THE LAW OFFICES OF
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A PROFESSIONAL CORPORATION

December 27, 2019

Securities and Exchange Commission
Office of Structured Finance
Division of Corporation Finance
100 F Street, NE,
Washington, D.C. 20549

Re: Response to Request for Public Input on Asset-Level Disclosure Requirements for Residential Mortgage-Backed Securities

Ladies and Gentlemen:

This letter responds to Chairman Clayton's above-referenced Request for Public Input (the "SEC Request").[1] We very much appreciate the time to address our questions that Securities and Exchange Commission (SEC) Office of Structured Finance staff generously made available to us on November 20, 2019.

The SEC Request seeks comment relating to the asset-level disclosure requirements for SEC-registered Residential Mortgage-Backed Securities (RMBS) subject to Regulation AB II, an SEC regulation of the registration, disclosure and reporting requirements for asset-backed securities, seemingly with a view to their potential loosening.

As we noted on the telephone call with staff, as attorneys we are primarily concerned with energy - including trading in physical and financial energy commodities, and all manner of other agreements relating to energy-generating assets. This includes practice in capital and financial markets for financing generating assets and hedging energy positions. We helped clients through terrifying times in these markets, including the 2008 financial crisis.

The federal post-mortem for the 2008 financial crisis, the Financial Crisis Inquiry Report,[2] concluded that the crisis was ***caused*** by the failures of regulators to understand and

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[1] Chairman Jay Clayton, SEC, Public Statement, Asset-Level Disclosure Requirements for Residential Mortgage-Backed Securities: Public Input from Investors and Other Market Participants Welcomed, Oct. 30, 2019 (avail. at https://www.sec.gov/news/public-statement/clayton-rmbs-asset-disclosure#).

[2] *E.g.,* Financial Crisis Inquiry Commission, Financial Crisis Inquiry Report (FCIR), pp., xvii-xviii, 79, 94, Republican dissent (2011) (avail. at http://fcic.gov/); see also FDIC, Crisis and Response: An FDIC History, 2008-2013 (2017) (avail. at https://www.fdic.gov/bank/historical/crisis/).

regulate "toxic" RMBS. This wasn't the first time that underappreciation and underregulation of RMBS was disruptive; there have been significant market events and investor losses due to the failure of supposedly sophisticated investors to understand and manage RMBS risks, at least since the failure of Granite Partners in 1994.[3]

An outcome of the 2008 financial crisis was the Dodd-Frank Act,[4] which encompasses significant regulation of the energy sector. The front matter of the Dodd-Frank Act regulations only reluctantly conceded the role of RMBS in the 2008 financial crisis. Swaps in general were portrayed as the primary culprit, like blaming the mailman for mail fraud. For example, regulators pilloried AIG's use of credit default swaps, omitting to mention that these were actually credit insurance backing RMBS issued by the world's largest banks.[5]

Although the energy sector had nothing to do with the causes of the financial crisis, regulations under the Dodd-Frank Act have had major, negative impacts on the energy sector. These include market participants responding to regulation and regulatory uncertainty[6] by cutting back hedging activity and liquidity and driving activity to futures exchanges, which require full margining. Every product and service in the US is made with energy, so every product and service in the US is that much more expensive because of unhedged risks and increased margin costs. To the energy sector in isolation, the Dodd-Frank Act has introduced ***more*** risk into the system. The only benefit to the energy sector – and to the economy at large bearing the increased costs placed upon the energy sector – is the greater financial stability of financial institutions that are now supposedly corralled from their propensities to load up on and misuse financial instruments to precipitate a financial crisis. The SEC and Commodity Futures Trading Commission (CFTC) noted that addressing poor risk management by financial institutions is the whole point of the new regulations to which every sector in the US economy is now subject.[7]

Therefore, we are baffled by initiatives, for example the shocking recently proposed regulation of the Federal Deposit Insurance Corporation (FDIC) to roll back regulation of holdings by FDIC-insured institutions of RMBS instruments to encourage more RMBS issuance.[8]

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[3] See statements of then-SEC Chairman reported in Associated Press, *Volatile Mortgage Bonds Behind Collapse of Hedge Fund*, Apr. 12, 1994 (avail. at https://apnews.com/63422deed3d64da7235f15bfa9993a62); see also General Accounting Office, Report to the Hon. Edward J. Markey, House of Representatives, OTC Derivatives: Additional Oversight Could Reduce Costly Sales Disputes (Oct. 1997) (avail. at https://www.gao.gov/assets/160/156011.pdf).
[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111 -203, 124 Stat. 1376 (2010).
[5] Compare 78 Fed. Reg. 45293-94, 77 Fed. Reg. 55942-43 with FCIR pp. 139-146; although there is an admission at 78 Fed. Reg. 45294 that Bear Stearns' failure was tied to subprime mortgages.
[6] Regulatory uncertainty still poisons the good faith goal of the sector to comply; see, e.g., Weinstein, *CFTC Regulation of Trade Options: Unfinished Project KISS Business*, 39 Futures and Derivatives Law Report, Issue 10 p. 1 (Nov. 2019) (avail. at http://bit.ly/TradeOptionsArticle).
[7] CFTC & SEC, *Joint Final Rule; Interpretations; Request for Comment on an Interpretation, Further Definition of "Swap," ...*, 77 Fed. Reg. 48208 at 48307 (Aug. 13, 2012). citing the FCIR, the SEC and CFTC noted that, "The crisis revealed the vulnerability of the U.S. financial system and economy to widespread systemic risk resulting from, among other things, poor risk management practices of certain financial firms and the lack of supervisory oversight for financial institutions as a whole."
[8] FDIC, Notice of Proposed Rulemaking, Securitization Safe Harbor Rule, 84 Fed. Reg. 43732 (Aug. 22, 2019), "This would suggest that ***removing the disclosures might be expected to encourage banks engaging in sponsoring***

Asset-level disclosure requirements. It is strange for regulators to be opaque about an initiative to roll these requirements back, as it was a lack of transparency (in asset-backed securities risks at the time of the financial crisis)[9] that precipitated a need for such disclosure requirements in the first place. Yet, the following statements made by regulators within the last two years are wanting for transparency:

Jun. 2017 The U.S. Dept. of the Treasury, in a report to the President on regulation of banks and credit unions in the US financial system in accordance with core principles ("Banks & Credit Unions Report"), recommended that "Congress should consider legislation providing additional protections for investors in [private-label securitizations]."[10] However, in this same report, Treasury criticized this type of legislation by finding that "[m]ost investors welcomed the enhanced disclosure requirements" implemented by the SEC pursuant to Dodd-Frank "to help investors make better investment decisions in a securitization based on the quality of the underlying collateral," but "issuers have stated that increased compliance burdens" and several other factors "have had a negative economic impact on issuing new publicly available securitizations."[11] The issuers are not identified.[12] The report states that "[c]urrently, Reg AB II requires 270 reporting fields per mortgage."[13] The report recommends (without providing applicable sources or analysis) that the SEC reduce the number of Reg AB II reporting fields.[14] Alternating between Dr. Jekyll and Mr. Hyde, the report stated, "[i]t is essential to

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private RMBS issuances to expand their activities. It also is possible that other institutions not currently involved in issuing private RMBS could begin doing so." Proposed Rule, 84 Fed. Reg. at 43735, col. 2.

[9] *See*, *e.g.*, Jed J. Neilson, et al., *Asset-Level Transparency and the (E)Valuation of Asset-Backed Securities* (Feb. 26, 2019) at 35 (avail. at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3350800_code1694359.pdf?abstractid=3247342&mirid=1) ("Many financial market observers believe that the opacity of the assets underlying ABS prior to the 2007–2009 financial crisis contributed to under-appreciation of the risks of ABS by investors and to excessively optimistic credit ratings of ABS by credit rating agencies. As an important part of the post-crisis effort to reform and revive the ABS markets, Reg AB II's asset- level disclosure requirements substantially increase the transparency of the underlying assets in each ABS deal.").

[10] Dept. of the Treasury, *A Financial System That Creates Economic Opportunities: Banks and Credit Unions* (Jun. 13, 2017) at 101 (avail. at https://www.treasury.gov/press-center/press-releases/Documents/A Financial System.pdf). This report is the first in a series of four reports issued pursuant to the directive to the Secretary of Treasury contained in Presidential Executive Order on Core Principles for Regulating the United States Financial System, Exec. Order 13772 (Feb. 3, 2017) (avail. at https://www.whitehouse.gov/presidential-actions/presidential-executive-order-core-principles-regulating-united-states-financial-system/), *reprinted at* 82 Fed. Reg. 9965 (Feb. 8, 2017) (https://www.govinfo.gov/content/pkg/FR-2017-02-08/pdf/2017-02762.pdf) ("Executive Order"). *See* Press release, Dept. of the Treasury, *Treasury Releases Report on Nonbank Financials, Fintech, and Innovation* (Jul. 31, 2018) (avail. at https://home.treasury.gov/news/press-releases/sm447) (announcing final report of series and identifying the three prior reports covering Banks and Credit Unions, Capital Markets, and Asset Management and Insurance).

[11] Banks & Credit Unions Report at 98.

[12] The Appendix A to the Banks & Credit Unions Report includes a long list of Participants in the Executive Order Engagement Process, including regulators, consumer advocates, academics, think tanks, and 244 names under the heading "Industry and Trade Groups." Perhaps somewhere in this list are the issuers who stated that the compliance burdens had a negative impact on the issuance of securitizations, but there is no way to know which ones they might be or what the nature of the impact is. *See also*, a similar appendix in the Capital Markets Report.

[13] Banks & Credit Unions Report at 98.

[14] Banks & Credit Unions Report at 98 & 137.

provide loan-level disclosures on the quality of underlying collateral to maintain transparency and promote investor confidence," and in the next sentence, "[h]owever, fewer fields and standardized definitions ***may*** provide sufficient transparency without placing excessive burden on the issuer"[15]---essentially telling the SEC to take a leap of faith. If Treasury was truly concerned with whether or not fewer fields would provide sufficient transparency, it would recommend that the SEC study what the effect would be first, as opposed to just recommending that the SEC reduce the number of fields solely because Treasury said so. Appendix B to the Banks & Credit Unions Report contains a table of recommendations to various regulators and Congress, and each recommendation in the table is identified as corresponding to one or more of seven core principles set out in the Executive Order.[16] For the recommendation to the SEC to reduce the number of reporting fields required by Regulation AB, the only corresponding Core Principle identified in the table is Principle F (i.e., "[m]ake regulation efficient, effective, and appropriately tailored").[17] Notably, Principle C ("[f]oster economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses systemic risk and market failures, such as moral hazard and information asymmetry")[18] was not identified as a corresponding core principle--not a total surprise, considering the lack of rigor in Treasury's recommendation to the SEC to reduce Regulation AB reporting fields. Four months later, in its Capital Markets Report, Treasury made a similar recommendation to reduce the Regulation AB reporting fields, but there it identified both Principles C & F as corresponding Core Principles.[19] This inconsistency--however interpreted--in itself indicates a failure to completely commit to the "rigorous regulatory impact analysis" of Core Principle C.[20]

Oct. 2017 The U.S. Dept. of the Treasury, in a report to the President on regulation of capital markets in the US financial system in accordance with core principles ("Capital Markets Report"), stated as one of its findings from its review of the securitization market, that "[e]xpanded disclosure requirements, while an important post-crisis reform, are unnecessarily burdensome and could be more appropriately tailored."[21] Schizophrenically, the expanded disclosure requirements are simultaneously "important" and "unnecessarily burdensome."

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[15] Banks & Credit Unions Report at 102 (emphasis supplied).
[16] *See* Executive Order, note 10, *supra* (laying out seven core principles for regulation of the US financial system, including "foster[ing] economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses systemic risk and market failures" (the third principle or Principle C) and "mak[ing] regulation efficient, effective and appropriately tailored," (the fifth principle or Principle F) and directing the Secretary of the Treasury to report to the President on how existing rules and policies promote the Core Principles and on what actions have been and are being taken to promote and support the Core Principles).
[17] Banks & Credit Unions Report, Appendix B at 137.
[18] *See* note 16, *supra*; Banks & Credit Unions Report at 3.
[19] *See* note 21, *infra*; Capital Markets Report, Appendix B at 211.
[20] Note 16, *supra*; Banks & Credit Unions Report at 3.
[21] Dept. of the Treasury, *A Financial System That Creates Economic Opportunities: Capital Markets* (Oct. 6, 2017) at 96 (avail. at https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf).

Such disclosures may very well be burdensome, but whether they are *unnecessarily* so is not supported by any evidence in the report.[22] The report stated (anecdotally) that unidentified "issuers"[23] "have stated that the increased cost and compliance burdens, lack of standardized definitions, and sometimes ambiguous regulatory guidance has had a negative impact" (which negative impact is not explained) "on the issuance of new public securitizations."[24] The report also stated that "[i]nvestors in securitized products broadly welcomed the enhanced disclosure requirements mandated by Dodd-Frank."[25] However, the report proceeded to recommend reducing the disclosed data; Treasury apparently finds that such investors are less important than issuers who have stated that there are compliance burdens. No information is offered to explain why any such compliance burdens are unnecessary. The report noted that the disclosures include up to 270 data fields at the loan level,[26] implying that 270 is an unnecessary burden. Without explaining why or at what number of fields the burden of disclosure would change from unnecessary to necessary, the Capital Markets Report concluded that "a sufficient level of transparency and standardization can be achieved at fewer than the current number of required fields."[27]

In its recommendations for SEC action, the report stated that the "scope of asset-level data required by Reg AB II warrants review and recalibration."[28] However, in the following sentence, it concluded that "[t]he number of required reporting fields for registered securitizations should be reduced," which suggests that Treasury is not interested in the results of any such review conducted by the SEC. Notably, this conclusion in the Capital Markets Report falls short of Core Principle C, the third core principle (of the Executive Order which the report responds to), which provides in part "foster[ing] economic growth and vibrant financial markets through ***more rigorous regulatory impact analysis*** that

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[22] Although, for the purpose of responding to the SEC Request, we are focusing on asset-level disclosures in RMBS, it is worth noting the following broad assessment in the Capital Markets Report: "[P]ost-crisis reforms have gone too far toward penalizing securitization relative to alternative, often more traditional funding sources such as bank deposits. The result has been to dampen the attractiveness of securitization, ***potentially*** cutting off or raising the cost of credit to ***thousands*** of corporate and retail consumers." Capital Markets Report at 95 (emphasis supplied). This finding is not particularly meaningful because it is qualified by the term "potentially," and it is conjecture about lending costs and availability to "thousands" of customers. For perspective, Freddie Mac forecasts $2.1 trillion in mortgage originations for 2019. *The Housing Market Continues to Stand Firm* (Nov. 2019) (avail. at http://www.freddiemac.com/fmac-resources/research/pdf/201911-Forecast-04.pdf).
[23] Appendix A to the Capital Markets Report includes a long list of Participants in the Executive Order Engagement Process, including academics, consumer advocates, regulators, think tanks and 251 names under the heading "Industry and Trade Groups." Perhaps somewhere in this list are the issuers who stated that the compliance burdens had a negative impact on the issuance of securitizations, but there is no way to know which ones they might be or what the nature of the impact is.
[24] Capital Markets Report at 104.
[25] Capital Markets Report at 104.
[26] Capital Markets Report at 104.
[27] Capital Markets Report at 105.
[28] Capital Markets Report at 105.

addresses systemic risk and market failures…."[29] No such "rigorous regulatory impact analysis" is offered by Treasury to explain why the asset-level reporting fields should be reduced. The rigors are similarly lacking where Treasury discusses Regulation AB (pre-crisis) and Regulation AB II (post-crisis), and finds that as compared to the detailed asset-level disclosures in the post-crisis rule, the principles-based disclosures of the pre-crisis "standard is reasonable to measure the adequacy of disclosure requirements."[30] Treasury didn't say why, and that's opaque.

Jul. 11, 2019 In a memorandum to the Board of Directors of the FDIC recommending that the FDIC remove SEC Regulation AB requirements from the FDIC's rules, FDIC staff referred to SEC revisions to Regulation AB, and stated that "[a]s adopted in 2014, Regulation AB ... declined to require issuers to provide the same disclosure for exempt offerings as is required for registered offerings."[31] The phrase "declined to require" seems intended to imply "rejected," which would be untrue, as the requirement remained an outstanding proposal under consideration. The SEC stated in the preamble to its final rule adopting revisions to Regulation AB: "These proposals remain outstanding…. Requiring issuers to provide the same disclosure for Rule 144A offering as required for registered offerings."[32] SEC Commissioner public statements also noted that disclosure requirements remained to be expanded to private placements.[33] FDIC staff would have been more transparent had it said the SEC had "not yet adopted," rather than "declined to adopt," those investor and systemic protections that the FDIC staff recommended jettisoning.[34]

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[29] Executive Order, note 16 *supra* (emphasis supplied); Capital Markets Report at 3.
[30] Capital Markets Report at 104.
[31] Recommendation memo of Maureen E. Sweeney & Nicholas J. Podsiadly to FDIC Board of Directors, *Proposed Rule to Revise Securitization Safe Harbor Rule* (Jul. 11, 2019) at 3 (avail. at https://www.fdic.gov/news/board/2019/2019-07-16-notice-dis-c-mem.pdf).
[32] SEC, Asset-Backed Securities Disclosure and Registration; Final Rule, 79 Fed. Reg. 57184, 57190 at col. 3 (Sep. 24, 2014).
[33] *E.g.,* "It is therefore crucial that the [SEC] complete the other outstanding ABS proposals in order to address the regulatory regime in this space. These include: … Requiring issuers to provide the same disclosure for ABS issued pursuant to private offerings and resold under Rule 144A, as is required for registered offerings …." Comm'r Luis A. Aguilar, *Correcting Some of the Flaws in the ABS Market*, SEC (Aug. 27, 2014) (avail. at https://www.sec.gov/news/public-statement/2014-08-27-open-meeting-statement-abs-laa#_edn1); "unfortunately, the [SEC]'s work in the ABS area is not complete. . . . the [SEC] has other outstanding regulatory proposals in the ABS space, including the following: (i) requiring issuers to provide the same disclosure for ABS issued pursuant to private offerings and resold under Rule 144A, as is required for registered offerings." Comm'r Luis A. Aguilar, *Skin in the Game: Aligning the Interests of Sponsors and Investors*, SEC, n.23 (Oct. 22, 2014) (avail. at https://www.sec.gov/news/public-statement/2014-spch102214laa).
[34] *See* Cadwalader, Wickersham & Taft, *At Long Last - SEC Adopts Regulation AB II*, p. 2 (Sept. 5, 2014) (avail. at https://www.cadwalader.com/uploads/cfmemos/6c1186aa6378825fd40a77c21cf10ed7.pdf) ("While these proposals were not adopted, in the Final Release the SEC expressly states that the proposals remain open, leaving open the possibility that they could be implemented in the future…. It seems likely to us that, given the addition by Section 942 of the Dodd-Frank Act of Section 7(c) to the Securities Act, mandating the SEC to require issuers to disclose asset-level data if necessary for investors to perform due diligence, the SEC may eventually prescribe loan-level disclosure for asset classes other than those addressed in the Final Rules. Whether efforts to extend Regulation AB

Jul. 16, 2019 FDIC staff made a presentation to the FDIC Board to recommend that the Regulation AB requirement be removed from the FDIC's Securitization Safe Harbor Rule. At the start of the presentation, a staff member stated that "we're proposing to make one specific amendment to the FDIC's securitization safe harbor rule … as part of our ongoing reconsideration of this rule."[35] Oddly (i.e., opaquely), the phrase "ongoing reconsideration" is used as a matter of course, as if no explanation is needed for why staff has been reconsidering the rule or for how long such reconsideration has been ongoing. Regulation AB was added to the FDIC Safe Harbor Rule in 2010.[36] Information as to why or at whose prompting the rule is being reconsidered (and for how long this reconsideration has been ongoing) would make this presentation more transparent.

Aug. 22, 2019 In a proposed rulemaking, in its discussion of the proposal to remove the Regulation AB requirement, the FDIC made the following remarkably vague and unsupported statement:

"The FDIC believes that if, in the midst of the financial crisis, it was appropriate, in crafting an FDIC rule governing when securitization investors are eligible for safe harbor protection, to make applicable to certain transactions SEC disclosure requirements that do not otherwise apply to those transactions, ***such a requirement is no longer necessary in view of regulatory developments*** relating to residential mortgages since 2010."[37]

The foregoing text was also cited in a statement by FDIC Board Member, Martin J. Gruenberg, who voted against the proposed rule, and as a voice of reason stated "[h]owever, the [proposal] does not indicate what those regulatory developments are or why they make the application of the SEC disclosure requirements no longer necessary."[38] Other parts of Mr. Gruenberg's statement point to information gaps in the FDIC's proposal, and he noted how important clear disclosure by the FDIC is (i.e., transparency) for this rulemaking, considering the role that RMBS had in the financial crisis.[39]

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disclosures to private transactions again pick up momentum may depend on the success of the investor protections added by the Final Rules and the extent, if any, to which transactions may shift into the private markets to avoid some of the elements of the Final Rules.").

[35] FDIC, Webcast of FDIC Board Meeting at 11:40 (Jul. 16, 2019) (avail. at http://fdic.windrosemedia.com/index.php?category=FDIC+Board+Meetings).

[36] FDIC, Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation After September 30, 2010; Final rule, 75 Fed. Reg. 60287, 60298 col.3 (Sep. 30, 2010).

[37] FDIC, Securitization Safe Harbor Rule; Notice of proposed rulemaking, 84 Fed. Reg. 43732, 43734 col.3 (Aug. 22, 2019) (https://www.govinfo.gov/content/pkg/FR-2019-08-22/pdf/2019-15536.pdf).

[38] Martin J. Gruenberg, Member, FDIC Board of Directors, *Statement Regarding Notice of Proposed Rulemaking to Amend Securitization Safe Harbor Rule* (Jul. 16, 2019) at 4 (avail. at https://www.fdic.gov/news/news/speeches/spjul1619c.pdf).

[39] *E.g.*, Mr. Gruenberg states "[t]he application of the FDIC's Safe Harbor Rule to publicly and privately issued

Sep. 2019 The U.S. Dept. of Treasury, in its Housing Reform Plan stated that "[i]t is difficult to collect the required data for some of [the asset-level data fields under Regulation AB]– with the expense and burden of collection ***potentially outweighing*** the benefit to [private-label securitization] investors…. These requirements ***might also have adversely affected*** private placement activity because the FDIC's securitization safe harbor requires compliance with Regulation AB II…."[40] The terms "potentially" and "might" continue the conjecture of the earlier Capital Markets Report regarding asset-level data.[41] More concrete information is needed in order to know if the benefits to investors of disclosures are outweighed by the burdens of data collection or whether or not private placement activity has been adversely affected, and what any adverse effect would be measured against.

Oct. 2019 In the SEC Request, Chairman Clayton stated "[i]n light of the absence of SEC-registered RMBS offerings, I have asked SEC staff to review our RMBS asset-level disclosure requirements with an eye toward facilitating SEC-registered offerings."[42] There appear to be embedded assumptions as to how much more RMBS is needed and how much more of such RMBS needs to be registered with the SEC. We understand that the White House has directed Treasury to report on certain rules and activity of those involved in US financial system regulation and to make certain recommendations,[43] and Treasury has, in turn, recommended that the SEC take certain steps with respect to Regulation AB,[44] which implicates RMBS. That said, clarification as to the driver behind these embedded

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securitizations, particularly residential mortgage backed securitizations, was a response to one of the central causes of the financial crisis. If the FDIC proposes to eliminate the Regulation AB disclosure requirements of the Safe Harbor Rule that apply to private placements in the RMBS market, it has an obligation to identify clearly what in the disclosure requirements is an impediment to the market and why its elimination would not undermine the purposes of the FDIC's Rule." *Id*. at 5.

[40] Dept. of the Treasury, *Housing Reform Plan* (Sep. 2019) at 39 (emphasis supplied) (avail. at https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf) (the "Treasury Housing Reform Plan").

[41] *See* note 22, *supra*.

[42] Para. 5 of SEC Request, note 1, *supra*.

[43] *See* Executive Order, note 10, *supra*; The President, *Memorandum on Federal Housing Finance Reform* (Mar. 27, 2019) (avail. at https://www.whitehouse.gov/presidential-actions/memorandum-federal-housing-finance-reform/) (directing the Secretary of Treasury to develop a housing reform plan to achieve certain goals, including facilitating competition in the housing finance market, ending the conservatorships of the GSEs and increasing competition and participation of the private sector in the mortgage market, among other recommendations) (the "Presidential Memorandum").

[44] In response to the Executive Order, Treasury issued a series of four reports (*see* note 10, *supra*), two of which are relevant to the SEC Request: (1) the Banks & Credit Unions Report and (2) the Capital Markets Report. *See id*.; note 21, *supra*. Although the Executive Order didn't actually require Treasury to make any recommendations, Treasury provided 14 recommendations for the SEC in the Banks & Credit Unions Report, including one specifically related to Regulation AB, and Treasury provided over 70 recommendations for the SEC in the Capital Markets Report, including several related to Regulation AB, and at least 3 recommendations related to reducing or limiting asset-level disclosures. *See* Banks & Credit Unions Report at 102 & Appendix B *passim*; Capital Markets Report at 211 & Appendix B *passim*. In response to the Presidential Memorandum, Treasury issued the Treasury Housing Reform Plan. *See* note 40, *supra*. This plan also made recommendations to the SEC regarding Regulation AB.

assumptions would facilitate concrete assessment of the benefits and burdens discussed in the reports on rulemaking materials from Treasury and the FDIC.

We note that the U.S. Dept. of the Treasury Housing Reform Plan dated Sept. 2019[45] set forth a five-step plan at p. 40, two steps of which are:

- "The SEC should review Regulation AB II to assess the number of required reporting fields and to clarify the defined terms for PLS issuances. (administrative)

- FHFA should consider whether to require each GSE to conform its loan-level disclosures to Regulation AB II after the regulation is reviewed by the SEC. (administrative)"

The GSEs (i.e., Fannie Mae & Freddie Mac)[46] are currently exempt from Regulation AB II.[47] Thus it appears that Treasury wants the GSEs to be subject to Regulation AB II, and that the first step would be to loosen Regulation AB II to a level of pain that the GSEs can live with, and subject the GSEs to that pain. It is commendable that Treasury, in its discussion of "leveling the playing field" between the GSEs and the private sector, suggests that "[r]equiring each GSE to conform its disclosure to Regulation AB II could help level the playing field,"[48] however, we are concerned that rollback of asset-level disclosure requirements under Regulation AB without "rigorous regulatory impact analysis" (per Core Principle C of the Executive Order),[49] would just lower the bar, instead. Figure 1 of the Treasury Housing Reform Plan shows a relatively stable participation of GSEs in single-family mortgage debt since the financial crisis, with a decline since the financial crisis of previously toxicity-prone private-label RMBS.[50] Figure 1 omits essential information that would assist with the SEC Request, namely the absolute level of RMBS, and whether there is any shortage of RMBS against necessary mortgage credit. There is nothing in the Treasury Housing Reform Plan that statistically demonstrates the need for more RMBS, or that regulation is choking off the overall issuance of RMBS. There seems to be a bias in the Treasury Housing Reform Plan to reduce the GSEs' relative share. We think that presents a broader policy that should be transparently presented for what it is--a discussion of the future role of the GSEs in RMBS finance. We also believe that the policy considerations of the requirements for RMBS issuances by agencies such as the FDIC and the National Credit Union Administration (NCUA) that currently apply Regulation AB II to nonpublic issuances[51] should

[45] Note 40, *supra*.
[46] *See* Capital Markets Report at 92.
[47] *See* Treasury Housing Reform Plan at 35 n.68, citing 12 U.S.C. §§ 1455(g) & 1723c, as exempting securities of Freddie Mac and Fannie Mae, respectively, "from the SEC's registration requirements, which includes the Regulation AB II disclosure requirements applicable to [private-label securitization]."
[48] *See* Treasury Housing Reform Plan at 39.
[49] Note 16, *supra*.
[50] Treasury Housing Reform Plan at 6.
[51] *See* 12 C.F.R. §§ 360.6(b)(2)(i)(A) & 709.9(b)(2)(i)(A) (regulations of the FDIC and the NCUA, respectively, which provide that the documents creating a securitization require information to be disclosed to investors that, at a minimum complies with the requirements of SEC Regulation AB "or any successor disclosure requirements for

be discussed directly in terms of the apparently desired – by some apparently very powerful constituency whose concerns for financial stability are secondary - renewed involvement of federally insured institutions in these assets, which in the absence of regulatory safeguards, are demonstrably toxic. As much as we appreciate the transparency of the technical inquiry itself as a technical inquiry, and the openness and availability of SEC staff to discuss the technical inquiry, we do not think either of these policies are transparently presented to the public for comment by a technical inquiry on data fields.

We do not see the logic of the entire economy continuing to bear the brunt of legislation and regulation responsive to a financial crisis that was caused by too-light RMBS regulation, from which the regulators now propose to grant just RMBS issuances a break. We see that there ***are*** drivers behind this initiative, but the ***who, why*** and ***what*** of these drivers are not being disclosed for public input. They should be before any loosening of RMBS regulation is further contemplated.

Thank you for the opportunity to comment.

Yours truly,

Jeremy D. Weinstein   Geoffrey F. Heffernan

cc: Congressman Mark DeSaulnier

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public issuances, even if the obligations are issued in a private placement or are not otherwise required to be registered)."