EDUCATION FINANCE COUNCIL

July 20, 2011

Office of the Comptroller of the Currency
250 E. Street, SW.
Mail Stop 2-3
Washington, DC 20219
Docket No. OCC-2011-002
Via E-Mail: regs.comments@occ.treas.gov

Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
Fourth Floor
1700 G Street, NW.
Washington, DC 20552
RIN 2590-AA43
Via E-Mail: regcomments@fhfa.gov

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave., NW.
Washington, DC 20551
Docket No. R-1411
Via E-Mail:
regs.comments@federalreserve.gov

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW.
Room 10276
Washington, DC 20410-0500
Docket No. FR-5504-P-01
Via Federal eRulemaking Portal:
www.regulations.gov

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW.
Washington, DC 20429
RIN 3064-AD74
Via E-Mail: comments@fdic.gov

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE.
Washington, DC 20549-1090
File Number S7-14-11
Via E-Mail: rule-comments@sec.gov

Re: Credit Risk Retention

Ladies and Gentlemen:

The Education Finance Council ("EFC") appreciates the opportunity to submit this letter in response to the request of the agencies listed above (the "Agencies") for comments regarding *Credit Risk Retention; Proposing Release, 76 F.R. 24090* (April 29, 2011) (the "Proposing Release"). The Proposing Release was published by the Agencies pursuant to the requirements of Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), which was codified as new Section 15G of the Securities Exchange Act of 1934 (the "Exchange Act").

About EFC

EFC is the trade association focused on representing America's nonprofit and state-based student loan providers. These public purpose student loan providers are dedicated to the goal of making college more affordable. EFC's mission is to expand access to higher education by ensuring the availability of student loan funds while striving to make paying for college easier and less expensive for all students and families. Additional information about EFC is available at www.efc.org.

Requested Exemptions from the Risk Retention Requirement

EFC supports the principle that securitizers should retain an appropriate amount of credit risk in order to ensure that the interests of securitizers and investors are aligned. Congress recognized that in implementing this principle through the rulemaking process, the Agencies would need to have the flexibility to grant exceptions, exemptions and adjustments to the general risk retention requirement set out in the Dodd-Frank Act. This flexibility is essential because the wide variety of securitizers, securitized assets, securitization structures and public policy considerations precludes a "one size fits all" approach to risk retention. Accordingly, the Agencies have been given ample authority under Section 15G of the Exchange Act to provide appropriate exemptions, exceptions and adjustments to the risk retention requirement.

No other sector of the securitization market presents a more compelling case for an appropriate set of exemptions than the student loan market. As explained below, EFC believes that the final risk retention rules should provide exemptions for:

- public purpose student loan providers;
- securitization transactions in which the securitized assets consist of student loans guaranteed under the Federal Family Education Loan Program ("FFELP Loans"); and
- securitization transactions in which the securitized assets consist of non-federally guaranteed student loans ("Supplemental Student Loans") that satisfy specified underwriting criteria.

Analysis

Public Purpose Student Loan Providers Should be Exempt from the Risk Retention Requirement

The Agencies should create an exemption from the risk retention requirement for nonprofit entities[1] and state agencies[2] (collectively, "Public Purpose Student Loan Providers"). By offering

[1] When used in this letter, the term "nonprofit entity" means (a) any entity established and operated exclusively for the purpose of acquiring student loan notes incurred under the Higher Education Act of 1965 or (b) any other student loan provider that is exempt from U.S. federal income tax pursuant to Section 501(c)(3) of the Internal Revenue Code of 1986.

or helping to facilitate affordable student loans, Public Purpose Student Loan Providers help to bridge the critical funding gap between the cost of higher education and the amount of loans available under the Federal Direct Loan Program ("FDLP"). [3] The application of a risk retention requirement to securitizations conducted by Public Purpose Student Loan Providers is unnecessary and will cause financial distress to Public Purpose Student Loan Providers, thus impairing their ability to carry out their public-interest mission.

1. The Interests of Public Purpose Student Loan Providers and Investors are Strongly Aligned

As noted above, EFC recognizes that risk retention serves to align the economic interests of securitizers with those of investors. The potential for a misalignment of interest is of particular concern when a securitization transaction is sponsored by a for-profit entity. The pursuit of short-term profits by a securitization sponsor, when coupled with the sponsor's asymmetric access to information about the characteristics of the securitized receivables, can lead to deteriorating credit underwriting practices, poorly-structured securitization transactions and lax monitoring standards, ultimately leading to losses by securitization investors.[4] Under such conditions, a risk retention requirement can be helpful in better aligning the interests of sponsors and investors.

The alignment of interest problem described above is largely non-existent in securitization transactions conducted by Public Purpose Student Loan Providers because Public Purpose Student Loan Providers are not motivated to earn profits. Thus, the key underlying force that often drives a wedge between the interests of securitizers and the interests of investors is not present in securitization transactions conducted by Public Purpose Student Loan Providers.

Moreover, the combined force of the long-term mission of Public Purpose Student Loan Providers and the unique structure of their securitization transactions acts to strongly align the interests of Public Purpose Student Loan Providers with those of securitization investors. As noted above, the long-term mission of Public Purpose Student Loan Providers is to dependably bridge the gap between the cost of higher education and the limited financing options available through FDLP. The ability of Public Purpose Student Loan Providers to fulfill this long-term

[2] When used in this letter, the term "state agency" means any entity organized at the request of a state or one or more political subdivisions thereof or is requested to exercise such power by one or more political subdivisions and required by its corporate charter and bylaws, or required by state law, to devote any income (after payment of expenses, debt service and the create of reserves for the same) to the purchase of additional student loan notes or to pay over any income to the United States.

[3] As of July 1, 2010, all subsidized and unsubsidized Stafford Loans, PLUS loans and Consolidation loans are made under FDLP.

[4] On page 14 of its Report to the Congress on Risk Retention (October 2010), the Board of Governors of the Federal Reserve System explained that "over time, if an originator sells relatively bad loans to securitizers, or a securitizer markets poorly structured securities or securities backed by relatively bad loans to investors, its reputation will suffer and securities with which the entity is associated will fetch lower prices. In the short run, however, investors, credit rating agencies, and other market participants might find it hard to detect bad loans or bad behavior because differences in loan quality across securities may become apparent only in downturns and may require several years of data to detect. As a result, this reputation effect may not be sufficient to overcome the 'adverse selection' problems associated with securitization."

mission is inextricably linked to the ability of Public Purpose Student Loan Providers to maintain long-term access to financing through the securitization market. No other source of funding is available in an amount sufficient to permit Public Purpose Student Loan Providers to fulfill their mission. Public Purpose Student Loan Providers have no incentive to risk their long-term access to securitization financing by "cutting corners" to the detriment of their investors.

In addition, the structure of securitizations conducted by Public Purpose Student Loan Providers is unique in that Public Purpose Student Loan Providers own the underlying securitized student loans and act as the issuing entity with respect to the asset-backed securities collateralized by those student loans. In other words, Public Purpose Student Loan Providers effectively retain more than 5% of the credit risk of the securitized assets; indeed, they retain *all* of the securitized assets and pledge those assets to secure their payment obligations to investors. If a Private Purpose Student Loan Provider defaults on its obligation to make payments to investors, its own assets (i.e., the securitized student loans) are subject to foreclosure under the related securitization indenture. In contrast, for-profit sponsors of securitizations backed by RMBS, auto loans, credit cards and other traditional asset classes use transaction structures in which the sponsor sells the securitized assets, directly or indirectly, to the issuing entity for cash or other forms of consideration, thereby leaving the issuing entity, rather than the sponsor, as the party with "skin in the game."[5]

2. A Risk Retention Requirement Would Cause Financial Distress for Public Purpose Student Loan Providers

The non-profit mission of Public Purpose Student Loan Providers as well as applicable law prevents Public Purpose Student Loan Providers from maintaining significant amounts of equity capital. A rule that requires Public Purpose Student Loan Providers to retain credit risk in the form of a retained ABS interest or representative sample as contemplated by the Proposing Release would necessarily require Public Purpose Student Loan Providers to finance that retained interest either with full recourse debt[6] or with equity capital.

Unlike their for-profit counterparts, Public Purpose Student Loan Providers cannot raise equity capital in the stock market and have few sources of cost-effective debt financing. Not only would the imposition of a risk retention requirement strain the already thin resources of Public Purpose Student Loan Providers, it would also "tilt the playing field" with respect to student loan financing in favor of for-profit student loan companies because for-profit student loan companies can fund the cost of risk retention much more easily and economically than Public Purpose Student Loan Providers.

[5] This structural distinction is implicitly recognized by the basic terms of the Proposing Release, as well as the Dodd-Frank Act itself. The Proposing Release requires that the "sponsor" satisfy the base risk retention requirement. The Proposing Release defines the term sponsor as "a person who organizes and initiates a securitization transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity." Similarly, the term "securitizer" under the Dodd-Frank Act refers to the sponsor and the depositor. Thus, by definition, a Public Purpose Student Loan Provider that itself acts as the issuing entity is neither a "sponsor" under the Proposing Release nor a "securitizer" under the Dodd-Frank Act.

[6] §__.14(e) of the Proposing Release prevents a sponsor from financing retained credit risk on a non-recourse basis.

3. The Exemption for Issuers of Qualified Scholarship Funding Bonds Should Not Require Such Bonds to be Tax Exempt

Section 15G(c)(1)(G)(iii) of the Exchange Act requires the Agencies to provide an exemption for "qualified scholarship funding bonds" as defined in Section 150(d)(2) of the Internal Revenue Code of 1986 (the "Code").[7] Pursuant to this requirement, §__.21(a)(4) of the Proposing Release provides that the risk retention requirement does not apply to "any asset-backed security that meets the definition of a qualified scholarship funding bond, as set forth in Section 150(d)(2) of the [Code]."

EFC respectfully requests that the Agencies make it clear that, in order to satisfy the qualified scholarship funding bond exemption, it is sufficient that the issuer be the type of entity described in the definition of qualified scholarship funding bond. Alternatively, a clear exemption for Public Purpose Student Loan Providers would clear up this ambiguity. The Dodd-Frank Act exemption for qualified scholarship funding bonds should not be read to require that those bonds be exempt from federal income taxation in order to be exempt from the risk retention requirement.

The Risk Retention Requirement Should Not Apply to Securitizations Backed by FFELP Loans

Although the Health Care and Education Reconciliation Act of 2010 (the "HCERA") eliminated the Federal Family Education Loan Program and no new FFELP Loans may be made under that program, approximately $450 billion of FFELP Loans remain outstanding.[8] A sizable portion of these FFELP loans have final maturity dates which extend past 2020 and some extend past 2040. Therefore, it is imperative that securitization remain a viable source of financing for these remaining FFELP Loans.

As explained below, FFELP Loans are 97% to 100% guaranteed by the federal government. Thus, the amount of credit risk posed by FFELP Loans is negligible.

Moreover, because no new FFELP Loans may be made, the application of the risk retention requirement to securitizations of FFELP Loans could not have any effect on future underwriting practices with respect to FFELP Loans. Therefore, the risk retention requirement should not apply to securitizations of FFELP Loans.

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[7] The term "qualified scholarship funding bond" is defined in Section 150(d)(2) of the Code as "a bond issued by a corporation which – (A) is a corporation not for profit established and operated exclusively for the purpose of acquiring student loan notes incurred under the Higher Education Act of 1965, and (B) is organized at the request of the State or 1 or more political subdivisions thereof or is requested to exercise such power by 1 or more political subdivisions and required by its corporate charter and bylaws, or required by State law, to devote any income (after payment of expenses, debt service and the creation of reserves for the same) to the purchase of additional student loan notes or to pay over any income to the United States."

[8] *See* Department of Education "Fiscal Year 2011 Budget Request" at page T-20 (available at: http://www2.ed.gov/about/overview/budget/budget11/justifications/t-loansoverview.pdf).

1. FFELP Loans Pose Negligible Credit Risk

FFELP Loans benefit from a federal government guaranty of 97% to 100% of the outstanding principal amount of the loan (plus accrued interest) depending upon the year of origination and other factors.[9] Because of this guaranty by the federal government, FFELP Loans pose virtually no credit risk.

The Proposing Release contains a number of exemptions for securitization transactions in which the securitized assets are partially or fully guaranteed by the federal government. Those exemptions include both full guarantees and partial guarantees and are summarized below.

- Exemption Based on Full Guarantee: The Proposing Release exempts asset-backed securities that are "collateralized solely (excluding cash and cash equivalents) by assets that are fully insured or guaranteed as to the payment of principal and interest by the United States or an agency of the United States by obligations issued by the United States."[10]

- Exemption Based on Partial Guarantee: The Proposing Release exempts asset-backed securities collateralized solely (excluding cash and cash equivalents) by residential, multifamily, or health care facility mortgage loan assets that are insured or guaranteed as to the payment of principal and interest by the United States or any agency of the United States."[11] Examples provided by the Agencies of assets eligible for this exemption are:

    - loans under a Department of Veterans Administration Program in which the federal government guarantees between 25% and 50% of lender losses in the event that the residential borrower defaults;[12] and

    - loans under a United States Department of Agriculture Rural Development program in which the federal government guarantees a sliding amount against loss up to 90% of the original loan amount for single family loans.[13]

The federal guaranty of FFELP Loans amounts to nearly a full guaranty by the federal government. With a guaranty level of 97% to 100%, the amount of credit risk inherent in FFELP Loans is far less than the credit risk inherent in the types of assets eligible for the existing partial guarantee exemption described above. The amount of credit risk inherent in FFELP Loans is also almost certainly less than the credit risk inherent in assets that meet the criteria specified in the Proposing Release for qualified residential mortgages, qualifying commercial loans, qualifying commercial mortgage loans and qualifying auto loans.

[9] This guaranty is provided under a guaranty program administered by the Department of Education.
[10] *See* §__.21(b)(2) of the Proposing Release.
[11] *See* §__.21(a)(1)(i) of the Proposing Release.
[12] *See* Proposing Release, at 24136.
[13] *Id.*

With respect to securitized assets guaranteed by the federal government, the Agencies observed that, in addition to the reduction or elimination of credit risk, "the federal department or agency issuing, insuring or guaranteeing ABS or collateral would monitor the quality of the assets securitized, consistent with the relevant statutory authority."[14] As the administrator of the guaranty program with respect to FFELP Loans, the Department of Education has the statutory authority and the incentive to monitor the quality of FFELP Loans.

2. Risk Retention Would Have No Effect on Underwriting Standards for FFELP Loans

As noted above, the Federal Family Education Loan Program was ended in 2010. No new FFELP Loans have been made since or will be made after June 30, 2010. Therefore, the application of a risk retention requirement to securitizations collateralized by FFELP Loans would have no effect on the underwriting standards for FFELP Loans. Moreover, the FFELP Loans that remain outstanding were required to be underwritten and serviced in accordance with the requirements of the Federal Family Education Loan Program.

The Risk Retention Requirement Should Not Apply to Securitization Transactions Collateralized by Qualifying Supplemental Student Loans

Section 15G(e)(1) of the Exchange Act provides the Agencies with broad authority to provide an exemption for classes of assets, so long as such exemption helps to ensure high quality underwriting standards and encourages appropriate risk management practices. Pursuant to such authority, the Proposing Release contains exemptions for securitization backed by qualifying residential mortgage loans, commercial loans, commercial mortgage loans or automobile loans. The Agencies have requested comment as to whether additional asset classes should be exempted from the risk retention requirement.

The Agencies should provide a risk retention exemption for securitization transactions backed by Supplemental Student Loans that meet specified underwriting and other criteria ("Qualifying Supplemental Student Loans"). A Qualifying Supplemental Student Loan exemption would facilitate the creation and securitization of well-underwritten Supplemental Student Loans, thus addressing the concerns underlying risk retention without constraining the supply of available funding for higher education.

Supplemental Student Loans are not guaranteed by the U.S. government. They are intended to be used by borrowers who have first utilized other sources of education funding, including government loan programs, scholarships, grants and other aid. For the 2009-2010 academic year, we believe that there was a "funding gap" in post-secondary education in the United States of approximately $133 billion between the costs of attendance and these other sources of education funding, based on information from the National Center for Education Statistics and the College Board. We believe that enrollment in post-secondary education institutions will continue to increase over the next several years, as will costs of attendance. As a result, we also believe that Supplemental Student Loans will continue to be necessary for students and their families after

[14] Id., at 24137.

applying personal savings and other funding sources, and exhausting all available government loan programs, scholarships, grants and other aid.

Among the criteria that should be included in the definition of Qualifying Supplemental Student Loan are: the loan must be certified by the institution of higher education attended by the borrower; borrowers are charged the same rate of interest regardless of the type of institution of higher education they attend (e.g., two-year, four-year, public, private); fixed interest rate options are available; and no prepayment penalties. The criteria for the Qualifying Supplemental Student Loan exemption should also include the same risk management and monitoring requirements as those specified in the qualifying asset exemptions included in the Proposing Release.

Conclusion

There is no benefit to imposing a risk retention requirement on Public Purpose Student Loan Providers because their interests are already strongly aligned with those of investors. Unlike for-profit student loan companies, Public Purpose Student Loan Providers have no cost-effective means of financing the cost of risk retention. Therefore the risk retention requirement should not apply to securitization transactions conducted by Public Purpose Student Loan Providers.

Risk retention should also not be required for securitizations collateralized by FFELP Loans or Qualifying Supplemental Student Loans. FFELP Loans have negligible credit risk and are not susceptible to any improvement in underwriting standards, as the Federal Family Education Loan Program has been eliminated. A Qualifying Supplemental Student Loan exemption would facilitate the creation and securitization of well-underwritten Supplemental Student Loans, thus addressing the concerns underlying risk retention without constraining the supply of available funding for higher education.

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We very much appreciate your consideration of these comments on the Proposing Release. If you have any questions, please contact the undersigned at (202) 955-5510 or at vinces@efc.org.

Sincerely yours,

Vince Sampson
President
EDUCATION FINANCE COUNCIL