Bank of America Corporation
Legal Department
NC1-027-20-05
214 North Tryon Street
Charlotte, NC 28255

August 1, 2011

Department of the Treasury
Office of the Comptroller of the Currency
250 E Street, SW, Mail Stop 2-3
Washington, DC 20219
Docket Number OCC-2011-0002

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

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

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

Federal Housing Finance Agency
Fourth Floor
1700 G Street, NW
Washington, DC 20552
Attn.: Alfred M. Pollard, General Counsel
RIN 2590-AA43

Department of Housing and Urban Development
Regulations Division
Office of General Counsel
451 7th Street, SW
Room 10276
Washington, DC 20410-0500
Docket Number FR-5504-P-01

Re: Credit Risk Retention Proposed Rule

Dear Madams and Sirs:

Bank of America Corporation ("Bank of America") previously submitted a letter in response to the request of the Department of the Treasury, Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the Federal Housing Finance Agency, and the Department of Housing and Urban Development (each an "Agency," and collectively the "Agencies") for comments regarding their proposed rule regulating credit risk retention (the "Proposed Rule").[1] In that letter, we addressed the Proposed Rule's impact on a number of different asset types and also indicated that we would provide supplemental comments regarding the Proposed Rule's impact on the Commercial Mortgage Backed Securities ("CMBS") market at a later date.[2] We also wish to provide supplemental comments regarding the Proposed Rule's impact on the Collateralized Loan Obligation ("CLO") market. We now respectfully submit the following comments, which should be considered in conjunction with our earlier letter.

I. Commercial Mortgage Backed Securities Comments

The CMBS market has re-started following the credit crisis and is experiencing slow growth. The CMBS market has returned because the underlying structure of CMBS deals includes protections for investors that meet market expectations. Such protections include thorough due diligence on each of the underlying assets, careful pool selection that includes the involvement of the most junior investors (the B-piece buyers) and a number of control mechanisms. The control mechanisms encompass protections such as trustees, operating advisors and special servicers that provide strong protections to investors during the life of the transaction by monitoring the underlying assets and providing checks and balances among the deal participants. Additionally, the control mechanisms and structure of CMBS provide the parties retaining the greatest risk of loss with appropriate controls to ensure that the commercial real estate ("CRE") loan underwriting standards remain sound. We refer you to the Letter dated July 18, 2011, from the Commercial Real Estate Finance Council ("CREFC") regarding the Proposed

---

[1] Bank of America Corporation, Comment Letter on the Credit Risk Retention Proposed Rule (July 13, 2011), *available at* http://fdic.gov/regulations/laws/federal/2011/11c84ad74.PDF (hereafter "Bank of America Risk Retention Letter").
[2] *Id.* at 71.

Rule (the "CREFC Comment Letter") for a description of CMBS generally and the current CMBS market.[3]

We believe the Proposed Rule raises three primary issues with respect to the CMBS market that must be addressed to ensure the long-term viability of the CMBS market while promoting accountability for quality underwriting of CRE loans for securitization.

- First, the Proposed Rule's B-piece retention option, which allows investment by a third-party purchaser ("B-piece buyer") to satisfy the risk retention requirement in a CMBS transaction, must be modified in several important ways. Among other things, the B-piece buyer must be able to transfer the B-piece subject to certain conditions; otherwise the lack of liquidity for that investment will drive away from the market most, if not all, B-piece buyers and/or push the pricing and discounting for such an illiquid investment to levels that will make borrowing costs for CRE prohibitive. We believe that B-piece transferability can be tailored to attract current players in the B-piece market while still ensuring better quality mortgages with subsequent lower levels of default.
- Second, the proposed premium capture cash reserve account ("PCCRA") will have the effect of eliminating (or putting at significant risk) the sponsor's financial incentive to originate and securitize CRE assets. Without a financial incentive to securitize, the CMBS market will severely contract or close completely, thereby significantly reducing liquidity to the CRE market, which will result in lower loan origination and higher borrowing costs.

[3] *See* Attachment A to the CREFC Comment Letter.

- Third, the proposed definitions of CRE loan (which, among other things, determines whether the B-piece retention option is available in a CMBS deal) and qualifying CRE loan (for which zero risk retention is required) need to be adjusted. The vast majority of commercial mortgage loans that are presently securitized would fail to meet the proposed definition of CRE loan because certain common CRE loan characteristics are not accounted for in the present definition.

Unless modified, the proposed risk retention requirements will drive many sponsors and B-piece buyers out of the CMBS market, deny credit to many commercial mortgage borrowers, and increase the ultimate cost of borrowing for all commercial mortgage borrowers. We fear that if these three issues are not corrected, the results would severely harm the commercial real estate market.

A. CMBS B-piece retention option

1. The proposed B-piece retention option rule

The Proposed Rule would permit the sponsor of a CMBS transaction to satisfy its retention obligation by having a third party purchaser acquire an eligible horizontal residual interest in the issuing entity in the same form, amount, and manner as the sponsor would have been required to retain, provided that several additional conditions are met. These conditions include: (1) at closing, at least 95% of assets (by principal balance) must be "commercial real estate (CRE) loans",[4] (2) the B-piece buyer must pay for the first-loss interest in cash at the

---

[4] A "commercial real estate loan" is defined as a loan secured by a property with five or more single family units, or by nonfarm nonresidential real property, the primary source (50% or more) of repayment for which is expected to be derived from the proceeds of the sale, refinancing, or permanent financing of the property; or rental income associated with the property other than rental income derived from any affiliate of the borrower. *See* § __.16 of the Proposed Rule. Excluded from the definition are land development and construction loans (including 1- to 4-family residential or commercial construction

closing of the securitization without financing being provided, directly or indirectly, from any other person that is a party to the securitization transaction (other than a person that is a party solely by reason of being an investor), (3) the B-piece buyer must perform certain due diligence on each securitized asset prior to the sale of the ABS interests, (4) the B-piece buyer must not be affiliated with any other party to the securitization transaction (other than investors) and must not have control rights in the securitization (including, but not limited to acting as servicer) that are not collectively shared by all other investors in the securitization (except that it may act as, or be affiliated with, a servicer and may have such control rights if the securitization transaction documents provide for an operating advisor with the rights and powers specified in the Proposed Rule), (5) the sponsor must provide a number of disclosures concerning the B-piece buyer and other information concerning the transaction, and (6) the B-piece buyer must comply with the hedging, transfer and other restrictions applicable to such interest as if the third-party purchaser was a sponsor. Bank of America supports the B-piece retention option and appreciates the Agencies' efforts to accommodate the structure of CMBS deals. There are, however, significant problems with the requirements of the B-piece retention option.

2. The operating advisor provision of the B-piece retention proposal will make B-pieces unattractive to buyers

One of the most troublesome requirements for the B-piece retention option is the requirement that an operating advisor have control rights and servicer termination rights while the B-piece buyer is holding the most junior risk. The willingness of B-piece buyers to invest in the first loss position of traditional CMBS deals has been contingent upon their rights (i) to control material servicing actions and (ii) remove or replace the special servicer (the servicer in a

---

loans), any other land loans, loans to a real estate investment trust (REIT), and unsecured loans to a developer. *See* the discussion under the heading "CRE Loan and Qualifying CRE Loan definitions" below regarding the exclusion of loans to REITs and land loans.

CMBS deal that services distressed or defaulted loans). B-piece buyers rightfully expect this control because, as the holder of the most subordinate tranche of the securitization, they absorb losses on the underlying assets before other investors. This structure creates a strong incentive for the B-piece buyer to monitor and influence the performance of the special servicer in a way that is best for the performance of the securitized assets. There will be a serious misalignment of interests if control of material actions and special servicing is not held by the B-piece but by a party that will not be the first party at risk for the losses their decisions may create. Most B-piece buyers will be unwilling to invest in B-pieces if the ability to control loan level decisions is ceded to the operating advisor. The number of B-piece buyers in the market is already very limited, so potential reductions in that market caused by the effects of the Proposed Rule must be considered carefully.[5] Reduced availability of capital at the junior risk level would mean reduced CMBS issuance and less credit available to commercial property owners.

The proposed operating advisor requirement also creates another administrative layer in the securitization process that will likely make the servicing and workout of securitized loans more difficult from the borrower's perspective. As deals are presently structured, during the period the B-piece buyer is holding the risk of first loss, the special servicer must obtain the consent of the B-piece buyer for certain material servicing actions to be taken. This process takes time as the B-piece buyer needs to educate itself on the issues, make an internal decision and come to a consensus with the special servicer. The addition of an operating advisor with which the special servicer must also consult will take more time and require reconciling more conflicts between differing views. During this time the borrower, who may need to move quickly to address issues at the related property, will be left in limbo, unable to move forward until an

[5] *See Two Shops Enter B-Piece Market*, COMMERCIAL MORTGAGE ALERT, April 29, 2011, at 3 ("There has been a shortage of B-piece buyers since the revival of the CMBS market.").

action is approved by all constituents. With commercial real estate, property values can quickly drop due to inaction from the loss of a tenant, deterioration of the property, lack of property management or a change in the local real estate market.

To address the above-described issues with the proposed operating advisor requirement, the Proposed Rule should be modified to the operating advisor framework that CREFC has developed and proposed in the CREFC Comment Letter.[6] The framework was created with input from investors (including B-piece buyers), servicers, special servicers and issuers. The CREFC Comment Letter sets forth several suggestions with respect to the operating advisor framework. First, the letter advocates modifying the framework so that the operating advisor's powers would be in place at the inception of the transaction instead of arising only when the B-piece buyer is, or is affiliated with, the servicer. Those powers should be limited to special servicer oversight and termination. The operating advisor would be responsible for oversight of the special servicer to ensure that the special servicer complies with the applicable pooling and servicing agreement; provided that, when the B-piece buyer is "in control,"[7] that oversight role would be reactive to investor complaints so that "if investors have complaints concerning the special servicer's performance of its obligations under the [applicable pooling and servicing agreement], the [operating advisor] will respond and attempt to resolve those investor complaints and will have the power to enforce any special servicing obligations that are not being satisfied."[8] When the B-piece buyer is no longer in control, the operating advisor's oversight role would be proactive, overseeing the special servicer's performance whether or not there have been investor complaints. We agree with the CREFC recommendation described above regarding

[6] *See* CREFC Comment Letter, Section IV.F(1).
[7] Under current market practice, a B-piece investor is "in control" until principal payments, appraisal reductions and realized losses have reduced the most senior class of the B-piece buyer's position to less than 25% of the original principal balance of such class.
[8] *See* CREFC Comment Letter, Section IV.F(1)(a).

the operating advisor's oversight power and we believe that the operating advisor's enforcement power should be limited to the termination right recommended by CREFC as described below[9] and should not encompass an ability to participate in individual decisions being made by the special servicer. The ability to participate in individual decisions would result in many of the same problems outlined above with respect to an operating advisor having consultation rights.[10]

The CREFC Comment Letter further suggests that the servicer termination right be modified so as to require an affirmative vote by investors rather than an override structure as contained in the Proposed Rule. Among other things, removal of the special servicer would require (i) a determination by the operating advisor that the special servicer committed willful misconduct, bad faith or negligence (while the B-piece buyer is in control, that determination would only be made if an investor complains, and after the B-piece buyer is not in control, that determination could be initiated by the operating advisor), (ii) notice to the special servicer and an opportunity for the special servicer to discuss and explain the conduct, (iii) if the operating advisor adheres to its determination described above in clause (i), posting of the operating advisor's recommendation and rationale (and any rebuttal arguments from the B-piece buyer or special servicer) on the trustee website and certain other venues for review by all investors, and (iv) an affirmative minimum vote on the removal recommendation by investors (excluding the investors in the B-piece) as specified in the applicable pooling and servicing agreement. If such removal vote passes while the B-piece buyer is in control, the B-piece buyer would have the right to name the replacement. After the B-piece buyer is no longer in control, the right of the

[9] We also note that pooling and servicing agreements already include a mechanism for the trustee, who is acting as a fiduciary to all investors, to terminate the special servicer based on a failure to perform its obligations under the pooling and servicing agreement, which provides an additional method to enforce the special servicer's obligations.

[10] *See* CREFC Comment Letter, Section IV.F(1).

operating advisor to remove the special servicer could be as negotiated by the parties through the applicable pooling and servicing agreement or other transaction document.[11]

CREFC advocates that the operating advisor's consultation right be removed from the proposal as it would add delay and uncertainty to servicer actions and the powers otherwise described above address senior investor concerns.[12]

In addition, for the reasons stated therein, we agree with the CREFC position that the operating advisor's powers should not extend to the oversight and removal of the master servicer (which is the servicer in a CMBS transaction responsible for servicing performing loans), but instead, should only be with respect to the special servicer (which has authority or consent rights with respect to all material servicing actions and defaulted loans).[13]

3. The Proposed Rule's transfer restriction will unnecessarily eliminate liquidity for B-piece buyers

Another significant problem with the Proposed Rule applicable to the B-piece retention option is that the B-piece buyer must hold the B-piece for the life of the related CMBS deal. Investors desire and in many cases require liquidity in their investment. Additionally, investors often have fiduciary duties with respect to the management of capital which essentially would prohibit them from investing in a security that they could not sell. Many B-piece buyers will choose to exit the CMBS market if their investment has no liquidity. Any B-piece buyers that stay in the market will demand higher pricing and steeper discounts for investments that already sell at significant discounts due to the high risk of loss. Therefore, strict transfer restrictions will result in less credit availability and higher credit cost to borrowers.

---

[11] *See* CREFC Comment Letter, Section IV.F(1)(d).
[12] *See* CREFC Comment Letter, Section IV.F(1)(c).
[13] *See* CREFC Comment Letter, Section IV.F(1)(b).

The Dodd-Frank Act provides that the sponsor in a CMBS deal may transfer risk retention to a B-piece buyer that meets certain criteria. There is no sound reason that further transfer should be restricted so long as the basic criteria of holding a B-piece are met to address any concerns about proper alignment of interests. The Proposed Rule should be modified to allow the B-piece buyer to sell the B-piece to another third-party that satisfies the basic requirements applicable to the initial third-party purchaser, (each such third-party, an "eligible B-piece buyer"). Thus, an eligible B-piece buyer who buys the B-piece from the initial B-piece buyer (or any subsequent B-piece buyer) would be required to purchase the B-piece for cash (with no direct financing from a party to the securitization transaction) and to perform appropriate due diligence on the assets prior to its purchase. Any disclosure required on the new B-piece buyer could be included in the next monthly report for the CMBS deal. Allowing the B-piece to be transferred under these conditions would not remove the benefits and protections provided by the B-piece retention option; if transfer is allowed, the initial B-piece buyer's ability to sell its B-piece will still depend on the underwriting, performance, and quality of the pool assets, thereby incenting the initial B-piece buyer to sufficiently diligence the assets prior to the CMBS transaction closing.[14]

In addition to the above ability to transfer the B-piece, we also note that any retention obligation (whether the obligation is being satisfied by the sponsor, an originator or a B-piece buyer) should end at a reasonable time after origination.[15] As we discuss in Section III.H of the Bank of America Risk Retention Letter, the permanent retention obligation imposed by the structure of the Proposed Rule for all forms of retention is problematic and unnecessary to promote quality origination.

[14] *See* CREFC Comment Letter, Section IV.F(2).
[15] *See* Bank of America Risk Retention Letter, Section III.H.

4. The Proposed Rule should clarify that more than one purchaser can invest in a B-piece retention

The Proposed Rule's language regarding the B-piece retention option uses the phrase "a" third-party purchaser, which suggests that the Proposed Rule does not allow multiple B-piece buyers to share the risk retention obligation. Many CMBS deals involve two or more investors "partnering" to invest together in the B-piece. This is necessary and advisable to diversify each such investor's risk. Prohibiting such co-investing would further limit the number of potential B-piece investors. The Proposed Rule should be modified to allow multiple B-piece buyers to collectively satisfy the risk retention obligation. Each B-piece buyer can be required to satisfy the requirements of an eligible B-piece buyer.

Allowing the required 5% horizontal interest to be allocated among multiple B-piece buyers is consistent with how the Proposed Rule would allow a sponsor that chooses to retain a vertical or horizontal retention piece to share the risk retention obligation with an "originator", as long as certain criteria are met.[16] In many ways the B-piece buyer acts like a mortgage originator in that it re-underwrites the underlying loans and helps determine which loans are included in the CMBS transaction. The B-piece buyer should therefore have a similar option to transfer a portion of the retention piece to another qualified B-piece buyer under the same conditions. This flexibility would help B-piece buyers diversify risk and disperse the retention burden and would make the role of a B-piece buyer more attractive to many market participants, thereby lowering borrowing costs.

Another situation that requires multiple B-piece buyers involves participations or other interests in individual CRE loans. As described in Section III.C(4) of the Bank of America Risk Retention Letter, the Proposed Rule should be modified to allow for risk retention in the form of

---

[16] *See* Proposed Rule §__.13.

participation interests in individual loans, including CRE loans. In many instances, a CRE loan included in a CMBS transaction (a "trust mortgage loan") consists of a note secured by a mortgage that also secures one or more other notes ("companion loans") that are not owned by the securitization trust. Therefore a portion of the mortgage debt is held by the trust within the securitization and portion of the mortgage debt is held outside the trust in a non-securitized form. The companion loan may be subordinate to the trust mortgage loan in payment rights (a "subordinate companion loan") or may be *pari passu* to the trust mortgage loan in payment rights (a "*pari passu* companion loan").

Similarly, instead of using separate notes, a mortgage loan can be split by issuing participation interests in the mortgage loan, with a senior participation interest ("trust participation interest") owned by the securitization trust and one or more other participation interests owned by individual institutions in a non-securitized form (each a "participation interest"). Appendix A to this letter contains an illustration of a split CRE loan. Such participation interests may be subordinate to the trust participation interest (a "subordinate participation interest") or may be *pari passu* to the trust participation interest (a "*pari passu* participation interest"). Another way that CRE loans have been structured into multiple interests is by transferring the entire CRE loan to the securitization trust and dividing the CRE loan into a senior component (which is pooled with the rest of the loan pool) and a subordinate component, which is represented by a loan-specific class of certificate, known as a "rake bond," which represents the subordinate interest in that CRE loan.

Each of a subordinate companion loan, a subordinate participation interest and a rake bond (each referred to as a "subordinate loan interest") absorbs the first losses on the related underlying CRE loan and provides the holders of such interests with certain control rights related to the loan. Such subordinate loan interests act like subordinate interests in the securitization and, if held by an originator, B-piece buyer or sponsor, should qualify as horizontal risk retention, which can be combined with other permitted forms of risk retention to satisfy the five percent risk retention requirement.

5. The Proposed Rule should clarify that certain financing provided by a party to the securitization is permitted

The condition that the B-piece buyer "[d]oes not obtain financing, directly or indirectly, for the purchase"[17] of the eligible horizontal residual interest from any other person that is a party to the securitization should be clarified with respect to what specific types of financing are prohibited. Many financial institutions extend credit to B-piece buyers for general corporate purposes and not specifically as purchase-money financing for the subject B-piece. The Proposed Rule should specify that financing provided by a party to the securitization would not be prohibited if it was a pre-existing or unrelated line of credit.[18]

6. Certain sponsor disclosure requirements should be clarified or removed

Under Section __.10(a)(5) of the Proposed Rule, the sponsor would be required to provide several disclosures regarding the transaction and the B-piece buyer. The requirement that the sponsor disclose the purchase price paid by the B-piece buyer is problematic and should be removed. In the current market, pricing information for private transactions is highly confidential and considered proprietary by sponsors and B-piece buyers because it is based on each party's modeling assumptions, the agreed upon transaction structure and pricing models they have developed and is the result of confidential negotiations. Requiring its disclosure would have a

---

[17] Proposed Rule §__.10(a)(2)(ii).

[18] This is similar to the exemption under Regulation W which provides an exemption to the attribution rule in the case of a pre-existing line of credit provided to a third party by a bank when the third party uses that line of credit to purchase assets from an affiliate of the bank. 12 CFR 223.16(c)(3).

chilling effect on the market. The requirement that the sponsor disclose "[a]ny other information regarding the third-party purchaser or the third-party purchaser's retention of the eligible horizontal residual interest that is material to investors in light of the circumstances of the particular securitization transaction" should also be removed from the Proposed Rule. This requirement is too vague and disclosure of "material information" is already required under existing disclosure rules. We refer to the additional comments on the required disclosure set forth in the CREFC Comment Letter and we support those positions.[19]

7. The Proposed Rule should clarify the sponsor's compliance and monitoring requirement

Section __.10(b) of the Proposed Rule provides that the retaining sponsor must monitor the B-piece buyer's compliance with the retention requirements in Section ___.10 and notify investors of non-compliance with certain of those requirements. We support CREFC's position that, in lieu of the sponsor monitoring the B-piece buyer's compliance, the B-piece buyer should be required to certify to the operating advisor annually to its compliance with the requirements for third-party retention, and the operating advisor should be authorized to enforce compliance through the trustee.[20] Requiring a securitization party to deliver annual certifications of compliance is a customary and appropriate method to monitor compliance and to identify compliance failures that require disclosure. For example, Item 1123 of Regulation AB requires filing of a statement of compliance by servicers in a securitization.

B. The Premium Capture Cash Reserve Account (PCCRA) provision will have significant negative consequences on CMBS transactions

Under the heading "Premium Capture Cash Reserve Account" in Section III.B of the Bank of America Risk Retention Letter, there is a full discussion of the PCCRA and the serious

---

[19] *See* CREFC Comment Letter, Section IV.F(5)(e).
[20] *See* CREFC Comment Letter, Section IV.F(3).

issues it causes for RMBS deals (such discussion, the "RMBS-PCCRA Discussion"). The significant negative consequences that the PCCRA requirement will have on RMBS deals and on the availability and cost of credit to borrowers described in the RMBS-PCCRA Discussion apply equally to CMBS deals and commercial mortgage borrowers. Specifically, the PCCRA provisions convert a sponsor's proceeds from a CMBS deal into a long-term asset with significant risk, thereby removing a sponsor's incentive to originate and securitize CRE loans. Also, excess proceeds from a CMBS transaction are required to cover transaction costs as well as any realized losses on hedges covering interest rate risk on loans held by the originator between the time of origination and securitization. The PCCRA requirement (in particular the inability to net from proceeds the closing costs paid to sponsor affiliates) would prohibit the use of proceeds to cover such CMBS transaction costs and hedging costs. Additionally, for the reasons we discuss in Section III.B(5) of the Bank of America Risk Retention Letter, the PCCRA requirement may make delivery of the necessary true sale opinion for CMBS transactions impossible.

These effects of the PCCRA provisions, and the others described in the RMBS-PCCRA Discussion, will result in less credit available to owners of commercial real estate, higher cost of such credit, and lower real estate values. Additionally, as pointed out in the CREFC Comment Letter, the costs of the PCCRA will substantially impact the CMBS market. The increased costs for all participants will cause many to abandon the market, ultimately increasing costs to borrowers.[21]

In addition to the issues described in the RMBS-PCCRA Discussion, there is one particular issue that is unique to the CMBS market and the B-piece retention option. One of the stated reasons for the PCCRA provision in the Proposed Rule is to prevent a sponsor from

[21] *See* CREFC Comment Letter, Section IV.E.

effectively reducing the sponsor's 5% risk retention by the amount of monetized excess interest or premium. However, the purpose of the B-piece retention option is for the B-piece buyer (instead of the sponsor) to hold the required risk retention. If the sponsor is not the party holding the required risk retention (as is the case if the B-piece retention option is used), then a rule intended to prevent the sponsor from effectively reducing the amount of risk it is retaining should not be applicable. Additionally any PCCRA held by the sponsor will be subordinate to the B-piece buyer which will effectively reduce the B-piece buyer's incentive to control the underwriting standards because the first losses on the transaction will not be absorbed by the B-piece buyer but by the sponsor holding the PCCRA.[22] Therefore, the PCCRA requirement certainly does not work in the context of risk retention held by a B-piece buyer.

C. CRE Loan and Qualifying CRE Loan definitions

1. The CRE Loan definition should be modified to better reflect the characteristics of the CMBS market

The definition of a "commercial real estate (CRE) loan" ("CRE loan") under the Proposed Rule needs to be modified to reflect the characteristics of commercial loans in the CMBS market. It is crucial that all types of commercial mortgage loans that are customarily included in CMBS deals fall within the definition of CRE loan since the B-piece retention option is available only if 95% (by principal balance) of the loans in the pool are CRE loans. The proposed definition of a CRE loan is problematic in several respects. First, the proposed definition excludes any loan made to a REIT. REITs are frequently borrowers under commercial

[22] As CREFC has pointed out in the CREFC Comment Letter, if PCCRA provisions were to apply in such a way as to force the B-piece buyer to purchase 5% of proceeds, the B-piece buyers' ability to fund B-pieces would be in jeopardy unless cost of credit to borrowers were raised to support a higher yield on the larger B-piece. The PCCRA would greatly increase the amount of capital needed to purchase the B-pieces and the retention requirement would potentially require the B-piece buyer to hold the B-piece for the life of the deal. It would be extremely difficult for a B-piece buyer to raise the necessary capital, especially given that many B-piece buyers are real estate funds whose investors supply capital only for a limited amount of time. *See* CREFC Comment Letter, Section IV.E.

mortgage loans that are securitized and are a significant and systemically important holder of commercial mortgage properties. CMBS is an important source of funding for REITs and the risk retention rules should not exclude REITs from the CMBS market.

Second, the definition requires that the primary source (50% or more) of repayment of the subject loan be from rental income “other than rental income derived from any affiliate of the borrower.” The exclusion of rental income from an affiliate as a source of repayment has the effect of eliminating almost all loans secured by operating business properties, including hotels, health care facilities, senior housing and assisted living facilities. Additionally, it is simply not feasible to identify and track whether the source of each rental stream on a property is an affiliate of the borrower. The risk retention rules should not exclude these properties from the CMBS market.

Third, “land loans” are excluded from the definition of CRE loan. While “land loan” is not defined in the Proposed Rule, it should be clarified not to include a loan to the owner of a fee interest in improved property that is ground leased to a third party who owns the improvements and whose ground lease payments are a source of income for debt service payments on the loan. This type of loan has historically been included in CMBS transactions and should not be excluded from the definition of CRE loan.

We propose that, to constitute a CRE loan, the primary source of repayment must merely be income derived from the real property, including operating proceeds, and with no exclusion of rental income from affiliates. This would allow the aforementioned loans to be included in the definition of CRE loan and would not harm the quality of the loans in a CMBS deal.

2. The Qualifying CRE Loan definition should be modified

The Proposed Rule establishes a category of qualifying CRE loans for which there would be a 0% retention obligation, if all of the related criteria set forth in the Proposed Rule are met.

We support the idea that well underwritten CRE loans should have reduced or no associated risk retention, but the parameters established in the Proposed Rule for such loans are not workable. The proposal sets forth parameters, including a maximum 20-year amortization, DSCR of not less than 1.7x and LTV of not more than 65%, which are vastly more stringent than almost any originations in the CMBS market today or historically. As an example, the 20-year maximum amortization requirement presents one of the most significant problems, since most commercial mortgage loans are underwritten and structured based on a 30-year amortization schedule. Therefore, very few, if any, commercial mortgage loans currently originated would meet the qualifying CRE loan definition. In fact, our research shows that, of the commercial mortgage loans included in CMBS "conduit" deals from 2005 to 2008, less than one percent would meet the amortization and DSCR requirements of the proposed definition of qualifying CRE loan.[23]

Furthermore, even if the definition of a qualifying CRE loan is changed to provide for workable parameters from a market perspective, the requirement that 100% of the CRE loans in the pool must be qualifying CRE loans is problematic. The "100% requirement" will force an originator to warehouse such loans for a significant amount of time before they can aggregate a pool made up entirely of qualifying CRE loans. Since only a small portion of the loans an originator originates will satisfy the qualifying CRE loan requirements, the time needed to accumulate the critical mass of 100% qualifying CRE loans to support a securitization will

[23] This research could not assess whether the loans met the Proposed Rule's criteria regarding tenant qualification, determining DSCR based on two years' actual performance or analyzing the borrower's ability to service the debt for the following two years. Also, we excluded from the loan pool analyzed all loans secured by hospitality properties as they do not satisfy the Proposed Rule's definition of CRE loan. It is also important to point out that there is a large disparity between the portion of residential mortgages that would meet QRM standards and the portion of commercial mortgages that would meet qualifying CRE loan standards. *See* CREFC Comment Letter, Section IV.G ("huge disparity between the anticipated quantum of qualifying commercial real estate mortgages (less than 0.4%) and the anticipated quantum of qualifying residential mortgages (10-20%)").

increase significantly. Since originators will be subject to a 100% market or interest rate risk on the CRE loans for a long period of time, any capital relief provided by securitization will be delayed. Costs of funds to the originator will increase, and subsequently the cost of credit to borrowers will likewise increase.

We propose an alternative to the 100% requirement which would allow for a pool consisting of both qualifying CRE loans and "unqualified" CRE loans. The sponsor could satisfy a 5% risk retention with respect to each "unqualified" CRE loan by either (a) retaining a 5% subordinate loan interest (or selling such interest to an eligible B-piece buyer[24]), a 5% *pari passu* companion loan or a 5% *pari passu* participation interest in each such CRE loan or (b) reduce the risk retention percentage requirement for the securitization pool using a "step" exemption mechanism. The former option is similar to the framework discussed in the Bank of America Risk Retention Letter[25] while the latter option is laid out in the CREFC Comment Letter.[26]

The "step" exemption mechanism proposed by CREFC would assign a lesser retention percentage requirement to a securitization pool based on the percentage of the pool made up of by qualifying CRE loans.[27] Such a mechanism would allow for loan pools with both qualifying and "unqualified" CRE loans, avoiding the risk of exposure to market and interest rate changes associated with holding loans for long periods of time.

Additionally, we wish to express our support for CREFC's position that following industry developed best practices in a CMBS transaction should be an alternative to, or reduce the required amount of, risk retention. CREFC has developed best practices with input from all constituencies in the CMBS industry to set a high standard for underwriting, disclosure and other

---

[24] *See* Section I.A.4 of this letter.
[25] *See* Section III.C(4) of the Bank of America Risk Retention Letter for a discussion of a similar proposal for RMBS.
[26] *See* CREFC Comment Letter, Section IV.G(4).
[27] *See id*.

transaction terms. As argued in the CREFC Comment Letter, the Proposed Rule should be revised to provide that CRE loans originated following these best practices should qualify for some amount of relief from risk retention.[28]

We also support CREFC's position that certain CMBS structures should be excluded from the risk retention requirements. The Proposed Rule's risk retention requirements and the requirements for the B-piece retention option seem to be based on the conduit-fusion type CMBS transaction. There are other types of CMBS deals, however, to which the risk retention requirements should not apply due to their transparency and the other characteristics described in the CREFC Comment Letter. Those types of CMBS deals that should be excluded are the single-asset transactions; single-borrower transactions; large loan transactions with pools of 2-10 loans; and large loan transactions having only an investment-grade component.[29]

D. CMBS Conclusion

If the suggested changes to the Proposed Rule described above in this CMBS section are made, we believe that the CMBS recovery currently in process will continue and the risk retention structure will satisfy the purpose of the Dodd-Frank Act to properly align interests and ensure improved underwriting and origination practices for CRE loans. A healthy CMBS market will improve credit availability, lower the borrowing cost to commercial property owners and promote the long-term stability of commercial real estate values.

II. Collateralized Loan Obligation Comments

A. Key CLO issues

While it may be appropriate to require risk retention in certain types of securitizations, we do not believe collateralized loan obligation transactions that are actively managed

[28] *See* CREFC Comment Letter, Section IV.C.
[29] *See* CREFC Comment Letter, Section IV.D.

(hereinafter, "Managed CLOs") should or can be subject to such requirements because Managed CLOs are not "originate-to-distribute" securitizations. We believe that the Proposed Rule, if applied to CLOs, would negatively impact CLOs and, as a direct result, would remove a significant source of funding and thereby materially impair liquidity to the loan markets that provide credit for corporations and other businesses. As described in more detail below, we do not believe Managed CLOs should be required to comply with the risk retention requirements of the Proposed Rule. The following are the principal characteristics of Managed CLOs that support this conclusion:

- Managed CLOs are not "originate-to-distribute" securitizations. Managed CLOs do not give rise to the moral hazard concerns cited in the Proposed Rule (e.g., substandard underwriting) as being inherent risks of assets sold to generate profit upon or shortly after origination.

- The structure and operation of Managed CLOs align the collateral manager's economic interests with those of the investors. In particular, portions of the collateral manager's compensation are linked to the performance of the related CLO's underlying portfolio. As noted below,[30] Managed CLOs performed well throughout the recent financial crisis and are currently the subject of broad-based upgrades by the rating agencies.

B. Managed CLOs are substantially different from the troubled ABS CDOs of the financial crisis

Generally speaking, CLOs can be divided into two categories. The first category is commonly known as "balance sheet" CLOs. In these transactions, a bank or other financial institution securitizes a pool of so-called "middle market" or other commercial loans that it has originated. Balance sheet CLOs have historically comprised only a modest portion of the CLO

[30] *See infra* note 34.

market. The structure of balance sheet CLOs is similar to the more common securitization structures in which the financial institution that originated the corporate loans transfers such assets to a special purpose subsidiary that deposits the assets into an issuing entity that issues the asset-backed securities.

In contrast, in a Managed CLO the pool of corporate loans that is securitized is selected by a third party known as the "collateral manager." The collateral manager does not originate the loans, and will not ever own the loans. Instead, the collateral manager will usually select the loans for the CLO portfolio subject to a variety of eligibility and other structural limitations set out in the operative agreement, and the issuing CLO entity purchases the loans in the open market in a series of trades with a variety of counterparties who may be either the originators of the assets or secondary owners.

Managed CLOs are an important component of the corporate loan market as a whole. According to the Loan Syndications and Trading Association (the "LSTA"), from 2004 through the first half of 2007, CLOs purchased more than 60% of new institutional loans.[31] In 2010, CLOs have provided approximately 20% or $250 billion of the $1.2 trillion of funded syndicated commercial loans to U.S. companies.[32]

CLOs are structurally similar to other collateralized debt obligation transactions ("CDOs") in that each is an investment structure that pools certain financial assets and

---

[31] *See* LSTA, "CLO's: Challenges … and Opportunities" (2010) (the "LSTA Presentation"), *available at* http://www.lsta.org/WorkArea/downloadasset.aspx?id=10522. *See also* Wells Fargo Securities, LLC Fixed Income Research, "CLOs Through the Cycle: A Look at CLO Performance Through the Great Recession" (February 1, 2011) ("Wells Fargo Research"), *available at* https://www.wellsfargoresearch.com/Research%20Publications/2011/February/SPECIAL_RPT_CLOS_THROUGH_CYCLE_020111-20110201170054.pdf. During this same time period, CLOs constituted approximately 60% of the primary market for syndicated corporate loans.

[32] *See* the LSTA's testimony on CLOs and risk retention before the House Financial Services Subcommittee on Capital Markets (April 14, 2011) (the "LSTA Testimony"), *available at* http://www.lsta.org/WorkArea/showcontent.aspx?id=13144.

instruments, and finances the investment in that pool by issuing securities that are of varied seniority and take specified levels of pool risk. CLOs, however, are substantively distinct from other types of CDOs. During the recent financial crisis, 435 CDOs that were secured by residential mortgage-backed securities ("ABS CDOs") triggered an event of default under the related operative document, whereas few if any Managed CLOs defaulted.[33] The primary reason for this difference is the different types of assets in which each invest. The assets in an ABS CDO are asset-backed securities—of the type that the Proposed Rule is intended to target—and the poor performance of the asset-backed securities triggered the poor performance of ABS CDOs.

The ability of Managed CLOs to avoid significant defaults during the recent financial crisis may be attributable (at least in part) to the fact that the collateral managers are allowed to trade out of weaker corporate loans for better performing assets. This feature of Managed CLOs is not typical in other securitizations. Also, it should not be overlooked that the assets in CLOs are predominantly syndicated leveraged corporate loans made to companies, for which multiple sources of information are available, not least of which are informational meetings held by the corporate obligor and prospective lenders during syndication of its loan. Breadth of information sources enhances the feasibility of the collateral managers to diligence assets for Managed

[33] As of Jan. 25, 2011, per S&P, no CLO had suffered a default. *See* "Cash Flow and Hybrid CDO Event of Default Notices Received as of Jan. 25, 2011," S&P, *available at* http://www.standardandpoors.com/ratings/articles/en/us/?assetID=1245302658900. However, according to similar research by Moody's, there were 6 CLOs that had a structure that included market value triggers (which are not typical for CLOs) that did default – as would be expected given the significant reduction in market value of the related CLO portfolios – but the controlling class in those deals worked with the collateral manager to get back the entirety of their funds. *See* "Recent Performance of Market Value Collateralized Loan Obligations," Moody's, *available at* http://www.moodys.com/research/Recent-Performance-of-Market-Value-Collateralized-Loan-Obligations?lang=en&cy=global&docid=PBS_SF202130.

CLOs. That coupled with the generally better quality of assets have enabled Managed CLOs to perform favorably over the past several years.[34]

C. Managed CLOs should not be subject to the Proposed Rule

Managed CLOs should not be subject to the credit risk retention requirements of the Proposed Rule because (i) Managed CLOs do not present the risks inherent in "originate-to-distribute" securitizations and thus also in ABS CDOs, and (ii) no primary participant in a Managed CLO, especially the collateral manager, can be properly characterized as the "securitizer" of the CLO. In essence, the character and nature of Managed CLOs do not conform to the plain meaning of any of the relevant criteria in the Proposed Rule.[35]

1. Managed CLOs are not "originate-to-distribute" securitizations

The Agencies' stated primary rationale for requiring credit risk retention is to reform "the 'originate-to-distribute' model for securitization and [to realign] the interests in structured finance."[36] It is believed that the "originate-to-distribute" model is susceptible to moral hazard or adverse selection because the company that originated the securitization asset, once it securitizes that asset, no longer has any capital at risk in that asset. Separately, ABS CDOs have been criticized for excessive information asymmetries between issuers and investors.

In the "originate-to-distribute" model, the originator or the operating parent company receives the upfront benefit of transferring the credit risk of the securitization assets to third party

[34] Indeed, while the default rates of corporate loans spiked in 2009, the corporate loan market recovered in 2010 and, in fact, the default rates in 2011 thus far are well below the rolling 12 year average annual default rate for corporate loans. *See* Wells Fargo Research at 7. Since 1999, the average annual default rate for corporate loans has been 3.7% by principal amount and 3.5% by obligor. For 2011 year to date, the default rate by principal amount is below 2% by principal amount and slightly above 2% by obligor. *See id.*

[35] As a corollary, the Agencies' assumption in footnote 42 to the preamble to the Proposed Rule is incorrect as a collateral manager does not fit within the plain meaning of "securitizer" or "sponsor" under Dodd-Frank or Regulation AB. *See* Proposed Rule, 76 Fed. Reg. at 24098.

[36] Press Release, FDIC, Chairman Bair's Statement on Credit Risk Retention Notice of Proposed Rulemaking (Mar. 29, 2011), available at http://www.fdic.gov/news/news/press/2011/statement03292011.html.

investors. In Managed CLOs, on the other hand, the collateral managers do not originate and do not own the underlying loans. Instead, the collateral managers research and select the loans in accordance with the guidelines set forth in the operative CLO document, and the CLO issuing entity purchases such loans in the primary syndication and secondary corporate loan markets. In addition to the diligence performed by the lending syndicate, collateral managers also perform their own diligence on the borrower. Performance of the collateral manager in selecting the loans for a CLO also impacts the reputational risk for the collateral manager. A recent Citigroup poll of equity investors in Managed CLOs shows that in determining whether to invest in a CLO, 44% believe the historical cash-on-cash performance of the collateral manager is the most important criterion, and 33% look to the organizational stability and reputation of the collateral manager.[37] In contrast, only 15% believe the level of equity retained by the collateral manager is the primary consideration.[38]

2. Contingent and incentive compensation aligns manager economic interest

Managed CLOs utilize conditional cash flows and performance-based compensation to mitigate the risks sought to be addressed by the Proposed Rule's risk retention requirements. The structural constraints of the CLO have been modified over the years by the market in response to investor requirements to protect CLO investors. For example, CLOs typically invest in pools of syndicated loans that are required to be diversified across obligors and industries and are structured so that disruptions within an industry or distress of a particular obligor would have a limited effect on the CLO's cash flows. The majority of corporate loans in which CLOs invest are broadly syndicated loans of large companies. The broad syndication of corporate loans

[37] *See* LSTA Weekly Review, April 15, 2011, *available at* http://www.lsta.org/WorkArea/showcontent.aspx?id=13160http://www.lsta.org/WorkArea/showcontent.aspx?id=13160.
[38] *See* id.

contributes to the general liquidity of these obligations, enabling Managed CLOs to trade in and out of positions on a discretionary basis. Managed CLOs also have structural protections for its capital obligations, the most important of which are the performance-based tests (specifically overcollateralization and interest coverage tests and related cash flow diversions) which if unsatisfied would require the CLO to, among other things, divert interest and principal proceeds to amortize its capital obligations and/or suspend its reinvestment activities until such performance tests are satisfied. In addition, most Managed CLOs will treat a defaulted loan at the lesser of its par/purchase price or market value, which constitutes another reason for a collateral manager to trade out of a distressed position before it becomes defaulted.

In addition (and significantly), the collateral manager's economic interests are aligned with the interests of the investors. The usual CLO manager compensation arrangement includes a base fee (payable at a high level of the waterfall), a subordinate fee (payable only after and if current debt service is met) and an incentive fee (payable only if the equity holders receive more than a specified return—generally toward the end of the term of the CLO). The base fee is generally sized to cover the collateral manager's overhead expenses; the subordinate and incentive fees generally determine what the collateral manager earns for performing its services.[39] The subordinate and incentive fee arrangement will track the performance of the CLO's investment portfolio, and therefore, closely align the economic interests of the collateral manager with those of the CLO investors.

3. There is no sponsor in a Managed CLO

Under § 941(b), a "securitizer" is defined as either "an issuer of an asset-backed security" or "a person who organizes and initiates an asset-backed securities transaction by selling or

[39] *See* Federal Reserve Board, "Report to Congress on Risk Retention" (the "FRS Report") at 47, *available at* http://federalreserve.gov/boarddocs/rptcongress/securitization/riskretention.pdf.

transferring assets, either directly or indirectly, including through an affiliate, to the issuer." Under either prong of this definition, it is unclear who (if anyone) constitutes a "securitizer" in the case of a Managed CLO.

With respect to the "issuer" prong, the Agencies concluded that "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."[40] As described above, the underlying assets in a Managed CLO are typically acquired directly by the issuing entity, which assets have been selected by the collateral manager in accordance with the investment guidelines provided in the operative CLO document. As such, there is no party that "deposits" assets into the CLO issuing entity. The Agencies acknowledged that an ABS transaction may not have a depositor, and concluded in such cases that "[f]or asset-backed securities transactions where there is not an intermediate transfer of the assets from the sponsor to the issuing entity, the term depositor refers to the sponsor."[41]

To identify the sponsor, the Agencies looked to the second prong of the definition of "securitizer," noting that it is "substantially identical to the definition of a 'sponsor' of a securitization transaction in the Commission's Regulation AB governing disclosures for ABS offerings," and accordingly provided that "a 'sponsor' of an ABS transaction is a 'securitizer' for the purposes of section 15G."[42] Identifying the sponsor of a Managed CLO, however, is not readily apparent. The parties who transferred the assets to the issuing entity may not be aware that they are dealing with a securitization entity or what the counterparty intends to do with the loan. These entities do not fall within the "sponsor" branch of the definition of securitizer;

---

[40] *See* Proposed Rule, 76 Fed. Reg. at 24099.
[41] *See* footnote 47 of the Proposed Rule, 76 Fed. Reg. at 24099.
[42] *See* Proposed Rule, 76 Fed. Reg. at 24098. The Agencies further state that the term "sponsor" will be defined "in a manner consistent with the definition of that term in the Commission's Regulation AB." *See* id.

although they transferred assets to the issuing entity, they have no intention of "organizing" or "initiating" an asset-backed securities transaction.[43] In addition, the underlying loan portfolio in a CLO is actively managed, and as a result, assets may be acquired and sold over the life of the transaction. If the sponsor branch of "securitizer" were interpreted to include any party selling loans to a CLO in the secondary market, that interpretation would lead to the incongruous effect, and impractical result, that the identity(ies) of the securitizer(s) would change over time as the underlying loan portfolio changed.

It is also difficult to treat any primary participant in a Managed CLO as an "originator". Each credit extender from whom a CLO purchases assets could technically fall within the definition of "originator", as the assets it created have ultimately been transferred to the CLO. If the credit extender has sold directly to the securitizer, and if the sale contract expressly contemplates the actual or possible securitization of the assets, then it would seem that the credit extender has reason to believe that it could be an originator for purposes of § 941 of the Dodd-Frank Act. However, as discussed above, many credit extenders have no reason to believe that the assets they originate and subsequently sell are going to be included in a securitization and do not necessarily have any knowledge of the motivations of a purchaser of the debt.

It is apparent that the entities that Congress intended to be subject to the retention of credit risk are the primary participants in an "originate-to-distribute" securitization. The legislative history of § 941, as well as studies on risk retention released by various agencies mandated to do so under Dodd-Frank all concluded that the risk in "originate-to-distribute"

[43] Some Managed CLOs, however, are formed at the request of one or more third party investors, whose involvement includes specifying the portfolio parameters and substantially limiting the collateral manager's discretion. While it may seem appropriate for such third party to be the "sponsor" of such CLOs, as discussed in this comment letter, that third party would also need to satisfy the other conditions for being a sponsor, namely that such third party must also sell or transfer assets to the CLO – which is unusual in the marketplace.

models is that "originators receive significant compensation upfront without retaining a material ongoing economic interest in the performance of the loan. … [t]his reduces the economic incentive of originators and securitizers to evaluate the credit quality of the underlying loans carefully."[44] Such risks are not present in CLOs for the reasons described above.

4. Excluding Managed CLOs from risk retention requirements is consistent with the purpose of Dodd-Frank § 941

Throughout the foregoing, we have described how the unique structure of Managed CLOs already aligns the interests of the main participants in the CLO. Managed CLOs have proven these principles through their performance despite one of the biggest financial crises in this country's history. Managed CLOs did not give rise to the moral hazard risk in loan origination that has been widely attributed to "originate-to-distribute" securitizations. Significantly, Congress recognized that a "one-size fits all" solution to regulating different types of securitizations would be impracticable and would not yield the best results.[45] Indeed, the Financial Stability Oversight Council (the "FSOC"), formed and tasked by the Dodd-Frank Act, advised that "any framework [implemented by the Agencies] should serve to mitigate the misalignment of incentives, asymmetric information, and macroeconomic risks associated with securitization, *and simultaneously promote a robust securitization market that can continue to provide credit to businesses, consumers and homeowners in the United States*."[46] The second half of the FSOC recommendation is critical. Managed CLOs provide significant funding and liquidity to the corporate loan markets. By imposing risk retention requirements on Managed

---

[44] *See* Financial Stability Oversight Council, "Macroeconomic Effects of Risk Retention Requirements" (Jan. 2011) (the "FSOC Risk Retention Study"), at 11, *available at* http://www.treasury.gov/initiatives/wsr/Documents/Section%20946%20Risk%20Retention%20Study%20%20(FINAL).pdf.

[45] *See* Senate Report No. 111-176 ("Senate Report"), at 130, *available at* http://banking.senate.gov/public/_files/Comittee_Report_S_Rept_111_176.pdf.

[46] *See* FSOC Risk Retention Study at 18 (emphasis added).

CLOs, and in particular the collateral managers, the corporate loan market would become constricted, reducing available funding and related liquidity, the effects of which could damage the U.S. economy.

Therefore, we ask that the Agencies explicitly exclude Managed CLOs from the Proposed Rule. While we note that CLOs may not properly be the subject of the Proposed Rule, in any case, the Dodd-Frank Act authorizes the Agencies to exempt certain securitizations which "may be appropriate in the public interest and for the protection of the investors."[47] Collateral managers of Managed CLOs do not originate any of the assets in their respective portfolios, the investment criteria and structural safeguards of these CLOs as well as the alignment of the economic interests of the collateral manager are indicative of reasonable risk management practices; also the important value of Managed CLOs in the corporate loan market should not be dismissed. We also note that Bank of America is a member of the Loan Syndication and Trading Association and has participated in the deliberations and consideration of a proposed comment letter, which (although we have not reviewed the final version of the LSTA letter) is expected to be submitted to the Agencies and Bank of America generally supports the proposed parameters of an "Open Market CLO" that the LSTA will suggest be exempt from otherwise required risk retention requirements.

D. Additional Aspects of the Proposed Rule that May Negatively Affect CLOs

For completeness, we would like to raise to the Agencies' attention two other features of the Proposed Rule which would have a negative effect on CLOs: the Premium Capture Cash Reserve Account; and the duration of the risk retention.

The proposed requirement for the Premium Capture Cash Reserve Account may be problematic for Managed CLOs where excess spread in the deal is monetized at closing through

[47] *See* Senate Report at 130.

the issuance of what is commonly called the "Class X" notes. The proceeds from the Class X notes have been used by Managed CLOs to cover certain large initial expenses of the CLO. The Class X notes are paid only from interest proceeds. The funds from the Class X notes are not allocated to pay any fees of the collateral manager or the issuing entity. We believe Managed CLOs share some of same impediments that issuers of RMBS would face, as discussed in Part III.B. of the Bank of America Risk Retention Letter, and therefore we refer the Agencies to the policy arguments advocated therein.

The Proposed Rule also requires a securitizer to retain the credit risk for the duration of the securitization. However, the purpose of credit risk retention is to ensure assets are reasonably underwritten and diligenced. The ABS interests of CLOs can have stated maturities of 10 or more years. After an initial period of time, the performance of the assets in the portfolio would no longer be solely or even primarily attributable to underwriting and origination, and instead such performance would be more a function of other external factors, e.g., the economy, inflation, wage growth, etc. We therefore believe the Agencies should propose reasonable timeframes for which risk retention is required for CLOs.

E. Conclusion

CLOs provide substantial funding and liquidity for corporations and businesses and the Proposed Rule if applied to Managed CLOs would significantly impair such funding and liquidity. We are aware that others have argued that the Agencies have no authority to apply the Proposed Rule to Managed CLOs and, even if the Agencies have such authority, we maintain that the Agencies should exempt Managed CLOs from the Proposed Rule for the reasons stated above.

* * * * *

We are grateful for the chance to provide these supplemental comments to the Proposed Rule. If there are any questions arising from our comments or any other aspect of this topic, we welcome the opportunity to provide assistance in any way helpful. Please feel free to contact Isvara Wilson (isvara.wilson@bankofamerica.com, 980-387-3597) or the undersigned (kenneth.l.miller@bankofamerica.com, 980-386-6669) at any time.

Respectfully Submitted,

Kenneth L. Miller

Deputy General Counsel

Appendix A

Split CRE Loan