

MEMORANDUM

TO: File No. S7-38-11

FROM: Elizabeth Sandoe  
Senior Special Counsel  
Office of Trading Practices  
Division of Trading and Markets

DATE: December 19, 2016

RE: Meeting with representatives from Bass Berry and Sims, Loomis, Sayles and Company, and PentAlpha

On December 19, 2016, Kathy Hsu and Hughes Bates from the Division of Corporation Finance, Caite McGuire, Elizabeth Sandoe, Paula Jenson, Dan Fisher and Brad Bartels, from the Division of Trading and Markets, and Rochelle Plesset from the Division of Investment Management met with Jay Knight (Bass Berry and Sims), Alessandro Pagani (Loomis, Sayles & Company), and James Callahan (PentAlpha). The participants discussed the attached deal agent structure and its potential application in connection with the proposed rulemaking regarding the prohibition against conflicts of interest in certain securitizations. A handout is attached to this memorandum.

Attachment

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## DEAL AGENT: NEW AGREEMENT TEMPLATE AVAILABLE FOR RMBS

**BOSTON AND GREENWICH** (September 15, 2016) –Today, a working group of mortgage industry participants distributed its Sample Deal Agent Agreement– a legal template that describes and governs the role of the Deal Agent intended to reform the securitization contracts for US non-agency residential mortgages (RMBS).

The working group, co-led by Alessandro Pagani, head of securitized assets at Loomis, Sayles & Company, and Jim Callahan, principal at PentAlpha, focused on the request by investors for the inclusion of a Deal Agent, an independent party that would provide governance and oversight of the trust, while also subject to duties of care and loyalty.

“We are pleased to distribute this document for industry consideration. Members of the working group shared their diverse experience and put countless hours toward the shared goal of reforming, and improving, the structure of RMBS. We believe this framework will support a gradual and responsible growth of mortgage credit with fair protections and increased transparency,” said Mr. Pagani.

“The Deal Agent structure is intended to provide fair protections to all investors in the trust, increase transparency and allow trust parties to adapt to events not specifically contemplated in the securitization contracts. This framework is an important step to defining key practices for the oversight and review functions,” said Mr. Callahan.

The Sample Deal Agent agreement is a full legal document and an expansion of the Key Principles, which were released publicly in February 2016. The Agreement was finalized after soliciting feedback across the committee membership, and sharing, discussing and incorporating members’ comments. The document provides additional details and a robust legal construct necessary for the Deal Agent to operate consistent with its duties of care and loyalty.

The main areas covered by the Agreement template include:

- Description of Services, which outlines the broad responsibilities of the Deal Agent
- Scope of Services, which describes the various roles of the Deal Agent and its powers to oversee the actions of the different trust parties
- Indemnification and Dispute Resolution mechanisms among the Deal Agent, investors, and other trust parties

For more information on this initiative, please reference the introduction document on the working group’s efforts and the Sample Deal Agent Agreement, which are available at <http://www.fairmortgagemarkets.org/>.

### About Loomis Sayles

Since 1926, Loomis, Sayles & Company, L.P. has served the investment needs of institutional and mutual fund clients. As performance-driven investors seeking exceptional opportunities, Loomis Sayles employs actively managed disciplines that combine fundamental research, systematic risk assessment and experienced portfolio management. This rich tradition has



earned Loomis Sayles the trust and respect of clients worldwide, for whom it manages \$240 billion in assets as of June 30, 2016.

#### **About PentAlpha**

Founded in 1994, PentAlpha is considered an industry-leading workout firm dedicated to repairing damaged financial institutions and the debt instruments they issue. The firm is staffed with former investment banking and finance company traders, bankers, quantitative analysts and operations specialists with loan origination and loan collections expertise. The firm specializes in European and US interests.

PentAlpha and Loomis, Sayles & Company are not affiliated.

MALR015810

September 14, 2016

## **Introduction to the Sample Deal Agent Agreement**

We are pleased to distribute for industry consideration the “Sample Deal Agent Agreement,” which is a legal document that describes and governs the role of the Deal Agent in fulfilling its Duties of Care and Loyalty in future RMBS Trusts.

As Co-Chairs of the Deal Agent Committee<sup>1</sup> we publicly released on February 25, 2016 the “Key Principles of the Deal Agent Framework”. The proposal was based on over 18 months of discussions facilitated by the U.S. Department of Treasury (“Treasury”) under its “Private Label Securitization (PLS) Initiative.” The Treasury’s PLS Initiative provided a forum for a large number of industry participants (investors, mortgage originators and aggregators, mortgage servicers, trustees, potential Deal Agents, and rating agencies) to address several topics, including servicer oversight, representations & warranties enforcement and the role of the trustee.

The initial release of the Key Principles aimed to explain the goals of the proposal, disseminate it to the broader market, and solicit feedback from additional parties. The Key Principles describe the essential elements that the framework’s proponents believe are necessary for the Deal Agent construct to accomplish its intended goals:

- Provide fair protections to all investors in the trust;
- Allow trust parties to adapt to events not specifically contemplated in the securitization contracts; and
- Increase transparency.

Over the last several months the work of the Deal Agent Committee has continued with the goal of completing the “Sample Deal Agent Agreement” to expand the Key Principles into a full legal document. The document was finalized after soliciting feedback across the committee membership, and sharing, discussing, and incorporating members’ comments. The document provides additional details and a robust legal construct necessary for the Deal Agent to operate consistent with its Duties of Care and Loyalty.

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<sup>1</sup> The Deal Agent Committee refers to an informal working group of industry representatives, who have participated in a series of discussions facilitated by Treasury as part of its Private Label Securitization (PLS) Initiative. In facilitating discussions related to the PLS Initiative, Treasury did not and does not seek advice or recommendations for any federal government policy, decision, or activity and does not endorse the Sample Deal Agent Agreement. The proposed Sample Deal Agent Agreement may not represent the views of all the participants in Treasury’s PLS Initiative.

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In summary, the main areas covered by the Agreement include:

- Description of Services, which outlines the broad responsibilities of the Deal Agent;
- Scope of Services, which describes the various roles of the Deal Agent and its powers to oversee the actions of the different trust parties; and
- Indemnification and Dispute Resolution mechanisms among the Deal Agent, investors, and other trust parties.

The Agreement is a template and not a form. It leaves certain aspects of the integration of the Deal Agent into the overall legal framework for an RMBS transaction, such as compensation, to the trust parties, while defining the key standards for the oversight and review functions that the committee considers to be core aspects of the Deal Agent.

On behalf of the framework's proponents, we believe that the market should adopt the Agreement as the template for new RMBS transactions. To that end, we suggest that:

- Issuers are welcome to use this Agreement as the basis for a stand-alone Deal Agent Agreement to be incorporated into their future transactions;
- Potential Deal Agents may use this document to develop their own operational capabilities to meet the responsibilities laid out in the Agreement;
- Credit rating agencies and regulators may find the document useful in evaluating the quality of governance and investor protections in future securitizations; and
- The document will be presented to the Structured Finance Industry Group (SFIG) through SFIG members who also participated in Treasury's PLS Initiative, as a working submission to SFIG's "RMBS 3.0" task force. We have asked the task force leadership to evaluate the Agreement and related ideas as part of its overall effort to reform and reinvigorate the RMBS market via enhanced structural protections within RMBS trusts.

We would like to thank the staff at Treasury for facilitating and encouraging open dialogue across many parties with sometimes diverging interests. Thank you to all the participants in the working group who have shared their deep and diverse experiences and put in countless hours of work toward the shared goal of improving and reforming the structure of RMBS. Lastly, it behooves us to single out the essential contribution of Latham & Watkins LLP, who represented certain members of the working group in transforming the ideas, views, and comments of the working group into a robust legal document. We do not represent that the Agreement has achieved unanimous acceptance, but believe it represents broad achievable consensus within the committee and can help reform and grow the RMBS market.

September 14, 2016

Sincerely,

Co-Chairs of the Deal Agent Committee

James Callahan  
Principal  
Pentalpha Global

Alessandro Pagani  
Head of Securitized Assets  
Loomis Sayles & Company

## Sample Deal Agent Agreement

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[Preamble of Deal Agent Agreement] (the “Agreement”), dated as of [ ], by and among [ ] (“Deal Agent”) and [XYZ Trust] [ABC Bank, as Trustee on behalf of XYZ Trust][SPV] (the “Trust”).<sup>1</sup>

### 1. Description of Services.

[Trust]<sup>2</sup> has retained [ ] to serve as Deal Agent to perform certain oversight and reporting services and to provide direction related to certain activities to be taken by any servicer, servicing participant or master servicer (each, a “Servicer”), the Trustee or any due diligence provider or other transaction participant listed on Schedule [ ] to this Agreement with respect to loans held by the Trust (the “Loans”), in each case as more fully described in Sections 2.1 through 2.7 hereof (collectively, the “Services”) in connection with the Trust’s [describe securities] (the “Securities”).

Deal Agent will be a fiduciary for the Trust and will perform the Services subject to the Duties of Care and Loyalty, as set forth below. For purposes of this Agreement:

(a) The “Duty of Care” means the obligation of the Deal Agent to act with the care an ordinarily prudent person in a like position would exercise under similar circumstances to maximize the value of the Loans and any other Trust assets and to otherwise protect the interests of the Trust, as if it were acting on its own behalf; and

(b) the “Duty of Loyalty” means the obligation of the Deal Agent to act solely on behalf of the Trust hereunder without regard to its own self-interest, to exercise its judgment and discretion hereunder in a manner it reasonably believes to be in the best interests of the Trust and to avoid actual, or the reasonably perceived appearance of, conflicts of interest and/or self-dealing. The Deal Agent shall not place the interests of any class of investors above the interest of any other class.<sup>3</sup> For the avoidance of doubt, the duties of good faith and fair dealing shall be considered part of the Duty of Loyalty for purposes of this Agreement.

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<sup>1</sup> Parties, including the party engaging the deal agent, to be tailored to deal structure. The deal agent may be engaged by the Trust, the Trustee on behalf of the Trust, the Depositor or the Sponsor. It is important for transaction parties to consider how this Agreement fits into the overall documentation structure for the transaction. Additional parties may need to be added to this Agreement, and other trust documentation should be reviewed to ensure that such trust documentation includes provisions that support the ability of the Deal Agent to perform the functions undertaken by it here.

<sup>2</sup> See note 1.

<sup>3</sup> It is understood that certain actions may benefit one class more than another class, and that such disproportionate benefit may be inherent in the risk tranching of the Securities (and is not a violation of the Duty of Loyalty). The Deal Agent should act to maximize the value of the Trust assets, and should not specifically act to

The Deal Agent may, in its discretion, seek investor guidance through formal or informal voting mechanisms, in each case to the extent provided in and subject to any limitations or thresholds set forth in the [Pooling and Servicing Agreement], provided that the Deal Agent (i) shall not be bound by any such investor guidance unless such vote is binding under the applicable [Pooling and Servicing Agreement], and (ii) shall not delay any action that it believes to be required under its Duty of Care pending the receipt of such guidance, if such delay would be inconsistent with its Duty of Care. The [Trust] shall pay the Deal Agent the fees for its services, and shall reimburse Deal Agent for its expenses, as set forth in Schedule [ ] to this Agreement.<sup>4</sup>

## **2. Scope of Services.**

### **2.1 Representation and Warranty Review and Enforcement.**

(a) Representation and Warranty Review. The Deal Agent will review a Loan to determine whether such Loan failed to comply with any of the representations and warranties made by the [Originator, Seller, Depositor] with respect to such Loan, or any covenants or conditions to transfer of such Loan, including without limitation filing or delivery requirements (collectively, the “Representation and Warranty Review”), when the Deal Agent deems appropriate in light of its Duty of Care. In exercising such Duty of Care, the Deal Agent may wish to consider conducting such review (i) after the first time such Loan is delinquent for 60 or more days (it being understood that a loan would be considered delinquent if the payment had not been received by the end of the day immediately preceding the Loan’s next due date), (ii) if the Servicer for such Loan informs the Deal Agent that the Servicer believes that the Loan failed to comply with any of the representations or warranties made with respect to such Loan, the Securities or the pool of Loans, (iii) at any time a trigger permitting or mandating such review in the [identify applicable agreements] is breached or (iv) if the Deal Agent in its good faith judgment believes that any such Loan fails to comply with any representations or warranties made with respect to such Loan, the Securities or the pool of Loans. The Deal Agent may, in its discretion, in connection with a potential issue affecting multiple Loans, review a sample of such Loans rather than each such Loan, and will have the discretion to expand or reduce the sample size based on its initial findings. If a Servicer, a third-party due diligence provider, or an Asset Representations Reviewer (ARR) appointed pursuant to the requirements of Regulation AB under the Securities Act of 1933 reviews or has reviewed the applicable Loan and has provided the Deal Agent with an executed Form ABS Due Diligence-15E (“Form 15E”) or an

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benefit one class over another (e.g., by accelerating or delaying the resolution of an asset to manipulate the effect of the resolution under the waterfall).

<sup>4</sup> Fee structures and expense reimbursements are outside the scope of this form agreement. Key considerations include predictability of cash outflows for ratings purposes, ensuring an adequate flow of funds to the deal agent to support long-term operation of the business, and incentivizing appropriate (but not excessive) use of Trust funds in the exercise of deal agent responsibilities. Market participants should be prepared to provide disclosures addressing the deal agent compensation and expense reimbursement structure, the ways in which they believe the structure will support the deal agent role, the manner in which extraordinary expenses will be approved, and the class or classes of securities that will bear any extraordinary expenses.

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executed Form ABS-15G (“Form 15G) furnished through the Securities and Exchange Commission’s EDGAR website presenting the results of such review with respect to a specific Loan, the Deal Agent may take such report into account in considering the scope of review of its own review that would be consistent with its Duties of Care and Loyalty.

(b) Review Procedures. If the Deal Agent determines to review any Loan, it shall request the Loan files, together with the applicable underwriting guidelines, from the applicable Servicer, depositor or custodian and the Servicer, depositor or custodian, as applicable, shall provide such files and guidelines to the Deal Agent promptly after such request. The Loan files shall include the origination files, the servicing files and, if copies of the collateral file documents are not held in the origination or servicing files, the collateral files. Schedule [ ] to this Agreement specifies which party is responsible for maintaining the relevant Loan files and contact information for the Deal Agent to request such Loan files.<sup>5</sup> For each Loan subject to Representation and Warranty Review, Deal Agent will perform the tests listed in Schedule [list of R/W tests] (“Review Procedures”), as such Review Procedures may be amended from time to time by the Deal Agent, in consultation with the Trustee and/or the Sponsor to reflect updated best practices; provided that Deal Agent may increase or reduce the scope of review for any particular Loan to the extent it deems appropriate in the exercise of its Duty of Care. Without limiting the foregoing, Deal Agent may in its discretion, including if requested by the Trust, the Trustee, the Sponsor or one or more holders of Securities, perform additional analysis that is outside of the Review Procedures if such additional analysis is determined by the Deal Agent in good faith to be in the best interests of the Trust. For each completed Representations and Warranties Review, Deal Agent will determine whether any information included in or omitted from the Loan file, together with any information provided by the Servicer, available from other sources or otherwise determined through the Review Procedures, indicates that the Loan is not compliant with applicable representations and warranties (a “Breach”). If no Breach is identified for a given Loan, the Representation and Warranty Review is considered complete for such Loan and Deal Agent will report results as described in Section 2.7 [Deal Agent reporting]; provided, however, that if the applicable party against whom repurchase or other remedies may be asserted (or any affiliate, agent, or representative of such party, or any other person acting for, on behalf of, or at the direction or request of such party) refuses to provide any information reasonably requested by the Deal Agent in connection with a Representation and Warranty Review, within the time frame specified in the applicable Loan transfer agreement, then such Loan will automatically be subject to repurchase in accordance with clause (d) below. Each applicable Loan transfer agreement shall include the covenants set forth on Exhibit A hereto with respect to such access and repurchase rights.

(c) Impairment. For each identified Breach, Deal Agent will complete an assessment of Loan to determine if the Breach did or could reasonably be expected to impair the value or enforceability of the Loan, the interests of the holders of the Securities in the Loan, or the aggregate value of the Trust’s assets (an “Impairment”). Impairments may include, without

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<sup>5</sup> To the extent possible, the transaction should provide for all loan origination files and collateral files to be held with a third-party custodian from the closing date for the transaction.

limitation: (i) direct contribution to or cause of a borrower event of default, (ii) Servicer's inability to complete applicable default action against the borrower, (iii) Servicer's inability to liquidate the asset, (iv) fees, costs and/or expenses incurred as a result of the Breach, (v) reduction of realized or expected asset liquidation proceeds resulting from misstated asset value, (vi) failure of the Trust to have a perfected, first priority lien on the underlying property, (vii) the Servicer's determination to modify or reprice the Loan to prevent a borrower event of default and (viii) a Breach or defect that would have caused the Loan to be excluded from the Trust or reduced the value at which the Loan was acquired by the Trust.

Deal Agent's assessment of an Impairment shall not serve to eliminate or replace such other rights that the Trust may have with regard to review and determination of Breach, determinations of the materiality of any Breach and subsequent right to pursue repurchase or other remedies.

(d) Repurchase Demand. For each identified Breach and each Loan subject to automatic repurchase pursuant to clause (b) above, Deal Agent will seek to effect repurchase [or substitution where applicable] of the asset from the [Originator, Seller, Depositor] (the "Repurchase Parties") in accordance with the procedures described in Section [●] of the [Pooling and Servicing Agreement] [*Repurchase Process*] (a "Repurchase Demand"). If the Repurchase Parties or the Servicer, as applicable, believe the Breach can be cured such that no Impairment will remain, and Deal Agent in its reasonable judgment agrees with such assessment, Deal Agent may allow the Breach to be cured in place of requiring that the Loan be repurchased. Deal Agent will facilitate, track and reconcile all repurchase and cure actions with the objective that each agreed-to Repurchase Demand results in the Trust being made whole for the Breach. Deal Agent will report the status of each Repurchase Demand as described in Section 2.7 [*Deal Agent reporting*].

(e) Repurchase Dispute. For each Repurchase Demand which is disputed by the Repurchase Parties, Deal Agent will refer the Repurchase Demand to [mediation][binding arbitration]<sup>6</sup> in accordance with the procedures described in Section 9 [*Dispute Resolution*]. Deal Agent will track and reconcile all dispute resolution actions and will report the status of each Repurchase Demand as described in Section 2.7 [*Deal Agent reporting*].

## 2.2 Servicer Performance Oversight.

Deal Agent agrees to review, from time to time in its reasonable discretion, but in any event not less than annually, the operational practices of each Servicer servicing a material portion of the Trust's assets with respect to the Loans, which review shall include an assessment of each Servicer's policies and procedures, to determine, in Deal Agent's judgment, whether Servicer's practices demonstrate (i) adherence with the terms of the [Pooling and Servicing Agreement

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<sup>6</sup> The dispute resolution provisions should be determined by the transaction parties in light of anticipated costs, timing of process and certainty of resolution. Such process, any anticipated conflicts of interest inherent in such process, any efforts or provisions to mitigate such conflicts and the basis on which such provisions were chosen should be described in the related offering document.

including any Delegated Authority Matrix], (ii) adherence to direction provided by Deal Agent, so long as such direction does not violate applicable Law, (iii) avoidance of conflicts of interest and compliance with applicable servicing standards as set forth in [the Pooling and Servicing Agreement],<sup>7</sup> (iv) compliance with Servicer's policies and procedures;<sup>8</sup> and (v) reasonable and good faith efforts made by Servicer to maximize Trust asset value in accordance with the documents that govern the Trust ("Trust Documents") (collectively the "Accepted Servicing Practices"); provided, however, that Deal Agent shall not evaluate Servicer decision-making and outcomes so long as Servicer has acted in accordance with the Accepted Servicing Practices. The Servicer may engage in transactions with affiliates with the approval of the Deal Agent, subject to the following conditions: (i) all terms of such transactions shall be arms' length terms, consistent with those obtainable by Servicer in a transaction with an unaffiliated third party, and (ii) the Servicer shall have used an open bidding process in which the selection of an affiliate counterparty was made in good faith based on objective criteria. The Sponsor shall cause the Pooling and Servicing Agreement, each other Servicing Agreement and any other applicable Trust Document to contain provisions that require each Servicer to provide reasonable access to Deal Agent to such Servicer's premises, systems, data and personnel (subject to appropriate confidentiality provisions and restrictions on access to information unrelated to the Trust's assets and the servicing thereof), to facilitate the review required hereunder. Failure of Servicer to provide access upon reasonable notice and at reasonable hours shall constitute a Servicer Event of Default under such applicable Trust Documents. Each applicable agreement shall include the covenants set forth on Exhibit A hereto with respect to such access and Servicer Event of Default.

If an independent accounting firm reviews or has reviewed the Servicer's compliance with servicing criteria and provides a signed attestation with respect to management's assertion of compliance by the Servicer with such servicing criteria, which attestation is filed as an exhibit to the Trust's Annual Report on Form 10-K (if applicable), the Deal Agent may rely on such attestation, rather than conducting an independent review, if the Deal Agent determines that such reliance is consistent with its Duties of Care and Loyalty. In making such a determination, the Deal Agent must consider the scope of review provided and whether such scope is reasonably comparable to the scope articulated in clauses (i) through (iv) above.

(a) Onsite Servicer Review. On a no less frequent than annual basis, Deal Agent will complete an operational review of each Servicer of a material portion of Trust assets at one or

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<sup>7</sup> We expect the Pooling and Servicing Agreement or another applicable transaction document to define applicable servicing standards, for instance by reference to GSE practices or other industry standards. The goal of this Agreement is not to define such standards but to define the scope of appropriate oversight.

<sup>8</sup> The role of the Deal Agent is to assess whether the Servicer is complying with the Servicer's policies and procedures, and not to evaluate the adequacy of those policies and procedures or to cause the Servicer to substitute the Deal Agent's policies and procedures for those of the Servicer. However, if the Deal Agent determines that the Servicer's policies and procedures are inconsistent with the servicing standards set forth in the relevant transaction documents, the Deal Agent would be expected to identify a deficiency in the Servicer's compliance with servicing standards.

more of the Servicer's operating locations (the "Onsite Servicer Review").<sup>9</sup> The objective of the Onsite Servicer Review is to assess the current state of Servicer's policies, procedures, and controls and Servicer's ability, capacity, and readiness to service the Loans in accordance with Accepted Servicing Practices, and shall include review of a random sampling of Loans to confirm that such Loans have been serviced in accordance with the Accepted Servicing Practices. The specific scope and nature of each Onsite Servicer Review will be determined (i) by Deal Agent based on its general responsibility to oversee the Servicer's performance in accordance with Accepted Servicing Practices, after giving due consideration to any observed or suspected Loan or counterparty risk identified by Deal Agent in connection with its provision of the Services and in the exercise of Deal Agent's judgment; or (ii) as required by a Corrective Action Plan (as defined below) resulting from a Material KPI Breach as described in Section 2.2(c). Deal Agent will report Onsite Servicer Review results for each Servicer as described in Section 2.7 [*Deal Agent reporting*].

Where the Deal Agent determines that the Servicer does not have the ability, capacity, and readiness to service the Loans in accordance with Accepted Servicing Practices, Deal Agent will facilitate the [definition and] implementation of Servicer's corrective actions (a "Corrective Action Plan") and will oversee and validate Servicer's completion of such Corrective Action Plan. Deal Agent's [definition,] oversight and validation of Servicer Corrective Action Plans may include, (i) Deal Agent conducting targeted or statistically sampled Loan reviews of Servicer activities, (ii) Deal Agent performing additional onsite reviews of Servicer systems, policies, procedures, and personnel and/or (iii) such other actions that Deal Agent determines are appropriate. Deal Agent will report the status of the applicable Corrective Action Plan as described in Section 2.7 [*Deal Agent reporting*].

Where the Deal Agent determines that the inability, lack of capacity and/or lack of readiness defined in the Corrective Action Plan cannot be or has not been satisfactorily addressed within a reasonable period of time, or the Deal Agent determines that the severity of the risk to the Trust warrants immediate action, Deal Agent will report an Incurable Servicer Event of Default in accordance with the provisions set forth in the [Pooling and Servicing Agreement] or other applicable Servicing Agreement.

(b) Key Performance Indicator (KPI) Review. For each Loan, each Servicer will provide Deal Agent with data fields and frequencies listed on Schedule [*loan data list*] ("Loan Data"). Deal Agent will store Loan Data in its data warehouse (subject to Section 4(f)) and will perform data validation activities as described in this Section 2.2(b). Deal Agent will use Loan Data to calculate and measure Servicer performance with respect to the Key Performance Indicators ("KPIs") and agreed-upon performance thresholds set forth in Schedule [*KPI list*]. The Sponsor will ensure that the Pooling and Servicing Agreement and each other Servicing Agreement for the Trust will contain provisions specifying that breach of the KPI thresholds by

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<sup>9</sup> Deal Agents are expected to work with Servicers to minimize the operational burdens of such review, such as by conducting a consolidated review of each Servicer for all trusts for which the Deal Agent acts as deal agent.

any Servicer will constitute a Servicer Event of Default (subject to reasonable materiality qualifiers and cure periods).

On a [monthly] basis for each KPI, Deal Agent will determine whether the servicer's measured performance was within each applicable threshold or was otherwise in violation of the KPI (a "KPI Breach"). On an annual basis, Deal Agent will conduct audits of Loan Data and documentation to confirm that information relied upon to calculate and measure KPI values is accurate and comprehensive. Loan Data accuracy thresholds are included as KPIs set forth in Schedule [KPI list] and will be subject to the Services outlined in this Section 2.2(b) through 2.2(d).

Deal Agent will report KPI results for each Servicer as described in Section 2.7 [*Deal Agent reporting*]. For each KPI Breach, Deal Agent will provide Servicer (with a copy to the Trust and the Trustee) with notice of the breach including a request for Servicer's response and planned remediation to resolve such KPI Breach going forward.

(c) Key Performance Indicator (KPI) Breach Materiality. For each identified KPI Breach, Deal Agent will determine in its judgment whether the KPI Breach (i) represents an immediate and significant risk to the Trust, (ii) has existed for a sustained period in excess of allowable limits set forth in Schedule [KPI list], or (iii) has been present at a frequency in excess of allowable limits set forth in Schedule [KPI list] (each, a "Material KPI Breach"). For each identified Material KPI Breach, Deal Agent will complete an assessment of the circumstances to determine in its judgment if the Material KPI Breach may be cured through action taken by the Servicer.

Where the Deal Agent determines that a Material KPI Breach may be cured, Deal Agent will facilitate the [definition and] implementation of Servicer's Corrective Action Plan and will oversee and validate Servicer's completion of such Corrective Action Plan. Deal Agent's [definition,] oversight and validation of Servicer Corrective Action Plans may include, (i) Deal Agent conducting targeted or statistically sampled Loan reviews of Servicer activities, (ii) Deal Agent performing onsite reviews of Servicer systems, policies, procedures, and personnel and/or (iii) such other actions that Deal Agent determines are appropriate. Deal Agent will report the status of each Material KPI Breach and associated Corrective Action Plan as described in Section 2.7 [*Deal Agent reporting*].

Where the Deal Agent determines that a Material KPI Breach cannot be cured within the cure period as defined in the Corrective Action Plan or otherwise set forth in Schedule [KPI list], or where the Deal Agent determines that the severity of the risk to the Trust warrants immediate action, Deal Agent will report an Incurable Servicer Event of Default in accordance with the provisions set forth in the [Pooling and Servicing Agreement] or other applicable Servicing Agreement.

(d) Loan Event Review. Deal Agent will identify Loans subject to conditions where (i) Servicer decisions and actions impact cash flow to the Trust, (ii) asset value has been or may be

impaired, or (iii) Loan risk has been identified by Deal Agent through its completion of the Services (“Loan Events”)

Deal Agent will review Loan Events for the purpose of determining in its judgment whether any actions taken or not taken by Servicer (a) resulted in reduced asset value and/or incorrect cash flow to the Trust, and/or (b) were in violation of Accepted Servicing Practices (collectively a “Loan Event Breach”).

For each Loan Event Breach, Deal Agent will calculate the resulting asset value and or cash flow detriment to the Trust in accordance with terms set forth in the [Pooling and Servicing Agreement] or other applicable Servicing Agreement (the “Loan Impairment Amount”). Deal Agent will provide Servicer with written notice of each Loan Event Breach including a demand for Servicer to reimburse the Trust for the applicable Loan Impairment Amount in accordance with the [Pooling and Servicing Agreement] or other applicable Servicing Agreement. Deal Agent will report Loan Event Review results including the status and amount of any associated Loan Impairment Amount as described in Section 2.7 [*Deal Agent reporting*].

Where Servicer does not comply with or otherwise respond to, rebut and/or dispute Deal Agent’s demand for reimbursement of any Loan Impairment Amount within the cure period set forth in the [Pooling and Servicing Agreement] or other applicable Servicing Agreement, Deal Agent will [cause servicing advance recovery or servicing fees to be withheld, report an Incurable Servicer Event of Default, submit to arbitration, etc.]. For each such demand which is disputed by the Servicer, Deal Agent will refer the demand to [mediation][binding arbitration]<sup>10</sup> in accordance with the procedures described in Section 9 [*Dispute Resolution*]. Deal Agent will track and reconcile all dispute resolution actions and will report the status of each such demand as described in Section 2.7 [*Deal Agent reporting*].

### 2.3 Non-Delegated Servicer Direction.

(a) Non-Delegated Event Review. As set forth in the [Pooling and Servicing Agreement, including any Delegated Authority Matrix], Servicer must seek direction and/or approval from Deal Agent prior to performing certain actions with regard to the Loans or establishing and/or revising certain operational policies or procedures<sup>11</sup> (collectively, “Non-Delegated Events”). Servicer will notify Deal Agent in writing of the occurrence of any Non-Delegated Event including any applicable timeframe within which the Deal Agent must provide its direction to avoid Trust asset value impairment which may result from delayed Servicer action. Servicer will provide Deal Agent with all data, documentation, and other information Deal Agent determines to be appropriate to timely complete its assessment and will consult

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<sup>10</sup> The dispute resolution provisions should be determined by the transaction parties in light of anticipated costs, timing of process and certainty of resolution. Such process, any anticipated conflicts of interest inherent in such process, any efforts or provisions to mitigate such conflicts and the basis on which such provisions were chosen should be described in the related offering document.

<sup>11</sup> Intended to include the servicer’s NPV model.

with Deal Agent to the extent requested by Deal Agent. Deal Agent will review each Non-Delegated Event on a case-by-case basis, and will provide Servicer with its written direction and/or approval to take such action or actions as Deal Agent reasonably believes will be consistent with its Duty of Care. Deal Agent will report Non-Delegated Event assessment results as described in Section 2.7 [*Deal Agent reporting*].

In no circumstances will Deal Agent be responsible for the execution, or lack thereof, of required servicing duties so long as the Deal Agent has given the Servicer appropriate directions in accordance with the terms of this Agreement. In no case will Deal Agent assume responsibility or liability for the Servicer's non-compliance with applicable laws or regulations, even in consideration of Deal Agent's directions related to Non-Delegated Events. Should any Servicer actions resulting from Deal Agent's directions be in conflict with such applicable laws or regulations, Servicer will inform Deal Agent and Trustee of the details of such conflict. Deal Agent will consider any such conflict and will revise its directions to the Servicer to bring such directions into compliance with applicable laws or regulations as advised to it by Servicer; provided that Deal Agent shall not be responsible for determining whether such revised directions comply with applicable laws or regulations, and all such responsibility shall remain with the Servicer. Deal Agent will report the status and outcome of any such revised direction in Section 2.7 [*Deal Agent reporting*].

(b) Delegated Event Review. Deal Agent will perform a periodic [annual, quarterly] review of sample Servicer actions which the Servicer determined did not require Non-Delegated Direction (the "Delegated Event Review"). Deal Agent will review the actions taken by Servicer to determine whether Servicer inappropriately determined that such actions did not require approval and/or direction from the Deal Agent (a "Delegated Event Breach").

Deal Agent will calculate and seek Servicer reimbursement to the Trust for any asset value and/or cash flow detriment which resulted from any Delegated Event Breach. Delegated Event Breach reimbursement demands will reflect all material provisions comparable to those described in Section 2.2(d). Deal Agent will report Delegated Event assessment results, including any demands for Servicer reimbursement, as described in Section 2.7 [*Deal Agent reporting*].

#### 2.4 Reporting Review and Reconciliation.

(a) Cash Flow Reconciliation. The Sponsor shall cause the Pooling and Servicing Agreement, each other Servicing Agreement and any other applicable Trust Document to include a covenant (i) requiring the applicable Servicer to tie out monthly cash flows to a \$25 tolerance as set forth on Exhibit A hereto, meaning that any discrepancy between amounts received (as reflected in any remittance reporting) and amounts reported (as reflected in any Loan Data reporting) should not exceed \$25 per Loan that the applicable Servicer services and (ii) requiring the Trustee to tie out monthly cash flows to a \$500 tolerance as set forth on Exhibit A hereto, meaning that any discrepancy between amounts received from each Servicer

(as reflected in any remittance reporting) and amounts reported (as reflected in any report provided by the applicable Servicer or the Master Servicer) should not exceed \$500 for the Trust in the aggregate for any month. Deal Agent will (i) confirm each month that the required reconciliations have been performed and are satisfactory, and (ii) [at least once annually, and <sup>12</sup>in Deal Agent's discretion, from time to time,] perform a monthly reconciliation of Servicer and Trustee remittance reporting, and Loan Data reported by each Servicer, to identify any inconsistencies with respect to (i) cash collected by Servicer from borrowers or from the liquidation of Trust assets, (ii) cash advanced by Servicer in accordance with [the Pooling and Servicing Agreement] or other applicable Servicing Agreement, (iii) cash withheld by Servicer with respect to fees and escrows, and (iv) cash distributed to holders of the Securities.

Where cash flow inconsistencies or inaccuracies are identified by Deal Agent, Deal Agent will provide written notice to such Servicer, the Trustee, or other Parties as applicable. Such notice will include details of Deal Agent's findings and direction on required corrective actions required of applicable Parties as determined by Deal Agent in its judgment. Deal Agent will report cash flow reconciliation findings as described in Section 2.7 [*Deal Agent reporting*].

(b) Other Reporting Reconciliation. Deal Agent will perform reconciliation of other Servicer and Trustee remittance reporting not described in Section 2.4(a), as determined by Deal Agent, to identify any inconsistencies which Deal Agent determines in its judgment to be material to the Trust asset value or to the information provided to holders of Securities with respect thereto. Deal Agent may, in its judgment, work with the Trustee, the Servicer and/or the Master Servicer to attempt to resolve any such inconsistencies, and may in its judgment exclude from its reporting any inconsistencies resolved through such process unless such exclusion is prohibited by applicable law.

Where Deal Agent identifies inconsistencies or inaccuracies determined material by the Deal Agent in its judgment, Deal Agent will provide written notice to such Servicer, the Trustee, or other Parties as applicable. Such notice will include details of Deal Agent's findings and direction on required corrective actions required of applicable Parties as determined by Deal Agent in its judgment. Deal Agent will report reporting reconciliation findings as described in Section 2.7 [*Deal Agent reporting*].

(c) Servicer Expense Review. Deal Agent will promptly review all expenses of each Servicer that are allocated to the Trust each month to determine whether such expenses are appropriately being allocated to the Trust. If Deal Agent determines that any such allocation is not appropriate, Deal Agent will provide written notice to such Servicer, the Trustee, or other Parties as applicable. Such notice will include details of Deal Agent's findings and direction on required corrective actions required of applicable Parties as determined by Deal Agent in its judgment. Deal Agent will report servicer expense review findings as described in Section 2.7 [*Deal Agent reporting*].

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<sup>12</sup> Parties to consider costs associated with a mandatory Deal Agent reconciliation monthly.

## 2.5. Transferee Servicer Selection and Loan Transfer Oversight.

Where Deal Agent identifies an Incurable Servicer Event of Default and all procedures required by the applicable agreement to confirm such Incurable Servicer Event of Default have been completed, Deal Agent will notify Servicer that [all, certain, seriously delinquent<sup>13</sup>] Loan servicing responsibilities will be transferred to the backup replacement servicer for the Trust (the “Transferee Servicer”).<sup>14</sup> The Sponsor shall cause the Pooling and Servicing Agreement, each other Servicing Agreement and any other applicable Trust Document to include a definition of “Incurable Event of Default” as set forth on Exhibit A hereto. Deal Agent will oversee the transfer of Loans from Servicer to Transferee Servicer. Deal Agent’s oversight will include an assessment of (i) Servicer’s pre-transfer data and document status and availability, (ii) Transferee Servicer’s onboarding of data and documents to its systems of record, and (iii) sample Loan reviews to confirm continuity of Servicer actions, including, but not limited to borrower notifications, collection, loss mitigation, and default management activities, and asset liquidation proceedings.

## 2.6. Response to Inquiries from Holders of Securities.

Deal Agent will review all inquiries from holders of Securities where (i) the applicable holder provides proof of active Securities ownership,<sup>15</sup> (ii) such inquiries are submitted to the Deal Agent through the website described in Section 2.7 (*Deal Agent Reporting*), and (iii) the inquiring holder agrees that the inquiry and Deal Agent’s response will be disclosed within Deal Agent reporting (a “Qualified Investor Inquiry”) as described in Section 2.7 [*Deal Agent Reporting*].

Where a Qualified Investor Inquiry constitutes a request for Deal Agent to perform any review or analysis which does not fall within the Services described herein, Deal Agent will not be obligated to perform such requested review or analysis but will report that the Qualified Investor Inquiry is out of Deal Agent’s scope of Services as described in Section 2.7 [*Deal Agent reporting*]. Deal Agent shall determine the scope of review or analysis for all other Qualified Investor Inquiries, which may be limited to the degree Deal Agent considers appropriate, giving

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<sup>13</sup> Language has been updated to allow for flexibility to cause transfer of all loans, or certain loans (e.g., seriously delinquent loans could be transferred while other loans remain). This assumes that any issue that would allow the Deal Agent to cause a transfer would be considered a Servicer Event of Default.

<sup>14</sup> We have assumed that all deals will have a backup servicer at all times. For any transaction that does not have a backup servicer, this provision will need to be adjusted to address the process of identifying a replacement servicer.

<sup>15</sup> The requirements for registration of securities on the SEC’s new Form SF-3 require a commitment to facilitate investor communications and limit the types of proof of ownership that can be required. Specifically, (1) if the investor is a record holder of the securities at the time of a request to communicate, then the investor will not have to provide verification of ownership, and (2) if the investor is not the record holder of the securities, then the person obligated to make the disclosure may require no more than a written certification from the investor that it is a beneficial owner and one other form of documentation such as a trade confirmation, an account statement, a letter from the broker or dealer, or other similar document. Any requirement to provide proof of active Securities ownership should be no more onerous than the foregoing.

due consideration to the costs of any such review or analysis and the potential benefit that may result therefrom,

### 2.7 Deal Agent Reporting.

The [Deal Agent/Trustee] shall establish a passcode-protected, secure website to facilitate communication between the Deal Agent and the holders of the Securities. On a monthly basis, Deal Agent will report to the Trust, the Trustee and the holders of the Securities the findings and review status related to its performance of the Services described in this Section 2 along with Loan aggregation and trending reports designed to indicate the aggregate performance of the Trust and the Loans, in the form attached hereto as Annex \_\_, together with such other matters as the Deal Agent believes appropriate. Such reports shall be made available through the same methods as all other Trust reports are disseminated.

In no circumstances will the Deal Agent be required to report data or information if the Deal Agent in good faith believes that (i) reporting such data would violate applicable consumer or privacy laws, (ii) reporting such data would violate securities or other laws, or (iii) such data or information is materially inaccurate (without limiting the Deal Agent's obligation to report that such data or information is inaccurate in accordance with Section 2.2(b)).

### **3. Representations and Warranties**

The Deal Agent hereby makes the following representations and warranties<sup>16</sup> to Trust as of the date hereof:

(a) Deal Agent is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation and is duly qualified to do business in each jurisdiction where such qualification is required. Deal Agent has all licenses, qualifications, authorizations, registrations and permits necessary to the conduct of its business and to its compliance with the terms of this Agreement.

(b) Deal Agent has the full power and authority to execute and deliver this Agreement and to perform its obligations hereunder in accordance with the terms hereof;

(c) the execution, delivery and performance of this Agreement by Deal Agent and the consummation of the transactions contemplated hereby have been duly and validly authorized;

(d) this Agreement evidences the legal, valid and binding obligation of Deal Agent, enforceable against it in accordance with its terms;

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(e) neither the execution and delivery of this Agreement, nor the performance of the Services hereunder, will conflict with or result in a breach of any of the terms, conditions or provisions of Deal Agent's organizational documents or any legal restriction or any agreement or instrument to which Deal Agent is now a party or by which it is bound, or constitute a default or result in an acceleration under any of the foregoing, or result in the violation of any law, rule, regulation, order, judgment or decree to which Deal Agent is subject;

(f) there is no charge, investigation, action, suit or proceeding before or by any court pending or, to the best knowledge of the Deal Agent, threatened that, in the good faith judgment of the Deal Agent, would have a material adverse effect upon the performance by the Deal Agent of its duties under, or on the validity or enforceability of, this Agreement; and

(g) the Deal Agent has sufficient personnel, experience and other resources to conduct its business and to perform its obligations hereunder, and will at all times cause its personnel to devote as much of their time and attention to the performance of this Agreement as shall be reasonably necessary to fulfill the terms hereof and to meet the Duties of Care and Loyalty set forth herein.<sup>17</sup>

#### **4. Covenants.**

(a) Deal Agent will (i) obtain, preserve and keep in full force and effect its separate corporate existence and all rights, licenses, registrations and franchises necessary to the proper conduct of its business or affairs; (ii) qualify and remain qualified as a foreign limited liability company in each jurisdiction in which the character or location of the properties owned by it or the business transacted by it requires such qualification; and (iii) continue to operate its business as substantially presently operated.

(b) Deal Agent will comply with the requirements of all applicable laws, and all rules, regulations and orders of regulatory agencies and authorities having jurisdiction over it.

(c) Deal Agent will promptly notify the Trust and the Trustee of any action or proceeding brought against Deal Agent where such action or proceeding would, if determined adversely to Deal Agent, have a material adverse effect on Deal Agent or its ability to perform its obligations hereunder.

(d) Deal Agent shall maintain appropriate books of account and records relating to services performed hereunder, and such books of account and records shall be accessible for inspection by representatives of the Trust, the Trustee, the holders of the Securities and any independent accountants appointed by the Trust at any time during normal business hours at a time acceptable to the Deal Agent in its reasonable judgment and upon not less than two Business Days' prior notice.

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<sup>17</sup> Transaction parties may agree to be more specific here, including by requiring a minimum net worth requirement and/or proof of specific insurance (e.g., \$2.5 - \$5 MM, as in Ginnie Mae guidelines).

(e) In performing its obligations pursuant to this Agreement, Deal Agent may have access to and receive disclosure of certain confidential information about or belonging to the Trust, Servicers or the borrowers with respect to the Trust's assets which is confidential and the property of the party disclosing the information (collectively, the "Confidential Information"). Confidential Information shall not include: (i) information in the public domain at the time that it was provided by the furnishing party or subsequently came into the public domain other than as a result of breach of the confidentiality provisions contained herein; (ii) information obtained from a third party (provided such party was not bound by confidentiality agreements with the furnishing party); or (iii) information which Deal Agent develops independently. Deal Agent agrees (x) to keep the Confidential Information secure and confidential; (y) treat all Confidential Information with the same degree of care as it accords its own Confidential Information, but in no event less than a reasonable degree of care; and (z) not to use or disclose the Confidential Information of the other Party for any purpose, other than as expressly required or permitted under the terms of this Agreement.

(f) Without limiting the foregoing, Deal Agent agrees that it shall protect the privacy of the consumers' non-public personal information made available to it pursuant to this Agreement ("Consumer Information"). Without limiting the generality of the foregoing sentence, Deal Agent shall not disclose any non-public personal information to any third person except as required in the performance of services provided by Deal Agent, and Deal Agent shall not use any non-public personal information except to perform the services provided by Deal Agent. Deal Agent shall implement and maintain administrative, technical and physical safeguards for borrower records and information in Deal Agent's control or possession from time to time. Such safeguards shall be designed for the purpose of: (i) insuring the security of such records and information, (ii) protecting against any anticipated threats or hazards to the security or integrity of such records and information; (iii) protecting against unauthorized access to or use of such records and information that would result in substantial harm or inconvenience to any person; and (iv) assuring that such records remain available for access and use by the Trust. Such safeguards shall be established in accordance with Section 501(b) of Gramm-Leach-Bliley Act and the Interagency Guidelines Establishing Standards for Safeguarding Customer Information adopted pursuant to Section 501(b) of GLBA ("Safeguarding Guidelines").

## **5. Use of Deliverables.**

Trust may, without the permission of Deal Agent, use the information and reports provided to it by Deal Agent ("Deliverables") in order to carry out Trust's responsibilities under [the Pooling and Servicing Agreement] or any other Transaction Document; provided, however, that except as otherwise expressly provided herein, Trust may not distribute any Deliverable or derivation thereof to any non-party to this Agreement without Deal Agent's prior written consent, which shall not be unreasonably withheld. The parties acknowledge and agree that it shall be reasonable for Deal Agent to condition such consent on the applicable non-party executing an Access Letter in the form attached hereto as Exhibit [ ]. Trust expressly acknowledges and agrees that Deal Agent shall have no liability for any non-party reliance on any Deliverable or derivation thereof. Notwithstanding the foregoing, to the extent that the Services constitute

“due diligence services” under Rule 15Ga-2 of the United States Securities Exchange Act of 1934, as amended (the “Exchange Act”) (“SEC Rule 15Ga-2”) and Rule 17g-10 under the Exchange Act (“SEC Rule 17g-10”), Deal Agent shall furnish to Trust Form 15G or Form 15E, as applicable, and (i) any such Form 15G shall be permitted to be furnished on the SEC’s EDGAR website, if so required under SEC rules, and (ii) any such Form 15E shall be permitted to be filed on any website maintained by or on behalf of the Trust under Rule 17g-5 under the Exchange Act.

**6. No Investment Advice.**

The primary role of the Deal Agent under this Agreement is to provide the review and oversight Services described herein. The parties hereby acknowledge and agree that, solely in connection with and incidental to such Services, Deal Agent may provide analyses, valuations, or opinions from time to time with regard to the subject matter of the Services performed by Deal Agent. Those analyses, valuations and opinions may be different than those of the Trust and/or of holders of Securities and any other individual or entity with direct or indirect interests in the Trust. Each party expressly agrees that (i) the purpose of the Services is not to provide investment advice, (ii) the Deal Agent is not advising the Trust or such holders concerning the suitability of any particular transaction or investment strategy or other matter and (iii) no mention of a particular valuation, determination, analysis, or any other investment vehicle constitutes a recommendation for any such transaction. Certain information provided by Deal Agent may be compiled and based upon information provided to Deal Agent by unaffiliated parties, and, (i) except to the extent such information is the subject of the Services to be performed hereunder, or (ii) except to the extent that relying on such information would be inconsistent with Deal Agent’s Duty of Care, Deal Agent shall be permitted to rely on such information without independently confirming, verifying or auditing the accuracy or completeness of such information. Each party expressly agrees and acknowledges that any value given to certain loans, securities, instruments, or collateral (“Assets”) that may be reviewed by Deal Agent in its performance of Services under this Agreement is based upon a specific point in time and reflects Deal Agent’s analysis of the value or status of such Asset(s) solely through that point in time and does not forecast the value, price or performance of such Asset(s) or any portfolio in the future.

**7. Client Indemnification.**

[The Trust shall indemnify and hold Deal Agent, its Affiliates, assignees and each of its and their managing directors, directors, partners, officers, employees and agents (collectively, its “Indemnified Parties”) harmless from and against any and all suits, claims and civil, regulatory and/or criminal proceedings resulting in liabilities, damages, costs, losses and expenses, including court costs and reasonable attorneys' fees (collectively "Losses"), which arise from: (i) the willful misconduct or bad faith of Trust; (ii) claims asserted by a non-party to this Agreement arising out of or relating to the Services, except to the extent this Agreement expressly provides such non-party with the right to assert the claim; (iii) claims arising out of or relating to Trust’s distribution of a Deliverable to an individual or entity that has not signed an

Access Letter; (iv) actions and/or failure to act by Servicer and/or any other individual or entity that are in violation of law (except to the extent such Servicer, individual or entity took such action at the direction of Deal Agent) and (v) time and costs incurred by Deal Agent in responding to subpoenas and other discovery, and/or other judicially recognized requests that are related to regulatory investigations or actions or civil or criminal actions, arbitrations and/or other administrative proceedings, arising out of or relating to the Trust and/or the Deal Agent's Services under this Agreement, except where Deal Agent's action (or failure to act) constitutes gross negligence, bad faith or willful misconduct.

Deal Agent shall promptly notify Client in writing of any claim or proceeding which Deal Agent believes falls within the scope of this Section 6, but failure to give such notice shall not relieve the obligations of Trust hereunder unless Trust is materially prejudiced by such failure.]<sup>18</sup>

#### **8. Limitation Of Liability.**

In no event will Deal Agent be liable to Trust for claims arising out of or relating to Deal Agent's actions or failure to act in the performance of the Services, where such action or failure to act was based upon Deal Agent's use of judgment or discretion as permitted under this Agreement, except where Deal Agent's action (or failure to act) constitutes gross negligence, bad faith or willful misconduct.

#### **9. Dispute Resolution.**

[(a) In the event a dispute arises under this Agreement, the Parties agree that, prior to either of them commencing litigation, they will submit the dispute to mediation before a mutually acceptable mediator, or, in the absence of such a mediator, before a mediator who shall be selected, and who shall conduct the mediation, in accordance with the rules and procedures of the American Arbitration Association; provided, however, that nothing contained herein shall serve to preclude, limit or delay either Party's entitlement to seek judicial injunctive relief to enforce its rights under Sections [5] of this Agreement. The Deal Agent shall be entitled to reimbursement for the costs it incurs in participating in the mediation [if reimbursement of such costs is recommended by the mediator].]<sup>19</sup>

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<sup>18</sup> The economics and scope of indemnification of the Deal Agent should be negotiated among the transaction parties, and the foregoing provides sample language only. Considerations include the imposition of the expense of the indemnification on the Trust and whether it will be borne by the appropriate classes of investors if drawn; effects on ratings/ratings sensitivities; whether a cap on such indemnification is practicable; the possibility of insurance or external sources of protection for the Deal Agent; the need to ensure that the Deal Agent has the resources to continue to provide its services through the term of the transaction; and the need to protect the Deal Agent from unanticipated costs that arise through the actions of other parties or for which it otherwise should not be responsible. Any offering document for the Securities should explain in detail the final provisions included here, including any caps and position in waterfall, and should disclose any risks that such provisions may present or may fail to adequately address.

<sup>19</sup> Dispute resolutions are expected to be consistent with those in the Pooling and Servicing Agreement or other transaction documents, and may include mediation, binding arbitration, or such other provisions as the parties may agree. The dispute resolution provisions should be determined by the transaction parties in light of anticipated costs, timing of process and certainty of resolution. Such process, any anticipated conflicts of interest

(b) As to judicial proceedings that may be brought under this Agreement, the parties hereby irrevocably consent to the exclusive jurisdiction of, and venue in, any federal or state court of competent jurisdiction located in the State of New York for the purposes of adjudicating any matter arising from or in connection with this Agreement.

(d) Each party hereby waives its rights to a jury trial of any claim or cause of action based upon or arising out of this agreement or any statement of work. This waiver is intended to be all-encompassing of any and all disputes that may be filed in any court and that relate to the subject matter of this agreement, including, without limitation, contract claims, tort claims, breach of duty claims, and all other common law and statutory claims. This section has been fully reviewed by the parties hereto and these provisions will not be subject to any exceptions. Each party hereby further warrants and represents that it has had an opportunity to review this waiver with its legal counsel, and that its waiver hereunder is knowing and voluntary.

(e) In any judicial proceeding in which a party brings a claim either to enforce its rights under this Agreement against the Deal Agent or to obtain a declaration of the obligations of the Deal Agent under this Agreement, the party asserting the claim shall bear the burden of proving each element of the claim by a preponderance of the evidence except where statutory or common law requires that the party asserting the claim meet a higher standard of proof, in which case the party asserting the claim shall be held to the higher standard.

(f) In any judicial proceeding in which a party brings a claim either to enforce its rights under this Agreement against the Deal Agent or to obtain a declaration of the obligations of the Deal Agent under this Agreement, the Deal Agent shall be awarded its reasonable attorney fees, and costs and expenses incurred to the extent it is the prevailing party on such claim.

#### **10. Term; Termination; Resignation or Removal of Deal Agent**

(a) This Agreement shall commence as of the date first set forth above and, unless terminated as provided for herein, shall continue in force until the first of the following occurs: (i) the liquidation of the Loans and the final distribution of the proceeds of such liquidation to the Holders of the Securities or the payment in full of the Securities; and (ii) the termination of [the Pooling and Servicing Agreement] in accordance with its terms

(b) The Deal Agent shall have the right to resign as Deal Agent under this Agreement only upon [90 days' prior written notice] to the Trustee and the holders of the Securities; provided that the Deal Agent will have the right to resign immediately upon the effectiveness of any material change in applicable law or regulations (or interpretation thereof) which renders the performance by the Deal Agent of its duties under this Agreement to be a violation of such law or regulation; provided, however, that except as otherwise required by applicable law, no

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inherent in such process, any efforts or provisions to mitigate such conflicts and the basis on which such provisions were chosen should be described in the related offering document.

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resignation under this Agreement shall become effective until the acceptance of appointment of a successor deal agent, who satisfies the criteria, and in accordance with the requirements, set forth in paragraph (c) below.

(c) Upon any resignation or removal of the Deal Agent while any of the Securities are outstanding, the [Trustee][Depositor] shall appoint a successor deal agent which satisfies the criteria in the following sentence; provided that the holders of [more than 20% by outstanding principal amount] of the Securities do not object to such appointment in writing within [30 days of notice] from the Trustee of such appointment, and provided that such successor deal agent (i) has demonstrated an ability to professionally and competently perform duties similar to those imposed upon the Deal Agent, (ii) is legally qualified and has the capacity to act as deal agent, and (iii) does not cause or result in the Trust becoming required to be registered as an investment company under the Investment Company Act; provided, however, that no removal of or resignation by the Deal Agent shall be effective until a successor deal agent has been appointed and approved in the manner specified in this Agreement. In the event that the Deal Agent has resigned or been removed pursuant to notice as described in this Section, and the [Trustee][Depositor] shall not have appointed a successor prior to the day following the termination date specified in such notice, or the holders of [more than 20% by outstanding principal amount] of the Securities have objected to such appointment, the Trustee may petition any court of competent jurisdiction for the appointment of a successor deal agent, which appointment will not require the consent of, nor be subject to the disapproval of, the Trustee or any holder. Upon expiration of the applicable notice period and the effectiveness of such resignation or removal, all authority and power of the Deal Agent under this Agreement, whether with respect to the Loans or otherwise, shall automatically and without action by any person or entity pass to and be vested in the successor deal agent upon the effectiveness of the appointment thereof.

(d) In addition to the other provisions of this Section 10, no removal or resignation of the Deal Agent under this Section while any Securities are outstanding under [the Pooling and Servicing Agreement] shall be effective unless the successor deal agent has agreed in writing to assume all of the Deal Agent's duties and obligations pursuant to this Agreement.

(e) If the Trust, the Trustee or Holders of at [20% by outstanding principal amount] of the Securities believes that Cause exists to remove the Deal Agent, the Trust or the Trustee (acting on its own initiative or at the direction of such holder of the Securities (which direction shall set forth with reasonable particularity the basis for such Cause and a copy of which will be provided simultaneously to the Deal Agent), shall arrange for the holders of the Securities to vote as to whether the Deal Agent should be removed. The Deal Agent shall be removed if holders of a majority (by outstanding principal amount) of Securities voting (without regard to the class of such Securities) votes for such removal, so long as a quorum of at least 25% of holders (by outstanding principal amount) participates in such vote. For this purpose, "Cause" will mean

(i) the willful and intentional breach by the Deal Agent of a material provision of this Agreement,

(ii) the violation by the Deal Agent of any material provision of this Agreement which violation (x) has a material adverse effect on holders of any class of Securities and (y) if capable of being cured, is not cured within 30 days of a responsible officer of the Deal Agent receiving notice from the Trust of, such violation, unless if such failure is remediable, the Deal Agent has taken action that the Deal Agent believes in good faith will remedy such failure and such action does remedy such failure within 60 days after a responsible officer receives notice thereof,

(iii) the Deal Agent (A) files, or consents by answer or otherwise to the filing against it of, a petition for relief or reorganization or arrangement or any other petition in bankruptcy, for liquidation or to take advantage of any bankruptcy, insolvency, reorganization, moratorium or other similar law of any jurisdiction, (B) makes an assignment for the benefit of its creditors, (C) consents to the appointment of a custodian, receiver, trustee or other officer with similar powers with respect to it or with respect to any substantial part of its property, or (D) is adjudicated as insolvent or bankrupt, or a petition seeking reorganization, arrangement, adjustment or composition of or in respect of the Deal Agent, or appointing a receiver, liquidator, assignee or sequestrator (or other similar official) of the Deal Agent or of any substantial part of its property or ordering the winding up or liquidation of the Deal Agent, and the continuance of any such decree or order is unstayed and in effect for a period of 60 consecutive days,

(iv) the failure of any representation, warranty or certification made or delivered by the Deal Agent, in writing, in or pursuant to this Agreement to be correct in any material respect when made, or

(v) the Deal Agent is indicted by a court of competent jurisdiction, or is sanctioned by any federal agency for any actions involving a breach of fiduciary duty, fraud, or willful misconduct.

## **11. Non-Petition**

Deal Agent hereby covenants and agrees that, prior to the date that is one year and one day after the final payment by the Trust on any of the Securities, it will not institute against, or join any other person or entity in instituting against, the Trust any bankruptcy, reorganization, arrangement, insolvency or liquidation proceedings or other similar proceeding under the laws of any jurisdiction (whether foreign or domestic).

## **12. Limited Recourse**

Deal Agent acknowledges and agrees that the obligations of the Trust under this Agreement are limited recourse obligations payable solely to the extent that funds are available therefor pursuant to the priority of payments set forth in [the Pooling and Servicing Agreement]. To the extent such funds are not available and the assets of the Trust have been fully realized and applied, any remaining obligations under this Agreement shall be extinguished and Deal Agent shall have no further rights hereunder.

[Trust]

[Deal Agent]

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Accepted and agreed this [ ● ] day of [ ● ]:

[ ● ], as Sponsor

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[Other signatories to be determined as appropriate given transaction documents and parties]

## EXHIBIT A—KEY PROVISIONS FOR OTHER TRUST DOCUMENTS<sup>20</sup>

### Transfer agreements

[If the applicable party against whom repurchase or other remedies may be asserted refuses to provide any information reasonably requested by the Deal Agent in connection with a Representation and Warranty Review, then such Loan will automatically be subject to repurchase.] (Section 2.1(b))

[Deal Agent may at any time request and shall be entitled to receive the original underwriting files with request to any Loans upon [two] Business Days' notice.] (Section 2.1(b))

[All parties agree that repurchase rights with respect to any Loan shall be available for [ten years]<sup>21</sup> following the discovery of any breach of a representation or warranty.]

### Servicing agreements

[Failure of Servicer to provide access upon reasonable notice and at reasonable hours shall constitute a Servicer Event of Default.] (Section 2.2)

[Breach of the KPI thresholds by any Servicer will constitute a Servicer Event of Default (subject to reasonable materiality qualifiers and cure periods).](Section 2.2(b))

[The applicable Servicer shall tie out monthly cash flows to a \$25 tolerance](Section 2.4)

["Servicer Event of Default" shall mean [ ● ]](Section 2.5)

["Incurable Servicer Event of Default" shall mean [ ● ].](Section 2.5)

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<sup>20</sup> The attached provisions are placeholders reflecting the language of the Deal Agent agreement.

<sup>21</sup> Time period can be discussed in connection with negotiation of representations and warranties, but investors expect the agreements to be drafted so that the repurchase rights begin at the time of discovery of a breach, rather than at closing, and any statute of limitations that would limit those rights to be waived to the extent such waiver is permitted by law.