March 27, 2023

VIA ELECTRONIC MAIL (rule-comments@sec.gov)
Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Request for Public Comment Regarding Proposed Rule 192
"Conflicts of Interest Relating to Certain Securitizations"
File Number S7-01-23

Dear Ms. Countryman,

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to provide additional comments on proposed Rule 192 (the "Proposed Rule" or "Rule 192") under the Securities Act of 1933. When adopted in its final form by the Securities and Exchange Commission (the "Commission"), Rule 192 will implement Section 27B of the Securities Act ("Section 27B"),[2] which prohibits certain material conflicts of interest in securitizations, subject to the exceptions set forth therein. We have provided this day a separate comment letter that addresses the broad concerns of the ABS community,[3] but in this letter we would like to draw your attention to and provide comment on issues that relate to the potential application of the Proposed Rule in the specific context of tender option bond ("TOB") transactions. TOBs are a somewhat unique type of ABS and, as discussed below, the Proposed Rule would hinder their use with no clear regulatory benefit and might actually add risk to TOB sponsors in the process.

As the Commission is aware, TOBs are transactions in which, similar to repos, the TOB sponsor is seeking financing to carry the investment in the underlying municipal security or

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] Section 27B was added to the Securities Act by Section 621 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act").

[3] *See* SIFMA, the Asset Management Group of SIFMA and the Bank Policy Institute Comment Letter on Proposed Rule Implementing Rule to Prohibit Conflicts of Interest in Certain Securitizations (Mar. 27, 2023).

securities for a period short of the maturity of such security. TOBs are an important source of credit and funding for banks, investment companies and other investors in municipal credit. TOBs serve to indirectly support issuances of municipal issuers and provide an important source of liquidity for the municipal market. TOBs are also a consistent source of short-term investments for money market and other short duration municipal bond funds, which are the typical purchasers of a floating rate interest issued by the TOB (such interest, the "floating rate certificates" or "floater certificates"), with the TOB sponsor retaining a residual interest. TOBs are structured with a liquidity facility, often provided by the TOB sponsor,[4] that supports the ability of a floating rate investor to put their floating rate interests (the "floater certificates") back to the TOB sponsor on short notice. In certain circumstances, the TOB sponsor may also provide (or provide for) a credit enhancement of the underlying municipal security to align the credit risk of the floater certificates with the credit requirements of investors, such as money market funds, who are required by regulation (e.g., Rule 2a-7) and as per their by-laws or other investment guidelines to purchase eligible securities with minimal credit risk. Frequently, the underlying municipal securities are shown on the TOB sponsor's balance sheet via its residual interest ownership, even while such municipal securities have been deposited into the TOB trust.

In TOBs, it is contemplated that a TOB sponsor may at some point no longer have a need for, and hence will look to unwind, a TOB financing, and thereby once again own the underlying municipal security short of the maturity date thereof.[5] As mentioned above, in many cases the TOB sponsor will have provided (or provided for) a full credit enhancement in the form of a letter or credit or surety to guarantee payments on the underlying municipal security when due. In both circumstances, the interests of the investors in the ABS (i.e., the TOB floater certificates) and the TOB sponsor are aligned and the concerns the Proposed Rule is designed to address are not present.[6] Consequently, hedging with respect to such letter of credit or surety should be permitted and prohibiting the TOB sponsor from entering into a hedging transaction or a back-to-back surety arrangement is not only unnecessary given that alignment of interests, but it also exposes the TOB sponsor to credit risks it could otherwise have managed or avoided entirely.

Therefore, we suggest that the current exception provided in the Proposed Rule for risk mitigating hedging activities should clearly state that hedges with respect to the municipal securities underlying a TOB transaction are permissible and do not constitute a "conflicted transaction" to the extent the TOB sponsor provides credit enhancement on the underlying asset or the floater certificates.

[4] In some cases, the TOB sponsor engages a third-party bank to provide the liquidity facility.

[5] TOBs often require the underlying municipal securities to be sold at a designated date prior to maturity in order to meet structural requirements relating to the tax treatment of the TOBs transaction that the floater investors at that point have an opportunity to gain from their ownership interest in the underlying securities through their interest in floating rate certificates.

[6] We also note that, where such credit enhancement has been provided, investors are not relying entirely on the credit of the underlying asset, rather such investors also look to the credit of credit enhancer. In such cases investors are not exposed to the risk the Proposed Rule is designed to address, that is, sponsors who are seeking to profit from the negative performance of the underlying asset.

With respect to certain municipal securities the TOB sponsor may hold, the TOB sponsor may have entered into a transaction, at the time of issuance of such municipal security or otherwise, to hedge the TOB sponsor's exposure to the related municipal issuer, with such decision being made independently of any decision as to whether to place such municipal security in a TOB or how to otherwise finance such security. For instance, the TOB sponsor, typically a bank, might purchase a municipal security from a municipal issuer but separately, and in contemplation of such purchase, obtain a guaranty or other form of credit protection from an entity related to the municipal issuer or a third party.[7] The hedge might be for the duration of the municipal security, or more likely it might be for a much shorter period.

The decision to require and enter into a hedge on the underlying municipal security is made as part of the bank's credit function and is an element in the overall structuring of the transaction with the municipal issuer. The decision of the TOB sponsor as to how to fund the purchase, for example through a TOB transaction, is made separately, and is based mainly on considerations other than credit, such as the after-tax cost of funds,[8] capital treatment and similar factors, and is a treasury function; it is not based on the factors or practices the Proposed Rule attempts to address or prohibit. As such, we believe that if the TOB sponsor does decide to fund the purchase or to later carry the municipal security through a TOB transaction, it is not appropriate or otherwise necessary to treat the hedge, surety, guarantee or other risk mitigating arrangement associated with the original acquisition of the municipal security as a conflicted transaction.

TOBs are in general single-credit securitizations of municipal securities comprising high-grade obligors that generally also report under a continuing disclosure agreement on EMMA and/or, as discussed above, with municipal securities that have been credit enhanced by the TOB sponsor in order, in either case, to offer to investors a security with minimal credit risk to the typical purchasers of the floater certificates. The risks the Proposed Rule is designed to address are typically multiple-credit or pooled transactions, without liquidity or credit enhancement, in which it may be more difficult for the purchasers of the related ABS to perform diligence beyond statistical procedures and considerations with respect to the underlying assets. In a TOB transaction, the purchasers can make their credit decision based on an analysis of the municipal issuer, the structure of the municipal security, any public filings on EMMA and any credit enhancement provided by or on behalf of the TOB sponsor.

We therefore request the Commission to include in the risk mitigating hedging activities exception a statement that hedges with respect to the underlying assets in single-credit TOBs are permissible.

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[7] This might occur in so-called "direct purchase" transactions whereby banks and others negotiate purchases of municipal bonds directly from the issuers (as opposed to a market offering as underwriter or placement agent). Direct purchase has grown substantially and represents an important source of credit to municipal issuers and carries significant advantages under certain circumstances. These transactions often require the issuers or obligors to provide separate credit enhancement or to enter into a hedge transaction with the lending bank or other purchaser in order to provide additional assurance of repayment.

[8] The ability of the purchaser of the municipal securities that are the subject of the hedge to enter into a TOB transaction is central to the opinions rendered in connection with the issuance and sale of the municipal securities. Any limitation on an owner's ability to enter into a TOB will make it more difficult to hedge the municipal securities in the way they are currently hedged in the market.

If the Commission is unwilling to grant an outright exclusion for single-credit TOBs, we ask the Commission to consider providing the exception but conditioned on principles recognized by the Commission in connection with prior rulemakings, as discussed below.

In the joint statement accompanying the final risk retention rule[9], the agencies, including the Commission, indicated it would be permissible to enter into a credit protection transaction with respect to a retained interest (or, where permitted, in the underlying assets) so long as the credit enhancement benefits all investors or the TOB sponsor does not benefit from the hedge until all investors in the ABS are paid in full. Similarly, in the context of TOBs, the agencies added a clarification to the effect that the liquidity facility that supports payment of the tender option provided to the floater certificates (which might benefit the TOB sponsor if it retained floaters as part of an eligible vertical interest and thus violate the hedging prohibition) is not an impermissible hedge since it was seen as "an important aspect of the existing market practice *and alignment of interests* in these transactions."[10] The TOB floater holders are in no way disadvantaged by this subordination, and may potentially be helped. We therefore request that if the Commission is not willing to grant an outright exclusion for hedges on single-credit TOBs, then the Commission should grant an exclusion conditioned on the TOB sponsor taking action to assign, subordinate its right of payment on, or otherwise provide the benefit of, the hedge to the ABS investors ahead of the TOB sponsors benefit therefrom. To do otherwise would disadvantage those market participants the proposed rule purports to protect.

To summarize, we believe TOBs are a well-known form of securitization, akin to repo and securities lending finance, with unique features and functions, that are formed with high-grade or credit enhanced assets and which do not carry the risks the Proposed Rule is designed to address. We believe, therefore, that the risk mitigating hedging activities exception should clearly state that hedges with respect to the underlying assets in a TOB are permissible to the extent the TOB sponsor either (i) provides credit enhancement on the asset or the floater certificates or (ii) assigns, subordinates its right of payment on, or otherwise provides the benefit of, any such hedge to the floater certificate investors ahead of the TOB sponsor's benefit therefrom.

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[9] Regulation RR release pp. 267-269. "[The agencies] do not believe that the rule prohibits the retaining sponsor from benefiting from credit enhancements or risk mitigation products that are designed to benefit all investors in the securitization in which the sponsor is required to retain risk. . .." The agencies go on to state that while in general the hedging and transfer prohibitions in the statute are intended to ensure that the sponsor retains meaningful credit exposure to the securitized assets rather than credit exposure to a third party, and therefore would impose limits on a sponsor benefitting from asset-level or pool-level insurance that covered 100 percent of the credit risk of the securitized assets, the agencies indicated such arrangements would be permissible where "the sponsor's right to recover insurance proceeds from such hedges is subordinated to the payment in full of all other investors."

[10] Regulation RR release, p. 269 (emphasis added). "The agencies are clarifying that the liquidity support provided by a regulated liquidity provider in satisfaction of the requirements set forth in the tender option bond risk retention option described in section 10 of the final rule … is not subject to the prohibition on hedging and transfer … [T]he liquidity support is an important aspect of the existing market practice and alignment of interest in these transactions."

SIFMA greatly appreciates your consideration of the views set forth in this letter. We stand ready to assist the Commission in this important rulemaking effort and we would be pleased to have the opportunity to discuss these matters with the Commission and its staff.

If you have any comments or questions, please feel free to contact me at (212) 313-1130 (lnorwood@sifma.org), or our outside counsel, Chapman and Cutler LLP, attention: William A. Gray at (212) 655-2523 (wagray@chapman.com), John C. Ketcham, (202) 478-6471(ketcham@chapman.com), or Brittney S. Gillott at (312) 845-3839 (bgillott@chapman.com).

Sincerely,

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