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August 21, 2012

VIA ELECTRONIC MAIL: secretary@cftc.gov
c/o David A. Stawick, Secretary

Commodity Futures Trading Commission

Chairman Gary Gensler
Commissioner Jill E. Sommers
Commissioner Bart Chilton
Commissioner Scott D. O'Malia
Commissioner Mark P. Wetjen

With copies to:

Office of The General Counsel
Dan M. Berkovitz, General Counsel

Division of Swap Dealer and Intermediary Oversight
Gary Barnett, Director
Frank N. Fisanich, Chief Counsel

Re: Potential Applicability of Commodity Pool Regulation to Securitization Transactions

Dear Chairman Gensler and Commissioners Sommers, Chilton, O'Malia and Wetjen:

The Securities Industry and Financial Markets Association ("SIFMA")[1] requests that the Commodity Futures Trading Commission ("Commission" or "CFTC"), or its staff, provide interpretative guidance and other appropriate relief regarding securitization transactions in the light of amendments to commodity pool regulation under the Commodity Exchange Act (as amended, the "CEA") by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). Historically, securitization entities have not been regulated as commodity pools by the CFTC. Securitization entities do not hold commodity interests as they were defined under prior law and regulation. However, the

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

expanded scope of the definition of "Commodity Pool" under the Dodd-Frank Act, which includes "swaps" as commodity interests, raises a question whether existing and new securitization entities that have entered or will enter into swaps could be viewed as commodity pools.

This concern does not stem primarily from the ordinary meaning of the statutory language, which defines a "Commodity Pool" as an investment trust or similar enterprise "operated for the purpose of trading" in commodity interests. Nor is there any legislative history indicating an intent to subject securitizations to commodity pool regulation. Rather, the concern arises from the broad interpretation the Commission has given those words in other contexts, in which it does not distinguish between trading and passive holding, appears to give no weight to the words "operated for the purpose" and has expressed the view that entering into a single swap would make an entity a "Commodity Pool."[2]

SIFMA believes that reading the new statutory definition of "Commodity Pool" to encompass securitization entities that have entered or will enter into swaps would strain reasonable interpretation and result in the application of a regulatory framework that would produce no meaningful benefit to the marketplace or the investors in these transactions. Furthermore, any such reading likely would have significant adverse consequences ranging from infeasibility or impossibility of compliance and potential economic harm to investors in the case of existing structures, to a potential chilling effect on lending to business and consumers. Perhaps most seriously, if securitization transactions are characterized as commodity pools, interaction with the regulations implementing the Volcker Rule, as currently proposed, could result in a significant contraction of business and consumer credit and adversely affect banking entities, with potential serious consequences for the U.S. economy. (See the discussion of the Volcker Rule below in this letter.)

Securitizations generally are financing transactions, in which, among other characteristics that distinguish them from commodity pools, passive limited purpose entities issue primarily fixed-income securities for the purpose of acquiring trade or consumer finance receivables, mortgage loans or other financial assets. Fixed-income securities are debt or debt-like instruments that have a specified principal amount, interest rate or yield and maturity date and do not share in profit or loss from the financial assets or any swaps the securitization entity may hold.

The commodity pool regulatory scheme plainly is designed for structures that are very different from securitizations, such that it is difficult and in some cases impossible to determine how particular regulatory requirements would be applied to or interpreted in the securitization context or how securitizations could even comply. These issues are most

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2 See, Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11252, 11258 (Feb. 24, 2012); and Defendant Commodity Futures Trading Commission's Cross-Motion for Summary Judgment, and Motion to Dismiss in Part at 15, Investment Company Institute, Chamber of Commerce of the United States of America v. United States Commodity Futures Trading Commission, No. 1:12-cv-00612 (BAH) (D.D.C. June 18, 2012).

critical in the context of already existing transactions — in general, amortizing structures that are not issuing new securities — that cannot feasibly be modified in order to comply. Moreover, as discussed below, compliance with many of the disclosure and similar requirements would be meaningless even if it could be achieved. Significant structuring and compliance issues also would exist for future transactions which use swaps. For these reasons, SIFMA respectfully submits that it is imperative that the Commission or its staff provide clear and unambiguous interpretative guidance and other appropriate relief in respect of securitization vehicles.

This letter outlines certain of the principal problems SIFMA believes are posed for the securitization markets, and the slides attached as Annex A provide data on the large volume of outstanding transactions. Given the imminent effectiveness of the relevant new provisions of the CEA and related regulations, and the chilling effect SIFMA expects they would have on the securitization markets in the absence of clarifying guidance, we request a meeting at your earliest convenience to discuss how the interpretative guidance and other relief we believe necessary to avoid market disruption and other adverse economic consequences can be most broadly and expeditiously achieved, and to answer questions you may have.

Background

Securitization has long been a significant component of the U.S. and global capital markets. As of June 2012, outstanding securitizations issued primarily in the U.S. numbered over ten-thousand, representing more than three trillion dollars of outstanding securities. (See Annex A.)

By "securitization" we mean generally a structure in which a special purpose entity issues asset-backed securities — predominantly highly rated, fixed-income debt instruments — for the purpose of financing the acquisition and holding of trade or consumer finance receivables, residential mortgages, commercial mortgages or other financial assets. The special purpose entity often is established by the originator of the assets, which sells the assets as part of the securitization process; these originators include manufacturers and other non-financial businesses as well as banks, finance companies and other financial institutions. The pool of financial assets is the source of repayment of the issued securities and other obligations of the entity. Funding through securitization is often a substantial portion of the originator's funding of its business. From an investor perspective, securitization affords diversification from corporate credit by offering secured debt with repayment based on an amortizing pool of financial assets (often consumer receivables), structured to be unaffected by an insolvency of the originator of the assets.

Many existing securitization entities have entered into swap transactions. In most cases, these are interest rate and/or currency swaps used to hedge mismatches between the fixed rates or the currency of the securitization vehicle's assets and the floating rate or the currency of the vehicle's issued securities. These swaps typically are entered into at or about the time of the transaction's closing and the entities generally do not enter into new swaps except as may be necessary to address a counterparty downgrade or default. These vehicles are not formed or operated for the purpose of entering into swaps and do not acquire other commodity interests. The swaps they enter into are incidental to the purpose for which securitization entities are formed: to provide funding for the extension of business and consumer credit. Securitization entities do not engage in activities that even remotely resemble "trading in" swaps or other commodity interests; they generally enter into and hold swaps to maturity for the purpose of hedging. Securitizations are not marketed as, nor are they, a way to invest in commodity interests.

Moreover, securitizations lack the other defining characteristics of commodity pools —

> ***Financings, not "Investment Trusts"***
>
> The most traditional and standardized forms of securitization — those of auto loans and leases, credit card receivables, student loan receivables, residential mortgage loans and commercial mortgage loans — are essentially capital markets financings of sales finance or other financial asset inventory. These transactions, as well as securitizations of other asset classes, and the trade receivables financing offered to manufacturing and other businesses through asset-backed commercial paper issuers, are functionally close relatives of inventory finance and receivables factoring, or mortgage lending, not "investment trusts."
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> ***Issuers of Tranched Debt Securities***
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> Securitization entities issue primarily fixed-income securities, generally in multiple tranches with different payment priorities. These are debt or debt-like instruments with a stated interest rate or yield and principal balance and a specified maturity date which do not share in profit or loss from the financial assets and any swaps the securitization entity may hold.
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> ***Non-Redeemable Securities; No "NAV"***
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> As described above, securitization entities issue securities to fund the acquisition and holding of receivables or other amortizing financial assets. Securitizations rely on the amortizing cash flow from these receivables or other financial assets, together with net payments under any swaps, to repay their securities. These pools of assets, which may consist of thousands of consumer loans, generally do not have a readily ascertainable market value. Securitization entities do not calculate a "net asset value" for their issued securities. The market value of the underlying assets, even if it were readily available, is irrelevant because these structures rely on cash flow from held-to-maturity assets and are not permitted to liquidate assets in the ordinary course. Investors do not have a right of redemption, nor can the sponsor or issuer call the transaction (other than, in certain cases, a *de minimis* "clean-up call").

Generally Passive Entities

Auto loans and leases, residential mortgage loans, student loans, commercial mortgages and other asset classes are predominantly securitized through the use of passive issuing vehicles that acquire a pool of financial assets to be held to maturity. Other asset classes, such as credit cards, have a revolving pool of receivables arising in a designated portfolio of consumer accounts. While certain types of securitization, such as collateralized loan obligations and collateralized debt obligations, may have managed portfolios and permit limited trading for a specified period, this trading typically would be of commercial loans or securities, not commodity interests. All of these entities are limited purpose vehicles that, once formed, have no ability to change their purposes or permitted assets, and little to no ability to amend their governing documents.

Potential Negative Effects on the Securitization Markets

Market Uncertainty

SIFMA believes that securitization entities should not be classified as commodity pools. However, in the absence of clarifying interpretive guidance from the CFTC, the securitization market may suffer significant harm as a result of uncertainty with respect to the status of securitization entities under new law and regulation. This legal and regulatory uncertainty could have a significant chilling effect on any new securitization transactions that have a structural need to hedge interest rate or currency risks, and would be particularly acute for existing securitization entities that have little or no ability to modify their governance and administration in order to conform to a regulatory scheme that was not applicable to them when they were formed.

Infeasibility of Compliance with Retroactive Regulation

Securitization entities are established with limited purposes relating to the assets they are to acquire and the securities they will issue to fund that acquisition, and are subject to numerous restrictive covenants limiting their ability to engage in other activities or to take actions not contemplated at the time of formation. Securitizations are rarely amended. It is at best difficult and often impossible to obtain the investor and other consents generally required to amend securitization transaction documents. In addition, at the time of formation these vehicles estimate anticipated expenses and provide for coverage of those expenses but have no ability to raise additional capital. Accordingly, depending upon the documents and structure of a given securitization, there either may be no source of funds available for additional expenses involved in complying with newly applicable regulations, or such expenses may reduce the funds needed to repay debt outstanding to investors.

Among other things, the uncertainty regarding application of the new regulations, together with the difficulty or impossibility of compliance for existing entities, could result in some entities being considered to be a commodity pool but not having a person identified as a

Commodity Pool Operator that is registered or exempt from registration. Such an entity would not be an "eligible contract participant;" as a result, it would not be able to enter into a replacement swap if, for example, its counterparty on a hedging transaction were to default. The inability for a securitization entity to enter into a replacement hedge could result in diminished cash flows available to repay its debt, which could cause losses to investors.

These and likely other potential adverse consequences to investors due to a retroactive application of new law and regulations would seem to be antithetical to, rather than in furtherance of, the goals of the Dodd-Frank Act.

Ownership of Indirect Commodity Interests

Absent regulatory clarification, investors such as investment vehicles that hold mortgage-backed or other asset-backed securities — including such investment vehicles that are not commodity pools under existing law and regulation and do not enter into derivatives transactions — could suddenly find themselves commodity pools by virtue of a retroactive change in the regulatory status of their investments.[3] Such an effect presumably is unintended, but could have far-reaching ripple effects if not addressed.

Regulatory Requirements Burdensome, Conflicting and Largely Irrelevant to Securitization

The retroactive imposition of new regulatory requirements that adversely affect outstanding securities or have unanticipated, unintended, adverse regulatory consequences for the persons who hold or obtained funding from those securities, would be unfortunate in any circumstances. However, retroactive imposition is particularly unfortunate when it serves no constructive purpose. The imposition of the commodity pool regulatory framework on the securitization markets would not fulfill any regulatory purpose or produce any benefit to investors in either existing or new transactions. Securitization vehicles are securities issuers that must comply with U.S. securities laws if offering securities in the U.S. or to U.S. persons. Being required also to satisfy CFTC disclosure and reporting requirements would not only be duplicative, but also in many cases would subject issuers to conflicting regulatory requirements. Furthermore, as presently formulated, CFTC disclosure and reporting requirements seek information that is largely irrelevant to securitizations.

Potential for Serious Unintended Consequences under the Volcker Rule

In their proposed rulemaking issued in fall of 2011, the agencies charged with drafting regulations under the Volcker Rule, including the Commission (the "Agencies"), construed the statutory definition therein of "hedge fund" and "private equity fund" as providing them with discretion to define the term "covered fund" to include any commodity pool as defined in the Commodity Exchange Act without regard to whether the commodity pool is in the nature of a hedge fund or private equity fund. The overbreadth of the Agencies' definition of

[3] See, Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11252, 11268 (Feb. 24, 2012).

"covered fund" was exacerbated by the Agencies having inadequately addressed robust exemptions for loan securitization business, thus giving insufficient regard to Congressional efforts to avoid disrupting securitization markets via Section 13(g)(2) of the Volcker Rule (the "Securitization Exclusion"). The Securitization Exclusion prescribed that the Volcker Rule is not to be "construed to limit or restrict the ability of a banking entity or nonbank financial company ... to sell or securitize loans." Many securitization vehicles that are not hedge funds or private equity funds rely solely on section 3(c)(1) or 3(c)(7) of the Investment Company Act to not be deemed an investment company and would therefore be included as "covered funds" under a separate clause of the definition in the proposed rulemaking. However, many more securitization vehicles, especially those involving registered public offerings, would not be covered funds under the proposed definition because they rely on Rule 3a-7 under the Investment Company Act or Section 3(c)(5) of the Investment Company Act rather than section 3(c)(1) or 3(c)(7). If all of these securitization vehicles are treated as commodity pools, and commodity pools are treated as covered funds, then, in the absence of an adequate loan securitization exemption applicable across the covered funds and related provisions of the Volcker Rule, including the so-called "Super 23A" provisions, banking entities would not be able to maintain any ownership interests in the vehicles or sponsor the vehicles. Even if a banking entity were able to rely on a loan securitization exemption to sponsor the vehicle, the banking entity could not own debt securities issued by or extend credit to the vehicle, or transact in derivatives with the vehicle, even if for the vehicle's hedging purposes, giving rise to credit exposure to the vehicle. ***This result would mean that nearly all bank-sponsored securitizations would either be prohibited or severely restricted by the Volcker Rule and would drastically curtail the securitization market.***[4] Moreover, this would occur at the time of great need to restart the private residential mortgage securitization market and when the non-mortgage asset-backed securities market, providing funding for auto loans, credit cards, student loans and other consumer receivables, and the commercial mortgage-backed securities markets, providing important funding for commercial and multi-family properties across the country, have finally started to regain full health. Such a contraction of credit, as well as potential adverse consequences to banking entities if they are required to divest themselves of securities issued by such entities, could have adverse consequences not only for the banking entities and the securitization markets but for the U.S. economy.

Finally, we note that this issue rests on whether the entity in question is a "commodity pool" and would not be resolved by relying on a mere exemption from registration as a Commodity Pool Operator.

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[4] Annex A to this letter includes statistical information showing that banking entities historically have sponsored a significant proportion of asset-backed securities issued in the U.S. markets, including most of those backed by credit card receivables and approximately two-thirds of private-label, mortgage-backed securities.

Other Potential Adverse Effects on Availability of Credit and Investment Product

Securitization is a key component of medium and long-term, stable capital markets funding for U.S. manufacturers and other businesses, as well as for banks, finance companies and other financial institutions. The U.S. securitization market also is an important funding source for non-U.S. manufacturers, banks and other financial institutions; among other benefits to the functioning of global credit markets, this diversifies investment opportunities for U.S. investors. SIFMA believes that, at a minimum, subjecting the securitization markets to a regulatory scheme designed for hedge fund-like vehicles would impose a significant regulatory burden on market participants and add to the time and expense of bringing to market transactions that use swaps; this could increase the cost of credit without producing any discernable regulatory benefit. Beyond that, it could create a significant disincentive to using swaps for hedging in securitizations which could both reduce the availability of floating rate investment product available in the U.S. capital markets and increase the cost of funding for sponsors of securitizations. Furthermore, for non-U.S. manufacturers or financial institutions it could become unfeasible to offer in the U.S. securities (typically denominated in U.S. dollars) backed by receivables originated by those institutions outside the U.S. (and denominated in other currencies), which would reduce investment opportunities available in the U.S. markets and could have other unintended and adverse consequences on global capital markets.

Annex A to this letter contains data as to the outstanding number of certain categories of securitizations and volume of related securities issued. Although specific data is not available as to how many of those existing securitization entities have entered into swaps, it can be assumed that the amounts are substantial, both in terms of number of entities and securities outstanding. Thus there is a large universe of transactions that would be at risk of being non-compliant and whose investors could be adversely affected if commodity pool regulation were deemed to be retroactively applicable to securitizations.

Need to Clarify and Harmonize Regulations

If there were any category of securitization vehicles considered by the CFTC to be commodity pools, SIFMA believes that clarification and substantial modification of reporting and other existing requirements applicable to Commodity Pool Operators would be necessary in order for the requirements to be workable in a securitization context and not misleading to investors. Additional time also would be needed for these revisions to be developed and for compliance to be achieved where necessary. Furthermore, SIFMA believes that it would be appropriate to provide broader, "grandfathering" relief for existing securitization transactions, if any, considered to be commodity pools, due to the infeasibility of compliance and unintended, adverse consequential effects discussed above in this letter.

Points to be clarified include the threshold issue of who would be considered the Commodity Pool Operator, because most securitizations do not have a person that corresponds to the definition in the CEA or to descriptions in CFTC regulatory materials. Clarification also would be necessary as to what persons, if any, involved in a securitization might be considered a Commodity Trading Advisor. The following is only a partial list of other problems that would be created by the application of commodity pool regulation to securitization, in addition to those addressed above —

NAV and Most Other Periodic Reporting Not Relevant

As discussed above, the concept of "net asset value" is not relevant to securitizations. Much of the periodic reporting required to be furnished by Commodity Pool Operators relates to the calculation of NAV and other data based on the NAV, or other information not relevant to securitizations (such as gain or loss on commodity interest positions liquidated and amount of participation units redeemed). Securitization issuers already do periodic reporting to their security holders of pool performance and other data that is meaningful to investors in the context of the particular structures and asset classes. For many securitizations that is specifically required by the SEC's regulations covering asset-backed securities. There would be no regulatory or investor interest served by requiring the preparation of additional reporting in which almost no line item is relevant.

Exemptions Inadequate

The applicability of existing exemptions from Commodity Pool Operator registration, including that under the CFTC's Regulation 4.13(a)(3), is at best unclear in the context of securitizations. Even if clarified, such as with respect to calculation of the *de minimis* test under Regulation 4.13(a)(3), the existing exemptions would be inadequate to address certain significant issues raised for the securitization market, including the following, among others. First, there is no existing exemption for registered offerings, which constitute a significant portion of the securitization market. Second, the existing *de minimis* test may not be sufficient for cross-border transactions that must hedge both interest rate and currency risks, and accordingly are likely to have an aggregate notional amount of hedging swaps that exceeds the liquidation value of the financial assets held. Third, and perhaps most significantly, an exemption from Commodity Pool Operator registration, even if better tailored to securitization, would not address problems raised by an issuer being classified as a commodity pool in the context of the Volcker Rule, as discussed above.

Potential Conflicts With Applicable Securities Laws

Harmonization with existing securities law requirements would be necessary to avoid conflicting regulatory requirements, such as could be the case with applicable and developing SEC disclosure requirements for asset-backed securities. As one example, advance submission of securities offering materials to the NFA would be duplicative of (and potentially conflict with) securities regulation to which securitization issuers already are subject and could have other adverse consequences, including diminishing the utility of shelf registration due to the three week period for NFA review before each offering.

For all of the reasons discussed in this letter, in the absence of generalized interpretive clarification relating to securitizations, the CFTC and its staff could receive an extraordinary volume of individual petitions for interpretive clarification and relief on a multitude of issues concerning the application of commodity pool regulation to securitizations. This could strain the Commission's resources and would be unlikely to produce the necessary regulatory guidance to market participants on a timely basis, or to do so in a comprehensive manner that would avoid the potentially severe adverse consequences discussed in this letter.

We greatly appreciate your consideration of the views set forth in this letter, and look forward to the opportunity to discuss these matters further with the Commission and its staff. Please contact Richard Dorfman at (212) 313-1359 or rdorfman@sifma.org, or Chris Killian at (212) 313-1126 or ckillian@sifma.org.

Sincerely,

Richard A. Dorfman Managing Director Head of Securitization	Christopher B. Killian Managing Director

Count and Volume of Outstanding Securitization Transactions, June 2012

	# Deals	$ Billions
MBS - RMBS*	4,700	$ 685.64
MBS - CMBS	888	$ 669.56
ABS - Home Equity**	3,620	$ 487.19
ABS - Auto	309	$ 138.14
ABS - Credit Card	230	$ 141.24
ABS - Equipment	57	$ 17.93
ABS - Manufactured Housing	206	$ 13.79
ABS - Other	638	$ 82.68
ABS - Student Loan	388	$ 233.88
CLO***	839	$ 359.93
CDO***	1889	$ 504.57
ABCP	N/A	$ 318.80
Estimated Total	13,764	$ 3,653.35

* Private label, does not include MBS issued by Fannie Mae, Freddie Mac, or guaranteed by GNMA. 4700 is an estimate based on SIFMA analyis; we expect the actual number falls between 4160 and 5000

**Primarily non-prime MBS

***Global outstandings; other numbers are primarily U.S. issued deals.

Data Sources: Thomson Reuters, Dealogic, Federal Reserve, Bloomberg, Moody's, S&P, Fitch, AFME/SIFMA Members, SIFMA

Bank Share of Securitization Issuance, 1983-2008

	Bank Issued	Total	Bank Share
Auto ABS	$ 409.10	$ 1,393.60	29%
Credit Card ABS	$ 1,095.00	$ 1,166.60	94%
Student Loan ABS	$ 54.30	$ 238.40	23%
MBS/HELOCs/HELOANs	$ 1,134.30	$ 2,908.60	39%
CMBS	$ 740.40	$ 1,384.40	53%
CLO/CDOs	$ 772.40	$ 1,987.20	39%
Other ABS	$ 228.50	$ 764.10	30%
Private-label MBS	$ 5,077.60	$ 7,596.60	67%

Data Source: Federal Reserve Bank of New York, SIFMA