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***By Electronic Submission***

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**Re: Notice of Proposed Rulemaking, Credit Risk Retention**
SEC (Release No. 34–64148; File No. S7–14–11)**;** FDIC (RIN 3064–AD74); OCC (Docket No. OCC–2011–0002); FRB (Docket No. 2011–1411); FHFA (RIN 2590-AA43); HUD (RIN 2501-AD53)

Ladies and Gentlemen:

The Loan Syndications and Trading Association ("LSTA")[1] is pleased to submit these comments in response to the joint Notice of Proposed Rulemaking ("NPRM")[2] concerning the

[1] The LSTA, founded in 1995, is the trade association for the syndicated corporate loan market and is dedicated to advancing the interests of the market as a whole. The LSTA is active on a wide variety of activities intended to foster the development of policies and market practices designed to promote a liquid and transparent marketplace. More information about LSTA is available on its Web site at www.lsta.org. This comment letter was prepared in consultation with the LSTA's CLO Committee, which includes representatives of institutions active in the CLO market as investors, asset managers, and underwriters.

[2] Credit Risk Retention; Proposed Rule, 76 Fed. Reg. 24090 (Apr. 29, 2011).

credit risk retention requirements authorized by section 941 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act").[3]

## Summary of Comment

As discussed in detail in section II of this letter, the LSTA believes that managers of Open Market CLOs (as defined below) are not subject to risk retention requirements because their activities do not meet the definition of securitizer under either section 941 of the Dodd-Frank Act or the NPRM. We believe this legal treatment of managers of Open Market CLOs is consistent with the purposes and intent of section 941 of the Dodd-Frank Act as discussed in section III of this letter and that the application of a risk retention requirement on managers of Open Market CLO would seriously diminish the flow of much needed credit to U.S. business that is made available through the purchase of syndicated loans by Open Market CLOs. Finally, to the extent that the agencies are nevertheless of the view that managers of Open Market CLOs are subject to risk retention, we request that the agencies exercise their authority under section 941(e) of the Dodd-Frank Act to establish an exemption from risk retention for Open Market CLOs meeting the requirements set forth in section IV of this letter.

## Introduction

These comments are addressed exclusively to collateralized loan obligation issuers ("CLOs") that purchase syndicated commercial loans in the open market (hereinafter "Open Market CLOs"). The characteristics of Open Market CLOs are described more fully below.[4]

The LSTA's comment is focused specifically on the suggestion raised in footnote 42 of the preamble to the NPRM that a sponsor's risk retention requirement may be imposed on Open Market CLO managers.[5] To the extent it is intended to reach the managers of Open Market CLOs, the statement in footnote 42 is contrary to the plain language of section 941 of the Act, and is also contrary to the plain language of the agencies' own proposed rules. Because the managers of Open Market CLOs are not "issuers" of an asset-backed security ("ABS") and do not directly or indirectly "sell" or "transfer" loan assets to the issuing entity, Open Market CLO managers are clearly not "securitizers" within the meaning of section 941. For the same reasons,

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[3] Pub. L. No. 111-203, 124 Stat. 1376 (2010). Under section 941 of the Dodd-Frank Act, the authority to prescribe regulations implementing the risk retention requirements (other than for qualified residential mortgages) is granted to the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("FRB"), the Federal Deposit Insurance Corporation ("FDIC"), and the Securities and Exchange Commission ("SEC") (hereinafter, collectively, the "agencies"). *See* Securities Exchange Act § 15G(b)(1), 15 U.S.C. § 78o-11(b)(1), as added by Dodd-Frank Act § 941(b) (providing that "the Federal banking agencies and the Commission shall jointly prescribe regulations to require any securitizer to retain an economic interest in a portion of the credit risk for any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party").

[4] The term "Open Market CLO" as used in this letter excludes "balance sheet" CLOs that involve the securitization through a CLO of a portfolio of loans by the entity that made the loans in the first instance.

[5] *See* 76 Fed. Reg. at 24098 n.42 ("in the context of [CLOs], the CLO manager generally acts as the sponsor by selecting the commercial loans to be purchased by an agent bank for inclusion in the CLO collateral pool, and then manages the securitized assets once deposited in the CLO structure.").

they are not and cannot be treated as "sponsors" or "depositors" within the meaning of the proposed rules. For purposes of our letter, references to "Open Market CLOs" refer to CLOs that directly purchase individual loans either as part of a commercial loan syndication transaction or in a secondary market transaction in the same manner as any other party that purchases loans in the syndicated loan market.[6]

As a matter of law, the scope of the agencies' risk retention rulemaking authority is limited by the plain terms of section 941, and under the clear language of both section 941's definition of "securitizer" and the agencies' own proposed definitions of "sponsor" and "depositor," no risk retention obligation may be imposed on Open Market CLO managers. Accordingly, the LSTA respectfully requests that in any final rule, the agencies retract or correct the statement in footnote 42 of the NPRM and clarify that no risk retention requirement applies to the manager of an Open Market CLO.

This result is fully supported by the purpose and intent behind section 941 and the Dodd-Frank Act as a whole, since Open Market CLOs did not have a part in causing the financial meltdown of 2008, which was the impetus for Congress's enactment of Dodd-Frank and its risk retention requirements. In fact, Open Market CLOs performed very well through the crisis and are highly beneficial to the economy because they are an efficient, reliable and transparent source of credit for American businesses and liquidity for the commercial loan market.

Moreover, as a practical matter, Open Market CLOs are not structured in a manner that would feasibly permit the managers to comply with risk retention requirements in any event, and such a requirement would therefore effectively shut down these important providers of capital. Any effort by the agencies to impose legally unsupported risk retention obligations on Open Market CLOs would result in serious negative consequences for the national economy by severely constraining both sources of credit that corporations rely on to create jobs and invest in growth, and liquidity that commercial lenders need.[7]

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[6] We note that footnote 42 may be read to indicate that the agencies' suggestion that risk retention should apply to managers of Open Market CLOs is premised or conditioned on the view that Open Market CLO transactions involve an acquisition of loans aggregated by an "agent bank" at the direction of the Open Market CLO manager and the subsequent sale of such loans by the "agent bank" to the CLO. There is no legal or business requirement for an Open Market CLO to use such a structure.

[7] As recognized by the SEC in the NRPM, Section 23(a)(2) of the Securities Exchange Act of 1934 ("Exchange Act") requires the SEC, when issuing a rule under the Exchange Act, to consider the burden of the rule on competition and not to promulgate a rule if it would impose an undue burden on competition unless it is necessary or appropriate in furtherance of the purposes of the Exchange Act. Moreover Section 3(f) of the Exchange Act and Section 2(b) of the Securities Act of 1933 require the SEC to consider whether a proposed rule will promote efficiency, competition and capital formation when determining whether a proposed rule is necessary or appropriate in the public interest. 76 Fed. Reg. at 24150. However, the NRPM contains no analysis by the SEC weighing the potentially significant negative impacts of applying risk retention requirements to Open Market CLO managers, would have on the Open Market CLO managers or on investors or the economy at large, against the minimal benefits that may be achieved by this action. We submit that this is a deficiency that must be addressed before proceeding further with any portion of the NRPM as it applies to Open Market CLOs or their managers. One need look no further than the July 22, 2011 decision by the United States Court of Appeals for the D.C. Circuit vacating proposed Rule 14a-11 under the Exchange Act to underscore the critical importance of adequate consideration of the effects of proposed regulations by agencies in determining whether to promulgate a

To the extent that, notwithstanding the foregoing, the agencies are of the view that managers of Open Market CLOs are subject to a risk retention requirement, we respectfully request that the agencies exercise their authority under section 941(e) of the Dodd-Frank Act to establish an exemption from risk retention requirements for Open Market CLOs meeting the requirements set forth below in section IV of this letter.

## I. <u>The Essentials of Open Market CLOs</u>

To appreciate fully the legal error of footnote 42 of the NPRM and the extent of the economic impact that could be imposed on the industry and the economy as a whole, it is important to understand (i) how syndicated loans are different from other loans and mortgages, (ii) how Open Market CLOs work, (iii) who Open Market CLO managers are, and (iv) the functions and incentives of Open Market CLO managers. The characteristics of Open Market CLOs and their managers are fundamentally different from other types of ABS vehicles. Critically, as will be discussed below, ***the manager of an Open Market CLO does not originate the loans held by the CLO and does not directly or indirectly sell or transfer any loans to the CLO***.

### A. Syndicated loans are different from many other securitized assets

Syndicated loans in the United States provide $2.5 trillion of financing to U.S. companies,[8] and fundamentally differ from many other types of assets that are included in securitizations. Borrowers range from large blue-chip companies like IBM to industrial companies like U.S. Steel to middle market companies like Sizzling Platter (which owns Little Caesars and Sizzler). The size of syndicated loans generally ranges from $20 million to $2 billion and beyond. Loans of this size are often too large to be held by one single lender, and thus they are syndicated among a lender group, which may include CLOs.

Syndicated loans are typically arranged by one or more lenders that have a relationship with the commercial borrower, and they are typically made only after a robust credit approval

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regulation. *Bus. Roundtable v. Sec. & Exch. Comm'n*, 2011 U.S. App. LEXIS 14988 (D.C. Cir. July 22, 2011). In that case, the court found that the SEC violated the Administrative Procedure Act in promulgating Rule 14a-11 by "failing to adequately consider the rule's effect on efficiency, competition, and capital formation, as required by Section 3(f) of the Exchange Act[,]" among other reasons. *Id.* at *2-*3.

The importance of such cost-benefit analyses in federal rulemaking also was highlighted by Executive Order Number 13,563 ("Order") recently issued by President Obama. *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (Jan. 21, 2011). In that Order, the President ordered that federal agencies subject to the Order proposing or adopting regulations must conduct a reasoned cost-benefit analysis and tailor regulations to the extent possible to impose the least burden on society. While the Order does not expressly apply to the agencies, in light of the likely significant impacts of the NPRM on Open Market CLOs, their managers and investors, and the economy at large, we urge the agencies to embrace the concepts set forth in the Order as "best practices" in this case and to conduct a thorough and complete cost-benefit analysis of applying the risk retention requirements to managers of Open Market CLOs.

8 Shared National Credit Review, September 2010. The Shared National Credit Review is jointly run by the FRB, the FDIC and the OCC and reviews and classifies any loan or loan commitment of $20 million or more, held by three or more federally supervised institutions.

process by these lenders — a process involving thorough due diligence; a review of the borrower's business, financial condition, and ability to repay the loan; and a careful assessment of the value of any underlying collateral. Because they are syndicated, these loans must be priced and structured in an attractive way so that other lenders, including prospective institutional buyers (such as Open Market CLOs), will come into the lending facility.

Extensive information is available to each prospective lender, including institutional buyers such as Open Market CLOs, for each loan. Due diligence information regarding each borrower, every loan, and its collateral is provided to prospective lenders. Each prospective lender performs its own due diligence based on this information and makes its own independent credit and profitability analysis prior to its acquisition of the loan.

The loan market itself is more transparent than the markets for many other types of assets. More information is publicly available on syndicated loans than many other asset classes that are securitized. For instance, there are a number of news services that report on the issuance and trading of individual syndicated loans.[9] In addition, many of the syndicated loans are individually rated by S&P, Moody's and Fitch, and are priced daily by two independent pricing services.[10] Extensive information also is delivered to CLO investors in the monthly trustee report required by the CLO documents.[11]

In addition to being transparent, the individual loans often are quite liquid. A robust secondary loan market provides liquidity to loan investors (including Open Market CLOs) enabling them to dynamically manage their portfolios. More than $400 billion of syndicated loans trade every year.[12] The secondary market pricing information on many of these loans provides additional information on the performance and value of the loans. As a result of the transparency and liquidity of the syndicated loan market and information provided to CLO investors, CLO investors are able to continually assess the risks of their investment.[13]

### B. The role of an Open Market CLO Manager

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9 Thomson Reuters LPC, S&P/LCD, Bloomberg.

10 Markit, LSTA/Thomson Reuters Mark-to-Market Pricing.

11 For each individual loan in the Open Market CLO portfolio, this report typically provides the obligor name, country of obligor, industry, principal amount, interest rate, stated maturity, rating agency ratings, rating agency recovery rates, purchase price, sale price (if applicable-, sale reason (if applicable0 and prepayment (if any). For the overall portfolio, the report provides aggregate principal balance, any defaults (including their market value), any assets rated CCC+/Caa1 or below (including their market value), extent of compliance with investment guidelines, including weighted average collateral quality tests, diversity, concentration limits, overcollateralization and interest coverage tests, assets purchased, and assets sold (and reason therefor). For the Open Market CLO itself, the report provides the list of accounts and cash balances.

12 LSTA Trade and Settlement Study, February 3, 2011.

13 In contrast, the Report of the Senate Committee on Banking, Housing and Urban Affairs on the legislation that was enacted as the Dodd-Frank Act explained the Committee's general concern that "it proved impossible for investors in asset-backed securities to assess the risks of those underlying assets . . . Complexity and opacity in securitization markets created the conditions that allowed the financial shock from the subprime mortgage sector to spread into a global financial crisis . . ." S. Rep. No. 111-176, at 128 (2010) ("Senate Report"). This clearly is not the case for the Open Market CLOs and the syndicated loan market.

Unlike a loan originator in an "originate to distribute" model, which originates loans and then securitizes them in order to remove assets and credit risk from its balance sheet and shift them to third-party asset-backed security investors, an Open Market CLO is itself a third-party purchaser that seeks to purchase loans in the open loan market for its portfolio based on its own due diligence. An Open Market CLO does not originate loans. Like any other institutional buyer, it decides whether or not to acquire loans available in the market.

### C. It is especially important in regard to the application of risk retention requirements to understand that the manager of an Open Market CLO does not originate the loans held by the CLO and does not sell or transfer any loans to the CLO issuer.

Importantly, Open Market CLO managers are generally registered investment advisers who often manage loans in the form of mutual funds and separate accounts as well as CLOs.[14] Their business mandate is to select loans that will perform well for the Open Market CLO. Consequently, when selecting a loan to be acquired by the Open Market CLO the manager engages in the extensive due diligence discussed above. After such acquisition, the manager actively manages the CLO's loan portfolio through purchases and sales in accordance with the CLO documents. Because an Open Market CLO typically acquires loans in $1-5 million allocations and thus owns only approximately 100-150 loans, the Open Market CLO manager generally is very familiar with each individual loan.

Ultimately, a manager on behalf of the Open Market CLO brings discipline to the underwriting process and to the transparency of the loan market, since the Open Market CLO manager will only approve purchases of loans it believes to be appropriate for the Open Market CLO after thorough due diligence.

Furthermore, the management fee structure in an Open Market CLO creates a strong incentive for the Open Market CLO manager to prudently select and manage the Open Market CLO's loan portfolio, thereby aligning the Open Market CLO manager's interests with those of the Open Market CLO investors. Indeed, the FRB's Securitization Study describes the performance-based fee structure typically used to align incentives for CLO managers: "Management fees are often split into three parts: a base fee (senior to all noteholders), a subordinate fee (subordinate to all noteholders but senior to equity), and an incentive fee (gain sharing after equity has achieved a target rate of return)."[15]

The manager of an actively managed Open Market CLO is not paid gain on sale (since it does not sell assets to the Open Market CLO) and is generally not paid any upfront fee, but rather is generally paid through a three-tier fee structure during the life of the Open Market CLO. The base fee (usually 10–20 basis points ("bps") per annum) is paid prior to payments of interest to noteholders. This fee allows the Open Market CLO manager to cover certain of its costs

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14 Registered investment advisers are registered with the SEC under the Investment Advisers Act of 1940, as amended ("Advisers Act") and subject to SEC regulation and supervision thereunder.

15 Report to the Congress on Risk Retention, The Board of Governors of the Federal Reserve (Oct. 9, 2010), available at http://federalreserve.gov/boarddocs/rptcongress/securitization/risk retention.pdf. at 47.

associated with managing the Open Market CLO. The subordinated fee, which is the bulk of the "running" fee (usually 30–40 bps per annum), is paid only after interest is paid on all rated CLO notes. If the Open Market CLO is not performing well and interest is not being paid on the CLO's rated notes, the Open Market CLO manager will have the bulk of its fees deferred. Finally, the majority of Open Market CLOs also have an incentive fee, which is paid towards the end of the life of the CLO. This fee is paid only if all of the CLO's rated notes have received all payments of principal and interest required to be made by such time and the CLO equity has achieved a certain pre-negotiated rate of return. Thus, the majority of the CLO manager's compensation is tied to the performance of the CLO.

This compensation structure ensures that the Open Market CLO manager's incentives are aligned with those of the Open Market CLO investors throughout the life of the CLO. In addition, Open Market CLO managers rely on their reputations for prudence and performance to develop new business, and this reputational incentive provides an additional safeguard for investors' interests. To state it simply, the Open Market CLO manager already has "skin in the game" because it does not earn profit from its management unless the Open Market CLO performs as expected.

### D. CLOs performed well in the Great Financial Crisis

It is important to recognize that CLOs performed well in the worst financial crisis since the Great Depression. There are more than 600 Open Market CLOs outstanding today, but there have been *only six* transactions that experienced an event of default, three of which were subsequently cured.[16] Moreover, none of these defaults caused losses for investors holding notes rated A or better.[17] Open Market CLOs also experienced only modest ratings downgrades. For instance, 85% of the Open Market CLO notes originally rated Aaa by Moody's were still rated Aa or better following a downgrade sweep in early 2010. In recognition of the continued strong performance of CLOs since then, rating agencies have been *upgrading* CLOs since early 2010. Most recently, in June 2011, Moody's announced that it was putting more than 4,000 CLO tranches on review for upgrade. The upgrades will be material: senior notes are expected to be upgraded by one to three notches, while mezzanine and junior notes may be upgraded one to five notches.[18]

## II. Legal Discussion

### A. The Dodd-Frank Act Does Not Authorize the Agencies to Impose a Risk Retention Obligation on Managers of Open Market CLOs

[16] Moody's CLO Interest, July 2011.

[17] Moody's Investors Service.

[18] Moody's press release, June 22, 2011. Moreover, in recent months, as the economics of Open Market CLOs have once again become viable, the market is signaling the attractiveness of CLOs as an investment vehicle. There has been $5 billion of Open Market CLO formation since the beginning of May 2011, according to Thomson Reuters LPC. Clearly, investors are participating in Open Market CLOs again because they have determined that they performed well through one of the most difficult economic periods in history.

The authority granted to the agencies to prescribe rules for imposing risk retention requirements on ABS "securitizers" under section 941 of the Dodd-Frank Act is strictly limited by the clear terms of section 941's definition of "securitizer." Administrative agencies may not prescribe rules that are inconsistent with the intent of Congress as expressed in the plain language of the controlling statute. *See Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") (citing *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984)); *New Jersey v. EPA*, 517 F.3d 574, 581 (D.C. Cir. 2008) (same). Rules that exceed statutory authority are subject to invalidation under the Administrative Procedure Act. *See* 5 U.S.C. § 706 ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .").

As discussed below, any interpretation, such as that suggested in footnote 42 of the agencies' NPRM, that would impose risk retention requirements on the managers of Open Market CLOs would exceed the agencies' rulemaking authority under section 941 and would be legally invalid.

**1. Under the Plain Terms of the Act, the Agencies May Only Apply the Risk Retention Requirement to "Securitizers," as Defined in the Statute, and Managers of Open Market CLOs Clearly Do Not Fall Within that Definition**

Under section 941 of Dodd-Frank, the agencies are directed to issue regulations that require, subject to certain exceptions, an ABS "securitizer" to retain an economic interest in a portion of the credit risk of the assets underlying the ABS.[19] Section 941, in turn, defines a "securitizer" to mean:

> (A) an issuer of an asset-back security; or
>
> (B) a person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer[.][20]

Thus, the agencies' authority to impose risk retention requirements in the proposed rules is constrained by and may not exceed the scope of the statutory definition of "securitizer."

The manager of an Open Market CLO clearly falls outside the plain terms of section 941's definition of "securitizer." The manager is not an "issuer" of the ABS securities in any ordinary sense of the term, since the manager in no way issues the CLO's securities. *See, e.g.*, Black's Law Dictionary 850 (8th ed. 2004) (defining "issuer" to mean: "A person or entity (such

[19] Securities Exchange Act § 15G(1)(b), 15 U.S.C. § 78o-11(b)(1), as added by Dodd-Frank Act § 941(b).

[20] *Id.* § 15G(a)(3), 15 U.S.C. § 78o-11(a)(3), as added by Dodd-Frank Act § 941(b).

as a corporation or bank) that issues securities, negotiable instruments, or letters of credit.").[21] And the manager does not organize and initiate the ABS transaction by directly or indirectly "selling or transferring" any assets to the CLO. Accordingly, under the clear and unambiguous terms of section 941, the agencies have no authority to require Open Market CLO managers to retain a portion of the economic risk of the loans that underlie the Open Market CLO.

On this point, the agencies' own proposed definition of "sponsor" is fully aligned with the second prong of the statutory definition of "securitizer" and also clearly excludes Open Market CLO managers from the scope of the risk retention obligation. In addressing the scope of the key term "securitizer," the agencies proposed the following two-pronged definition:

> *Securitizer* with respect to a securitization transaction shall mean either:
>
> (1) the depositor of the asset-backed securities; or
>
> (2) a sponsor of the asset-backed securities.[22]

The NPRM notes that the second prong of the statutory definition of "securitizer" is substantially identical to the definition of "sponsor" in SEC Regulation AB,[23] and the agencies proposed to interpret the term "securitizer" by reference to the regulatory definition of "sponsor," as follows:

> *Sponsor* means a person who organizes and initiates a securitization transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity.[24]

Just as they are excluded from the second prong of the statutory definition of "securitizers," managers of Open Market CLOs cannot be "sponsors" as defined in the proposed rules because they do not organize and initiate the CLO "by selling or transferring assets, either directly or indirectly" to the issuing entity, since the Open Market CLO manager does not own or control the assets held by the seller or transferor and thus cannot, and does not, sell or transfer them either directly or indirectly as required by the definition.

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21 In addressing the term "issuer" as used in section 15G(a)(3)(B) of the statutory definition of "securitizer," the agencies themselves in the NPRM recognized that the ordinary meaning of the term refers to "the issuing entity that issues the ABS." 76 Fed. Reg. at 24098 n.41. In the context of an Open Market CLO, the entity that issues the ABS is the CLO itself, not the manager. Curiously, in the very next paragraph of the NPRM, the agencies ignored this plain meaning interpretation of "issuer" when addressing the same term as used in section 15G(a)(3)(A), where the agencies substituted the regulatory term "depositor." *See* 76 Fed. Reg. at 24099.

22 § ___.2 (proposed common rules).

23 *See* 76 Fed. Reg. at 24098.

24 § ___.2 (proposed common rules).

Because section 941 does not include a special definition of "issuer" as used in the first prong of the statutory definition of "securitizer," the agencies looked to how the term is used in other securities statutes, rather than applying the ordinary meaning of the word. The agencies noted in the NPRM that the term is given different meanings under the securities laws, depending on the context, and that under several provisions of the securities laws and regulations, "the term 'issuer' when used with respect to an ABS transaction is defined to mean the entity—the depositor—that deposits the assets that collateralize the ABS with the issuing entity."[25] Accordingly, the agencies proposed to interpret the term "issuer" in section 15G(a)(3)(A) "as referring to the 'depositor' of the ABS,"[26] and they proposed the following regulatory definition of "depositor":

> *Depositor* means:
>
> (1) The person that receives or purchases and transfers or sells the securitized assets to the issuing entity;
>
> (2) The sponsor, in the case of a securitization transaction where there is not an intermediate transfer of the assets from the sponsor to the issuing entity; or
>
> (3) The person that receives or purchases and transfers or sells the securitized assets to the issuing entity in the case of a securitization transaction where the person transferring or selling the securitized assets directly to the issuing entity is itself a trust.[27]

A manager of an Open Market CLO plainly does not qualify as a "depositor" under this proposed regulatory definition. The manager does not transfer or sell the securitized loans to the CLO and thus cannot be deemed a depositor under clause (1) or (3) of the definition; and it cannot be deemed a depositor under clause (2) of the definition because it does not qualify as a "sponsor" under the proposed rules.

In short, both the statute and the proposed rules plainly exclude Open Market CLO managers from the scope of the risk retention requirements.[28]

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25 76 Fed. Reg. at 24099. Again, as noted above, this approach is curiously at odds with the agencies' own interpretation of the word "issuer" as used by Congress in the second prong of the very same statutory provision, section 15G(a)(3). *See id.* at 24098 n.41. When the same word is used by Congress in two adjoining provisions of the same statute, courts usually require administrative agencies to the give the term the same meaning in both provisions, absent some clear indication from Congress that different meanings were intended. *See FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1184-85 (2011); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). There is no such indication here.

26 *Id.*

27 § ___.2 (proposed common rules).

28 Similarly, the underwriter, placement agent or arranger (collectively "placement agent") of an Open Market CLO transaction would not be a securitizer under section 941 of the Dodd-Frank Act. A placement agent is typically hired by the Open Market CLO manager as an initial step in establishing an Open Market CLO. The placement agent negotiates with the rating agencies on behalf of the Open Market CLO and places the

2. **By Stating that Risk Retention Requirements Would Apply to CLO Managers on the Ground that the Managers "Select" the Loans that Go into the CLO, Footnote 42 is Contrary to the Plain Language of Section 941 and to the Agencies' Own Proposed Rules**

As set forth above, it is clear that a manager of an Open Market CLO is not a "securitizer" under section 941 or a "sponsor" or "depositor" under the proposed rules. Unfortunately, in footnote 42 of the preamble to the NPRM, the agencies suggested that the risk retention obligations of a "sponsor" may apply to a CLO manager solely on the ground that the manager "selects" the syndicated loans to be held in the CLO's collateral pool. Any such suggestion is contrary to the requirements of the statute and flatly inconsistent with the agencies' own proposed rules.

The preamble states that the agencies:

> believe that proposing to apply the risk retention requirement to the **sponsor** of the ABS—as permitted by section 15G—is appropriate in light of the active and direct role that a **sponsor** typically has in arranging a securitization transaction and selecting the assets to be securitized.[29]

Certainly, the typical sponsor of an ABS initiates the securitization by selecting the assets to be securitized, and the agencies' reasoning here is unobjectionable, to the extent the party required to retain the credit risk satisfies the regulatory definition of a "sponsor" by also selling or transferring the assets to the issuing entity.

But footnote 42 strays beyond the limits of the statutory definition and beyond the language of the proposed rules' definition of "sponsor" when it suggests that "selecting" the underlying loans alone is enough to treat a CLO manager as a "sponsor":

> For example, in the context of collateralized loan obligations (CLOs), the CLO manager **generally acts as the sponsor by selecting the commercial loans to be purchased** by an agent bank for inclusion in the CLO collateral pool, and then manages the securitized assets once deposited in the CLO structure.[30]

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Open Market CLO's securities with investors. The Open Market CLO manager selects the loans to be purchased by the Open Market CLO in its sole discretion from a variety of sellers which may include the placement agent or one of its affiliates. In this structure, the placement agent cannot be viewed as organizing and initiating a securtization transaction by selling or transferring assets to the issuing entity. Therefore, it would not be a securitizer for purposes of the definition of that term in section 941 of the Dodd-Frank Act or its proposed definition in the NPRM.

[29] 76 Fed. Reg. at 24098 (emphasis added; footnote omitted).

[30] *Id.* at 24098 n.42 (emphasis added).

To the extent this footnote was intended to mean that a CLO manager will be deemed a sponsor for risk retention purposes without regard to whether the manager sells or transfers the assets to the CLO issuing entity, the suggestion in the footnote is legally invalid, because it is contrary to the plain language of section 941. There can be no dispute that "selecting loans" does not constitute "selling or transferring loans."

The suggestion in footnote 42 is also impossible to square with the terms of the agencies' own definition of "sponsor" in the proposed rules, which also requires that the party sell or transfer the assets to the issuing entity. Statements made by an agency in the preamble of a rulemaking cannot contradict or expand the plain language of the agency's proposed rule itself. *See Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("language in the preamble of a regulation is not controlling over the language of the regulation itself") (citing *Jurgensen v. Fairfax County*, 745 F.2d 868, 885 (4th Cir. 1984) (a preamble "does not enlarge or confer powers on administrative agencies or officers")).

The OCC in response to a question from Representative Bill Posey regarding footnote 42 ("OCC Response") appears to suggest that activities of a CLO manager apparently combined with the phrase "indirectly" in the definition of "securitizer" acts in some fashion to cause a CLO manager to be subject to risk retention. It appears that this position may be premised on the presence of an "agent bank" as an intermediate purchaser in the transaction rather than applying in the case of direct purchases by the Open Market CLO. The OCC response states:

> As you point out, the CLO manager takes a significant role in organizing and initiating a CLO securities transaction. Part of this process, as discussed in the preamble and the Federal Reserve Study, involves the CLO manager using an agent bank to purchase assets on its behalf for ultimate securitization. The actions of the CLO manager in selecting the assets and arranging for their transfer to the securitization issuer appear to fall within the statutory language covering "transferring assets, either directly *or indirectly* . . . to the issuer," which would make the CLO manager a "securitizer" under the definition laid out by Congress in Section 941. However, the Agencies are requesting public comment on whether the proposed regulatory definitions appropriately implement the statutory terms.[31]

Whatever the merits of this position in regard to a CLO that involves an intermediate purchase and sale of loans by an agent bank, it is not applicable to an Open Market CLO that itself directly purchases loans in the open market. The OCC response in no way would support the treatment of a manager of an Open Market CLO as being subject to risk retention where as described above, the Open Market CLO purchases loans as part of the syndication of the loan and in the secondary loan market.

[31] Letter from Julie Williams, First Senior Deputy Comptroller and Chief Counsel, OCC to Representative Scott Garret, June 14, 2011.

As discussed above, the statute and the proposed rule attribute the status of a "securitizer" to a party that **sells or transfers** assets to an ABS issuing entity. In an Open Market CLO, the Open Market CLO manager in no conceivable respect is engaged in selling or transferring loans to the Open Market CLO. The manager does not own the loans nor does it control the decision of a seller in the open market to sell loans. With respect to an Open Market CLO buying loans in the open market, an Open Market CLO manager simply selects loans to be purchased by the Open Market CLO.

In the case of an Open Market CLO, the Open Market CLO manager is not the seller or transferor of the assets, either directly or indirectly. Nor is the Open Market CLO manager the purchaser of the assets; the Open Market CLO is the purchaser. The Open Market CLO manager merely selects the loans to be purchased by the Open Market CLO. It is the Open Market CLO that acquires ownership of the loans, not the Open Market CLO manager. Moreover, the language of the statute and the proposed rule cannot reasonably be read to provide that a party that "purchases" loan assets is a "securitizer." The distinction between a seller and a purchaser is beyond dispute or controversy. A "purchaser" cannot sell or transfer assets, it can only acquire them from a willing "seller."

Since the treatment of a party as a securitizer is clearly based on the party being a seller or transferor, the reference in the definition of securitizer to such a sale being done "either directly or indirectly, including through an affiliate" plainly refers to, and is limited to, conduct of the SELLER OR TRANSFEROR, not the party that selects the assets or the direct purchaser of assets in the open market. The OCC's Response appears to seek to use the term "indirectly" to accomplish something it simply cannot. The use of the term "indirectly," specifically and exclusively in regard to seller conduct, cannot be read to support a claim that a purchaser, or a party associated with a purchaser, can engage in conduct that would transform it into a seller or transferor.

The agencies should retract or correct the suggestion raised in footnote 42 that an Open Market CLO manager may be treated as a "sponsor" solely because it "selects" loans for the CLO. Instead, the agencies should expressly clarify in the final rulemaking that the managers of Open Market CLOs are not subject to a risk retention requirement.

### 3. Recognizing that Managers of Open Market CLOs Are Not Subject to Risk Retention Is Fully Consistent with the Purposes and Intent of Section 941

An examination of Congress's intent in enacting section 941 demonstrates that Open Market CLOs are not the type of ABS vehicle that Congress was concerned with and on which Congress intended to impose risk retention. The Senate Report identified two major problems that had emerged in regard to securitization during the financial crisis.

According to the Senate Report, one problem was that:

> under the "originate to distribute" model, loans were made expressly to be sold into securitization pools, which meant that

> lenders did not expect to bear the credit risk of borrower default. This led to significant deterioration in credit and underwriting standards, particularly in residential mortgage loans.[32]

A second major concern discussed in the Senate Report was the quality of information available about the assets underlying a securitization:

> [I]t proved impossible for investors in asset-backed securities to assess the risks of those underlying assets . . . Complexity and opacity in securitization markets created the conditions that allowed the financial shock from the subprime mortgage sector to spread into a global financial crisis . . . .[33]

As described in detail at the outset of these comments, Open Market CLOs do not pose and never have posed the risks identified by Congress in enacting section 941. Furthermore, as discussed above, CLOs performed well through a historic financial crisis.

## III. <u>Imposing Regulatory Risk Retention Obligations on Open Market CLOs Would Result in Serious Negative Consequences for the National Economy</u>

### A. The Risk Retention Concept Described in the NPRM Has No Practical Application to Open Market CLOs

Discussions with our members and other market participants indicate that a risk retention requirement cannot feasibly be applied to managers of Open Market CLOs in a way that is commercially viable. Since they do not own the assets sold to the Open Market CLO, the managers of Open Market CLOs cannot "retain" credit risk; *they would have to purchase it*.[34] In

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32 S. Rep. No. 111-176, at 128 (2010). While loans may be sold to a number of parties, including ABS, syndicated loans are not "made expressly to be sold into securitization pools." The numbers bear this out: at the height of the market in 2007, according to Thomson Reuters, there was $1.69 trillion of U.S. syndicated loan issuance. According to calculations from S&P/LCD, CLOs purchased $220 billion of syndicated loans that year. Thus, clearly syndicated loans are not "made expressly to be sold into securitization pools" involving Open Market CLOs. Consequently, the Open Market CLOs themselves are not based on the "originate to distribute" model as discussed in the Senate Report.

33 S. Rep. No. 111-176, at 128 (2010). As discussed previously, there is publicly available information available on most loans purchased by Open Market CLOs so it is relatively easy for investors to assess the risk of the underlying assets.

34 In regard to whether an Open Market CLO itself could retain the risk required under section 941, since it holds all the assets it retains the full risk on those assets which obviates any need to apply one of the risk retention structures that the NPRM proposes for other types of ABS structures. In another context, the NPRM takes the position that no risk retention requirement is applicable to parties participating in a Freddie Mac or Fannie Mae fully guaranteed ABS securitization because Freddie Mac and Fannie Mae "are exposed to the entire credit risk of the mortgages that collateralize those securities." 76 Fed. Reg. at 24112 (footnote omitted). Similarly, the Open Market CLO holds all the credit risk on the assets owned by it, thereby effectively eliminating need for imposing risk retention requirements on any other party.

In regard to whether retention in a form analogous to the "CMBS B piece" would be viable generally investors or investment advisers that have fiduciary duties would not be in a position to invest in interests in an Open Market CLO that cannot be sold and as to which the risk cannot be hedged.

the vast majority of cases, Open Market CLO managers are simply asset managers; they are not themselves sources of capital. They generally do not have significant capital to put to work, and the scarce capital some do have must achieve adequate returns. For that reason, it is economically impracticable for an Open Market CLO manager to purchase a 5% ownership position in any of the ways required of a "securitizer" under the proposed rules' various risk retention options.[35] Indeed, the LSTA believes that only a small fraction of CLO managers would continue to serve as Open Market CLO managers if they were required to purchase ownership interests in the Open Market CLO to satisfy risk retention requirements.

A straightforward review demonstrates that not one of the available risk retention options described in the proposed rules is commercially viable for Open Market CLOs:

The "representative sample" option is designed for consumer ABS and is not available to CLOs. This option requires the securitizer to retain 5% of a designated pool of at least 1,000 assets for securitization, but Open Market CLOs typically manage no more than 150 loans.[36] Accordingly, it is simply not possible for an Open Market CLO to qualify for this option.

The "vertical slice" option is uneconomical for CLO managers' return profiles. Most managers of Open Market CLOs lack the capital to purchase 5% risk in a vertical pro rata strip. Moreover, even if some managers had the necessary capital, their return hurdles would make investing in the senior notes of an Open Market CLO unattractive. Open Market CLO managers cannot commit scarce capital to earn the returns offered by the CLO.[37]

The "L-shaped" option, which includes a vertical component, is uneconomical for CLO managers' return profiles and is not viable for the same reasons as the vertical slice option.

The "horizontal slice" option, or "horizontal cash reserve account," is also not workable because the vast majority of Open Market CLO managers do not have either the capital or balance sheet capacity to retain securities equal to 5% of the par value[38] of the CLO.[39]

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[35] Retention of a 5% ownership position was launched in the European Union through the Capital Requirements Directive 2 ("CRD2"). The experience in Europe since CRD2 took effect at the close of 2010 has been exactly what we forecast will take place if the NPRM is adopted. To our knowledge there have been no new European Open Market CLOs since CRD2 became effective. *See* Comment Letter regarding the NPRM submitted by the Loan Management Association, dated August 1, 2011.

[36] The fact that the representative sample option requires at least 1,000 assets in the pool further indicates that the risk retention requirements were designed with originate-to-distribute ABS in mind. In such securitizations, asset pools of that volume are pooled fungible consumer assets; whereas in CLOs, a much smaller number of loans are selected for their individual characteristics.

[37] In an LSTA survey of Open Market CLO managers (who collectively managed $99 billion in CLO assets, out of a $250 billion CLO market), only 13% said that they had the capacity and structure that might allow them to retain a vertical slice of a CLO they managed. The vast majority responded that the vertical slice option was simply not a viable option from a cost perspective. Of those that said they could theoretically hold a vertical strip, several added that they might not be able to justify deploying scarce capital to do so and thus would likely not continue to manage Open Market CLOs.

[38] We note that the Dodd-Frank Act requires retention of an economic interest in the **credit risk** of an ABS, while the NPRM proposes to mandate retention of 5% of the par value of the ABS. The reality, of course, is that equity equivalent to 5% of the **par value** of an ABS is many times greater than 5% of the credit risk.

The proposed rules include an exclusion from risk retention for "qualifying commercial loans," but this exclusion, as crafted, is exceedingly narrow and would not accommodate the loans typically comprising Open Market CLO collateral. Indeed, the exclusion is so narrow that essentially all commercial loans would fail to qualify, even those issued to blue-chip companies.[40] The exclusion also does not reflect Open Market CLO practices. The qualifying commercial loan exclusion would prohibit Open Market CLOs from reinvesting in new loans and would not allow managers to purchase loans more than six months after their closing date. Both of these criteria are counter to the active management that investors demand of an Open Market CLO.

For all of these reasons, the imposition of the agencies' proposed risk retention requirements on Open Market CLOs would effectively end the meaningful availability of such CLOs.

### B. Forcing Risk Retention Obligations on Open Market CLOs Would Cut Off an Important Source of Credit that American Corporations Rely on to Create Jobs and Invest in Economic Growth and Would Deny Liquidity to Commercial Lenders

Cutting off the availability of Open Market CLOs through the imposition of unworkable risk retention requirements would adversely affect the availability of credit to American businesses and severely diminish liquidity in the commercial loan market. While a small number of Open Market CLO managers might be able to continue managing CLOs in such an environment, it is unlikely that the investment banks that act in the Open Market CLO sector today would continue to devote the resources and efforts necessary for the maintenance of a viable Open Market CLO sector. Unworkable risk retention requirements would not only strangle the Open Market CLO sector but, by dramatically reducing the number of managers in the business, would also negatively affect investors and eliminate an important investor protection because there would now be so few choices of managers.

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[39] Moreover, subjecting the manager of an Open Market CLO to the risk retention requirements of a "securitizer" does not accommodate the consequences of the CLO manager's removal. In Open Market CLOs, the manager may be removed by a vote of a certain percentage of the investors for failure to perform the manager's obligations or if other specified adverse events occur. In addition, certain investors in some Open Market CLOs are entitled to remove the manager without cause. If the original manager were required to purchase a 5% ownership position in the Open Market CLO, presumably the new manager would also be required to purchase this ownership position from the replaced manager. But such a requirement would make the manager's removal and replacement unduly difficult and potentially impossible to achieve in practice. Consequently, the investor protection achieved by investors' ability to replace a collateral manager would be undermined by deeming the manager to be a "securitizer" for purposes of risk retention requirements.

[40] According to the NPRM's criteria, for two years before and after the closing of the loan, the borrower must have (i) a total-liabilities ratio of 50% or less, (ii) a leverage ratio of three or less, and (iii) a debt-service coverage ratio of 1.5 or greater. In addition, the loan's term must be five years or less, and repayment must come solely from business revenues (and not asset sales or refinancing) and be based on straight-line amortization. The agencies state: "Under the proposed rules, the loan payments under the commercial loan must be determined based on straight-line amortization of principal and interest that fully amortize the debt over a term that does not exceed five years from the closing date of the loan." 76 Fed. Reg. at 24131.

Open Market CLOs enable qualified institutional investors who want to participate in the syndicated loan market, which provides loan capital to commercial borrowers, to do so by hiring experienced loan managers to select and manage the syndicated loans and other assets purchased by the Open Market CLOs.

Through their purchase of syndicated loans, Open Market CLOs serve as an important source of credit for the small and mid-sized companies that fuel much of the Nation's economic growth and that tend to be underserved by banks. Open Market CLOs serve as an important source of liquidity for the larger loan market, since they acquire portions of broadly syndicated loans. In 2010, there was more than $1.2 trillion in outstanding syndicated loans as the U.S. economy emerged from the recession and the credit crunch.[41] More than $500 billion was provided by lenders other than banks, including insurers, finance companies, CLOs, and mutual funds. Open Market CLOs alone provided $250 billion of this loan capital. CLOs have provided billions of dollars in financing to important, high profile companies such as Community Health Systems, Charter Communications, Ford Motor Company, General Motors, Chrysler, Goodyear Tire, Delta Airlines, Regal Cinemas, Reynolds & Reynolds, Supervalu, Dole Food and US Airways – as well as countless middle market companies that benefit from CLO financing.

## IV. <u>Exemption For Open Market CLOs Meeting Specified Criteria From Risk Retention Requirements</u>

For the legal and policy reason discussed above, we do not believe that managers of Open Market CLOs should be subject to risk retention requirements. Without waiving, and without prejudice to, the rights of the LSTA and its members, to the extent that notwithstanding our position, the agencies are of the view that managers of Open Market CLOs are subject to a risk retention requirement, we respectfully request that the agencies exercise their authority under section 941(e) of the Dodd-Frank Act to establish an exemption from risk retention requirements for Open Market CLOs meeting the requirements set forth below.

Section 941(e)(1) provides the agencies with broad authority to adopt exemptions, exceptions or adjustments to the rules issued under section 941, including for classes of institutions or assets relating to the risk retention requirement and the prohibition on hedging. Section 941(e)(2) provides that such an exemption, exception or adjustment shall (i) help ensure high quality underwriting standards for the securitizers and originators of assets that are available for securitization; and (ii) encourage appropriate risk management practices by the securitizers and originators of the asset, improve the access of consumers and businesses to credit on reasonable terms, or otherwise be in the public interest and the protection of investors.

The LSTA has carefully considered the types of protections that the agencies may wish to see included in an Open Market CLO exemption while taking into account business and market factors that are essential to maintaining a viable Open Market CLO sector. To the extent that the agencies do not agree with our position in sections II and III of this letter, we respectfully request

[41] Credit Quality of the Shared National Credit Portfolio Improved in 2010, Shared National Credit Review (Sept. 28, 2010), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/ 20100928a.htm.

that the agencies establish an exemption from risk retention requirements and the hedging prohibition for Open Market CLOs that meet the following terms.

1. Investment Limitations

100% of the assets of the exempt Open Market CLO must be corporate credit obligations, cash and temporary liquidity investments. Of those, at least 90% must be senior, secured syndicated loans. This requirement would severely restrict holdings in other asset classes such as bonds, and would effectively limit the exemption to Open Market CLOs.

2. Requirements for Purchases in Initial Commercial Loan Syndication Transactions

Purchases by an exempt Open Market CLO in an initial commercial loan syndication transaction would be limited to circumstances where multiple financial institutions are given the opportunity to acquire loans through the syndication process on an arm's length basis.

3. Underlying Obligors

The underlying senior, secured syndicated loans are made to commercial borrowers.[42] That would exclude instruments that included, for example, residential mortgages, car loans and student loans.

4. Real Credit Requirements

Exempt Open Market CLOs would not be permitted to invest in asset backed securities. This restriction would exclude CDOs of ABS, CDOs-squared, and any other type of resecuritizations from qualifying for the exemption.

5. Derivative Investment Prohibitions

Exempt Open Market CLOs would not be permitted to invest in derivatives as assets.[43] Letters of credit and loan participations, which are traditional bank lending products, would be permissible. This would mean that exempt Open Market CLOs would be comprised of actual loans to real companies. Assets would not be able to be synthetically manufactured for an exempt Open Market CLO in which to invest.

6. Registration and Regulation of CLO Managers

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42 Such commercial borrowers may not be ABS issuers themselves, but may have subsidiaries or affiliates that are ABS issuers.

43 Thus, Open Market CLOs could not invest in loan credit default swaps, loan total return swaps, credit default swaps or total return swaps. Appropriate hedging instruments, such as interest rate swaps and currency swaps would be permitted.

Exempt Open Market CLOs would be required to be actively managed by a registered investment adviser or an affiliate thereof. By limiting the management of exempt Open Market CLOs to registered investment advisers and their affiliates, it would reduce the potential for transactions to inappropriately wander away from the boundaries of this exemption.[44]

7. Alignment of Compensation with Investor Risks

The exempt Open Market CLO manager's compensation would have to be structured to align its interest with that of the Open Market CLO's investors, with the majority of compensation based on performance. This would involve: (i) the manager receiving no compensation from the CLO at closing; (ii) compensation being tied to the performance of the CLO on a tiered basis; and (iii) at least 60% of the manager's compensation being subordinate to the interest payments required on the rated CLO liability notes. By tiering the fee structure, the exempt Open Market CLO manager's compensation and interests are well aligned with that of its investors.

The LSTA believes that an exemption for Open Market CLOs ("Exempt Open Market CLO") that reflects the foregoing points would tightly define what an exempt Open Market Market CLO is, and at the same time prevent current or future ABS products that the agencies believe section 941 is directed at from qualifying for this exemption.

We believe that terms of the Open Market CLO Exemption meet, to the extent applicable to this type of vehicle, the standards set forth in section 941(e)(2). Addressing the first prong of the criteria, CLO managers' long-term compensation is directly predicated on the *long-term* performance of the assets that they manage so they are incentivized to prudently select and manage loans for the Open Market CLO. Thus, the continuation of the CLO market should directly support the maintenance of strong underwriting standards in the syndicated loan market. In regard to the second prong of the criteria, CLOs facilitate the provision of credit on reasonable terms to businesses. These are the businesses that may be underserved by the banking sector and thus otherwise have limited access to credit at a reasonable cost. At a time when economic growth is a critical concern for the nation, Open Market CLOs are an important vehicle for providing funding for corporate operations and expansion.

[44] In this respect, the Advisers Act and the SEC's rules directly address potential conflicts of interest between the registered investment adviser and its clients. Of particular relevance to Open Market CLOs, Section 206(3) of the Advisers Act prohibits a registered investment adviser (or an affiliate of the adviser), acting as principal for its own account, from selling assets to a client of the adviser (the CLO) without disclosing in writing to the client, before the completion of the transaction, the capacity in which the adviser is acting and obtaining the client's consent.

## Conclusion

For all of the foregoing reasons, the LSTA respectfully urges the agencies to retract or correct the erroneous suggestion made in footnote 42 of the NPRM that CLO managers may be treated as "sponsors" for risk retention purposes and to make clear in the final rulemaking, consistent with the plain terms of section 941 and the terms of the proposed rules, that Open Market CLO managers are not subject to any risk retention requirements.

To the extent that the agencies do not agree with our position in sections II and III of this letter, we respectfully request that the agencies establish an exemption from risk retention requirements and the hedging prohibition for Open Market CLOs that meets the requirements discussed in section IV for an Exempt Open Market CLO. In this regard, we would be pleased to discuss in greater detail the rationale for and details of the Exempt Open Market CLO with the agencies at any time.

We sincerely appreciate your consideration of our comments. Please feel free to contact Elliot Ganz at (212) 880-3003 or Meredith Coffey at (212) 880-3019 if you have any questions regarding our comments.

Sincerely

R Bram Smith

Bram Smith
Executive Director