CADWALADER

Cadwalader, Wickersham & Taft LLP
New York London Charlotte Washington Beijing

One World Financial Center, New York, NY 10281
Tel 212 504 6000 Fax 212 504 6666
www.cadwalader.com

Clients&FriendsMemo

SEC Issues Final Rules for New Disclosure Requirements Regarding Representations and Warranties in Asset-Backed Securities Offerings

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The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Act**") was signed into law by President Obama on July 21, 2010.* Section 943 of the Act requires the Securities and Exchange Commission (the "**SEC**") to prescribe regulations on the use of representations and warranties in the market for asset-backed securities.[1] Such regulations must provide for disclosure by "securitizers," as defined in the Act, of fulfilled and unfulfilled repurchase requests across all trusts aggregated by the securitizer. They also require a description by nationally recognized statistical rating organizations ("**NRSROs**"), in reports accompanying credit ratings of securitization transactions, of the representations, warranties and enforcement mechanisms contained in each transaction and how they differ from those contained in issues of similar securities.

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* Cadwalader has prepared a short summary of the Act and a series of memoranda focused on the Act's application to specific industries, entities and transactions. To see these other memoranda, please see *Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Appendix A links to the various topic-focused memoranda) or visit our website at http://www.cadwalader.com/list_client_friend.php.

[1] Section 943 of the Act reads as follows:

REPRESENTATIONS AND WARRANTIES IN ASSET-BACKED OFFERINGS.

Not later than 180 days after the date of enactment of this Act, the Securities and Exchange Commission shall prescribe regulations on the use of representations and warranties in the market for asset-backed securities (as that term is defined in section 3(a)(77) of the Securities Exchange Act of 1934, as added by this subtitle) that—

(1) require each national (*sic.*) recognized statistical rating organization to include in any report accompanying a credit rating a description of—

(A) the representations, warranties, and enforcement mechanisms available to investors; and

(B) how they differ from the representations, warranties, and enforcement mechanisms in issuances of similar securities; and

(2) require any securitizer (as that term is defined in section 15G(a) of the Securities Exchange Act of 1934, as added by this subtitle) to disclose fulfilled and unfulfilled repurchase requests across all trusts aggregated by the securitizer, so that investors may identify asset originators with clear underwriting deficiencies.

On October 4, 2010, the SEC released its proposed rule[2] (the "**Proposed Rule**") pursuant to Section 943 of the Act.[3] On January 21, 2011, the SEC issued its final rule (the "**Final Rule**") that requires (a) new disclosures applicable to any "securitizer" with respect to "asset-backed securities" (each as defined in the Act and described below) to be filed pursuant to a new Form ABS-15G, (b) new disclosures for prospectuses and reports on Form 10-D under Regulation AB and (c) new disclosures for NRSROs rating new issues of asset-backed securities.[4] The Final Rule becomes effective March 27, 2011.[5]

In order to allow the affected participants to set up their systems and gather and track the applicable data, the SEC has adopted the following transition period for compliance with the Final Rule:

- securitizers required to file first Form ABS-15G commencing February 14, 2012;[6]
- securitizer required to comply with new Regulation AB prospectus disclosure requirements commencing with first bona fide offering of registered Exchange Act ABS on or after February 14, 2012;
- securitizer required to comply with new Regulation AB Form 10-D requirements commencing with the first Form 10-D filing after December 31, 2011; and
- NRSROs required to comply with new disclosure requirements commencing six months after the effective date of the Final Rule.

New Disclosure Requirements Applicable to Securitizers of Exchange Act ABS

Overview

The SEC explains that Section 943(2) of the Act was a response to a perceived lack of effectiveness of the buy-back covenants in asset-backed securities transaction documents where breaches of underlying asset-level representations and warranties were alleged. The SEC believes that by mandating detailed reporting requirements of all repurchase requests and the ultimate

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2 *Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, SEC Release Nos. 33-9148; 34-63029 (October 4, 2010).

3 See our Client & Friends Memo, *SEC Proposes New Disclosure Requirements regarding Representations and Warranties in Asset-Backed Securities Offerings*, October 18, 2010.

4 *Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 76 Fed. Reg. 4489 (January 26, 2011) (amending 17 CFR pts. 229, 232, 240 and 249). *See* http://www.sec.gov/rules/final/2011/33-9175fr.pdf.

5 Sixty days after its publication in the Federal Register.

6 An additional three-year transition period was implemented for municipal securitizers, whose first filing is due February 14, 2015.

results of the requests to investors in both registered and unregistered asset-backed securities offerings, investors would have sufficient information to identify asset originators "with clear underwriting deficiencies, as mandated by Section 943 of the Act."

To that end, the SEC is adopting new Rules 15Ga-1 and 17g-7 to the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), new Form ABS-15G and amendments to Regulation AB, in order to satisfy the requirements of Section 943(2).

Applicability of disclosure requirements of new Rule 15Ga-1

The disclosure requirements of new Rule 15Ga-1 would apply to asset-backed securities, as defined in the Act ("**Exchange Act ABS**"), which is substantially broader than the definition set forth in Regulation AB. The definition of Exchange Act ABS includes securities that are typically sold in transactions that are exempt from the registration requirements of the Securities Act of 1933, as amended (the "**Securities Act**").[7]

The new disclosure requirements apply to any "securitizer", which is broadly defined in the Act to include issuers, sponsors and depositors.[8] The SEC states that this definition is intended to apply to any entity or person that issues or organizes an Exchange Act ABS transaction, including asset-backed securities issued or guaranteed by government-sponsored enterprises, such as Fannie Mae and Freddie Mac, or municipal issuers.[9]

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7 "Asset backed security (A) means a fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset, including— (i) a collateralized mortgage obligation; (ii) a collateralized debt obligation; (iii) a collateralized bond obligation; (iv) a collateralized debt obligation of asset-backed securities; (v) a collateralized debt obligation of collateralized debt obligations; and (vi) a security that the Commission, by rule, determines to be an asset-backed security for purposes of this section; and (B) does not include a security issued by a finance subsidiary held by the parent company or a company controlled by the parent company, if none of the securities issued by the finance subsidiary are held by an entity that is not controlled by the parent company." *See* Section 3(a)(77) of the Exchange Act, as amended by the Act.

8 "Securitizer means (A) an issuer of an asset-backed security; or (B) a person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer." *See* Section 15G(a)(3) of the Exchange Act, as amended by the Act. The Final Rule allows affiliated sponsors and depositors to make only one filing, taking into account that "securitizers" is broad enough that affiliated sponsors and depositors could otherwise be required to separately file the same information. Note that this single filing is only available where multiple securitizers are affiliates. 76 Fed. Reg. 4491.

9 76 Fed. Reg. 4490-91. The Commission specifies that the Rule applies to Fannie Mae, Freddie Mac and municipal entities, as well as entities engaged in private offerings under Rule 144A and other exemptions from the registration requirements of the Securities Act, but the Final Rule provides for an additional three-year transition period for municipal securitizers, with an initial filing required on February 14, 2015 covering the three years ending on December 31, 2014 (76 Fed. Reg. 4505).

Note: The SEC acknowledges that both sponsors and depositors fit within the statutory definition of securitizer, which could lead to duplicative filings by sponsors and affiliated depositors of a sponsor. In response, the SEC provides that if a sponsor files all disclosures required under Rule 15Ga-1, which includes disclosures of the activity of affiliated depositors, those affiliated depositors would not have to separately provide and file the same disclosures.[10] Similarly, if all depositors affiliated with a sponsor separately file disclosures with respect to all of their respective trusts, the sponsor would not have to separately provide and file the same disclosures.[11]

The scope of Rule 15Ga-1 is limited to Exchange Act ABS transactions where the underlying documents contain a covenant to repurchase or replace assets in the event of a breach of a representation or warranty. Within the context of such transactions, both the applicability of the rule and the scope of the new reporting requirements are quite broad. It is important to note that Rule 15Ga-1 has no application to any transaction that does not require repurchase or replacement of assets as a remedy for breaches of representations and warranties.

Note: Traditional CDO and CLO transactions and other second and third-level securitizations that do not have repurchase requirements would not be impacted by Rule 15Ga-1. Issuers and originators should note, however, that if such a feature were added to any new CDO or CLO products as part of a revitalization of the CDO/CLO market, issuers and originators would be required to comply with the new disclosure requirements, even if such offerings are conducted under Rule 144A or Regulation S of the Securities Act or are otherwise structured to be exempt from the registration requirements of the Securities Act.

Disclosures required under Rule 15Ga-1; Form ABS-15G

Rule 15Ga-1 requires any securitizer of Exchange Act ABS to disclose all fulfilled and unfulfilled requests for asset repurchases or replacements based on breach of representation or warranty across all securitizations aggregated by the securitizer for the applicable periods as discussed below.[12] This disclosure is required regardless of whether or not there is any merit to the request, whether the representations and warranties relate specifically to underwriting standards, whether or not the request is fulfilled or unfulfilled and regardless of whether the request is made by the transaction trustee at its own initiative or pursuant to a request received by the trustee from

[10] 76 Fed. Reg. 4491.

[11] 76 Fed. Reg. 4498, fn 82.

[12] 76 Fed. Reg. 4500.

investors. The disclosure is required for all assets securitized by the securitizer[13] that are included in outstanding Exchange Act ABS transactions, regardless of asset class, where any such securities are held by non-affiliates of the securitizer and where a repurchase covenant for breaches of representations and warranties exists.[14]

The disclosures must be made on Form ABS-15G, and filed with the SEC on EDGAR. The form must be signed by the senior officer of the securitizer in charge of the securitization.[15] Because disclosure is required of all repurchase requests, whether or not the repurchase is consummated, the Final Rule provides for columns in Form ABS 15-G for repurchase requests that have not been satisfied, with columns for repurchase demands that have been disputed, withdrawn or rejected.[16]

As discussed above, disclosure is required of all repurchase demands, whether initiated by the trustee on its own or by investor demands upon a trustee, irrespective of the trustee's determination to make a repurchase demand on a securitizer based on such investor demand. In this regard, the SEC acknowledges the concern that a securitizer may not be able to obtain complete information from trustees that did not previously keep track of investor requests for repurchase received by the trustee. The Final Rule provides that, to the extent a securitizer is unable initially to complete information on Form ABS 15-G, securitizers may include a footnote in the form if they are unable to obtain all information with respect to investor demands upon a trustee that occurred prior to July 22, 2010.[17]

In response to comments that historical data may not be readily available to securitizers who did not have systems in place at the time to track it, the Final Rule permits securitizers to omit information that is unknown or not reasonably available without unreasonable effort or expense, provided that the securitizer includes in the report a statement showing that unreasonable effort or expense would be required to obtain the omitted information.[18]

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[13] The Proposed Rule would have required disclosure of repurchase requests relating to assets "originated or sold" by a securitizer. The SEC agreed with commentators that the proposed wording could have required disclosure about transfers of assets that were not securitized so the Final Rule requires disclosure only as to assets securitized by securitizers. 76 Fed. Reg. 4492, 4496.

[14] 76 Fed. Reg. 4492, 4496.

[15] 76 Fed. Reg. 4500.

[16] 76 Fed. Reg. 4499. The Proposed Rule would have allowed securitizers to footnote explanatory information to explain why repurchase requests were not satisfied. Instead, this information will be included in the tabular reporting on Form ABS-15G.

[17] 76 Fed. Reg. 4514.

[18] 76 Fed. Reg. 4509.

Form ABS-15G requires reporting in tabular format of the following information with respect to the applicable Exchange Act ABS, organized by asset class and, within each asset class by issuing entity in order of the date of its formation:

- name of each originator,
- total assets in the securitization by each such originator,
- number, principal balance and percentage of assets subject to a demand for repurchase or replacement,
- number, principal balance and percentage of assets repurchased or replaced,
- number, principal balance and percentage of assets pending repurchase or replacement (relevant, for example, where repurchase or replacement was demanded but a cure period that is longer than the reporting period has not expired),
- number, principal balance and percentage of assets subject to repurchase demands that are in dispute,
- number, principal balance and percentage of assets subject to repurchase demands that have been withdrawn, and
- number, principal balance and percentage of assets subject to repurchase demands that have been rejected.

A "check the box" column is included to denote whether the issuing entity involved a registered transaction, in which case disclosure of its CIK number is also required.[19] Principal balances of assets and percentages of the asset pool they represent are required to be calculated based on asset and pool balances on the last day of the relevant period covered by the Form ABS-15G filing. A copy of the tabular format required to be used in Form ABS-15G is attached as an annex to this memorandum.

Filing Requirements

Initial Report

Any securitizer that issued an Exchange-Act ABS during the three-year period ended December 31, 2011 that includes a covenant to repurchase or replace an underlying asset for breach of representation or warranty will be required to file an initial Form ABS-15G no later than

[19] 76 Fed. Reg. 4498 and Form ABS-15G.

45 days after the end of the three-year period, or February 14, 2012.[20] The initial disclosures are limited to the last three years of activity.[21]

Quarterly Reports

Updated disclosures are required on a quarterly basis, by Filing Form ABS-15G on EDGAR[22] within 45 days of the end of each calendar quarter by any securitizer that:

- issued an Exchange Act ABS during the prior quarter;
- organized and initiated an Exchange Act ABS during the prior quarter by securitizing an asset, either directly or indirectly, including through an affiliate; or
- had outstanding Exchange Act ABS held by non-affiliates in the calendar quarter;

where, in each case, the underlying transaction agreements provide a covenant to repurchase or replace an underlying asset for breach of a representation or warranty.[23]

Quarterly reporting is not cumulative and only needs to present the information for the most recent quarter. Where a securtizer has had no repurchase or replacement demands during the previous calendar quarter, it may check a box on Form ABS-15G and then suspend quarterly reporting until there is such a demand. An annual filing would still be required to confirm that there has been no reportable activity since the previous filing. Securitizers are allowed to terminate reporting obligations with respect to an Exchange Act ABS when the last payment is made on such Exchange Act ABS outstanding held by a non-affiliate that was issued by the securitizer or an affiliate.[24]

> *Note: Unlike the trigger for the initial filing, because the quarterly Form ABS-15G filing requirement applies to any securitizer that issued an Exchange Act ABS during the reporting period or had outstanding Exchange Act ABS held by non-affiliates during the reporting period, the obligation to file quarterly reports beginning with the quarter ending March 31, 2012 may apply to existing securitizers who are not required to make an initial*

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[20] 76 Fed. Reg. 4500. This is a change from the Proposed Rule, which proposed the initial filing be done in connection with securitizer's first offer of an Exchange Act-ABS. Note that, as discussed above, there is a further 3-year delay for municipal securitizers, with the first report due on February 14, 2015.

[21] 76 Fed. Reg. 4500. Activity during the three-year period is required to be reported, even if the initial demand occurred prior to such period. The Proposed Rule had proposed a five-year look-back.

[22] Municipal securitizers are allowed to file on EMMA instead of EDGAR.

[23] 76 Fed. Reg. 4514.

[24] 76 Fed. Reg. 4514-4515.

filing covering the three-year period ending December 31, 2011. It is not clear from the release adopting the Final Rule whether the SEC intended this trap for the unwary, and industry clarification on this point prior to the compliance date is advisable.

Considerations for exempt transactions

The SEC has adopted Form ABS-15G for providing the disclosures required by new Rule 15Ga-1 and is requiring that it be filed on EDGAR, even for unregistered transactions.[25] Securitizers of Exchange Act ABS offerings that are unregistered should note that, although the SEC states that filing Form ABS-15G would not foreclose reliance by an issuer on the private offering exemption and the safe harbor for offshore transactions from the registration requirements of Section 5 of the Securities Act, the SEC also noted in the Proposed Rule that inclusion in a Form ABS-15G filing of information beyond what is required by Rule 15Ga-1 may jeopardize such reliance by constituting a public offering or conditioning the market for the securities being offered under an exemption.[26]

Note: Securitizers involved in unregistered offerings should limit disclosures to the strict requirements of Rule 15Ga-1.

In the Final Rule, the SEC repeated its view stated in the Proposed Rule that filing Form ABS-15G would not foreclose reliance by an issuer on the private offering exemption and safe harbor for offshore transactions.[27]

Certain Amendments to Regulation AB

The SEC notes that there is overlap between its proposal to update the disclosure requirements of Regulation AB pursuant to the SEC's release of April 7, 2010[28] and the disclosure requirements of Section 943 of the Act. However, the requirements of Section 943(2) go beyond the SEC's prior Regulation AB proposals. The prior Regulation AB proposals would impose similar disclosure obligations for fulfilled and unfulfilled repurchase requests, but only for registered offerings and only if the amount of publicly securitized assets subject to repurchase or replacement is material.

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[25] 76 Fed. Reg. 4500-4501.

[26] Proposed Rule, page 18, fn 34.

[27] 76 Fed. Reg. 4499.

[28] *See Asset Backed Securities*, 75 Fed. Reg. 23328 (April 7, 2010). Cadwalader has prepared a memorandum summarizing and discussing these proposed amendments to Regulation AB. *See SEC Announces Proposal to Significantly Enhance the Regulation of Asset-Backed Securities* (April 20, 2010), which may be accessed on our website at http://www.cadwalader.com/assets/client_friend/042010SEC_Enhancements.pdf.

Under the Final Rule, the SEC amended Items 1104 and 1121 of Regulation AB. These amendments will now require disclosures, within prospectuses and ongoing reports on Form 10-D, of securitized assets subject to repurchase or replacement to be reported in the tabular format set forth in Rule 15Ga-1. Prospectus disclosure is required for a three-year look-back period and is limited to the same asset class as the registered securities that are the subject of the offering, while Form 10-D reporting is limited to the period otherwise covered by the report and to the assets of the issuing entity that is the subject of the report.[29]

Because Section 943(2) of the Act does not contain a materiality threshold, the SEC removed the materiality thresholds it had proposed under Items 1104 and 1121 in its April 7, 2010 release. In addition, the Final Rule requires all prospectuses in registered offerings and all reports on Form 10-D to reference the most recent Form ABS-15G filing made by the securitizer and to disclose the CIK number of the securitizer so that investors may easily locate Form ABS-15G filings of such securitizer on EDGAR.

The Final Rule provides that information presented in a prospectus not be more than 135 days old, which the SEC believes will reduce the burdens on securitizers because it is consistent with the disclosure conventions for static pool and interim financial information.[30] In response to comments that older reliable information may not be available, the SEC is phasing in the disclosure requirement for prospectuses such that a prospectus filed in the first year after February 14, 2012 will be permitted to include a one-year look back period, and in the second year after February 14, 2012, a two-year look back period. Prospectuses filed in the third year after February 14, 2012 must include the full three-year look back period.[31]

Disclosure Requirements for NRSROs

Section 943(1) of the Act requires each NRSRO to include, in any report accompanying a "credit rating" for an Exchange Act ABS, a description of the representations, warranties and enforcement mechanisms available to investors and of how such rights and remedies differ from the representations, warranties and enforcement mechanisms in issuances of similar securities. The Final Rule adds Rule 17g-7 to the Exchange Act to implement the requirements of Section 943(1). This part of the Final Rule simply restates the statutory requirements of Section 943(1) and contains no mandate and little guidance on how NRSROs may comply with the requirements of Section 943(1) of the Act.

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[29] 76 Fed. Reg. 4502.

[30] 76 Fed. Reg. 4502. The SEC noted, however, that more current information would need to be included in the prospectus if the securitizer had filed a quarterly report on Form ABS-15G within the 135-day period. See 76 Fed. Reg. 4505.

[31] 76 Fed. Reg. 4502-4503.

The SEC noted in its Proposed Rule that it "anticipates" one way NRSROs could fulfill this requirement would be to review previous issuances on both an initial and ongoing basis in order to establish "benchmarks" for various types of securities and revise them as appropriate.[32] In the Final Rule, the SEC declined to include definitions or interpretive rules, instead saying that it expects that NSRSOs would draw upon their knowledge of industry standards, along with their own expertise with previously rated deals and their knowledge of the market in general in comparing representation and warranty provisions in different deals.[33]

The SEC also indicated in the Proposed Rule that it was proposing a note that would clarify that the term "credit rating" for purposes of the Proposed Rule would include any expected or preliminary credit rating issued by an NRSRO, including any indications of a rating used prior to the assignment of an initial credit rating for a new issuance.[34] Pre-sale reports typically issued by NRSROs in connection with an offering would be considered a "credit rating" for such purposes. The Final Rule adopted this approach and clarifies further that the Final Rule applies, without limitation, to "any report accompanying a credit rating", including unsolicited ratings and ratings issued to foreign issuers that are not offering securities in the U.S. by NRSROs that are otherwise subject to the SEC's oversight.[35]

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Please feel free to contact any of the following Cadwalader attorneys if you have any questions about this memorandum.

Aaron J. Benjamin	+1 704 348 5384	aaron.benjamin@cwt.com
Charles E. Bryan	+1 202 862 2212	charlie.bryan@cwt.com
Michael S. Gambro	+1 212 504 6825	michael.gambro@cwt.com
Anna H. Glick	+1 212 504 6309	anna.glick@cwt.com
Stuart N. Goldstein	+1 704 348 5258	stuart.goldstein@cwt.com
Gregg S. Jubin	+1 202 862 2485	gregg.jubin@cwt.com
Henry A. LaBrun	+1 704 348 5149	henry.labrun@cwt.com
Lisa J. Pauquette	+1 212 504 6298	lisa.pauquette@cwt.com
Frank Polverino	+1 212 504 6820	frank.polverino@cwt.com
Patrick Quinn	+1 212 504 6067	pat.quinn@cwt.com
Y. Jeffrey Rotblat	+1 212 504 6401	jeffrey.rotblat@cwt.com
Jordan M. Schwartz	+1 212 504 6136	jordan.schwartz@cwt.com
Robert L. Ughetta	+1 704 348 5141	robert.ughetta@cwt.com
Neil J. Weidner	+1 212 504 6065	neil.weidner@cwt.com

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[32] Proposed Rule, pages 35-36, fn 63.

[33] 76 Fed. Reg. 4504-4505.

[34] Proposed Rule, page 36, fn 65.

[35] 76 Fed. Reg. 4504-4505.

Annex A
Form ABS-15G

Name of Issuing Entity	Check if Registered	Name of Originator	Total Assets in ABS by Originator			Assets That Were Subject of Demand			Assets That Were Repurchased or Replaced			Assets Pending Repurchase or Replacement (within cure period)			Demand in Dispute			Demand Withdrawn			Demand Rejected		
(a)	(b)	(c)	(#) (d)	($) (e)	(% of principal balance) (f)	(#) ($) (g)	(h)	(% of principal balance) (i)	(#) ($) (j)	(k)	(% of principal balance) (l)	(#) ($) (m)	(n)	(% of principal balance) (o)	(#) ($) (p)	(q)	(% of principal balance) (r)	(#) ($) (s)	(t)	(% of principal balance) (u)	(#) ($) (v)	(w)	(% of principal balance) (x)
Asset Class X																							
Issuing Entity A CIK #	X	Originator 1																					
		Originator 2																					
Total			#	$		#	$		#	$		#	$		#	$		#	$		#	$	
Asset Class Y																							
Issuing Entity B		Originator 3																					
Total			#	$		#	$		#	$		#	$		#	$		#	$		#	$	
Total			#	$		#	$		#	$		#	$		#	$		#	$		#	$	