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July 28, 2011

Department of the Treasury
Office of the Comptroller of the Currency
Docket No. OCC-2011-0002

U.S. Securities and Exchange Commission
File Number S7-14-11

Federal Reserve System
Docket No. R-1411

Federal Housing Finance Agency
RIN 2590-AA43

Federal Deposit Insurance Corporation
RIN 3064-AD74

Department of Housing and Urban Development
Docket No. FR-5504-P-01

Re: Credit Risk Retention

Ladies and Gentlemen:

This letter is in response to the request for comments on the proposed credit risk retention rules (collectively, the "Proposed Rules") jointly proposed by the Office of the Comptroller of the Currency, the Federal Reserve System, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the Federal Housing Finance Agency and the Department of Housing and Urban Development. Capitalized terms used herein and not defined shall have the respective meanings ascribed thereto in the Proposed Rules.

Please note that the comments contained herein express solely the views of Kutak Rock LLP and may not necessarily represent the views of any or all of our clients.

As a general matter, we believe that the Proposed Rules should be reconsidered wherever possible to encourage private sector investors and private entities to become more involved in the securitization process. While we understand that the Dodd-Frank Act has been adopted and is in effect, we believe that it unfortunately contemplates a "one size fits all" approach to all securitizations. However, that Act does provide much discretion to the Agencies and the Commission in enacting details thereunder and providing asset class exemptions that should be used to provide such private sector encouragement[1] and to promote economic growth and job creation.

[1] See, S. Rep. No. 111-176, at 130.

Section II. General Definitions and Scope

Q. 2. See comment regarding Q. 6. below.

Q. 6. We believe that, generally, the definitions are helpful and necessary. In particular, the definition of "asset" would be very helpful because it would add flavor to the term "asset-backed security." In this regard, the definition of "asset-backed security" in Section 3(a)(77) of the Exchange Act is extremely broad and can be read to include much more than traditional securitizations.

For example, for purposes of a "collateralized bond obligation" or a "collateralized debt obligation" it would appear that a bond or a debt secured by a single loan or project can be contemplated by the definition. In this regard, it is not unusual to issue a bond to finance a real estate or other project that is collateralized by a loan made on the project or by the project itself, with the loan proceeds or project revenues being used to pay off the bond. Also, municipal industrial development bonds are similar and may be read to be included in the definition.[2] Neither of these situations would appear to be contemplated by Section 15G, but clearly could be read to fall within the definition if a definition for "asset" or other relevant definitions are not included. Likewise, it is unclear whether the Section 3(a)(77) definition is meant to relate only to a "pool" of assets and, if so, what would constitute such a pool. One asset or loan or multiple assets and loans?

Section III. General Risk Retention Requirement

Q. 88(a) and (b). We believe that the minimum allocation of risk to originators be set at 10 percent. Ten percent is generally considered a material amount, at least for securities law purposes, and appears to be a sufficient threshold to ensure that an originator who has been allocated such risk has an incentive to monitor the collateral pool. However, please note the following paragraph.

Q. 89(a) and (b). We believe there clearly should be a mechanism constructed allocating risk to multiple originators because if there are multiple originators they will not want to accept risk for assets originated by other originators over which they have no control and which they did not originate. If an originator is allocated such risks, in all likelihood they would not accept any such allocation relating to assets originated by others and would probably have no incentive to accept risk after all of their own assets have paid out or are no longer in the securitization. In this regard, the rules should be written such that the sponsor would retain any risk not accepted by an originator.

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[2] We note that a traditional industrial development bond issued by a municipality or other state agency may be exempt from the Proposed Rules, but the underlying loan to a private entity is itself considered a separate security under Rule 131 of the Securities Act. It is unclear whether this would cause these collateralized bonds to be subject to the Proposed Rules. See our comment regarding Q. 166(b) below.

Q. 93(a) and (b). The sponsor should be required to enter into a written agreement with an originator retaining credit risk. We believe that if an originator fails to comply with the retention, the sponsor should be relieved of any liability so long as the sponsor acted in good faith in allocating the risk. In this regard, it is unclear what the consequences would be if an originator accepting credit risk files for bankruptcy or becomes insolvent.

Q. 94(a). See response above to Q. 93(a). The written agreement should provide that the investors and any trustee be third-party beneficiaries under such agreement allowing them to enforce it if so desired.

Section IV. Reduced Risk Retention Requirements

Q. 152. In line with our general observation above, we believe that additional asset classes should be addressed by the Proposed Rules. Initially, it should be noted that real estate related securitizations were the asset class most responsible for the credit crisis. Beyond this observation, however, the Board of Governors of the Federal Reserve System's Report to Congress on Risk Retention focused on additional asset classes that should be addressed in the Proposed Rules. These most noticeably included student loan, credit card and equipment lease securitizations[3]. It would appear that there is no valid justification for not at least addressing these asset classes in the Proposed Rules because not doing so, keeps their risk retention requirement at five percent. In particular, it should be noted that the Board Report indicated little or no downgrades with respect to these asset classes by Standard & Poor's. In this regard, what is extremely surprising with respect to the Board Report is that there is no information included showing the magnitude of defaults on asset-backed securities discussed therein. Downgrade information was included, but just because securities are downgraded does not necessarily mean that the securities defaulted and caused losses to investors. Moreover, there was no information provided that compared losses on the different asset class securitizations to losses on other non-securitized debt obligations. Not providing such information makes it extremely difficult, if not impossible, to conduct a cost-benefit analysis with respect to the Proposed Rules.

With respect to student loan, credit card and equipment lease securitizations, the Board Report provided little information on default rates relating thereto and, thus, no justification is provided therein or in the Proposed Rules for keeping the credit risk retention at five percent for those asset classes. We understand that this failure of analysis is "water under the bridge" at this point since the Dodd-Frank Act is now effective, but that Act provides sufficient authority for the Agencies and the Commission to correct its short-comings. We disagree with the observation in the last paragraph of Section V.A. of the Proposed Rules that student loan, credit card and equipment lease assets are not homogeneous and are "assets that by their nature exhibit relatively high credit risk." With respect to credit risk, one has only to review the Board Report to see that it is not the case for these asset classes, and in the case of government guaranteed student loans,

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[3] While we have specifically identified these three asset classes, other asset classes that have not historically shown significant credit risk may be appropriate to be addressed in the Proposed Rules as well.

they are 97% guaranteed by the federal government. As far as homogeneity is concerned, most securitizations involving these asset classes are not pools originated by multiple originators, but rather from a single originator or related originators involving consistent underwriting criteria. Our experience is that CMBS involves much more heterogeneity than these asset classes and, therefore, rules with respect thereto should be much easier to establish.

We are unable to provide data with respect to performance for these asset classes, but from the data provided in the Board Report with respect to securities downgraded or likely to default with respect to these assets, it would appear that the performance for these asset classes has been good and provide low credit risk. Since there appears to have been little or no justification for including these asset classes in the risk retention rules to begin with, we believe that the Agencies and the Commission, and not commentators, should include justification for continuing to make them subject to the full breadth of the credit risk retention rules. Furthermore, we believe that ignoring these asset classes is completely arbitrary and should be seriously reconsidered.[4]

Section VI. General Exemptions

Q. 162. We believe the exemption of section 15G(e)(3)(B) of the Exchange Act is appropriately implemented. By authorizing the insurance or guaranty program in question, the Congress has indicated the purposes of the program are of significant value to our country. Limiting the exemption would clearly detract from the Congressionally approved public purposes of the program. Moreover, the Congress can limit the ability of the marketplace to securitize any insured/guaranteed obligation, such as is the case for FHA insured obligations where the FHA insurance only can run to an FHA-approved mortgagee. It would seem inappropriate to not fully implement the exemption – and thus lessen the value of the program in question – absent clear Congressional direction to do so.

Q. 163. Yes. See Q. 162 addressed above.

Q. 164. As discussed in Q. 162 above, we believe it inappropriate to second guess the Congress' clear intent to not restrict the programs in question, particularly recognizing that Congress can (and has) already done so where it has deemed it appropriate. Nevertheless, if the Agencies and the Commission believe they have a superseding mandate, it would seem that any guaranty or insurance program should be exempt if it provides at least the same amount of coverage as the risk retention requirement.

Q. 166(a). Yes it is appropriate. Public policy and comity clearly support the exemption. Moreover, historical data demonstrate that State and municipal securities are far less risky than other ABS.

[4] See, *Business Roundtable and Chamber of Commerce v. SEC*, DC Circuit (July 22, 2011).

Q. 166(b). As described in Q. 6. above, there are often securities issued by a municipal entity and exempt by reason of Section 3(a)(2) of the Securities Act, where the proceeds are used, under a lease, sale or loan arrangement, by or for an industrial or commercial enterprise. In such case, under Rule 131 of the Securities Act of 1933, the lease, sale or loan to a private enterprise is deemed to be a security separate from the Section 3(a)(2) security and such separate security is often secured by the project financed. We believe that both the municipal security and the separate security should be exempt from the Proposed Rules because if one is subject to the Rules, the other also will have to be structured to comply with the Rules. In addition, any lease, sale or loan constituting a separate security is constrained by the public purpose doctrine applicable to municipal entities. As a result, we suggest that the Proposed Rules make clear that any separate security is also specifically excluded pursuant to Section 15G(c)(1)(G)(iii) of the Exchange Act. To not do so would be inconsistent with the statutory construct of "private activity bonds" specifically authorized by Sections 141-150 of the Internal Revenue Code of 1986 (and before that Section 103 of the Internal Revenue Code of 1954) which date back to the 1960s.

Q. 166(c). Securities issued by entities that are so-called "on behalf of" entities created by municipal entities should likewise be exempt from the Proposed Rules since the Commission has historically, through no-action letters, deemed such securities to be exempt under Section 3(a)(2) of the Securities Act.

Q. 166(d). Yes, if the securities are otherwise exempt pursuant to Section 3(a)(2) of the Securities Act, we believe they should be exempt from the Proposed Rules – even if the municipal issuer appears to use the same underwriting criteria as a private label securitizer. State and municipal issuers are required by state constitutions to carry out a "public purpose", making a profit is not a state constitutional public purpose. As a result state and municipal issuers usually impose programmatic requirements which do not, on their face, appear to impose additional credit criteria but, in reality, result in better credits. Moreover, States and municipal issuers have a track record of pro-actively working with debtors to avoid defaults – part of their public purpose mission. Private securitzers have no such purpose or legal directives.

Section VIII. C. Administrative Law Matters

We suggest that the Commission's Economic Analysis be expanded to include reasonable, estimated dollar costs for the Proposed Rules so that a cost-benefit analysis can be conducted in order to ensure that the regulatory consequences on economic growth and job creation can be properly analyzed. We also suggest that the Commission's Economic Analysis should be expanded to include a discussion of the estimated cost involved in not addressing the asset classes discussed above (e.g. student loans, credit cards and equipment leases (among others)).[5] These costs are as real as the asset classes identified in the Proposed Rules and should be addressed to avoid creating unnecessary and burdensome rules that affect economic growth

[5] *Id.*

and job creation. The analysis should also be expanded to include a discussion of the benefits (if any) for not exempting these asset classes from the full breadth of the Proposed Rules.

We also note that the Commission has proposed various rules with respect to asset-backed securities, in addition to the Proposed Rules. We believe that the cost-benefit analysis for the Proposed Rules and these other proposed rules should be aggregated, because the costs of the entire integrated package may be more than the sum of the individual asset-backed proposals.

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If you would like to discuss any of our comments, please contact Bob Ahrenholz at (303) 297-2400 or John Wagner at (402) 346-6000.

Sincerely yours,

Robert J. Ahrenholz

John J. Wagner