February 22, 2011

VIA ELECTRONIC SUBMISSION

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

Re: RIN 3038–AD06—Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant" and RIN 3038, AD10, End-User Exception to Mandatory Clearing of Swaps

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 "CFTC") for comments regarding (i) RIN 3038–AD06 (Release No. 34-63452, File No. S7-39-10), dated December 1, 2010 (the "Definitions Release"), issued jointly with the Securities and Exchange Commission (the "SEC"; collectively with the CFTC, the "Commissions") and relating to the definitions of "Swap Dealer" and "Major Swap Participant" under Section 721(a)(33) and Section 721(a)(49), respectively, of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") and (ii) RIN 3038, AD10, dated December 9, 2010 ("End-User Exception Release"; collectively with the Definitions Release, the "Proposing Releases"), relating to exceptions to the mandatory clearing requirement pursuant to Section 723 of 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 CFTC for seeking industry input regarding its proposed rules on these critically important issues. Over the

[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.

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 the CFTC and other agencies on issues affecting our market. Our views as expressed in this letter are based on feedback received from our broad membership.

I. Background and Use of Swaps by Structured Finance Participants

Title VII of Dodd-Frank creates new categories of regulated swap entities, "Swap Dealer" and "Major Swap Participant," which, in the case of the "Major Swap Participant" category, could depend upon whether the Swaps utilized by the relevant entity are used for the purpose of "hedging or mitigating commercial risk." If determined to fall within either of these two categories, then a number of regulatory requirements will apply to such a swap user, including registration, capital and margin, recordkeeping and business conduct standards. Therefore, whether an entity will be subject to these regulatory requirements will depend in large part upon how the CFTC defines these terms. Further, Section 723(a) of Dodd-Frank amends the Commodities Exchange Act ("CEA") to provide that it is unlawful for any person to engage in a swap unless that person submits such swap for clearing to a derivatives clearing organization ("DCO") registered as prescribed under Dodd-Frank or a derivatives clearing organization that is exempt from registration as prescribed under Dodd-Frank, subject to certain exceptions. In RIN 3038, AD00 dated October 26, 2010, the Commission proposed Regulation 39.5, prescribing a process for review of swaps for mandatory clearing (the "Mandatory Clearing Process Release"). Pursuant to the Mandatory Clearing Process Release, the Commission proposes Regulation 39.5 to specify the requirements for electing to use, and facilitating compliance with, the exception to mandatory clearing of swaps established by Dodd Frank in CEA Section 2(h)(7).

The ASF believes that Structured Finance Participants (as hereinafter defined) should not, standing alone, be considered to be either Swap Dealers or Major Swap Participants under Dodd-Frank, the mandatory clearing requirements should not apply to Structured Finance Swaps (as hereinafter defined) entered into by Structured Finance Participants (as hereinafter defined) and the definition of "hedging or mitigating commercial risk" as set forth in proposed CEA Regulation 1.3(ttt) should be applied so as to not preclude Structured Finance Participants from meeting this definition.[2] Accordingly, we organize this letter into three parts. The first part addresses the Definitions Release and sets forth ASF's comments in relation to the definitions of Swap Dealer and Major Swap Participant. The second covers the rationale supporting an exception to the mandatory clearing requirement for Structured Finance Swaps. Finally, the third part covers the definition of "hedging or mitigating commercial risk" as it applies to the use of swaps by Structured Finance SPVs. Prior to setting forth these sections, however, we would like to provide some background on the use of swaps by Structured Finance Participants.

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[2] We understand that the End-User Exception Release is addressed to one specific exception, the end-user exception. We also understand that a number of commenters used the comment period for the Mandatory Clearing Process Release (for which the comment period has closed) to comment on how the mandatory clearing process should be applied, i.e., what are clearable swaps subject to the mandatory comment? In the context of responding to the Definitions Release and the End-User Exception Release, however, we believe that it is appropriate to address the issue of clearability of Structured Finance Swaps even though the comment period for the Mandatory Clearing Process Release has closed.

A universally accepted definition of structured finance does not seem to exist. However, the definition used by the Bank of International Settlements can be instructive in setting forth an operational definition:

> Structured finance instruments can be defined through three key characteristics: (1) pooling of assets (either cash-based or synthetically created); (2) tranching of liabilities that are backed by the asset pool…; (3) de-linking of the credit risk of the collateral pool from the credit risk of the originator, usually through the use of a finite lived, standalone special purpose vehicle.[3]

Structured finance special purpose vehicles ("Structured Finance SPVs") are typically legal entities created by the sponsor or originator by transferring assets to the Structured Finance SPV, to facilitate a specific purpose or defined activity, or a series of such transactions. Structured Finance SPVs have no other purpose than the transactions for which they were created, and the Structured Finance SPV can make no operational decisions; the rules governing them are prescribed in advance and carefully limit their activities. The legal entity for a Structured Finance SPV may be a limited partnership, a limited liability company, a trust or a corporation. See Frank J. Fabozzi, Henry A. Davis and Moorad Choudhry, "Introduction to Structured Finance: Introduction" (Wiley & Sons 2006) ("Introduction to Structured Finance"). Structured Finance SPVs may be structured to be either off or on the balance sheet of the sponsor or originator.[4]

Financing structures commonly included within structured finance include securitization, cash flow or synthetic collateralized debt or loan obligations and structured notes, including credit linked notes. Depending upon the particular structure, participants in a structured financing generally can include originators and/or sellers of assets, servicers (collectively, the "Sponsoring Group") and the Structured Finance SPVs (collectively with the Sponsoring Group, the "Structured Finance Participants") which typically act as the issuer of the debt instruments that back the particular asset pool.

Structured Finance Participants utilize many different types of swaps but interest rate, currency and credit linked derivatives are among the most commonly used. There are many different features that vary among the swaps used by Structured Finance Participants, but frequently swaps used by such entities are either entered into by the Structured Finance SPV directly ("SPV Swaps") and/or do not have a fixed notional amount, but either accrete or amortize according to a fixed schedule ("Predetermined Schedule Notional Swap") or in accordance with the prepayment schedule of the structured finance note, which may vary depending upon the prepayments made on the underlying structured finance note ("Floating

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[3] See "The Role of Ratings in Structured Finance: Issues and Implications," Committee on the Global Financial System, Bank for International Settlements, 2005. Notwithstanding the second characteristic, structured financings do not necessarily have to involve tranching of liabilities.

[4] Typically, off-balance sheet Structured Finance SPVs have the following characteristics: (a) they do not have independent management or employees; (b) their administrative functions are performed by a trustee who follows set rules with regard to the distribution of cash; there are no other decisions; (c) assets held by the SPV are serviced through a servicing agreement; and (d) they are structured so that they are bankruptcy remote. See Introduction to Structured Finance, Introduction.

Notional Swap", collectively with the SPV Swaps and the Predetermined Schedule Notional Swap, the "Structured Finance Swaps"). Structured Finance Swaps are frequently not margined with cash or liquid securities but share in the collateral pool underlying the structured finance as security.

II. The terms "Swap Dealer" and "Major Swap Participant" should not be defined and applied in a manner that would aggregate SPV Swaps with the swaps of the Sponsoring Group or the SPV Swaps of other Structured Finance SPVs sponsored by the same Sponsoring Group

In the Definitions Release, the Commissions raised the issue of whether the Major Swap Participant tests should, in some circumstances, aggregate the swap and security-based swap positions of entities that are affiliated. In seeking to address this issue and avoid evasion, the Commissions preliminarily adopted the position that the Major Swap Participant tests may appropriately aggregate the subsidiary's swaps or security-based swap positions at the parent for purposes of the substantial position analysis. The Commissions requested comment to address whether the swaps of corporate subsidiaries should be attributed to an entity that itself is not the majority owner of the direct counterparty to a swap or security-based swap. The Commissions further requested comment as to whether this type of attribution should apply when one entity controls another entity and asked for comments on how the concept of control should be defined further.

The ASF believes that the test for attribution of swaps between related or sponsored entities should not focus on strict ownership tests or whether one entity controls the other. Rather, consistent with the focus of Dodd-Frank on preventing systemic risk, the test should be whether a significant part of the economic risks of a transaction has been transferred to the Structured Finance SPV or retained by the Sponsoring Group, whether directly or through guarantees. Sponsors or originators may have established the Structured Finance SPV with a majority of ownership held by the sponsor or originator (directly or through its affiliates) and/or, through the board of directors, to the extent that it may exercise a certain amount of control over the Structured Finance SPV. The economic risk of the issuance and the Structured Finance Swap, however, often remains with the Structured Finance SPV. The assets that are the subject of the structured financing are transferred to the Structured Finance SPV and typically become the source of repayment and cash flows for the servicing of the structured finance debt instrument as well as the SPV Swaps. The transfer is typically the subject of a true sale opinion and, as mentioned above, a characteristic of Structured Finance SPVs is that they are structured to be bankruptcy remote. Accordingly, the failure of the Structured Finance SPV to meet its obligations under the Structured Finance Swap (or in general) is not likely to have ripple effects to the Sponsoring Group where there is no or little recourse to the assets of the Sponsoring Group.

While we do not believe that a strict percentage test is warranted, nonetheless we offer that were the Commissions to adopt such a test, they should set the threshold at least at the predominant level, namely that where the Sponsoring Group has either guaranteed or was directly obligated to meet a majority of the obligations of the Structured Finance Swap, it would then be appropriate to attribute such portion so guaranteed or obligated to the Sponsoring Group

for the purposes of determining whether the Sponsoring Group should be considered a "Swap Dealer" or "Major Swap Participant."

Aggregating the Structured Finance Swaps with the Sponsoring Group so as to cause such Structured Finance SPVs to be deemed to be Swap Dealers or Major Swap Participants would have negative consequences for structured finance issuances. As special purpose vehicles, the Structured Finance SPVs would not be able to comply with these requirements standing alone. Applying margin, capital, clearing and business conduct standards to Structured Finance SPVs would face the Sponsoring Group with a choice to either retain more of the economic risk of the structured finance issuances[5] or forego such issuances. The resulting effect will be less liquidity in these markets (e.g. for mortgages, auto loans and credit cards), thereby creating adverse consequences as the economy struggles to recover. These same effects may occur if the Structured Finance Swaps are attributed to the Sponsoring Group. Accordingly, we respectfully request that the definitions of Swap Dealer and Major Swap Participant be clarified and applied in such a manner so as to not encompass Structured Finance SPVs that, standing alone without attribution or aggregation with the swaps of the Sponsoring Group, would not qualify independently as Swap Dealers or Major Swap Participants.[6]

III. Structured Finance Swaps should not be subject to the Mandatory Clearing Requirement

(a) Structured Finance Swaps are not clearable

Section 723(a) of Dodd-Frank provides that the CFTC shall take into account a number of factors when making the determination as to whether a swap should be cleared, including, without limitation, "the availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded…" and "the effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of derivatives clearing organizations available to clear the contract."

Applying these factors in particular, we believe that an exemption from clearing should be made for Structured Finance Swaps. Structured Finance Swaps do not typically have a fixed set notional schedule, rather they amortize or accrete either according to a predetermined fixed schedule, such as the Predetermined Notional Schedule Swap, or according to the prepayments on the underlying debt instrument as in the case of the Floating Notional Swap. The typical cleared interest rate swap is one with a fixed set notional that does not decrease or increase. Structured Finance Swaps are not standardized and typically come in many different sizes and tenors, depending upon the economics of the underlying structured finance transaction. It would be extremely difficult, if not impossible, for a DCO to clear a Floating

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[5] The regulation of retention of economic risk by Sponsoring Groups is the subject of other provisions of Dodd-Frank, notably Section 941. There is no evidence that the Title VII derivatives provisions were also intended to be applied in a manner so as to reinforce securitization risk retention requirements contained elsewhere in Dodd-Frank.

[6] If a Structured Finance SPV has directly entered into an amount of Structured Finance Swaps that qualify independently as "substantial" under the Definitions Release and, under the proposed regulations, on its own would meet any of the definitions of Swap Dealer or Major Swap Participant, then we have no objection to it being considered a Swap Dealer or Major Swap Participant and the corresponding requirements should apply.

Notional Swap, which by definition is non-standard, without forcing the counterparties to modify the material terms so it becomes a swap with a fixed set notional schedule.

Further, as set forth above, the collateral for Structured Finance Swaps are typically not cash or liquid securities, but the pool of assets underlying the structured financing itself. This raises a host of questions as it relates to clearing: (a) How will the DCO evaluate the underlying collateral pool? (b) On what basis can the DCO take a security interest in such collateral? and (c) What will happen if there is overcollateralization? Attempts to answer these questions reveal the difficulties inherent in a DCO accepting this collateral in satisfaction of its margining requirements. They do not have the credit support infrastructure to make this evaluation. Accordingly, the result of this would be to force the Structured Finance SPVs to post liquid collateral to the DCO.

This result may render many structured financings uneconomic as the Structured Finance SPV would be required to post cash and liquid securities which it does not have. As mentioned above, the source of repayment for structured financings is generally the cash flow from the assets or receivables which is generated over time. Requiring the posting of liquid collateral would affect the cash flow analysis for a structured financing and cause adverse effects on the functioning of this market, including ultimately resulting in a reduction in the available amount of loans or other financing for the assets underlying the structured financing.

Moreover, it is difficult to see how requiring the clearing of such swaps would mitigate systemic risk. In fact, it could increase systemic risk either by forcing Structured Finance SPVs to forego hedging their risk or by spreading the performance risk of the pools of assets that underlie the structured finance transactions. Under the typical Structured Finance SPV this bankruptcy risk is borne by the investors and the counterparty. If such a risk was then transferred to a DCO, the risk of performance of many different asset classes, such as mortgages, auto loans and credit cards, would now be transferred to the DCO.

(b) Structured Finance SPVs should not, standing alone, be considered to be "Financial Entities" and should be eligible for the End-User Exception.

Section 723(a) of Dodd-Frank at Section (2)(h)(7) sets forth the end-user exception to the mandatory clearing requirement if the one of the counterparties is not a financial entity, uses swaps to hedge or mitigate commercial risks and notifies the CFTC of how it generally meets its financial obligations associated with entering into non-cleared swaps. The ASF requests that the CFTC clarify that, unless the Structured Finance SPV independently qualifies as a financial entity by meeting one of the categories set forth in Section 2(h)(7)(c) of the CEA it shall not be deemed to be a "financial entity" solely by virtue of its structured financing activities. The business of the Structured Finance SPV is limited—it is not engaged in lending or taking deposits, but is engaged in issuing securities that are backed by a pool of assets transferred to the Structured Finance SPV.[7] In addition, the Sponsoring Group's structured

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[7] The term "financial entity," as defined in Section 3C.(g)(3) of the Exchange Act, includes an "employee benefit plan," as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and a "governmental plan," as defined in Section 3(32) of ERISA. Structured Finance SPVs are often specifically structured to not become plan assets under ERISA and the Structured Finance Swaps frequently have termination

finance activities, namely, the sale of a pool of assets to the Structured Finance SPV and the servicing of those assets, would not, in and of themselves, cause any member of the Sponsoring Group to be included within any of the enumerated categories of "financial entities" in Section 2(h)(7)(C) of the CEA. None of its activities could be deemed to be any of the activities that are financial in nature as defined in Section 4(k) of the Bank Holding Company Act of 1956.

Further, as in the context of assessing whether Structured Finance SPVs should be considered Swap Dealers and Major Swap Participants, their swap positions should not be attributed to, or aggregated with the positions of the members of the Sponsoring Group, even if members of the Sponsoring Group would constitute "financial entities". The rationale for non-aggregation in this context is the same as set forth in Section II above, namely that in furtherance of the goal of reducing systemic risk the focus should not be on control or ownership but on economic risk which is typically not predominantly retained by the Sponsoring Group, whether or not it contains "financial entities" as its members.

(c) The CFTC should clarify that the captive finance exception to the mandatory clearing requirement applies where the derivative is entered into directly by the Structured Finance SPV

Section 2(h)(7)(C)(iii) of the CEA contains, at Section 723(a) of Dodd-Frank, a provision that states that a financial entity should not include an entity whose primary business is providing financing, and uses derivatives to hedge commercial risks related to interest rate and foreign currency exposures, 90% or more of which arises from financing that facilitates the purchase or lease of products, 90% or more of which are manufactured by the parent company or another subsidiary of the parent company. Section 2(h)(7)(D)(i) of the CEA clarifies that an affiliate of a person that qualifies for the end user exception may qualify for the exception only if the affiliate, acting on behalf of the person and as an agent, uses the swap to hedge or mitigate the commercial risk of an affiliate that is not a financial entity.

We request that the CFTC interpret and clarify that these provisions, taken together, should not preclude a Structured Finance SPV whose originator or seller is a captive finance company from using the captive finance exception. Often captive finance companies, which provide the financing for the purchase or lease of products, do not directly issue the structured finance debt backed by the pool of assets. Rather, like other Sponsoring Groups they establish Structured Finance SPVs in order to provide liquidity to the captive finance entities which enable them to make the loans and leases for the purchases of the products of the parent company. The Structured Finance SPVs, not the captive finance companies or their affiliates, are the entities that directly enter into the swaps. The Structured Finance SPVs, through the purchase of the asset pool, which is frequently the receivables and notes from the captive financing company's loans and leases, enable the captive finance companies to facilitate the purchase of the parent company's goods.

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events that are triggered in the event that they were to become plan assets. In addition, Structured Finance SPVs are clearly excluded from the definitions of "employee benefit plan" and "governmental plan" set forth in ERISA. Accordingly, a Structured Finance SPV should not be considered a "financial entity" within the meaning of Section 3C.(g)(3) of the Exchange Act as a result of an investment by such plans in securities issued by the Structured Finance SPV.

The purpose of the captive finance exception would be served by clarifying that Structured Finance SPVs are eligible to use the exception to the same extent that a direct captive finance company or its affiliate can use the exception. Through an assignment or sale of the assets, the Structured Finance SPV is facilitating the purchase of the products in the same way that it would be done directly by a captive finance company or its affiliate. In fact, by setting up the Structured Finance SPV the Sponsoring Group may achieve a lower cost of funding, thereby enhancing the ability to facilitate the lease or purchase of its parent's products to a greater extent than if it had done so directly. Not extending this captive finance exception to such Structured Finance SPV transactions would effectively penalize those Sponsoring Groups that sought to minimize the risk through a lower cost structure by requiring such Structured Finance SPVs to clear these swaps and subjecting them to potentially more onerous margin requirements. Were Structured Finance SPVs in this situation not able to use the captive finance exception they would certainly pass on these increased costs of margin to the Sponsoring Groups, which would have an adverse effect on the cost to the ultimate consumer of the parents' products.

IV. The definition of the term "hedging or mitigating commercial risk" in the Definitions Release (which term is also used in the End-User Exception Release) should be clarified and interpreted by the CFTC so as not to preclude SPV Swaps from meeting this definition

Proposed CEA Regulation 1.3(ttt) provides that:

> a swap position shall be deemed to be held for the purpose of hedging or mitigating commercial risk when: (1)(i) such position is economically appropriate to the reduction of risks that are associated with the present conduct and management of a commercial enterprise, or are reasonably expected to arise in the future conduct and management of the commercial enterprise, where such risks arise from: (A) The potential change in the value of assets that a person owns, produces, manufactures, processes, or merchandises or reasonably anticipates owning, producing, manufacturing, processing, or merchandising in the ordinary course of business of the enterprise; (B) The potential change in the value of liabilities that a person has incurred or reasonably anticipates incurring in the ordinary course of business of the enterprise; or (C) The potential change in the value of services that a person provides, purchases, or reasonably anticipates providing or purchasing in the ordinary course of business of the enterprise...

The ASF requests that the foregoing definition should be interpreted in such a manner as to not preclude swaps used by Structured Finance SPVs from meeting this definition. As set forth above, Structured Finance SPVs are special purpose vehicles which typically do not have ongoing operational activities, but whose activities consist either of servicing a pool of assets or monitoring the performance of swaps. The actual performance of such activities is typically done not by the Structured Finance SPV itself, but by the servicer through a contractual arrangement. In addition, the administrative functions are usually conducted not by the Structured Finance SPV itself but by a trustee. A narrow construction of the meanings of

"economically appropriate" and "conduct and management of a commercial enterprise" so as to mean only those entities that directly or through affiliates conduct operational activities such as manufacturing or services would effectively eliminate Structured Finance SPVs (and, in fact, most other special purpose vehicles) from consideration for any exception or exclusion under Dodd-Frank that rests upon the meaning of "hedging or mitigating commercial risk."

Moreover, Structured Finance Swaps, such as interest rate swaps, are generally used by the Structured Finance SPVs to hedge the floating interest rate liabilities associated with the structured financing. Accordingly, such Structured Finance swaps should fall within the meaning of clause (1)(i)(B) of the definition of "hedging or mitigating commercial risk" set forth in Proposed CEA Regulation 1.3.(ttt)

Finally, for the reasons articulated above, we believe that a limited interpretation of the phrase "hedging or mitigating commercial risk" that is contrary to that proposed in this Section IV would cause adverse effects on the structured finance market without having a correspondent reduction in systemic risk.

We would like to emphasize that, while we make this comment regarding the definition of "hedging or mitigating commercial risk" in the context of the Definitions Release, we note that our comments in this section apply equally to the term when used elsewhere in Title VII of Dodd-Frank, specifically the end-user exception to the mandatory clearing of swaps contained in Section 723(a) of Dodd-Frank.

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ASF very much appreciates the opportunity to provide the foregoing views in connection with the CFTC'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,

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American Securitization Forum