February 22, 2011

Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
Attn: Mr. David Stawick
Secretary of the Commission

Re: RIN 3038-AD25, Business Conduct Standards for "Swap Dealers" and "Major Swap Participants" with Counterparties

Ladies and Gentlemen:

The American Securitization Forum ("ASF")[1] appreciates the opportunity to submit this letter in response to the request of the Commodity Futures Trading Commission (the "Commission") for comments regarding RIN 3038-AD25, dated December 22, 2010 (the "Proposed Rule") related to business conduct standards for "Swap Dealers" and "Major Swap Participants" under Section 731 of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). ASF supports appropriate reforms within the over-the-counter ("OTC") derivatives market as it relates to the securitization market and we commend the Commission for seeking industry input regarding its proposed rules on these critically important issues. Over the past decade, ASF has become the preeminent forum for securitization market participants 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 regulatory agencies on issues affecting our market. Our views as expressed in this letter are based on feedback received from our broad membership.

[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.

I. Background

New Section 4s(h)(5) of the Commodity Exchange Act ("CEA") (as added by Section 731 of Dodd-Frank) sets forth certain business conduct standards that the Commission may impose on swap dealers and major swap participants ("MSPs") that offer to enter into or enter into a swap with a "Special Entity." That section provides:

> (5) *SPECIAL REQUIREMENTS FOR SWAP DEALERS AS COUNTERPARTIES TO SPECIAL ENTITIES.—*
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> *(A) Any swap dealer or major swap participant that offers to enter or enters into a swap with a Special Entity shall—*
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> *(i) comply with any duty established by the Commission for a swap dealer or major swap participant, with respect to a counterparty that is an eligible contract participant within the meaning of subclause (I) or (II) of clause (vii) of section 1a(18) of this Act, that requires the swap dealer or major swap participant to have a reasonable basis to believe that the counterparty that is a Special Entity has an independent representative that—*
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> *(I) has sufficient knowledge to evaluate the transaction and risks;*
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> *(II) is not subject to a statutory disqualification;*
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> *(III) is independent of the swap dealer or major swap participant;*
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> *(IV) undertakes a duty to act in the best interests of the counterparty it represents;*
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> *(V) makes appropriate disclosures;*
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> *(VI) will provide written representations to the Special Entity regarding fair pricing and the appropriateness of the transaction; and*
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> *(VII) in the case of employee benefit plans subject to the Employee Retirement Income Security act [sic] of 1974, is a fiduciary as defined in section 3 of that Act (29 U.S.C. 1002); and*
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> *(ii) before the initiation of the transaction, disclose to the Special Entity in writing the capacity in which the swap dealer is acting; and*
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> *(B) the Commission may establish such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in the furtherance of the purposes of this Act.*

A parallel provision with respect to security-based swaps is contained in section 15F(h)(5) of the Securities Exchange Act of 1934 (as added by Section 764 of Dodd-Frank). We intend our comments to apply equally to the CEA and the Securities Exchange Act.

The definition of Special Entity includes any employee benefit plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and any governmental plan, as defined in Section 3 of ERISA.

II. Regulation of Employee Benefit Plans under ERISA

Section 3(3) of ERISA defines an employee benefit plan as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." "Employee pension benefit plan" and "employee

welfare benefit plan" are defined broadly in ERISA to include virtually any type of benefit plan, including both benefit plans subject to ERISA (U.S. private-sector plans) as well as benefit plans not subject to U.S. law (non-U.S. private- and public-sector plans). Thus, a literal reading would indicate that a Special Entity could include both U.S. plans subject to ERISA, as well as plans not otherwise subject to U.S. law. For reasons more fully discussed below, the ASF believes that such a literal reading does not reflect the intent of Congress in passing Dodd-Frank and potentially leads to unintended consequences. It is our view that Special Entities should not include plans not otherwise subject to U.S. law.

Further, under existing regulations of the U.S. Department of Labor ("DOL"), the concept of "employee benefit plan" could include, under certain circumstances, investment vehicles that have employee benefit plan investors. The ASF is concerned that if a broad interpretation of "employee benefit plan" is used in drafting new regulations to implement provisions of Dodd-Frank, the definition of "Special Entity" could include such investment entities. We believe that the purpose for an expansive reading in the DOL regulations is different from the concerns that have led to Dodd-Frank and, consequently, that adopting an expansive approach is not justified in regulations implementing Dodd-Frank.

ERISA was passed in 1974 in response to severe problems with the integrity and funding of U.S. private-sector pension plans. Its purpose is to provide broad regulation and oversight of pension and welfare plans and fiduciaries and other service providers to such plans. Consequently, the statute and accompanying regulations reach broadly to cover both the plans and certain vehicles in which these plans invest.

As part of this broad-based approach to regulating plans, fiduciaries and service providers, U.S. Department of Labor Regulation Section 2510.3-101 (the "Plan Assets Regulation") contains a "look-through rule" that, subject to certain exceptions, provides that when an employee benefit plan subject to ERISA invests in an equity interest of an entity primarily engaged in the investment of capital that is neither a publicly offered security nor a security issued by an investment company registered under the Investment Company Act of 1940, the plan's investment includes the equity interest and an undivided interest in the underlying assets of the entity. One exception provided by the Plan Assets Regulation applies if the equity participation by "benefit plan investors" in the entity is not "significant," that is, benefit plan investors do not hold 25% or more of any class of equity of the entity. Note that this bright line rule permits investment managers to avoid regulation by keeping investments by plans below the 25% threshold. Alternatively, such managers can choose to accept plan money without limitation and affirmatively declare themselves to be fiduciaries with respect to the plan assets invested in the vehicle, thereby subjecting themselves and the vehicle to more stringent regulation. Plans investing in these vehicles will know at the time of investment whether or not the manager is limiting plan investment and can act and monitor accordingly.

In this regard, it is worth noting that the Pension Protection Act of 2006 (the "PPA") narrowed the scope of the definition of "benefit plan investor" and consequently the scope of the 25% threshold. Prior to passage of the PPA, the DOL interpreted the Plan Assets Regulation as counting all employee benefit plans, whether or not subject to ERISA, including government plans and foreign plans. The DOL did not seek to regulate these plans; however, in meeting the 25% threshold such plans were counted. This led to the following situation: an investment

vehicle could have 25% or more of government and/or foreign plan money invested and not be subject to regulation as long as no ERISA money was invested. However, the first dollar of ERISA money invested in the vehicle would subject the vehicle to regulation because it (a) exceeded the 25% threshold and (b) had investors subject to ERISA. In the PPA, Congress mandated a more sensible approach by limiting the definition of "benefit plan investor" to (a) plans subject to regulation under the fiduciary responsibility provisions contained in Title I of ERISA, (b) plans (such as IRAs) subject to Section 4975 of the Internal Revenue Code and (c) vehicles containing significant investment (i.e., investment that exceeded the 25% threshold) by plans described in (a) or (b).

Further, the PPA clarified certain other rules with respect to benefit plan investment. Prior to PPA's passage, when 25% or more of any class of equity interests in an entity (other than an insurance company general account) was held by benefit plan investors, all of its assets were generally treated as plan assets when it invested in another entity. However, the PPA provided for a proportional approach that treated an entity as holding plan assets to the extent of the percentage of the equity interests owned by benefit plan investors. This change made it easier for issuers to calculate the 25% limit and avoid unexpected ERISA regulation caused by benefit plan investment. This more tailored approach seems to reflect Congressional intent that, while regulation is critical, such regulation should focus on the intended targets and not foster confusion with overly broad rules.

III. Regulation of Employee Benefit Plans under Dodd-Frank

In contrast to the broad regulatory goals of ERISA, the ASF believes that the Special Entity rule in Dodd-Frank is more focused. Specifically, our reading is that it is designed to protect swap participants that are likely to be less sophisticated than the counterparties with whom they are dealing. The requirements for dealing with Special Entities seem designed to separate and eliminate Special Entities that lack sufficient savvy to enter into the covered transactions.

An extension of the definition of Special Entities, whether in the manner that ERISA does or otherwise, would defeat the policy goal of this part of Dodd-Frank. While nothing is stated, presumably competent management of plan assets or municipal assets requires, especially in the case of relatively unsophisticated investors, the hiring of competent professional asset managers, who in turn will invest the assets, including in investment vehicles. Extending the definition of Special Entity beyond the specific entities named in Dodd-Frank would create an impossible compliance situation for such investment vehicles, with the probable result that such vehicles would bar the enumerated Special Entities from investing in the vehicle. Such a limitation would limit the effectiveness of any professional asset manager hired to invest the assets and would limit the return available to any Special Entity. The ASF does not believe that this is a desirable outcome or the intended outcome of the drafters of Dodd-Frank.

Further, we know of no regime other than ERISA that would extend the definition from the enumerated Special Entities to include any investment vehicles. Extension of the definition would have one of two results, both of which we believe are detrimental. First, ERISA-like rules could be established for any of the enumerated Special Entities. We see no precedent that would permit this interpretation. Second, and more plausibly, we see the possibility of investment

vehicles containing ERISA plan assets being subjected to a more stringent regime than that imposed on the other enumerated Special Entities.

While we see how this increased stringency could be justified by analogy to ERISA, we think such an approach would be fundamentally unfair. First, as suggested above, it could cause investment vehicles to restrict investment by ERISA plans, affecting returns available to such plans (thus putting such plans at a disadvantage relative to other Special Entities). Second, and more importantly, such regulation would be unnecessarily duplicative of requirements already imposed by ERISA. Plan assets cannot be invested without the specific approval of a person who meets the requirements as a fiduciary under ERISA. The ERISA fiduciary is charged with determining that the investment is in the best interest of the plan involved. Such determination includes judging the competence of the manager of the investment vehicle. To require a swap counterparty to confirm this judgment adds nothing of value and may in fact, as noted above, restrict the investment opportunity.

Moreover, in the securitization market, asset-backed securities ("ABS") and mortgage-backed securities ("MBS") vehicles that issue certificates generally are structured to comply with an "Underwriter Exemption"[2] to facilitate the purchase and holding of those certificates by ERISA plans. One of the conditions that must be satisfied in connection with an Underwriter Exemption is that an investing ERISA plan must be an "accredited investor" as defined in Rule 501(a)(1) of Regulation D under the Securities Act of 1933. Accredited investors must satisfy certain requirements with respect to size and sophistication. Likewise, ABS and MBS vehicles that issue debt generally require that ERISA plan investors comply with an "investor-based exemption" in order to purchase and hold debt of the vehicle. Investor-based exemptions include Prohibited Transaction Class Exemption ("PTCE") 84-14 (regarding plan asset transactions determined by a qualified professional asset manager, which must satisfy certain size and sophistication requirements); PTCE 91-38 (regarding certain transactions involving bank collective investment funds, which funds are managed by a bank); PTCE 90-1 (regarding certain transactions involving insurance company pooled separate accounts, which accounts are managed by an insurance company); PTCE 95-60 (regarding certain transactions involving insurance company general accounts, which accounts are managed by an insurance company); and PTCE 96-23 (regarding plan asset transactions determined by in-house asset managers, which must meet certain size and sophistication requirements). All of the investor-based exemptions contain financial and other requirements for fiduciaries seeking to benefit from them.

IV. Governmental Plans

As noted above, the definition of Special Entity includes governmental plans, as defined in Section 3(3) of ERISA. For similar reasons as are set forth above with respect to ERISA

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[2] The Underwriter Exemptions are individual prohibited transactions exemptions relating to the purchase and holding of mortgage-backed and asset-backed securities by ERISA plans and the operation of securitization vehicles that issue such securities. On four occasions, the U.S. Labor Department has amended all existing Underwriter Exemptions, most recently by Prohibited Transaction ("PTE") 2007-05, 72 Fed. Reg. 13130 (March 20, 2007). One effect of these amendments is that all Underwriter Exemptions are now identical except for the identity of the recipient. PTE 2007-05 also contains a listing of all Underwriter Exemptions issued up to the date of its publication.

plans, the ASF believes that expanding the definition of Special Entity to include investment vehicles into which governmental plans invest is not justified or necessary.

V. Conclusion

For the reasons stated above, it is our view that Section 4s(h)(5) should be interpreted strictly as drafted and not extended to include any entity in which an ERISA plan or any other enumerated Special Entity invests. We see no added benefit in a broad reading of the rules in that the areas of concern are adequately addressed under ERISA. Further, we see a broad reading leading to confusion and administrative problems. We are concerned that the response to these problems will lead to the exclusion of plans from investment opportunities that would be beneficial to them.

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ASF very much appreciates the opportunity to provide the foregoing views in connection with the Commission's rulemaking process. 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 Associate Director, at 212.412.7109 or at esiegert@americansecuritization.com, or ASF's outside counsel on this matter, Evan M. Koster of Dewey & LeBoeuf at 212.259.6730 or at ekoster@dl.com.

Sincerely,

Tom Deutsch

Executive Director
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