December 14, 2010

The Honorable Timothy F. Geithner
Secretary of the Treasury
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Ben S. Bernanke
Chairman
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue
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John E. Bowman
Acting Director
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John G. Walsh
Acting Comptroller of the Currency
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The Honorable Mary L. Schapiro
Chairman
Securities and Exchange Commission
100 F Street, NE
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The Honorable Sheila C. Bair
Chairman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429-9990

Re: Implementing Provisions of the Dodd-Frank Act Relating to Risk Retention and Due Diligence for Corporate Debt Repackagings

Ladies and Gentlemen:

The American Securitization Forum ("ASF")[1] submits this letter to express our views relating to implementation of Section 941 (Regulation of Credit Risk Retention) and Section 945 (Due diligence analysis and disclosure in asset-backed securities issues) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act") for securities backed by corporate debt ("Corporate Debt Repackagings"). In particular, this letter discusses concerns regarding the possible application of these obligations to Corporate Debt Repackagings of the type described below to the extent such securities meet the definition of asset-backed securities under the Act. ASF supports reforms within the securitization market and we commend the regulatory agencies

[1] The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 330 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com.

for seeking industry input prior to proposing rules on this critically important issue. Our views as expressed in this letter are based on feedback received from our broad membership.

I. General

Corporate Debt Repackagings are created by the deposit of corporate debt securities purchased by the sponsoring institution in the secondary market into a trust which issues certificates backed by cash flows on the underlying corporate bonds. Corporate Debt Repackagings are generally issued in order to (i) provide access by individual investors to the corporate debt market through the offering of trust certificates having minimum denominations lower than those typically associated with the underlying security or (ii) allow corporate debt to be combined with interest rate or currency swaps in order to provide institutional investors with a preference for floating rate instruments the opportunity to invest in corporate debt having a fixed interest rate, to allow institutional investors with a preference for fixed rate instruments the opportunity to invest in corporate debt having a floating interest rate or to allow institutional investors to receive payments in currencies other than the currency in which the underlying corporate debt securities are denominated. Institutional transactions generally involve a small number of investors and are tailored to meet the investment objectives of the particular investors.

Corporate Debt Repackagings are commonly issued as registered securities under existing Form S-3 and, to the extent that the debt of a single issuer or a group of affiliated issuers of the underlying corporate debt securities represents 10% or more of the asset pool, unless the pool assets are backed by the full faith and credit of the United States, the financial information required by Item 1112 of Regulation AB is provided to investors in the trust certificates, generally through incorporation by reference as contemplated in Item 1100(c)(1) of Regulation AB or by reference as contemplated in Item 1100(c)(2) of Regulation AB. Corporate Bond Repackagings are also offered privately in reliance on Rule 144A under the Securities Act of 1933 (the "Securities Act"), generally to customers of the sponsor who indicate, through reverse inquiry, that they hold corporate debt securities with payment characteristics that they would like to change through the addition of swaps, as described in the preceding paragraph.

We support efforts to align the incentives of issuers and originators with securitization investors and believe these incentives should encourage the application of sound underwriting standards by both the originator and securitizer in connection with the assets that are securitized. We believe that risk retention can aid in achieving this goal so long as the requirements are tailored to each class of securitized assets. Securitization practices, including the forms of credit risk retention, differ in important respects across the different asset categories based on a variety of factors, including the nature and characteristics of the assets, the historical development and credit performance of each asset class and the securitization structures themselves. Given this variability, any blanket, one-size-fits-all retention requirement would be arbitrary in its application to any particular asset type, and would not reflect important differences in the expected credit and performance characteristics of each asset type as well as the related securitization structures.

Our view is consistent with the Act's directive to implement "separate rules for securitizers of different classes of assets" and reflects the primary recommendation of the Board of Governors of the Federal Reserve System in its recently published Report to the Congress on Risk Retention (the "Federal Reserve Study"), in which it stated:

> "Thus, this study concludes that simple credit risk retention rules, applied uniformly across assets of all types, are unlikely to achieve the stated objective of the Act—namely, to improve the asset-backed securitization process and protect investors from losses associated with poorly underwritten loans. … Given the degree of heterogeneity in all aspects of securitization, a single approach to credit risk retention could curtail credit availability in certain sectors of the securitization market. A single universal approach would also not adequately take into consideration different forms of credit risk retention, which may differ by asset category. Further, such an approach is unlikely to be effective in achieving the stated aims of the statute across a broad spectrum of asset categories where securitization practices differ markedly. … In light of the heterogeneity of asset classes and securitization structures, practices and performance, the Board recommends that rulemakers consider crafting credit risk retention requirements that are tailored to each major class of securitized assets."[2]

II. Section 941 Risk Retention Requirements

Section 941 of the Act requires the Federal Deposit Insurance Corporation ("FDIC"), the Federal Reserve Board of Governors ("FRB"), the Office of the Comptroller of the Currency ("OCC") and the Securities and Exchange Commission (the "Commission" and collectively, the "Joint Regulators") to jointly implement rules to require any "securitizer" to retain an economic interest in a portion of the credit risk for any asset that the securitizer, through the issuance of an "asset-backed security," transfers, sells, or conveys to a third party. As described further below, Section 941 amends the Securities Exchange Act of 1934 (the "Exchange Act") to establish an alternative definition of "asset-backed security" (an "Exchange Act ABS") that is broader than the existing definition set forth in Regulation AB of the Securities Act and a definition for the term "securitizer" which is, generally, an issuer of Exchange Act ABS or a person who organizes and initiates an Exchange Act ABS transaction by transferring assets to the issuer.[3]

The general standards for risk retention are set forth in Section 941, which requires a securitizer to retain "(i) not less than 5 percent of the credit risk for any asset" or "(ii) less than 5 percent of the credit risk for an asset" if the originator of the asset meets underwriting standards to be prescribed by the Joint Regulators. The regulations prescribed under Section 941 must specify "the permissible forms of risk retention" and "the minimum duration of the risk retention." In addition, the regulations "shall establish asset classes with separate rules for securitizers of

[2] The Board of Governors of the Federal Reserve System, Report to Congress on Risk Retention, available at http://federalreserve.gov/boarddocs/rptcongress/securitization/riskretention.pdf, p. 3, 83-84.

[3] In a release of proposed rules relating to Section 943 of the Act, the Commission indicates its belief that the definition of Exchange Act ABS includes securities that are typically sold in transactions exempt from registration under the Securities Act and that the definition of securitizer is not specifically limited to entities that undertake transactions that are registered under the Securities Act. *See* pages 8 and 10 of Release Nos. 33-9148; 34-63029; File No. S7-24-10.

different classes of assets, including residential mortgages, commercial mortgages, commercial loans, auto loans, and any other class of assets that the Federal banking agencies and the Commission deem appropriate" and, for each asset class established, the regulations "shall include underwriting standards established by the Federal banking agencies that specify the terms, conditions, and characteristics of a loan within the asset class that indicate a low credit risk with respect to the loan." The Act also requires specific requirements for certain types of securities including commercial mortgage-backed securities and "collateralized debt obligations, securities collateralized by collateralized debt obligations, and similar instruments collateralized by other asset-backed securities." Finally, Section 941 specifies that the regulations shall provide for certain exemptions as further described below.

Corporate Debt Repackagings are generally considered asset-backed securities and are, therefore, likely encompassed within the broader definition of Exchange Act ABS added by the Act. Therefore, on its face, Section 941 of the Act would, in the first instance, require the Joint Regulators to prescribe regulations requiring a securitizer of corporate debt securities to retain an economic interest in a portion of the credit risk for those assets. However, Section 941 of the Act permits the Joint Regulators to provide for a total or partial exemption of any securitization, "as may be appropriate in the public interest and for the protection of investors" and further grants the Joint Regulators the power to "jointly adopt or issue exemptions, exceptions or adjustments to the rules issued under this section, including exemptions, exceptions or adjustments for classes of institutions *or assets* (emphasis added) relating to the risk retention requirement..." Section 941 further provides any exemption, exceptions or adjustment adopted by the Joint Regulators "shall (A) help insure high quality underwriting standards for the securitizers and the originators of assets that are securitized or available for securitization; and (B) encourage appropriate risk management practices by the securitizers and originators of assets, improve the access of consumers in businesses to credit unreasonable terms, or otherwise be in the public interest and for the protection of investors."

Both the risk retention requirement of Section 941 and the language permitting exemptions from the risk retention requirement and setting forth the standards for exemption reflect the fundamental legislative intent behind Section 941. Specifically, in adopting the risk retention requirement of Section 941, as well as the other provisions of subtitle D of the Act relating to improvements to the asset-backed securitization process, Congress sought to address what it perceived as flaws in the securitization process that contributed to or precipitated the recent financial crisis. Chief among these was the perceived deterioration in credit underwriting standards, particularly in the residential mortgage market, as a result of the transfer of ownership to capital markets investors, through securitization, of newly originated assets which, prior to the advent of securitization, had traditionally been held in the portfolio of the asset originator or purchased by institutional whole loan purchasers who performed thorough due diligence. Therefore, it has been suggested, the separation of loan origination and ownership reduces the traditional incentives for asset originators to ensure that the assets they originate are of high quality. The expansion of the definition of asset-backed security to include collateralized debt obligations, collateralized bond obligations, collateralized debt obligations of asset-backed securities and collateralized debt obligations of collateralized debt obligations, reflects the legislative understanding that the existence of so-called "second generation" securitizations, i.e.

securitizations of previously issued interests in other securitizations, may have helped to exacerbate the deleterious effects of separation of loan origination and loan ownership.

To address the perceived problem of separation of asset origination from ownership, Section 941 of the Act attempts to align the interests of securitizers of assets with those of investors in securitization by mandating the Joint Regulators to require securitizers to retain at least a 5% economic interest in the securitization. In theory, because the originator would be exposed to the same economic consequences of the performance of the assets as third party investors, the securitizer would be incentivized to securitize only high quality assets and to originate, or encourage third party originators to originate, only high quality, properly underwritten assets.

Regardless of whether one accepts the premise underlying Section 941 that the best way to align the incentives of originators and issuers with investors in securitization, and thereby promote higher quality underwriting, is through risk retention, the policy it seeks to support clearly has no applicability to Corporate Debt Repackagings. Unlike traditional asset-backed securities, such as securities backed by residential or commercial mortgage loans, automobile loans or leases, or student loans, Corporate Debt Repackagings are not part of the process of directly or indirectly financing the origination of consumer loans or other financial assets. Instead, they represent the reoffering of existing debt securities of corporate issuers acquired in the secondary market. Those corporate debt securities are not created by the underlying corporations with the intention or expectation that they will be acquired and securitized, and the existence or terms of those corporate debt obligations are not dictated or influenced by the possibility that they be included in Corporate Debt Repackagings. The sponsor of a Corporate Debt Repackaging will not acquire the underlying corporate bonds directly from the issuer thereof nor will the bonds represent an unsold allotment held by the sponsor. Accordingly, the retention of an interest in the corporate bonds underlying a Corporate Debt Repackaging would serve no public interest nor further the protection of investors, as such risk retention would have no effect, directly or indirectly, on the creation of the asset underlying the securitization, the credit quality of which is solely dependent on the credit of the issuer of the underlying corporate bond and not a third party, such as a mortgagor or automobile purchaser, that is the subject of credit underwriting. We find implicit support for that conclusion in the Federal Reserve Study, which suggested tailoring mechanisms to align incentives to different asset classes. While the Federal Reserve Study addressed nine different asset classes, it made no mention of Corporate Debt Repackagings, presumably because the logic behind Section 941 of the Act simply does not apply to that asset class. In that regard, Corporate Bond Repackagings are distinguishable from collateralized debt obligations, the assets of which consist of asset-backed securities, primarily residential mortgage-backed securities, and which, as discussed above, are perceived to influence the process in which credit is extended to the borrower of the underlying assets.

III. Section 945 Due Diligence Requirements

Section 945 of the Act requires the Commission to implement rules requiring the issuer of registered asset-backed securities to perform a review of the assets underlying such securities and to disclose the nature of such review. The Commission issued for comment Release Nos.

33-9150 and 34-63091; File No. S7-26-10 (the "Proposing Release"),[4] which addresses the requirements of Section 945 by (i) promulgating Rule 193 ("Rule 193") under the Securities Act to require issuers to perform a review of the assets underlying any registered asset-backed securities and (ii) amending Item 1111 of Regulation AB ("Item 1111") to require issuers to disclose both the nature and the findings and conclusions of such review in the registration statement. Proposed Rule 193 permits an issuer to engage a third party to perform the requisite review, provided that the third party consents to being named as an expert in the issuer's registration statement.

The legislative intent underlying Section 945 of the Act is less obvious than the rationale behind risk retention. Requiring a review by the issuer of the asset pool in registered securitizations seems somewhat redundant of the protection accorded investors for improper description of the pool under the liability provisions of the Securities Act. We assume that this requirement reflects the belief of Congress that, because securitization enables originators of consumer and business financial assets to transfer risk, some level of diligence and disclosure is appropriate to ensure that the securitization process itself does not incentivize the creation of poor quality or poorly underwritten assets. In that regard, the purpose of the due diligence review substantially overlaps with the purpose of risk retention. As discussed above, unlike other asset classes that are securitized, the registered corporate debt securities that underlie Corporate Debt Repackagings are not assets created by a lender through a credit underwriting process, and the creation of the assets is not influenced by the existence of the Corporate Debt Repackaging market itself. Further, unlike with respect to consumer and business loans and receivables underlying traditional asset-backed securities, copious amounts of information about the corporate debt securities underlying registered Corporate Debt Repackagings is already publicly available and easily accessible to investors through the EDGAR system. Therefore, the requirement in proposed Rule 193 to conduct and disclose the findings of a review of the pool assets would, we believe, add nothing to the information or protection of investors, and we therefore request that Corporate Debt Repackagings be exempted from the operation of that Rule and the correlative requirement of reproposed Item 1111 of Regulation AB. Such a review would similarly add no benefit with respect to Corporate Debt Repackagings backed by debt obligations guaranteed by the full faith and credit of the United States.

If the Commission nevertheless believes that Rule 193 should apply to Corporate Debt Repackagings, we request that it confirm the type of review appropriate to pool assets that consist of registered debt securities of Exchange Act reporting companies. In the Proposing Release, the Commission declined to set a specific type or level of review. However, it noted that "our proposal for asset-level data points in our 2010 ABS Proposing Release, which remains outstanding, provides examples of the kind of information that the issuer could undertake to review in order to comply with proposed Rule 193." Specifically, the Commission was referring to items of asset-level data proposed to be required to be filed and incorporated in an issuer's prospectus pursuant to proposed Item 1111(h) of Regulation AB and Schedule L thereunder. Schedule L prescribes various fields of data required to be disclosed about each asset in the asset pool for a securitization, including several fields applicable to all asset classes and others tailored

[4] See http://www.sec.gov/rules/proposed/2010/33-9150.pdf.

to each of 10 different asset classes, including corporate debt. For corporate debt, the nine asset-specific data fields address:

(i) Title of the underlying security,

(ii) Minimum denomination of the underlying security,

(iii) Currency of the underlying security,

(iv) Trustee of the underlying security,

(v) SEC registration statement file number for the offering of the underlying security,

(vi) CIK number of the issuer of the underlying security,

(vii) Whether the underlying security is callable,

(viii) Frequency of payments on the underlying security, and

(ix) Whether the underlying security is interest bearing.

Each of the foregoing specific data fields, as well as the general data fields prescribed by Schedule L which are applicable to Corporate Debt Repackagings (such maturity date) would be addressed in the prospectus relating to the underlying securities or the Exchange Act reports of the underlying issuer. The Exchange Act reports of the underlying issuer would also address any amendments to the terms of or defaults affecting the underlying securities. We therefore suggest that, if the Commission were to require issuers of Corporate Debt Repackagings to perform a review of the pool assets under Rule 193, it would be appropriate to specify that the issuer's obligation is met by a review of the prospectus relating to the offering of the underlying securities, the most recent annual report on Form 10-K of the issuer of the underlying securities and any subsequent Exchange Act reports filed by the issuer of the underlying securities prior to the date of the prospectus for the Corporate Bond Repackaging.

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ASF very much appreciates the opportunity to provide the foregoing views in connection with the Joint Regulators' rulemaking process. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact me at 212.412.7107 or at tdeutsch@americansecuritization.com, Evan Siegert, ASF Associate Director, at 212.412.7109 or at esiegert@americansecuritization.com, or ASF's outside counsel on this matter, Jordan Schwartz of Cadwalader, Wickersham & Taft LLP, at 212.504.6136 or at jordan.schwartz@cwt.com.

Sincerely,

Tom Deutsch

Tom Deutsch
Executive Director
American Securitization Forum