CRE Finance Council®
The Voice of Commercial Real Estate Finance

August 31, 2012

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

Re: *DTC Rulemaking: Notice of Filing of Amendment No. 1 to Proposed Changes to Timing of Post-Payable Adjustments*, SEC Release No. 34-66894; File No. SR-DTC-2012-03

Dear Ms. Murphy:

The Commercial Real Estate (CRE) Finance Council® appreciates the opportunity to submit this response to the above-referenced amendment to the proposed rule change approved earlier this month by the Securities and Exchange Commission.[1] The proposed rule as amended would change the established practice of the Depository Trust Company (DTC) by significantly decreasing the time period—from one year to ninety days—for DTC to process post-payable adjustments of principal and income payments. Under the proposed rule, if post-payable adjustments are necessary outside the 90-day period, issuers and agents must make "adjustments and payment arrangements directly with the affected DTC participants" and obtain a "'P&I Allocation Register.'"[2]

The CRE Finance Council is pleased that the original proposed time frame of 60-days for post-payable adjustments to be made within the DTC settlement process has been increased to 90-days. The CRE Finance Council also appreciates the opportunity to participate in the DTC Industry Post Payable Adjustment Task Force that will be, among other things, recommending a definition for "uncontrollable post-payable adjustments" that would be exempt from the 90-day period, as well as recommending a joint DTC/industry process for handling post-payable adjustments that occur outside the 90-day window and are not exempt under the definition of "uncontrollable post-payable adjustments".

However, the CRE Finance Council is generally opposed to changing the timing of post-payable adjustments. We believe that shortening the timing window will not reduce payment errors but instead will reduce needed corrections to payment errors, thereby hurting investors. The use by Issuers and/or Paying Agents of a "P&I Allocation Register" to modify payments beyond the time frame DTC is required to do so is not, in many cases, an effective method for making such changes. A "P&I Allocation Register"

[1] Proposed Rule Change, *Self-Regulatory Organizations; The Depository Trust Company; Notice*
[2] *Id.* at 26797.

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will not eliminate the difficulty of identifying beneficial holders and securing their cooperation in connection with necessary payment modifications. While the proposed rule change might "limit ambiguity surrounding payment finality" as the Commission suggests in the "Discussion" section, the proposed rule change will likely create new ambiguity regarding payment quality by making it more difficult to correct payment errors.

Although the Commission has already approved Amendment No. 1 to the proposed rule, you have invited comments so we respectfully ask that the Commission consider our following viewpoints.

We do not believe it is appropriate to finalize the rule change until such time as the Adjustment Claims Repository is established and operational. As currently written, DTC will investigate the development and potential operation of such a repository *after* the adoption of the proposed amendment. There is no guarantee the repository will in fact be created. If the Adjustment Claims Repository had been established before the adoption of this rule change, then adjusting to a shorter window of time during which DTC will make payment adjustments would have been easier for the industry because there would be another reliable method for correcting payment errors besides relying on DTC.

We are also concerned that the proposed rule change does not offer a definition of "uncontrollable post-payment adjustments" that industry participants can consider and comment on. Determining what is "uncontrollable" is inherently subjective given the number of parties and steps involved in collecting, processing and calculating payments. It is unclear which of these parties would or could determine what payment adjustments are "uncontrollable". Given this subjectivity, developing such a definition could be challenging and should therefore be incorporated into a rule change process.

The lack of definition and clarity regarding the "root cause adjustment code" is also a concern. The phrase suggests that the circumstance or party causing each payment error will be reflected in a code which will later be used to develop issuer report cards on post-payable adjustments. In many circumstances, a simple code is unlikely to capture the complicated and sometimes numerous factors that contribute to the need to modify a payment. In other circumstances, a paying agent may not know the root cause of the needed adjustment. Moreover, our members are concerned about whether such a code would assign fault to a party, directly or indirectly, for a needed payment change. Understandably, they are also concerned about the potential legal ramifications and risks presented to them by the use of such a code. Without the opportunity to review and comment on the codes in connection with the rulemaking process, our members were prevented from evaluating these potential risks before the adoption of the proposed rule change. In this regard, the employment of a "root cause adjustment code" appears to be at least partially at odds with the stated purpose of the proposed rule change of "mitigating the risks associated with post payable adjustments". Given these concerns, instead of adopting the proposed rule change before the development of such codes, we believe industry participants should have had the opportunity to consider the "root cause adjustment codes" and comment accordingly through the rulemaking process.

The CRE Finance Council also requests that the SEC consider requiring DTC participants to capture and retain, for up to one year, the forwarding addresses of accounts (beneficial holders) that move their business to another broker-dealer. We strongly urge you to consider this recommendation as we believe if the DTC participants hold this account information it would make the process of identifying and contacting beneficial holders outside of the DTC process and 90-day timeframe much more streamlined and efficient. We do not believe it would be burdensome or difficult for DTC participants to capture and retain such information.

As stated in our initial comments, our members are concerned that the proposed rule will undermine the strength and liquidity of the commercial real-estate capital finance market by making it more difficult to process post-payment adjustments. Our investor members are further concerned that the proposed rule will deter efforts to process post-payable adjustments in commercial mortgage-backed securities ("CMBS") deals because such adjustments routinely occur outside the proposed 90-day time period.

The CRE Finance Council is the collective voice of the entire $3.5 trillion commercial real estate finance market, including portfolio, multifamily, and CMBS lenders; issuers of CMBS; loan and bond investors, such as insurance companies, pension funds, and money managers; master and special servicers; rating agencies; accounting firms; law firms; and other service providers to the commercial real estate capital finance industry. Because its members represent a broad spectrum of interests within the CRE finance market, the CRE Finance Council has an interest in the development of a regulatory framework that promotes a favorable investing environment for commercial real estate.

We appreciate your consideration of our comments regarding amendment 1 to the proposed rule change. We stand ready to provide any assistance that may be helpful.

Respectfully submitted,

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CRE Finance Council

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