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October 30, 2013

By Electronic Submission

Office of the Comptroller of the Currency
250 E Street, S.W.
Mail Stop 2–3
Washington, D.C. 20219

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave., N.W.
Washington, D.C. 20551

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Alfred M. Pollard, Esq.
General Counsel
Federal Housing Finance Agency
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Washington, D.C. 20552

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, S.W., Room 10276
Washington, D.C. 20410-0500

Re: **Notice of Proposed Rulemaking, Credit Risk Retention**
SEC (File No. S7-14-11); FDIC (RIN 3064-AD74); OCC (Docket No. OCC-2013-0010); FRB (Docket No. R-1411);
FHFA (RIN 2590-AA43); HUD (RIN 2501-AD53)

Ladies and Gentlemen:

BlueMountain Capital Management, LLC ("BlueMountain") is pleased to submit these comments in response to the joint Further Notice of Proposed Rulemaking, 78 Fed. Reg. 57928 (Sept. 20, 2013; originally released Aug. 28, 2013) ("FNPRM"), concerning risk retention and the implementation of Section 941 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act").

I. Overview.

BlueMountain submits these comments to address how the agencies' proposed regulations would adversely affect CLOs and the commercial loan market, how features of CLOs already provide extensive and adequate incentives that align CLO managers' interests with those of CLO investors, and how, if regulation is deemed necessary, other alternatives would protect investors without causing extensive harm to CLOs, credit markets, and competition.

In particular, BlueMountain is very concerned that the regulations proposed by the agencies would significantly and adversely affect the formation and continued operation of CLOs, along with the support they provide to the commercial loan market. Open Market CLOs present none of the risks presented by the originate-to-distribute model that Section 941 was designed to address, and a range of incentives ensure that their managers act consistently with investors' interests. CLO performance during the recent financial crisis confirms the robustness of these incentives, as does the subsequent resurgence of the CLO market that demonstrates investors' confidence that their interests are fully protected. For these reasons, additional regulation requiring CLO managers to retain more credit risk would produce no benefits and would substantially harm competition and the public. This result would be especially unfortunate because various alternatives are available to the agencies that would far better advance the public interest.

II. Our Experience with CLOs and Commercial Loan Markets.

BlueMountain is a leading absolute return manager managing approximately $17.4 billion of assets, with $14 billion in absolute return assets and $3.4 billion in CLO assets. BlueMountain is registered as an investment adviser under the Investment Advisers Act of 1940 and as a commodity pool operator and commodity trading advisor with the Commodity Futures Trading Commission. Our large and diverse team of more than 220 professionals in New York and London has broad experience in the credit markets.

BlueMountain has a long track record as a CLO manager dating to 2005. We currently manage nine CLOs, including three CLOs launched in 2013 and three CLOs launched prior to the financial crisis.

In addition to our deep expertise in the loan and CLO markets as a CLO manager, we are an active participant in both markets in our capacity as investment manager to our absolute return funds. We have been a loan investor since our inception in 2003 and have been investing in third-party CLO tranches since 2009. Today, absolute return funds managed by BlueMountain hold more than $1.7 billion (market value) of loans and $860 million (market value) of CLO debt/equity tranches.[1]

BlueMountain's market role and experience provides us with a clear understanding of the current CLO market, CLOs' performance during and since the recent financial crisis, and the

[1] Market value provided as of October 22, 2013.

likely adverse effects of the proposed regulations.

III. The Proposed Rules Would Adversely Affect Us, Other Open Market CLO Managers, Commercial Lending, Borrowers, and Investors.

Our experience in the CLO market leaves us with no doubt that the proposed rules would significantly and adversely affect the formation and scope of future CLOs.

The requirement that Open Market CLO managers retain five percent of the face value of the CLO's assets – in addition to the very significant credit risks already assumed through the CLO managers' compensation structure – would very adversely affect CLO formation. Many CLO managers are too small to secure or devote funds of that magnitude for positions that cannot be disposed or hedged – no matter what the competing business opportunities or demands. For other CLO managers that might have the financial capacity to hold such a significant position, including us, doing so would require a substantial restructuring of current business models and anticipated returns – making a once viable business much less profitable, requiring that managers instead devote those funds to other, more productive uses. Indeed, assuming the proposed risk retention requirements are implemented in their current form, BlueMountain would need to consider whether continuing to add newly launched CLOs to its management platform remains desirable.

Looking beyond BlueMountain, our market assessment is that the proposed rules would cause a dramatic decrease in the size and functioning of the CLO market as a whole. We are aware of the survey of CLO managers that indicated that the decrease in CLO offerings is anticipated to be in the order of 75 percent.[2] We are also aware of the broad range of comments and record evidence that establish that the proposed rules would adversely affect the formation and continued operation of the CLO market.[3] We generally agree with the factors identified in those comments and believe that those factors will contribute to the magnitude of the decrease in CLO formation identified in the LSTA survey. Indeed, the agencies themselves anticipate these adverse effects on CLOs and competition.[4]

Our experience also indicates that the resulting decrease in the formation and scope of CLOs would have profoundly negative implications for the loan market. CLOs are vital to supporting the loan syndication process and to providing liquidity necessary to the efficient functioning of many of the most important sectors of the commercial loan market. If the proposed rules were implemented and adversely affected CLOs in the manner we anticipate, then

[2] *See* LSTA Letter Comment, July 29, 2013 at 3–6.

[3] *See* LSTA Letter Comment, Aug. 1, 2011 at 14–17; LSTA Letter Comment, Apr. 1, 2013 at 14–16; LSTA Letter Comment, July 29, 2013 at 3–9; SIFMA Letter Comment, June 10, 2011 at 70; American Securitization Forum Letter Comment, June 10, 2011 at 137; JP Morgan Chase & Co. Letter Comment, July 14, 2011 at 50; Financial Services Roundtable Letter Comment, Aug. 1, 2011 at 32; Bank of America, Letter Comment, Aug. 1, 2011 at 29-30; Wells Fargo Letter Comment, July 28, 2011 at 29; White & Case Letter Comment, June 10, 2011 at 2.

[4] *See* 78 Fed. Reg. 57962.

borrower costs would increase, many borrowers could be shut out of the loan market altogether, the secondary market would become considerably less liquid, and many investors would be denied a valuable and attractive set of investment opportunities. Competition in the provision of loans and investment products would decrease. Those adverse results pose broad risks to the efficient functioning of the loan markets, and the adverse impact on borrowers would have further adverse effects on production efficiency, innovation, employment, and consumer prices.

IV. Additional Regulation of Open Market CLOs Is Inappropriate and Unnecessary.

A. Commercial and Regulatory Factors Already Align the Interests of Open Market CLO Managers and CLO Investors.

The proposed credit risk retention rules fail to account for the very significant factors that already ensure that Open Market CLO managers select and manage CLO assets prudently and in investors' interests. Importantly, Open Market CLO managers do not employ the "originate-to-distribute" model of securitization that contributed to the financial crisis and prompted Congress to enact Section 941. The nature of Open Market CLOs, and their role in the loan market and in the provision of securities to investors, ensures that they operate independently and that managers' interests are aligned with CLO investors' interests. This alignment of interests, and related lack of any need for risk retention regulation to further align those interests, arises from the following characteristics of Open Market CLOs.

First, Open Market CLO managers act independently of loan originators and exercise independent judgment in selecting among loans originated by unaffiliated entities. They are free from potential conflicts and disincentives related to the originate-to-distribute model and attract investors based in large measure on this independence and the resulting quality of asset selection. This provides a strong incentive for continued selection of higher-quality assets.

Second, CLO managers bear significant risk through their deferred, contingent compensation structure that has been shaped and ratified by the market. CLO managers receive their primary sources of compensation only if they deliver for their investors: they are compensated principally as the most subordinated CLO investors secure their returns, and a component of their compensation is received only after the investors in the most subordinated securities have achieved significant realized returns. CLO managers' compensation structure places a premium on careful selection and management of assets, aligning their interests with investors' interests. Indeed, investors and the competitive process have shaped and ratified the compensation structure. In this very fundamental sense, CLO managers already have skin in the game – and creating that interest, which already exists for CLOs, is the entire point of the proposed regulations. Moreover, the agencies have recognized and acknowledged the alignment of investor and manager interests created by the compensation structure.[5]

Third, like BlueMountain, almost all Open Market CLO managers are registered investment advisors, with associated fiduciary duties – and potential liabilities – to their

[5] *See* 78 Fed. Reg. 57963.

investors. This status triggers a separate and quite effective regulatory and supervisory regime that also provides incentives for careful selection and management of assets.

Fourth, the assets selected by Open Market CLO managers have been evaluated through multiple layers of underwriting and market decisions. These include the loan arrangers' decisions in underwriting the loans, the market's evaluation in pricing and syndicating the loans, and the CLO manager's decisions in selecting the loans for the CLO to purchase. Often, the assessments reflected in secondary market pricing also contribute to the selection of high-quality assets.

Fifth, CLO managers actively manage their loan portfolios for much of the life of a CLO. This active role is unlike that for many other ABSs, and further protects investors. CLO managers can limit losses and secure additional gains based on the additional performance information provided for the particular loans and by the secondary market. In this management role, the CLO manager exercises independent judgment and has every incentive to act only in the best interest of CLO investors.

Finally, CLO managers select – and CLO investors demand – commercial loans with features that protect investors. Prominently, CLO managers select senior secured loans. This often ensures a substantial recovery and loss protection even in the event of default, and is an important reason why CLOs protected investors so well during the recent financial crisis.

B. CLO Performance Confirms the Adequacy of Existing Incentives and Investor Protections.

The historically strong performance of CLOs demonstrates the concrete and practical results of these unique features of CLOs. Despite the massive financial crisis that resulted in widespread losses among other asset classes, CLOs performed exceptionally well. Although CLOs experienced ratings downgrades, the vast majority of CLO notes that were originally rated AAA retained ratings of AA or higher during the crisis.[6] The Board of Governors of the Federal Reserve has acknowledged the low default rate among CLOs during the financial crisis, which it attributed in part to the incentive alignment mechanisms inherent to CLOs.[7]

We are aware of numerous comments submitted in this rulemaking that confirm the strong performance of CLOs during the financial crisis.[8] Our experience as direct participants in

[6] *See* LSTA Letter Comment, August 1, 2011 at 7.

[7] *See* Board of Governors of the Federal Reserve, Report to Congress on Risk Retention 62, Oct. 2010.

[8] *See* LSTA Letter Comment, Aug. 1, 2011 at 7; LSTA Letter Comment, April 1, 2013 at 19; LSTA Letter Comment, July 29, 2013 at 2 and Appendix A; American Bar Association Business Law Section Letter Comment, July 20, 2011 at 90-93; American Securitization Forum Letter Comment, June 10, 2011 at 134-135; SIFMA Letter Comment, June 10, 2011 at 69; Morgan Stanley Letter Comment, July 27, 2011 at 18; Bank of America Letter Comment, Aug. 1, 2011 at 23; Wells Fargo Letter Comment, July 28, 2011 at 29; The Center for Capital Markets Competitiveness of the United States Chamber of Commerce Letter Comment, Aug. 1, 2011 at 4; Cong. Himes and other Members of Congress Letter Comment, July 29, 2011 at 2.

the industry accords with these views. We believe that this record of performance demonstrates that the existing safeguards and incentive alignments in the CLO industry more than adequately meet the goals of Section 941.

V. Other Regulatory Alternatives Would Be Preferable to the Agencies' Proposed Approach.

Although we believe that the intended scope of Section 941 and the facts surrounding the operation of CLOs indicate that it would be a significant mistake to impose credit risk retention requirements on Open Market CLOs, alternative regulatory approaches would meet the agencies' objectives while causing far less harm to CLOs and commercial loan markets.

For example, the LSTA has proposed that CLO managers could retain credit risk, consistent with the statutory requirements, by holding a set of securities that embody the compensation structure currently endorsed by the market and purchasing an interest in the CLO's equity.[9] Both the securities and the equity interest would confirm the alignment of interests between the CLO manager and the CLO investors. Significantly, the cash outlay for the proposed equity interest would be manageable for most CLO managers. We endorse that approach as far preferable to the agencies' proposed regulations. We also believe that the standard CLO compensation structure aligns our interests with those of our investors, and that the proposed purchase of an equity interest is workable and should remove any doubt that appropriate incentives apply to CLO managers' asset selection decisions.

In addition, we are aware that various commenters are proposing that parties associated with the CLO manager be able to retain credit risk in a manner that would satisfy Section 941's requirements. We endorse those proposals. Often, key investors or market participants work with a CLO manager in initiating the CLO and may play an advisory or other role in the selection of CLO assets. Having such parties, rather than the CLO manager, retain credit risk makes considerable sense in terms of the agencies' objectives and the effect on the CLO market (the agencies' recently proposed alternative related to loan arrangers' holding risk similarly relies on a third party's retention of credit risk). Because parties coordinating with the CLO manager may contribute to the selection of assets, having them retain credit risk advances the agencies' goal of improving incentives related to asset selection. Such parties often have investment, rather than investment management, as their core business, making it more appropriate that they retain the requisite interest. In addition, they may do so without causing the disincentives and adverse impacts that arise when the CLO manager is required to retain a comparable economic interest.

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BlueMountain appreciates the agencies' consideration of these comments and would be pleased to provide additional information or assessments that might assist the agencies' decision-making. Please feel free to contact Brandon Cahill in the event you have questions regarding

[9] *See* LSTA Letter Comment, Apr. 1, 2013.

these observations and conclusions.

Sincerely,

Brandon Cahill
Portfolio Manager
BlueMountain Capital Management, LLC