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August 10, 2012

By Email: rule-comments@sec.gov

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

Re: Credit Risk Retention - Use of Participation Interests
(Rel. No. 34-64148; File No. S7-14-11)

Ladies and Gentlemen:

This letter is submitted on behalf of the Federal Regulation of Securities Committee and the Securitization and Structured Finance Committee (together, the "Committees") of the Business Law Section of the American Bar Association (the "ABA").

On July 20, 2011, the Committees submitted a comment letter (the "Primary ABA Comment Letter") in response to the Proposed Rules relating to Credit Risk Retention referenced above (the "Proposal") released jointly by the Office of the Comptroller of the Currency (Department of the Treasury), the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the U.S. Securities and Exchange Commission (the "Commission"), the Federal Housing Finance Agency and the Department of Housing and Urban Development (collectively, the "Agencies").

In June, 2012, several members of the Committees participated in a teleconference with representatives of several of the Agencies. The purpose of the teleconference was to discuss the proposal in the Primary ABA Comment Letter regarding the use of participation interests as a permitted form of risk retention.

We are writing this letter as a follow up to that teleconference. Specifically, we are submitting our suggestion for text to be included the rules that would permit the use of participation interests as a form of risk retention.

The suggested text is enclosed with this letter. We will not describe in detail in this letter our rationale for our suggested text. Instead, we have included a number of explanatory endnotes in the enclosure. However, we will highlight here key points of what we seek to accomplish with this text:

- the ability to use either a "lead interest" or a "participant's interest" as the method of risk retention held by a securitizer; we refer to these interests as "eligible participation interests"

- the ability to include more than one eligible participation interest in a pool of securitized assets

- the ability to combine both "qualifying" assets (which require zero risk retention) and non-qualifying assets (which require full risk retention) in the same securitized pool

The comments expressed in this letter represent the views of the Committees only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law. This letter is addressed to the Commission, and not to the other Agencies, due to limitations on the Committees' authority within the Section of Business Law, but we will provide copies to the other Agencies. Our Committees are composed of lawyers from private practice, corporate law departments, trade associations and other organizations. Collectively, we have substantial experience in the securitization markets, and in virtually all of the many asset classes that have been securitized.

The Committees appreciate the opportunity to submit this proposed text. Members of the Committees would be happy to share our experience, not as industry representatives, but as experienced practitioners, in helping shape the final risk retention rules. We are available to meet and discuss these matters with the Commission and its staff and to respond to any questions.

Very truly yours,

/s/ Catherine T. Dixon
Catherine T. Dixon
Chair, Federal Regulation of Securities Committee

/s/ Martin Fingerhut
Martin Fingerhut
Chair, Securitization and Structured Finance Committee

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PROPOSED RULE TO PERMIT PARTICIPATION INTERESTS IN RISK RETENTION[a]

Definitions

"Eligible participation interest" means, with respect to any securitization transaction, an interest in one or more[1] underlying assets[2] that:

(a) is a fixed undivided percentage interest;

(b) constitutes either (i) a lead interest, where the issuing entity holds a participant's interest, or (ii) a participant's interest, where the issuing entity holds the lead interest;[3]

(c) in respect of all rights to cash flow from the underlying assets, is pari passu with the interest held by the issuing entity; and

(d) does not provide the holder of the participant's interest with recourse against the lead due to the lack of creditworthiness of any obligor on an underlying asset.

"Exempt underlying asset"[4] means any underlying asset that (i) meets the standards prescribed in any of §§ __.15, 18, 19, 20 or 21 of this part (other than the requirement that a securitization be collateralized solely by such underlying assets)[5] or (ii) for which no risk retention is required by reason of any other exemption, exception or adjustment to the rules in this part that is made available in accordance with § __.23 of this part.

"Lead interest" means, with respect to a participation interest arrangement in one or more underlying assets, the interest of a lead that has granted a participation interest in each such underlying asset to another party.

"Participant's interest" means, with respect to a participation interest arrangement in one or more underlying assets, the interest of a participant that has acquired a participation interest in each such underlying asset directly or indirectly from the lead.

"Required risk retention percentage" means, with respect to one or more underlying assets, the percentage equivalent of a fraction, the numerator of which is five percent (or, if applicable, such other non-zero percentage for such underlying assets based on an exemption, exception or adjustment to the rules in this part that is made available in accordance with § __.23 of this part), and the denominator of which is the excess of one hundred percent over the numerator.[6]

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[a] We have included a number of endnotes which are intended as an explanation of the choices we have made in the proposed rule; they are not intended to be part of the proposed rule.

"Securitized asset" means an underlying asset that:[7]

(a) (a) (i) is transferred, sold or otherwise conveyed to an issuing entity or (ii) is the subject of an eligible participation interest in which the issuing entity holds a lead interest or a participant's interest, and

(b) collateralizes the ABS interests issued by the issuing entity, either directly or by means of a lead interest or participant's interest held by the issuing entity in such underlying asset.

"Underlying asset" means a self-liquidating financial asset (including but not limited to a loan, lease, mortgage or receivable).[8]

Proposed Rule

§__[4A]. Participation interest risk retention.

(a) In general. [9]The securitizers and the originators, collectively and without duplication, retain one or more eligible participation interests in underlying assets other than exempt underlying assets, each of which is in an amount equal to at least the required risk retention percentage of the lead interest or the participant's interest in such underlying assets (whichever interest in such underlying assets is held by the issuing entity).

(b) Disclosures. A securitizer using this section shall provide, or cause to be provided, to potential investors a reasonable amount of time prior to the sale of the asset-backed securities in the securitization transaction and, upon request, to the Commission and its appropriate Federal banking agency, if any, disclosure in written form under the heading "Credit Risk Retention" of the collective interest represented by the eligible participation interests held by the securitizers and originators as a percentage of the lead interest or the participant's interest in such underlying assets (whichever interests are held by the issuing entity).

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1 This submission envisions that there could be more than one participation interest ("PI") included in a given transaction. We believe it is appropriate to permit both "loan level" and "pool level" PIs. For example, a securitizer that is an aggregator of underlying assets acquired from several different originators may wish to create a separate participation interest for the underlying assets of each originator.

2 A securitizer may have some underlying assets that are so large it would seek to split them up among two or three securitizations to avoid an excessive single-asset concentration in one transaction. The use of the PI structure is perhaps the only practical way to accomplish such a goal.

3 This definition has been designed to permit two different types of participation interests: *first,* a situation in which the securitizer grants a PI in the underlying assets to the issuing entity (and the securitizer's retained lead interest is its risk retention); and, *second,* a situation in which the securitizer transfers ownership of the

assets to the issuing entity and takes back a PI (which constitutes the securitizer's risk retention) in the underlying assets.

4 We endorse the view expressed by other commenters on the original notice of proposed rulemaking ("NPR") that the Agencies should permit proportionately reduced risk retention in pools containing both qualified assets that are entitled to zero risk retention (or, perhaps, assets entitled to some level greater than zero but less than five percent) and ordinary non-qualified assets that will be subject to a five percent requirement. Toward that end, we have designed the term "exempt underlying asset" to refer to underlying assets for which zero risk retention is required. We have also designed the term "required risk retention percentage" to permit the percentage of risk retention to be calculated against the particular assets subject to a non-zero risk retention requirement, rather than solely against the pool as a whole.

5 We have inserted the parenthetical carving out the "solely collateralized by" requirement to be clear that this provision would facilitate securitization of pools comprised of some "qualifying" assets and some non-qualifying assets.

6 In the ordinary course for underlying assets subject to 5 percent risk retention, the required risk retention percentage for the interest held by the securitizer will be calculated with a numerator of 5 and a denominator of 100 minus 5 (i.e., 95). This calculation results in a required risk retention percentage of 5.263158%. We note that §__.8 of the proposed rules (the representative sample provision) uses a similar approach. There, the Agencies rounded this percentage up to 5.264 percent.

7 "Securitized asset" is proposed to be redefined to reflect that it might be a participation interest in the underlying assets, rather than the underlying assets themselves, that are transferred to the issuing entity. However, the term is still meant to refer to all of the underlying assets, not just the portion of the underlying assets represented by the issuing entity's participation interest. This approach seemed to be consistent with the usage of "securitized asset" in almost all of the proposed rules in the NPR; the only exception was in the portion of the rules dealing with representative samples (but it seems unlikely that a PI and a representative sample would be used together in a given transaction, so that "conflict" did not seem material).

8 "Underlying asset" is identical to the definition of "asset" in the NPR. The use of "asset" in the NPR rules caused some confusion in places, because it was not entirely clear whether the Agencies meant to use the term to refer just to the self-liquidating financial assets held by an issuing entity or, more broadly, to all of the various assets (including, e.g., reserve accounts and interest rate derivatives) that might be held by an issuing entity. So this proposed PI rule is suggesting the re-labeling of "asset" as "underlying asset."

9 This proposed rule does not include the language "at the closing of the transaction" at the beginning, unlike the vertical slice rule. There are two reasons for this approach. *First,* the idea is to permit this form of risk retention to be used for revolving structures, where "the closing" is not really meaningful. *Second,* a ratable participation interest should presumably always be the required risk retention percentage, even if the pool has, for example, massive losses. Accordingly, the PI does not need to be measured at a point in time.