February 13, 2012

Department of the Treasury
Office of the Comptroller of the Currency
250 E Street SW, Mail Stop 2.3
Washington, DC 20219

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitutional Avenue NW
Washington, DC 20551

Robert Feldman, Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429
Attention: Comments, Federal Deposit Insurance Corporation

Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: RIN 1557-AD44 [Document No. OCC-2011-0014]; 7100 AD 82; 3064-AD85; 3235-AL07

Ladies and Gentlemen:

The American Securitization Forum ("ASF")[1] appreciates the opportunity to submit this letter in response to the request of the Joint Regulators (as defined below) for comments regarding their notice of proposed rulemaking (the "Proposing Release") entitled "Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds" (the "Proposed Regulations") (RIN 1557-AD44; 7100 AD 82; 3064-AD85; 3235-AL07),[2] issued pursuant to Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). Section 619 (the "Volcker Rule") requires the Office of the Comptroller of the Currency (the "OCC"), the Board of

[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.

[2] *See* http://www.gpo.gov/fdsys/pkg/FR-2011-11-07/pdf/2011-27184.pdf.

Governors of the Federal Reserve System (the "Board"), the Federal Deposit Insurance Corporation (the "FDIC"), the Securities and Exchange Commission (the "SEC" and collectively with the OCC, the Board and the FDIC, the "Joint Regulators"), and the Commodity Futures Trading Commission (the "CFTC") to implement rules to impose certain prohibitions on the ability of a banking entity to engage in proprietary trading and have certain interests in, and relationships with, hedge funds and private equity funds. ASF supports reforms within the securitization market and we commend the Joint Regulators for seeking industry input on this critically important issue. Over the past decade, ASF has become the preeminent forum for securitization market participants including investors, issuers and broker-dealers, among others, 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 various regulators on issues affecting our market. We are hopeful that the comments included in this letter will assist the Joint Regulators in crafting final regulations that ultimately meet the goals of Dodd-Frank while also promoting a vibrant securitization market.

ASF has strongly supported regulatory and industry reforms that are tailored to permit the proper operation of the securitization markets, including risk retention, conflicts of interest, revised and enhanced disclosure regimes, residential mortgage securitization representations and warranties and enforcement mechanisms, and due diligence standards. While there is need for modifications to the regulations proposed in each of these areas, they are specifically designed to address concerns in the securitization markets that ASF is anxious to work with the Joint Regulators to allay. In contrast to those provisions of Dodd-Frank, its implementing regulations and other regulations intended to specifically regulate the securitization industry following the financial crisis, the Volcker Rule, despite its breadth as written, is intended to address concerns that have nothing to do with the securitization markets per se: specifically, the concern that banking entities may be exposed to undue risks through proprietary trading and the sponsorship and ownership of hedge funds and private equity funds. Many securitization vehicles potentially are brought within scope of the Proposed Regulations simply because they share the same exemptions from the Investment Company Act—Section 3(c)(1) and Section 3(c)(7)—as traditional hedge funds and private equity funds. While ASF applauds the Joint Regulators for recognizing this fact and attempting to exempt certain securitization structures and activities from the scope of regulation under the Volcker Rule, for the reasons stated in this letter such efforts do not go far enough to:

- Give proper effect to the explicit statutory directive in Section 13(g)(2) of the Volcker Rule that **"[n]othing in [the Volcker Rule] shall be construed to limit or restrict the ability of a banking entity... to sell or securitize loans in a manner otherwise permitted by law"** (*emphasis added*); or

- Permit the proper participation of banking entities in the securitization markets that this statutory directive was intended to protect in order to preserve securitization as an effective means of financing the American economy.

The ability of banking entities to continue to securitize assets that they originate, act as sponsors of securitization vehicles that finance customer assets of all kinds, extend credit to and enter into other covered transactions with these securitization entities, invest in asset-backed securities, and act as third party service providers to these entities is critical to the continued operation of the debt markets in general and to the securitization markets specifically. Without the ability of banks to access the capital markets to fund financial assets through securitization, bank liquidity and the ability of banks to deploy capital to make loans to their customers will be severely constrained. The permanent adverse effect this could have on the U.S. economy cannot be overstated.

Executive Summary

We believe that Congress did not intend to restrict banks' participation in the securitization markets in enacting the Volcker Rule, as we describe in Section I of this letter. Many securitization entities rely on Section 3(c)(1) or 3(c)(7) of the Investment Company Act, as do the traditional hedge funds and private equity funds that Congress intended to be subject to Volcker Rule prohibitions. However, the similarities between securitization entities and hedge funds and private equity funds end there. Securitization is a vital and cost effective means through which banks extend credit to U.S. businesses and individual bank customers; it is therefore a core banking function that falls outside the intended scope of the Volcker Rule. As the Financial Stability Oversight Council stated in its study and recommendations, "to ensure that the economy and consumers continue to benefit from robust and liquid capital markets and financial intermediation, the Volcker Rule provides for certain 'permitted activities' that represent **core banking functions"** (*emphasis added*).[3] Indeed, Congress specifically provided in Section 13(g)(2) of the Volcker Rule that the Joint Regulators should not "limit or restrict the ability of banking entities or nonbank financial companies... to sell or securitize loans..."

The permissible loan securitization exclusions in Sections __.13(d) and __.14(a)(2)(v) do not adequately capture all of the legitimate lending activities that banks engage in through securitization. For example, as we describe in detail in Section II of this letter, certain automobile loan and lease securitizations, asset-backed commercial paper conduits, tender option bonds, and corporate bond and loan securitizations would be severely limited or even prohibited under the Proposed Regulations as written. These and other securitization products provide a vital source of low cost funds for individual consumers, states and municipalities, and businesses of all kinds and sizes in the U.S. and abroad. Moreover, as securitization evolves and new bank customer funding needs arise, bank lending may be further limited in unanticipated ways.

In addition, the prohibition in Section __.16 on engaging in covered transactions with covered funds will preclude banking entities from continuing safe and sound, well-functioning, time-

[3] Financial Stability Oversight Council, Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds and Private Equity Funds (January 18, 2011) ("FSOC study"), pp. 1

tested securitization programs that provide credit to small businesses, municipalities, consumers and other banking customers. For example, in many such programs, banks provide liquidity, credit support or derivatives to securitization entities that enable these vehicles to be cost efficient and to meet customer needs. This would not be permitted under Section ___.16. Corporate debt repackagings and tender option bonds, which allow individuals to invest at reduced minimum denominations, finance municipal securities, or obtain a rate of interest or currency denomination different from that offered by the borrower, would not work without a bank providing a swap or liquidity facility necessary for the investment to include the features required by willing investors. Section __.16 will also limit banks' ability to service securitizations, provide indemnities to investors for breaches of representations and warranties, and underwrite, place, make markets in or remarket securities.

Anything short of an exclusion for securitization entities from the definition of covered fund will limit the securitization market in a manner prohibited by Section 13(g)(2) of the Volcker Rule. Accordingly, we believe it is appropriate for the Joint Regulators to provide for a broad carve out for entities that act as depositors and issuers in securitization transactions from the definition of "covered fund" in the final Volcker Rule regulations.

If the Joint Regulators nevertheless elect not to exclude securitization entities from the definition of covered fund, Sections II through IX of this letter address a number of modifications to Subpart C of the Proposed Regulations that will be necessary to accommodate a number of securitization products and features that, if not included in these exceptions, would have a severe impact on the ability of banks to securitize loans, contrary to Congressional intent. Section II also discusses what we think would be the incongruous result of limiting the interest that a bank may retain in a securitization while also being subject to risk retention rules that require a minimum retained interest in the same assets. As noted above, ASF believes that securitization entities should be completely exempted from the definition of covered fund. The required changes discussed in Section II will be necessary only if the Joint Regulators elect (wrongfully in our view) not to so exclude securitizations from the covered fund definition; furthermore, we note that such changes may not address all of the unintended consequences and other potential adverse outcomes that could be prevented by simply excluding securitizations.

Section III of this letter addresses required changes to the definition of ownership interests in Section __.10, which if not made will also result in what we think would be an unintended limitation of the loan securitization market.

Section IV of this letter addresses Section __.16 and the impact that prohibiting all covered transactions with securitization entities will have on asset-backed commercial paper, tender option bonds, loan servicing, underwriting and market-making, standard representations and warranties regarding securitized assets, and collateralized loan obligations.

Section V of this letter discusses modifications that need to be made to Section __.10 in order to clearly exempt trustees, servicers and securitization service providers from the definition of sponsor or investment manager of securitization entities. Without these changes, banks could

be prohibited under Section __.10 from performing supporting roles such as loan servicing and holding and investing cash collected on assets held by the related securitization entity. Such service providers are necessary for the proper functioning of securitizations. It is imperative that if securitization entities are not excluded from the definition of covered fund that these roles not be limited.

Section VI of this letter asks that to the extent that an activity is permitted with respect to a securitization transaction under the conflicts of interest rules adopted under Section 621 of Dodd-Frank, such activity should not be considered a conflict of interest under the Proposed Regulations and in final regulations that will be adopted.

Section VII of this letter discusses necessary modifications so as to accommodate certain cross-border issues and transactions.

Section VIII of this letter discusses the compliance reporting provisions and the impact that these provisions will have on loan securitization.

Section IX of this letter discusses issues that will arise if, despite our request, certain securitization entities remain subject to regulation as "covered funds" under the Proposed Regulations. As a practical matter it will be necessary for these entities to unwind or restructure their activities immediately in order to achieve compliance with these regulations. This would result in asset fire-sales and a sudden loss of credit and liquidity in these markets. We therefore respectfully request that, if securitization entities are considered covered funds, then banking entities subject to the Volcker Rule be permitted to enter into covered transactions throughout the conformance period and be permitted to satisfy contractual obligations following the conformance period so long as they arose prior to the end of the conformance period.

Finally, Section X addresses the general impact that the proprietary trading restrictions will have on the securitization market.

I. Securitization Entities Should be Excluded from the Definition of Covered Funds

The Volcker Rule was Intended to Regulate Hedge Funds and Private Equity Funds, Not Securitization

As stated above, despite its breadth as written, the Volcker Rule is intended to address concerns that have nothing to do with the securitization markets. Instead, the Volcker Rule is directed at the participation of banking entities in proprietary trading and in the sponsorship and ownership of hedge funds and private equity funds. Congress considered such activities as potentially high-risk and distant from a bank's role in serving the needs of customers. At the same time, Congress was concerned with protecting and promoting a broad array of banking activities that provide client-oriented financial services, such as capital markets securitization activities that are traditional client-driven capital markets products intermediated by banking entities. Such products are critical liquidity management tools for the extension

of corporate and consumer credit and are pillars of a healthy, stable and sound economy. For these reasons, we believe it is appropriate for the Joint Regulators to provide for a broad carve out for entities that act as depositors and issuers in securitization transactions from the definition of "covered fund" in the final regulations implementing the Volcker Rule. We propose, as set forth in Appendix A, that the Joint Regulators promulgate this exception by excluding issuers of and depositors with respect to asset-backed securities, as such term is defined in the Securities Exchange Act of 1934 (the "Exchange Act"), from the definition of "covered fund."

New Section 13(a)(1)(b) of the Bank Holding Company Act (the "BHC Act"), made applicable through adoption of the Volcker Rule, prohibits a banking entity from "acquir[ing] or retain[ing] any equity, partnership, or other ownership interest in or sponsor[ing] a hedge fund or a private equity fund." In the Proposed Regulations, the Joint Regulators have proposed to define a "hedge fund" and a "private equity fund" to include every issuer that would be an investment company under the Investment Company Act of 1940, as amended (the "Investment Company Act"), but for Section 3(c)(1) or 3(c)(7) of the Investment Company Act.

Without utilizing the flexibility we believe is contained in the definition in the Volcker Rule, the broad regulatory definition of a "hedge fund" and "private equity fund" in the Proposed Regulations (encompassed in the definition of "covered fund") would restrict a banking entity from engaging in any securitization transaction with a securitization entity acting as a depositor or issuer in which that banking entity has any equity interest or a sponsorship role if that securitization entity relies on the exemptions of Section 3(c)(1) or 3(c)(7) of the Investment Company Act. Due principally to the nature of the assets involved or the particular structure, many securitization issuers currently rely on one of those exemptions. Examples of issuers that rely on Section 3(c)(1) or 3(c)(7) include asset-backed commercial paper conduits; tender option bond issuers; automobile and equipment lease securitization issuers in which significant residual value of the automobiles or equipment is financed; corporate debt repackagings; and collateralized loan obligation issuers.[4] Moreover, because the Volcker Rule and the Proposed Regulations prohibit banking entities from engaging in covered transactions with a "hedge fund" or "private equity fund" that the banking entity sponsors or manages, this regulatory definition of a "hedge fund" and "private equity fund" would prohibit banking entities from providing loans or engaging in other covered transactions with a securitization vehicle that the banking entity sponsors or manages. Without the ability to enter into such transactions with securitization entities, these securitization vehicles could not function properly. For example, as described in detail in Section II.G. of this letter, asset-backed commercial paper conduits rely on liquidity and credit support facilities that would not be permitted under either Section __.16 or as a permitted asset under the loan securitization exemption to Section __.10(a).

[4] We recognize that many securitization issuers of traditional asset-backed securities may currently rely on Section 3(c)(5) of or Rule 3a-7 under the Investment Company Act. However, in the nearly 20 years since Rule 3a-7 was proposed, securitization structures have evolved or new products have been created such that one or more of the technical requirements of that Rule can no longer be satisfied. Without a broad carve out for securitization entities from the definition of covered fund, there is a real risk that additional securitization products that Congress did not intend to include within the scope of the Volcker Rule today will be prohibited in the future as products, issuers, markets and investor demands evolve.

Similarly, as described in detail in Sections II.F. and II.H. of this letter, tender option bond and corporate debt repackaging vehicles, respectively, must contain a liquidity facility or swap that provide investors with their required investment attributes. Banking entities would be prohibited from entering into such transactions with these vehicles under the Proposed Regulations. As a result, most of these vehicles would need to be discontinued in order to comply with the Proposed Regulations.

As we stated in our November 10, 2010 comment letter on the Volcker Rule,[5] we are confident that Congress did not intend for securitization entities to be defined as "hedge funds" or "private equity funds" subject to the limitations on sponsorship and ownership, and prohibitions on covered transactions, set forth in the Proposed Regulations. Indeed, in Section 13(g)(2) of the Volcker Rule, Congress provided the Joint Regulators with compelling evidence that such application was not intended and, in fact, prohibited. As noted above, Section 13(g)(2) provides that nothing in the Volcker Rule is to be "construed to limit or restrict the ability of banking entities or nonbank financial companies ... to sell or securitize loans...." (the "Securitization Exclusion"). By specifically including the Securitization Exclusion in the "Rules of Construction" for Section 13 of the BHC Act in its entirety, Congress made clear that even though securitization vehicles might rely on the same Section 3(c)(1) or 3(c)(7) exemption as hedge funds and private equity funds, those vehicles were not meant to be "covered funds" as such term is used in the Proposed Regulations.

As stated above, the Volcker Rule contains a general description of prohibited activities and does so with very broad provisions. The Joint Regulators and the CFTC have been delegated the responsibility to interpret and refine those provisions so as to implement the policy underlying the Volcker Rule. By defining "hedge fund" and "private equity fund" as in the Proposed Regulations, the application of the definition would (against the express intent of Congress) dramatically and adversely impact many long-established and sound securitization-related businesses of banking entities.

Congress Provided the Joint Regulators with Flexibility to Define the Scope of Covered Fund

We believe that Congress provided the Joint Regulators the authority to define, by rule, the terms "hedge fund" and "private equity fund" in a manner consistent with the type of entity commonly referred to in the marketplace as a "hedge fund" or a "private equity fund" or as being engaged in the business of a "hedge fund" or "private equity fund." We do not believe that Congress intended the Joint Regulators to define the universe of entities with which banking entities and nonbank financial companies are prohibited from engaging in activities solely by virtue of sharing a characteristic that relates to their exemption from registration as an investment company. Such an approach would lead to a wide range of unintended consequences--such as the disruption of traditional securitization activities--that Congress directed the Joint Regulators to avoid.

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[5] *See* http://www.americansecuritization.com/uploadedFiles/ASF_Volcker_Rule_Comment_Letter_111010.pdf.

Specifically, the Volcker Rule provides that "the terms 'hedge fund' and 'private equity fund' mean an issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), but for Section 3(c)(1) or 3(c)(7) of that Act, ***or*** such similar funds as the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission may, by rule, as provided in subsection (b)(2), determine." (*emphasis added*). We believe the use of the conjunction "or" (as opposed to "and") provides the Joint Regulators with sufficient flexibility to more appropriately define the terms hedge fund and private equity fund. Moreover, we believe the exclusion of securitization vehicles from the definition of "hedge fund" and "private equity fund" is mandated by the Securitization Exclusion.

Legislative History, FSOC Study and Section 402 of Dodd-Frank Support Rules that Limit Scope of Volcker Rule to Traditional Hedge Funds and Private Equity Funds

We find further Congressional support for this conclusion in the legislative history of the Volcker Rule. Specifically, the statements of Representative Frank, a principal sponsor, provide a particularly persuasive explanation of the intended scope of the legislation, namely that Congress intended to capture only "traditional" "hedge funds" and "private equity funds."[6]

The study and recommendations of the Financial Stability Oversight Council ("FSOC") provide further support for this conclusion. The FSOC's recommendations are themselves a source of authority under Section (b)(2)(A) of the Volcker Rule. Section (b)(2)(A) required the FSOC to conduct a study and develop recommendations based on the purposes behind the Volcker Rule, and required the Joint Regulators to consider those recommendations in promulgating regulations.

The FSOC study acknowledged that regulatory implementation of the Volcker Rule's definition of "hedge fund" and "private equity fund" to include any and all entities relying on either Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act would be overly

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[6] The following colloquy on the floor of the House of Representatives between Representative Jim Himes and Representative Frank strongly suggests that Congress intended for the Joint Regulators and the CFTC to have a significant amount of discretion in interpreting the Volcker Rule and in excluding certain entities that rely on the Section 3(c)(1) and Section 3(c)(7) exclusions:

Mr. HIMES. Madam Speaker, I rise to enter into a colloquy with Chairman FRANK. I want to clarify a couple of important issues under section 619 of the bill, the Volcker Rule. The bill would prohibit firms from investing in ***traditional*** private equity funds and hedge funds (*emphasis added*). Because the bill uses the very broad Investment Company Act approach to define private equity and hedge funds, it could technically apply to lots of corporate structures, and not just the hedge funds and private equity funds.

I want to confirm that when firms own or control subsidiaries or joint ventures that are used to hold other investments, that the Volcker Rule won't deem those things to be private equity or hedge funds and disrupt the way the firms structure their normal investment holdings. (*emphasis added*).

Mr. FRANK of Massachusetts. If the gentleman would yield, let me say, first, you know, there has been some mockery because this bill has a large number of pages, although our bills are smaller, especially on the page. We do that—by the way, there are also other people who complain sometimes that we've left too much discretion to the regulators. It's a complex bill dealing with a lot of subjects, and we want to make sure we get it right, and we want to make sure it's interpreted correctly.

The point the gentleman makes is absolutely correct. We do not want these overdone. We don't want there to be excessive regulation. And the distinction the gentleman draws is very much in this bill, and we are confident that the regulators will appreciate that distinction, maintain it, and we will be there to make sure that they do.

Mr. HIMES. Thank you, Mr. Chairman.

156 Cong. Rec. H5226 (daily ed. June 30, 2010).

broad and extend far beyond what Congress intended. The FSOC noted that these two provisions of the Investment Company Act "are used by a wide variety of funds and other legal entities... including special purpose acquisition vehicles and certain ERISA qualified employee pension funds."[7] The FSOC therefore recommended that the Joint Regulators "carefully evaluate the range of funds and other legal vehicles that rely on the exclusions contained in Section 3(c)(1) or 3(c)(7) and consider whether it is appropriate to narrow the statutory definition by rule in some cases."[8] "In implementing the Volcker Rule," the FSOC states, "agencies should consider criteria for providing exceptions with respect to certain funds that are technically within the scope of the 'hedge fund' and 'private equity fund' definition in the Volcker Rule but that Congress may not have intended to capture in enacting the statute."[9]

We believe it is reasonable to assume that Congress intended to provide the Joint Regulators with the flexibility to define which entities that rely on the Section 3(c)(1) or 3(c)(7) exemption should be considered "hedge funds" and "private equity funds" for purposes of the Volcker Rule, especially when you consider the comparable definition of "private fund" under Section 402 of Dodd-Frank, which determines the extent to which certain investment advisers must provide information about these funds on the SEC's Form PF. Section 402 also defines "private fund" by reference to the Section 3(c)(1) and Section 3(c)(7) exemptions to the Investment Company Act. However, unlike the Volcker Rule, Section 402 does not allow for the SEC to designate "similar funds" as an alternative.[10]

In implementing Section 402, the SEC has separated the broad term "private fund" into several subcategories, including "hedge funds," "liquidity funds," "private equity funds," "real estate funds," "securitized asset funds," "venture capital funds" and "other private funds." Separating the broader private fund definition into these subcategories indicates that the SEC recognized not only that numerous types of funds are implicated by reference to Sections 3(c)(1) and 3(c)(7), but also that each of these funds has fundamentally different characteristics. Furthermore, the numerous types of funds identified by the SEC on Form PF provides substantial evidence that looking solely to Sections 3(c)(1) and 3(c)(7) for purposes of defining hedge funds and private equity funds, which are mere subsets of "private funds" on Form PF, would be wholly over-inclusive for purposes of the Volcker Rule. In fact, the SEC set forth a catch-all category on Form PF, "other private funds," because, presumably, it was impossible to identify and define each and every fund that relies on those exemptions. For these reasons, we believe that if Congress intended for funds beyond traditional hedge funds and private

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[7] FSOC study, pp. 61-62.

[8] *Id.* At 62. The FSOC further outlined the factors to be considered in identifying which entities have the characteristics of hedge funds or private equity funds. These characteristics include: (i) is the compensation of the owners, managers or advisors to the fund based on fund performance (including the gains or losses on the fund's assets/investments)?; (ii) what is the trading and investing strategy of the fund?; (iii) is the fund highly leveraged?; and (iv) are there many unaffiliated investors? FSOC Study, pp. 62. In the view of the FSOC, incentive compensation, volatility of asset performance and high leverage are indicia of hedge and private equity funds, and the kind of risky behavior the Volcker Rule is intended to prohibit. Securitizations do not generally share these features.

[9] *Id.* At 7.

[10] "(a) INVESTMENT ADVISERS ACT OF 1940 DEFINITIONS. Section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b 2(a)) is amended by adding at the end the following: "(29) The term 'private fund' means an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for section 3(c)(1) or 3(c)(7) of that Act." Title IV, "Regulation of Advisers to Hedge Funds and Others", Section 402(a).

equity funds to be included within the Volcker Rule, they would have used a more expansive definition of covered fund such as the "private fund" definition set forth in Section 402. Instead, Congress chose to provide specificity in the Volcker Rule, pointing to only hedge funds and private equity funds, and to provide the Joint Regulators with the ability to set alternative definitions if they so choose.

We further note that the SEC's distinction under Section 402 between "securitized asset funds" and true "hedge funds" and "private equity funds" demonstrates that appropriate definitions of these terms are possible based on substantive distinctions rather than a common Investment Company Act exemption.[11] Securitization entities do not generally pay incentive fees to advisers or short the assets held by such entity; accordingly, they do not share these characteristics of hedge funds identified by the SEC in these definitions. Moreover, unlike hedge funds, securitization entities are generally static vehicles or their ability to buy and sell assets are highly constrained by collateral requirements set forth in their governing documents.

Unlike hedge funds, securitization entities almost invariably issue fixed income securities that pay principal and a rate of interest that is either fixed or based on a readily discernable basis such as the London interbank offered rate. Investors in the securities issued by securitization entities typically require that the securities receive a credit rating from one or more nationally recognized statistical rating organizations. Hedge fund investors do not typically require ratings on their investments. We believe that a similar definitional distinction is appropriate in the final Volcker Rule regulations and could be used as a basis for distinguishing securitization entities from traditional hedge funds and private equity funds in that context.[12]

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[11] Form PF was recently adopted by the SEC as the periodic reporting form for private fund advisers under the Investment Advisers Act of 1940. Form PF defines "hedge funds," "private equity funds," "private funds," and "securitized asset funds" as follows:

Hedge fund: Any *private fund* (other than a *securitized asset fund*):

a. with respect to which one or more investment advisers (or *related persons* of investment advisers) may be paid a performance fee or allocation calculated by taking into account unrealized gains (other than a fee or allocation the calculation of which may take into account unrealized gains solely for the purpose of reducing such fee or allocation to reflect net unrealized losses);

b. that may borrow an amount in excess of one-half of its *net asset value* (including any *committed capital*) or may have gross notional exposure in excess of twice its *net asset value* (including any *committed capital*); or

c. that may sell securities or other assets short or enter into similar transactions (other than for the purpose of hedging currency exposure or managing duration).

Solely for purposes of this Form PF, any *commodity pool* about which you are reporting or required to report on Form PF is categorized as a *hedge fund*.

For purposes of this definition, do not net long and short positions. Include any borrowings or notional exposure of another person that are guaranteed by the *private fund* or that the *private fund* may otherwise be obligated to satisfy.

Private equity fund: Any *private fund* that is not a *hedge fund, liquidity fund, real estate fund, securitized asset fund* or *venture capital fund* and does not provide investors with redemption rights in the ordinary course.

Private fund: Any issuer that would be an investment company as defined in section 3 of the Investment Company Act of 1940 but for section 3(c)(1) or 3(c)(7) of that Act.

If any *private fund* has issued two or more series (or classes) of equity interests whose values are determined with respect to separate portfolios of securities and other assets, then each such series (or class) should be regarded as a separate *private fund*. This only applies with respect to series (or classes) that you manage as if they were separate funds and not a fund's side pockets or similar arrangements.

Securitized asset fund: Any *private fund* whose primary purpose is to issue asset backed securities and whose investors are primarily debt-holders.

[12] In doing so, the concept of a "securitized asset fund" such as is included in Form PF would need to be expanded to include securitization entities that act as depositors of financial assets as well as issuing entities. Securitizations often require the use of such interim special purpose entities, which may themselves rely upon the Section 3(c)(1) exemption from the Investment Company Act. In addition, in certain

Joint Regulators Also Have Authority Under Section 3(d)(1)(J) to Exempt Securitization Entities from Volcker Rule

We note that the Joint Regulators have proposed to exercise their authority under Section 3(d)(1)(J) of the Volcker Rule to exempt certain entities that meet the technical definition of "covered fund" in the Proposed Regulations from the sponsorship and ownership prohibitions of the Volcker Rule. Specifically, in addition to entities engaged in the securitization of loans, banks are permitted to own or sponsor certain bank-owned life insurance separate accounts and investments in and sponsoring of certain entities that rely on the exclusion from the definition of investment company in Section 3(c)(1) and/or 3(c)(7) of the Investment Company Act but that are, in fact, common corporate organizational vehicles. In granting these exemptions, the Joint Regulators primarily focused on the fact that these entities did not engage in the types of speculative activities that the Volcker Rule was intended to prohibit.[13] Securitization entities that promote the efficient funding of American businesses, consumers and governmental entities, without presenting any of the risks the Volcker Rule is intended to address, are similarly distinguishable from traditional hedge funds and private equity funds. The Joint Regulators can and should use their authority under Section (d)(1)(J) of the Volcker Rule to exclude securitization entities from the definition of "Covered Fund" as they promote banking entities' safe and sound operations and contribute to the larger U.S. economy and overall financial stability.[14]

There is Additional Legislative Support for a Municipal Securities Repackaging Exemption from the Covered Fund Definition

Repackagings of municipal securities, commonly known as tender option bonds ("TOBs"), as described in greater detail in Section II.A. below, share characteristics with securitization, and our arguments in this section that securitization vehicles should not be regarded as covered funds apply with equal force to TOBs. TOBs promote the funding of municipal borrowers and also supply investors with liquid, tax-exempt money market investments. They contribute to the larger U.S. economy and overall financial stability, and promote the safety and soundness

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securitizations, such as corporate debt repackagings and tender option bonds, the investors receive pass-through certificates or other securities that may not technically be considered debt securities. We request that if the Joint Regulators are inclined to adopt this definition, that the definition include investors buying pass-through certificates representing ownership in the assets of the securitized asset fund.

[13] *See* Proposing Release at 68913.

[14] Alternatively, the SEC could use its rulemaking authority under Section 6(a) of the Investment Company Act to exempt securitization entities from the definition of investment company under that Act in a manner that would have the effect of excluding such entities from regulation as covered funds under the final Volcker Rule regulations. Congress chose to incorporate into the Volcker Rule the definitional framework of the Investment Company Act, under which the SEC has broad exemptive and regulatory authority; Congress certainly also understood that the SEC retained this authority with respect to the scope of Section 3(c)(1) or 3(c)(7) of that Act. Congress could not have intended for the exemptive authority granted to the SEC under the Investment Company Act to be static as it relates to the investment company status of entities that absent some other exemption would be treated as "covered funds" as of the date the Volcker Rule regulations become effective. The SEC could therefore use this exemptive authority to create an additional Investment Company Act exemption for securitization entities not giving rise to the concerns the Volcker Rule was designed to address. We note in this regard that in the adopting release of Rule 3a-7 (relating to issuers of asset-backed securities) under the Investment Company Act, the SEC observed that "structured financings fall within the definition of investment company . . . but cannot operate under the Act's requirements." The SEC intended for Rule 3a-7 to relieve the securitization market from the "constraint[s]" of the Investment Company Act. *See* 17 CFR Part 270 at *Federal Register* 56248 (November 27, 1992). Providing an exemption for all securitization vehicles that would otherwise be subject to the Volcker Rule due to their required reliance on Section 3(c)(1) or 3(c)(7) would be consistent with such intention.

of the financial system, without raising any of the concerns that the Volcker Rule is intended to address. They are not hedge funds or private equity funds. We believe that the Joint Regulators have additional support to exclude TOBs from the definition of covered fund. Section 13(d)(1)(A) of the Volcker Rule provides a permitted activity for the purchase, sale, acquisition or disposition of, among other things, obligations of any State or of any political subdivision thereof ("municipal securities"). If banking entities are permitted to own and dispose of such obligations directly, there should be no reason that they cannot own these obligations through ownership of a TOB vehicle. Owning municipal securities through a TOB vehicle poses no greater threat to the safety and soundness of a banking entity than owning the obligation directly. For these reasons, we believe that the Joint Regulators have the statutory authority to exclude TOB vehicles from the definition of covered fund, and we respectfully request that the Joint Regulators do so.

There is further justification for excluding TOBs from the definition of covered fund in that TOBs provide an important segment of the municipal securities market with financing in a manner economically similar to repurchase agreements.[15] In Section __.3(b)(2)(iii)(A) of the Proposed Regulations, the Joint Regulators exclude repurchase agreements from the covered financial positions definition because they "operate in economic substance, as secured loans." As described in Section II.A. of this letter, TOBs serve a vital purpose of matching short-term money market investors with municipal borrowers seeking long-term funding. These structures share economic attributes with repurchase agreements -- and therefore are more akin to secured loans by banking entities than investments in covered funds -- and should therefore be excluded from the definition of covered fund.

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For the reasons stated in this section, we believe that a broad exclusion for securitization entities from the definition of covered fund would be appropriate in the final Volcker Rule regulations. We recommend that the Joint Regulators provide an exclusion from the definition of a "covered fund" for any issuer or depositor with respect to an asset-backed security, as that term is defined in Section 3(a)(77) of the Exchange Act. Language to effect this exclusion is provided in Appendix A.

The comments in Sections II through IX address significant issues with the Proposed Regulations that would need to be addressed if the Joint Regulators elect not to grant such an exclusion. Expanding exceptions to the Section __.10(a) and Section __.16 prohibitions will

[15] TOBs are intended to provide banks and other investors with a means of financing their investment in municipal securities in a similar manner to a secured loan. TOBs were created to allow investors to finance their municipal securities portfolios through a secured tax efficient structure that allows the tax-exempt income from the underlying long-term municipal securities to pass through to the holders of the securities issued by the TOB. In effect, TOBs serve as the market equivalent of repurchase agreements or securities lending agreements by permitting investors to finance municipal securities positions at short-term money market rates. The latter benefit is predicated on TOB security holders bearing a portion of the risk of a change in value of the underlying municipal security, which is achieved through a partnership structure, and is the primary reason why municipal securities generally do not finance using a standard repurchase arrangement. Furthermore, from an accounting perspective, the TOB residual holder typically consolidates the entire TOB trust on its balance sheet according to GAAP. Hence, the TOB residual investor shows a municipal security and a liability (financing) in the same manner as if the investor had financed that position with a repurchase agreement or securities lending agreement. Accordingly, to the residual holder, the economics of a TOB mimic the economics of a repurchase agreement.

be necessary to permit the securitization market to continue without great disruption if securitization entities are not excluded from the covered funds definition, but we urge the Joint Regulators to consider that an ad hoc approach will be far less effective in advancing the Congressional mandate that loan securitization not be restricted. Something less than a comprehensive securitization exemption is fraught with complexity and will likely result in consequences that are unintended and unanticipated as banks work with these rules in the future.

II. The Loan Securitization Category of Permissible Covered Fund Activities Should be Expanded

If Congress does not exempt securitization entities altogether from the definition of covered funds, we are concerned that the loan securitization category of permissible covered fund activities set forth in the Proposed Regulations will prohibit some features and types of loan securitizations that Congress intended the Securitization Exclusion to protect. Specifically, as described below, we request that entities established to facilitate loan securitizations be permitted to hold cash and short-term, high quality investments purchased with the proceeds received on the loans and other assets permitted to be held by the issuer, which is a universal feature in securitization. In addition, we request that securitizations of asset-backed securities that themselves are backed by loans or receivables that are originated by or owned by the sponsor of such securitization also be treated as permitted loan securitizations, as described below. We also request that securitization entities be permitted to hold, in addition to loans, guarantees and other types of credit support, which will promote (and not detract from) the safety and soundness of banks. We also propose that banks securitizing their own assets and that are subject to risk retention rules under Dodd-Frank and similar laws and regulations be permitted to sponsor issuers of asset-backed securities and retain an ownership interest in the issuer in an amount at least equal to the risk retention required under Dodd-Frank and similar laws and regulations. In addition, we note that repackagings of municipal securities and asset-backed commercial paper conduits' entry into certain note purchase or liquidity facilities, as described in the Proposed Regulations, would inappropriately be prohibited by the Proposed Regulations. These securitization activities serve important and legitimate credit-extension functions by banks, and should not be prohibited or limited in contravention of the Securitization Exclusion set forth in Section 13(g)(2) of the BHC Act. We also propose that securitization entities that securitize commercial loans and bonds be permitted to hold a limited basket of long credit exposures through entry into credit derivatives not for the purpose of speculation, but rather for credit diversification. Finally, we request certain additional technical modifications and clarifications, as described below.[16]

A. Cash and Eligible Cash Investments

Most securitizations require that cash proceeds received from the assets held in the securitization be held in a collection account or invested in high quality short-term investments

[16] We have attached as Appendix A to this letter modifications to Section __.13(d) of the Proposed Regulations that incorporate the changes necessary to accommodate our comments in this section of the letter. Similar changes would need to be made to Section __.14(a)(2).

that mature no later than the date on which such proceeds are required to be paid to investors in the asset-backed securities ("eligible investments"). Many securitization vehicles are also permitted to, and may at times be required to, issue securities prior to the purchase of assets by the securitization vehicle, and in that event, the vehicle will hold cash or will invest the cash in eligible investments. As currently drafted, the permitted loan securitization category makes no accommodation for such assets. We do not believe that prohibiting an issuer from holding cash or investing cash proceeds in these types of eligible investments would serve the purposes of the Volcker Rule. Also, because such short-term investments are necessary for loan securitizations, we believe Section 13(g)(2) requires that they be permitted. Accordingly, we propose that permitted loan securitizations be allowed to hold cash and eligible investments.

B. For Securitizations Involving Intermediate Steps, Asset-Backed Securities Backed by Permissible Loans Should be Treated as Permissible Loans

In certain cases, a sponsor's securitization of loans necessitates the use of one or more intermediate vehicles that issue asset-backed securities to the ultimate issuer of the securitization. These intermediate asset-backed securities are backed by loans, and the interests issued in the securitization ultimately rely on payment from such loans for payment on the securities, despite not being collateralized directly by such loans. One example is a securitization of leases with respect to equipment where a titling trust is used to hold ownership of the equipment. The titling trust owns the vehicles and the right to payment on the leases, and issues a security or other instrument (often referred to as a special unit of beneficial interest ("SUBI")) representing ownership interest in the titling trust to the securitization issuer. Another example arises with credit card securitization master trusts where the asset pool of the issuing entity for the asset-backed securities consists of a collateral certificate representing an interest in the asset pool of the credit card master trust. These structures, and similar structures existing in today's securitization marketplace and which may develop through innovation in the future, are in substance loan securitizations. ASF proposes that the Proposed Regulations be modified to permit the securitization of asset-backed securities as a permissible loan securitization so long as the assets backing the intermediate asset-backed securities satisfy the definition of loan in the Proposed Regulations.[17]

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[17] Our submission that SUBIs and collateral certificates are in substance loans and that a securitization of such instruments is the equivalent of a securitization of the underlying loans has been, in our view, validated by the SEC. The SEC has provided guidance in a telephone interpretation (see Interpretation 13.01 of the SEC's Manual of Publicly Available Interpretations on Regulation AB) and has proposed in its proposed revisions to Regulation AB that SUBIs and other collateral certificates not be treated as an "underlying security" subject to payment of an SEC registration fee in addition to that required for the asset-backed security. See 17 CFR Part 200 at *Federal Register* 23399, 23436 and 23439). In addition, the SEC, "recognizing that these structures are designed solely to facilitate the structuring of the transaction," (17 CFR Part 210 at *Federal Register* 1563) exempted under Regulation AB issuers of collateral certificates and SUBIs from separate annual reporting and other reporting under the Exchange Act. In order for an issuer to be eligible for these exemptions, the following requirements must be met:

- Both the issuing entity for the asset-backed securities and the entity that issued the SUBI or collateral certificate were established under the direction of the same sponsor and depositor;
- The SUBI or collateral certificate was created solely to satisfy legal requirements or otherwise facilitate the structuring of the asset-backed securities transaction;
- The structure is not part of a scheme to avoid registration or reporting requirements of the Securities Act and the Exchange Act; and
- The SUBI or collateral certificate is held by the issuing entity and is a part of the asset pool for the asset-backed securities.

C. Loan Guarantees and Other Credit Support

It is common for loan securitizations to include external credit support of borrower obligations under such loans. Such support may take the form of a third party or parent guarantee, insurance policy, letter of credit or other contractual commitment to make payments or perform other obligations of the borrower under the loan. Such obligations are not loans, but by their nature consist of credit exposure to an entity similar to a direct extension of credit to a borrower and support a borrower's obligation to repay the loan. Securitization entities may also have the benefit of liquidity or credit support facilities that permit such entities to repay their liabilities following a liquidity event or following losses on assets held by the securitization entity. We believe that including such arrangements as permissible assets under the loan securitization category is consistent with Congress's mandate to not limit the ability of covered banking entities to securitize loans. Indeed, in making loans to customers, banks frequently require their borrowers to obtain guarantees or other support facilities. If banks may directly benefit from such obligations in connection with permissible loan activities, we see no reason that banks should be prohibited from having ownership interests in entities benefitting from such obligations. Such credit support obligations promote the safety and soundness of the banking entity.

D. Technical Modifications to the Definition of "Loan"

We request that certain technical modifications be made to the definition of "Loan" to permit covered banking entities to hold the residual interests in the property subject to leases. With respect to lease securitizations, the lessor's interest being securitized typically includes not only the rights in the lease contract, but the lessor's ownership interest in the property subject to the lease. We request clarification that the Joint Regulators intended that the term "lease" include such lessor's ownership interest. We believe that such changes are consistent with the intent of the Joint Regulators to permit covered banking entities to hold ownership interests in loan securitizations and with Congress's mandate that loan securitizations not be restricted.

E. Required Risk Retention

Section __.14(a)(2)(iii) of the Proposed Regulations exempts from the prohibition contained in Section __.10(a) ownership by a banking entity of an issuer of asset-backed securities to the extent required under the minimum risk retention requirements of Dodd-Frank and related implementing regulations.[18] We request that this category of permissible ownership interests be expanded such that any banking entity that securitizes its own assets is permitted to sponsor the securitization issuer and retain an ownership interest representing the credit risk of the securitized assets in an amount or value of economic interest *at least* equal to the risk retention percentage required under risk retention rules applicable to such entity. The risk retention rules

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[18] *See* Section 15G of the Exchange Act. We also note that Article 122A of the European Union Capital Requirements Directive, the FDIC's securitization safe harbor rule (12 CFR Part 360 at *Federal Register* 60289 (September 30, 2010)) and possibly other jurisdictional risk retention requirements may impose additional risk retention obligations on issuers of asset-backed securities. Such requirements would also conflict with the restrictions under Section __.10(a) as described herein.

were designed to insure that securitizers maintain "skin in the game" by retaining a meaningful portion of the credit risk of the securitized assets. While Congress and the regulators have adopted minimum risk retention standards, such standards are only a floor. We submit that from Congress's and the regulators' standpoint, the more risk retained, the better in terms of advancing the policy behind the risk retention rules. Indeed, investors often require that securitizers (including banks) retain more risk than what is required under Dodd-Frank and the proposed risk retention regulations.

We believe that if a bank is permitted to hold 100% of an asset, and is also permitted to securitize that asset so long as it retains the portion required under risk retention rules applicable to such entity, there is no reason that it should be limited to retaining an ownership interest in the securitization entity only up to the minimum amount that is required to be retained under the risk retention rules. Such a requirement would not serve the policy behind the Volcker Rule and would directly clash with the policy behind Section 15G of the Exchange Act which dictates that securitizers maintain "skin in the game" to promote sound credit underwriting.[19]

F. Repackagings of Municipal Securities

We believe that municipal securities repackaging vehicles -- *i.e.*, entities that issue securities collateralized by obligations of states, political subdivisions and agencies of states or other local governmental entities -- should be specifically exempted from the Section __.10(a) prohibition. While the market generally does not view these transactions as securitizations, an exemption could be accomplished through an expansion of the permissible loan securitization category of permissible covered fund activities.[20] Most issuers of such vehicles rely on the Section 3(c)(1) or Section 3(c)(7) exemption of the Investment Company Act. As described in detail below, such vehicles typically hold liquidity commitments from the sponsor or a third party that are essential in making these securities marketable investments. Banks that sponsor such vehicles would not be permitted to rely on the loan securitization exemption from Section __.10(a) as currently proposed because such liquidity commitments are not one of the enumerated assets that may be held by the issuer. Furthermore, certain municipal securities may technically be considered to be asset-backed securities and thus not included within the definition of "loan" as that term is defined in the Proposed Regulations. For example, certain revenue bond structures that involve the issuance of senior and subordinated bonds could be viewed as asset-backed securities given the broad definition of that term in the Proposed Regulations.

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[19] Appendix A includes our suggested modifications to Section __.14(a)(2)(iii) that incorporate the changes necessary to accommodate our comments in this section of the letter.

[20] We note that banking entities do not treat such vehicles as securitizations for all purposes and that the market for such investments is distinct from traditional asset-backed securities markets and has a different investor base than the traditional asset-backed securities market. However, we believe that for purposes of the Volcker Rule, Congress's mandate that loan securitizations not be constrained fairly encompasses municipal repackaging vehicles. As described below, the securities issued from such vehicles are collateralized by the municipal securities deposited in such vehicles, which themselves are in the nature of extensions of credit.

The most common form of such municipal securities repackagings is generally referred to in the marketplace as "tender option bonds" or "TOBs" (which were previously discussed in Section I). A typical TOB transaction consists of the deposit of a single issue of highly rated, long-term municipal securities[21] in a trust and the issuance by the trust of two classes of securities: a floating rate, putable security (the "floater"), and a residual floating rate security (the "residual"). No tranching is involved. The holders of floaters have the right, generally on a daily or weekly basis, to put the floaters for purchase at par, which put right is supported by a liquidity facility delivered by a highly rated provider (that is often affiliated with the sponsor) and allows the floaters to be treated as a short-term security. The floaters are primarily purchased and held by money market mutual funds. The residual typically is held by a longer term investor (bank, insurance company, mutual fund, hedge fund, etc.) and could be the sponsor itself or an affiliate thereof. The residual investors take all of the market and structural risk related to the TOB structure, with the floaters investors only taking limited, well-defined insolvency and default risks associated with the underlying municipal securities, which risks are equivalent to those associated with investing in such municipal securities directly.

The TOB market, which has been in existence for nearly two decades, has come to play an important role in the larger municipal finance market by bringing together issuers of fixed rate, long-term debt and buyers of variable rate, short-term instruments. While, as noted above, in many respects the risks associated with owning floaters are no different than those associated with owning the underlying municipal securities directly, the critical difference is that such municipal securities would likely not be eligible investments for money market mutual funds and other floaters investors in the absence of the TOB structure.[22] Accordingly, the floaters have become a critical component of the investment portfolios of the short-term tax-exempt money market funds that are a fundamental fixture in the financial landscape of the United States.[23] This is particularly the case when, as in recent years, municipal issuers are constrained by various forces from entering the short-term debt market directly. It is noteworthy that TOBs have continued to function well even during the recent market disruptions. Indeed, the largely unfettered right to put the floaters, for any reason, to the liquidity provider, whether for reasons related to the performance of the underlying assets or for market or any other reasons, is a distinguishing feature of the TOB structure.

For these reasons, we propose that an additional category of loan securitizations be added to Sections __.13(d) and __.14(a)(2)(v) specifically for issuers of securities backed by municipal securities. We believe that the municipal securities that are deposited in TOB vehicles are extensions of credit and therefore fit within the definition of "Loan" in the Proposed Regulations, and accordingly should not be restricted as provided in the Securitization

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[21] Most TOB trusts are used to finance tax-exempt municipal securities. In very limited circumstances, the structure may be used to finance taxable municipal securities and other tax-exempt municipal products.

[22] This is especially true due to recent changes to Rule 2a-7 of the Investment Company Act requiring increased liquidity requirements for money market funds.

[23] We estimate that the overall amount of municipal securities financed in the TOBs market is approximately $75-100 billion, whereas we estimate that the overall size of the short-term tax exempt money market is approximately $290 billion.

Exclusion to the Volcker Rule.[24] However, the liquidity facilities necessary to match the short-term investors with the long-term municipal borrowers are not included in the list of permissible assets that may be held under Sections __.13(d) and __.14(a)(2)(v). Accordingly, we propose that such issuers be permitted to hold liquidity commitments described above and still qualify as a permissible loan securitization under Section __.13(d) or __.14(a)(2)(v).

We believe that such exemption from the Volcker Rule for municipal bond repackaging transactions would promote safe and sound banking practices and the core banking function of bringing together investors in municipal securities and municipal borrowers. TOB issuers are not hedge funds or private equity funds and share no common traits with them other than their reliance on exemptions to the Investment Company Act; accordingly, we believe that Congress did not intend to include such arrangements in the scope of the Volcker Rule. We emphasize the vital connection between the municipal bond repackaging market, particularly the TOB market, and the greater municipal finance market, *i.e.*, bringing together long-term state and local governmental issuers and short-term investors. Restricting the ability of banking entities to sponsor these securitization transactions would cause fewer of these securitization transactions to be done. This reduction of access to the short-term market will reduce the liquidity of municipal securities, which will lead to an increase in the borrowing costs for municipalities and other issuers of municipal securities, all at a time when many state and local governmental entities are in serious need of cash for important public projects and essential government activities. Correspondingly, there will be a decrease in short-term investments available for the tax-exempt money market funds, which have become a key component of the investment portfolios of individuals of all income brackets, which is particularly problematic in light of the recent changes to Rule 2a-7 under the Investment Company Act regarding daily and weekly liquidity requirements. All this would occur without advancing the stated policy goals of the Volcker Rule: to protect the safety and soundness of banking institutions by limiting the ability of banks to engage in proprietary trading or from acquiring an ownership interest in, sponsoring or having relationships with hedge funds or private equity funds.

G. Asset-Backed Commercial Paper Conduits

For the reasons set forth below, we request that the Proposed Regulations include a separate category of permissible loan securitizations for asset-backed commercial paper ("ABCP") conduits which will permit such vehicles to hold certain notes, certificates or other instruments backed by loans or financial assets that are negotiated by the purchasing ABCP conduit; hold certain financial assets in addition to loans; and hold liquidity and support commitments provided by their sponsors. These modifications are necessary to allow ABCP conduits to

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[24] We note that our members are concerned that certain provisions in Subpart B could create uncertainty as to whether municipal securities are loans for purposes of the loan securitization exclusions under Sections .13(d) and .14(a)(2)(v) in the Proposed Regulations. Section __.3(b)(3)(ii) provides that a covered financial position does not include any position that is a loan. However, Section __.6(a)(1)(iii) provides a permitted activity for purchases and dispositions of covered financial positions that are obligations of any State or of any political subdivision thereof. These two provisions, read together, could suggest that the Joint Regulators intend such obligations to be excluded from the definition of loans. We believe that such obligations are extensions of credit, and are fairly within the scope of what Congress intended to be included in the Securitization Exclusion. Accordingly, we ask that if the Joint Regulators do not specifically include a permissible loan securitization category for such obligations in the manner that we suggest in Appendix A, that the Joint Regulators otherwise clarify that such obligations are loans as that term is used in Sections __.13(d) and __.14(a)(2)(v).

continue to extend credit to bank clients and are consistent with the Congressional mandate to continue to permit banking entities to securitize loans.

ABCP has for nearly 30 years been a vital source of low-cost working capital for businesses of all kinds both in the United States and globally, from industrial companies to finance and service companies to governmental entities. Assets funded through these vehicles include auto loans, commercial loans, trade receivables, credit card receivables, student loans and many other types of financial assets. ABCP financing of corporate America and the global economy remains substantial. For example, approximately $66.7 billion of automobile loans and leases, $52.1 billion of student loans, $22.3 billion of credit card charges, $49.4 billion of loans to commercial borrowers and $50.7 billion of trade receivables were financed by the U.S. ABCP market as of October 31, 2011. The total outstanding amount of ABCP sold in the U.S. market stood at $344.5 billion as of January 18, 2012. Asset-backed commercial paper conduits with 100% liquidity support from their sponsoring financial institutions and other A-1/P-1 rated financial institutions have functioned well, even through the depths of the financial crisis.[25] For purposes of this letter, we refer to only such asset-backed commercial paper conduits as "ABCP conduits," and "ABCP" is intended to refer only to commercial paper notes issued by such ABCP conduits.

Banks organize and sponsor ABCP conduits to make loans and other extensions of credit to their customers. ABCP conduits issue short-term (not to exceed 397 days) commercial paper and sometimes other liabilities and use the proceeds of such issuance to fund customer assets. The ABCP conduit holds these customer assets, but the ABCP is generally repaid through the sale (or rolling) of new issuances of commercial paper. If ABCP cannot be rolled, then the ABCP conduit may draw on liquidity support provided by the bank sponsor. In addition, most ABCP conduits are supported by letters of credit, revolving credit commitments and other support facilities from their sponsors that absorb credit losses on the assets financed by ABCP conduits before the ABCP investors absorb any losses or on a pari passu basis with ABCP investors. We refer to these types of credit enhancement as "Program Support Facilities."

ABCP conduits fund their customers' assets by purchasing loans, receivables, leases or other assets from customers or by making loans to customers. Such loans are often in the form of variable funding notes or certificates or other forms of revolving credit lines, interests in entities that own leases or loans, such as automobile titling trusts, or other securities. We refer to such instruments herein as "Note Purchase Facilities." While such Note Purchase Facilities might otherwise fit the definition of "loan" in the Proposed Regulations, the summary commentary discussing covered financial positions under the proprietary trading restrictions states that the definition of "loan" does not include asset-backed securities. ASF is concerned that the Proposed Regulations as currently drafted would not permit ABCP conduits to fund customer assets through Note Purchase Facilities because some Note Purchase Facilities may

[25] We note that certain segments of the asset-backed commercial paper markets performed poorly after the onset of the global credit and liquidity crisis. In particular, asset-backed commercial paper issued by "structured investment vehicles" ("SIVs") and other non-bank supported market value financing platforms, including market value CDOs, were unable to satisfy their liquidity needs or issue additional short-term securities from the onset of the credit crunch, and were thereafter effectively shut out of the short-term capital markets. These types of vehicles would not qualify for the treatment that we are proposing.

technically be asset-backed securities. We seek either (a) clarification from the Joint Regulators that the Proposed Regulations are not intended to exclude such instruments purchased by ABCP conduits from the definition of "Loan," or (b) inclusion of a specific Note Purchase Facility category of asset-backed securities that may be purchased by ABCP conduits, as provided in our proposed modifications set forth on Appendix A. These modifications would explicitly permit ABCP conduits to invest in Note Purchase Facilities backed by loans or other financial assets provided that (x) the terms of such Note Purchase Facilities are negotiated by the related ABCP conduit, its sponsor or an agent acting on its behalf or (y) the related note, certificate or other instrument is purchased by such ABCP conduit pursuant to a note purchase agreement or similar subscription document to which such ABCP conduit, its sponsor or an agent acting on its behalf is a party.

ABCP conduits do not enter into these Note Purchase Facilities to speculate or exploit arbitrage opportunities. Rather, such investments are a conduit through which banks arrange for loans for their customers. Banks would be permitted to make the investments made by ABCP conduits that they administer directly under the restrictions on proprietary trading set forth in the Proposed Regulations, as these structured investments are at their inception expected to be held by the ABCP conduits through their final repayment dates.

The notes, certificates or other instruments purchased by ABCP conduits as part of a Note Purchase Facility are fixed income investments that pay principal and interest to the ABCP conduit in an amount sufficient to cover the ABCP conduit's cost of funding and the costs of maintaining the ABCP conduit program. Further, funding through investment in a Note Purchase Facility can help a bank protect itself from the insolvency risk of the asset seller and enable the asset seller to retain risk in the transferred assets, both as required by investors and as will be required under the final risk retention rules. Such structures also permit a syndicate or group of banks and other investors to invest together on a pro rata basis in a diversified pool of assets. Without such structures, each investor would be forced to buy the underlying loans and other financial assets -- rather than an interest in a larger pool of such assets -- and therefore be subjected to asset concentration and other risks that would not promote the safety and soundness of the banking institutions sponsoring these vehicles. In addition, in many cases an intermediate special purpose vehicle ("SPV") may also sell interests to other third parties. As an illustration, an ABCP conduit might purchase a security issued by a credit card master trust that issues different series of securities to various investors. In addition, ABCP conduits often participate in other multi-lender transactions, in which an intermediate SPV sells an interest in a note to ABCP conduits and ABCP conduit sponsors, as well as to non-ABCP conduit sponsoring banks, to achieve, among other things, diversification of funding sources and enhanced flexibility. In such cases, banks will purchase an interest in the note, rather than the underlying assets themselves. So long as ABCP conduits do not purchase such interests for speculative reasons or arbitrage, we see no reason why these vehicles should be prohibited from purchasing them. Our proposal to limit the purchase of such instruments to issuances where the ABCP conduit or the bank sponsor has the opportunity to negotiate the terms of the instrument or is a party to the related purchase agreement would address any concerns that banks could use such vehicles to speculate in securities in a manner prohibited by the tenets of the Volcker Rule.

Section 13(g)(2) requires the Joint Regulators to interpret the Volcker Rule to avoid any restriction that would "limit or restrict the ability of a banking entity" to sell or securitize loans. For this reason, we believe an ABCP conduit should, like other securitization vehicles, be excluded from the definition of a "hedge fund" or "private equity fund" consistent with the Securitization Exclusion. If the Joint Regulators do not do so, we believe the Joint Regulators must expand the permitted loan securitization category to permit ABCP conduits to hold Note Purchase Facilities. ABCP conduits need to enter into Note Purchase Facilities in order for the bank to finance and "securitize" loans to their customers.

We also request that ABCP conduits be permitted to hold liquidity commitments and Program Support Facilities as permissible assets that may be held under Sections __.13(d) and __.14(a)(2)(v). These facilities are integral to these vehicles functioning as lending conduits to bank customers.

In limited instances, ABCP conduits may purchase financial assets that may not fit the definition of loan in the Proposed Regulations, but which have the characteristics of loans. Examples of such financial assets may include the purchase of music, patent and other intellectual property royalties, future flow assets and whole business securitizations whereby a company obtains funding on core cash-flowing properties. We request that the permitted loan securitization category be expanded to permit ABCP conduits to hold loans, financial assets or asset-backed securities backed by financial assets that by their terms convert to cash within a finite period of time.

In addition, some ABCP conduits currently hold asset-backed securities that they purchased on the secondary market to diversify the asset base in the conduit. These investments are not speculative, but rather provide additional credit exposure to the ABCP investors and function similarly to direct loans. Such investments represent a small percentage of the assets held in ABCP conduits. Requiring ABCP conduits to divest these assets would have a negative impact on their value, which would be detrimental to the safety and soundness of the banking entities sponsoring the related ABCP conduit and also potentially harm the overall market for asset-backed securities. To avoid creating any opportunities for banks to circumvent the policies underpinning the Volcker Rule, we propose that ABCP conduits be permitted to own asset-backed securities on the secondary market only if the aggregate principal amount of such securities does not exceed 5% of the aggregate principal or face amount of all assets held by the ABCP conduit.

H. Corporate Loan and Corporate Bond Securitizations

Banks often use the securitization market to obtain financing for corporate loans and bonds in their portfolios. These securitizations are an important balance sheet management tool for banking institutions. Corporate loan securitizations provide banks with capital that banks can then use to fund commercial loans to corporate borrowers. The loan securitization market provides an important and substantial source of financing for commercial borrowers. Sections __.13(d) and __.14(a)(2)(v) will permit banks to sponsor and hold ownership interests in such loan securitization vehicles so long as the assets in such vehicles consist only of loans and

related assets and interest rate and currency derivatives. The bulk of the assets held in such vehicles generally consist of loans, which accordingly will qualify as permissible assets.[26] However, for some loan securitizations, investors may seek a broader pool of credit exposures than the bank has available or can obtain to securitize in order to achieve risk diversification. To accommodate such investor requirements, loan securitization issuers may also include a limited basket of synthetic exposures to corporate loans and bonds. Such synthetic exposure may be obtained through the sale of credit protection by the issuer to a credit protection buyer under a credit default swap, entry into a total return swap, repurchase agreement, or other similar contract. Such arrangements give the securitization issuer exposure to the credit risk of the referenced debt, and a yield similar to that paid on the referenced corporate debt, without owning the security or loan itself. ASF proposes that Sections __.13(d) and __.14(a)(2)(v) be expanded to permit loan securitization issuers to hold up to 10% of its assets in the form of synthetic risk exposure that reference loans that could otherwise be held directly under the Proposed Regulations.

We understand and support the Volcker Rule's objective in preventing banks from engaging in speculative investing that will impact their safety and soundness. The use of credit default swaps and similar instruments in loan securitizations as described above are not used by banks to speculate, take short-term financial risks, or profit from price movements in these instruments. Rather, the limited use of such instruments facilitates banks' abilities to manage risks in their corporate loan and debt books by accessing capital from a broad group of capital markets investors and facilitates making markets. We believe that the limits we propose on the use of synthetic exposures would ensure that these synthetic exposures promote safety and soundness and not speculation. Because these synthetic exposures are required for certain loan

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[26] As noted in footnote 24 with respect to municipal securities, we note that our members are concerned that certain provisions in Subpart B could be read to suggest that the Joint Regulators did not intend for extensions of credit to corporate borrowers in the form of corporate bonds to qualify as loans under the Proposed Regulations. We believe that corporate bonds are extensions of credit. Accordingly, corporate bonds are fairly within the scope of the Securitization Exclusion. We ask that if the Joint Regulators do not, as we suggest in our proposed modifications in Appendix A, specifically include corporate bonds in the definition of loans for purposes of Subpart B, that the Joint Regulators otherwise clarify that corporate bonds are loans as that term is used in Sections __.13(d) and __.14(a)(2)(v). Alternatively, if the Joint Regulators did not intend the definition of loans to include corporate bonds, ASF proposes that Sections __.13(d) and __.14(a)(2)(v) be expanded to permit loan securitization issuers to hold up to 10% of their assets in the form of corporate bonds. Investors in loan securitizations may seek a broader pool of credit exposures than the bank has available in its loan portfolio in order to achieve risk diversification. Permitting a limited amount of corporate bonds would afford a banking entity access to the securitization market that it may not otherwise be able to obtain without the increased diversification that a limited basket of corporate bonds would provide. Accordingly, we believe that the Securitization Exclusion requires at the very least that banks be permitted to securitize a limited amount of corporate bonds in connection with a loan securitization.

We further note that if the definition of loan in the final rule does not include corporate debt securities, then corporate debt repackagings would not be permitted under the loan securitization exemption in most cases because most of these vehicles rely on Section 3(c)(1) or 3(c)(7). Corporate debt repackagings ("Corporate Debt Repackagings") are created by the deposit of corporate debt securities purchased by the sponsoring institution in the secondary market into a trust which issues certificates backed by cash flows on the underlying corporate bonds. Corporate Debt Repackagings are generally issued in order to (i) provide access by individual investors to the corporate debt market through the offering of trust certificates having minimum denominations lower than those typically associated with the underlying security or (ii) allow corporate debt to be combined with interest rate or currency swaps in order to provide institutional investors with a preference for floating rate instruments the opportunity to invest in corporate debt having a fixed interest rate, to allow institutional investors with a preference for fixed rate instruments the opportunity to invest in corporate debt having a floating interest rate or to allow institutional investors to receive payments in currencies other than the currency in which the underlying corporate debt securities are denominated. Institutional transactions generally involve a small number of investors and are tailored to meet the investment objectives of the particular investors. We believe that these securities bear no resemblance to traditional hedge funds and private equity funds, other than their reliance on Section 3(c)(1) or 3(c)(7), and that Congress had no intent to limit the use of such vehicles in adopting the Volcker Rule. For these reasons as well, we believe that the definition of loan should include corporate bonds, or that the Joint Regulators should otherwise exempt Corporate Debt Repackagings from Section __.10(a).

securitizations, we believe Section 13(g)(2) requires that they be permitted subject to those limits.

III. Issues Regarding What Constitutes an Ownership Interest for Purposes of the Volcker Rule Prohibitions

We are quite concerned with the Joint Regulators' suggestion in the release accompanying the Proposed Regulations that holders of asset-backed security debt may be viewed as having "ownership interests" for purposes of the prohibitions set forth in Section __.10 of the Proposed Regulations. Banking entities that own the senior classes of asset-backed securities, including in connection with an underwriting of asset-backed securities or market-making activities, should not have to (i) determine if they are "ownership interests" and (ii) sell them as soon as practicable after the Volcker Rule becomes effective. Further, banking entities should not be restricted from owning debt classes of new asset-backed securities. Doing so would substantially constrict the market for asset-backed securities.

Our concern stems from the substantial voting rights the senior class has in any asset-backed securities transaction, particularly the right to terminate the manager and participate in the selection of the replacement manager as provided in the related transaction documents. Ownership interest as defined in Section __.10(b)(3) of the Proposed Regulations means any equity, partnership, *or other similar interest* (including, without limitation, a share, equity security, warrant, option, general partnership interest, limited partnership interest, membership interest, trust certificate, *or other similar instrument*) in a covered fund, whether voting or nonvoting, or any derivative of such interest (*emphasis added*). In the discussion of the definition of "ownership interest" the Joint Regulators state: "To the extent that a *debt security* or other interest of a covered fund exhibits substantially the same characteristics as an equity or other ownership interest (e.g., *provides the holder with voting rights*, the right or ability to share in the covered fund's profits or losses, or the ability, directly or pursuant to a contract or synthetic interest, to earn a return based on the performance of the fund's underlying holdings or investments)" (*emphasis added*), the Joint Regulators could consider such instrument to be an "other similar instrument" and thus an ownership interest.

Banking entities holding asset-backed securities should not be treated as owners of the related securitization entities that they do not otherwise own or sponsor for purposes of the Volcker Rule prohibitions merely because they are prudent in requiring or otherwise obtaining voting rights that protect their interests in such transactions. Ownership interests for purposes of the Volcker Rule should be limited to those interests that share in the profits or losses of the relevant entity on an unlimited basis or that otherwise earn a return that is specifically based upon the performance of the underlying assets.

An additional ownership issue arises with respect to incentive fees. In order for an incentive fee not to be deemed an "ownership interest" for purposes of Section __.10 of the Proposed Regulations, Section __.10(b)(3)(ii)(A)(4) requires that it not be transferable by the manager except to another subsidiary or affiliate of the manager. Since management/servicing is permitted to be transferred by the manager/servicer to non-affiliates with various consents and

usually rating confirmation, an incentive fee may create an ownership interest unless the right to receive the incentive fee or transfer it to a non-affiliate is irrevocably waived. Any such waiver could interfere with the ability of an investment adviser or asset manager or its parent to sell the asset management platform or management under particular contracts.

Finally, if the Joint Regulators are of the view that "ownership interest" includes ownership of a debt security issued by a securitization entity, then we request that the Joint Regulators (i) add to Subpart C an underwriting and market-making exemption, similar to Sections __.4(a) and __.4(b) (but subject to our comments in Section X of this letter regarding the Section __.4(b) market-making provisions), respectively and (ii) expand the scope of the Section __.16(a)(2) exemption to the ban on covered transactions, in each case in a manner sufficient to permit banking entities to purchase structured finance securities as part of their traditional underwriting and market-making activities. Without an exemption, banking entities generally will not be permitted to acquire or hold such interests, as would be necessary to continue both to act as underwriter in an initial offering of the securities and to engage in market-making activities with respect to securities issued by securitization entities.

The ability of banking entities to purchase securities issued by securitization entities is important not only to overall liquidity but to new origination and placements. A banking entity involved in the development and initial placement of such securities will often both underwrite and thereafter attempt to make a market in, and thus add to the liquidity of, those securities. While a dealer's ability to make a market in the securities is understood by investors not to be guaranteed, investors generally look to underwriters to make a market in securities they distribute, and take comfort from the presence of at least one dealer willing to attempt to act as a market maker. If the Proposed Regulations were to prohibit or limit either the initial underwriting of or the market-making in these securities, the negative impact on this market could be severe.

Securitization investors also depend on the inter-dealer market for price transparency that is necessary to accurately mark the securities to market. If dealers are unable to continue in this role, then the mutual funds, insurance companies, pension funds and endowments that rely on the pricing provided by dealers as part of their market-making function will face new obstacles to accurately valuing these securities, which could further damage the viability of this market.

Such a negative effect on the secondary market for these types of securities is not the result required or intended by Congress, which has expressly sought to protect "[t]he purchase, sale, acquisition or disposition of securities . . . in connection with underwriting or market-making related activities." (Volcker Rule Section 13(d)(1)(B)). Section 13(d) of the Volcker Rule permits the Joint Regulators to provide for exemptions with respect to the "restrictions under subsection (a)", which refers to both the ban on proprietary trading and the directive that a banking entity "shall not... (B) acquire or retain any equity, partnership, or other ownership interest in or sponsor a hedge fund or a private equity fund." There is no statutory authority to exclude the acquisition or retention of ownership interests in a securitization entity from the scope of permissible underwriting or market-making activities.

IV. Section __.16 of the Proposed Regulations Must Permit Covered Transactions with Respect to Securitization Entities that a Banking Entity is Permitted to Own or Sponsor

Subject to the Section 13(f)(3) exemption for certain prime brokerage transactions, Section 13(f) of the BHC Act (enacted as Section 619(f) of Dodd-Frank) will (1) prohibit all "covered transactions" (as defined in Section 23A of the Federal Reserve Act) between a bank (or any affiliate) and any covered fund it sponsors or manages and (2) impose Section 23B "arm's length" requirements on virtually all transactions between a bank (or any affiliate) and such covered fund. The application of Section 23A in Section 13(f) and the Proposed Regulations to transactions between banking entities and covered funds would prohibit, and the application of Section 23B in Section 13(f) and the Proposed Regulations to transactions between banking entities and covered funds would hinder, loan securitizations currently not prohibited or restricted by Sections 23A and 23B.

Many banking entities that sponsor or manage securitization vehicles that securitize loans enter into transactions with such vehicles that meet the definition of covered transactions under Section 23A. As examples:

1. Banking entities almost always act as servicers for securitizations of their loans and may be obligated to make servicer advances in anticipation of receipts from the loans they securitize. These banks also normally make representations and warranties with respect to the quality and characteristics of their securitized assets that may give rise to asset repurchase or indemnification obligations under the related transaction documents.

2. Investors in ABCP issued by ABCP conduits that are administered by banks normally require the bank to provide liquidity support for that ABCP. Similarly, investors are not willing to bear the full credit risk of the customer assets, which is best analyzed and understood by the bank. The bank, therefore, normally provides credit support for some or all of the ABCP conduit's transactions.

3. In most TOB programs, the sponsor bank provides a liquidity ("put") commitment to facilitate purchases of floaters that have been tendered at par on each purchase date if the tendered TOB's floaters are not successfully remarketed. Without such liquidity commitments, TOB programs would not be marketable.

4. Banks use collateralized loan obligations ("CLOs") to securitize loans. Most of these transactions would not be marketable (or would be prohibitively expensive) unless the bank securitizing those loans supplied swaps hedging against rate, basis, timing, and/or currency risk.

5. In corporate debt repackaging transactions, a banking entity will supply a swap to the vehicle, or enter into a repurchase agreement with the vehicle, thereby permitting investors exposure to the credit risk of the underlying corporate bond, but with a lower denomination than would be permitted if the investor purchased the bond directly, or with an

interest rate basis or currency denomination different from that attached to the actual corporate bond.

6. Banking entities often act as underwriters, placement agents and remarketing agents for securitization entities that would meet the definition of covered fund under the Proposed Regulations.

Each of these activities is critical for the functioning of securitization vehicles that are or should be viewed as engaged in the sale or securitization of loans within the meaning of Section 13(g)(2). We believe that the Securitization Exclusion in Section 13(g)(2) requires the Joint Regulators to exempt securitization entities from the restrictions in Section 13(f), since it provides that nothing in the Volcker Rule is to be "construed to limit or restrict the ability of banking entities or nonbank financial companies... to sell or securitize loans...." Otherwise, as evidenced above, Section 13(f) would operate to "limit or restrict" the ability of a banking entity to securitize loans, which is prohibited by Section 13(g)(2). We believe this further supports the view that securitization vehicles should be excluded (as we propose in Appendix A) from the definition of "hedge fund" and "private equity fund" in the Volcker Rule and the related definition of a "covered fund" in the Proposed Regulations.

V. Banks Acting as Third Party Service Providers to Securitization Entities Should Not be Treated as Sponsors or Investment Managers of Such Entities

Banking entities participate in securitization transactions in a variety of different capacities. In many of these transactions they act as a service provider in exchange for a fee. Examples of such roles include trustee, custodian, collateral agent, servicer, master servicer, backup servicer, securities administrator, remarketing agent and collateral administrator. These roles are principally ministerial in nature and do not generally involve investment discretion or management and control activities with respect to covered funds or their assets. In most of these roles, the banking entities' duties are prescribed by the relevant transaction documents, and only involve discretion after some default by other transaction parties, such as when a trustee is required to effect a post-event of default collateral sale or when a backup servicer has to step in as successor servicer of a covered fund's assets after a default by the initial servicer. In other circumstances, the banking entity may have some discretion with respect to the assets of a covered fund, such as when a servicer has the duty, within the servicing standards set forth in the applicable transaction documents, to deal with delinquent or defaulting borrowers. As servicer though, the banking entity has no responsibility for choosing the collateral that is put into the transaction, but merely takes in collections and enforces the underlying loan contracts. A trustee may also have limited discretion in the ability to choose among investments permitted under the securitization agreements for the few days that it holds collections prior to payments being made to the applicable investors. In some cases a trustee invests funds held by it in prescribed eligible investments, such as government money market funds, for up to a few days, and the investment income represents some or all of its fee. However, even in the circumstances described above, a banking entity acting as a service provider is not managing the covered fund in the same manner that a hedge fund manager manages its funds. We do not believe that the Volcker Rule or the Proposed Regulations intended to prohibit or restrict these

service provider activities where the banking entity is merely exercising the limited investment, management and control activities described above. We have suggested below several minor clarifications to the language of the Proposed Regulations to ensure this result.

The exclusion in Section __.10 of the Proposed Regulations for trustees that do not exercise management or investment discretion might not be broad enough to cover all activities of a banking entity acting as a service provider. Section __.10 of the Proposed Regulations generally prohibits a covered banking entity from acting as a sponsor of a covered fund. Although the definition of sponsor in Section __.10 includes a trustee of a covered fund, Section __.10(b)(6)(i) specifically excludes a trustee that does not exercise investment discretion with respect to a covered fund. Section __.10(b)(6)(ii) of the Proposed Regulations states, however, that any covered banking entity that possesses authority and discretion to manage and control the assets of a covered fund for which such a person identified in Section __.10(b)(6)(i) of the Proposed Regulations serves as trustee, shall be considered a trustee of such covered fund. We believe it is uncertain from these sections precisely which trustees are excluded from the definition of trustee and which are not. This uncertainty, coupled with our previously stated point that banking entities act in a variety of service provider roles other than trustee, suggests that a broader exclusion from the definition of sponsor for service providers is appropriate.

The Proposed Regulations should specifically include a definition of service provider. An example of a possible definition is as follows:

> Service Provider is a banking entity that serves as a trustee to a trust or provides other services, including but not limited to, loan servicing, custodial services, collateral agency, administration and remarketing agency, in exchange for a negotiated fee to a covered fund that holds financial assets and/or issues asset-backed securities.

Once a definition of service provider is included in the Proposed Regulations, the definition of sponsor should then be amended to specifically exclude service providers as defined. The foregoing definitional changes would allow banking entities to continue to perform their service provider activities in securitizations which, as previously stated, we do not believe the Volcker Rule or the Proposed Regulations intended to restrict.

Section __.16 of the Proposed Regulations provides, in part, that no covered banking entity that serves, directly or indirectly, as the investment manager to a covered fund, and no affiliate of such entity, may enter into a transaction with the covered fund that would be a covered transaction as defined in Section 23A of the Federal Reserve Act. The term investment manager is not defined in the Proposed Regulations. As a result, it is impossible to know if some of the service provider activities performed by banking entities might fall within the definition of investment manager. Once again, we do not believe the Volcker Rule or the Proposed Regulations intended to prohibit banking entities from performing as a service provider in securitizations. Without clarification on this issue, banking entities acting as service providers, and their affiliates, may be prohibited from extending credit to or purchasing

securities from, covered funds to which such banking entity is providing a service. Accordingly, we suggest that an investment manager definition be added to the Proposed Regulations and that a part of such definition include a specific exclusion for service providers as defined above.

VI. To the Extent that an Activity is Permitted with Respect to a Securitization Transaction under the Conflicts of Interest Rules Adopted Under Section 621 of Dodd-Frank, Such Activity Should Not be Considered a Conflict of Interest under the Proposed Regulations

Section 621 of Dodd-Frank adds new Section 27B to the Securities Act of 1933 (the "Securities Act"). Section 27B specifically regulates conflicts of interest in securitization transactions. Proposed Rule 127B under the Securities Act is the implementing rule for Section 27B. ASF has submitted a detailed comment letter to the SEC outlining recommended changes to proposed Rule 127B that will better align it with the intent behind Section 621. We believe that, with these changes, Rule 127B, rather than the conflict rules set forth in Section __.17 of the Proposed Regulations, is the appropriate mechanism to address conflicts of interest with respect to securitization entities and securitizations generally. As such, we believe that transactions with securitization entities involving the issuance of asset-backed securities should be excluded from the scope of Section __.17 of the Proposed Regulations and instead be regulated under Rule 127B. We believe that the more specific securitization conflicts of interest rule as modified with our requested changes will address any conflict concerns that may arise with respect to securitization entities that banking entities sponsor, own, advise or manage. We also believe that this result would be consistent with the Congressional mandate in Section 621 for the SEC to promulgate rules relating to conflicts in securitization separately from the Volcker Rule and prevent any potential confusion arising from dual application. Exempting securitization vehicles from the conflicts of interest provisions of the Volcker Rule is also consistent with the findings of the FSOC study, which stated:

> "The creation and securitization of loans is a basic and critical mechanism for capital formation and distribution of risk in the banking system. While these activities involve the assumption of principal risk, the broader benefits to the economy reflect the intent of federal borrowing subsidies and protections. Accordingly, Congress determined that none of the restrictions of the Volcker Rule, *nor the "backstop" restrictions on permitted activities*, will apply to the sale or securitization of loans."[27]

[27] FSOC Study at 47 (*emphasis added*).

VII. Broad Geographic Scope of Proposed Regulations Should Be Narrowed and U.S. Regulatory Oversight of Structures Unique to Cross-Border Securitization Transactions Should Be Clarified

Over the years, the securitization industry has grown significantly in size and sophistication in response to the demands of the global marketplace. Specifically, both originators and investors have increasingly adopted global structures to diversify funding sources and investment exposures, respectively. Banks in the U.S. and abroad rely on the ability to execute securitization transactions across geographic boundaries to efficiently fund financial assets, maintain liquidity and support other core banking activities, all of which are vital to the financial stability of the U.S. and the global economy.

Providing U.S. lenders the ability to efficiently raise funding offshore for financial assets originated in the U.S. through securitization allows U.S. consumers and businesses to benefit from lower borrowing costs and greater access to capital. Increased regulation of securitizations, and particularly regulation that is not aligned with Congress' goals and purposes for enacting the Volcker Rule, as well as lack of clarity on the potential impact of the Proposed Regulations on non-U.S. issuers engaging in securitizations, could lead non-U.S. banks to avoid securitization altogether in order to escape the costs of compliance and regulatory uncertainty. Given the growth in the volume of investments made by non-U.S. banks in asset-backed transactions and securitizations generally, the disruption to the U.S. economy of such avoidance by non-U.S. banks could be significant.

Unless issues with the Proposed Regulations are addressed, non-U.S. banks, in many instances, may conclude that the compliance requirements arising from potentially holding ownership interests in, or transacting business with, a "covered fund" used in a securitization transaction are unduly intricate, burdensome and costly. Many such non-U.S. banks otherwise subject to the Volcker Rule may thereafter be deterred from securitizing their assets altogether. This is not consistent with Congress' stated purpose in the Volcker Rule and the Securitization Exclusion (to "eliminate excessive risk taking activities by banks and their affiliates while at the same time preserving safe, sound investment activities that serve the public interest".)[28]

The following highlights the key concerns that may hinder or even prevent cross-border securitization transactions under the Proposed Regulations, with some suggestions on how the final Volcker Rule regulations might address these concerns.

A. Jurisdictional Limits

The Proposed Regulations attempt to place a jurisdictional limit on the reach of Volcker Rule restrictions on holding ownership interests in covered funds and on engaging in proprietary trading by exempting certain trading, and certain covered fund activities and investments outside the U.S.,

[28] 156 Con. Rec. S5905 (daily ed. July 15, 2010).

from these restrictions.[29] However, the Proposing Release explicitly notes that these jurisdictional exemptions are "not identical" to those in Regulation S under the Securities Act ("Regulation S"), which provides the jurisdictional safe harbor applicable to securities offerings.[30] According to the Proposing Release, this narrower jurisdictional exemption is intended to capture the scope of U.S. counterparties, decision-makers and personnel that, if involved with the transaction, would preclude the transaction from being considered to have occurred solely outside of the United States, although no explanation is given as to why the jurisdictional safe harbor in Regulation S is inadequate to achieve these ends. Even if narrowing the exclusion from U.S. jurisdiction were appropriate for the traditional hedge funds and private equity funds that Congress intended to be subject to Volcker Rule prohibitions, which we do not concede, if securitization entities remain subject to regulation as "covered funds" under the Proposed Regulations, then the jurisdictional limits applicable to securitization entities should be aligned with those contained in Regulation S.

In particular, the exemptions in Sections _.6(d) and _.13(d) require, among other things, that the trading or other activities covered by the exemptions not involve a "resident of the United States". However, as noted above, the definition of that term in the Proposed Regulations is not aligned with the definition of "U.S. Person" in Regulation S.[31] In the more than 20 years since it was originally adopted, the definition of "U.S. Person" in Regulation S has become a key component of a globally understood and accepted standard whereby participants in all types of securities offerings, including offerings of asset-backed securities, can determine whether the costs and burdens of U.S. regulatory compliance apply to their transaction.

By using a new and more narrowly crafted definition for "resident of the United States" in the Proposed Regulations for securities offerings involving asset-backed securities, the Joint Regulators are creating two incongruent principles for how the U.S. determines which types of securities offerings are outside the jurisdiction of U.S. regulations. This will create uncertainty, in particular for non-U.S. issuers, and will inappropriately and unnecessarily bring certain transactions within the scope of U.S. regulation for purposes of the Volcker Rule.

Also, many non-U.S. entities have transaction and corporate structures already established with the current Regulation S standard in mind. Creating a new standard applicable to certain asset-backed securities would greatly disrupt the business practices of non-U.S. entities with little effect toward decreasing the financial risk posed to the U.S. market. Offerings of asset-backed securities (as defined in the Exchange Act) by non-U.S. issuers conducted exclusively pursuant to the safe harbor contained in Regulation S would not have a meaningful nexus with the U.S. Accordingly, ASF believes that the market protection policy behind the Proposed Regulations

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[29] Proposed Regulations, Section _.6(d) (*Permitted trading outside of the United States*) and Section _.13(c) (*Certain permitted covered fund activities and investments outside of the United States*).

[30] See Proposing Release at 68881.

[31] The following persons or entities are exempt from the definition of "U.S. Person" in Regulation S but not in the Proposed Regulations: (i) Any discretionary account or similar account held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary resident in the U.S.; (ii) certain estates of foreign persons, even if a U.S. person is acting as executor or administrator; (iii) certain trusts benefiting non-U.S. persons even if a U.S. person is acting as a fiduciary; (iv) certain foreign employee benefit plans; (v) certain non-U.S. agencies and branches of U.S. persons; and (vi) certain designated international financial institutions, such as the International Monetary Fund, even if located in the U.S.

would have less relevance, and thus compliance with the Proposed Regulations should not be required.

If securitization entities remain subject to regulation as "covered funds" under the Proposed Regulations, our proposal is to retain the definition of "U.S. Person" from Regulation S of the Securities Act word-for-word for purposes of Sections _.6(d) and _.13(c), at a minimum when applied to asset-backed securities as defined in the Exchange Act. Continuity in the jurisdictional reach of the Volcker Rule regulations with established standards would prevent confusion in the global marketplace for asset-backed securities and reduce the possibility of inadvertent non-compliance borne from such confusion, while still furthering the Volcker Rule's underlying purpose as reiterated by Congress and set out in the Proposed Regulations.

B. Application of Expanded Definition of Covered Fund

The Volcker Rule defines "private equity fund" and "hedge fund," in part, to include a company that would be an investment company under the Investment Company Act but for Section 3(c)(1) or Section 3(c)(7) thereof. In Section _.10(b)(1)(iii) of the Proposed Regulations, the Joint Regulators defined a "covered fund" to include "*any issuer...that is organized or offered outside the United States*...[that would be an investment company under the Investment Company Act of 1940 but for Section 3(c)(1) or Section 3(c)(7) thereof]...*if such issuer were organized under the laws of, or offered securities to one or more residents of, the United States*." Even if this approach were to be appropriate for traditional non-U.S. private equity funds and hedge funds, which we do not concede, ASF does not believe it is appropriate for non-U.S. securitization entities generally. If securitization entities remain subject to regulation as "covered funds" under the Proposed Regulations, ASF objects to this broad approach to the implementation of the statutory language in the Volcker Rule to the extent that it would be applicable to non-U.S. securitization entities.

If the proposed definition of "covered fund" contained in Section _.10(b)(1)(iii) were to be retained, many non-U.S. issuers of asset-backed securities with no other nexus with the United States would have no other alternative exemption from the definition of "investment company" except for Section 3(c)(1) or 3(c)(7), since non-U.S. asset-backed transactions would have no reason to be set up to take advantage of other exemptions. For example, certain domestic U.S. issuers of asset-backed securities may rely on the Rule 3a-7 exemption from the Investment Company Act as the most feasible alternative to the Section 3(c)(1) or 3(c)(7) exemptions. However, the Rule 3a-7 exemption requires, among other things, the use of a trustee that is a U.S. bank. This is typically not a feature needed or used by non-U.S. issuers of asset-backed securities, which makes them unable to technically comply with, and rely upon, Rule 3a-7.

ASF is especially concerned about the retroactive effect of the "covered fund" definition on legacy non-U.S. asset-backed transactions which were structured prior to the effective date of the Proposed Regulations. These new requirements would impose untenable obligations on the non-U.S. banks that structured these transactions, which were legal and regulatory compliant at the time of issuance (without considering the new regulations). New regulatory requirements such as those in the Proposed Regulations would precipitate a range of adverse results with

global effect, including potential non-compliance and even cancellation of transactions for illegality.

Accordingly, ASF proposes that, if securitization entities remain subject to regulation as "covered funds" under the Proposed Regulations, non-U.S. issuers of asset-backed securities (as defined in the Exchange Act) should be excluded from Section _.10(b)(1)(iii).

C. Unique Concerns for Cross-Border Transaction Structures

Cross-border transactions give rise to unique concerns as a result of how issuers structure their transactions or asset pools. As a result, we are suggesting revisions to the Proposed Regulations that we believe will preserve the ability of banking entities to enter into securitization and other core funding transactions in a manner consistent with the underlying policies behind the Proposed Regulations, as reiterated by Congress.

1. Covered Bonds

Covered bonds and other similar secured bank funding structures form a central part of the funding strategy for many banks, particularly those located in Europe and Canada, and appear to be of increasing importance to banks going forward. The Proposed Regulations have the potential to be interpreted to hinder or even prevent non-U.S. banks which are subject to the Volcker Rule from engaging in this core banking activity. Although covered bonds and similar structures are secured, full-recourse corporate obligations (and not asset-backed securities), certain of these structures utilize a special purpose vehicle which is set up to hold a pool of assets, sometimes known as the "cover pool". As currently drafted, the Proposed Regulations are not clear on whether these special purpose entities, which effectively function as collateral devices in the covered bond and similar secured bank funding arrangements (and not as separate investment vehicles), could nonetheless be considered a "covered fund". ASF accordingly requests that the Proposed Regulations be clarified so that collateral vehicles whose sole function is as part of an offering of covered bonds or other secured general recourse bank funding arrangements be excluded from the definition of "covered fund" for all purposes under the Volcker Rule.

2. Intermediate Entities

The implementation of the definition of "private equity fund" and "hedge fund," as encompassed in the definition of "covered fund" in the Proposed Regulations, would apply to foreign entities that Congress did not intend to include within the Volcker Rule's regulatory scope. In the United Kingdom, for example, sponsors structure master securitization trust transactions using several intermediary entities below the trust that directly holds the securitized asset pool – an entity that holds an "investor interest" in the trust and a further entity that acts as issuer and advances the securities proceeds to the entity holding the investor interest. These intermediary entities issue "securities" for purposes of the Investment Company Act and would therefore require an exemption from the definition of "investment company" even though these intermediaries do not directly own the assets being securitized

(which could permit the use of an exemption other than those contained in Section 3(c)(1) or Section 3(c)(7)). Correspondingly, these entities would likely be subject to the prohibitions contained in the Volker Rule even though they are part of a securitization transaction that, taken as a whole, would not be subject to the Rule. At the same time, these entities may not be able to benefit from the exemption in the Proposed Regulations for loan securitizations. The potential result is that these structures, frequently used by non-U.S. banks as part of their core funding activities (and which are otherwise compliant with the relevant laws and regulations of the jurisdiction in which these banks are based), may be hindered or even prevented if the sponsoring bank is itself subject to the Volcker Rule.

Accordingly, consistent with Section II.B above, ASF proposes that the Proposed Regulations be modified to permit the securitization of asset-backed securities as a permissible loan securitization so long as the assets ultimately backing the intermediate asset-backed securities (whether held through one or more intermediate entities) satisfy the definition of "loan" in the Proposed Regulations.

D. Nexus Between Proposed Regulations and European Capital Requirements Directive

At the same time Congress sought to increase oversight over financial institutions, regulators in the European Union responded to perceived weaknesses in the European securitization market practice by adopting Article 122a of the European Capital Requirements Directive ("Article 122a") in 2009. Article 122a became effective as of January 1, 2011 (whereas the risk retention requirements under Dodd-Frank will be phased in for different asset classes and will not be fully effective across all asset classes for at least another two years). Article 122a is also different from the U.S. risk retention rules in that it applies to European credit institutions and applies generally to any "securitization" in which a European credit institution assumes exposure (and clearly applies to "securitizations" originated by sponsors located outside of the European Union that are sold to European credit institutions). Finally, no risk retention is technically "required" under Article 122a; rather, in the absence of retention, high and, in some cases, non-economic capital charges are applied to European credit institutions that have exposure to securitizations.

Though Article 122a contemplates dual regulation and credits ownership interests retained as a result of non-EU-based risk retention rules, the Proposed Regulations fail to reciprocate this approach; ownership interests retained as a result of Article 122a and any other non-U.S. based risk retention rules are not exempted from the Volcker Rule restrictions under the Proposed Regulations. This type of incongruity could deter European credit institutions from providing credit to fund U.S. consumers and businesses by discouraging the investment in offerings of U.S. asset-backed securities subject to the Volcker Rule. It would likely also increase the costs associated with cross-border securitizations and add to general confusion in the marketplace.

ASF believes that it would therefore be beneficial to all global market participants if the Joint Regulators were to take into further consideration the interactions between the Proposed Regulations and non-U.S. risk retention regimes, such as Article 122a. ASF is concerned that

certain differences, most of which we do not believe are essential to the spirit of, or policies behind, the Proposed Regulations, may hinder or prevent cross-border transactions and thus adversely impact the U.S. economy.

VIII. Securitization Entities that are Excluded from the Scope of the Proposed Regulations Should Not be Subject to the Compliance and Reporting Regimes of the Proposed Regulations

We do not believe that the Volcker Rule requires, or that the policies behind the Volcker Rule would dictate, that securitization entities permissibly controlled by a banking entity be subject to the compliance monitoring set forth in Section __.20 of the Proposed Regulations. Issuers of asset-backed securities and related depositors that might be banking entities under the Proposed Regulations do not engage in proprietary trading and do not acquire ownership interests in or sponsor hedge funds or private equity funds. Rather, such issuers are passive entities whose permitted activities are generally limited to acquiring assets, issuing non-recourse securities collateralized by such assets and related ministerial activities. Requiring such entities to establish compliance programs to prevent the occurrence of prohibited activities -- even the minimal requirements set forth in Section __.20(d) or as part of enterprise-wide compliance -- would impose an unnecessary cost burden. These costs would ultimately increase the cost of obtaining credit for consumers and borrowers whose obligations are securitized. Accordingly, we believe that applying these requirements to securitization vehicles is inconsistent with the Securitization Exclusion.

If securitization vehicles are not excluded from the definition of "covered funds" (as we believe they should be), we believe, at a minimum, that the $1 billion thresholds on covered fund investments and assets in Section __.20(c)(2)(ii), which trigger mandatory adherence to the "programmatic" compliance regime in Appendix C, should <u>not</u> include the amount of investments in, or assets of, securitization vehicles that would be considered covered funds. Many smaller and regional banking entities that were not intended to be subject to Appendix C likely would hit this $1 billion threshold if securitization vehicles are inappropriately considered covered funds and included within the $1 billion limit.

IX. If, Despite ASF's Comments to the Contrary, the Joint Regulators Elect to Subject Certain Securitization Entities to the Regulations Adopted Under the Volcker Rule, Banking Entities Must be Permitted in Certain Circumstances to Continue to Engage in Certain Activities That Would be Prohibited by the Proposed Regulations Throughout the Conformance Period

If, despite our request herein, certain securitization entities remain subject to regulation as "covered funds" under the final Volcker Rule regulations, it will be necessary for these entities to unwind or restructure their activities in order to achieve compliance with these regulations. While as a general matter funds are given at least two years from July 21, 2012 to bring their activities and investments into compliance with the Volcker Rule, banking entities are not permitted under the Volcker Rule and Proposed Regulations to enter into new covered transactions with covered funds following their effective date, which is required to be no later

than July 21, 2012. As discussed above, however, with respect to certain securitization entities, such as ABCP conduits and TOB issuers, the inability of banking entities that own, sponsor, advise or manage these entities to extend credit, purchase assets under liquidity commitments, and enter into other forms of covered transactions with such securitization entities is tantamount to requiring such banking entities to immediately bring their activities and investments into compliance with Volcker Rule restrictions, resulting in tremendous disruption to these markets. We do not believe that such a result is consistent with the actual intent of the conformance period requirements of the Volcker Rule and related regulations or beneficial to entities that rely on the ability to obtain funding from or invest in these entities for the benefit of the larger economy. We therefore respectfully request that any securitization entities that remain subject to Volcker Rule restrictions be permitted to enter into covered transactions with banking entities that are deemed to sponsor, advise or manage such entities throughout the conformance period provided for by regulation. We further request that to the extent that satisfaction of any contractual obligations arising from covered transactions -- such as agreements to extend credit or satisfy credit support obligations -- would conflict with the Volcker Rule, that banking entities be permitted to satisfy such obligations following the conformance period so long as they arose prior to the end of the conformance period.

X. Proprietary Trading Issues

Market-making in asset-backed securities is a core function of our banking entity members. Market-making in asset-backed securities is critical to assuring the proper functioning of the asset-backed securities markets and provides the liquidity necessary for buyers of asset-backed securities that are the clients of our market-making members.

The definition of market-making in the Proposed Regulations is primarily designed for agency-based, highly liquid two-sided markets where risk and inventory do not need to be warehoused for a longer time period. The asset-backed securities market, by contrast, is much more limited and illiquid. Therefore it is much harder to buy and sell asset-backed securities transactions in the market. Market makers in asset-backed securities must find ways to provide liquidity to the asset-backed securities markets in order for these markets to function properly.

If banking entities that act as market makers in the asset-backed securities markets are restricted from holding asset-backed securities in inventory as part of market-making under the final rule, this will greatly decrease the available liquidity in these markets and increase transaction costs and market volatility, leading to higher borrowing costs for consumers and corporations. The market-making exemption in the Volcker Rule must, therefore, be interpreted in the final rule to provide a workable standard that permits normal market-making activities in debt securities markets such as the asset-backed securities market. The seven criteria in the proposed rule, and the related criterion for identifying permitted hedging, are overly restrictive and will make it impractical for dealers to continue making markets in most securitized products.

Of particular concern is the fact that cash agency residential mortgage-backed securities are exempt from the Proposed Regulations, while common hedging instruments such as TBA

options and swaps on interest only securities, principal only securities (IOS and POS) and mortgage indices are not exempt. This inconsistent treatment would have an adverse impact on market-making and hedging capabilities in the agency mortgage market. A reduction in liquidity would not only impact the secondary market, but would translate into higher mortgage rates for consumers. In addition, the Joint Regulators should confirm that the underwriting exemption contained in Section _.4(a) of the Proposed Regulations permits resecuritizations, which may involve sourcing bond collateral over a period of time in anticipation of issuing new securities. For example, a banking entity may respond to customer or general market demand for highly-rated mortgage paper by sourcing RMBS to re-securitize. The requisite collateral may be accumulated over a period of time and held in inventory until the transaction can be organized and assembled.

The ability of asset-backed securities issuers to sell their securities into the markets is dependent upon a vibrant and liquid secondary market for these securities. Institutional investors in these markets depend upon the activities of market makers, many of whom are banking entities, to provide liquidity. Failure to permit the activities necessary for banking entities to act in this market-making capacity would have a dramatic adverse effect on the ability of securitizers to access the asset-backed securities markets and thus to obtain the debt financing necessary to ensure a vibrant U.S. economy.

XI. Conclusion

ASF has been a strong and vocal advocate for targeted securitization market reforms and we continue to work with regulators to identify and implement them. ASF will continue to work to provide industry comment on all proposals issued by the various regulatory agencies as well as to promulgate best practices for securitization governance in order to restore confidence in this very important market. Where regulators are tasked with implementing reforms, we support uniform implementation of agreed, common standards supported by comprehensive industry and public comment.

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ASF very much appreciates the opportunity to provide the foregoing comments in response to the Joint Regulators' Proposed Regulations. 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 Managing Director, Senior Counsel, at 212.412.7109 or at esiegert@americansecuritization.com, or ASF's outside counsel on these matters, Tim Mohan of Chapman and Cutler LLP at 312.845.2966 or at mohan@chapman.com.

Sincerely,

Tom Deutsch
Executive Director
American Securitization Forum

APPENDIX A

Proposed additional clause at end of definition of "Covered Fund":

"Covered Fund" does not include (i) any issuer of or depositor with respect to an asset-backed security, as such term is defined in Section 3(a)(77) of the Exchange Act or (ii) any ABCP conduit whether or not it is an issuer of asset-backed securities as defined in Section 3(a)(77) of the Exchange Act.[32]

Proposed modifications to Section 13(d):[33]

(d) Loan securitizations. The prohibitions contained in § __.10(a) and § __.16 do not apply with respect to the acquisition or retention by a covered banking entity of any ownership interest in, acting as sponsor to, or entering into covered transactions with, a covered fund that is:

(A) an issuer of asset-backed securities or special purpose vehicle which acts as an intermediary to an issuer of asset-backed securities, the assets or holdings of which are solely comprised of:

(1) Loans, or asset-backed securities backed by Loans originated or owned by the sponsor of such securitization or which are issued by an entity that is organized under the direction of the same sponsor as the issuer of the covered fund;

(2) Contractual rights or assets directly arising from those loans supporting the asset-backed securities; any guarantee, insurance policy, letter of credit, liquidity facility or other obligation supporting such asset-backed securities or any Loans supporting the asset-backed securities; and cash and high quality short-term investments purchased with issuance proceeds or proceeds from the assets held by the issuer which mature no later than the date on which such proceeds are required to be paid to investors in the asset-backed securities or used to purchase assets; and

(3) Interest rate or foreign exchange derivatives that:

(i) Materially relate to the terms of such loans, asset-backed securities or contractual rights or assets; and

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[32] If the Joint Regulators are unwilling to grant this exclusion for securitization vehicles from the definition of covered funds, we believe the Agencies should, at a minimum, provide such an exclusion for all securitization vehicles that meet the requirements set forth below in the alternative proposed modifications to section 13(d).

[33] These modifications are necessary if the Joint Regulators do not elect to exclude issuers of asset-backed securities from the definition of "Covered Fund."

(ii) Are used for hedging purposes with respect to the securitization structure;

(4) With respect to a securitization of Loans consisting primarily of corporate loans and corporate bonds, credit default swaps, total return swaps or other agreements referencing corporate loans or corporate bonds:

(i) pursuant to which the issuer is the seller of credit protection or otherwise "long" the credit exposure of the reference corporate loan or bond, and receives a yield derived from the yield on the reference corporate loan or bond, and

(ii) the aggregate notional amount of which do not exceed 10% of the aggregate principal or face amount of the assets held by the securitization issuer.

(B) an Eligible ABCP conduit that issues asset-backed securities, the assets or holdings of which are solely comprised of:

(1) Loans, Financial Assets, Note Purchase Facilities, or asset-backed securities the ultimate source of payment for which are loans or Financial Assets the aggregate principal amount of which shall not exceed 5% of the aggregate principal or face amount of assets held by such ABCP conduit;

(2) Contractual rights or assets directly arising from those Loans, Financial Assets or asset-backed securities; any guarantee, insurance policy, letter of credit or other obligation supporting any Loans, Financial Assets or Note Purchase Facilities supporting the asset-backed securities; and cash and high quality short-term investments which mature no later than the date on which such proceeds are required to be paid to investors in the asset-backed securities or used to purchase assets;

(3) Interest rate or foreign exchange derivatives that:

(i) Materially relate to the terms of such loans or contractual rights or assets; and

(ii) Are used for hedging purposes with respect to the securitization structure; and

(4) Contractual commitments providing for liquidity protection or credit enhancement to such ABCP Conduit.

(C) an issuer of securities, the assets or holdings of which are solely comprised of:

(1) Municipal Securities;

(2) Contractual rights or assets directly arising from those Municipal Securities; any guarantee, insurance policy, letter of credit or other obligation supporting any Municipal Securities supporting such securities; and cash and high quality short-term investments purchased with proceeds from Municipal Securities which mature no later than the date on which such proceeds are required to be paid to investors in such securities;

(3) Interest rate or foreign exchange derivatives that:

(i) Materially relate to the terms of such Municipal Securities or contractual rights or assets; and

(ii) Are used for hedging purposes; and

(4) Contractual commitments providing for liquidity protection to such issuer.

Relevant definitions:

ABCP means an asset-backed promissory note that has a maturity at the time of issuance not exceeding 397 days, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

ABCP conduit means one or both of the following, as the context requires: an entity that issues ABCP or other asset-backed securities and any special purpose vehicle that (1) uses the proceeds of ABCP or other asset-backed securities issued by an ABCP conduit that is an issuing entity to acquire interests in one or more securitization transactions and (2) is sponsored by the same person that sponsors such issuing ABCP conduit.

Eligible ABCP conduit means an ABCP conduit provided that:

(1) The ABCP conduit is bankruptcy remote or otherwise isolated for insolvency purposes from the sponsor of the ABCP conduit; and

(2) One or more regulated providers have entered into a legally binding commitment to provide, in the aggregate, at least 100 percent liquidity coverage (in the form of a lending facility, an asset purchase agreement, a repurchase agreement, or other similar arrangement that may be conditional or unconditional) to all the asset-backed securities issued by the ABCP conduit by lending to, or purchasing assets from, the ABCP conduit in the event that funds are required to repay such maturing asset-backed securities.

Financial Assets means financial assets which by their terms convert to cash within a finite period of time.

Intermediate SPV means a special purpose vehicle that:

(1) Is bankruptcy remote or otherwise isolated for insolvency purposes from each originator-seller of such intermediate SPV; and

(2) Issues, sells, pledges or transfers interests collateralized by such Loans or Financial Assets to one or more ABCP conduits.

Loan means any loan, lease (including any lease residual interest), extension of credit including any corporate bond or Municipal Security, secured or unsecured receivable, or any participation, lien or other interest in any of the foregoing.

Municipal Securities means municipal securities as such term is defined in Section __.3(c)(9).

Note Purchase Facility means a note, certificate, revolving credit line, or other instrument issued by an Intermediate SPV (i) the terms of which were negotiated by the related ABCP conduit or an agent acting on its behalf, (ii) which is purchased by such ABCP conduit pursuant to a note purchase agreement or similar subscription document to which such ABCP conduit is a party and (iii) which is backed by Loans or Financial Assets or asset-backed securities issued substantially contemporaneously with such Note Purchase Facility the source of payment for which are Loans or Financial Assets.

Proposed modifications to Section 14(a)(2)(iii):

An issuer of an asset-backed security, if the ownership interest or sponsorship is maintained by a covered banking entity that is a "securitizer" or "originator" with respect to such asset-backed security that is required to comply with the requirements of section 15G of the Exchange Act (15 U.S.C. 78*o*-11) and any implementing regulations issued thereunder or any other legally mandated risk retention requirements.