly with the domestic and offshore companies that served as the issuers of the CDO's securities (hereinafter collectively referred to as the "Issuer").²⁶²³ GSI then acted as an intermediary for the Issuer by entering into a corresponding CDS contract with each party seeking to take a short position in the CDO. By inserting itself into the middle of the CDS transactions, GSI put Goldman's financial standing behind the CDS contracts issued by the Issuer and improved the credit ratings assigned to and investor confidence in the CDO. If a credit event later took place, the Issuer was responsible for making payments to GSI, and GSI, whether or not it received sufficient payments from the Issuer, was responsible for making the payments owed to the short parties in the corresponding CDS contracts. Sometimes, instead of contracting with a third party, GSI kept some or all of the short positions in the CDO on behalf of Goldman itself.

By acting as the primary CDS counterparty, GSI necessarily took the short side of each CDS contract it entered into with the Issuer. Those CDS contracts typically provided that, in the event of a specified credit event that required payment to GSI, GSI could collect a specified amount of funds from the Issuer. The Issuer paid its obligations to GSI by first drawing down any available cash in the default swap collateral account. If that cash was insufficient, GSI also had the right to identify one or more of the default swap collateral securities that together had a face (par) value equal to the amount owed to GSI. Those securities could then be sold and the sale proceeds used to

²⁶²¹ The parameters governing the type of default swap collateral securities that could be purchased with investor funds were generally outlined in the CDO agreement documents and offering memorandum. Typical criteria included: a AAA credit rating; a yield slightly greater than LIBOR; limitations on the maturation dates of the securities; and limited exposure to a single counterparty. Generally, the CDO agreement required that some of the default swap collateral be retained in Eligible Investments in order to be able to fulfill any obligations or payments due in the short term. In CDOs reviewed by the Subcommittee, the default collateral securities were sometimes RMBS or CDO securities bearing AAA ratings. These securities often lost substantial value which the collateral put provider then had to absorb.

²⁶²² The Timberwolf Indenture agreement referred to this role as the "Synthetic Security Counterparty." See 3/27/2007 Timberwolf I, LTD. Indenture Agreement, at § 12.5(b), GS MBS-E-021825583 at 711.

²⁶²³ Typically a shell company incorporated in a foreign jurisdiction (often the Cayman Islands) and a shell company incorporated in the United States (often Delaware) served as the "Issuer" and "Co-Issuer," respectively of the CDO. Generally, the financial institution that was underwriting the CDO, in this case Goldman, would arrange for the establishment of those entities. For simplicity, this section will refer to both companies as the "Issuer" of the CDO securities.

satisfy the amount owed to GSI under the CDS contracts.²⁶²⁴ GSI would then use the cash it received from the sale proceeds to pay off the short parties in the corresponding CDS contracts. Since GSI's financial obligations under the CDS contracts were dependent in part upon the quality of the default swap collateral securities, Goldman provided in the CDO agreement that those securities could be purchased only with the prior "consent" of GSI. This arrangement enabled Goldman to exert control over the selection of the default swap collateral securities.

In addition to acting as the primary CDS counterparty in the CDOs it constructed, Goldman often acted as the CDO's default swap collateral put provider (hereinafter "collateral put provider"). The collateral put provider essentially guarantees the face (par) value of the CDO's default swap collateral securities.²⁶²⁵

Since GSI was already acting as the primary CDS counterparty, the CDO indenture agreement typically provided that, if the market value of any default collateral security selected by GSI to satisfy an amount owed to GSI fell below its face (par) value, then GSI suffered the market risk, and could not recover additional funds from the Issuer to make up for the security's loss in value. GSI was still responsible, however, for making full payments to the short parties in the corresponding CDS contracts. This arrangement functioned effectively as a "put" agreement that guaranteed the face (par) value of the default swap collateral securities, and Goldman treated the arrangement as a put agreement.

Due to the dual roles played by GSI in its CDOs, many of Goldman's CDO indenture agreements did not contain an explicit put agreement, but simply constructed GSI's CDS contracts to include the provisions that achieved the same result. For example, the Timberwolf Indenture agreement specified that the primary CDS counterparty in its CDS contract – GSI – bore the market risk associated with any default swap collateral sold to satisfy an obligation to that counterparty.²⁶²⁶ In exchange for bearing the risk of not receiving the full payment owed to it from the sale of the default swap collateral securities, GSI received a discount – typically equal to 5 basis points – on the premiums GSI paid to the Issuer under the primary CDS contract. In a CDO deal of \$1 billion, the premium discount would yield a "fee" of approximately \$500,000.²⁶²⁷ In most cases, however,

²⁶²⁴ Another option was for Goldman to take physical possession of the security.

²⁶²⁵ In a typical put agreement, the put provider guarantees to pay to the put purchaser the face (par) value of a specified security upon delivery of the security, or pay to the put purchaser the difference between the security's par value and actual market price when sold. In exchange for that protection, the put purchaser typically pays a fee to the put provider. In many of the CDS contracts associated with synthetic CDOs, as described above, GSI fulfilled the role of a put provider, by absorbing any shortfall between the face (par) value and market price of any default swap collateral securities sold to pay amounts owing to the short party in the CDS contract.

²⁶²⁶ See 3/27/2007 Timberwolf I, LTD. Indenture Agreement, at § 12.5(b), GS MBS-E-021825583 at 712. For accounting purposes, Goldman established a CDO Put Reserve, to account for potential losses that might result from its role as a collateral put provider in CDOs.

²⁶²⁷ Any subsequent losses resulting from Goldman's role as the collateral put provider would reduce the profit resulting from that fee. In responses to Subcommittee questions for the record regarding 7 CDOs (Fort Denison, Camber 7, Timberwolf, Anderson Mezzanine, Point Pleasant, Hudson Mezzanine 2006-1, and Hudson Mezzanine 2006-2), Goldman reported that for most of the CDOs, the net profit was less than \$500,000. One exception was Hudson Mezzanine 2006-1, which yielded a profit of approximately \$1 million. See Goldman response to

the CDO indenture agreements did not specifically cite the connection between GSI's bearing the market risk of the default swap collateral sales and receiving a CDS premium discount. The CDO agreements simply included a reduced premium payment by GSI under the primary CDS contract with the Issuer.²⁶²⁸

Timberwolf Conflict of Interest. In the Timberwolf CDO, GSI acted as both the primary CDS counterparty and the collateral put provider. Documents provided to the Subcommittee show how these dual roles created a conflict between Goldman and the Timberwolf long investors, and how Goldman reacted by placing its interests before those of the clients to whom it had sold the Timberwolf securities.

In 2007, as the mortgage market deteriorated, the value of many types of default swap collateral securities also declined. Goldman became concerned that if the market value of the securities fell below par and a credit event occurred, those securities would provide insufficient funds to pay the amounts owed to GSI under its primary CDS contract with the Issuer. In addition, Goldman knew that the more the default swap collateral securities fell in value, the more of a shortfall Goldman would have to make up if GSI had to make payments to other short parties. Goldman wanted to maximize the value of the default swap collateral and what would be available

Subcommittee QFR at PSI_QFR_GS0249. For another CDO, Broadwick, Goldman also projected that the premium discount would yield a profit of more than \$1 million, less any costs it might have to absorb in its role as put provider. See 4/12/2006 email from Peter Ostrem to John Little and Robert Leventhal, GS MBS-E-010808964 at 66-67 ("Can we agree on how we want to treat P&L [profit and loss] on Peloton relative to the put swap? We expect P&L of over \$1mm [million] for the 5bp [basis point] reduction in the CDS premiums. ... I propose we separately book the put swap at close to zero (contingent MTM risk on 2 yr AAA diversified portfolio where Goldman retains selection optionality seems low), but we are open to booking 1bp in negative put cost (i.e., -\$200k)."). In some other CDOs, the projected put fee was about \$500,000.

²⁶²⁸ Timberwolf used this reduced premium approach, but in a few other instances, such as Hudson Mezzanine 2006-1 and Point Pleasant, Goldman received a direct fee for acting as the collateral put provider. Goldman representatives told the Subcommittee that, because the put fee was "embedded" in the CDS agreement in some of the CDOs, Goldman's operations group sometimes overlooked and failed to "book" the profit and loss associated with those put arrangements. When this oversight was discovered in 2007, Goldman identified 18 CDO put arrangements that had not been identified and accounted for in Goldman's books. See 6/28/2007 email from Carly Scales to Phil Armstrong and Steve Schultz, GS MBS-E-015192547:

- "Current Put Option Booking State: 22 Deals with the Put Option Feature
- 4 Deals that do have a Put Option Booked:
 - For these trades, Ops [the operations group] knew about the Put as there was a confirmation and a trade booked. ...
- 18 Deals that do not have a Put option Booked:
 - For these deals, there was no mention of a Put at all at the time of closing. ...
 - The Put option was embedded into the deal documents (Indenture, Offering Circular, etc – both of which are reviewed by outside counsel and GS legal as a normal course of business – but are not reviewed by Operations.)
 - For these trades, an intermediation fee was being taken on the CDS trades, but no specific Put was booked in our systems.
 - The original explanation from the desk was the intermediation fee was being taken for the risks associated with standing in between the Street and the deal with no mention of the Put."

to make all of the payments needed pursuant to Goldman's own short positions as well as any payments it would need to make to other short parties.

In the late spring of 2007, Goldman began to closely monitor the value of the default swap collateral securities in its synthetic CDOs.²⁶²⁹ On June 20, 2007, Matthew Bieber, a Goldman employee on the CDO Origination Desk and the deal captain of the Timberwolf CDO, sent an email to his colleagues requesting information on CDOs that Goldman had "significant exposure to in terms of default swap collateral."²⁶³⁰ Mr. Bieber identified 17 possible CDOs where the default swap collateral securities may have lost value and stated: "we need to get Dan [Sparks, the Mortgage Department head,] a list this morning."²⁶³¹ When asked about this email, Mr. Bieber told the Subcommittee that he did not recall why he had sent it or why he had to deliver the list to Mr. Sparks that same day, but he said he did recall that the decline in the value of the default swap securities was an issue.²⁶³² In response to the email, Goldman employees associated with the various CDOs submitted lists of the existing default swap collateral securities with their par and market values.

As the mortgage market worsened, Goldman's attention to the value of the default collateral securities increased. On July 18, 2007, the Goldman Credit Department sent an email to Mr. Bieber indicating that Goldman had large, valuable short positions in six of the CDOs it had originated, but that the department needed to monitor the value of the default swap collateral securities in each CDO to understand Goldman's "exposure" under the CDS contracts:

"From our discussion earlier today, we were able to verify the MTM [mark to market] exposures on the below CDOs against what we have in our credit systems (they are in fact as large as we mentioned). Our next step is understanding how the collateral pools are performing in each of the deals. Would you be able to give us a summary of the current marks and default writedowns for the below deals? This would help us in monitoring the collateralization in relation to our exposure from CDS."²⁶³³

The next day, July 19, 2007, Mr. Bieber informed David Lehman, who then oversaw Goldman's CDOs, that the Credit Department had asked the ABS Desk in the Mortgage Department to "mark" the value of all of the default swap collateral securities in the Goldman-originated CDOs

²⁶²⁹ One reason Goldman was so concerned about the value of the default swap collateral securities was because those securities included AAA rated RMBS securities whose values were declining in line with the entire mortgage market.

²⁶³⁰ 6/20/2007 email from Matthew Bieber to Goldman colleagues, GS MBS-E-001912772 ("Below are the deals I recall us having significant exposure to in terms of default swap collateral. Who is responsible for each of the deals? We need to get Dan a list this morning. If there are any missing, please let me know.").

²⁶³¹ Id. Mr. Bieber listed the following CDOs: Adirondack 1; Adirondack 2; Coolidge Funding; Broadwick; Hudson High Grade; Hudson Mezzanine 1; Hudson Mezzanine 2; Fortius I; Fortius II; Camber 7; Hout Bay; Point Pleasant; Timberwolf; Anderson Mezzanine; Altius I; Altius III; and Altius IV.

²⁶³² Subcommittee interview of Matthew Bieber (10/21/2010).

²⁶³³ 7/18/2007 email from Alfa Kiflu, GS MBS-E-001866507. The six CDOs in which Goldman had large short positions were: Hudson Mezzanine 1; Timberwolf; Camber 7; Hudson Mezzanine 2; GSC ABS Funding 2006-3G; and Anderson Mezzanine.

to “get a sense of the MV [market value] supporting the deals['] obligation to pay us, if necessary.”²⁶³⁴

Later that same day, another Credit Department official sent an email message to Mr. Lehman similar to the one that had been sent to Mr. Bieber:

“We understand that you are responsible for marking the collateral in relation to the below CDOs. Is that true? If so, can you please put us on your distribution list for these. We have some sizeable in the money swap positions (i.e. cdo owes GS) and Credit needs to monitor these positions vs. collateral market value.”²⁶³⁵

With respect to Timberwolf, on July 25, 2007, Fabrice Tourre, a Goldman employee on the Mortgage Department’s Correlation Trading Desk, circulated an internal Goldman analysis showing that the weighted average value or “mark” of Timberwolf’s default swap collateral securities had declined over 3%.²⁶³⁶ During the same period, the value of Goldman’s short position had increased. Mr. Tourre suggested to his colleagues that as Timberwolf’s default swap collateral securities matured, the resulting cash proceeds should not be re-invested in new securities, but instead be retained as cash:

“We need to start monitoring MtM [mark to market value] of the CDS collateral for the Wolf, given how much in the money the CDS are - right now, average bid side for the AAA cash bonds is approx 96.89 - per Mahesh analysis below. Matt/Mehesh - maybe we should look at the collateral reinvestment provisions in this deal - ideally principal proceeds on the CDS collateral should not be reinvested but I guess Greywolfe [sic] has discretion on this, right?”²⁶³⁷

In response, Mr. Bieber noted that the same situation applied to all of Goldman’s CDOs; the declining value of the default swap collateral securities was increasing Goldman’s exposure, and a weekly monitoring program was being set up. He also noted that it would be difficult for Goldman to oppose re-investment of the cash proceeds from maturing securities across the board:

“CDS across all of our transactions are in the money. We’ve had conversations at length with credit regarding our exposure to the default swap collateral and are setting ourselves up for weekly monitoring/pricing of the default swap collateral across the cdo business.

“We have discretionary approval over default swap collateral, however, it will be difficult for us to take the non-reinvestment approach.”²⁶³⁸

²⁶³⁴ 7/19/2007 email from Matthew Bieber to David Lehman, GS MBS-E-011178225.

²⁶³⁵ 7/19/2007 email from Patrick Welch, GS MBS-E-001866507.

²⁶³⁶ 7/25/2007 email from Fabrice Tourre, GS MBS-E-001989091.

²⁶³⁷ Id. Greywolf Capital was the collateral manager of the Timberwolf CDO.

²⁶³⁸ 7/25/2007 email from Matthew Bieber, GS MBS-E-001989091.

The next day, on July 26, 2007, the collateral manager of one of Goldman's CDOs sought approval to purchase some new default swap collateral securities. A Goldman employee responded: "We are going to pass on this bond. Given current market conditions, we'd like to keep some cash in the default swap collateral."²⁶³⁹ A few days later, after receiving more requests to approve the purchase of new default swap collateral securities, Mr. Bieber asked Mr. Lehman for a meeting to discuss how to proceed:

"Have gotten several requests today for reinvestment (Greywolf on TWOLF and TCW on DS7 [Davis Square 7]). Would like to sit down this evening to discuss how we're going to respond as this comes up."²⁶⁴⁰

In early August, Goldman conducted an internal analysis to assess the decrease in the return to the CDOs if the default swap collateral was kept in cash rather than re-invested in securities.²⁶⁴¹ As expected, that analysis showed that using the cash in the default swap collateral account to buy new securities would yield a larger return and more money for the CDO investors.²⁶⁴² But buying new securities also meant that Goldman, as the primary CDS counterparty and collateral put provider, would bear the risk if those securities later declined in market value. If the securities' market value fell below their par value, but had to be sold to make payments to the CDOs' short parties, Goldman would have to absorb any shortfall in the course of making the required payments to the short parties. Goldman's risk would be mitigated, however, if the default swap collateral was kept in cash, since cash is not subject to the same market fluctuation. The result was that Goldman benefitted more if the CDO default swap collateral was kept in cash, but the CDO investors benefitted more if the collateral was kept in securities. In short, what was best for Goldman clashed with what was best for the investors to whom Goldman had sold the Timberwolf securities.

Subsequent documents show that Goldman placed its financial interests before those of the CDO investors by taking actions to keep the CDO default swap collateral in cash, rather than securities. On August 21, 2007, Mr. Bieber sent an email to Mr. Lehman asking about what Goldman had decided regarding re-investment of the cash collateral: "Was there any further discussion over the past few days on what were going to be doing? With the 25th coming up, I suspect a bunch of managers are going to be looking to put cash to work."²⁶⁴³ Mr. Lehman responded: "Nothing further - I think our gameplan remains to build cash for now." Mr. Bieber replied: "Ok. I think we should be proactive in letting managers know, then, rather than waiting for them to come to us for approval and then denying." Mr. Lehman agreed.

²⁶³⁹ 7/26/2007 email from Shelly Lin, GS MBS-E-015232129.

²⁶⁴⁰ 7/30/2007 email from Matthew Bieber to David Lehman, GS MBS-E-001867239.

²⁶⁴¹ See 8/6/2007 email from Connie Kang to David Lehman, GS MBS-E-001992556; 8/9/2007 email from Mahesh Ganapathy to David Lehman, Matthew Bieber, and Jonathan Egol, GS MBS-E-001930307; 8/12/2007 email from Mahesh Ganapathy to David Lehman and Matthew Bieber, GS MBS-E-001930343; 8/13/2007 email from Mahesh Ganapathy to Matthew Bieber, David Lehman, and Jonathan Egol, GS MBS-E-001930571.

²⁶⁴² In addition, since the yield of most default swap collateral securities was linked to their "face (par) value," when the same securities could be obtained at a price lower than their par value, their yield (return on investment) increased as long as they continued to meet their scheduled principal and interest payments. This was another potential benefit to the long investors which conflicted with the interest of Goldman, the short party.

²⁶⁴³ 8/21/2007 email from Matthew Bieber to David Lehman, GS MBS-E-011273913.

Greywolf Objections. Over the next three or four weeks, Goldman continued to refuse to consent to the purchase of new default swap collateral securities by the collateral managers of its CDOs.²⁶⁴⁴

At first, Goldman delayed telling Greywolf, Timberwolf's collateral manager, what it had decided. In late August and early September, Joseph Marconi, a Greywolf executive, former Goldman employee, and key member of the Greywolf team managing Timberwolf, sent Goldman several requests to buy new default swap collateral securities, without receiving a response. On September 6, 2007, a Goldman employee on the CDO Origination Desk forwarded one of the requests to Mr. Bieber with the comment: "Guess we can't delay talking to him anymore."²⁶⁴⁵ Mr. Bieber informed Mr. Marconi that Goldman would no longer approve the purchase of additional default swap collateral securities for Timberwolf. When informed of Goldman's decision, Mr. Marconi protested in an email to Mr. Lehman, who was Mr. Bieber's supervisor:

"David: I would like to have a call with you to discuss the purchase of Default Swap Collateral into Timberwolf. I understand you are traveling this week. Let me know when you will have some time to talk. In response to the attached message, Matt [Bieber] told me that GS will not approve the purchase of any additional Default Swap Collateral into Timberwolf. While GS does have consent rights regarding the purchase of Default Swap Collateral, a blanket refusal to approve any assets is inappropriate, inconsistent with the parties' original expectations and will negatively impact the performance of both the debt and equity issued by Timberwolf. Give me a call when you can."²⁶⁴⁶

When asked by Subcommittee what he meant when he wrote that "a blanket refusal to approve any assets is inappropriate, inconsistent with the parties' original expectations and will negatively impact the performance of both the debt and equity issued by Timberwolf," Mr. Marconi explained that if Goldman wouldn't approve any new purchases as the default swap collateral securities matured, the CDO would have an increasing amount of cash on hand that would produce less income for Timberwolf than if that cash were invested in new securities.²⁶⁴⁷

Later on September 6, 2007, Mr. Lehman telephoned and spoke with Mr. Marconi. Neither he nor Mr. Marconi recalled exactly what was discussed, but the following day Mr. Marconi sent Mr. Lehman an email that repeated Greywolf's objections to Goldman's decision not to consent to the purchase of new default swap collateral securities:

²⁶⁴⁴ See 9/21/2007 email from Marty Devote of Aladdin Capital Management to Benjamin Case, GS MBS-E 022138816 ("We, at the direction of Connie and Roman [Goldman employees], have not been reinvesting CDS collateral as it matures. We've brought the topic up a few times over the past few months with your team. Last I heard, you were re-evaluating the market, and would come back to us with a breakdown of acceptable replacements. As the cash balances continue to grow, I'd like to address this issue, as the amount of cash drag is beginning to become meaningful.").

²⁶⁴⁵ 9/6/2007 email from Roman Shimonov to Matthew Bieber, GS MBS-E-000765873.

²⁶⁴⁶ 9/6/2007 email from Joe Marconi to David Lehman, GW 107909.

²⁶⁴⁷ Subcommittee interview of Joseph Marconi (Greywolf Capital) (10/19/2010).

“David: As we discussed yesterday, I believe that your refusal to approve the purchase of any additional Default Swap Collateral into Timberwolf is unreasonable and inconsistent with the way the transaction structure was originally presented to us. We were told that the purpose of the approval rights was to permit GS to review specific assets and approve or disapprove specific assets based on their relative credit merits. If we thought for a second that you had the right to prohibit all new purchases indefinitely, we would have implemented the much simpler GIC [Guaranteed Investment Contract] structure that is used in most other synthetic CDOs and CDO² transactions and thereby locked in a fixed spread to LIBOR for the term of our transaction. Also, the Timberwolf CDS economics include an ongoing fee to GS for the put swap component of the trade; we would not have agreed to those terms if we thought you had this option. Finally, I believe that if anyone on the deal team thought you had this option, it would have been clearly disclosed in the OM [Offering Memorandum]. Especially given current market conditions, I am surprised that you are taking a position that will directly result in less cash flow being available to debt and equity investors. As I said yesterday, we recognize the impact of current market conditions and, even before I spoke with Matt, I was suggesting we collectively focus on shorter average life AAA RMBS for the deal and I specifically solicited feedback on securities where GS would be comfortable. I continue to be surprised by your response.”²⁶⁴⁸

When asked by the Subcommittee why he sent such a strongly worded email to Goldman regarding its refusal to approve the reinvestment of Timberwolf’s cash collateral, Mr. Marconi responded: “We felt strongly about this. We had an obligation to investors to do the right thing.”²⁶⁴⁹

Mr. Marconi told the Subcommittee that Goldman had rationalized its decision by contending that it was less risky to have more cash and fewer securities. Mr. Marconi also told the Subcommittee that Greywolf felt Goldman’s blanket refusal to approve the purchase of additional securities was inconsistent with the terms of the CDO, and if anyone at Greywolf had believed that Goldman possessed that authority, Greywolf would have structured the deal differently.²⁶⁵⁰ In addition, Mr. Marconi’s September 6 email pointed out that Goldman was receiving an “ongoing fee” to serve as the collateral put provider and undertake the risk of guaranteeing the par value of the default swap collateral securities. The email stated that Greywolf would not have agreed to pay that fee to Goldman if it had thought Goldman could use its approval authority to stop the purchase of all default swap collateral securities and mitigate the risk it was being paid to bear.

The exchanges between Greywolf and Goldman brought into question the proper interpretation of Section 12.5 of the Timberwolf Indenture agreement which required the CDO to purchase default swap collateral which satisfied certain criteria and which received the “consent” of and was not “objected to” by Goldman as the “Synthetic Security Counterparty.”²⁶⁵¹ The issue was

²⁶⁴⁸ 9/7/2007 email from Joe Marconi to David Lehman, GW 107909.

²⁶⁴⁹ Subcommittee interview of Joseph Marconi (Greywolf Capital) (10/19/2010).

²⁶⁵⁰ Id.

²⁶⁵¹ Section 12.5(b) of the Timberwolf Indenture agreement stated: “The Synthetic Securities shall be structured as ‘pay-as-you-go’ credit default swaps. As part of the purchase of each Synthetic Security on or before the Closing Date, the Issuer will be required to purchase Default Swap Collateral which satisfies the Default Swap Collateral

whether that authority allowed Goldman to block the purchase of all default swap collateral securities and essentially limit the default swap collateral to cash. In a July 2007 email, Mr. Bieber wrote: “We have discretionary approval over default swap collateral, however, it will be difficult for us to take the non-reinvestment approach.”²⁶⁵² But when the Subcommittee asked about the matter, Goldman’s legal counsel sent a written statement indicating the Indenture agreement authorized Goldman’s actions:

“Section 12.5 of the Indenture for the Timberwolf CDO confers on the Secured Party the right to consent to the selection and reinvestment of default swap collateral. It is the position of Goldman Sachs that neither Section 12.5 of the Indenture nor any other relevant deal documents impose any obligation on the Secured Party to consent to reinvestment of default swap collateral, either on a case-by-case basis or generally.”²⁶⁵³

Goldman’s internal documents show that on September 7, 2007, the day after the email exchange between Mr. Marconi and Mr. Lehman, Mr. Bieber scheduled a meeting with Goldman’s legal counsel and a key compliance officer to discuss the issue. His email stated:

“Pls see email we received below - - wanted to get your take on what response (if any) we should craft. This is related to the default swap collateral account in Timberwolf used to collateralize the exposure we have to the CDO on the CDS contracts that are the assets in TWOLF.”²⁶⁵⁴

The meeting was scheduled for 1:15 p.m. that same day,²⁶⁵⁵ and one of the counsels requested a copy of the Offering Memorandum and “the operative documents that contain our rights/obligations with respect to the Collateral.”²⁶⁵⁶

The Subcommittee did not locate any documents recounting exactly what was discussed at the meeting. The default swap collateral issue involved a significant number of Goldman CDOs, affected Goldman’s relationships with investors and other financial firms serving as collateral managers of its CDOs, and entailed substantial financial risk for Goldman. Yet, when asked about

Eligibility Criteria set forth in the related Synthetic Security and the inclusion of which has been consented to by the Synthetic Security Counterparty in the amount required to secure the obligations of the Issuer in accordance with the terms of the related Synthetic Security which shall be in at least an amount equal to the Aggregate Reference Obligation Notional Amount. The Synthetic Security Counterparty shall have consent rights with respect to the Default Swap Collateral and no Default Swap Collateral objected to by the Synthetic Security Counterparty may be purchased by the Issuer. Default Swap Collateral shall be credited to the Default Swap Collateral Account. The amount payable by the Issuer to the Synthetic Security Counterparty under a Synthetic Security shall not exceed the Default Swap Collateral.” 3/27/2007 Timberwolf I, LTD. Indenture Agreement, GS MBS-E-021825583 at 711.

²⁶⁵² 7/25/2007 email from Matthew Bieber, GS MBS-E-001989091.

²⁶⁵³ 1/7/2011 email from Goldman counsel to the Subcommittee.

²⁶⁵⁴ 9/7/2007 email from Matthew Bieber to Tim Saunders, Susan Helfrick, and Jordan Horvath, GS MBS-E-021881077.

²⁶⁵⁵ Id.

²⁶⁵⁶ 9/7/2007 email from Susan Helfrick to Matthew Bieber, Tim Saunders, and Jordan Horvath, GS MBS-E-021881084.

it, the key participants said they could not recall whether the meeting took place, what was discussed at the meeting if it did take place, or what determinations were reached regarding Goldman's authority or actions. The participants who could not recall the meeting included Mr. Bieber, the Timberwolf deal captain; Tim Saunders, counsel from Goldman's legal department; Susan Helfrick, another legal counsel; and Jordan Horvath, the compliance officer. Mr. Saunders, the lead Goldman legal counsel on the matter, informed the Subcommittee that he had "no present recollection of the circumstances surrounding any disagreement between Goldman Sachs and Greywolf Capital Management LP regarding Goldman Sachs' right to consent to reinvestment of default swap collateral in Timberwolf."²⁶⁵⁷ Mr. Bieber, the Timberwolf deal captain, told the Subcommittee that he did not recall whether Goldman developed any specific strategy limiting the type of default swap collateral securities that could be purchased for its CDOs.²⁶⁵⁸

However, documents obtained by the Subcommittee indicate that the meeting did take place, and Goldman did develop a strategy to respond to Greywolf's concerns. On September 7, 2007, the same day as the meeting, Mr. Lehman sent a email to Mr. Bieber stating:

"U spoke w[ith] [Jonathan] egol? What ab[ou]t legal/compliance[?] Just make sure Dan [Sparks] is ok w[ith] it[.] Also I do th[in]k we sh[oul]d be consistent across deals . . . so if slmas and credit cards are 'ok' I th[in]k we tell our mgrs [managers] that . . . maybe 2 y[ea]rs and shorter."²⁶⁵⁹

Mr. Bieber responded: "Spoke with legal/compliance. Not doing anything w/o [without] discussing with dan [Sparks] first. Agree with the point on consistency."²⁶⁶⁰

Also on September 7, 2007, Jonathan Egol, head of the Mortgage Department's Correlation Trading Desk, sent an email to Mr. Lehman and others suggesting that Goldman identify a narrow set of very safe asset backed securities that it could propose to Greywolf as possible default swap collateral securities, such as AAA rated securities backed by credit card receivables or student

²⁶⁵⁷ Mr. Saunders, Ms. Helfrick, and Mr. Horvath provided signed statements to the Subcommittee to the same effect. See written statements submitted to the Subcommittee by Timothy Saunders (12/22/2010), Susan Helfrick (1/7/2011), and Jordan Horvath (1/7/2011). Although Mr. Lehman was not invited to the meeting, he told the Subcommittee that he generally recalled having discussions with his colleagues, including Goldman's legal department, about the general issue of default swap collateral, but did not recall his conversation with Mr. Marconi. He also submitted a statement to the Subcommittee saying he had no recollection of whether the meeting took place or, if a meeting was held, what was discussed or decided. Written statement of Mr. Lehman (1/26/2011). Mr. Sparks, the head of the Mortgage Department, told the Subcommittee that while he had a general knowledge of the issue regarding default swap collateral securities, he had no recollection of any meeting or decisions made. Subcommittee interview of Daniel Sparks (1/13/2011).

²⁶⁵⁸ Subcommittee interview of Matthew Bieber (10/21/2010).

²⁶⁵⁹ 9/7/2007 email exchange between David Lehman and Matthew Bieber, GS MBS-E-000766414. The reference to "slmas" is to asset backed securities that were issued by Sallie Mae and backed by pools of student loans.

²⁶⁶⁰ Id.

loans.²⁶⁶¹ Mr. Bieber sent an email the same day indicating he supported that approach, but wanted to speak first with Mr. Sparks, head of the Mortgage Department.²⁶⁶²

Subsequent documents indicate that Goldman reversed its initial position and decided to consent to the purchase of more default swap collateral securities. However, Goldman appeared to narrow the class of asset backed securities that it would consent to be acquired as default swap collateral. On September 10, 2007, Mr. Bieber sent an email to Mr. Lehman reporting:

“Managed to catch up with Dan [Sparks] just now. . .we’re going to put together a list of SLMA floaters in our inventory to show Joe [Marconi at Greywolf]. Going over w/ Dan tomorrow before sending anything externally.”²⁶⁶³

Goldman also sent a short list of commercial mortgage backed securities (CMBS) in its inventory that it would consent to be acquired for Timberwolf.²⁶⁶⁴

Over the next two weeks, Goldman sent a list of acceptable securities to two more collateral managers of its CDOs.²⁶⁶⁵ On October 15, 2007, Mr. Bieber provided virtually the same list to a Goldman colleague together with a short explanation of some of the criteria used to identify the securities:

²⁶⁶¹ 9/7/2007 email from Jonathan Egol to Michael Swenson and David Lehman, GS MBS-E-000765854.

²⁶⁶² See 9/7/2007 email from Matthew Bieber to David Lehman, GS MBS-E-000766414 (“I need to speak with dan... we’re thinking about offering some 1-3 year SLMA’s.”).

²⁶⁶³ 9/10/2007 email from Matthew Bieber to David Lehman, GS MBS-E-000765316. “SLMA” refers to asset backed securities that were issued by Sallie Mae and backed by pools of student loans.

²⁶⁶⁴ 9/25/2007 email from Matthew Bieber to Joe Marconi, GS MBS-E-000766338. The action taken by Goldman to stop the purchase of new default swap collateral securities was not the only instance in which it attempted to exert control over the collateral in the CDOs it constructed. In the case of the Broadwick CDO, for example, when some investors were entitled to the return of some collateral, Goldman attempted to have the CDO pay them with securities rather than cash, so that the CDO would preserve the cash in its collateral account. The Broadwick collateral manager objected and complained in an email sent to Mr. Sparks, stating in part:

“In case I wasn’t clear on the call, our three main points would be:

1. The aim of the collateral account was to provide LIBOR and not add additional risk to the deal.
2. GS said they would take market risk and clearly represented that to us and to the ratings agencies.
3. The only way the deal works, and the way the deal was marketed and explained to us, is that paydowns are equivalent to partial terminations. We do not believe you have any right to refuse to release excess cash that is no longer needed as collateral, and we do not believe you have the right to release bonds into the waterfall ever, and certainly not when cash exists. Perhaps the way you did these deals changed over time and you are comparing our deal to ones which you marketed or structured later/differently? I look forward to hearing from you.”

11/20/2007 email from Ron Beller to Matthew Bieber, GS MBS-E-013746516.

²⁶⁶⁵ Documents show that a list of assets was sent to Aladdin Capital Management and Trust Company of the West. See 9/24/2007 email from Benjamin Case to Marty Devote of Aladdin Capital Management, GS MBS-E 022138816; 9/20/2007 email from Matthew Bieber to Vincent Fiorillo of Trust Company of the West, GS MBS-E-022141026-27.

“Here are the shelves we’d like to use for default swap collateral reinvestment.
 RMBS: CBASS, GSAA, GSAMP, JPMAC, WFHET
 CARDS: AMXCA, BACCT, BOIT, MBNAS, CCCIT, CHAIT, DCMT
 AUTOS: COPAR, DCMOT, FORDO, HAROT, HDMOT, NALT, USAOT
 STUDENT LOANS: ACCSS, GCOE, KSLT, NCSLT, SLMA (FFELP)

In addition to the default swap collateral constraints in the docs for each transaction, also looking to securities that are (a) floating rate (b) monthly pay (c) senior-most bond in capital structure (d) avg life of less than or equal to 2 years (e) currently amortizing.
 Please let me know if you have any questions.”²⁶⁶⁶

All of the listed securities consisted of AAA rated securities backed by residential mortgages, credit card receivables, automobile loans, or student loans, and had an expected maturity of two years or less. It appears as if Goldman was restricting the selection of default swap collateral securities to a limited list of assets that it believed were likely to maintain their par value in order to minimize its financial exposure.

After indicating it would allow these new purchases, Goldman maintained tight control over the actual purchases made by the collateral managers. A September 27, 2007 email exchange between Mr. Marconi of Greywolf and Mr. Bieber of Goldman, for example, demonstrates Goldman’s intense monitoring effort:

Mr. Marconi: “Matt: I am seeing this list from another dealer. Can I assume that I can buy any name on your approved list?” ...

Mr. Bieber: “No-we need to give approval on a security by security basis.”²⁶⁶⁷

When asked about these matters, both Mr. Sparks and Mr. Lehman characterized the default swap collateral securities issue as a minor issue. Mr. Lehman informed the Subcommittee that he did not recall significant debate with collateral managers on the matter.²⁶⁶⁸ Mr. Sparks said the yield difference between keeping the collateral in cash and investing in securities was minimal and characterized the whole issue as “structured finance gymnastics.”²⁶⁶⁹ But information supplied by Goldman to the Subcommittee on seven Goldman-originated CDOs shows that, due to its duties as collateral put provider and the declining value of the CDOs’ default swap collateral securities, Goldman eventually lost over \$1 billion.²⁶⁷⁰

²⁶⁶⁶ 10/15/2007 email from Matthew Bieber to Matthew Verrochi, GS MBS-E-015732147. The list had one more RMBS security than the lists sent to the collateral managers.

²⁶⁶⁷ 9/27/2007 email from Joe Marconi to Matthew Bieber, GW 108645.

²⁶⁶⁸ Written statement of David Lehman (1/26/2011).

²⁶⁶⁹ Subcommittee interview of Daniel Sparks (1/13/2011).

²⁶⁷⁰ The seven CDOs were Fort Denison, Camber 7, Timberwolf, Anderson Mezzanine, Point Pleasant, Hudson Mezzanine 2006-1, and Hudson Mezzanine 2006-2. Goldman lost \$1.018 billion from acting as the collateral put provider for their default swap collateral securities. See Goldman response to Subcommittee QFR at PSI_QFR_GS0280.

Analysis. In its synthetic CDOs, Goldman arranged for its subsidiary, GSI, to act as both the primary CDS counterparty and the collateral put provider. Goldman also arranged for GSI to receive a fee for serving as the collateral put provider, through paying reduced premiums in connection with the CDS contracts it entered into with the CDOs. Despite this fee, Goldman took actions to evade its responsibilities as the collateral put provider, including by refusing to approve the purchase of new default swap collateral securities whose values might decline below par value. Instead, Goldman tried to force the CDOs to keep their collateral in cash. While this effort provided more protection for Goldman's financial interest as the short party, it worked to the disadvantage of the CDO investors because it produced lower returns for the CDOs than the purchase of default swap collateral securities.

When the Timberwolf collateral manager objected, Goldman backed down and allowed the purchase of a narrow range of very safe, short term asset backed securities as collateral for Timberwolf and other CDOs. Goldman's conduct in the Timberwolf CDO demonstrates how a financial institution that plays multiple roles in a CDO can develop conflicts of interest and attempt to manipulate the CDO to place its own financial interests before those of the investors to whom it sold the CDO securities.

(6) Analysis of Goldman's Conflicts of Interest

The Goldman Sachs case study identifies a number of practices that raise conflict of interest concerns. Those practices include the following.

1. **Shorting Its Own Securities.** In Hudson, Anderson, and Timberwolf, Goldman marketed CDO securities to clients, took a substantial portion of the short side of the CDO, bet the CDO would fall in value, and profited from its short position at the expense of the clients to whom it sold the securities.
2. **Failing to Disclose Key Information to Investors.** In Hudson, Anderson, and Timberwolf, Goldman represented to potential investors that its interests “were aligned” with theirs or advertised its retention of a portion of the CDO’s equity tranche, without disclosing that it had an even larger short position in the CDO and held a financial interest directly adverse to the investors to whom it was selling the CDO securities.
3. **Misrepresenting Source of Assets.** In Hudson, Goldman provided 100% of the CDO assets using CDS contracts it controlled and priced, transferred \$1.2 billion of risk from its own inventory to the CDO, and told investors the assets had been “sourced from the Street,” when they had been supplied solely by Goldman and not priced from transactions with third parties.
4. **Failing to Disclose Client Involvement.** In Abacus, Goldman enabled a client who was shorting the CDO to help select the CDO’s assets, solicited investors to buy the Abacus securities without disclosing the short party’s asset selection role or investment objective, and helped the client gain a \$1 billion profit at the expense of the investors to whom Goldman sold the securities.
5. **Minimizing Premiums.** In Abacus, Goldman entered into an undisclosed agreement with the sole short party to accept a fee for arranging low premium payments by the short party to the CDO, even though low premium payments meant less money for the long investors to whom Goldman had sold the Abacus securities.
6. **Selling Securities Designed to Fail.** Goldman sold Hudson and Abacus securities to clients knowing the securities were designed to fall in value and benefit the short party, which was a client in the case of Abacus and itself in the case of Hudson.
7. **Delaying Liquidation.** In Hudson, Goldman was paid a fee to serve as the liquidation agent, but delayed liquidating assets that were losing value for eight months, enhancing its financial gain as the CDO’s short party at the expense of the long parties whose losses would have been staunched if the assets had been liquidated.

8. **Misrepresenting Assets.** In Anderson, when clients asked how Goldman got “comfortable” with poor quality New Century loans in the CDO, Goldman worked to dispel those concerns and failed to disclose its own discomfort with New Century loans and that it held 40% of the short side of the CDO, betting its assets would lose value.
9. **Taking Immediate Post-Sale Markdowns.** In Timberwolf, Goldman knowingly sold Timberwolf securities to clients at prices above its own book values and then, often within days or weeks of a sale, marked down the value of the sold securities, causing clients to incur quick losses and requiring some to post higher margin or cash collateral.
10. **Evading Put Obligation.** In Timberwolf, Goldman was paid a fee to serve as the collateral put provider, but refused for two months to allow the purchase of default swap collateral securities, even though they meant better returns for long investors, because Goldman did not want to assume the risk that the collateral securities might lose value.
11. **Using Poor Quality Loans in Securitizations.** Goldman provided securitization services and warehouse accounts to lenders with a history of issuing high risk, poor quality loans, and knowingly included poor quality loans in Goldman-originated RMBS and CDO securities.
12. **Concealing Its Net Short Position.** From late 2006 through most of 2007, Goldman engaged in a relentless effort to sell the CDO and RMBS securities it underwrote, without disclosing to the clients it solicited that Goldman was simultaneously shorting the subprime market and betting it would lose value.

These practices raise a wide range of ethical and legal concerns. This section examines the key issues of whether Goldman had a legal obligation to disclose to clients the existence of material adverse information, including conflicts of interest, when selling them RMBS and CDO securities; whether Goldman had material adverse interests that should have been disclosed to investors; and whether Goldman had an obligation not to recommend securities that were designed to lose value. Many of these issues hinge upon the proper treatment of financial instruments, such as credit default swaps and CDOs, which enable an investment bank to bet against the very same securities it is selling to clients.

(a) Securities Laws

To protect fair, open, and efficient markets for investors, federal securities laws impose a range of specific disclosure and fair dealing obligations on market participants, depending upon the securities activities they undertake. In the matters examined by the Subcommittee, the key roles under the securities laws include market maker, underwriter, placement agent, broker-dealer, and investment adviser.

Market Maker. A “market maker” is typically a dealer in financial instruments that stands ready to buy and sell a particular financial instrument on a regular and continuous basis at a publicly quoted price.²⁶⁷¹ A major responsibility of a market maker is filling orders on behalf of customers. Market makers do not solicit customers; instead they maintain buy and sell quotes in a public setting, demonstrating their readiness to either buy or sell the specified security, and customers come to them. For example, a market maker in a particular stock typically posts the prices at which it is willing to buy or sell that stock, attracting customers based on the competitiveness of its prices. This activity by market makers helps provide liquidity and efficiency in the trading market for that security.²⁶⁷² Market makers do not keep the financial instruments they buy and sell in their own investment portfolio, but instead keep them in their sales portfolio or “trading book.”

Market makers have among the most narrow disclosure obligations under federal securities law, since they typically do not actively solicit clients or make investment recommendations to them. Their disclosure obligations are generally limited to providing fair and accurate information related to the execution of a particular trade.²⁶⁷³ Market makers are also subject to the securities laws’ prohibitions against fraud and market manipulation. In addition, they are subject to legal requirements relating to the handling of customer orders, for example using best execution efforts when placing a client’s buy or sell order.²⁶⁷⁴

Underwriter and Placement Agent. Underwriters and placement agents have greater disclosure obligations than market makers, because in this role they are actively soliciting customers to buy new securities they have helped an issuer bring to market.

When securities are offered to the public for sale, they are typically underwritten by one or more investment banks, each of which is a broker-dealer registered with the Financial Industry Regulatory Authority (FINRA).²⁶⁷⁵ An underwriter is typically hired by the issuer of the new securities to help the issuer register the securities with the SEC and conduct a public offering of the securities. The underwriter typically purchases the securities from the issuer, holds them on its books, conducts the public offering, and bears the financial risk until the securities are sold to the public.

²⁶⁷¹ Section 3(a)(38) of the Securities Exchange Act of 1934 (“The term ‘market maker’ means any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.”); see also SEC website, <http://www.sec.gov/answers/mktmaker.htm>; see also FINRA website, FAQs, “What Does a Market Maker Do?” <http://finra.atgnow.com/finra/categoryBrowse.do>.

²⁶⁷² SEC website, <http://www.sec.gov/answers/mktmaker.htm>.

²⁶⁷³ 1/2011 “Study on Investment Advisers and Broker-Dealers,” study conducted by the U.S. Securities and Exchange Commission, at 55, <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>, (hereinafter “SEC Study on Investment Advisers and Broker-Dealers”).

²⁶⁷⁴ See Goldman response to Subcommittee QFR at PSI_QFR_GS0046.

²⁶⁷⁵ FINRA is the largest independent self-regulatory organization for securities firms doing business in the United States. FINRA has been delegated authority by the SEC and a number of securities exchanges to regulate the broker-dealer industry. Its stated mission is “to protect America’s investors by making sure the securities industry operates fairly and honestly.” See FINRA website, <http://www.finra.org>.

Investment banks can also act as “placement agents,” assisting those seeking to raise money through a private offering of securities by helping them design the securities, produce the offering materials, and market the new securities to investors. Placement agents are also registered broker-dealers. While public offerings of securities are required to be registered and filed with the SEC, private offerings are made to a limited number of investors and are exempt from SEC registration. In the securitization industry, RMBS securities are generally sold through public offerings, while CDO securities are generally sold through private placements.

Whether acting as an underwriter or placement agent, a major part of the investment bank’s responsibility is to solicit customers to buy the new securities being offered. Under the securities laws, an issuer selling new securities to potential investors has an affirmative duty to disclose material information that a reasonable investor would want to know.²⁶⁷⁶ In addition, under securities law, a broker-dealer acting as an underwriter or placement agent is liable for any material misrepresentation or omission of material fact made in connection with a solicitation or sale of securities to an investor.²⁶⁷⁷

The Supreme Court has held that a fact is material if there is a “substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”²⁶⁷⁸ The SEC has provided this additional guidance:

“‘The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor.’ ‘[T]he reaction of individual investors is not determinative of materiality, since the standard is objective, not subjective.’ ‘[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information.’ Although in general materiality is primarily a factual inquiry, ‘the question of materiality is to be resolved as a matter of law when the information is ‘so obviously important [or

²⁶⁷⁶ See, e.g., SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 201 (1963) (“Experience has shown that disclosure in such situations, while not onerous to the advisor, is needed to preserve the climate of fair dealing which is so essential to maintain public confidence in the securities industry and to preserve the economic health of the country.”). See also SEC Study on Investment Advisers and Broker-Dealers at 51 [citations omitted] (“Under the so-called ‘shingle’ theory ... a broker-dealer makes an implicit representation to those persons with whom it transacts business that it will deal fairly with them, consistent with the standards of the profession. ... Actions taken by the broker-dealer that are not fair to the customer must be disclosed in order to make this implied representation of fairness not misleading.”).

²⁶⁷⁷ See Sections 11 and 12 of Securities Act of 1933. See also Rule 10b-5 of the Securities Exchange Act of 1934. See also SEC v. Capital Gains Research Bureau, Inc., 375 U.S. at 200 (“Failure to disclose material facts must be deemed fraud or deceit within its intended meaning, for, as the experience of the 1920’s and 1930’s amply reveals, the darkness and ignorance of commercial secrecy are the conditions upon which predatory practices best thrive.”). See also Goldman response to Subcommittee QFR, at PSI_QFR_GS0046.

²⁶⁷⁸ Basic v. Levinson, 485 U.S. 224, 231-32 (1988) (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

unimportant] to an investor, that reasonable minds cannot differ on the question of materiality.”²⁶⁷⁹

Unlike when a broker-dealer is acting as a market maker, a broker-dealer acting as an underwriter or placement agent has an obligation to disclose material information to every investor it solicits, including the existence of any material conflict of interest or adverse interest. This duty arises from two sources: the duties of an underwriter specifically, and the duties of a broker-dealer generally, when making an investment recommendation to a customer.

With respect to the duties of an underwriter, the First Circuit has observed that underwriters have a “unique position” in the securities industry:

“[T]he relationship between the underwriter and its customer implicitly involves a favorable recommendation of the issued security. ... Although the underwriter cannot be a guarantor of the soundness of any issue, he may not give it his implied stamp of approval without having a reasonable basis for concluding that the issue is sound.”²⁶⁸⁰

With respect to a broker-dealer, the SEC has held:

“[W]hen a securities dealer recommends a stock to a customer, it is not only obligated to avoid affirmative misstatements, but also must disclose material adverse facts to which it is aware. That includes disclosure of ‘adverse interests’ such as ‘economic self interest’ that could have influenced its recommendation.”²⁶⁸¹

The SEC has also stated that, if a broker intends to sell a security from its own inventory and recommends it to a customer, “the broker dealer must disclose all material facts.”²⁶⁸²

To help broker-dealers understand when they are obligated to disclose to investors material information, including any material adverse interest, FINRA has further defined the term “recommendation”:

²⁶⁷⁹ In the Matter of David Henry Disraeli and Lifeplan Associates, Securities Exchange Act Rel. No. 34-2686 (December 21, 2007) at 10-11 [citations omitted].

²⁶⁸⁰ SEC v. Tambone, 550 F.3d 106, 135 (1st Cir. 2008) [citations omitted].

²⁶⁸¹ In the Matter of Richmark Capital Corporation, Securities Exchange Act Rel. No. 48757 (Nov. 7, 2003) (citing Chasins v. Smith Barney & Co., Inc., 438 F.3d 1167, 1172 (2d. Cir. 1970) (“The investor... must be permitted to evaluate overlapping motivations through appropriate disclosures, especially where one motivation is economic self-interest”). See also SEC Study on Investment Advisers and Broker-Dealers at 55. In this recent study examining the disclosure obligations of broker-dealers and investment advisers, the SEC has explained: “Generally, under the anti-fraud provisions, a broker-dealer’s duty to disclose material information to its customer is based upon the scope of the relationship with the customer, which is fact intensive.” According to the SEC, when a broker-dealer acts as an order taker or market maker in effecting a transaction for a customer, the broker-dealer generally does not have a duty to disclose information regarding the security or the broker-dealer’s economic interest. The duty to disclose this information is triggered, however, when the broker-dealer recommends a security. *Id.*

²⁶⁸² SEC Study on Investment Advisers and Broker-Dealers at 56, n.252.

“[A] broad range of circumstances may cause a transaction to be considered recommended, and this determination does not depend on the classification of the transaction by a particular member as ‘solicited’ or ‘unsolicited.’ In particular a transaction will be considered to be recommended when the member or its associated person brings a specific security to the attention of the customer through any means, including, but not limited to, direct telephone communication, the delivery of promotional material through the mail, or the transmission of electronic messages.”²⁶⁸³

Goldman’s own compliance manual essentially incorporates this guidance and instructs Goldman personnel that a proactive effort to sell a specific investment to a specific customer constitutes a recommendation of that investment.²⁶⁸⁴

Once a broker-dealer, acting in the role of an underwriter or placement agent, has made an investment recommendation and triggered the duty to disclose any material adverse interest to a potential investor, it must disclose not only that the adverse interest exists, but also the “nature and extent” of the adverse interest.²⁶⁸⁵ In addition, it is not enough to inform a customer that the underwriter or placement agent “may” have an adverse interest if, in fact, the adverse interest already exists.²⁶⁸⁶ Further, there is no indication in any law or regulation that the obligation to disclose material adverse information is diminished or waived in relation to the level of sophistication of the potential investor.²⁶⁸⁷

²⁶⁸³ FINRA Notice to Members 96-60.

²⁶⁸⁴ See 2/1/2001 Goldman document, “United States Policies for the Preparation, Supervision, Distribution and Retention of Written and Electronic Communications,” at 9, GS MBS 0000035799.

²⁶⁸⁵ See, e.g., In the Matter of Arleen Hughes, Securities Exchange Act Rel. No. 4048 (Feb. 1948) (holding a broker-dealer, who is also a registered investment adviser, violated the anti-fraud provisions of the federal securities laws by failing to at minimum disclose the “nature and extent” of its adverse interest); In the Matter of Edward D. Jones & Co., L.P., Exchange Act Rel. No. 50910 (Dec. 22, 2004) (settled order), at 21 (broker-dealer consents to an order finding that disclosure to its customers was inadequate, because it failed to disclose the full nature and extent of its agreement, including “information about the source and the amount of the revenue sharing payments to [the broker-dealer] and the dimensions of the resulting potential conflicts of interest”).

²⁶⁸⁶ See, e.g., SEC v. Czuczko, Case No. CV06-4792 (USDC CD Calif.), Order Granting Plaintiff’s Unopposed Motion for Summary Judgment (Dec. 5, 2007). In Czuczko, the defendant, who offered online investment advice, included a disclaimer on his website advising that officers, directors, employees and members of their families “may, from time to time, trade in these securities for their own accounts” [emphasis in original]. *Id.* at 8. Relying on SEC v. Blavin, 760 F.2d 706 (6th Cir. 1985), the court held such an assertion “is itself a material misstatement because the Defendant *knew* he, his father, and his business partner *did* trade in the stocks and *had a biased interest* in the recommended stocks” [emphasis in original]. Czuczko, at 8.

²⁶⁸⁷ See FINRA Rules 2210(d)(1)(A) and 2211(a)(3) and (d)(1) (by rule all institutional sales material and correspondence may not “omit any material fact or qualification if the omission, in the light of the context of the material presented, would cause the communications to be misleading.”); and FINRA Rule 2310 and IM-2310-3 (suitability obligation to institutional customers). See also Hanly v. SEC, 415 F.2d 589, 596 (2d Cir. 1969) (holding that sophistication and knowledge of a broker’s customers do not warrant a less stringent standard of conduct under federal securities laws); Spatz v. Borenstein, 513 F. Supp. 571, 580 (N.D. Ill. 1981) (finding investors’ experience does not mitigate a broker’s duty to fully and truthfully disclose material facts, nor does the potential for investors to discover information not disclosed by a prospectus vitiate any legal liability stemming from a failure to disclose material facts); Department of Enforcement v. Kesner, FINRA Complaint No. 2005001729501 (February 26, 2010) (finding sophistication of investors does not relieve a securities representative from disclosing material facts to investors).

Suitable Investment Recommendations. In addition to requiring disclosure of material adverse information, federal securities laws and FINRA rules prohibit broker-dealers from making investment recommendations that would be unsuitable for any customer.²⁶⁸⁸

In a recent study, the SEC explained: “[W]hile the suitability obligation under the federal securities laws arises from the anti-fraud provisions, the SRO [Self Regulatory Organization] rules are grounded in concepts of ethics, professionalism, fair dealing, and just and equitable principles of trade.”²⁶⁸⁹ For example, FINRA Rule 2010, providing Standards of Commercial Honor and Principles of Trade, states: “A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.”²⁶⁹⁰

A broker-dealer violates the suitability rule if it makes a recommendation that “is unsuitable for any investor, regardless of the investor’s wealth, willingness to bear risk, age or other individual characteristics.”²⁶⁹¹ Under the applicable case law and FINRA rules, a broker-dealer is also obligated “to have an ‘adequate and reasonable basis’ for any security or strategy recommendation that it makes.”²⁶⁹²

Suitability rules are intended to prevent abuses that contributed to the stock crash of 1929 and the Great Depression of the 1930s, when Senators investigating investment bank activities at the time wrote the following:

“[Investors] must believe that their investment banker would not offer them the bonds unless the banker believed them to be safe. This throws a heavy responsibility upon the banker. He may and does make mistakes. There is no way that he can avoid making mistakes because he is human and because in this world, things are only relatively secure. There is no such thing as absolute security. But while the banker may make mistakes, he

²⁶⁸⁸ SEC Study on Investment Advisers and Broker-Dealers at 61.

²⁶⁸⁹ *Id.*

²⁶⁹⁰ FINRA Rule 2010. See also Study on Investment Advisers and Broker-Dealers at 55 (broker-dealers also have an obligation under the federal securities laws and FINRA rules to deal fairly with their customers).

²⁶⁹¹ *F.J. Kaufman and Co.*, Securities Exchange Act Rel. No. 27535 at 5 (December 13, 1989).

²⁶⁹² SEC Study on Investment Advisers and Broker-Dealers at 63 [citations omitted]. The suitability rule also requires the broker to determine that the specific security recommended is appropriate based on the customer’s financial situation and needs. FINRA Rule 2310. The suitability obligation clearly applies to institutional customers, FINRA IM-2310-3 (suitability obligations to institutional customers require members have a reasonable basis for recommending a particular security or strategy), but may not apply when a broker-dealer solicits another broker-dealer to buy an investment since, under FINRA Rules, the term “customer” does not include a broker or dealer. FINRA Manual, 0120 Definition. On the other hand, the term “customer” has been given a broad definition under the securities case law. See, e.g., *Department of Enforcement v. Zayed*, FINRA Complaint No. 2006003834901 (August 19, 2010) (“Cases interpreting the term ‘customer’ in the securities context have viewed the term broadly to encompass individuals or entities that have some brokerage or investment relationship with the broker-dealer. Specifically, courts have rejected the argument that an account is necessary to establish an investor’s status as a customer.” [citations omitted]). When the Subcommittee asked Mr. Blankfein whether he believed there was a difference between a “customer” and a “client,” Mr. Blankfein said he had “never distinguished” between the two terms. Subcommittee deposition of Lloyd Blankfein (12/15/2009), Hearing Exhibit 4/27-176 [Sealed Exhibit].

must never make the mistake of offering investments to his clients which he does not believe to be good.”²⁶⁹³

Investment Advisers. For investment banks that act, not just as a broker-dealer, underwriter, or placement agent, but also as an investment adviser to their customers, federal securities laws impose still a higher legal duty. When acting as an investment adviser, the law imposes a fiduciary obligation on the investment bank to act in the “best interests of its clients.”²⁶⁹⁴ A person qualifies as an “investment adviser” under the Investment Advisers Act if that person: provides advice regarding securities, is in the business of providing such advice, and provides that advice for compensation.²⁶⁹⁵ A broker-dealer, however, is excluded from the Investment Advisers Act if the performance of its investment advisory services is “solely” incidental to its business as a broker-dealer, and the broker-dealer does not receive “special compensation” for providing those advisory services.²⁶⁹⁶ Because Goldman appears to have acted primarily as an underwriter, placement agent, or broker-dealer in carrying out its securitization activities, this section analyzes Goldman’s conduct in that context and not in the context of an investment adviser.²⁶⁹⁷

(b) Analysis

One key issue is whether Goldman was acting as a market maker versus an underwriter or placement agent when it recommended that its clients purchase its CDO and RMBS securities, since those roles have different disclosure and suitability obligations under the law. A second key issue is whether Goldman withheld material adverse information when recommending its securities to its clients, including the fact that it was shorting the securities it was selling. A third key issue is whether Goldman violated its obligation to make suitable investment recommendations when urging customers to purchase securities that Goldman knew were designed to lose value.

(i) Claiming Market Maker Status

Given its active role in the securitization markets, Goldman assumed a variety of roles in the development, marketing, and trade of RMBS and CDO products. At times, it acted as a market maker responding to client orders to buy and sell RMBS and CDO products. In addition, from 2006 to 2007, Goldman originated and served as an underwriter or placement agent for 27 CDOs and 86 RMBS securitizations, and sold the resulting RMBS and CDO securities to a broad range of clients around the world.

²⁶⁹³ 6/16/1934 “Stock Exchange Practices,” Report of the Senate Committee on Banking and Currency, S. Rep. 73-1455, at 88 (quoting “Who Buys Foreign Bonds,” *Foreign Affairs* (1/1927)).

²⁶⁹⁴ SEC Study on Investment Advisers and Broker-Dealers at 15-16.

²⁶⁹⁵ *Id.*

²⁶⁹⁶ *Id.*

²⁶⁹⁷ The Subcommittee did not examine the extent to which Goldman was acting as an investment adviser within the meaning of the Investment Advisers Act when recommending that various customers buy its RMBS and CDO securities.

In public statements and testimony regarding the financial crisis, Goldman has often highlighted its role as a market maker and downplayed its role as an underwriter or placement agent in the securitization markets.²⁶⁹⁸ In the April 27, 2010 Subcommittee hearing, for example, Goldman executives repeatedly highlighted the firm's role as market makers – buying and selling RMBS and CDO securities at the request of clients – while deemphasizing that the firm also originated new securities and affirmatively solicited clients to buy those new securities.

In an exchange with Senator Susan Collins, for example, executives from Goldman's Mortgage Department were asked questions about whether they were investment advisers with a fiduciary duty to their clients. While not denying this duty, they emphasized their role as market makers with more limited client obligations.²⁶⁹⁹

Senator Collins: Thank you, Mr. Chairman. I would like to start my questioning by asking each of you a fundamental question. Investment advisers have a legal obligation to act in the best interests of their clients. Mr. Sparks, when you were working at Goldman, did you consider yourself to have a duty to act in the best interests of your clients?

Mr. Sparks: Senator, I had a duty to act in a very straightforward way, in a very open way with my clients. Technically, with respect to investment advice, we were a market maker in that regard. But with respect to being a prudent and a responsible participant in the market, we do have a duty to do that.

Senator Collins: Mr. Swenson?

Mr. Swenson: I believe it is our responsibility as market makers to provide a market-level bid and offer to our clients and to serve our clients and helping them transact at levels that are fair market prices and help meet their needs.

Mr. Tourre made similar representations in his prepared testimony to the Subcommittee:

“Between 2004 and 2007, my job was primarily to make markets for clients. I made markets by connecting clients who wished to take a long exposure to an asset – meaning they anticipated the value of the asset would rise – with clients who wished to take a short exposure to an asset – meaning they anticipated the value of the asset would fall. I

²⁶⁹⁸ See, e.g., 3/1/2010 letter from Goldman's legal counsel to the Financial Crisis Inquiry Commission, GS-PSI-01310 (discussing Goldman Sachs' "Role as a market maker" in detail and distinguishing it, in a much shorter description, from its underwriting and placement roles). Although the letter acknowledged that Goldman acted as an underwriter and placement agent for RMBS and CDO transactions, it also suggested that those transactions were commonly designed in response to client inquiries and did not discuss efforts by the firm to solicit customers to buy the securities: "Goldman Sachs' CDOs ... were initially created in response to the request of a sophisticated institutional investor that approached the firm specifically seeking that particular exposure. Reverse inquiries from clients were a common feature of this market."

²⁶⁹⁹ April 27, 2010 Subcommittee Hearing Transcript at 26-27.

was an intermediary between highly sophisticated professional investors – all of which were institutions. None of my clients were individual, retail investors.²⁷⁰⁰

In another exchange, when Subcommittee Chairman Levin asked Goldman CEO Lloyd Blankfein about the firm's duty as an underwriter and placement agent to disclose its adverse interests when selling its CDO securities to potential investors, Mr. Blankfein responded that market makers had no such disclosure obligations:

Senator Levin: You are betting against the very security that you are selling to that person. You don't see any problem? You don't see that you have to disclose, when you have put together a deal and you go looking for people to buy those securities, it just adds insult to injury when your people think it is a pile of junk. But the underlying injury is that you have determined that you are going to keep the opposite position from the security that you are selling to someone. You just don't see any obligation to disclose that. That is what seems to be coming through here.

Mr. Blankfein: I don't believe there is a disclosure obligation, but as a market maker, I am not sure how a market would work if it was premised on the assumption that the other side of the market cared what your opinion was about the position they were taking.

Senator Levin: Do they have a belief that you, at least when you are going out peddling securities, that you want that security to succeed? Don't they have that right to assume that if you are going out selling securities, that you have a belief that that is something which would be good for that client?

Mr. Blankfein: I think we have to have a belief, and we do have a belief that if somebody wants an exposure to housing –

Senator Levin: They don't want – you are out there selling it to them. You are out there selling these securities. This isn't someone walking in the door.

Mr. Blankfein: Again, I want –

Senator Levin: You are picking up the phone. You are calling all these people. You don't tell them that you think it is a piece of junk. You don't tell them that this is a security which incorporates or which in some way references a whole lot of bad stuff in your own inventory – bad lemons, they were called. ... You are out there looking around for buyers of stuff, whether it is junk or not junk, where you are betting against what you are selling. You are intending to keep the opposite side. This isn't where you are just selling something from your inventory. This is where you are betting against the very product you are selling, and you are just not troubled by it. That is the bottom line. There is no trouble in your mind –

²⁷⁰⁰ Prepared statement of Fabrice Tourre, April 27, 2010 Subcommittee Hearing at 1.

Mr. Blankfein: Senator, I am sorry. I can't endorse your characterization.

Senator Levin: It is a question, not a characterization. I am saying, you are not troubled.

Mr. Blankfein: I am not troubled by the fact that we market make as principal and that we are the opposite – when somebody sells, they sell to us, or when they buy, they buy from us.²⁷⁰¹

Although Goldman representatives routinely emphasized the firm's role as a market maker, when asked directly if the firm also functioned as an underwriter or placement agent when selling the CDO securities it originated, its executives agreed that in some circumstances, the firm played that role:

Senator Pryor: OK. But let me ask this: When you are selling a security such as a CDO, my understanding is you are not a market maker. Isn't it true that you are placement agent and as a placement agent you have a duty of full disclosure?

Mr. Sparks: Senator, that is correct.²⁷⁰²

Similarly, in a written response to a Subcommittee question asking about the firm's role in relation to Anderson, Hudson 1, Timberwolf and other CDOs, Mr. Blankfein wrote: "Goldman Sachs or an affiliate served as a placement agent."²⁷⁰³

Despite this acknowledged fact, Goldman continued to claim it was a market maker with limited disclosure and client obligations. On May 1, 2010, for example, less than a week after the Subcommittee's April 27 hearing, an article entitled, "Goldman Sachs' Lloyd Blankfein Defends 'Market Maker' Firm on 'Charlie Rose' Show," described Mr. Blankfein's statements on the televised show as follows:

"Asked by Rose whether Goldman investment advisers had ever bought securities from the firm, sold them to clients, and then bet against those same securities, Blankfein paused. And after a solid six seconds of silence, sought to explain ... Goldman's role as a 'market maker.'

'We're like a machine, that lets people buy and sell what they want to buy and sell' Blankfein said. 'That's not the advisory business. That's just a facility for market making.'"²⁷⁰⁴

²⁷⁰¹ April 27, 2010 Subcommittee Hearing at 137-138.

²⁷⁰² Id. at 53.

²⁷⁰³ Goldman response to Subcommittee QFR at PSI_QFR_GS0026.

²⁷⁰⁴ "Goldman Sachs' Lloyd Blankfein Defends 'Market Maker' Firm On 'Charlie Rose Show,'" Huffington Post (5/1/2010), http://www.huffingtonpost.com/2010/05/01/goldman%1esachs%1elloyd%1eblank_n_559606.html (video of Charlie Rose interview of Lloyd Blankfein embedded).

During the interview, Mr. Blankfein compared Goldman's activity to that of the New York Stock Exchange, claiming that the firm was a market maker taking buy and sell orders from clients.²⁷⁰⁵ At one point, Mr. Rose asked: "Has there ever been a time when Goldman's investment advisers bought securities from Goldman for a client and at the same time Goldman was simultaneously shorting it?" Mr. Blankfein responded: "I have to explain, see this is a problem. As a market maker, we are buying and selling a thousand times a minute, probably." Mr. Blankfein also stated during the interview: "If we believed it would fail, the security wouldn't work, we would not sell it."²⁷⁰⁶

(ii) Soliciting Clients and Recommending Investments

Under federal securities law and FINRA Rules detailed above, when a broker-dealer, acting as an underwriter or placement agent brings a specific security to the attention of a particular customer, it is considered to be recommending the security to that customer and has an obligation to disclose all material adverse information to that customer, including any adverse interest that a reasonable investor would consider material in considering the broker-dealer's recommendation. Despite Goldman's frequent efforts to characterize its CDO and RMBS sales efforts as a market making activity in response to client demand, Goldman's internal documents, emails, and interviews indicate that, from late 2006 through 2007, Goldman was not always responding to client demand, but was also aggressively soliciting customers in an attempt to sell its CDO and RMBS products.

In December 2006, for example, Goldman CFO David Viniar instructed the Mortgage Department to reduce its long position in mortgage related assets, including by selling RMBS and CDO products on its books.²⁷⁰⁷ The Mortgage Department responded with a concerted effort to sell to clients the bulk of the RMBS and CDO products in its inventory. The Subcommittee saw no evidence that this intensive selling campaign was undertaken in response to client demand. To the contrary, the evidence shows that the sales effort was undertaken at the request of senior management, despite what was then waning investor interest in securitization products.

In December 2006, on the same day Mr. Viniar directed the Mortgage Department to reduce its long assets, Kevin Gasvoda, head of the desk that handled RMBS securities, told his staff to "move stuff out even if you have to take a small loss."²⁷⁰⁸ In January 2007, Mr. Sparks, head of the Mortgage Department, asked a senior executive to compliment the CDO Origination Desk head and his staffer for their efforts to sell a specific CDO's securities over the prior

²⁷⁰⁵ Id.

²⁷⁰⁶ April 30, 2010 Transcript of The Charlie Rose Show at 12-14. Mr. Blankfein made similar claims the following week on CNBC's "Power Lunch" during a one-on-one interview with David Faber. May 7, 2010 Transcript of Power Lunch at 4.

²⁷⁰⁷ See, e.g., 12/14/2006 email from Daniel Sparks to Thomas Montag, "Subprime risk meeting with Viniar/McMahon Summary," GS MBS-E-009726498, Hearing Exhibit 4/27-3; Subcommittee interview of David Viniar (4/13/2010).

²⁷⁰⁸ 12/14/2006 email from Kevin Gasvoda to his staff, "Retained bonds," GS MBS-E-010935323, Hearing Exhibit 4/27-72.

month: “They structured like mad and traveled the world, and worked their tails off to make some lemonade out of some big old lemons.”²⁷⁰⁹ In March 2007, Mr. Sparks emailed a call for “help” to Goldman’s top sales managers around the world to “sell our new issues – CDOs and RMBS – and to sell our other cash trading positions.”²⁷¹⁰ He wrote: “I can’t over state the importance to the business of selling these positions and new issues. ... Priority 1 – sell our new issues and cash positions.”²⁷¹¹ In April 2007, the Mortgage Department issued one of many sales directives to Goldman’s global sales force, placing a priority on selling certain CDO securities in its inventory, including securities from Anderson, Timberwolf, Point Pleasant, and Altius CDOs, and Mr. Sparks recommended providing large sales credits for those able to complete the sales.²⁷¹²

The documents also show that Goldman personnel worked relentlessly to identify possible clients and pitch CDO securities to them. In March 2007, for example, the Syndicate Desk contributed a list of “non-traditional buyers” that could be targeted for CDO sales, writing that “we continue to push for leads.”²⁷¹³ A Goldman sales manager suggested targeting European and Middle Eastern banks and hedge funds.²⁷¹⁴ In New York, a Goldman sales representative recounted that the Abacus CDO security “has been showed to selected accounts for the past few weeks. Those selected accounts previously declined participating in Anderson mezz, Point Pleasant, and Timberwolf.”²⁷¹⁵

When CDO sales slowed in May 2007, the Mortgage Department produced a new “target” list of four primary and 35 secondary clients for CDO sales.²⁷¹⁶ A few days later, a Goldman salesperson reported that he planned to contact a hedge fund about Timberwolf and Point Pleasant securities, noting that the customer was “[n]ot expert[] in this space at all but [I] made them a lot of money in correlation dislocation and will do as I suggest.”²⁷¹⁷ In Australia, a Goldman sales representative contacted an Australian hedge fund, Basis Capital, and mounted a sustained effort to sell it \$100 million in Timberwolf securities, overcoming investor concerns to make the sale.²⁷¹⁸ In Korea, a Goldman sales representative attempting to sell \$56 million in

²⁷⁰⁹ 1/31/2007 email from Daniel Sparks to Tom Montag, “MTModel,” Hearing Exhibit 4/27-91.

²⁷¹⁰ 3/9/2007 email exchange between Mr. Sparks and sales managers, “help,” GS MBS-E-010643213.

²⁷¹¹ Id.

²⁷¹² 4/19/2007 email from Daniel Sparks to Bunt Bohra, GS MBS-E-010539324, Hearing Exhibit 4/27-102.

²⁷¹³ 3/21/2007 email from Syndicate, “Non-traditional Buyer Base for CDO ASEX,” GS MBS-E-003296460, Hearing Exhibit 4/27-78.

²⁷¹⁴ 3/9/2007 email exchange between Mr. Sparks and sales managers, “help,” GS MBS-E-010643213, Hearing Exhibit 4/27-76.

²⁷¹⁵ 3/30/2007 email from Fabrice Tourre to Mr. Sparks and others, GS MBS-E-002678071.

²⁷¹⁶ 5/20/2007 Goldman presentation, “Mortgage Department, May 2007,” GS MBS-E-010965212. See also 3/1/2007 email from Michael Swenson, “names,” GS MBS-E-012504595 (SPG Trading target list tiered according to likelihood of purchasing); 2/14/2007 email to Matthew Bieber, “Timberwolf I, Ltd. – Target Account List,” GS MBS-E-001996121 (list of U.S. accounts “we should be directly targeting” for Timberwolf sales); 3/2/2007 email from David Lehman, “ABX/Mtg Credit Accts,” GS MBS-E-011057632 (mortgage credit business shared with SPG Trading Desk “a fairly lengthy list of accounts that are considered to be ‘key’”).

²⁷¹⁷ 5/24/2007 email from Ysuf Aliredha to Mr. Sparks and others, “Priority Axes,” GS MBS-E-001934732.

²⁷¹⁸ See, e.g., 5/20/2007 email from George Maltezos to Mr. Lehman, “T/wolf and Basis,” GS MBS-E-001863555; 5/22/2007 email from Mr. Maltezos to Basis Capital, JUL 000685.

Timberwolf securities to a Korean life insurance firm was encouraged to “Get ‘er done” and “go for it” by his superiors when he informed them “we are pushing on our personal relationships to get this done.”²⁷¹⁹

These and other documents show that, in late 2006 and 2007, Goldman was not acting as primarily a market maker responding to client demand when it originated and sold Hudson, Anderson, Timberwolf, and Abacus securities, or when it sold other RMBS and CDO assets that senior management wanted to remove from the firm’s books due to their declining values and increasing risk. Instead, Goldman was acting as an underwriter, placement agent, or broker-dealer, aggressively soliciting its clients to purchase the CDO and RMBS products that senior management wanted to eliminate from its inventory.

(iii) Failing to Disclose Material Adverse Information

Goldman’s marketing and solicitation efforts to sell Hudson, Anderson, Timberwolf, and Abacus securities, along with other CDO and RMBS assets, to clients raise multiple questions about whether Goldman met its obligation to disclose material adverse information to potential investors. A related question is whether Goldman met its obligation to avoid material misrepresentations and omissions of material facts when recommending the purchase of those securities. One key issue is whether Goldman’s failure to disclose its shorting activities, which would enable it to profit from a decline in the value of the very securities Goldman was recommending to its clients to purchase, qualified as an “omitted fact” that “would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available” about the security being recommended by Goldman.²⁷²⁰

Taking the Short Side of a CDO. In the four CDOs examined in this Report, Goldman took 100% of the short side of Hudson, 40% of the short side of Anderson, and 36% of the short side of Timberwolf.²⁷²¹ In each of these CDOs, Goldman also made a relatively small investment in the long side of the CDO by initially retaining all or a portion of its equity tranche, allowing Goldman to claim an “interest” in the CDO’s long term success.²⁷²² In Abacus, Goldman did not intend to make any investment in the CDO itself, and instead enabled the client that had requested construction of the CDO and played a key role in selecting its assets to hold 100% of the short side of the CDO.

²⁷¹⁹ 6/7/2007 email from Omar Chaudhary to Mr. Sparks and others, GS MBS-E-001866450, Hearing Exhibit 4/27-104.

²⁷²⁰ *Basic v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Industries v. Northway*, 426 U.S. 438, 449 (1976)). Utilizing the SEC’s guidance, the issue could also be framed as evaluating “the significance the reasonable investor would place on the withheld or misrepresented information.”

²⁷²¹ Goldman Response to Subcommittee QFR at PSI_QFR_GS0192.

²⁷²² Typically, the equity tranche, which is the first to incur any losses sustained by a securitization, is retained by the originator. Equity tranches are typically not rated by the credit rating agencies and often not sold to third parties.

Goldman did not accurately or fully disclose its short interest in Hudson, Anderson, or Timberwolf to potential investors.²⁷²³ Instead, the CDO's offering materials advised potential investors, in difficult to understand language, that a Goldman affiliate "may" adopt a financial interest or investment position adverse to the investors when, in fact, Goldman had already determined to do so. In a section entitled, "Certain Conflicts of Interest," for example, the Hudson 1 Offering Circular stated in part:

"Certain Conflicts of Interest. Various potential and actual conflicts of interest may arise from the overall activities of the Credit Protection Buyer, the overall underwriting, investment and other activities of the Liquidation Agent, the Senior Swap Counterparty and the Collateral Put Provider, their respective affiliates and its clients and employees and from the overall investment activity of the Initial Purchaser, including in other transactions with the Issuer. The following briefly summarizes some of these conflicts, but is not intended to be an exhaustive list of all such conflicts.

"The Credit Protection Buyer and Senior Swap Counterparty. GSI [Goldman Sachs International] will be the initial Credit Protection Buyer and the initial Senior Swap Counterparty. The following briefly summarizes some potential and actual conflicts of interests related to the Credit Protection Buyer and Senior Swap Counterparty, but the following isn't intended to be an exhaustive list of all such conflicts. ...

"GSI and/or any of its affiliates may invest and/or deal, for their own respective accounts for which they have investment discretion, in securities or in other interests in the Reference Entities, in obligations of the Reference Entities or in the obligors in respect of any Reference Obligations or Collateral Securities (the "Investments") or in credit default swaps (whether as protection buyer or seller) In addition, GSI and/or any of its affiliates may invest and/or deal, for their own respective accounts or for accounts for which they have investment discretion, in securities (or make loans or have other rights) that are senior to, or have interests different from or adverse to, any of the Investments and may act as adviser to, may be lenders to, and may have other ongoing relationships with, the issuers or obligors of Investments and obligations of any Reference Entities."²⁷²⁴

This disclosure indicates that GSI or an affiliate "may invest and/or deal" in securities or other "interests" in the assets underlying the Hudson CDO, and "may invest and/or deal" in securities that are "adverse to" the Hudson "investments." The Offering Circular, however, misrepresented Goldman's investment plans. At the time it was created in December 2006, Goldman had already determined to keep 100% of the short side of the Hudson CDO and act as

²⁷²³ In Abacus, Goldman also failed to disclose the role of the hedge fund in the Abacus asset selection process. See Abacus section C(5)(b)(ii)DD, above.

²⁷²⁴ 12/3/2006 Goldman Offering Circular, "Hudson Mezzanine 2006-1, LTD.," at 56, GS MBS-E-021821196. The Goldman offering circulars for Timberwolf and Anderson contain similar sections. See 3/23/2007 Goldman Offering Circular, "Timberwolf I, LTD.," GS MBS-E-021825371 at 427; 3/16/2007 Goldman Offering Circular, "Anderson Mezzanine Funding 2007-1, LTD.," GS MBS-E-000912574, at 623.

the sole counterparty to the investors buying Hudson securities, thereby acquiring a \$2 billion financial interest that was directly adverse to theirs.²⁷²⁵

A federal court has held that disclosing a potential adverse interest, when a known adverse interest already exists, can constitute a material misstatement to investors.²⁷²⁶ In the case of the Hudson CDO, much of the profit Goldman obtained would be generated from the losses incurred by clients that bought Hudson securities, creating an actual, undisclosed adverse interest. This construct, in which Goldman's profits depended in part upon its clients' losses, created a clear conflict of interest between Goldman and the clients to whom it was selling the Hudson securities, once Goldman had decided to become a short party in the CDO it was simultaneously marketing.

In another part of the Offering Circular, Goldman stated that GSI would serve as the sole counterparty to the CDO, but that disclosure was made in the context of a common industry practice in which the CDO originator or its designate typically took the entire short side of the transaction in the first instance and was the only party that dealt directly with the shell corporation actually issuing the CDO's securities. The CDO originator, or its designate, then acted as an intermediary between the shell corporation and the other broker-dealers buying short positions in the CDO on behalf of themselves or a customer. By placing itself in the middle of each CDS contract, the originator or its designate provided stronger financial backing for the CDS contracts being issued by the CDO and obtained more favorable credit ratings for the CDO securities. In the CDOs examined by the Subcommittee, Goldman followed industry practice by designating its affiliate, GSI, as the initial sole counterparty in the Hudson, Anderson, and Timberwolf CDOs.²⁷²⁷ Customers learning of GSI's role as the initial sole counterparty in the Hudson CDO would likely have assumed that GSI planned to sell its initial short position to other parties, since that was industry practice. What Goldman failed to disclose to those customers is that it planned to hold (or already held) all or a substantial portion of the short side of the CDO as a proprietary investment adverse to the interests of the customers to whom Goldman was selling the CDO securities. Had those customers known of Goldman's substantial short investment, they would likely have understood that Goldman viewed the very CDO securities it was recommending they purchase as likely not to perform.

²⁷²⁵ See, e.g., Goldman response to Subcommittee QFR at PSI_QFR_GS0192 and PSI_QFR_GS00235.

²⁷²⁶ See, e.g., SEC v. Czuczko, Case No. CV06-4792 (USDC CD Calif.), Order Granting Plaintiff's Unopposed Motion for Summary Judgment (Dec. 5, 2007) (finding defendant made a material misstatement to potential investors when he disclosed that officers, directors, employees and members of their families "may" trade in the stocks recommended on his website, without disclosing that he, his father, and business partner were trading in those stocks and had an interest in them). See also In the Matter of Arleen Hughes, Securities Exchange Act Rel. No. 4048 (Feb. 1948) (holding a broker-dealer, who is also a registered investment adviser, had to disclose the "nature and extent" of its adverse interest); In the Matter of Edward D. Jones & Co., L.P., Exchange Act Rel. No. 50910 (Dec. 22, 2004) (settled order), at 21 (disclosure inadequate for failing to disclose full nature and extent of the broker-dealer's conflict of interest).

²⁷²⁷ Goldman sometimes referred to this position as the "Credit Protection Buyer" or "Synthetic Security Counterparty."

Goldman's failure to disclose its short interest was further compounded when it told investors that its interests "were aligned" with those of the long investors or when it advertised its retention of a portion of the CDO's equity tranche. The Hudson marketing booklet stated: "Goldman Sachs has aligned incentives with the Hudson program by investing in a portion of equity and playing the ongoing role of Liquidation Agent."²⁷²⁸ What made the statement misleading and what Goldman failed to disclose in the booklet was that its \$6 million equity investment²⁷²⁹ was far outweighed by its \$2 billion short investment.²⁷³⁰ In addition, Goldman later used its liquidation agent position to benefit its short investment at the expense of the long investors in Hudson.²⁷³¹ In Anderson, talking points prepared for the Goldman sales force advocated telling investors: "Goldman is underwriting the equity and expects to hold up to 50%."²⁷³² What the talking points left out was that Goldman's \$21 million equity investment in Anderson was less than one sixth the size of its \$135 million short position.²⁷³³ In Timberwolf, the marketing booklet stated that Goldman was purchasing 50% of the equity tranche, and the collateral manager Greywolf was purchasing the other 50%.²⁷³⁴ Again, the booklet failed to disclose that Goldman's equity investment was far outweighed by its short investment.²⁷³⁵ In each CDO, Goldman withheld from investors information that it had a more significant financial interest in seeing the CDO decline in value than increase in value. In light of its short investments, Goldman's claims that its interests were aligned with, rather than adverse, to the investors to whom it was selling the CDO securities were misleading.

Shorting the Subprime Market. Goldman also failed to disclose to clients that, at the same time it was recommending investments in Goldman-originated RMBS and CDO securities, it was committing billions of dollars to short the same types of securities, as well as their underlying assets,²⁷³⁶ and even some of the lenders whose mortgage pools were included or referenced in the securities.²⁷³⁷ In February 2007, Goldman's net short totaled about \$10 billion.²⁷³⁸ In June 2007, its net short reached about \$13.9 billion. A significant issue is whether this omitted information – that Goldman was heavily shorting the same types of investments it was recommending – "would have been viewed by the reasonable investor as having

²⁷²⁸ 10/2006 Hudson Mezzanine Funding 2006-1, LTD., GS MBS-E-009546963, at 966, Hearing Exhibit 4/27-87.

²⁷²⁹ See Goldman response to Subcommittee QFR at PSI_QFR_GS0223.

²⁷³⁰ See, e.g., 10/30/2006 email from Mr. Ostrem, "Great Job on Hudson Mezz," GS MBS-E-0000057886, Hearing Exhibit 4/27-90.

²⁷³¹ See discussion of Goldman's actions as the Hudson liquidation agent, above.

²⁷³² 3/13/2007 email from Mr. Ostrem to Scott Wisenbaker and Matthew Bieber, GS MBS-E-000898410, Hearing Exhibit 4/27-172.

²⁷³³ See Goldman response to Subcommittee QFR at PSI_QFR_GS0192.

²⁷³⁴ Timberwolf flipbook, GS MBS-E-000676809, Hearing Exhibit 4/27-99a.

²⁷³⁵ Goldman purchased its share of the Timberwolf equity tranche in March 2007, actually held it for only two months, and then, in May, sold it to Greywolf. See also Goldman response to Subcommittee QFR at PSI_QFR_GS0226.

²⁷³⁶ See, e.g., 6/5/2007 email from Benjamin Case to David Lehman, GS-MBS-E-001919861 (indicating Goldman was shorting some of the assets underlying Timberwolf using CDS contracts outside of the CDO).

²⁷³⁷ See, e.g., Goldman spreadsheet produced in response to a Subcommittee QFR, at GS MBS 0000037361 (identifying lenders whose stock Goldman shorted).

²⁷³⁸ See discussion of Goldman's net short positions, section C(4)(b), above.

significantly altered the ‘total mix’ of information made available” about the securities Goldman was recommending.²⁷³⁹

Other Adverse Information. In addition to its failure to disclose that it was shorting specific CDOs as well as the subprime mortgage market as a whole, Goldman failed to disclose other arrangements which created conflicts of interest and undisclosed financial interests that were adverse to its clients. Concerning Abacus, Goldman failed to disclose a compensation arrangement in which Goldman agreed to accept a fee for arranging low premium payments by the short party; those lower payments disadvantaged the long investors by reducing cash payments to the CDO. Concerning Hudson, Goldman failed to disclose that its dual roles as liquidation agent and sole short party meant that it could delay liquidating Hudson assets that were losing value and simultaneously increase the value of its short position; that same action increased the losses of the long investors. In Timberwolf, Goldman failed to disclose that it viewed its role as collateral put provider allowed it to refuse to consent to the purchase of default swap collateral securities and avoid any risk that the securities would decline in value – the very risk the long investors were paying Goldman a fee to assume.²⁷⁴⁰ In each CDO, Goldman took actions that created an undisclosed conflict of interest between itself and the investors to whom it recommended and sold the CDO securities.

These types of arrangements, when undisclosed, can result in conflicts of interest that disadvantage investors. The existence, nature, and extent of such arrangements are the type of material adverse information that the securities laws were designed to ensure were accurately described and disclosed to investors.

(iv) Making Unsuitable Investment Recommendations

In addition to the disclosure issues, Goldman’s efforts to sell Hudson, Anderson, Timberwolf, and Abacus securities raise a set of issues related to whether Goldman met its obligation to engage in fair dealing with its clients and avoid recommending investments that were unsuitable for any investor. The focus here is on Goldman’s sale of CDO securities that were designed to lose value, either because the short party selected the assets or the assets were so poor that Goldman knew or should have known they would perform poorly or fail, yet marketed them to customers anyway.

²⁷³⁹ That Goldman’s own investment decisions might be material information for an investor is demonstrated by a court ruling in a famous case in the 1970s, in which Goldman, an exclusive dealer, was sued by an investor who alleged that Goldman had sold it Penn Central notes without disclosing, among other things, that Goldman had recently reduced and placed limits on its own inventory of those same notes. Alton Boxboard v. Goldman, Sachs and Company, 560 F.2d 916 (8th Cir. 1977). Although the court decided the case on another basis, the Eighth Circuit found that the materiality of the undisclosed facts alleged was a question to be decided by a trier of fact. The court took note of the testimony from two sophisticated institutional purchasers concerning Goldman’s reduction of inventory in Penn Central notes. *Id.* at n.10. One sophisticated investor “testified that this information would have been a ‘red flag’ to him, and had he known of Goldman Sachs’ inventory decision, he would have wanted notes from another issuer.” *Id.* The other witness “stated he would have been concerned about such information and would have conveyed it to his customers, because it indicated that Goldman, Sachs did not have confidence in ... [the] notes.” *Id.*

²⁷⁴⁰ Each of these matters is discussed in detail, above.

As detailed earlier, broker-dealers are required to deal fairly with their customers and observe high standards of honor in the conduct of their business.²⁷⁴¹ When a broker-dealer, acting as an underwriter, makes an investment recommendation to a client, it is implicit that the broker-dealer has a reasonable basis to believe that the issue is sound.²⁷⁴² A broker-dealer is also required “to have an ‘adequate and reasonable basis’ for any security or strategy recommendation that it makes.”²⁷⁴³ Broker-dealers are barred from offering investments that are unsuitable for any investor.²⁷⁴⁴ Goldman itself, in response to a Subcommittee question, has acknowledged that broker-dealers owe a “general suitability” obligation to its institutional investors, and “[t]his suitability duty requires the broker-dealer to determine, in the first instance, that the transaction is suitable for at least some investors.”²⁷⁴⁵ Despite those requirements, the evidence gathered by the Subcommittee indicates that Goldman did not view any of the four CDOs examined in this Report as sound investments for the clients to whom it sold the securities.²⁷⁴⁶

Selection of Assets by Short Party. Internal documents and emails from Goldman indicate that both Abacus and Hudson were designed with the expectation they would lose value and produce a profit for the short side of the CDOs. The sole short party in Abacus was the Paulson hedge fund; the sole short party in Hudson was Goldman itself.

With respect to Abacus, Goldman knew that the Paulson hedge fund wanted to take 100% of the short side and would profit only if the CDO lost value, yet allowed the hedge fund to play a major but hidden role in selecting the CDO assets.²⁷⁴⁷ The Goldman employee with lead responsibility for Abacus, Fabrice Tourre, called it a “weak quality portfolio.”²⁷⁴⁸ The Paulson hedge fund executive who participated in the asset selection process acknowledged he selected assets that he expected would not perform well.²⁷⁴⁹ A Moody’s executive who oversaw CDO ratings when Abacus was rated – and testified that he did not know of Paulson’s role in the Abacus asset selection process – explained that “[i]t just changes the whole dynamic of the structure where the person who is putting it together, choosing it, wants it to blow up.”²⁷⁵⁰ When Goldman began to publicly market the Abacus securities, Ed Steffelin, a Senior trader at GSC who had declined Goldman’s request that his firm serve as the CDO’s portfolio selection agent, sent an email to Peter Ostrem, head of Goldman’s CDO Origination Desk, stating: “I do not have to say how bad it is that you guys are pushing this thing.”²⁷⁵¹ When asked by the Subcommittee what he meant by that comment, Mr. Steffelin said that he believed the Abacus

²⁷⁴¹ SEC Study on Investment Advisers and Broker-Dealers at 55.

²⁷⁴² SEC v. Tambone, 550 F.3d 106, 135 (1st Cir. 2008) [citations omitted].

²⁷⁴³ SEC Study on Investment Advisers and Broker-Dealers at 63 [citations omitted].

²⁷⁴⁴ *Id.* at 61.

²⁷⁴⁵ See Goldman response to Subcommittee QFR at PSI_QFR_GS0048.

²⁷⁴⁶ See, e.g., 1/23/2007 email from Fabrice Tourre to Marine Serres, GS MBS-E-003434918, Hearing Exhibit 4/27-62 (Tourre wrote: “[S]tanding in the middle of all these complex, highly levered, exotic trades he [Mr. Tourre] created without necessarily understanding all the implications of these monstrosities [sic] !!!”).

²⁷⁴⁷ See discussion of Abacus in section C(5)(b)(ii)DD, above.

²⁷⁴⁸ 12/18/2006 email from Fabrice Tourre, “Paulson,” GS MBS-E-003246145, Hearing Exhibit 4/27-107.

²⁷⁴⁹ SEC deposition of Paolo Pellegrini (12/3/2008). PSI-Paulson-04 (Pellegrini Depo)-0001, at 175-76.

²⁷⁵⁰ April 23, 2010 Subcommittee Hearing Transcript at 64.

²⁷⁵¹ 2/27/2007 email from Ed Steffelin to Peter Ostrem, GS MBS-E-009209654.

CDO created “reputational risk” for the collateral manager industry and the whole market.²⁷⁵² When Mr. Tourre later sought to book two CDS contracts referencing the Abacus securities, a Goldman salesman wrote: “seems we might have to book these pigs.”²⁷⁵³

As planned, once issued, the Abacus securities quickly lost value. In October 2007, six months after the Abacus securities were issued, the credit rating agencies downgraded them, and a Goldman salesperson noted: “This deal was number 1 in the universe of CDO’s that were downgraded by Moody’s and S&P. 99.89% of the underlying assets were downgraded.”²⁷⁵⁴ The three investors that bought Abacus securities together lost more than \$1 billion, while the Paulson hedge fund, as the sole short party, recorded a corresponding \$1 billion profit.²⁷⁵⁵ In July 2010, Goldman agreed to settle a securities fraud complaint brought by the SEC by paying a fine of \$550 million and “acknowledging it was a mistake for the Goldman marketing materials to state that the reference portfolio was ‘selected by’ ACA Management, LLC without disclosing the role of Paulson & Co. Inc. in the portfolio selection process and that Paulson’s economic interests were adverse to CDO investors.”²⁷⁵⁶

With respect to Hudson, Goldman designed the CDO from its inception as a way to transfer the risk of loss associated with ABX assets from Goldman’s inventory to the Hudson investors.²⁷⁵⁷ Goldman documents state, for example, that Hudson was “initiated by the firm as the most efficient method to reduce long ABX exposures,”²⁷⁵⁸ and the CDO was an “exit for our long ABX risk.”²⁷⁵⁹ Goldman created and took the short side of \$2 billion in single name CDS contracts referencing RMBS securities that it wanted to short, and sold them to the Hudson CDO. The end result was that Goldman wrote 100% of the CDS contracts that made up Hudson’s assets and took 100% of the short side of the CDO, which meant that Goldman would profit if the CDO fell in value. Goldman marketed the CDO without disclosing its status as the sole short party, instead telling investors that its interests were “aligned” with theirs. The Hudson securities immediately began losing value. Within a year, while the holders of the Hudson securities lost virtually their entire investments, Goldman’s profits reached \$1.7 billion, which it then used to offset other mortgage related losses.

In both CDOs, Goldman took actions that disguised that the transactions were designed to lose value. In Abacus, Goldman omitted mention of the Paulson hedge fund’s involvement in the asset selection process and hired a well known third party portfolio agent, ACA

²⁷⁵² Subcommittee interview of Ed Steffelin (12/10/2010).

²⁷⁵³ 4/15/2007 email from Cactus Raazi to Daniel Chan, “Dan: ABACUS 07-AC1,” Hearing Exhibit 4/27-82.

²⁷⁵⁴ 10/26/2007 email from Goldman salesman to Michael Swenson, “ABACUS 2007-AC1 – Marketing Points (INTERNAL ONLY) [T-Mail],” GS MBS-E-016034495.

²⁷⁵⁵ **Error! Main Document Only.** Securities and Exchange Commission v. Goldman Sachs, Case No. 10-CV-3229 (S.D.N.Y.), Complaint (April 16, 2010).

²⁷⁵⁶ SEC v. Goldman, Sachs & Co. and Tourre, Case No. 10-CV-3329 (BSJ) (S.D.N.Y.), Consent of Defendant Goldman, Sachs & Co (July 14, 2010).

²⁷⁵⁷ See discussion of Hudson CDO in section C(5)(b)(ii)AA, above.

²⁷⁵⁸ Goldman response to Subcommittee QFR at PSI_QFR_GS0249.

²⁷⁵⁹ 9/20/2006 email from Arbind Jha to Josh Birnbaum, GS MBS-E-012685289.

Management, to “leverage ACA’s credibility.”²⁷⁶⁰ In Hudson, Goldman omitted that it had written all of the CDO’s CDS contracts and it referenced \$1.2 billion in ABX assets in Goldman’s own inventory, and instead told investors that Hudson’s assets were “sourced from the Street” and Hudson was “not a Balance Sheet CDO.”²⁷⁶¹

Goldman marketed the Abacus and Hudson securities to clients knowing that each CDO had been designed to lose value and produce a profit for the short party. Given that information, Goldman marketed CDOs that it knew or should have known were not suitable for any investor.

Selection of Poor Quality Assets. Similar concerns apply to Goldman’s origination and marketing of the Anderson and Timberwolf CDOs, which contained such poor quality assets that Goldman knew or should have known that they would perform poorly or fail. Yet Goldman recommended them to investors anyway. The issue is whether, by recommending that investors purchase the Anderson and Timberwolf securities, Goldman violated its fair dealing obligation and recommended investments that were not suitable for any investor.

With respect to Anderson, Goldman personnel knew before marketing its securities that the CDO had poor quality assets that were losing value. Nearly 45% of the referenced RMBS securities in Anderson were dependent upon loans issued by New Century, while another 7% depended upon loans issued by Fremont, two subprime lenders known, including by Goldman personnel, for issuing poor quality loans and poorly performing RMBS securities.²⁷⁶² On February 24, 2007, Goldman personnel calculated that the assets in the Anderson warehouse account had already lost \$60 million in value from the time they were purchased.²⁷⁶³ In response, Mr. Sparks, the Mortgage Department head, decided to cancel the CDO.²⁷⁶⁴ Later, he changed his mind and rushed Anderson to market with only \$305 million of the \$500 million in assets that had been planned. Goldman was the largest short party, with 40% of the short interest in Anderson.

Anderson issued its securities on March 20, 2007. Goldman knew at the time that both New Century and Fremont were in financial distress.²⁷⁶⁵ In addition, the week before, Goldman had conducted reviews of both a New Century and a Fremont loan pool on the firm’s books, and found that 26% of the New Century loans²⁷⁶⁶ and 50% of the Fremont loans²⁷⁶⁷ reviewed had

²⁷⁶⁰ 3/12/2007 Goldman memorandum to Mortgage Capital Committee, “ABACUS Transactions sponsored by ACA,” GS MBS-E-002406025, Hearing Exhibit 4/27-118.

²⁷⁶¹ 10/2006 Hudson Mezzanine Funding 2006-1, LTD., GS MBS-E-009546963, at 978, Hearing Exhibit 4/27-87.

²⁷⁶² See discussion of Anderson CDO in section C(5)(b)(ii)BB, above. Another 8% were dependent upon loans issued by Countrywide.

²⁷⁶³ 2/24/2007 email from Deeb Salem to Michael Swenson and others, GS MBS-E-018936137.

²⁷⁶⁴ 2/24/2007 email from Mr. Sparks to Mr. Ostrem and others, GS MBS-E-001996601, Hearing Exhibit 4/27-95.

²⁷⁶⁵ See, e.g., 2/8/2007 email from Craig Broderick to Mr. Sparks and others, GS MBS-E-002201486 (calling New Century’s announcement that it would restate its earnings “a materially adverse development”); 3/14/2007 Goldman email, “NC Visit,” GS MBS-E-002048050 (stating Fremont still has cash “but not for long”); 3/13/2007 email from Mr. Ostrem to Scott Wisenbaker and Matthew Bieber, GS MBS-E-000898410, Hearing Exhibit 4/27-172 (providing talking points for selling Anderson securities to customers).

²⁷⁶⁶ 3/13/2007 email from Manisha Nanik, “New Century EPDs,” GS MBS-E-002146861, Hearing Exhibit 4/27-77.

deficiencies and should be returned to the lender for refunds. Goldman nevertheless continued to market the Anderson securities. When some potential investors expressed concerns about Anderson's underlying assets, in particular the New Century loans, Goldman tried to dispel those concerns even while harboring its own low opinion of New Century loans.²⁷⁶⁸ Goldman managed to sell approximately \$102 million in Anderson securities to nine investors who lost virtually their entire investments within a year.²⁷⁶⁹

With respect to Timberwolf, Goldman personnel knew that the CDO's assets had begun losing value almost from the time they were acquired.²⁷⁷⁰ Timberwolf was a CDO² transaction comprised of 56 different CDO assets with over 4,500 unique underlying securities.²⁷⁷¹ In February 2007, Mr. Sparks told a senior Goldman executive that it was a deal "to worry about," and that its assets had already incurred such significant losses that they had exhausted the share of the warehouse risk held by Goldman's partner in the transaction.²⁷⁷² Despite that loss in value, Goldman continued with the issuance of the Timberwolf securities in March 2007. By May, a special CDO valuation project undertaken by the Mortgage Department found that the Timberwolf's assets had lost still more value.²⁷⁷³ Despite its lower internal valuation, Mr. Sparks advised Goldman senior executives that his CDO pricing strategy was to "take the write-down, but market at much higher levels" to avoid "leaving some money on the table."²⁷⁷⁴

During the spring and summer of 2007, Goldman aggressively marketed Timberwolf securities to investors around the world, eventually selling about \$853 million in Timberwolf securities to 12 investors.²⁷⁷⁵ Goldman sold the securities at prices substantially above its internal book values for the Timberwolf securities. After making a sale, Goldman then, sometimes only days or weeks later, marked down the value of the securities it had sold, resulting in investors realizing losses and sometimes requiring the investor to post additional cash margin or collateral.²⁷⁷⁶ In September 2007, an internal Goldman analysis found that, in just six months, Timberwolf's AAA rated securities had lost 80% of their value. One of Goldman's senior executives monitoring Timberwolf pronounced it "one shitty deal."²⁷⁷⁷ The CDO was liquidated in October 2008, and the investors who purchased Timberwolf securities lost virtually their entire investments.

²⁷⁶⁷ 3/14/2007 Goldman email, "NC Visit," GS MBS-E-002048050.

²⁷⁶⁸ See, e.g., 3/6/2007 email from Joshua Bissu to Mr. Ostrem and Mr. Bieber, GS MBS-E-014597705 (talking points for Goldman personnel to respond to investor concerns about the New Century loans).

²⁷⁶⁹ See e.g., Goldman response to Subcommittee QFR at PSI_QFR_GS0223.

²⁷⁷⁰ See, e.g., 9/17/2007 email from Christopher Creed, "Timberwolf," GS MBS-E-000766370, Hearing Exhibit 4/27-106 (showing price for Timberwolf securities dropped from \$94 on 3/31/2007 to \$87 on 4/30/2007).

²⁷⁷¹ 8/23/2007 email from Jay Lee to Mr. Lehman and others, GS MBS-E-001927784.

²⁷⁷² 2/26/2007 email exchange between Mr. Sparks and Mr. Montag, GS MBS-E-019164799, Hearing Exhibit 4/27-71.

²⁷⁷³ 5/20/2007 email from Paul Bouchard, "Materials for Meeting," GS MBS-E-001863725.

²⁷⁷⁴ 5/14/2007 email from Mr. Sparks to Mr. Montag and Mr. Mullen, GS MBS-E-019642797.

²⁷⁷⁵ See, e.g., Goldman response to Subcommittee QFR at PSI_QFR_GS0223.

²⁷⁷⁶ See, e.g., example involving Basis Capital in discussion of Timberwolf in section C(5)(b)(ii)CC, above.

²⁷⁷⁷ 6/22/2007 email from Mr. Montag to Mr. Sparks, "Few Trade Posts," GS MBS-E-010849103, Hearing Exhibit 4/27-105.

Goldman CEO Lloyd Blankfein said publicly about the firm's securities: "If we believed it would fail ... the security wouldn't work, we would not sell it."²⁷⁷⁸ But Goldman marketed the Anderson and Timberwolf securities to clients knowing that each CDO had poor quality assets that were continually losing value. It marketed them at the same time it was investing on the short side of the CDOs and the subprime mortgage market as a whole, and its Mortgage Department head was telling his staff that it was "Game Over" and time to "get out of everything."²⁷⁷⁹ Within a year, the Anderson and Timberwolf securities were virtually worthless. Given what Goldman knew when marketing Anderson and Timberwolf, Goldman was recommending investments that were most likely not suitable for any investor.

This analysis examines Goldman's conduct in the context of the law prevailing in 2007. Since then, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 has established new conflict of interest prohibitions that would apply to this type of conduct, including Section 621 which bars any underwriter or placement agent of an asset backed security from engaging in any transaction "that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of such activity."

(7) Goldman's Proprietary Investments

When reviewing the conflict of interest issues related to Goldman's mortgage related activities in 2006 and 2007, another issue examined by the Subcommittee was the extent to which Goldman's Mortgage Department was engaged in proprietary trading.²⁷⁸⁰

In 2007, Goldman was not a commercial bank, and proprietary trading was not illegal. The issue that concerned the Subcommittee was the extent to which its proprietary activities may have contributed to the conflicts of interest that affected how Goldman operated.²⁷⁸¹ In a

²⁷⁷⁸ April 30, 2010 transcript of *The Charlie Rose Show*, at 14.

²⁷⁷⁹ 3/12/2007 Goldman Firmwide Risk Committee, "March 7th FWR Minutes," GS MBS-E-00221171, Hearing Exhibit 4/27-19; 3/3/2007 email from Mr. Sparks, "Call," GS MBS-E-010401251, Hearing Exhibit 4/27-14.

²⁷⁸⁰ Until its repeal in 1999, the Glass-Steagall Act prohibited banks from engaging in proprietary trading. Glass-Steagall Act, Section 16. The Act's prohibition on proprietary trading was weakened over the years and finally repealed by the Financial Services Modernization Act of 1999, P.L. 106-102 (1999). Since Goldman did not become a bank holding company until 2008, neither the Glass-Steagall prohibition nor its repeal affected its activities during the time period examined by the Subcommittee.

²⁷⁸¹ Financial institutions that trade for their own accounts at the same time that they conduct trades on behalf of their clients may experience conflicts of interest. See, e.g., 4/23/2010 letter from John Reed, former Chairman and CEO of Citigroup, to Senators Merkley and Levin ("When a firm is focused on market gain through proprietary trading, it too often will employ every available device to achieve those gains – including take advantages of clients and putting the firm at risk."); *In re Merrill Lynch, Pierce, Fenner & Smith, Incorporated*, Exchange Act Rel. No. 34-63760, Admin. Proc. 3-14204 (Jan. 25, 2011) (settling allegations that Merrill Lynch's proprietary traders misused information about their customers' trading); 7/19/2005 speech by Annette Nazareth before the Securities Industry Association Compliance and Legal Division Member Luncheon (discussing increased potential for conflicts of interest). In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-603, restored the prohibition on proprietary trading by banks, subject to certain exceptions. See Section 619, amending the Bank Holding Company Act of 1956, to be codified at 12 U.S.C. §1851. Regulations implementing Section 619, also known as the Merkley-Levin provisions after the Senators who authored them or the Volcker Rule after former Federal Reserve Chairman Paul Volcker who championed the ban, are due by October 2011.

recently issued “Report of the Business Practices Committee,” Goldman reaffirmed as its first business principle: “Our clients’ interests always come first.”²⁷⁸² Contrary to that statement, however, Goldman documents showed its employees repeatedly expressing concern about the firm’s interests, but rarely mentioning or placing a priority on the interests of its clients. In fact, after Goldman announced record profits for its Mortgage Department in the third quarter of 2007, when many of its clients were suffering substantial losses from the mortgage investments they purchased from Goldman, Peter Kraus, co-head of the Investment Banking Division, wrote the following to Goldman CEO Lloyd Blankfein: “I met with 10+ individual prospects and clients . . . since earnings were announced. The institutions don’t and I wouldn’t expect them to, make any comments like ur good at making money for urself but not us. The individuals do sometimes, but while it requires the utmost humility from us in response I feel very strongly it binds clients even closer to the firm, because the alternative of take ur money to a firm who is an under performer and not the best, just isn’t reasonable. Clients ultimately believe that association with the best is good for them in the long run.”²⁷⁸³

The tension between Goldman’s efforts to make money on behalf of itself versus on behalf of its clients raises a number of conflict of interest concerns, particularly when its efforts to profit from shorting the mortgage market or particular RMBS or CDO securities occurred simultaneously with its efforts to market mortgage related securities to its clients.

Goldman’s Proprietary Activities. Until recently, when asked about the extent of the firm’s proprietary activities, Goldman generally claimed that its proprietary investments contributed only approximately 10% of the firm’s profits.²⁷⁸⁴ In January 2011, however, Goldman announced in an SEC filing that it was changing the categories under which it reported income. Goldman added a new category called “Investments and Lending” to segregate the firm’s proprietary investment income from the income it derived from activities undertaken on behalf of clients.²⁷⁸⁵ Based on earnings reported in January 2011 for Goldman’s full fiscal year 2010, the proprietary investment income recorded under “Investments and Lending” accounted for \$7.5 billion, or about 20% of Goldman’s net revenues.²⁷⁸⁶ Goldman did not specify how it defined proprietary investments and lending for purposes of its earnings report, nor what desks

²⁷⁸² 1/2011 “Report of the Business Standards Committee,” at 1. In May 2010, at Goldman’s annual shareholders’ meeting, CEO Lloyd Blankfein announced the formation of a Business Standards Committee to conduct an extensive review of the firm’s business standards and practices to determine the extent to which the firm was adhering to its own written “Business Principles,” and to make appropriate recommendations. *Id.* The Committee’s January 2011 report provided recommendations in the areas of Client Relationships and Responsibilities, Conflicts of Interest, Structured Products, Transparency and Disclosure, Committee Governance, and Training and Professional Development.

²⁷⁸³ 9/26/2007 email to Mr. Blankfein, “Fortune: How Goldman Sachs Defies Gravity,” GS MBS-E-009592726, Hearing Exhibit 4/27-135.

²⁷⁸⁴ See, e.g., 1/21/2010, The Goldman Sachs Group Inc., 4Q 2009 Earnings Call Transcript, Q&A (David Viniar states that, in most years, proprietary trading accounts for “10% roughly plus or minus a couple of percent.”), <http://seekingalpha.com/article/183723-the-goldman-sachs-group-inc-q4-2009-earnings-call-transcript?part=qanda>.

²⁷⁸⁵ 1/11/2011 Goldman Form 8-K filed with the SEC (announcement of change in reporting categories). Goldman’s change in its reporting categories implemented one of the recommendations outlined in Goldman’s “Report of the Business Standards Committee” published in January 2011.

²⁷⁸⁶ See 1/19/2011 Goldman press release on 2010 earnings, available at www2.goldmansachs.com.

or activities contributed to the total, how it calculated the reported amount, or why it was double the amount cited a year earlier.

To date, three Goldman units have been identified as engaging explicitly in investments on behalf of the firm. One, based in New York, is called Goldman Sachs Principal Strategies or “GSPS,” which Goldman is reportedly in the process of dismantling.²⁷⁸⁷ The second is the Global Macro Proprietary Trading Desk, which had traders in New York and London and reportedly invested in foreign exchange markets, interest rate markets, stocks, commodities and other fixed income markets.²⁷⁸⁸ The third, according to Goldman, is the Special Situations Group or SSG, which is reportedly engaged primarily in long term investments on behalf of the firm and clients, with little short term trading or sales activities.²⁷⁸⁹

Proprietary Activities in the Mortgage Area. In the mortgage area, until 2005, Goldman had a dedicated proprietary investment desk in the Mortgage Department called the Principal Finance Group, often referred to as Principal Investments.²⁷⁹⁰ According to Goldman personnel, that desk specialized in long term investments on behalf of Goldman in assets such as distressed mortgages and credit card and energy receivables, but only rarely engaged in short term trading.²⁷⁹¹ In 2005, Principal Investments was folded into the Special Situations Group (SSG), which was then a Goldman business unit located in Asia and not part of the Mortgage Department.²⁷⁹² After Principal Investments personnel moved to SSG, the Mortgage Department operated without a desk that was explicitly dedicated to proprietary trading during 2006 and 2007.

When asked whether the Mortgage Department engaged in proprietary activities during 2006 and 2007, Goldman executives and traders in the Mortgage Department generally resisted providing a direct answer, declined to identify any proprietary trades or investments, and declined to estimate or calculate how much of the Mortgage Department’s 2007 revenues or profits were proprietary.

²⁷⁸⁷ Subcommittee interview of David Viniar (4/13/2010). See also “More Goldman Traders to Exit for Funds,” *Financial Times* (1/9/2011). Goldman may be eliminating the desk in response to the Dodd-Frank prohibition on proprietary trading.

²⁷⁸⁸ See “Goldman to Shut Global Macro Trading Desk,” *New York Times* (2/16/2011). Goldman may be eliminating this desk in response to the Dodd-Frank prohibition on proprietary trading.

²⁷⁸⁹ Subcommittee interview of Darryl Herrick (10/13/2010). To the extent that its activities are limited to long term investments, the SSG unit would not be affected by the Dodd-Frank prohibition on proprietary trading which applies only to trading accounts used “principally for the purpose of selling in the near term (or otherwise with the intent to resell in order to profit from short-term price movements),” and does not affect long term investments. See Section 619(h)(6). Under Section 620 of the Dodd-Frank Act, banking regulators are also conducting an 18-month review of all permitted bank investment activities, both long and short term, to gauge the risk of each activity, any negative effect the activity may have on the safety and soundness of the banking entity or the U.S. financial system, and the “appropriateness” of each activity for a federally insured bank.

²⁷⁹⁰ Subcommittee interview of Darryl Herrick (10/13/2010).

²⁷⁹¹ *Id.*

²⁷⁹² *Id.*

When asked about particular transactions, Goldman executives or traders often described them as examples, not of “proprietary trading,” but “principal trading” in which Goldman acted as a market maker. Goldman personnel told the Subcommittee that to fulfill the firm’s role as a market-maker, Goldman used its own capital to amass an inventory of assets in anticipation of customer demand, and acted as a “principal” when building that inventory. They indicated that the mortgage related assets were acquired for the purpose of accommodating existing or anticipated client buy and sell orders and not to produce proprietary profits for the firm.

At the same time, several Goldman executives and traders told the Subcommittee that all of Goldman’s trading desks, including those in the Mortgage Department, were given discretion to trade some amount of the firm’s capital within certain limits.²⁷⁹³ Daniel Sparks told the Subcommittee: “We told [the Firmwide Risk Committee] what we wanted to do, and they told us how much we could do.”²⁷⁹⁴ Joshua Birnbaum said that the amount of proprietary trading that a desk was allowed to do depended upon certain risk limits, but could not recall a specific or typical dollar amount of any risk limit assigned to the Mortgage Department as a whole or to any of its trading desks for proprietary trading purposes.²⁷⁹⁵ Goldman’s Chief Risk Officer Craig Broderick told the Subcommittee that the firm did not distinguish between “proprietary” versus other types of risk, because the aggregate risk levels would be the same.²⁷⁹⁶ Mr. Broderick said that the firm’s proprietary trading, outside of GSPS, was “embedded” in the routine business conducted by various trading desks and was not specifically segregated as “proprietary.”²⁷⁹⁷

Until enactment of the Dodd-Frank Act in 2010, federal securities law contained no statutory or regulatory definition of proprietary trading by banks and generally did not require firms to identify or monitor their proprietary investments.²⁷⁹⁸ The Subcommittee investigation found that the terms “proprietary” and “prop” were commonly used in the financial services industry to describe business performed on behalf of, or for the benefit of, a financial firm itself, while the term “flow” was used to refer to market-making transactions involving, or for the benefit of, the firm’s customers.²⁷⁹⁹

²⁷⁹³ Subcommittee interviews of Mr. Sparks (4/15/2010); Mr. Birnbaum (4/22/2010); and Mr. Broderick (4/9/2010). See also 12/17/2007 email from Michael DuVally to Mr. Sparks, “WSJ Responses,” GS MBS-E-013821884 (“Some traders are allowed to express their own market views using the firm’s capital.”).

²⁷⁹⁴ Subcommittee interview of Daniel Sparks (4/15/2010).

²⁷⁹⁵ Subcommittee interview of Joshua Birnbaum (4/22/2010).

²⁷⁹⁶ Subcommittee interview of Craig Broderick (4/9/2010).

²⁷⁹⁷ *Id.* Goldman’s Chief Financial Officer David Viniar provided similar information in response to questions from the Financial Crisis Inquiry Commission, indicating that Goldman did not specifically “break out” its proprietary trading from its other business results. See FCIC Hearing, Testimony of David Viniar (7/2/2010), www.fcic.gov.

²⁷⁹⁸ The Dodd-Frank Act defines “proprietary trading” as “engaging as a principal for the trading account of [a] banking entity . . . in any transaction to purchase or sell, or otherwise acquire or dispose of, any security, any derivative, any contract of sale of a commodity for future delivery, any option on any such security, derivative, or contract or any other security or financial instrument that the appropriate Federal banking agencies . . . may, by rule . . . determine.” 12 U.S.C. § 1851(h)(4). The Act further defines “trading account” as one used for “near term” trading or for capturing profits from “short term price movements.” Section 1851(h)(6). These provisions are subject to further refinement through implementing regulations.

²⁷⁹⁹ See, e.g., description of proprietary trading in Deutsche Bank’s 3/26/2008 Form 20-F filed with the SEC at 24 (“Within Corporate Banking & Securities, we conduct proprietary trading, or trading on our own account, in addition to providing products and services to customers. Most trading activity is undertaken in the normal course

A number of internal Goldman documents in 2006 and 2007, used the terms “prop” and “flow” when referring to mortgage related activities. In a 2006 email to Goldman senior executives, for example, Mr. Sparks, the Mortgage Department head, used the terms when criticizing a decision by Morgan Stanley to move its most experienced mortgage traders from its mortgage department’s “franchise” desk to a dedicated proprietary desk.²⁸⁰⁰ Mr. Sparks argued against Goldman’s doing the same by claiming exposure to customer trades or “flows” made mortgage traders “more effective” in their proprietary trades:

“Morgan Stanley is going overboard by taking most of their experienced and known traders out of the franchise. We should keep our franchise leaders in the seats and continue to allow them to take prop views – the customer flows they see make them more effective.”²⁸⁰¹

This email shows, not only that Mr. Sparks and other Goldman executives used the terms “prop” and “flow,” but they also knew Goldman mortgage traders were handling both customer and proprietary transactions at the same time.

In November 2007, Mr. Sparks received an email from the Mortgage Department’s business manager, John McHugh, indicating that proprietary trades made up a substantial portion of the Department’s activities.²⁸⁰² In the email, Mr. McHugh provided Mr. Sparks with a draft of the Department’s 2008 business plan which included a description of the projected business activities of the Structured Product Group – the Mortgage Department trading desk that then handled RMBS, CDO, and other mortgage related trading activities. Under the heading, “Prop vs. Flow,” the draft plan stated: “Prop/flow components of SPG Trading will be roughly equal.”²⁸⁰³ Under another section entitled, “Assumptions/ Initiatives in ABS [Asset Backed Security] p&l [profit and loss],” the draft business plan stated:

- “Good prop opportunity capitalizing on selling pressure, selective distressed asset purchases.
- Expect prop flow split to be roughly 50/50.”²⁸⁰⁴

of facilitating client business. For example, to facilitate customer flow business, traders will maintain long positions (accumulating securities) and short positions (selling securities we do not yet own) in a range of securities and derivative products, reducing this exposure by hedging transactions where appropriate. While these activities give rise to market and other risk, we do not view this as proprietary trading. However, we also use our capital to exploit market opportunities, and this is what we term proprietary trading.”)

²⁸⁰⁰ 4/13/2006 email from Mr. Sparks to Messrs. Cohn, Sobel, and Mullen, “Morgan Super Traders Worry Hedge Funds,” GS MBS-E-016187625.

²⁸⁰¹ Id. See also Glenn Bedwin, International Research Director, Thomson Financial, Trading for Investors Forum, Financial News Supplement at 14 (2004) (noting the value of “information [banks] gain from looking at the flow going through their desk”).

²⁸⁰² 11/16/2007 email from John McHugh to Mr. Sparks, “FICC 2008 business plan presentation to Firm,” GS MBS-E-013797964.

²⁸⁰³ Id.

²⁸⁰⁴ Id.

The draft business plan suggests that fully half the 2008 SPG and ABS activities were expected to involve proprietary investments.

When the Subcommittee asked Mr. Sparks about the “prop/flow components of SPG Trading” in the Department’s 2008 draft business plan, Mr. Sparks indicated that he was not sure what his business manager meant and was unable to estimate what percentage of the SPG Trading Desk’s activities was spent on proprietary trades.²⁸⁰⁵ In a later written response to Subcommittee questions about the email, Mr. Sparks wrote: “‘Prop’ or ‘proprietary’ can mean different things to different people.” He continued that Mr. McHugh’s email appeared to use “prop” to refer to investments made with a longer holding period, such as months or years, while “flow” seemed to refer to investments with a shorter holding period:

“Defined this way, both ‘prop’ and ‘flow’ trades can involve customers, although sometimes the term ‘proprietary’ is used to describe business that does not involve a customer. (Sometimes proprietary is used to describe any activity that involves use of a firm’s own capital.).”²⁸⁰⁶

Goldman’s Net Shorts As Proprietary Investments. Goldman’s practice of embedding its proprietary trading activities within the ordinary trading conducted on its market-making mortgage trading desks, together with its unwillingness to estimate its proprietary activities, made it difficult to determine the extent of the proprietary trading that took place within the Mortgage Department from 2006 to 2007.²⁸⁰⁷ Nonetheless, many of the transactions undertaken by the Mortgage Department from late 2006 to late 2007 appear to have been undertaken to advance the financial interests of the firm, rather than primarily to make markets for clients.

Several factors suggest that transactions undertaken to build and profit from Goldman’s two large net short positions in 2007 were completed for Goldman’s own benefit, rather than on behalf of its clients. First, the two net short positions – totaling \$10 billion in February and \$13.9 billion in June 2007 – were far larger than a financial institution would establish simply to meet anticipated client demand.²⁸⁰⁸ Second, the magnitude of the risk attached to those short positions was also outsized. As indicated earlier, the Mortgage Department typically contributed

²⁸⁰⁵ Subcommittee interview of Daniel Sparks (10/3/2010).

²⁸⁰⁶ Daniel Sparks response to Subcommittee QFR at PSI-QFR_GS0452.

²⁸⁰⁷ The difficulties associated with distinguishing between proprietary trading and market making activities are examined in a recent study by the new Financial Stability Oversight Council (FSOC), an intra-governmental council established by the Dodd-Frank Act, comprised of ten regulators in the financial services sector, and charged with identifying risks and responding to emerging threats to U.S. financial stability. See FSOC FAQs, www.treasury.gov; 1/2011 “Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds” (hereinafter “FSOC Study”), at 22-44. The FSOC Study observed: “Absent robust rules and protections, banking entities may have the opportunity to migrate existing proprietary trading activities from the standalone business units that are presently recognized as ‘proprietary trading’ into more mainstream ‘sales and trading’ or other operations that engage in permitted activities.” *Id.* See also “Proprietary Trading Goes Under Cover: Michael Lewis,” *Bloomberg*, (10/27/2010) (quoting a bank trader who reportedly said “from here on out, if he wants to take a proprietary position ... he will argue that he bought the position because a customer wanted to sell the position, and he was providing liquidity”).

²⁸⁰⁸ These totals include Goldman’s net shorts from both its mortgage trading and CDO securitization activities.

only about 2% of Goldman's total net revenues, yet in 2007, it was allowed to continually exceed its permanent Value-at-Risk (VAR) limit and incur up to 52% of firmwide risk. The Subcommittee uncovered no evidence to suggest that Goldman incurred and sustained that disproportionately high level of risk to accommodate client demands or to hedge positions taken on to accommodate clients.

A third factor indicating the net short positions were proprietary in nature was how long Goldman held onto them. For example, the Mortgage Department maintained a \$9 billion ABX AAA short for six to nine months in 2007. While that short was initially used to hedge certain long positions held by various Mortgage Department desks, it was retained even after those long positions were sold off or written down. Mr. Sparks later described the ABX AAA short as "disaster insurance" in case the subprime market collapsed.²⁸⁰⁹ The Subcommittee found no evidence indicating that the \$9 billion short was maintained over such a long period of time to accommodate client demand.

A fourth factor indicating Goldman's net short positions were proprietary in nature was the Mortgage Department's affirmative effort to solicit clients to buy RMBS and CDO assets in its inventory.²⁸¹⁰ The Subcommittee saw no evidence that this sales activity was undertaken to accommodate client demand; to the contrary, the documents show that the Mortgage Department's sales efforts took place amid a deteriorating mortgage market and waning investor interest in mortgage related products.²⁸¹¹

Still another indicator that the Mortgage Department's net shorts were proprietary was that, when clients expressed interest in acquiring certain short positions, Goldman at times refused to accommodate their requests. For example, in June 2007, when Goldman began building its second large net short position, its Mortgage Department refused client requests to purchase the short side of CDS contracts with Goldman: "Really don't want to offer any [shorts to customers]" and "too late!"²⁸¹² On another occasion in March 2007, a Goldman employee told Goldman's Chief Risk Officer Mr. Broderick that the Mortgage Department was no longer buying subprime assets: "Just fyi not for the memo, my understanding is that desk is no longer

²⁸⁰⁹ Subcommittee interview of Daniel Sparks (4/15/2010).

²⁸¹⁰ See, e.g., documents cited in Section C(4)(b) (sales efforts to reduce Goldman's \$6 billion long position) and Section C(5)(a)(iii) (sales efforts to reduce Goldman-originated RMBS and CDO securities), above.

²⁸¹¹ See, e.g., emails noting difficult sales environment. 1/31/2007 email from Mr. Sparks to Mr. Montag, "MTModel," Hearing Exhibit 4/27-91 (making "lemonade out of some big old lemons"); 3/9/2007 email from Mr. Sparks to Mr. Schwartz and others, GS MBS-E-010643213, Hearing Exhibit 4/27-76 ("team is working incredibly hard and is stretched"); 3/27/2007 email from Mr. Ostrem to Mr. Bieber, GS MBS-E-000907935, Hearing Exhibit 4/27-172 (congratulating Mr. Bieber for "an excellent job pushing to closure these deals in a period of extreme difficulty"); 6/11/2007 email from Mr. Montag, GS MBS-E-001866144 (after a sale of Timberwolf securities, telling the sales team they had done an "incredible job - just incredible").

²⁸¹² 6/10/2007 email from Michael Swenson, "CDS on CDOs," GS MBS-E-012568089; 6/13/2007 email from sales, "CDO protection," GS MBS-E-012445931. See also 9/7/2007 Fixed Income, Currency and Commodities Annual Individual Review Book, Salem 2007 Self-Review, GS-PSI-03157 at 71 (in his self-evaluation Mr. Salem wrote that his desk sold short positions on single name CDS contracts only to customers that could provide Goldman with useful information: "We were very aggressive with pricing and only shared risk [short positions] with smart guys if they gave us insight on names to go short or go long in return.").

buying subprime. (We are low balling on bids.).”²⁸¹³ Refusing client requests and lowballing bids to avoid purchases indicate that the Goldman Mortgage Department was not acting as a market maker to accommodate client demand.

Perhaps the strongest indicator that Goldman’s large net short positions were proprietary investments are the statements made by Goldman’s own executives and traders. Goldman’s head ABX trader, Joshua Birnbaum, described the Department’s decisions in February and June to build and profit from its net short positions, not as efforts to accommodate anticipated client demand, but as investments made on behalf of the firm to produce large profits:

“Whereas execution of strategies has clearly been a concerted team effort, I consider myself the initial or primary driver of the macro trading direction for the business. I would highlight 3 major calls here:

1. Dec-Feb: ... The prevailing opinion within the department was that we should just ‘get close to home’ and pare down our long. ... I concluded that we should not only get flat, but VERY short. ... [W]e all agreed the plan made sense. ... [W]e implemented the plan by hitting on almost [every] single name CDO protection buying opportunity in a 2-month period. Much of the plan began working by February when the market dropped 25 points and our profitable year was underway. ...

3. Jun-Jul: the BSAM [Bear Stearns Asset Management failure] changed everything. I felt that this mark-to-market event for CDO risk would begin a further unraveling in mortgage credit. Again, when the prevailing opinion in the department was to remain close to home, I pushed everyone on the desk to sell risk aggressively and quickly. We sold billions of index and single name risk such that when the index dropped 25pts in July, we had a blow-out p&l [profit & loss] month, making over \$1Bln that month. ...

We made money: a) taking large directional views, the direction of which we changed several times, b) ... betting the bad names would get much worse vs. the good ones, c) shorting CDOs, d) capturing the index to single name basis ... among other things.”²⁸¹⁴

²⁸¹³ 3/2/2007 email exchange between Mr. Broderick and Patrick Welch, GS MBS-E-009986805, Hearing Exhibit 4/27-63.

²⁸¹⁴ 9/26/2007 EMD Reviews, Joshua Birnbaum Self-Review, GS-PSI-01975, Hearing Exhibit 4/27-55c. Mr. Birnbaum’s comments indicate that Goldman’s proprietary activities extended to its CDO activities. As explained earlier, while Abacus 2007-AC1 was undertaken in response to a client request, Hudson 1 was conceived by the Mortgage Department as a way to transfer risk associated with poorly performing ABX assets in its inventory. Goldman supplied 100% of the CDS contracts that made up Hudson’s assets, took 100% of the short side, and profited at the expense of the Hudson investors. In October 2006, Mr. Ostrem, head of the CDO Origination Desk, wrote to Mr. Sparks that a client was upset, because it knew “Hudson Mezz (GS prop deal) is pushing their deal back,” clearly identifying Hudson as a “prop” or proprietary transaction. 10/16/2006 email from Mr. Ostrem to Mr. Sparks, GS MBS-E 010916991, Hearing Exhibit 4/27-59. See also 2/25/2007 email exchange between Peter Ostrem and Matthew Bieber, at GS MBS-E-001996601, Hearing Exhibit 4/27-95 (Mr. Ostrem proposed allowing a hedge fund to include assets in Anderson and then short them, but Mr. Bieber thought Mr. Sparks would want to “preserve that ability for Goldman”); 12/29/2006 email from Mr. Birnbaum to Mr. Lehman, GS MBS-E-011360438, Hearing Exhibit 4/27-5 (when discussing certain proposed CDO deals that would generate \$1 to \$3 billion in short positions and reference certain RMBS securities, Mr. Birnbaum stated: “On baa3 [RMBS securities with credit ratings of

In a later presentation put together to propose a new compensation arrangement for the SPG Trading Desk's trading activities, Mr. Birnbaum was unequivocal that the net shorts the desk had acquired were not hedges to offset risk, but "outright" short investments to produce profits:

"By June, all retained CDO and RMBS positions were identified already hedged. ... SPG trading reinitiated shorts post BSAM [Bear Stearns Asset Management] unwind on an outright basis with no accompanying CDO or RMBS retained position longs. In other words, the shorts *were not a hedge*."²⁸¹⁵

In his 2007 self-evaluation, Michael Swenson, head of the Mortgage Department's SPG Trading Desk, described the net short positions undertaken by the firm in this way:

"It should not be a surprise to anyone that the 2007 year is the one that I am most proud of to date. ... extraordinary profits (nearly \$3bb [billion] to date). ... I directed the ABS desk to enter into a \$1.8 bb short in ABS CDOs that has realized approx. \$1.0bb of p & l [profit and loss] to date. ... [W]e aggressively capitalized on the franchise to enter into efficient shorts in both the RMBS and CDO space."

Mr. Swenson's description of the net short position he "directed" to be built in CDOs and the resulting \$1 billion in profit makes no reference to client demands. Mr. Salem, a trader on the ABS Desk, was equally clear in his 2007 self-evaluation that the desk made a deliberate bet on the direction of the mortgage market: "Mike, Josh, and I were able to learn from our bad long position at the end of 2006 and layout the game plan to put on an enormous directional short."²⁸¹⁶ Each of these three Mortgage Department employees played a key role in building the firm's net short positions. Their own statements indicate that they perceived acquiring the 2007 net short positions to be for the benefit of the firm, and not to build an inventory of assets to respond to anticipated client demand.

Other internal documents also portray the net short positions as decisions made by the firm to advance its own financial interests. In an internal presentation to the Goldman Board of Directors regarding the "Subprime Mortgage Business," for example, the Mortgage Department wrote that, in the first quarter of 2007, "GS reverse[d] long market position through purchase of single name CDS and reductions of ABX."²⁸¹⁷ In September 2007, the Goldman Board of Directors summarized its mortgage business this way: "Although broader weakness in the mortgage markets resulted in significant losses in cash position, we were overall net short the

BBB-], I'd say we definitely keep it for ourselves. On baa2 [RMBS securities with BB ratings], I'm open to some sharing to the extent that it keeps these customers engaged with us.").

²⁸¹⁵ 10/3/2007 "SPG Trading - 2007," presentation prepared by Joshua Birnbaum with input from other SPG employees, but which was not ultimately provided to senior management, GS MBS-E-015654036, at 44 [emphasis in original]. Mr. Birnbaum reaffirmed his analysis in a 2010 written response to Subcommittee questions. See Mr. Birnbaum's response to Subcommittee QFR at PSI_QFR_GS0509.

²⁸¹⁶ 9/7/2007 Fixed Income, Currency and Commodities Annual Individual Review Book, Salem 2007 Self-Review, GS-PSI-03157, at 71.

²⁸¹⁷ 3/26/2007 Presentation to Goldman Board of Directors, "Subprime Mortgage Business," GS MBS-E-005565527, Hearing Exhibit 4/27-22.

mortgage market and thus had very strong results.”²⁸¹⁸ Talking points prepared for CFO David Viniar prior to a March 2007 earnings call with analysts stated: “The Mortgage business’ revenues were primarily driven by synthetic short positions.”²⁸¹⁹ In an October 2007 letter sent to the SEC, Goldman wrote:

“[W]e are active traders of mortgage securities and loans and ... we may choose to take a directional view of the market For example, during most of 2007, we maintained a net short sub-prime position and therefore stood to benefit from declining prices in the mortgage market.”²⁸²⁰

In an October 2007 internal presentation to another Goldman unit, Chief Risk Officer Craig Broderick wrote:

“So what happened to us? ... In market risk – you saw in our 2nd and 3rd qtr results that we made money despite our inherently long cash positions. – because starting early in ‘07 our mortgage trading desk started putting on big short positions ... and did so in enough quantity that we were net short, and made money (substantial \$\$ in the 3rd quarter) as the subprime market weakened.”²⁸²¹

In a November 2007 email to his colleagues, Goldman CEO Lloyd Blankfein wrote: “Of course we didn’t dodge the mortgage mess. We lost money, then made more than we lost because of shorts.”²⁸²² None of these internal documents suggests that the Mortgage Department’s net short transactions were undertaken to accommodate existing or anticipated client trades.

In January 2011, the new Financial Stability Oversight Council (FSOC) issued a study that focused, in part, on criteria that can be used to distinguish between proprietary and market making activities.²⁸²³ Applying those recently developed criteria to the Mortgage Department’s 2007 activities also supports viewing that activity as the result of proprietary rather than market making activities. For example, the Mortgage Department was building its net shorts with the expectation that they would appreciate in value rather than provide assets to facilitate customer transactions; the position created risks out of proportion to those necessary to accommodate

²⁸¹⁸ 9/17/2007 Board of Directors Meeting Financial Summary, GS MBS-E-009776907, Hearing Exhibit 4/27-42.

²⁸¹⁹ 3/9/2007 email from Sheara Fredman to David Viniar and others, GS MBS-E-009762678, Hearing Exhibit 4/27-16. When preparing a later internal presentation, in October 2007, Dan Sparks was even more blunt: “The desk benefitted from a proprietary short position in CDO and RMBS single names.” 10/5/2007 draft of “Business Unit Townhall Presentation, Q3 2007,” prepared by Mr. Sparks, Hearing Exhibit 4/27-47. Mr. Sparks removed this phrase from the final version of the presentation and told the Subcommittee he had been mistaken to include it in the earlier draft.

²⁸²⁰ 10/4/2007 letter from Goldman to the SEC, GS MBS-E-009758287, Hearing Exhibit 4/27-46.

²⁸²¹ 10/29/2007 presentation by Craig Broderick to the Tax Department, GS MBS-E-010018512, Hearing Exhibit 4/27-48. See also 10/5/2007 draft presentation by Mr. Sparks, for a Business Unit Townhall meeting, GS MBS-E-013703468, Hearing Exhibit 4/27-47 (“The desk benefitted from a proprietary short position in CDO and RMBS single names.”).

²⁸²² 11/18/2007 email from Mr. Blankfein, “NYT,” GS MBS-E-009696333, Hearing Exhibit 4/27-52.

²⁸²³ 1/2011 “Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds,” at 22-44.

customer demand; the Mortgage Department actively and aggressively solicited clients to build its short positions; the Mortgage Department accumulated an unpredictable inventory profile in terms of volume and in relation to customer demand; and it had a relatively low inventory turnover with the bulk of the profits derived from inventory appreciation when Goldman covered its shorts.

Advocating More Proprietary Trading. One last set of documents shines additional light on the role of proprietary investments in the Goldman Mortgage Department in 2006 and 2007. As indicated earlier, for several years, Goldman's Mortgage Department had a proprietary trading desk, Principal Investments, that was explicitly and exclusively dedicated to engaging in transactions for the benefit of the firm. In 2005, it was moved to the SSG unit. Internal Goldman documents show that some in the Mortgage Department wanted to revive that desk, increase the amount of proprietary trading in the mortgage area, or claim a greater share of the proprietary profits created by the Mortgage Department for the firm.

In August 2006, for example, the CDO Origination Desk proposed that Goldman establish a formal proprietary trading fund or proprietary trading operation within the Mortgage Department to conduct mortgage related transactions on behalf of the firm. In an August 2006 email, Peter Ostrem, the CDO Origination Desk head, made the proposal to Mr. Sparks, the Mortgage Department head:

"Let's do our own fund. SP [Structured Product] CDO desk. Big time. GS [Goldman Sachs] commits to hold proportion of equity outright. This could be big. ... I need real leverage. Got some structured ideas too. When can we talk strategy for an hour or so?"²⁸²⁴

Mr. Sparks responded: "Next week. In the meantime calm the blank down."²⁸²⁵ Later the same day, he later wrote to Mr. Ostrem: "Not going to happen."²⁸²⁶ When asked about these emails, Mr. Sparks told the Subcommittee that Goldman decided not to allow the Mortgage Department to set up its own hedge fund or explicit proprietary trading desk.²⁸²⁷

In March 2007, after a series of large trades with the Harbinger hedge fund on the ABS Desk, Deeb Salem, an ABS trader, emailed Mr. Birnbaum, Mr. Swenson, and Mr. Chin with a proposal for a proprietary CDO:

"Am I crazy to be thinking we might want to grow the harbinger trade and do our own abs desk cdo. There'll be so much juice in it. It would blow out. We could sell supersenior and maybe some equity. Then the remaining mezz would be a cover of a couple hundred million of our cdo short. Haven't crunched the numbers, but I'm

²⁸²⁴ 8/10/2007 email from Mr. Ostrem to Mr. Sparks, "Leh CDO Fund," GS MBS-E-010898470.

²⁸²⁵ Id.

²⁸²⁶ 8/10/2007 email from Mr. Sparks to Mr. Ostrem, "Leh CDO Fund," GS MBS-E-010898476.

²⁸²⁷ Subcommittee interview of Daniel Sparks (10/4/2010).

guessing we'd effectively cover well north of 1000 plus own some call rights. Or we also keep the equity and own it for free.

To select the portfolio, we look at the underlying rmbs deals in our cdo shorts. And replicate that as best as possible.”²⁸²⁸

Mr. Birnbaum replied: “I like it.”²⁸²⁹ Mr. Swenson responded: “Love it we will give dan [Sparks] a heart attack.”²⁸³⁰ Two months later, in June 2007, Mr. Swenson wrote Mr. Salem: “Talk to me now things are developing - dan wants you to be the epicenter of the subprime universe which is not a bad position to be in.”²⁸³¹ Mr. Salem replied:

“That’s fine. My number 1 concern is that it[']s traded by the right people bc [because] the opportunity is huge. It’s a product that needs to be traded as a prop product. ... U need to be in charge and we need prop minded guys involved.”²⁸³²

That same month, however, the Bear Stearns’ hedge funds collapsed due to losses from their subprime holdings. In July, the mass ratings downgrades took place, and the RMBS subprime market began to shut down as well. The Subcommittee saw no evidence that the proprietary CDO proposed by Mr. Salem was carried out.

In July 2007, Mr. Birnbaum, Goldman’s head ABX trader, remarked that Goldman was giving John Paulson, the head of the Paulson Partners hedge funds, “a run for his money” in shorting the mortgage market, and claimed Goldman was “No. 2” behind the Paulson hedge funds in profiting from a massive net short position.²⁸³³ In October 2007, Mr. Birnbaum drafted a proposal that the SPG Trading Desk be compensated in accordance with a hedge fund model, rather than through Goldman’s bonus pool, so the desk could obtain a portion of the proprietary profits it was generating.²⁸³⁴ He discussed the proposal with other Mortgage Department personnel, but did not present it to senior management.²⁸³⁵ The Mortgage Department personnel who helped build the net shorts nevertheless received substantial compensation for their 2007 efforts.²⁸³⁶

Proprietary trading was not prohibited by law in 2007, and Goldman was free to and did engage in billions of dollars in mortgage related trades for its own account. The Goldman case

²⁸²⁸ 3/3/2007 email from Mr. Salem, “Another idea . . .,” GS MBS-E-012511081.

²⁸²⁹ Id.

²⁸³⁰ Id.

²⁸³¹ 6/7/2007 email from Mr. Swenson to Mr. Salem, “Fyi,” GS MBS-E-012444245.

²⁸³² Id.

²⁸³³ 7/12/2007 email from Mr. Birnbaum, GS MBS-E-012944742, Hearing Exhibit 4/27-146 (“He’s definitely the man in this space, up 2-3 bil on this trade. We were giving him a run for his money for a while but now are a definitive #2.”).

²⁸³⁴ See slides prepared by Mr. Birnbaum, “SPG Trading – 2007,” GS MBS-E-015654036 -50.

²⁸³⁵ Mr. Birnbaum response to Subcommittee QFR at PSI_QFR_GS0509.

²⁸³⁶ Mr. Birnbaum, for example, received \$17 million in 2007. Subcommittee interview of Joshua Birnbaum (4/22/2010).

study also demonstrates how proprietary trading, when undertaken at the same time as trading on behalf of clients, can give rise to conflicts of interest between the bank's financial interests and those of its clients. The new proprietary trading and conflict of interest restrictions in the Dodd-Frank Act are designed to address and reduce these conflicts.

D. Preventing Investment Bank Abuses

Developments over the past two years offer a number of ways to address problems identified in the Goldman Sachs and Deutsche Bank case studies. The success of those alternatives will depend in large part upon how they are implemented, and the degree to which the market disruptions caused by the financial crisis convince investment banks to realign their use of structured finance products, curb their proprietary trading, and respect the interests of their clients. Success will also depend upon sensible implementation of the measures enacted into law by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

(1) New Developments

The Dodd-Frank Act contains several measures that affect investment banking practices. Three key provisions involve proprietary investments, conflicts of interest, and a new study of permitted banking activities.

Proprietary Trading Restrictions. Commercial banks, their holding companies, and affiliates, including any investment banks,²⁸³⁷ are prohibited by the Dodd-Frank Act from engaging in proprietary trading, subject to certain provisions allowing them to continue to serve clients and reduce risks.²⁸³⁸ The proprietary trading ban will still allow banks, for example, to continue to engage in transactions as market makers for clients, hedge their risks, and maintain very limited investments in private funds they sponsor or manage for others.²⁸³⁹

The proprietary trading provision also addresses conflicts of interest and high risk activities. It explicitly bars any proprietary trading activity that “would involve or result in a material conflict of interest ... between the banking entity and its clients, customers, or counterparties,” or that would result “in a material exposure by the banking entity to high-risk assets or high-risk trading strategies.”²⁸⁴⁰ Those express limitations are intended to reduce not only the risk of proprietary trading losses, but also the conflicts of interest that arise when a bank-affiliated investment bank enters into an activity that allows it to profit at the expense of its clients.

Investment banks that have no bank affiliation are not subject to the law's proprietary trading prohibition. If, however, an investment bank is designated by the newly-created

²⁸³⁷ Two of the largest U.S. investment banks, Goldman Sachs and Morgan Stanley, are currently structured as bank holding companies and so are subject to the ban on proprietary trading.

²⁸³⁸ Section 619 of the Dodd-Frank Act (creating a new §13(a) in the Banking Holding Company Act of 1956).

²⁸³⁹ *Id.* at §13(d)(1).

²⁸⁴⁰ *Id.* at §13(d)(2).

Financial Stability Oversight Council as a systemically critical firm, the Dodd-Frank Act would subject its proprietary trading to additional capital requirements and quantitative limits. Those restrictions are intended to ensure large investment banks have sufficient safeguards in place when engaging in risky proprietary activities to prevent them from damaging the U.S. financial system as a whole or necessitating a taxpayer bailout if they get into financial trouble.

Private Fund Restrictions. To ensure that the proprietary trading restrictions are effective, the Dodd-Frank Act prohibits banks and their affiliates, including any investment banks, from bailing out any private fund they advise or sponsor, including an affiliated hedge fund or private equity fund.²⁸⁴¹ This prohibition would apply, for example, to Deutsche Bank and its affiliated hedge fund, Winchester Capital, which made a large proprietary investment in mortgage related products.²⁸⁴² These restrictions would not apply to investment banks that are not affiliated with a bank. If, however, the investment bank is designated as a systemically critical firm, it would become subject to additional capital charges to account for the risk that it may end up bailing out a private fund. The private fund provision also addresses the issue of eliminating any unfair advantage that banks may have from being able to rely on the special privileges of being a bank to implicitly guarantee a private fund, and ensures that a federally insured bank will not be put at risk if an affiliated private fund suffers losses.²⁸⁴³

Conflict of Interest Prohibitions. In 2009, one well known investment adviser described the link between proprietary trading and conflicts of interest as follows:

“Proprietary trading by banks has become by degrees over recent years an egregious conflict of interest with their clients. Most if not all banks that prop trade now gather information from their institutional clients and exploit it. In complete contrast, 30 years ago, Goldman Sachs, for example, would never, ever have traded against its clients. How quaint that scrupulousness now seems. Indeed, from, say, 1935 to 1980, any banker who suggested such behavior would have been fired as both unprincipled and a threat to the partners’ money.”²⁸⁴⁴

The Dodd-Frank Act contains two conflict of interest prohibitions to restore the ethical bar against investment banks and other financial institutions profiting at the expense of their clients. The first is a broad prohibition that applies in any circumstances in which a firm trades for its own account, as explained above.²⁸⁴⁵ The second, in Section 621, imposes a specific, explicit prohibition on any firm that underwrites, sponsors, or acts as a placement agent for an asset backed security, including a synthetic asset backed security, from engaging in a transaction “that would involve or result in any material conflict of interest” with an investor in that

²⁸⁴¹ Id. at §13(d)(1)(G) and (I); (d)(4); and (f).

²⁸⁴² Id. See section discussing Deutsche Bank, above.

²⁸⁴³ Id. See, e.g., 6/12/2010 Cambridge Winter Center report, “Test Case on the Charles,” (explaining how State Street Bank bailed out the funds it managed, but then itself needed several emergency taxpayer-backed programs).

²⁸⁴⁴ “Lesson Not Learned: On Redesigning Our Current Financial System,” *GMO Newsletter Special Topic*, at 2 (10/2009), available at <http://www.scribd.com/doc/21682547/Jeremy-Grantham>.

²⁸⁴⁵ Section 621 of the Dodd-Frank Act (creating a new § 27B(a) in the Securities Act of 1933).

security.²⁸⁴⁶ Together, these two prohibitions, if well implemented, will protect market participants from the self-dealing that contributed to the financial crisis.

Study of Banking Activities. Section 620 of the Dodd-Frank Act directs banking regulators to review what types of banking activities are currently allowed under federal and state law, submit a report to Congress and the Financial Stability Oversight Council on those activities, and offer recommendations to restrict activities that are inappropriate or may have a negative effect on the safety and soundness of a banking entity or the U.S. financial system. This study could evaluate, for example, the use of complex structured finance products that are difficult to understand, have little or no track record on performance, and encourage investors to bet on the failure rather than the success of financial instruments.

Structured Finance Guidance. In connection with provisions in the Dodd-Frank Act related to approval of new products and standards of business conduct,²⁸⁴⁷ the banking agencies, SEC, and CFTC may update and strengthen existing guidance on new structured finance products. In 2004, after the collapse of the Enron Corporation, the banking regulators and SEC proposed joint guidance to prevent abusive structured finance transactions.²⁸⁴⁸ This guidance, which was not finalized until January 2007, was issued in a much weaker form.²⁸⁴⁹ The final guidance eliminated, for example, warnings against structured finance products that facilitate deceptive accounting, circumvention of regulatory or financial reporting requirements, or tax evasion, as well as detailed guidance on the roles that should be played by a financial institution's board of directors, senior management, and legal counsel in approving new products and on the documentation they should assemble.

(2) Recommendations

To prevent investment bank abuses and protect the U.S. financial system from future financial crises, this Report makes the following recommendations.

1. Review Structured Finance Transactions. Federal regulators should review the RMBS, CDO, CDS, and ABX activities described in this Report to identify any violations of law and to examine ways to strengthen existing regulatory prohibitions against abusive practices involving structured finance products.

2. Narrow Proprietary Trading Exceptions. To ensure a meaningful ban on proprietary trading under Section 619, any exceptions to that ban, such as for market-making or risk-mitigating hedging activities, should be strictly limited in the implementing regulations to activities that serve clients or reduce risk.

²⁸⁴⁶ Id. at § 621.

²⁸⁴⁷ Section 717 and Title IX of the Dodd-Frank Act.

²⁸⁴⁸ “Interagency Statement on Sound Practices Concerning Complex Structured Finance Activities,” 69 Fed. Reg. 97 (5/19/2004).

²⁸⁴⁹ “Interagency Statement on Sound Practices Concerning Elevated Risk Complex Structured Finance Activities,” 72 Fed. Reg. 7 (1/11/2007) (issued by the Office of the Comptroller of the Currency; Office of Thrift Supervision; Federal Reserve System; Federal Deposit Insurance Corporation; and Securities and Exchange Commission).

- 3. Design Strong Conflict of Interest Prohibitions.** Regulators implementing the conflict of interest prohibitions in Sections 619 and 621 should consider the types of conflicts of interest in the Goldman Sachs case study, as identified in Chapter VI(C)(6) of this Report.
- 4. Study Bank Use of Structured Finance.** Regulators conducting the banking activities study under Section 620 should consider the role of federally insured banks in designing, marketing, and investing in structured finance products with risks that cannot be reliably measured and naked credit default swaps or synthetic financial instruments.

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