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Office of the Comptroller of the Currency
Legislative and Regulatory Activities Division
400 7th Street, SW
Suite 3E-218, Mail Stop 9W-11
Washington, DC 20219
Docket Number OCC-2013-0010

Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attn.: Robert deV. Frierson, Secretary
Docket No. R-1411

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attn.: Comments, Robert E. Feldman, Executive Secretary
RIN 3064-AD74

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn.: Elizabeth M. Murphy, Secretary
File Number S7-14-11

Federal Housing Finance Agency
Constitution Center, (OGC) Eighth Floor
400 7th Street SW
Washington, DC 20024
Attn.: Alfred M. Pollard, General Counsel
Comments/RIN 2590-AA43

Department of Housing and Urban Development
Office of General Counsel
Regulations Division
451 7th Street, SW
Room 10276
Washington, DC 20410-0500
RIN 2501-AD53

Re: Credit Risk Retention Re-Proposal

Dear Sirs and Madams:

This letter supplements our letters dated June 8, 2011, October 20, 2011, December 20, 2011, and June 20, 2012 in response to the SEC's March 29, 2011 Notice of Proposed Rulemaking (the "NPRM") to implement the credit risk retention requirements of P.L. 111-203 (the "Dodd-Frank Act") and is focused on responding to various questions raised by your Notice of Proposed Rulemaking published in the Federal Register on September 20, 2013 (the "Re-Proposal") regarding credit risk retention.

Background on ELFA

ELFA is the trade association that represents financial services companies and manufacturers in the U.S. equipment finance sector. The industry's equipment finance volume is forecast to be $827 billion in 2013. ELFA members finance the acquisition of all types of capital equipment, including commercial and corporate aircraft, rail cars and rolling stock, trucks and transportation equipment, vessels and containers, construction, agriculture and off road equipment, medical technology and equipment, IT equipment and software and virtually every other type of equipment.

ELFA represents virtually all sectors of the equipment finance market and its members see practically every type of equipment financing transaction conducted in the United States and every type of funding available to providers of equipment finance. ELFA members who are service providers to the equipment finance industry (such as lawyers, accountants, trustees and vendors) have a unique vantage point of seeing scores of financial transactions from initial concept to final payout and from the perspective of both the borrower/issuer and lender/investor/funding source. ELFA truly is at the heart of equipment finance in the United States.

We note that Equipment ABS differs markedly from MBS in that equipment lessors and lenders do not operate on an "originate to distribute" model, but rather securitize (usually, on balance sheet) only when an adequate size pool has accumulated and market conditions are favorable for long term ABS issuance. Equipment lessors and lenders nearly always are the servicers of the securitized assets and (through overcollateralization, reserve accounts, and other credit enhancement) retain the first loss risk that the securitized assets will perform as anticipated. Unlike real estate, repossession and disposition of equipment can be performed pursuant to straightforward Uniform Commercial Code procedures and the liquid market for used equipment, together with the presence of numerous third party refurbishing and remarketing enterprises, means that investors in Equipment ABS have not faced the dilemmas confronting investors in MBS. We further note that the Federal Reserve Board reveals that equipment lease transactions performed well during the crisis: http://www.federalreserve.gov/boarddocs/rptcongress/securitization/riskretention.html.

The purpose of this letter is to express our concern with two suggestions made in the Re-Proposal, at pages 54 and 59, and to describe some of the more significant points in the Re-Proposal.

I. Proposed disclosure of reference data set

The Agencies have requested comment on the proposal to "require sponsors to provide or cause to be provided to potential investors a reasonable time prior to sale of the ABS interests…and, upon request, to the Commission" a description of the methodology used to calculate the fair value of all classes of ABS interests and the fair value of the eligible horizontal residual interest that would be retained by the sponsor versus the fair value of the eligible horizontal interest required to be retained by the sponsor. The methodology would have to include the "key inputs and assumptions used in measuring the total fair value of all classes of

ABS interests and the fair value of the eligible horizontal residual interest...and the sponsor's technique(s) to derive the key inputs".

The Re-Proposal further would require sponsors using the horizontal risk retention option to disclose "the reference data set or other historical information that would enable investors and other stakeholders to assess the reasonableness of the key cash flow assumptions underlying the fair value of the eligible horizontal residual interest [including] default, prepayment, and recovery".

We strongly urge the Agencies to reject this methodology disclosure requirement. First, sponsors will have to represent and warrant to the underwriters or investors that the transaction, including risk retention, complies with all applicable law. The current investment climate will not tolerate sponsors making little more than an educated guess at whether their risk retention meets the regulatory minimum. Consequently, the underwriter and investory documentary requirements should have an adequate *in terrorem* effect without the sponsor's having to reveal what could be proprietary data and methodologies.

Second, detailed disclosure of the risk retention and fair value methodological inputs could have a perverse effect on investor protection. Sponsors who knew that their projections could be second-guessed by investors or regulators, resulting in securities law liability for failure accurately to calculate and disclose horizontal risk retention, would be motivated to structure ABS offerings so that their horizontal risk retention was close to the regulatory 5% minimum—even if they were prepared to provide risk retention of 10% or more. This would be the case because it would be easier to demonstrate (using more general data and methodology) that a projected 5% risk retention would be accomplished than it would be for 20% risk retention. Requiring detailed disclosure of risk retention metrics thus would result in diminished investor protection, the opposite of what Dodd-Frank sought to achieve. It also would produce the kind of misalignment between investor and sponsor objectives, which worried authors of some of the earlier commentaries which the agencies have received.

Third, this element of the Re-Proposal would place an undue burden upon sponsors. Unlike some asset classes, confidentiality is a real concern for several ABS categories because providing data sets or historical information may enable competitors (who may be affiliated with prospective ABS investors) to derive a sponsor's proprietary underwriting practices such as estimating equipment residual values in Equipment ABS. This is of particular concern in Equipment ABS, where there is a less uniformly recognized method for projecting residual values than for Auto ABS. None of this is to suggest, however, that private placement or Rule 144A investors might not have the market power to influence disclosure to them, with appropriate confidentiality safeguards, of whatever backup materials might be deemed essential for their particular investment decision under particular transaction circumstances.

Fourth, Equipment ABS differs markedly from Auto ABS. Because auto loans and leases are primarily a consumer product, they are underwritten on a more standardized basis that looks at Fair Isaac (FICO) scores and similar statistical metrics to assess credit quality and that better lend themselves to loan level disclosures regarding credit quality, either individually or by uniform groupings of obligor credit quality. In contrast, Equipment ABS obligors range from AAA-rated corporations to unrated middle market companies to small businesses which may or

may not have a FICO score. In addition, equipment leases and loans are often credit enhanced by use of cash reserves, letters of credit, cross collateralization and other means that are diverse and variable. Thus, mandating, for Auto ABS, loan and lease level disclosures about FICO scores, interest rates and other key credit terms is both more relevant and less likely to reveal confidential or competitive information than is the case with Equipment ABS, where developing and agreeing on a mandated set of requirements for loan and lease level disclosures regarding credit terms is problematic at best.

For the reasons set forth above, we recommend that the agencies not require advance disclosure to prospective investors, of detailed risk retention methodology, in the final Regulation.

II. Proposed requirement to maintain retained risk at original level

The Agencies have requested comment on an alternative provision relating to the amount of principal payments received by the eligible horizontal residual interest. Under this alternative, the sponsor would be prohibited from receiving a cumulative amount which exceeded the sponsor's proportionate share of payments made to holders of the ABS Interests. The proportionate share would be determined in accordance with the closing date fair value calculations mandated by the Regulation.

We urge the Agencies to reject this alternative. First, residual payments in Equipment Lease ABS are expected to be "lumpy" in that large, unscheduled amounts can be received in the securitization collection account, whether from prepayment of the securitized receivables, from casualty insurance proceeds, from equipment remarketing proceeds upon expiration of the lease (including disposition after an event of default), or from early termination of the related contract. Early termination of equipment finance contracts typically is artificially high because of the industry tradition—which is particularly pronounced in securitized transactions with their rigid contract modification limitations—that an upgrade of the equipment typically is accomplished by terminating the existing contract and simultaneously entering into a new one for the reconfigured equipment.

To the extent that these unscheduled payments constitute monies in respect of future rentals or loan payments, investors rightly insist that those amounts are to be applied to pay down principal on the ABS notes in accordance with the indenture flow of funds waterfall. But all of these unscheduled payments contain an amount in respect of the fair market value of the equipment. Those "equipment residual" amounts belong to the issuer and are not paid to third party investors unless on a payment date there are shortfalls in receivables paid to the collection account, by reason of obligor defaults or delinquencies. Once all funds in the collection account have been applied on each payment date in accordance with the transaction documents, any remaining amounts are to be paid to the issuer or its designee. The issuer and the sponsor have no control over the timing of any such "lumpy" payments and should not be denied receiving payments in respect of their residual interest in the equipment collateral simply because unscheduled collections have arrived earlier than expected.

Second, if this alternative were implemented, it would have a perverse effect on investor protection. Sponsors who knew that they could never receive the equipment residual portion of

unscheduled payments, if so doing would reduce the closing date risk retention percentage, would be motivated to structure ABS offerings with risk retention much closer to the regulatory 5% minimum. Hence, the alternative would result in diminished investor protection—the opposite of what Dodd-Frank has sought to achieve. It also would produce the misalignment between investor and sponsor objectives, which worried authors of some of the earlier commentaries which the agencies have received.

Third, the alternative would disadvantage highly-rated sponsors from using securitization, because those originators typically retain a higher portion of subordinated, overcollateralization cash flow, for the reason that the relatively high interest rates demanded by investors in the more subordinated ABS classes would not be economically efficient. The sponsors prefer not to issue those high-yield classes, but instead to retain their investment in that portion of the cash flow (and the risk of nonpayment, since the senior ABS interests issued to third parties would have first claim on all cash flow from the receivables). This structure means that the risk retention by such sponsors is noticeably higher than what other sponsors have to provide—a benefit to investors in ABS originated by those highly rated sponsors. But insisting that such sponsors must be locked in to an artificially high closing date risk retention percentage, and be barred from receiving prepayments and other residual cash flow which would reduce that percentage to any extent, would reduce motivation to securitize their assets. The effect could be to increase such a sponsor's cost of funding, which could adversely affect the customers or other obligors of such sponsors.

For the reasons set forth above, we recommend that the agencies not include this alternative provision in the final Regulation and simply require that payments to the sponsor not reduce the eligible horizontal residual interest to less than the statutory minimum of 5%.

III. Flexibility for Eligible Horizontal Retained Interests

Our prior letters have emphasized the diverse methods by which eligible horizontal retained interest can be structured: advanced rates/overcollateralization; equipment residual values; reserve accounts; third party credit enhancement. It would provide needed clarity if the final Rule would recognize that each of these options constitutes eligible horizontal retained interest.

Furthermore, excess reserve fund monies should be permitted to be released to the issuer or its designee, once the amount on deposit equals that required by the ABS transaction documents. Most transactions require the reserve account, once it has fallen below its required level, to be replenished from cash flow otherwise payable to the issuer on each scheduled payment date. Conversely, the issuer or its designee typically is entitled to receive any excess amounts from the reserve account whenever that account balance has reached the agreed-upon maximum. We recommend that the Agencies recognize that reserve account property not only can be released in this manner (provided that the statutory 5% risk retention amount is maintained), but also utilized to pay deal-essential payments in the upper part of most waterfalls, such as trustee, rating agency and servicer fees and expenses. These costs customarily have priority over investor principal and interest distributions on each payment date.

IV. Qualifying Equipment Loan ("QEL") Exemption

The Re-Proposal provides for an exemption for qualified commercial loans, but equipment loans (with their emphasis on the remarketing value of the equipment rather than obligor financial covenants) are inherently different from commercial loans. We applaud the recommendation of the Structured Finance Industry Group that the agencies create a new exemption category for qualified equipment loans with certain bright-line characteristics such as that: the original term not exceed 84 months; the principal amount of the loan be fully amortized not later than the maturity date; the lender hold a valid security interest in all the equipment subject to the loan; and the amount of the loan not exceed 90% of the original invoice cost of the equipment, net of any trade-in allowance or other consideration (such as the termination value paid by the obligor in connection with any upgrade of the financed equipment). In order to preserve the innovation which has characterized the equipment finance marketplace for the past fifty years, we recommend that qualified equipment loans can be documented using a loan agreement, an installment sale agreement, an equipment finance agreement, or any other form of contract except one which would constitute a "lease" under Uniform Commercial Code Article 2A (Leases).

Thank you for your attention to these comments to your thoughtful Re-Proposal. We would be happy to respond to any questions which you may have.

Respectfully submitted,

William G. Sutton, CAE
President and CEO