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April 26, 2012

VIA HAND DELIVERY

Honorable William H. Pauley
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street, Courtroom 15C
New York, NY 10007

Re: *Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago, et al. v. The Bank of New York Mellon*, No. 11-cv-05459 (WHP)

Dear Judge Pauley:

We are counsel to the Securities Industry and Financial Markets Association ("SIFMA") and are writing to respectfully request a pre-motion conference under item III.A of your Individual Practices or other authorization for leave to submit a letter (the "Letter") to the Court as *amicus curiae* to support defendant The Bank of New York Mellon's ("BNYM's") motion for: (1) reconsideration of the Court's Order of April 3, 2012 applying the Trust Indenture Act of 1939, as amended, 15 U.S.C. §§ 77aaa *et seq.* (the "TIA"), to SEC-registered mortgage pass-through certificates issued pursuant to Pooling and Servicing Agreements; or (2) in the alternative, certifying the Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

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

SIFMA respectfully seeks to be heard on its members' behalf because: (1) the Order is inconsistent with decades of SEC guidance that mortgage pass-through securities are not subject to the TIA; and (2) the Order may impose significant costs and uncertainty on the multi-hundred billion dollar mortgage pass-through securities ("MBS") market. Throughout the 35-year history of the MBS market, SIFMA's members, and their affiliates, have played a significant role in the market, in a broad range of capacities, including as trustees, issuers, servicers, market-makers and investors. Throughout this period, SIFMA's members have participated in the MBS market on the understanding that the TIA does not apply to mortgage pass-through certificates. Accordingly, SIFMA's members have a strong interest in a definitive

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resolution to the market uncertainty created by the Order. SIFMA brings an industry-wide perspective, distinct from that of the parties, with respect to the costs and uncertainties that may be imposed on all market participants by the Order, as well as with respect to the broader policy implications of the Order. *See Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002) ("an amicus [brief] may provide important assistance to the court" by "'explain[ing] the impact a potential holding might have on an industry or other group'") (citation omitted).

In light of the above, we respectfully request that the Court convene a pre-motion conference at a date convenient to the Court to consider a motion or otherwise grant leave to SIFMA to submit the Letter to the Court as *amicus curiae* in support of defendant BNYM's motion for reconsideration of the Order, or, in the alternative, for certification of the Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). For the convenience of the Court, SIFMA respectfully attaches hereto as Exhibit A a copy of the proposed Letter.

Respectfully Submitted,

Martin L. Seidel

Martin L. Seidel

MLS/pal
Enclosure

cc (w/enclosure, by hand delivery and email):
Beth Kaswan, Esq., Scott & Scott
Matthew D. Ingber, Esq., Mayer Brown LLP

EXHIBIT A

Proposed Letter *Amicus Curiae* of the
Securities Industry and Financial Markets Association ("SIFMA")

Exhibit A

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Re: *Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago, et al. v. The Bank of New York Mellon*, No. 11-cv-05459 (WHP)

Dear Judge Pauley:

We are counsel to the Securities Industry and Financial Markets Association ("SIFMA"),[1] *amicus curiae* in the above-referenced matter. We write in support of the motion by defendant The Bank of New York Mellon ("BNYM") for: (1) reconsideration of the Court's Order of April 3, 2012 (the "Order") applying the Trust Indenture Act of 1939, as amended (15 U.S.C. §§ 77aaa *et seq.*) (the "TIA"), to SEC-registered mortgage pass-through certificates issued pursuant to Pooling and Servicing Agreements ("PSAs"); or (2) in the alternative, for certification of the Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).[2]

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

Please note that the views expressed in this letter do not necessarily represent those of SIFMA's asset management group, some members of which may hold different or opposing views to those expressed herein.

[2] Consistent with Second Circuit Local Rule 29.1, SIFMA states that no party's counsel authored this letter in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the letter; and no person other than SIFMA, its members, and its counsel contributed money that was intended to fund preparing or submitting this letter. 2d Cir. L.R. 29.1.

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April [ ], 2012

SIFMA respectfully seeks to be heard on its members' behalf because application of the TIA to such "private label" mortgage pass-through certificates would retroactively impose on transaction parties unforeseen duties and liabilities that are contrary to long-standing Securities and Exchange Commission ("SEC") guidance and decades of market practice. SIFMA's members, and their affiliates, play a significant role in the mortgage pass-through certificates ("MBS") market in a broad range of capacities, including as trustees, issuers, servicers, market-makers and investors. Accordingly, SIFMA brings an industry-wide perspective distinct from that of the parties, including as to the costs and uncertainties that may be imposed on all market participants by the Order. As explained below, the Order may fundamentally alter the settled relationships of participants in thousands of existing MBS transactions, collectively representing hundreds of billions of dollars. It also may create significant uncertainty regarding the respective roles and liabilities of participants in future MBS transactions, just as the securitization markets are attempting to rebound from the recent financial markets crisis. Until there has been final resolution as to the TIA-related liabilities and obligations of trustees and other transaction parties, the resulting uncertainty may create costs and complexity with respect to both completed and prospective transactions.

In light of decades of SEC guidance that mortgage pass-through certificates are not subject to the TIA, Congress' consistent failure to extend the TIA to mortgage pass-through certificates and the significant costs and uncertainty that may be created by the Order, we respectfully support BNYM's motion for reconsideration of the Order or, in the alternative, for certification of the Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

The Order Upends More than Three Decades of SEC Guidance and Market Practice

The first SEC-registered mortgage pass-through certificates were issued in 1977, by a trust established by Bank of America to acquire residential mortgages. Because mortgage pass-through securities had previously been issued exclusively by Fannie Mae, Freddie Mac and Ginnie Mae, which enjoy special status under the federal securities laws, the entire Commission, not only its staff, considered certain Securities Act of 1933 ("1933 Act") and Securities Exchange Act of 1934 ("1934 Act") issues raised by that ground-breaking Bank of America offering. *See Bank of Am. Nat'l Trust & Sav. Ass'n*, 1977 SEC No-Act. LEXIS 1343 (May 19, 1977); *Bank of Am. Nat'l Trust & Sav. Ass'n*, Rel. No. 34-14446, 14 SEC Dkt. 113 (Feb. 6, 1978). The TIA status of those certificates was almost certainly addressed in the context of that offering because Section 305 of the TIA requires the SEC to issue an order refusing to permit a registration statement to become effective if it finds that a security lacks a required indenture. 15 U.S.C. § 77eee. No such TIA-related "stop order" was issued with

respect to that offering (or any subsequent MBS offering), demonstrating the SEC's determination that the TIA is not applicable to mortgage pass-through certificates.

Indeed, a 1984 article by one of the first securitization practitioners makes clear that, from the inception of the SEC-registered MBS market, the SEC has taken the position that the TIA is not applicable to mortgage pass-through certificates. *See* Walter G. McNeill, "Securities Law Aspects of Mortgage-Backed Securities," 250 PLI/Real 399, 421 (PLI Sept. 24, 1984). SEC Staff Interpretative Response 202.01 under the Trust Indenture Act, which played a prominent role in the Order, consequently represents a long-standing position of the SEC and a fundamental tenet of the private label pass-through market. *See* SEC Div. of Corp. Fin., *Trust Indenture Act of 1939 – Interpretive Response Section 202.01* (last updated Mar. 30, 2007), *available at* http://www.sec.gov/divisions/corpfin/guidance/tiainterp.htm. In fact, that Interpretative Response merely repeats Item 11 of the "Telephone Interpretations" under the Trust Indenture Act published in July of 1997, which were themselves an attempt to codify prior SEC staff interpretations.[3] *See* SEC Div. of Corp. Fin., *Manual of Publicly Available Telephone Interpretations* (*Trust Indenture Act of 1939*), *No. 11* (July 1997), *available at* http://www.sec.gov/interps/telephone/cftelinterps_tia.pdf.

Throughout the 35-year history of the SEC-registered MBS market, both the SEC and Congress have repeatedly taken steps to formally or informally remove regulatory barriers to the growth of the market and to craft a regulatory scheme that was deemed appropriate. However, at no time have they sought to impose the provisions of the TIA on that market, despite ample opportunities to do so.

Notably, in 1984, the Secondary Mortgage Market Enhancement Act ("SMMEA") was enacted to remove impediments to the development of a secondary market for residential mortgage-backed securities (Pub. L. No. 98-440, 98 Stat. 1689 (1984)); and, while SMMEA was under consideration, the SEC amended Rule 415 under the 1933 Act to permit "mortgage related securities" (as defined in SMMEA) to be offered on a "shelf-registered" basis. *See Final Rule: Shelf Registration*, Rel. No. 33-6499, 1983 SEC LEXIS 315 (Nov. 17, 1983). To address another obstacle to the growth of the market, the Tax Reform Act of 1986 created a new tax vehicle, commonly called a REMIC, to facilitate the issuance of multi-class mortgage pass-through certificates by eliminating "double taxation" of those securities. *See* Pub. L. No. 99-514, 100 Stat. 2085 (1986).

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[3] In that regard, "no-action" letters issued in 1984 and 1988 are consistent with the position taken in Interpretive Response 202.01 and the predecessor 1997 Telephone Interpretation. *See Marion Bass Sec., Inc.*, 1984 SEC No-Act. LEXIS 2473 (July 9, 1984); *Harbor Fin., Inc.*, 1988 SEC No-Act. LEXIS 1463 (Oct. 31, 1988).

The SEC also took a significant step toward facilitating the growth of the market in 1992, when it adopted Rule 3a-7 under the 1940 Act to exclude the issuers of most asset-backed securities ("ABS"), including mortgage pass-through certificates, from that Act. *See Final Rule: Exclusion from the Definition of Investment Co. for Structured Financings*, Rel. No. IC-19105, 1992 SEC LEXIS 3086 (Nov. 19, 1992). Two years later, Congress passed legislation to amend the 1934 Act to include commercial mortgages in the definition of "mortgage related security," thereby permitting highly-rated commercial mortgage-backed securities ("CMBS") to obtain the same favored treatment SMMEA afforded to highly-rated residential mortgage-backed securities ("RMBS"). *See* Reigle Community Development & Regulatory Improvement Act of 1994, Pub. L. No. 325, § 347, 108 Stat. 2241 (1994). That same year, the SEC created a specially-tailored 1933 Act framework to permit the use of "structural term sheets" and "computational materials" to market ABS. *See Mortgage & Asset-Backed Securities*, 1994 SEC No-Act. LEXIS 525 (May 20, 1994).

However, the most important SEC ABS initiative was announced in May of 2004, when the SEC proposed Regulation AB and other ABS rules, to "address comprehensively the registration, disclosure and reporting requirements for asset-backed securities." *See Proposed Rule: Asset-Backed Securities*, Rel. No. 33-8419, 2004 SEC LEXIS 934, at *1 (May 3, 2004). When it considered Regulation AB, the SEC repeatedly emphasized that "the staff has to date addressed the lack of a defined set of regulatory requirements for asset-backed securities ***through the filing review process*** and, where necessary, through staff no-action letters or interpretive statements." *Id.* at *32 (emphasis added); *see also Final Rule: Asset-Backed Securities*, Rel. No. 33-8518, 2004 SEC LEXIS 3068 (Dec. 22, 2004). In something of an understatement, the SEC characterized those no-action letters and interpretive positions as "numerous." 2004 SEC LEXIS 934, at *33.

More recently, in response to the crisis in the financial markets, the SEC proposed significant amendments to Regulation AB and other ABS-related rules, to "improve investor protection and promote more efficient asset-backed markets." *See Proposed Rule: Asset-Backed Securities*, Rel. No. 33-9117, 2010 SEC LEXIS 1493, at *12 (May 3, 2010). The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 11-203, § 619, 124 Stat. 1623 (2010) (codified at 12 U.S.C. § 1851(d)(1))) also contained a number of provisions designed to address perceived shortcomings in the regulatory framework for ABS; and the SEC has adopted or proposed various rules in response thereto. *See, e.g., Final Rule: Issuer Review of Assets in Offerings of Asset-Backed Securities*, Rel. No. 33-9176, 2011 SEC LEXIS 234 (Jan. 20, 2011).

None of the foregoing Congressional or SEC initiatives has suggested that the TIA is applicable to mortgage pass-through certificates or is needed to close a regulatory gap

or protect investors. Because Regulation AB was intended to "comprehensively" address the treatment of ABS, it is particularly significant that none of the above-cited Regulation AB releases has addressed the TIA. Rather, although each of those releases makes clear that the SEC is knowledgeable regarding the structural aspects of ABS transactions (including the functions of the PSAs) and although Item 1109 of Regulation AB imposes specific disclosure requirements regarding the duties and responsibilities of trustees, the SEC made no attempt to revise its long-standing TIA treatment of pass-through certificates. To the contrary, Interpretive Response 202.01, which was published approximately two years after Regulation AB was adopted, reiterated this long-standing position.

That the SEC periodically has considered the application of the TIA in the context of the ABS market also is evidenced by the fact that the SEC was the driving force behind the Trust Indenture Reform Act of 1990 (the "TIA Reform Act") (Pub. L. No. 101-550, § 401, 104 Stat. 2721 (1990) (codified as amended at 15 U.S.C. §§ 77ccc-77eee, 77iii-77rrr and 77vvv)), which made extensive revisions to the TIA "to adjust the requirements of the law to contemporary financing instruments and techniques." *See* Statements on Introduced Bills & Joint Resolutions: S. 2566 (Sen. Proxmire), Cong. Rec. S15912, S15947 (daily ed. June 24, 1988). Indeed, the original version of that legislation was drafted by the SEC; and an SEC memorandum in support of the legislation notes that the SEC sought to expand the exemptive authority contained in Section 304 of the TIA to, in part, accommodate collateralized mortgage obligations (a type of ABS that is indisputably subject to the TIA). *See* Memorandum of SEC in Support of Trust Indenture Reform Act of 1987, Cong. Rec. S15912, S15952 (daily ed. June 24, 1988). Although the SEC clearly was cognizant of the MBS market when it proposed this legislation, it made no attempt in that context (or subsequent thereto) to alter its TIA treatment of pass-through certificates. By contrast, several bills have been introduced in the current Congress to apply the TIA, or certain TIA-inspired requirements, to mortgage-backed securities. *See* Foreclosure Fraud and Homeowner Abuse Prevention Act of 2011, S. 824, 112th Cong., 1st Sess. (Apr. 14, 2011); Private Mortgage Market Investment Act, H.R. 3644, 112th Cong., 1st Sess. (Dec. 13, 2011). The introduction of those bills serves to underscore the Congressional understanding that the TIA does not currently apply to "private label" mortgage pass-through certificates and that applying the TIA in this market requires legislative, rather than judicial, action.

In sum, the MBS transactions to which the Order is directed were effected during a 35-year period in which the SEC – in the context of its review of hundreds of 1933 Act registration statements, in Interpretive Response 202.01 (and the predecessor Telephone Interpretation), in its efforts to modernize the TIA, in several "no-action" letters and, implicitly, in its efforts to adopt and revise Regulation AB – made clear that the TIA is not applicable to pass-through certificates. With that 35-year history as a backdrop, this is clearly

not a circumstance in which the market has been relying solely upon "conclusory," hastily-drafted statements on the SEC's website. Rather, Interpretive Response 202.01 reflects three and one-half decades of ongoing review of the MBS regulatory scheme by both the SEC and its staff, as well as by Congress. During that entire time period, only the Order has concluded that the TIA is applicable to pass-through certificates.

The Market at Which the Order Is Directed Is Both Enormous and Economically Crucial

The market in which the Order is currently reverberating is both enormous and crucial to the economic well-being of our country. In the former regard, the non-agency RMBS market and the CMBS market collectively included outstanding securities of $1.438 trillion as of the end of 2011. *See* SIFMA, "U.S. Mortgage-Related Securities Outstanding," *available at* http://www.sifma.org/uploadedfiles/research/statistics/statisticsfiles/sf-us-mortgage-related-outstanding-sifma.xls. That total represents thousands of different transactions that were effected in the well-founded belief that the TIA was not applicable, but that are now subject to legal uncertainty as a result of the Order.

In the context of proposing and adopting Regulation AB, the SEC observed that the "fairly young" ABS market has "rapidly become an important part of the U.S. capital markets." *See* 2004 SEC LEXIS 934, at *7; 2004 SEC LEXIS 3068, at *10. The SEC also acknowledged that "securitization is playing an increasingly important role in the evolution of the fixed income markets." *See* 2004 SEC LEXIS 934, at *32; 2004 SEC LEXIS 3068, at *37. Moreover, notwithstanding the financial markets crisis, the SEC continues to believe that "[s]ecuritization can provide liquidity to nearly all major sectors of the economy including the residential and commercial real estate industry . . ." and that the drastic decrease in new issuances of ABS following the financial crisis "has negatively impacted the availability of credit." *See* 2010 SEC LEXIS 1493, at **13, 15.

In view of the massive size and economic significance of the market, SIFMA is concerned that the Order will have far-reaching ramifications.

Applying the TIA Retroactively Could Impose Unforeseen Burdens and Liabilities and Raise Difficult Interpretive Questions

As discussed, the parties to mortgage pass-through securities transactions effected those offerings and assumed their roles in the good faith and long-standing belief that the TIA is not applicable and in reliance on legal opinions that reinforce this belief. Applying the TIA retroactively to thousands of MBS transactions, totaling hundreds of billions of

dollars, as the Order would do, may thus subject transaction parties to potential obligations and liabilities that were neither expected nor bargained for and for which the trustees, in particular, were never compensated. It also may raise a myriad of questions regarding the manner in which certain TIA provisions should be construed in the mortgage pass-through context.

With respect to the latter issue, the TIA was drafted using terminology that is not well-suited to pass-through certificates, *e.g.*, it references "obligors" and "default." However, in the pass-through certificate context, the identity of the "obligor" is unclear and "events of default" typically do not relate to credit events with respect to the securities. Ambiguity regarding the identity of the "obligor" will, for example, raise questions regarding the construction of, and the potential need to comply with: (1) Section 314, which imposes extensive reporting requirements on "obligors" (15 U.S.C. § 77nnn); and (2) Section 312, which requires each "obligor" to furnish the trustee with the names and addresses of securities holders (*id.* § 77lll). A similar interpretive problem arises with respect to Section 314(d) of the TIA, which imposes certain appraisal requirements upon an "obligor" if an indenture "is to be secured by the mortgage or pledge of property or securities." *Id.* § 77nnn(d).

The meaning of "default" also is pivotal, because, if such an event has occurred, pass-through trustees could be compelled to consider whether they have a "conflict of interest" for purposes of Section 310 of the TIA, requiring them to either eliminate the conflict, resign or seek a "stay" order from the SEC. *Id.* § 77jjj. This requirement could be particularly problematic if Section 310 were deemed to require a separate trustee, following a "default," for each of the multiple classes of MBS issued in a particular offering. Trustees also may be compelled to determine whether they must provide security holders with the notice of default required by Section 315(b) of the TIA and whether the heightened duties to which they are subject in certain circumstances derive only from the applicable PSAs or also from the TIA. *Id.* § 77ooo(b). Even if no "default" has occurred, trustees may need to consider whether any events have occurred that might require them to transmit to security holders, and file with the SEC, a report pursuant to Section 313(a) of the TIA. *Id.* § 77mmm(a).

To add to the market confusion created by the Order, at least one Order-inspired lawsuit already has been filed (*Policemen's Annuity and Benefit Fund of the City of Chicago v. Bank of America, N.A.*, No. 12-cv-2865 (S.D.N.Y. Apr. 11, 2012)); and many others are certain to follow. Trustees could thus be faced with the need to defend their past actions in numerous lawsuits, while simultaneously attempting to assess their TIA status and TIA obligations in the case of thousands of securitizations with respect to which they serve as trustee. Issuers and other transaction parties also could face additional potential liabilities and obligations.

The Order Creates Substantial Uncertainty for Parties That Are Currently Structuring Transactions

The Order also poses a significant challenge for parties that are currently in the process of structuring SEC-registered pass-through transactions or that may wish to do so while the uncertainty created by the Order remains, as those parties will be confronted with the need to assess the TIA status of those transactions. This unanticipated impediment could further delay the recovery of the currently moribund private label RMBS market, thereby continuing to suppress the availability of mortgage credit and helping to prolong the sustained slump in home prices that has severely hindered the recovery of the U.S. economy. It also could have a chilling effect on new CMBS transactions, just as that market has been growing more robust.

* * *

For the above-described reasons, SIFMA supports BYNM's motion for reconsideration or, in the alternative, for certification of the Order for interlocutory appeal. As noted, the Order contradicts decades of SEC guidance, may create substantial and unforeseen burdens for transaction parties, and has already generated and will continue to generate significant uncertainty in an enormous and economically significant market.

Respectfully Submitted,

Martin L. Seidel

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