



Invested in America

Via Electronic Delivery

May 21, 2012

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve
System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
Docket No. R-1432
RIN 7100 AD 82

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
File No. S7-41-11

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
RIN 3064-AD85

Office of the Comptroller of the Currency
250 E Street, S.W.
Mail Stop 2-3
Washington, D.C. 20219
Docket ID OCC-2011-14

Mr. David A. Stawick
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581
RIN 3038-AD05

Re: Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds: **Suggested Revisions to Covered Fund Definition Regarding Asset-Backed and Insurance-Linked Securities, Asset-Backed Commercial Paper and Tender Option Bond Transactions**

Ladies and Gentlemen:

We appreciated the opportunity to meet with staff of several of the regulatory bodies involved with the promulgation of the Proposed Rules to implement new Section 13 of the Bank Holding Company Act of 1956 (the “Volcker Rule”) on April 10, 2012 to discuss our comment letter regarding the provisions that affect asset-backed securities and insurance-linked securities.¹

¹ Available at <http://www.sec.gov/comments/s7-41-11/s74111-204.pdf>.

The Proposed Rules' "covered fund" definition, which implements the Volcker Rule's definition of "hedge fund" and "private equity fund", broadly encompasses any issuer that would be an investment company under the Investment Company Act of 1940 ("1940 Act") but for the exemptions contained in Sections 3(c)(1) or 3(c)(7) of that act. As we noted in our comment letter and at our meetings, although they are not hedge funds and private equity funds, many issuers of asset-backed securities and insurance-linked securities² rely upon one of those exemptions and therefore could be characterized as covered funds under the Agencies' proposed definition. Such characterization, combined with the "Super 23A" provisions of the Proposed Rules, will effectively prevent banking entities from sponsoring and owning a large variety of asset-backed securities, in contravention of the rule of construction (set forth in Section 13(g)(2) of the Volcker Rule) that the Volcker Rule not be construed to limit or restrict the ability of banking entities to securitize loans. In addition, such characterization would significantly impede the worldwide efforts of regulators and market participants to restart the securitization markets. Such characterization could also prevent banking entities from sponsoring and owning insurance-linked securities, a result we do not believe was intended by Congress in passing the Volcker Rule.

In light of the above, and based on staff feedback at several of our meetings, we have crafted a modification to the "covered fund" definition that would exclude therefrom issuers of asset-backed and insurance-linked securities that customarily need to rely upon Sections 3(c)(1) or 3(c)(7) for an exemption from the 1940 Act. In response to staff feedback, we have designed the proposed modification to ensure that asset-backed security issuers do not issue securities that have hedge fund-like or private equity fund-like characteristics. We set forth the proposed modification in Exhibit A to this letter.

Under the proposed modification:

- Asset-backed security issuers eligible for exclusion from the "covered fund" definition would be prohibited from issuing managed securities that are collateralized by or reference asset-backed securities.
- In order to distinguish excluded asset-backed security issuers from hedge funds and private equity funds, such issuers would be required to be contractually limited in the type, quality and amount of assets they could buy and sell and would be prohibited from issuing securities repayable at the option of their holders based on calculations of net asset value.

Further, unlike hedge funds and private equity funds, asset-backed security issuers would be subject to the applicable provisions of Section 621 of the Dodd- Frank Act and the SEC's implementing regulations thereunder.

Our proposed modification would also exclude from the "covered fund" definition issuers of asset-backed commercial paper the repayment of which is supported by a liquidity facility

² Although not specifically addressed in our previous letter, we have included here a discussion of tender option bond transactions, based on SIFMA's comment letter addressing the same. That letter is available at: <http://www.sec.gov/comments/s7-41-11/s74111-202.pdf>.

provided by one or more banks or other financial institutions, issuers of insurance-linked securities and, for the reasons set forth in our separate comment letter on the Proposed Rules relating to tender option bond transactions, issuers of such transactions.

We would emphasize that our recommendations with respect to exclusions from the "covered fund" definition are not intended to be exhaustive and are limited solely to issuers of asset-backed securities, asset-backed commercial paper, insurance-linked securities and tender option bond transactions. Moreover, we are not endorsing in any manner the Proposed Rules' current overbroad definition of "covered fund" and encourage the Agencies to review the additional recommendations for appropriate exclusions set forth in our letter on the covered funds portion of the Proposed Rules.³

We greatly appreciate your consideration of this response and would be pleased to have the opportunity to discuss it further. If you have any comments or questions, please feel free to contact Richard Dorfman at (212) 313-1359 or rdorfman@sifma.org, Chris Killian at (212) 313-1126 or ckillian@sifma.org, or Daniel M. Rossner of Sidley Austin LLP at (212) 839-5533 or drossner@sidley.com.

Sincerely,

A handwritten signature in blue ink that reads "Richard A. Dorfman". The signature is fluid and cursive, with the first name being the most prominent.

Richard A. Dorfman
Managing Director
Head of Securitization

A handwritten signature in blue ink that reads "Christopher B. Killian". The signature is cursive and somewhat stylized.

Christopher B. Killian
Managing Director

cc: Jeff Foster, U.S. Department of the Treasury

³ Available at <http://www.sec.gov/comments/s7-41-11/s74111-210.pdf>.

About SIFMA

SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

Suggested Revisions to Covered Fund Definition Regarding Asset-Backed and Insurance-Linked Securities, Asset-Backed Commercial Paper and Tender Option Bond Transactions

"Covered fund" includes:¹

- (a) an issuer that would be an investment company, as defined under 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 other than (i) a Permitted ABS Issuer, (ii) an ABCP Issuer, (iii) an ILS Issuer, or (iv) a TOB Issuer.

* * *

New Definitions

"ABCP Issuer" means the issuer of asset-backed commercial paper the repayment of which is supported by one or more liquidity facilities provided by one or more banks or other financial institutions.

"ABS Issuer" means the issuer of (i) one or more fixed-income or other securities (other than excluded securities)² collateralized by any type of financial assets or Other Eligible Assets that allow the holders of the security to receive payments that depend on the cash flows from such assets, or (ii) one or more fixed-income or other securities (other than

¹ We emphasize that our recommendations with respect to exclusions from the "covered fund" definition are not intended to be exhaustive and are limited solely to issuers of asset-backed securities, asset-backed commercial paper, insurance-linked securities and tender option bond transactions. Moreover, we are not endorsing the Proposed Rules' definition of "covered fund" and encourage the Agencies to review the additional recommendations for appropriate exclusions set forth in our letter on the covered funds portion of the Proposed Rules, available at <http://www.sec.gov/comments/s7-41-11/s74111-210.pdf>.

² This would generally exclude issuers of managed CDOs and synthetic CDOs by defining "excluded securities" to be managed asset-backed securities that are either collateralized by other asset-backed securities and/ or which source their exposure through credit default swaps or other derivative financial contracts that reference asset-backed securities.

The Agencies should clarify in the preamble to the final implementing rules that intermediate asset-backed securities (*i.e.*, intermediate securities created to back the asset-backed security or synthetic asset-backed security being issued or beneficial interests in auto lease securitization or similar titling trusts) would not be viewed as excluded securities.

excluded securities)³ the payments on which depend upon the cash flows from credit default swaps or other derivative financial contracts that reference any type of financial assets or obligors on one or more financial assets.⁴

“**excluded security**” means a security (A) (i) collateralized by asset-backed securities (as defined in Section 3(a)(77) of the Securities Exchange Act of 1934) or synthetic asset-backed securities or (ii) the payments on which depend on the cash flows from credit default swaps or other derivative financial contracts that reference asset-backed securities (as so defined) or synthetic asset-backed securities *and* (B) whose issuer is permitted to buy or sell securities or other financial assets for the primary purposes of recognizing gains or losses resulting from market value changes.

“**ILS Issuer**” means any issuer of an insurance-linked security.

“**insurance-linked security**” means a fixed-income or other security (other than an excluded security) the repayment and/or income of which is at risk of loss, delay or conversion into another instrument as a consequence of the occurrence or non-occurrence of one or more fortuitous events not under the control of any of the parties to the arrangement under which the security was issued, such as natural or other disasters, catastrophes or other defined risks, hazards, injuries or liabilities including, without limitation, pandemic, mortality, morbidity or longevity risks.

“**Other Eligible Assets**” means any rights or other assets (including cash, swaps, caps and floors) designed to assure the servicing or timely distribution of proceeds to holders of a security.

“**Permitted ABS Issuer**” means:⁵

- (A) any ABS Issuer:
 - (i) that is contractually limited in the type, quality and amount of assets that it can buy or sell;⁶ and

³ *Id.*

⁴ The criteria in clause (i) generally mirrors the criteria to be an “asset-backed security” in Section 3(a)(77) of the Securities Exchange Act of 1934, with the omission of certain technical requirements (such as that the financial assets must be self-liquidating or that payments on the security “depend primarily” (rather than just depend) on cash flow on financial assets). The inability to meet such technical requirements (for example, in securitizations of leases with significant residual values or non-performing asset securitizations) is often a reason that an issuer of an asset-backed security would need to rely upon Section 3(c)(1) or 3(c)(7) of the Investment Company Act rather than Rule 3a-7 under that Act and therefore might inadvertently be subject to the Volcker Rule. The criteria in clauses (i) and (ii) also largely tracks the criteria to be a “structured finance product” in the SEC’s proposed Regulation AB II (available at <http://www.sec.gov/rules/proposed/2010/33-9117fr.pdf>; <http://www.sec.gov/rules/proposed/2011/33-9244fr.pdf>).

⁵ Unlike transactions involving hedge funds and private equity funds, securitizations of a Permitted ABS Issuer would be subject to the applicable prohibitions on conflicts of interest contained in Section 621 of the Dodd-Frank Act and the SEC’s implementing regulations thereunder.

- (ii) whose securities are not subject to repayment at the option of their holders based on calculations of net asset value;⁷ or
 - (B) any entity that acts as an intermediary of an ABS Issuer described in clause (A).⁸
- “**TOB Issuer**” means the issuer of a tender option bond transaction.⁹

⁶ As the SEC staff has noted, a distinguishing feature of a hedge fund is that its governing documents “generally provide the adviser with the maximum flexibility in selecting, shifting and modifying its strategies.” *See* Securities and Exchange Commission, “Implications of the Growth of Hedge Funds,” September 2003, page ix, www.sec.gov/news/studies/hedgofunds0903.pdf. In contrast, the assets issuers of securitizations may invest in are typically limited as to type, quality and amount. Accordingly, the definition of Permitted ABS Issuer requires that the assets of such an issuer be so limited.

⁷ As distinguished from hedge funds, whose main risk is that the net asset value of the fund may fall because of a fall in the market value of the assets in the fund, the main risk of an asset-backed security is the default experience on the underlying assets, which risk depends on the credit quality of such assets, the credit enhancement supporting such assets and the priority of the particular tranche of the asset-backed security. Accordingly, the definition of Permitted ABS Issuer requires that the securities of the issuer not be subject to repayment at the option of their holders based on calculations of net asset value.

⁸ Clause (B) is intended to cover the depositor in a two-tier securitization.

⁹ Please see SIFMA’s comment letter, dated February 13, 2012, available at <http://www.sec.gov/comments/s7-41-11/s74111-202.pdf>, for a description of tender option bonds and the related issues in the Proposed Rules for tender option bond transactions.