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NCHELP

July 22, 2011

Office of the Comptroller of the Currency
250 E St SW Mailstop 2-3
Washington DC 20219
Docket No. OCC-2011-02
Via E-mail: regs.comments@occ.treas.gov

Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
1700 G St NW 4th FL
Washington DC 20552
RIN 2590-AA43
Via E-mail: regcomments@fhfa.gov

Jennifer J. Johnson
Secretary, Board of Governors
Federal Reserve System
20th St and Constitution Ave NW
Washington DC 20551
Docket No. R-1411
Via E-mail:
regs.comments@federalreserve.gov

Office of General Counsel
Regulations Division
Department of Housing and Urban Development
451 7 St SW Room 10276
Washington DC 20410-0500
Docket No. FR-5504-P-01
Via Federal eRulemaking Portal:
www.regulations.gov

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th St NW
Washington DC 20429
RIN 3064-AD74
Via E-mail: comments@fdic.gov

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F St NE
Washington DC 20549
File Number S7-14-11
Via E-mail: rule-comments@sec.gov

Re: Credit Risk Retention

Ladies and Gentlemen:

This is in response to the above described notice, as jointly issued by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the U.S. Securities and Exchange Commission, the Federal Housing Agency and the Department of Housing and Urban Development (collectively, the "Agencies") in which the Agencies proposed rules (the "Proposed Rules") implementing the credit risk retention requirements of section 15G of the Securities and Exchange Act of 1934 (the "Exchange Act"), as added by section 941 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

The National Council of Higher Education Loan Programs (NCHELP) appreciates the opportunity to comment on the Proposed Rules and their potential impact on our members. NCHELP is a trade association that represents a nationwide network of lenders, secondary markets, loan servicers, guaranty agencies, collection agencies, postsecondary schools and others who administer loan programs that make financial assistance available to students and parents to pay for the costs of postsecondary education. NCHELP members who issue securities to finance education loans include a variety of State public entities ("State Issuers"), nonprofit organizations ("Nonprofit Issuers") and for-profit corporations ("For Profit Issuers").

Securities issued to fund education loans are collateralized by two distinct asset classes: federally sponsored education loans made under the Federal Family Education Loan Program (the "FFELP" and "FFELP Loans") and supplemental education loans ("Supplemental Loans"). Such securities include conventional revenue bonds as well as conventional asset-backed securities. Securities issued by State Issuers to finance either FFELP Loans or Supplemental Loans and securities issued by certain Nonprofit Issuers to finance FFELP Loans may be issued on either a federally tax-exempt or taxable basis. Such securities are typically issued by State Issuers and Nonprofit Issuers on a nonrecourse basis with respect to the general assets of the issuer, but are secured by pledged collateral that may include an equity contribution. Securities issued by a State Issuer may also be secured by a "moral obligation" pledge by the sponsoring State (effectively assuring, subject to appropriation, the availability of State moneys to effect payment of all or a portion of debt service in the event of a revenue shortfall) or by other programmatic external credit support. Nonprofit Issuers include but are not limited to issuers whose activities are limited to comply with Section 150(d) of the Internal Revenue Code ("Code Section 150(d)" and "Qualified Scholarship Funding Bond Issuers"). We note that under Code Section 150(d), qualified scholarship funding bonds may be issued only by not-for-profit corporations that are formed at the request of a State or political subdivision exclusively for the purpose of financing FFELP Loans. For Profit Issuers include a range of regulated financial institutions and several registrants under the Securities Act of 1933.

It is far from clear that all of these securities could be, or should be, deemed within the scope of "asset-backed securities" for purpose of Section 3(a)(77) of the Exchange Act. However, as the Proposed Rules do not appear intended to give guidance on this point, we will reserve our comments as to this fundamental scope issue and will limit our comments on the Proposed Rules to the exemption sections that could apply to student loan ABS (§__.21 and §__.23) and the sections describing acceptable forms of risk retention (§__.4 through §__.11). Our specific comments on the Proposed Rules are as follows:

I. *The Agencies Should Maintain the Full Class Exemption for Securities Issued by State Issuers and Qualified Scholarship Funding Bonds*

First of all, to the extent that such securities might otherwise be determined to constitute "asset backed securities" for purpose of Section 3(a)(77) of the Exchange Act, we request that the current full class exemption set forth in §__21(a)(3)-(4) for securities issued by a State Issuer (including a political subdivision or public instrumentality of a State) and securities that meet the definition of a qualified scholarship funding bond be retained in the final rule. This exemption is vital to State Issuers and Qualified Scholarship Funding Bond Issuers who continue to struggle under current capital market conditions to refinance existing loan assets, including loan assets securing failed auction rate bond programs, and to fund Supplemental Loans to current students and new purchases of outstanding FFELP Loans on an economically feasible basis. As we hope you will appreciate, any lack of clarity on this point might seriously compromise efforts by these public purpose issuers who in most if not all cases do not have access to sufficient unencumbered equity to permanently comply with the risk retention requirements of the Proposed Rules. For this reason, we would respectfully request that the final form of the Proposed Rules or the accompanying Adopting Release explicitly confirm that this exemption extends to securities issued on a federally taxable as well as on a federally tax-exempt basis. There is no basis for believing that Congress intended to differentiate between these substantially identical securities or groups of public purpose issuers.

As noted in the Proposed Rules, Section 15G(c)(1)(G)(iii) of the Exchange Act, as added by the Dodd-Frank Act, provides that the risk retention rules shall provide a total or partial exemption for these types of securities.[1] The discussion states that the Agencies are proposing to fully exempt such securities from the risk retention requirements as an exemption that is appropriate in the public interest and for the protection of investors and expressly asks for comment as to this determination.[2] There can be no question that the Agencies' determination that a full exemption should be provided is correct. In case of State Issuers the security is a municipal security. In the case of a Qualified Scholarship Funding Bond Issuer, the issuer by definition is limited to performing the nonprofit function set forth in the Internal Revenue Code. There is no evidence that securities issued by State Issuers and Qualified Scholarship Funding Bond Issuers were affected in any way by the issues that the risk retention requirement was designed to address.

We note in passing that many of the student loan revenue bonds issued by our State Issuer and Nonprofit Issuer members would not appear to constitute "securitization transactions" for purposes of the Proposed Rules for reasons that may include the absence of an "issuing entity" as defined and, in certain cases, the absence of primary reliance upon the performance of the student loan collateral. Confirmation and clarification that this is the intended reading of these definitions would also be welcome.

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[1] 76 Fed. Reg. 24137 (April 29, 2011).
[2] Id.

II. *The Agencies Should Provide a General Asset Class Exemption for Asset-backed Securities Collateralized by FFELP Loans*

Second, we respectfully request that there be added to the Proposed Rules an additional full exemption applicable to any other security that is collateralized solely by FFELP Loans (and cash or investment securities consistent with rating agency approved criteria). While the Proposed Rules contain such a full general class exemption for certain securities backed by federally guaranteed assets, no such asset class exemption is provided for securities collateralized by FFELP Loans (and cash or investment securities consistent with rating agency approved criteria). The terms and conditions of FFELP Loans are set forth in Parts B and F of Title IV of the Higher Education Act[3] (the "HEA") and regulations and interpretative guidance promulgated by the federal Department of Education ("DOE") pursuant thereto (collectively, "HEA Requirements"). Under the HEA Requirements, FFELP Loans were originated by statutorily defined "eligible lenders". It also should be noted that all FFELP Loans that could become collateral for a security have already been made.[4] The HEA Requirements prescribe in detail mandatory origination, servicing and collection procedures. FFELP Loan funds must be used by the borrower to pay for the cost of education of an eligible student attending an eligible institution of higher education. FFELP Loans have federal guarantees administered by guaranty agencies on behalf of the DOE, which is ultimately responsible for payment of guaranty claims. So long as the FFELP Loans are serviced in accordance with HEA Requirements, 97 to 100 percent of the principal and interest on defaulted loans is guaranteed by the applicable guaranty agency, which pays guaranty claims with funds held in a "Federal Fund" that is owned by the United States.[5] Each guaranty agency is reinsured by the federal government pursuant to agreements between the U.S. Secretary of Education and the guaranty agency. In the event a guaranty agency is unable to meet its insurance obligations, the HEA provides that a holder of loans insured by the agency may submit claims directly to the DOE, which shall pay the holder of the loan the full insurance obligation.[6] The insurance of FFELP Loans under the HEA should properly be considered a federal guaranty.

This loan guarantee schema was designed to encourage lenders to make FFELP Loans available to borrowers, principally students without established credit histories, without primary reliance upon conventional credit criteria. As noted above, the HEA Regulations prescribe detailed origination, servicing and collection requirements. FFELP lenders and servicers are comprehensively regulated by the DOE, which closely monitors and audits the operation of all aspects of the program, both directly and through agents. Thus, securities collateralized by

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[3] See 20 U.S.C. 1071 et seq.

[4] Pursuant to section 2201 of the Health Care and Education Reconciliation Act of 2010 (Pub. L. 11-152), no new FFELP Loans could be originated after June 2010. However, there are approximately $400 billion in outstanding FFELP Loans. Many of these loans are or will be available for securitization, either because they are held on balance sheet by the holder or need to be refinanced.

[5] See 20 U.S.C. 1072a and 20 U.S.C. 1078(b)(1)(G).

[6] See 20 U.S.C. 1082(o).

FFELP Loans meet the criterion, described in the discussion to the Proposed Rules, that the "federal department or agency issuing, insuring or guaranteeing the ABS or collateral would monitor the quality of the assets securitized consistent with the relevant statutory authority."[7]

We do not read the Dodd-Frank Act as providing that, as a prerequisite for coverage under the federal guarantee exemption, the guaranty be 100 percent. In the case of the FFELP, the guaranty covers substantially all of the collateralized asset and, as noted, significant additional federal payments and oversight apply. We think this level of insurance coverage and involvement should be recognized as being sufficient to meet the statutory exemption. We note that some of the asset classes that the discussion to the Proposed Rules implies would be fully exempt from the risk retention requirement are assets that have much lower coverage of their federal guaranty (for example, the discussion in the Proposed Rules indicates that the Department of Veterans Administration guarantees between 25 and 50 percent of lender losses due to borrower defaults would qualify under the exemption for securities collateralized solely by assets insured or guaranteed as to principal and interest by the United States or an agency of the United States).[8] Absent an exemption, there would be the anomalous situation under which a 5 percent risk retention requirement would be applied to an asset where, at most, 3 percent of the asset is at risk.

For all of the above reasons, we believe the federal guaranty under the FFELP warrants a general asset class exemption for asset-backed securities collateralized by FFELP Loans.[9] Such a general class exemption would be justified under section 15G(c)(1)(G)(i) of the Securities and Exchange Act of 1934, as added by the Dodd-Frank Act, because it is appropriate for the public interest and for the protection of investors. The Agencies should recognize that all FFELP Loans that may become collateral have already been made, that they were made under underwriting criteria established by the federal HEA Requirements and that under the HEA they benefit from substantial federal guaranty and other federal subsidies that result in very low credit risk. The public interest would be also furthered by a general class exemption because it would facilitate the refinancing of existing loans, which might otherwise be required to be held on balance sheet by lenders, tying up capital that would be better put to use in financing new assets and stimulating the economy. We note in this connection that (i) Section 15G(e) of the Exchange Act, as added by the Dodd-Frank Act, authorizes the Agencies to issue exemptions for securitizers of assets that satisfy underwriting standards and risk management practices

[7] 76 Fed. Reg. 24137 (April 29, 2011).
[8] 76 Fed. Reg. 24136 (April 29, 2011).
[9] Approximately 10% of outstanding FFELP Loans currently serve as security for an asset-backed commercial paper program, Straight-A Funding LLC, set up in 2009 under a program announced by the U.S. Department of Education, the Department of the Treasury and the Office of Management and Budget. A number of NCHELP members, including State Issuers, Nonprofit Issuers and For Profit Issuers, participate in this funding vehicle. In a comment letter on the Proposed Rules dated July 15, 2015 filed by BMO Capital Markets Corp. as Manager of Straight-A Funding, LLC, the Manager recommends that the Agencies take action to ensure that the risk retention requirement does not apply to the Straight-A Funding program. NCHELP endorses this request. Among the requests in the letter is that the Agencies provide an exemption for FFELP student loan backed securities which would be broad enough to cover the Straight-A Funding program.

specified by the Agencies, and (ii) Section 15G(c)(2)(B) of the Exchange Act, as added by the Dodd-Frank Act, authorizes the Agencies to set separate rules for asset classes that the Agencies deem appropriate, provided the underwriting standards set by the Agencies indicate a low credit risk with respect to the loans. Thus, it is clear that the Agencies have the statutory authority to recognize an exemption for FFELP ABS. For all of these reasons, we believe an adjustment of the credit risk retention requirement for FFELP ABS down to zero would be appropriate.[10]

III. The Agencies Should Provide an Exemption for Securities Issued by Nonprofit Issuers that Are Backed by Supplemental Loans

Securities issued to fund education loans also include securities backed by Supplemental Loans. We have two comments with respect to this type of security. First, we note that the exemption in the Proposed Rules for securities issued by a State (or a political subdivision or public instrumentality of a State) includes securities backed by Supplemental Loans. We think there is a similar justification for excluding securities issued by other nonprofit issuers of securities that have received 501(c)(3) designations under the Internal Revenue Code. In both cases, the issuers are normally required to use all surpluses for their charitable and nonprofit purposes. Based on their missions, these Nonprofit Issuers are restrained in their ability to accumulate the surpluses that might be necessary to meet the risk retention requirement under the Proposed Rules. In fact, accumulation of capital could be inconsistent with the public mission of nonprofit student loan issuers. Subjecting these issuers to the risk retention requirement would interfere, and perhaps totally impede, with the ability of these Nonprofit Issuers to provide low cost education loans in accordance with their public missions.[11]

Also, in most cases, nonprofit student loan issuers do not use special purpose funding vehicles (SPV's) as in traditional securitizations. To the contrary, nonprofit student loan issuers directly issue limited recourse revenue bonds that are secured by and payable from the pledged student loans financed. In addition, nonprofit student loan issuers retain the residual interest in their financings. The issuers are therefore incentivized to carefully underwrite and monitor the assets they originate and securitize. In fact, not only do nonprofits maintain the residual, they <u>own</u> all of the student loans on their balance sheets throughout the term of the security. Thus, they retain far more than 5 percent of the credit risk of the securitized assets. They retain all of the securitized assets and are vulnerable to losing them to foreclosure under their financing if there is a default in one of their securitization transactions. This result is completely different than the result in a traditional securitization structure, in which the sponsor sells the securitized assets, directly or indirectly, to the issuing entity for cash, with the issuing entity, and not the sponsor,

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[10] At a minimum, we suggest that the risk retention requirement be based on the uninsured portion of the collateral. Thus, for example, for a loan subject to 97% insurance, the risk retention requirement could be based on 5% of the 3% uninsured portion.

[11] The requested exemption could be limited to securities backed by Supplemental Loans that meet certain underwriting criteria. If the Agencies decide to pursue this approach, NCHELP stands ready to provide suggestions on appropriate criteria.

having "skin in the game." The misalignment of interests in certain ABS transactions (not involving student loans) was the basis for the risk retention requirement. However, this concern does not exist in the case of securities where the originator/issuer retains the residual, owns all of the assets on its balance sheet throughout the term of the security and oversees servicing throughout the term of the security. Indeed, the interests of Nonprofit Issuers that retain the pledged assets are not only aligned, but are intertwined, with the interests of investors throughout the term of the security. For these reasons, we believe special consideration should be given to Nonprofit Issuers of Supplemental Loan securities because it is in the public interest and for the protection of investors. At a time when students and their families are looking for funds to pay for increasing college costs, many nonprofit public benefit companies are the best source of funding as their mission is to offer the lowest cost loans available. Imposing risk retention on these types of entities will reduce competition among providers and ultimately lead to the unintended consequence of higher costs for students and families. The Agencies have authority to grant this exemption to the risk retention requirement for Supplemental Loan securities issued by State Issuers and Nonprofit Issuers under Section 15G(c)(1)(G)(i) of the Exchange Act, as added by the Dodd-Frank Act, because it would be appropriate in the public interest and for the protection of investors. The nonprofit mission of helping families obtain affordable financing to cover the cost of higher education seems to be precisely the type of public interest exemption to the risk retention requirement that the statutory authority set forth in Section 15G(c)(1)(G)(i) is designed to provide. The importance of this nonprofit mission will be compounded as the costs of higher education continue to increase dramatically.

IV. The Agencies Should Provide Flexibility in Meeting the Risk Retention Requirements

Finally, we commend the Agencies for development of a full menu of permissible forms of risk retention. We believe this full menu, including both the horizontal and vertical slice options, should be retained in the final rule. However, we request that the final rule make clear that any initial equity contribution or other overcollateralization required by the rating agencies or financial markets be specifically included as an acceptable form of risk retention and counted in meeting any risk retention calculation.

Thank you for the opportunity to comment on the Proposed Rules. Should you have any questions, please contact me at 202-721-1195 or shelly_repp@nchelp.org.

Sincerely,

Sheldon D Repp

Sheldon Repp
President