American Bankers Association

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[redacted]

May 31, 2012

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

Re: DTC Proposed Changes to Timing of Post-Payable Adjustments
SEC Release No. 34-66894; File No. SR-DTC-2012-03

Dear Ms. Murphy:

The American Bankers Association (ABA)[1] on behalf of the ABA Corporate Trust Committee is pleased to respond to the proposal by the Depository Trust Company (DTC) published by the Securities and Exchange Commission (Commission) to implement a change in the practices of DTC with respect to post-payable adjustments of principal and income payments. The members of ABA's Corporate Trust Committee provide more than 95 percent of the corporate trust services in the U.S., and include banks that are the largest paying agents in the U.S. as well as a significant number of regional banks that are paying agents.

DTC's current practice is to accommodate issuers and/or their paying agents by facilitating the collection and in many cases the reallocation of certain misapplied, misdirected, or miscalculated principal and income payments with respect to such post-payable adjustments up to one year after the initial payment is made. Under the proposal, which would become effective on November 1, 2012, DTC would no longer accommodate paying agent requests to process these types of post-payable adjustments beyond 60 calendar days after the initial payment date. As stated in the Release, "[t}his change in practice will allocate assignment of accountability appropriately and will mitigate the risk associated with the reallocation of such principal and income payments." DTC has indicated that the number of adjustments has risen substantially of late and they seek to change that trajectory. We understand that the risk intended to be mitigated is the cost borne by custodians when overpayments made to security holders in error cannot be recouped by the custodian because the security holders are unable to provide the funds or are no longer customers of the custodian.

At the outset, we recognize the valid concerns of the custodians. However, as discussed more fully below, we believe that the vast majority of adjustments are the result of actions outside of the control of paying agents, and that removing the adjustment process outside of DTC after 60 days cannot eliminate or even significantly reduce such adjustments. Rather, forcing paying agents to process adjustments directly with custodians without DTC's efficient operational capabilities will substantially increase the burdens on both the custodians and paying agents and, ultimately disserve security holders. Moreover, regardless of whether or not DTC processes the payment adjustments, DTC will still be required to make the necessary adjustments to its own books and records to keep its records in balance with those of the paying agents. Because of the undue burden that would be imposed on paying agents as a result of actions over which they have no control, ABA opposes the proposal.

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at www.aba.com.

We are pleased to note that ABA's Corporate Trust Committee has recently begun a dialogue with DTC and with the Association of Global Custodians with the goal of finding common ground and working toward a mutually acceptable resolution of the issues. ABA strongly believes that there are multiple "root causes" for the existing volume of adjustments, and that only after reviewing the facts and circumstances surrounding each of the root causes can a meaningful analysis be made by DTC, the custodians and the paying agents as to how best to grapple with the issues. Accordingly, we urge the Commission not to act on the proposal, but rather to hold it in abeyance to permit this constructive dialogue to work its course.

General Comments

As noted above, post-payable adjustments will occur regardless of any change in the permissible time frame for processing adjustments through DTC. The only result of removing DTC from the process, as contemplated in the proposal, will be a lengthier, far more burdensome process for both custodians and paying agents, and – ultimately – security holders. DTC facilitates the orderly processing of payment revisions in that it makes adjustments to participants through the daily net settlement process. Currently, when a post-payable adjustment is processed by DTC the participant accounts are debited and credited within a number of days.

Without DTC playing this role, agents will have to claim the participants directly. If a position is held by more than one participant, each participant will have to be claimed. If paying agents have to perform this same post-payable adjustment outside of DTC, the process could take weeks or months. Of necessity, paying agents will have to delay paying out funds to participants (and ultimately to security holders) until all claims have been received. This delay in the proper allocation of funds will cause an additional hardship on DTC participants and the custodian community because clients' trades will be happening while the adjustments are pending, leaving underpaid beneficial holders without their rightful funds. Importantly, if paying agents are unable to claim overpayments outside of DTC because claims are denied by custodians, then holders who are due those funds will not receive them. *Paying agents will not pay underpaid holders until funds from overpaid holders are collected.*

Sources of Adjustments

At the outset, we note that adjustments are done at the CUSIP level. Each CUSIP has to be adjusted for each month going back, meaning that one error can result in many adjustments. For example, a transaction with 50 CUSIP's that had to be revised ten months ago would represent 500 adjustments at the CUSIP level. Thus when compounded with the number of months needing adjustment, the number of adjustments exceeding the 60-day time frame may well be substantial.

The ABA Corporate Trust Committee is currently working to compile data from the paying agents that will delineate the root causes of the adjustments. Our comments below are based on preliminary data. We will provide more robust data to the Commission and DTC as soon as possible. In the meantime, we note that the vast majority of adjustments are occurring in structured finance transactions, and that the documents for such transaction (which were approved by DTC) permit post-payable adjustments to principal and income payments. We note further that only a small amount of adjustments are the result of errors directly attributable to paying agents.

The preliminary data show that the root causes noted above can be broken down into the following categories:

- Servicer-generated data;
- Legal and document related issues;
- Third-party communications; and
- Paying agent issues.

1. Adjustments by or related to servicers

First, our preliminary data show that a significant amount of adjustments are the result of paying agents receiving revisions from servicers. Such adjustments occur for a multitude or reasons. While some revisions are related to manual errors by the servicers, many of the revisions result from loan losses and modifications stemming from the financial crisis and ensuing deflation in the mortgage market. The high volume of loan modifications and loan modification programs has been a serious challenge for the securitization industry. Situations involving credit support depletion, negative cash flow and insurer payback waterfall, and defaulted assets have resulted in servicers requiring numerous adjustments to prior payments with which paying agents must comply. For example, adjustments may result from the following types of situations:

- Paying agents often receive revised servicer files to correct loan level balances and interest/ principal payments submitted in prior periods. In the case where loan level activity affects the balances and payments of the security holders each period, the restatement will have to be processed. Some of the revised servicer files contain multi-period servicer loan level revisions.

- Paying agents can experience swap counterparty revisions. Depending on the fixed or variable miscalculation, the end result could affect the amount of available funds for optimal bond payments beyond the proposed 60-day DTC limit.

- Paying agents can experience late receipt of insurance claims. Depending on how significant the claim amount is, Regulation AB requirements do not allow the trustee to hold funds until the subsequent month.

- Bond insurance premiums and fees are based on bond balances. These must be adjusted even if they occur beyond the proposed 60- day DTC limit.

- Tax liabilities based on adjustments in current tax year may have favorably affected the prior tax year. This will result in a post-payable adjustment.

- For certain structured credit transactions, third parties, such as the collateral manager or the accountant, may have an opinion as to the order and amount that should be paid to the different classes of notes. Based on these opinions, a paying agent may be required to process a post-payable adjustment.

In addition, the servicing industry as a whole has undergone many changes, with the result that many current servicers are themselves successor servicers on mortgage-backed securities transactions. Thus, servicer transition issues have increased the number of adjustments.

An important subset of the adjustments by servicers is revisions on collateralized debt obligations (CDOs) and resecuritizations. Adjustments are required for these types of securities because of adjustments to the securities underlying the CDOs and resecuritization transactions themselves. Resecuritizations (also known as re-REMIC transactions) put paying agents on the DTC participant side of certain structured securities. Post-payable adjustments on the underlying securities, often with different paying agents, require the re-REMIC paying agent to process further post-payable adjustments. Any delay in the initial adjustment of the underlying securities will cause further delays in the processing of the re-REMIC post-payable adjustment. Prohibiting processing of adjustments after 60 days may hamper the actions of paying agents due to their perceived legal risk if there is insufficient time to process their revisions. This situation is exacerbated because many of these instruments pay quarterly, and would by their terms fall outside of the proposed 60-day period.

2. Legal and Document-Related Issues

There are legal situations which impact the ability of paying agents to make adjustments within the proposed 60-day time period. Where there are ambiguities in the governing instruments, the paying agent must seek direction from a court or the paying agent may have been given interim direction from a court pending final resolution by that body. In such situations, the paying agent is simply a stakeholder for the benefit of security holders and has no ability to require that the court make its determinations in a more timely fashion. In other cases, provisions in the deal documents for structured securities may contain language suggesting that any material changes that affect payments may require security holder consent for adjustments. Collecting consents for holders at the DTC participant level will cause delays in the ultimate allocation of post-payable adjustments.

In addition, paying agents are affected by evolving interpretations of Regulation AB by independent accounting firms. Under Regulation AB, attestations must be made by such firms concerning the operating platforms of banks that act as trustee on thousands of transactions. For example, the accounting firm may have a view on how governing documents are to be interpreted *vis-a-vis* calculations on one or more transactions that differs from that of the trustee bank. If the trustee bank is not able to convince the accounting firm that the model created by the bank is consistent with those documents, adjustments must be made, and the paying agent *must* abide by those changes. Such revisions may or may not be related to the trustee or calculation agent for the particular transaction, Moreover, the identification of the issue by the accounting firm may very well occur after the proposed 60-day period for adjustments has elapsed.

3. Third-Party Communications

In many cases, the paying agent is the last party in the chain of communications and must take direction from unaffiliated trustees or unaffiliated calculation agents. Incorrect modeling or other mistakes by these unaffiliated parties cause delays that must be factored into the analysis.

4. Paying Agent Errors

Errors made by paying agents, such as input-related errors, are a cause of adjustments. However, based on preliminary data, this represents a very small fraction of the root causes creating the volume of adjustments which have occurred in recent years. In addition, it is important to note that operational errors caused by paying agent error or even errors by unaffiliated trustees and calculation agents are generally detected and corrected before the payment date relating to the instruments involved.

Finally, it must be noted that pursuant to their contracts with issuers, paying agents have a legal duty to pay DTC (or CEDE & Co, DTC's nominee name) as the registered holder. Payments made to parties other than the registered holder, DTC, would likely be reviewed and criticized by bank examiners. Moreover, some paying agents may be concerned about the legal risk and potential breach of contract for making payment to parties that are not the registered holders. And, as noted above, DTC will nonetheless have to make the adjustments to its books and records regardless of whether it makes the payment to keep their records in balance with the paying agents. Critically, paying agents have no privity of contract with custodians or with the participants in DTC's system. Nor do paying agents have any relationship with the beneficial holders.

Conclusion

For the reasons described above, ABA opposes the proposal. However, ABA's Corporate Trust Committee is committed to participating in a constructive dialogue with DTC and the custodians as well any other parties whose participation is crucial to reaching a mutually agreeable resolution to these issues. While we support the goal of decreasing the number of post-payable adjustments, we strongly believe that a resolution that imposes an undue burden on paying agents for actions of other parties outside of the control of paying agents is simply not feasible. Accordingly, we urge the Commission to hold DTC's proposal in abeyance to permit this constructive dialogue to work its course.

Sincerely,

Cristeena G. Naser

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cc: Jerry W. Carpenter
Securities and Exchange Commission

Ms. Janet L. Wynn
The Depository Trust Clearing Corporation