February 4, 2011

VIA E-MAIL: rule-comments@sec.gov

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
Attn: Elizabeth M. Murphy, Secretary

Re: Release No 34-6356; File No. S7-43-10—End-User Exception to Mandatory Clearing of Security-Based Swaps

Ladies and Gentlemen:

The American Securitization Forum ("ASF")[1] appreciates the opportunity to submit this letter in response to the request of the Securities and Exchange Commission (the "SEC") for comments regarding Release No. 34-63556; File No. S7-43-10, dated December 15, 2010 (the "End-User Exception Release"), relating to the End-User Exception to the Mandatory Clearing of Security-Based Swaps of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). ASF supports appropriate reforms within the over-the-counter ("OTC") derivatives market as it relates to the securitization market and we commend the SEC for seeking industry input regarding its proposed rules on these critically important issues. Over the past decade, ASF has become the preeminent forum for securitization market participants to express their views and ideas. ASF was founded as a means to provide industry consensus on market and regulatory issues, and we have established an extensive track record of providing meaningful comment to the SEC and other agencies on issues affecting our market. Our views as expressed in this letter are based on feedback received from our broad membership.

I. Background and Use of Security-Based Swaps by Structured Finance Participants

Section 763(a) of Dodd-Frank amends the Securities Exchange Act of 1934 (the "Exchange Act") to provide that it is unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a derivatives clearing organization ("DCO") registered as prescribed under Dodd-Frank or a derivatives clearing

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[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.

organization that is exempt from registration as prescribed under Dodd-Frank, subject to certain exceptions. Section 763(a) of Dodd-Frank provides in Section 3.C.(g)(1) of the Exchange Act for an end-user exception to this mandatory clearing requirement where the entity is not a financial entity, is using security-based swaps to hedge or mitigate commercial risk and notifies the SEC of how it generally meets its financial obligations associated with entering into non-cleared security-based swaps. In the End-User Exception Release the SEC proposes Rule 240.3Cg-1 to specify the manner in which an entity seeking to use the end-user exception is to evidence how it generally meets its financial obligations with respect to non-cleared security-based swaps.

The ASF believes that Structured Finance Participants (as hereinafter defined) when viewed on a stand-alone basis, are not, and should not be considered to be, "financial entities" as that term is used under Dodd-Frank.[2] Accordingly, we request that the SEC clarify the End-User Exception Release and proposed Rule 240.3Cg-1 so as to not preclude Structured Finance Participants from being eligible for the end-user exception. Prior to setting forth our request in relation to the proposed rule, however, we would like to provide some background on the use of security-based swaps by Structured Finance Participants.

A universally accepted definition of structured finance does not seem to exist. However, the definition used by the Bank of International Settlements can be instructive in setting forth an operational definition:

> Structured finance instruments can be defined through three key characteristics: (1) pooling of assets (either cash-based or synthetically created); (2) tranching of liabilities that are backed by the asset pool; (3) de-linking of the credit risk of the collateral pool from the credit risk of the originator, usually through the use of a finite lived, standalone special purpose vehicle.[3]

Structured finance special purpose vehicles ("<u>Structured Finance SPVs</u>") are typically separate legal entities created by the sponsor or originator by transferring assets to the Structured Finance SPV, to facilitate a specific purpose or defined activity, or a series of such transactions. Generally, Structured Finance SPVs have no other purpose than the transactions for which they were created, and the Structured Finance SPV can make no operational decisions; the rules governing them are prescribed in advance and carefully limit their activities. The legal entity for a Structured Finance SPV may be a limited partnership, a limited liability company, a trust or a

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[2] With respect to the second requirement for the end-user exception, hedging or mitigating commercial risk, we plan to comment on this requirement in the context of Exchange Act proposed rule 240.3a67-4 which defines "hedging or mitigating commercial risk." See Joint Release, Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," Release No. 34-63452, File No. S7-39-10 (December 21, 2010). With regards to the third requirement for the end-user exception, we believe that Structured Finance Participants should be able to show how they generally meet their financial obligations with respect to non-cleared swaps given that structured finance swaps are generally entitled to payments in the issuer's waterfall at a level equivalent to or more senior than the highest rated class of securities issued by the Structured Finance SPV, which is generally rated AAA.

[3] See "The Role of Ratings in Structured Finance: Issues and Implications," Committee on the Global Financial System, Bank for International Settlements, 2005. Notwithstanding the second characteristic, structured financings do not necessarily have to involve tranching of liabilities.

corporation. See Frank J. Fabozzi, Henry A. Davis and Moorad Choudhry, "Introduction to Structured Finance: Introduction" (Wiley & Sons 2006) ("Introduction to Structured Finance"). Structured Finance SPVs may be structured to be either off or on the balance sheet of the sponsor or originator.[4]

Financing structures commonly included within structured finance include receivables securitizations, cash flow and synthetic collateralized debt and loan obligations and structured notes, including credit linked notes. Participants in a structured financing generally can include originators and/or sellers of assets, servicers (collectively, the "Sponsoring Group"), the trustees and administrators of the Structured Finance SPV and the Structured Finance SPV itself (collectively with the Sponsoring Group, the "Structured Finance Participants"), which typically acts as the issuer of the debt instruments that are backed by the particular asset pool.[5]

Structured Finance Participants utilize many different types of security-based swaps, including single name credit default swaps and equity derivatives. There are many different features that vary among the security-based swaps used by Structured Finance Participants ("Structured Finance Security-Based Swaps"), but generally, security-based swaps used by such entities are entered into by the Structured Finance SPV directly ("SPV Security-Based Swaps") and are not margined with cash or liquid securities, but rather, share in the general collateral pool that secures the structured financing.

II. Structured Finance Participants should be assessed on a stand-alone basis for the purpose of determining whether or not they are "Financial Entities" and should be eligible for the End-User Exception.

Section 763(a) of Dodd-Frank, creating Section 3C(g)(1) of the Exchange Act, sets forth the end-user exception to the mandatory clearing requirement. The ASF requests that the SEC clarify that, unless a Structured Finance SPV independently qualifies as a "financial entity" by separately meeting one of the categories set forth in Section 3C.(g)(3) of the Exchange Act, it shall not be deemed to be a "financial entity" solely by virtue of its structured financing activities, or its affiliation with any entity that might itself be deemed to be a "financial entity." The business of the Structured Finance SPV is limited- it is not engaged in lending or taking deposits, but is engaged in issuing securities that are backed by a pool of assets transferred to the

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[4] Typically, off-balance sheet Structured Finance SPVs have the following characteristics: (a) they do not have independent management or employees; (b) their administrative functions are performed by a trustee who follows set rules with regard to the distribution of cash; there are no other decisions; (c) assets held by the SPV are serviced through a servicing agreement; and (d) they are structured so that they are bankruptcy remote. See Introduction to Structured Finance, Introduction.

[5] Any of these entities could, independent of its involvement in a structured financing, be a financial institution and qualify as a "financial entity" under Dodd-Frank. For example, trustees that act on behalf of Structured Finance SPVs are frequently financial institutions and engage in financial activities apart from their fiduciary activities on behalf of Structured Finance SPVs. The involvement of the trustee in this structured financing capacity is limited. We do not believe, therefore, that their fiduciary activity on behalf of Structured Finance SPVs in the structured financing context should be considered to be actions of a "financial entity" nor should their involvement with the Structured Finance SPVs in the context of a structured financing be attributed to a Structured Finance SPV so as to make the Structured Finance SPV a "financial entity" under Dodd-Frank.

Structured Finance SPV.[6] In addition, the Sponsoring Group's structured finance activities, namely, the sale of a pool of assets to the Structured Finance SPV and the servicing of those assets,, would not, in and of themselves, cause any member of the Sponsoring Group to be included within any of the enumerated categories of financial entities in Section 3C.(g)(3). None of such activities could be deemed to be any of the activities that are financial in nature as defined in section 4(k) of the Bank Holding Company Act of 1956.

Notwithstanding the foregoing, without the clarification to the term "financial entity" that we are proposing, it is possible that Structured Finance Security-Based Swaps would inadvertently become subject to the mandatory clearing requirement. This result would not serve any of the factors set forth in Section 3C.(a)(4) of the Exchange Act which the SEC is required to take into account under Dodd-Frank when considering the submission of a security-based-swap for the determination of mandatory clearing. Structured Finance Security-Based Swaps are not standardized and typically come in many different sizes and tenors, depending upon the economics of the underlying structured finance transaction. It would be extremely difficult, if not impossible, for a DCO to clear a Structured Finance Security-Based Swap, without forcing the counterparties to modify the material terms.

Moreover, as set forth above, the collateral for Structured Finance Security-Based Swaps is not typically cash or liquid securities, but the pool of assets underlying the structured financing itself. This raises a host of questions as it relates to clearing: (a) How will the DCO evaluate the underlying collateral pool? (b) On what basis can the DCO take a security interest in such collateral? (c) What will happen if there is overcollateralization? Attempts to answer these questions reveal the difficulties inherent in a DCO accepting this collateral in satisfaction of its margining requirements. They do not have the credit support infrastructure to make this evaluation. Accordingly, the result of this would be to force the Structured Finance SPVs to post liquid collateral to the DCO; a result that would render many structured financings uneconomic. As mentioned above, the source of repayment for structured financings is the cash flow from the assets or receivables which is generated over time. Requiring the posting of liquid collateral would affect the cash flow analysis for a structured financing and cause adverse effects on the functioning of this market, including ultimately resulting in a reduction in the available amount of loans or other financing for the assets underlying the structured financing.

Finally, it is difficult to see how requiring the clearing of such security-based swaps would mitigate systemic risk. In fact, it could increase systemic risk either by forcing Structured Finance SPVs to forego hedging their risk or by spreading the performance risk of the pools of assets that underlie the structured finance transactions. Under the typical Structured Finance

[6] The term "financial entity," as defined in Section 3C.(g)(3) of the Exchange Act, includes an "employee benefit plan," as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and a "governmental plan," as defined in Section 3(32) of ERISA. Structured Finance SPVs are often specifically structured to not become plan assets under ERISA and the Structured Finance Security-Based Swaps frequently have termination events that are triggered in the event that they were to become plan assets. In addition, Structured Finance SPVs are clearly excluded from the definitions of "employee benefit plan" and "governmental plan" set forth in ERISA. Accordingly, a Structured Finance SPV should not be considered a "financial entity" within the meaning of Section 3C.(g)(3) of the Exchange Act as a result of an investment by such plans in securities issued by the Structured Finance SPV.

SPV this bankruptcy risk is borne by the investors and the counterparty. If such a risk was then transferred to a DCO, the risk of performance of many different asset classes, such as mortgages, auto loans and credit cards, would now be transferred to the DCO.

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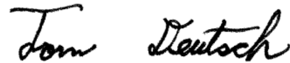
ASF very much appreciates the opportunity to provide the foregoing views in connection with the SEC's rulemaking process. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact me at 212.412.7107 or at tdeutsch@americansecuritization.com, Evan Siegert, ASF Associate Director, at 212.412.7109 or at esiegert@americansecuritization.com, or ASF's outside counsel on this matter, Evan M. Koster of Dewey & LeBoeuf at 212.259.6730 or at ekoster@dl.com.

Sincerely,



Tom Deutsch
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