



The City of New York  
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**Mark Page**  
*Director*

November 12, 2010

*VIA EMAIL: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)*

Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090  
Attn: Elizabeth M. Murphy, Secretary

Re: Implementing Rules relating to Risk Retention, Repurchase Requests, Due Diligence Disclosure and Conflicts of Interest in Asset-Backed Securities Offerings pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act")

Ladies and Gentlemen:

The City of New York (the "City" or the "City of New York"), as sponsor of the tax lien-backed securities ("TLBS") described herein, submits this letter in response to the request for comments made by the Securities and Exchange Commission (the "SEC") in Release Nos. 33-9150, 34-63091 dated October 13, 2010 (the "Due Diligence Proposing Release") relating to review of assets in offerings of asset-backed securities, the request for comments made by the SEC in Release Nos. 33-9148, 34-63029 dated October 4, 2010 (the "Repurchase Requests Proposing Release") relating to the disclosure of fulfilled and unfulfilled repurchase requests in connection with alleged breaches of representations and warranties in asset-backed securities offerings, and to express our views regarding the implementation of Section 621 of the Act in connection with conflicts of interest and Section 941 of the Act in connection with credit risk retention.

We commend the SEC for inviting comments both in response to and prior to proposing rules on these issues. We hope that our comments in both this letter and our letter of July 30, 2010 in response to the request for comments in Release Nos. 33-9117, 34-61858 dated May 3, 2010 provide useful insight as the SEC undertakes this important task.

### **Background**

The New York State Constitution authorizes the City of New York to levy and collect taxes on real property for any public or municipal purpose. The City levies taxes and other special charges on real property pursuant to the provisions of the New York State Real Property Tax Law, the City

Charter and the City Administrative Code. Under these laws, all real property taxes, assessments and sewer and water charges become liens on the day they become due and payable if unpaid. These taxes, assessments and charges, and any related tax liens, arise by operation of law and do not involve an extension of credit by any party or any underwriting decision on the part of the City. The liens securing unpaid property taxes, assessments and sewer and water charges are sold by the City through its tax lien securitization program described below. The City does not engage in a selection process; rather, virtually all qualified tax liens (with the limited exception described below) are securitized.

The City of New York has the right to sell unpaid tax liens, together with interest, penalties and costs of advertisement or notices of such sales. Applicable laws impose certain requirements on such sales, including that the taxes must be in excess of \$1,000 and a certain number of months past due to be eligible for sale, and that multiple notices to property owners of each lien sale must be provided prior to sale.

Since 1996, the City has sold 16 pools of tax liens to special purpose entities, each a Delaware business trust created by the City (each, an "Issuer"), which issued securities to third-party investors in one or more classes backed by such tax liens. In the case of each such sale, many delinquent property owners paid their delinquent taxes after the notice of sale was given by the City and before the applicable sale date. As a result, the tax lien sale program is an exceedingly effective means of collecting delinquent taxes not only because of the receipt of the proceeds of the sale of the tax lien-backed bonds but also because of the acceleration of collections from property owners who voluntarily pay their delinquent taxes prior to the tax lien sale. In fact, the tax lien sale program is the City's primary means of enforcing the payment of delinquent property taxes and water and sewer charges. Property taxes constitute the single largest source of the City's revenues. The ability to continue this program in an efficient and cost-effective way is crucial to the City's continuing fiscal stability.

In the City's tax lien securitization program, the structure of the securities is very simple. A single class of bonds or, in some transactions, a senior class of bonds and up to three subordinate classes of bonds are issued, all of which are rated investment grade. Credit enhancement is provided in the form of the overcollateralization provided by the residual interest in the pool and, if subordinate certificates are issued, by the subordinate certificates. No payments are made to the holder of a residual interest until the bonds are paid in full. If subordinate bonds are issued, then senior and subordinate bondholders receive their interest payments in order of priority, followed by principal payments due to them on a pro rata basis, unless the securities become undercollateralized due to losses. In that case, the senior certificateholders receive the principal payments due them before the subordinate certificateholders receive their principal payments. The City holds the residual interests in the pools of tax liens and receives net collections generated from the lien pools only after all bonds have been retired.<sup>1</sup>

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<sup>1</sup> The City holds the residual interests in the pools of tax liens because retaining the residual cash flows from the tax liens has been the most fiscally efficient structure for the City. The amount of the residual interest is the amount of credit enhancement necessary to support the desired rating(s) on the bonds. The City's retention of these interests is in no way intended to achieve an alignment of incentives or ensure that only high quality assets are included in the pools. That amount has generally ranged from approximately 5% where subordinate investment grade bonds are issued to as much as 40% where only AAA-rated bonds are issued.

The securities in each series of the City's TLBS have been sold to an initial purchaser(s) in reliance on Section 4(2) of the Securities Act of 1933 (the "Securities Act") and immediately resold (and eligible for further resale) privately to "qualified institutional buyers" in reliance on Rule 144A under the Securities Act.<sup>2</sup>

### I. Risk Retention Requirements

The City of New York respectfully submits that municipally-sponsored securitizations of tax liens should be exempt from regulations as to risk retention prescribed in accordance with Section 941 of the Act, because the concerns that these requirements are meant to address are not evident in such securitizations. In Section 941(e)(2) of the Act, Congress sets forth standards for the Federal banking agencies and the SEC to follow in adopting or issuing exemptions, exceptions, or adjustments to the risk retention rules, which are to "(A) help ensure high quality underwriting standards for the securitizers and originators of assets...; and (B) encourage appropriate risk management practices by the securitizers and originators of assets, improve the access of consumers and businesses to credit on reasonable terms, or otherwise be in the public interest and for the protection of investors." In the recommendations presented in the report prepared by the Board of Governors of the Federal Reserve System (the "Board") in October 2010, the Board states that "[b]y requiring that securitizers or originators retain a portion of the credit risk of securitized assets (unless the assets meet high quality underwriting standards), section 941 appears primarily aimed at reducing the potential incentive of an originator or securitizer to securitize poor quality assets."

As noted in the "Background" section above, the tax liens arise by operation of law and are not originated pursuant to the application of underwriting standards. In addition, virtually all qualified tax liens are sold, other than tax liens that the City of New York determines not to sell because of housing policy considerations. No other selection decisions are made. Accordingly, there is no need to build in incentives to ensure that high quality underwriting standards are upheld or that only high quality assets are chosen for the securitization pool. Imposing risk retention requirements on the City will not affect the characteristics of the tax liens that are securitized in any way, will not provide any benefit to investors, and will only increase the burden on the City.

The tax lien securitization program is a critical element of the City's exercise of an essential governmental function – to assess and collect taxes. Performing this function in the most efficient and cost-effective manner is in the public interest. Compliance with the proposed risk retention rules would substantially increase the City's burden of exercising this governmental function and reduce the revenues the City is able to realize from the program without providing offsetting benefits to investors.<sup>3</sup>

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<sup>2</sup> While the market views the City's TLBS as asset-backed securities, we note that the City's TLBS do not meet the Act's definition of "asset-backed security" because tax liens, by their nature, are not self-liquidating assets. The tax liens arise because property owners are delinquent in the payment of taxes and assessments and, as a consequence, tax liens do not satisfy the delinquency and non-performing standards that the SEC applies to the concept of self-liquidating assets, as codified in the Regulation AB definition of "asset-backed security."

<sup>3</sup> We note that Section 941 of the Act directs that the prescribed regulations specifically provide for "the full or partial exemption of any asset-backed security that is...exempt from the registration requirements of the Securities Act of 1933 by reason of section 3(a)(2) of that Act..." The City's securitization program could be structured in such

As noted above, the City historically has retained the residual interests in the trusts. If the SEC nonetheless determines to impose risk retention requirements on the City in its program, we respectfully request that such requirement be satisfied by a 5% first loss position.

## II. Disclosure of Repurchase Requests

The City of New York respectfully submits that municipally-sponsored securitizations of tax liens should be exempt from Section 943 of the Act. Section 943 states that the aim of the requirement of a securitizer to disclose fulfilled and unfulfilled repurchase requests is to help investors “identify asset originators with clear underwriting deficiencies.” As mentioned above, the tax liens arise by operation of law. No underwriting occurs, and no underwriting standards of any type are applied. Other than to exclude certain tax liens that the City may choose not to sell for housing policy reasons, the City makes no decisions as to which tax liens are included in the tax lien pool. Moreover, the City of New York is the only consistent issuer of tax lien securitizations. Thus, no comparison between issuers is possible.

While the City believes that an exemption to this regulation is appropriate because the issue that it is meant to address does not apply to the New York City tax lien securitization program, the City requests that, failing a full exemption from the regulation, it be required to disclose such information on an annual or quarterly, rather than monthly, basis. The offering documents and quarterly payment date statements provided to investors already include information as to the repurchase of tax liens due to breaches of representations and warranties. Payments on the TLBS are made quarterly, not monthly. Disclosure under Section 943 of the Act, if required, should be annual or should coincide with the timing of payments and other reporting to investors.

## III. Due Diligence

The City of New York respectfully submits that the requirements set forth in Section 932(s)(4) of the Act, which require the issuer or underwriter of any asset-backed security to make publicly available the findings and conclusions of any third-party due diligence report obtained by the issuer or underwriter, should not be applied to municipally-sponsored tax lien securitization programs. We believe that the purpose of Section 932(a)(4) of the Act is to require an issuer or underwriter to disclose the assessment of a third party as to the conformity of the assets underlying a securitization to the underwriting criteria and characteristics disclosed. The City does not employ a third party to undertake this type of review. The City does, however, utilize the services of a third party to confirm whether the tax liens identified by the City, in fact, qualify for sale. In other words, the third party does not validate whether the information provided with respect to the characteristics of the tax liens is accurate and in conformance with underwriting criteria, but instead deems the information to be accurate and determines whether, based on this information, the tax liens qualify for sale under the applicable statute. Because only tax liens that this third party determines will qualify are included in the pool, disclosing the results would not provide any meaningful information

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a way that it falls under this exemption, but in the past has chosen not to do so for reasons of administrative convenience and cost reduction. While the City of New York TLBS do not comply with the technical requirements of Section 3(a)(2) of the Securities Act, the policy reasons for exempting assetbacked securities relying on Section 3(a)(2) from risk retention requirements apply equally to the City of New York TLBS.

to investors. In addition, the rejection of any tax lien that is determined not to qualify for sale does not indicate that the City has originated or chosen liens that do not meet underwriting standards or selection criteria, because there are no underwriting standards or selection criteria applicable to this type of asset. Although we believe that the type of third-party review that is undertaken in the City's tax lien securitization program arguably is not encompassed by the proposed rules, we are concerned that the description of third-party due diligence provider is overly broad and would potentially include such a review.

Similarly, the City of New York does not believe that accountants' agreed-upon procedures or attorneys' security interest opinions are meant to be treated as a third-party due diligence report for purposes of Section 932(s)(4) of the Act. For the New York City tax lien securitization program, accountants compare information in a tax lien data file provided by the City against documents provided by the City in support of the information in the data file. The accountants do not assess the accuracy or completeness of the information provided. The context of Section 932(s)(4) of the Act suggests that the third-party due diligence reports covered in this section are those that report on the accuracy of asset level information.

The costs of publicly disclosing the findings and conclusions of third-party due diligence reports would impose a significant financial burden on the City. In turn, as discussed above, this type of due diligence information is of little benefit to investors.

#### **IV. Conflicts of Interest**

The City of New York respectfully submits that municipally-sponsored tax lien securitization programs should be exempt from the rules promulgated pursuant to Section 621 of the Act. We believe that the overriding aim of Section 621 of the Act is to prohibit an entity in a position to do so from designing a security to fail so as to enter into another transaction that will benefit from such security's failure. The City, as a governmental entity, is not among the actors that this section is intended to regulate. As noted above, the City does not make any decision as to which tax liens are included in a securitization pool. The tax liens arise by operation of law, and other than tax liens excluded for housing policy reasons, virtually all qualified tax liens are securitized. Because of the nature of municipally-sponsored securitizations of tax liens, including that they do not entail a selection of assets based on credit quality, it would be virtually impossible for a municipal sponsor to design securities that would be more likely to fail.

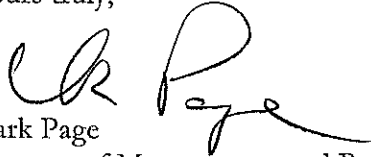
However, while the application of the rules promulgated under Section 621 of the Act to municipal entities would not further the intended aims, it could in fact have significant unintended and costly consequences. Many actions that the City of New York takes in the exercise of its governmental powers pursuant to other statutes or regulations or to serve the public's interest and protect the health and safety of its residents could potentially be viewed as being in conflict with the interests of investors in the tax lien-backed securities. For example, the City could take an action that would adversely impact the value of one of the properties securing a tax lien or the value of other properties in that area, which could adversely impact the value of that property. It would pose an undue burden on the City to be required to evaluate each such action to determine whether such a conflict might arise. In addition, any activity that might potentially be subject to the rules could then be frustrated, which would unduly restrict the City's exercise of its governmental powers with no offsetting benefit to investors. While crafting rules that clarify what the SEC considers to be a material conflict of interest may serve to address many of the City's concerns, we respectfully

request that the City nonetheless be exempted from the rules implementing Section 621 of the Act to eliminate all potential confusion and in light of the critical governmental function the TLBS program helps to achieve.

The City of New York appreciates the opportunity to comment on the implementation of the Act. Because tax liens arise by operation of law, do not involve the extension of credit to a borrower and do not entail any underwriting decision on the part of a municipality, municipal issuers of tax lien-backed securities should not be subject to rules meant to improve the quality of underwriting practices. Tax lien securitizations play a significant role in New York City's exercise of an essential government function, and the City hopes to be able to continue to do so in as efficient and cost-effective a manner as possible.

Please do not hesitate to contact Katharine I. Crost, Esq. of Orrick, Herrington & Sutcliffe LLP at (212) 506-5070 or Albert F. Moncure Jr., Esq., Chief, Municipal Finance Division, New York City Law Department at (212) 788-1160 should you have any questions or desire clarification concerning the matters addressed in this letter.

Yours truly,

A handwritten signature in black ink, appearing to read 'Mark Page', written in a cursive style.

Mark Page  
Director of Management and Budget  
The City of New York