

**TESTIMONY OF J. CHRISTOPHER HOEFFEL ON BEHALF OF  
THE COMMERCIAL REAL ESTATE FINANCE COUNCIL**

**Before the  
UNITED STATES HOUSE FINANCIAL SERVICES COMMITTEE  
SUBCOMMITTEE ON CAPITAL MARKETS AND GOVERNMENT SPONSORED ENTERPRISES**

**HEARING ON: “UNDERSTANDING THE IMPLICATIONS AND CONSEQUENCES OF THE PROPOSED RULE  
ON RISK RETENTION”**

**APRIL 14, 2011**

The Commercial Real Estate (CRE) Finance Council is grateful to Chairman Garrett, Ranking Member Waters, and the Members of the Subcommittee for holding this hearing to examine the implications and consequences of the proposed risk retention rule on our nation’s credit markets. The CRE Finance Council represents all constituencies in the broader CRE finance market, and we appreciate the opportunity to share our views on the proposed rule as it pertains to the commercial real estate market.

**Introduction & Overview**

The \$7 trillion commercial real estate market in the United States is just emerging from a period in which it faced serious duress brought on by the severe economic downturn, and significant hurdles remain to recovery in the near term. The challenges posed by the distress the CRE market has experienced will continue to have an impact on U.S. businesses that provide jobs and services, as well as on millions of Americans who live in multifamily housing. Since 2009, the CRE problem shifted from a crisis of confidence and liquidity to a crisis of deteriorating commercial property fundamentals, plummeting property values and rising defaults. In the next few years alone, over \$1 trillion in outstanding commercial mortgages will mature and borrower demand to refinance those obligations will be at an all-time high.

Prior to the onset of the economic crisis, commercial mortgage-backed securities (“CMBS”) were the source of approximately half of all CRE lending, providing approximately \$240 billion in capital to the CRE finance market in 2007 alone. After plummeting to a mere \$2 billion in 2009 at the height of the crisis, the CMBS market began to see signs of life in 2010 with \$12.3 billion in issuance, and issuance in 2011 is expected to range from \$30 to \$50 billion, depending on a number of factors including economic conditions and the manner in which regulatory and accounting changes are implemented.

One of the overarching questions faced at this juncture is whether CMBS will be able to continue to help to satisfy the impending capital needs posed by the refinancing obligations that are coming due. Without CMBS, there simply is not enough balance sheet capacity available through traditional portfolio lenders such as banks and life insurers to satisfy these demands. It is for this reason that Treasury Secretary Geithner noted two years ago that “no financial recovery plan will be successful unless it helps restart securitization markets for sound loans made to businesses – large and small.”<sup>1</sup>

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<sup>1</sup> Remarks by Treasury Secretary Timothy Geithner Introducing the Financial Stability Plan (Feb. 10, 2009) (available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ahSJwkdThtlo>).

Similarly, then-Comptroller of the Currency John C. Dugan noted that, “[i]f we do not appropriately calibrate and coordinate our actions, rather than reviving a healthy securitization market, we risk perpetuating its decline – with significant and long-lasting effects on credit availability.”<sup>2</sup>

Against this backdrop, Congress adopted a credit risk retention framework for asset-backed securities in the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”),<sup>3</sup> and the proposed rule being discussed today would implement that risk retention framework.<sup>4</sup> Prior to the issuance of the proposed rule, the Board of Governors of the Federal Reserve issued a “Report to the Congress on Risk Retention” as required under a Dodd-Frank provision authored by Chairman Garrett, and the Board concluded that:

[S]imple credit risk retention rules, applied uniformly across assets of all types, are unlikely to achieve the stated objective of the Act—namely, to improve the asset-backed securitization process and protect investors from losses associated with poorly underwritten loans ... the Board recommends that rulemakers consider crafting credit risk retention requirements that are tailored to each major class of securitized assets. Such an approach could recognize differences in market practices and conventions, which in many instances exist for sound reasons related to the inherent nature of the type of asset being securitized. Asset class-specific requirements could also more directly address differences in the fundamental incentive problems characteristic of securitizations of each asset type, some of which became evident only during the crisis.<sup>5</sup>

The proposed regulations attempt to address this construct by offering different options for satisfying the retention requirements (e.g., vertical, horizontal, and L-shape retention structures) and providing asset-class-specific options, such as those afforded to CMBS, to satisfy the retention mandate. As a community, our members appreciate the efforts to create rules by asset class, given the unique nature of the CMBS market.

At the same time, the proposed risk retention regulations are complex, and we are in the process of studying and discussing them with the different CMBS constituencies included under the CRE Finance Council umbrella (including lenders, issuers, servicers, and investors, among others) in order to fully evaluate their potential impact and to provide useful feedback to regulators on their proposal. As

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<sup>2</sup> Remarks by John C. Dugan, Comptroller of the Currency, before the American Securitization Forum (Feb. 2, 2010), at 2 (available at [http://www.crefc.org/uploadedFiles/CMSA\\_Site\\_Home/Government\\_Relations/CMSA\\_Issues/TALF\\_Treasury\\_Plans/DuganRemarksatASF2010.pdf](http://www.crefc.org/uploadedFiles/CMSA_Site_Home/Government_Relations/CMSA_Issues/TALF_Treasury_Plans/DuganRemarksatASF2010.pdf) ).

<sup>3</sup> Pub. L. No. 111-203.

<sup>4</sup> Proposed Rule, Credit Risk Retention, Federal Deposit Insurance Corporation et al., FDIC Docket No. 2011-\_\_\_\_, RIN 3064-AD74 (rel. Mar. 29, 2011), (hereafter, “Risk Retention NPRM”) (available at <http://www.fdic.gov/news/board/29Marchno2.pdf>).

<sup>5</sup> Board of Governors of the Federal Reserve System, Report to the Congress on Risk Retention (October 2010), at 3 (available at <http://www.federalreserve.gov/boarddocs/rptcongress/securitization/riskretention.pdf>).

the Board's Report went on to note, the totality of the regulatory changes that are being put into motion – including the various new disclosure and credit rating agency reform provisions in Dodd-Frank, the accounting changes that must be effectuated, and the new Basel capital requirements regime – must be considered *in toto* in making this evaluation:

[R]ulemakings in other areas could affect securitization in a manner that should be considered in the design of credit risk retention requirements. Retention requirements that would, if imposed in isolation, have modest effects on the provision of credit through securitization channels could, in combination with other regulatory initiatives, significantly impede the availability of financing. In other instances, rulemakings under distinct sections of the Act might more efficiently address the same objectives as credit risk retention requirements.<sup>6</sup>

Viewed through this lens, there are elements of the proposed retention regime that raise potential concerns in the market and, overall, the proposed rule has prompted more questions than it answers. Three portions of the proposal have drawn particularly acute scrutiny from our members:

- First, the insertion of an unexpected “Premium Capture Reserve Account” provision that generally would prohibit bond issuers from monetizing profits when the bonds are issued has raised numerous questions about the intent of the provision and how it would operate in practice, as well as whether the requirement itself could greatly restrict overall CMBS credit availability.
- Second, the CMBS-specific “B-piece buyer” provisions that would permit the retention obligation to be borne by third-party investors if certain specified additional obligations are satisfied. For example, an “Operating Advisor” would be required to be added as an extra layer of servicing accountability to the most common CMBS deal structures. This has raised a broad array of questions and concerns that range from whether the provision is strong enough to whether it is needed at all.
- Third, the proposed regulations include “qualifying” CRE loan requirements designed to identify low-risk loans that, if satisfied, would exempt such loans from any retention requirements. Unfortunately, it appears that extremely few, if any, outstanding CMBS loans would satisfy the “qualifying” criteria and consequently, it is unclear whether the entire exemption concept will have any practical import. At the same time, the retention regime overall appears to be designed primarily for “conduit” securitizations through which as many as 200-300 individual loans typically were securitized in the CMBS space. That overlooks the growing and critical segment of the market oriented toward single-borrower and large loan deals, which some estimate to be as much as 50 percent of the market for CMBS lending. The “qualifying CRE loan” provisions may be an ideal place to address those and other similar market segments.

As the regulatory process moves forward, many will argue that implementing certain requirements – or the failure to implement certain requirements – will be a death knell for the market.

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<sup>6</sup> *Id.* at 84.

The more likely outcome is that the failure to get the details right will restrict capital that is available through the securitization finance markets. The proposed rule imposes additional costs on and will – in some cases – disincentivize issuers, and disrupt the efficient execution of capital structures that securitization provides.

Of particular concern are the potential effects of the proposed rule that could lead to a significantly smaller secondary market, less credit availability, and increased cost of capital for CMBS borrowers. Another major concern is that lending on balance sheet (i.e., portfolio lending) may be able to offer more competitive rates, thus attracting the safest risks to the portfolio space, leaving the smaller and/or less safe risks for CMBS where borrowers would have to pay higher rates. Further, small borrowers – those that are not concentrated in the major urban areas and that need loans in the sub-\$10 million space – would be the primary victims of these changes. For these reasons, 23 separate trade organizations, representing many different types of borrower constituencies, as well as lenders and investors in different asset classes, jointly signed a letter last year urging careful consideration of the entirety of the reforms to ensure that there is no disruption or shrinkage of the securitization markets.<sup>7</sup>

At the same time, the CRE finance industry also has taken direct steps to strengthen the CMBS market and to foster investor confidence through the development of “market standards” in the areas of representations and warranties; underwriting principles; and initial disclosures. Scores of members of the CRE Finance Council across all of the CMBS constituencies worked diligently on these market reforms for more than a year. The CRE Finance Council anticipates that new market standards, coupled with the unparalleled disclosure regime that already was in place, will create increased transparency and disclosure in underwriting and improved industry representations and warranties, all of which we believe will go a long way toward meeting both investor demands and Dodd-Frank objectives.

As our members continue to work through the proposed rule to better crystallize our views, we cannot overstate the stakes, given that this rule will directly impact credit availability and an overall economic recovery. As noted at the outset, the stakes are high. The agencies need to satisfy the somewhat arbitrarily-imposed Congressionally-mandated rule promulgation schedule, and we are concerned that the ultimate judgments they reach may not be as soundly thought through as a more generous schedule would allow. We therefore ask that Congress consider extending those deadlines; this may be especially appropriate given the fact that under the Dodd-Frank implementation provision, the rules for non-residential asset-backed securities would not go into effect for an additional two years<sup>8</sup> and our industry could still abide by that final effective date even if more time were allotted prior to finalizing the actual rules.

The balance of our testimony will focus on five key areas:

- (1) A description of the CRE Finance Council and its unique role;
- (2) The current state of CRE finance, including the challenges that loom for the \$3.5 trillion in outstanding CRE loans;

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<sup>7</sup> A copy of the March 25, 2010 letter is attached.

<sup>8</sup> Dodd-Frank, § 941(b) (adding Securities Exchange Act § 15G (i)(2)).

- (3) The unique structure of the commercial mortgage market and the importance of having customized regulatory reforms, as contemplated in Dodd-Frank, to support, and not undermine, our nation's economic recovery;
- (4) The CRE Finance Council's general reactions to the recently proposed regulation to implement Dodd-Frank's risk retention requirement; and
- (5) The CRE Finance Council's market standards initiatives, which have been designed to build on existing safeguards in our industry, to promote certainty and confidence that will support a timely resurgence of the CRE finance market in the short term, and a sound and sustainable market in the long term.

## **Discussion**

### **1. The CRE Finance Council**

The CRE Finance Council is the collective voice of the entire \$3.5 trillion commercial real estate finance market, including portfolio, multifamily, and CMBS lenders; issuers of CMBS; loan and bond investors such as insurance companies, pension funds and money managers; servicers; rating agencies; accounting firms; law firms; and other service providers.

Our principal missions include setting market standards, facilitating market information, and education at all levels, particularly related to securitization, which has been a crucial and necessary tool for growth and success in commercial real estate finance. To this end, we have worked closely with policymakers in an effort to ensure that legislative and regulatory actions do not negate or counteract economic recovery efforts in the CRE market. We will continue to work with policymakers on this effort, as well as our ongoing work with market participants and policymakers to build on the unparalleled level of disclosure and other safeguards that exist in the CMBS market, prime examples of which are our "Annex A" initial disclosure package, and our Investor Reporting Package™ ("IRP") for ongoing disclosures.

While the CMBS market is very different from other asset classes and is already seeing positive developments, the CRE Finance Council is committed to building on existing safeguards, to promote certainty and confidence that will support a timely resurgence in the short term and a sound and sustainable market in the long term. In this regard, we have worked with market participants to develop mutually agreed upon improvements needed in the CRE finance arena that will provide an important foundation for industry standards. Prime examples of our work include both the CRE Finance Council's "Annex A" initial disclosure package and the Investor Reporting Package™ for ongoing disclosures.

Furthermore, our members across all constituencies have devoted an extraordinary amount of time over the past year to working collaboratively and diligently on the completion of market standards for: (1) Model Representations and Warranties; (2) Underwriting Principles; and (3) Annex A revisions, all of which we previously have shared with the regulators charged with implementing the Dodd-Frank risk retention rules: the Securities and Exchange Commission, Federal Reserve Board, Federal Deposit Insurance Corporation, Department of the Treasury, and the Office of the Comptroller of the Currency. We anticipate that these three new market standards initiatives, along with the unparalleled ongoing disclosure offered by our existing IRP, will create increased transparency and disclosure in underwriting and improved industry representations and warranties, which we believe will go a long way toward meeting both investor demands and Dodd-Frank objectives.

## 2. The Current State of CRE Finance

CRE is a lagging indicator that is greatly impacted by macroeconomic conditions, and as such, began to be affected by the prolonged economic recession relatively late in the overall economy's downward cycle. What started as a "housing-driven" recession due to turmoil in the residential/subprime markets (in which credit tightened severely) quickly turned into a "consumer-driven" recession, impacting businesses and the overall economy. Not surprisingly, CRE has come under strain in light of the economic fundamentals today and over the last three years, including poor consumer confidence and business performance, high unemployment and property depreciation. Unlike previous downturns, the stress placed on the CRE sector today is generated by a "perfect storm" of several interconnected challenges that compound each other and that, when taken together, has exacerbated the capital crisis and will prolong a recovery:

- **Severe U.S. Recession.** – With a prolonged recession and an unemployment rate at or above 8.8% for the last 24 months, there is no greater impact on CRE than jobs and the economy, as commercial and multifamily occupancy rates, rental income, and property values have subsequently been severely impacted and perpetuate the downturn. Those impacts persist even as the recession has abated.
- **"Equity Gap."** – During the worst of the economic crisis, our industry saw CRE assets depreciate in value by 30% to 50% from 2007 levels, creating an "equity gap" between the loan amount and the equity needed to extend or re-finance a loan, which impacted even "performing" properties that had continued to support the payment of monthly principal and interest on the underlying loans. While there has been some lessening of the equity gap in the past year as the slide in property values slowed, the market is at a sensitive point on the climb toward recovery and a shortage of capital at this stage could cause a resurgence of the equity gap problem.
- **Significant Loan Maturities.** – Approximately \$1 trillion in CRE loans mature over the next several years, but perhaps most significantly, many of those loans will require additional "equity" to refinance given the decline in CRE asset values
- **CMBS Restarting, Slowly.** – Even in normal economic conditions, the primary banking sector lacked the capacity to meet CRE borrower demand. That gap has been filled over the course of the last two decades by securitization (specifically, commercial mortgage-backed securities) which utilizes sophisticated private investors – pension funds, mutual funds, and endowments, among others – who bring their own capital to the table and fuel lending. CMBS accounts, on average, for approximately 25% of all outstanding CRE debt, and as much as 50% at the peak, with readily identifiable properties funded by CMBS in every state and Congressional district. However, a prolonged liquidity crisis caused the volume of new CRE loan originations and thus of new CMBS to plummet from \$240 billion in 2007 (when CMBS accounted for half of all CRE lending) to \$12 billion in 2008, and \$2 billion in 2009. In 2010, the CMBS market began to see signs of life with \$12.3 billion in issuance, while issuance is expected to range between \$30 and \$50 billion in 2011, depending upon a number of economic conditions and uncertainty related to regulatory and accounting changes. While there is revitalized activity in the CMBS space, there is a mismatch between the types of loans that investors are

willing to finance and the refinancing that existing borrowers are looking for to extend their current loans.

Although the market has evolved from the initial liquidity crisis, there is still an unfortunate combination of circumstances that leave the broader CRE sector and the CMBS market with three primary problems: 1) the “equity gap” (again, the difference between the current market value of commercial properties and the debt owed on them, which will be extremely difficult to refinance as current loans mature), as previously discussed; 2) a hesitancy of lenders and issuers to take the risk of trying to make or “aggregate” loans for securitization, given the uncertainty related to investor demand to buy such bonds (this 3-6 month “pre-issuance” phase is known as the “aggregation” or “warehousing” period); and 3) the tremendous uncertainty created by the multitude of required financial regulatory changes, which serve as an impediment to private lending and investing, as the markets attempt to anticipate the impact these developments may have on capital and liquidity. Indeed, market analysts have concluded that regulatory uncertainty will likely delay recovery of the securitization markets, including one observer that recently concluded that the delay would be at least another twelve months.<sup>9</sup>

The importance of the securitized credit market to economic recovery has been widely recognized. Both the previous and current Administrations share the view that “no financial recovery plan will be successful unless it helps restart securitization markets for sound loans made to consumers and businesses – large and small.”<sup>10</sup> The importance of restoring the securitization markets is recognized globally as well, with the International Monetary Fund noting in a 2009 Global Financial Stability Report that “restarting private-label securitization markets, especially in the United States, is critical to limiting the fallout from the credit crisis and to the withdrawal of central bank and government interventions.”<sup>11</sup>

Significantly, it is also important to be aware of the importance of securitization to smaller businesses that seek real estate financing. The average CMBS securitized loan is \$8 million. As of July 2010, there were more than 40,000 CMBS loans less than \$10 million in size that had a combined outstanding balance of \$158 billion, which makes CMBS a significant source of capital for lending to small businesses.<sup>12</sup> Therefore, when evaluating securitization reforms like the proposed risk retention

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<sup>9</sup> See “A Guide to Global Structured Finance Regulatory Initiatives and their Potential Impact,” Fitch Ratings (Apr. 4, 2011), at 1 (“the environment for issuers and investors remains uncertain given the number of rules, the risk of them being inconsistently applied given the scope for differing interpretations, plus the varying timelines for their implementation. This market uncertainty is likely to play a part in delaying a more meaningful revival of the [structured finance] market until these issues are resolved, i.e. until mid-2012.”) (available at [http://www.fitchratings.com/creditdesk/reports/report\\_frame.cfm?rpt\\_id=571646](http://www.fitchratings.com/creditdesk/reports/report_frame.cfm?rpt_id=571646)).

<sup>10</sup> See n. 1, *supra*..

<sup>11</sup> International Monetary Fund, “Restarting Securitization Markets: Policy Proposals and Pitfalls,” Chapter 2, *Global Financial Stability Report: Navigating the Financial Challenges Ahead* (October 2009), at 33 (“Conclusions and Policy Recommendations” section) (available at <http://www.imf.org/external/pubs/ft/gfsr/2009/02/pdf/text.pdf>).

<sup>12</sup> See Testimony of the Commercial Real Estate Finance Council before the House Financial Services Committee, Hearing on “Alternatives For Promoting Liquidity in the Commercial Real Estate Markets, Supporting Small Businesses And Increasing Job Growth” (July 29, 2010), at 3 (available at <http://financialservices.house.gov/Media/file/hearings/111/CREFC%20Testimony%207.29.2010.pdf>).

rules, policymakers should be mindful that changes that could halt or severely restrict securitization of CRE loans will have a disparate adverse impact on small businesses, and on capital and liquidity in CRE markets in smaller cities where smaller CRE loans are more likely to be originated.

### **3. Unique Characteristics of the CRE Market and the Need to Customize Reforms**

Throughout the debate regarding securitization reform, the CRE Finance Council urged that the reforms be tailored to account for the differences that exist among the various types of asset classes (e.g. residential mortgages, commercial mortgages, student loans, auto loans, etc.), because customization helps ensure that measures designed to strengthen the financial markets and foster investor confidence do not inadvertently create negative implications for capital, liquidity and credit availability.

Using our industry as an example, CMBS has innate characteristics that minimize the risky securitization practices that policymakers sought to address in Dodd-Frank. More specifically, the unique characteristics that set CMBS apart from other types of assets relate not only to the type and sophistication of the borrowers, but to the structure of securities, the underlying collateral, and the existing level of transparency in CMBS deals, each of which are briefly described here:

- **Commercial Borrowers:** Part of the difficulty for securitization as an industry arose from practices in the residential sector where, for example, loans were underwritten in the subprime category for borrowers who may not have been able to document their income, or who may not have understood the effects of factors like floating interest rates and balloon payments on their mortgage's affordability. In contrast, commercial borrowers are highly sophisticated businesses with cash flows based on business operations and/or tenants under leases (i.e. "income-producing" properties). Additionally, securitized commercial mortgages have different terms (generally 5-10 year "balloon" loans), and they are, in the vast majority of cases, "non-recourse" loans that allow the lender to seize the collateral in the event of default.
- **Structure of CMBS:** There are multiple levels of review and diligence concerning the collateral underlying CMBS, which help ensure that investors have a well informed, thorough understanding of the risks involved. Specifically, in-depth property-level disclosure and review are done by credit rating agencies as part of the process of rating CMBS bonds. Moreover, non-statistical analysis is performed on CMBS pools. This review is possible given that there are far fewer commercial loans in a pool (traditionally, between 100-200 loans; while some recent issuances have had between 30 and 40 loans) that support a bond, as opposed, for example, to residential pools, which are typically comprised of between 1,000 and 4,000 loans. The more limited number of loans (and the tangible nature of properties) in the commercial context allows market participants (investors, rating agencies, etc.) to gather detailed information about income-producing properties and the integrity of their cash flows, the credit quality of tenants, and the experience and integrity of the borrower and its sponsors, and thus conduct independent and extensive due diligence on the underlying collateral supporting their CMBS investments.
- **First-Loss Investor ("B-Piece Buyer") Re-Underwrites Risk:** CMBS bond issuances typically include a first-loss, non-investment grade bond component. The



third-party investors that purchase these lowest-rated securities (referred to as “B-piece” or “first-loss” investors) conduct their own extensive due diligence (usually including, for example, site visits to every property that collateralizes a loan in the loan pool) and essentially re-underwrite all of the loans in the proposed pool. Because of this, the B-piece buyers often negotiate the removal of any loans they consider to be unsatisfactory from a credit perspective, and specifically negotiate with bond sponsors or originators to purchase this non-investment-grade risk component of the bond offering. This third-party investor due diligence and negotiation occurs on every deal before the investment-grade bonds are issued. We also note that certain types of securitized structures are written so conservatively that they do not include a traditional “B-Piece.” Such structures, for example, include extremely low loan-to-value, high debt-service-coverage-ratio pools that are tranching only to investment grade.

- **Greater Transparency:** CMBS market participants already have access to a wealth of information through the CRE Finance Council Investor Reporting Package™, which provides access to loan-, property-, and bond-level information at issuance and while securities are outstanding, including updated bond balances, amount of interest and principal received, and bond ratings. Our reporting package has been so successful in the commercial space that it is now serving as a model for the residential mortgage-backed securities market. By way of contrast, in the residential realm, transparency and disclosure are limited not only by servicers, but by privacy laws that limit access to borrowers’ identifying information. Importantly, the CRE Finance Council released version “5.1” of the IRP in December 2010 to make even further improvements. The updated IRP was responsive to investor needs, including disclosures for a new “Loan Modification Template.” Also, as referenced above and as discussed in greater detail in Part 5 below, CRE Finance Council working groups – comprised of all CMBS constituencies (issuers, investors, etc.) – have created standard practices that could be used immediately in the market to enhance disclosure, improve underwriting, and strengthen representations and warranties to ensure alignment of interests between issuers and investors. These consensus standards build on existing safeguards in CMBS and go beyond Dodd-Frank requirements for CRE loans.

As policymakers are aware, Congress specifically concluded in Dodd-Frank’s risk retention provision<sup>13</sup> that with respect to commercial mortgages and CMBS, “skin-in-the game” measures or the “alignment of risk” could take a number of permissible forms, including potential retention by a securitizer or originator. Recognizing the role that B-piece investors have traditionally played in the CMBS market, the statute also contemplated potential risk retention by a third-party investor who performs due diligence and retains this risk in accordance with the statute. The CRE Finance Council’s membership is united in the view that the alignment of the interests of lenders, issuers and investors in the securitization process is essential.

The CRE Finance Council appreciates that regulators have sought to develop risk retention regulations that are tailored to the unique characteristics of the CRE finance market and to offer some

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<sup>13</sup> Dodd-Frank, § 941(b) (adding Securities Exchange Act § 15G (c)).

flexibility in certain respects. We are now engaged in the task of analyzing the proposed risk retention regulations, and assessing their impact and practicality.

#### **4. Preliminary Views on the Proposed Risk Retention Rule**

The proposed risk retention rule was first released on March 29, 2011, by the FDIC. As mentioned, the proposal is complex, and it will accordingly take several weeks for the industry to digest and to understand the potential ramifications of the rule. At this point, our preliminary view is that the structural framework of the CMBS-specific provisions could provide a workable foundation for implementing the risk retention rules as Congress envisioned in Dodd-Frank. However, there are areas where the rule could have unintended adverse consequences for securitization and the broader CRE finance market. At the same time, the purpose of many important provisions is unclear, and they will likely need to be refined to ensure that they accomplish their intent in the least disruptive manner. Needless to say, the stakes are high with the impact on credit availability weighing in the balance, and we look forward to working with Congress and the regulators to ensure a regulatory framework that supports a sound and vibrant securitization market, which is critical to consumers in the U.S. economy.

##### *The Proposed Risk Retention Regulation for Commercial Mortgages*

By way of background, the proposed risk retention regulation contains “base” risk retention requirements that generally apply to all asset classes. The base requirements include a number of options for the securitizer to hold the required 5% retained interest, such as: a “vertical slice,” which involves holding 5% of each class of ABS interests issued in the securitization; a horizontal residual interest, which requires that the securitizer retain a first-loss exposure equal to at least 5% of the par value of all the ABS interests issued in the transaction; and an “L-shaped” option which involves a combination of the vertical and horizontal options. The CRE Finance Council believes generally that the menu of options for holding the retained interest will be beneficial in that this flexibility will foster more efficient and practical structuring of securitizations than a one-size-fits-all approach, and we commend regulators for the thought and effort they put into developing these options.

The retained risk would be required to be held for the life of the securitization. No sale or transfer of the retained interest would be permitted, except in limited circumstances.

Notably, the base retention regime includes a restriction on the ability of securitizers to monetize excess spread on underlying assets at the inception of the securitization transaction, such as through sale of premium or interest-only (“IO”) tranches. As discussed below in greater detail, this provision, which requires securitizers to establish a “premium capture cash reserve account” where a transaction is structured to monetize excess spread, and to hold this account in a first-loss position even ahead of the retained interest, has generated considerable confusion throughout the market, and the purpose of the provision is unclear. It should be noted that this particular provision is one that is prompting significant concerns about a potential adverse impact on the viability of the CMBS market, as well as questions about whether it can be implemented as a practical matter without shutting down the market for new CMBS issuance.

Hedging of the retained interest is generally prohibited, although the proposed regulation gives securitizers the ability to use tools, such as foreign currency risk hedges, that do not directly involve hedging against the specific credit risk associated with the retained interest. The continued ability to use market risk hedges is a matter the ABS issuer community viewed as critical to the viability of

securitization, and we believe that the proposed rule is generally responsive to the market's concerns in that regard.

In addition to the base risk retention rules, there are two important provisions specific to commercial mortgages. First, there is an option to have a third-party purchaser hold a 5% horizontal first-loss position. The third-party retention option is subject to several conditions, which are being closely examined, but market participants have noted a lack of clarity with respect to some of the conditions, and there are concerns that some of the conditions may create significant disincentives for use of this retention option. An unworkable third-party retention option would render the rule more inflexible, which may run counter to the intent of Congress when it outlined third-party risk retention as one of the options for the CRE market in Dodd-Frank.

Second, there is a commercial mortgage loan exemption that would subject qualified commercial mortgage loans to a 0% retention obligation, if several criteria are met. While we understand that regulators intended that only a small subset of "low-risk" loans would qualify for the exemption, our initial examination of the CRE exemption provision reflects that the parameters for qualified commercial mortgages are so narrow that virtually no CRE mortgage could qualify. This stands in contrast to other asset classes, where we understand that proposed exemptions could cover an appreciably larger percentage of the universe of loans.

Three components of the proposed rules have generated the most internal discussion and debate among the CRE Finance Council's members.

*Premium Capture Cash Reserve Accounts.* First, there is considerable confusion and concern within the CRE finance community about the proposed rule's requirement that securitizers establish a "premium capture cash reserve account" when a transaction is structured to monetize excess spread at the inception of the securitization transaction, such as through an IO tranche. One issue is that the purpose of such a requirement is unclear. The narrative to the proposed rule states that the purpose of the premium capture is to prevent sponsors of the securitization from "reduc[ing] the impact of any economic interest they may have retained in the outcome of the transaction and in the credit quality of the assets they securitized,"<sup>14</sup> presumably by extracting all of their profit on the deal at the outset. However, the CRE Finance Council is informed through preliminary discussions with the regulatory agencies, for example, that the premium capture feature was designed to ensure that the retained interest, whether held by the sponsor or a third party, represents 5% of the transaction proceeds.

The effect of the proposal as drafted would be for all revenue from excess spread (which is virtually all revenue) to be retained for the life of the transaction. Such a mechanism will inhibit an issuer's ability to pay operating expenses, transaction expenses, and realize profits from the securitization until, typically, ten years from the date of a securitization. Thus, while the proposed rule's narrative expressed regulators' expectation that the premium capture feature would merely prompt securitization sponsors to stop structuring securitizations to monetize excess spread at closing,<sup>15</sup> the broader impact would be to make the securitization business very unattractive to sponsors, which in turn, would shrink capital availability. For this reason, many in our industry have significant concerns about the premium capture component having an adverse impact on the viability of the CMBS market.

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<sup>14</sup> Risk Retention NPRM at 89.

<sup>15</sup> *See id.* at 90.

*Conditions for Retention by a Third-Party Purchaser.* Second, the third-party retention option that was specifically designed for CMBS also has generated substantial discussion. Under the proposal, the option is subject to several conditions.<sup>16</sup> Most notable among the conditions is a requirement that an independent Operating Advisor be appointed where a third-party purchaser retains the risk and also has control rights (itself or through an affiliate) that are not collectively shared with all other classes of bondholders, such as servicing or special servicing rights.<sup>17</sup> The Operating Advisor would have to be consulted on all major servicing decisions, such as loan modifications or foreclosures, and would have the ability to recommend replacement of the servicer or special servicer if it determines that the servicer or special servicer is not acting in the best interests of the investors as a whole. Only a majority vote of each class of bondholder would prevent the servicer or special servicer from being replaced in this instance.

As a preliminary matter, certain aspects of the Operating Advisor provision are not sufficiently fleshed out, and our membership believes that additional clarity will be necessary for an Operating Advisor framework to function efficiently. For example, other than requiring the Operating Advisor to be independent, the proposed rule provides no specifics on qualifications for an entity to serve as an Operating Advisor, such as whether the entity should have expertise in dealing with the class of securities that are the subject of the securitization. CMBS servicing can be a complex and highly fact-specific enterprise and CMBS transaction parties, including B-piece buyers who might hold the retained interest under the proposed rule and who may handle servicing or special servicing, are sophisticated and very experienced in these matters. It is unlikely that such a B-piece buyer would accept the appointment of an Operating Advisor lacking in CMBS expertise to oversee servicing. Nor should this be a desirable from regulators' perspective, since an unqualified Operating Advisor is unlikely to add value, and would only add to transaction costs.

B-piece buyers and issuers also have raised concerns that the Operating Advisor requirement may create other significant disincentives for use of the third party retention option. For example, some question whether it is necessary for an Operating Advisor to have the authority to oversee servicing and have replacement rights from the deal's inception, when a B-piece buyer's capital is at risk in a first-loss position, which gives a B-piece/servicer incentives that are more fully aligned with those of other investors. Moreover, there are concerns that the addition of another administrative layer in the securitization process may make the servicing and workout of securitized loans more difficult from the borrower's perspective.

Some investment-grade investors have expressed interest in the Operating Advisor construct, but at a minimum, there clearly is room to better hone the powers of and the limitations on the requisite Operating Advisor. For example, one suggestion being discussed to address concerns of B-piece buyers and investment-grade investors is to have the Operating Advisors' recommendations to replace servicers approved by a majority vote of investors, rather than requiring a majority to disapprove as the proposed rule currently contemplates.<sup>18</sup>

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<sup>16</sup> See *id.* at 75-81.

<sup>17</sup> *Id.* at 77-79.

<sup>18</sup> See *id.* at 79.

We note that there is precedent in the market for use of independent Operating Advisors in these circumstances, as the industry has developed a fairly standard Operating Advisor framework with input from B-piece buyers, investors, and issuers in the past few years. In this regard, one matter being discussed within the industry is identifying the most practical analogue to examine among past transactions, and whether the best analogue would be deals that only involved an independent Operating Advisor once the B-piece buyer/servicer is “out of the money” and its interests theoretically would not perfectly align with those of other bondholders. Such a structure might solve the alignment of interest concern while also addressing B-piece buyers’ understandable reluctance to have servicing decisions second-guessed by a third-party when the B-piece buyer’s investment is first in line should there be losses.

*Exempt Commercial Mortgages.* There is a commercial mortgage loan exemption that would subject “qualified” commercial mortgage loan pools to a 0% retention obligation, if several criteria are met. Regulators have stated that they only intended for a relatively small percentage of loans, meeting a set of “low-risk” characteristics, to qualify for the exemption. While the CRE Finance Council understands this objective, our initial examination of the CRE exemption provision reflects that the parameters for qualified commercial mortgages are so narrow that virtually no CMBS mortgages could qualify.

The exemption’s 20-year maximum amortization requirement,<sup>19</sup> for instance, presents perhaps the most significant hurdle to qualification, since commercial mortgages are amortized on a 30-year basis. One issue the CRE Finance Council’s members are discussing is identifying a better metric for assessing the risk characteristics of a loan such as the loan-to-value ratio at origination and maturity. Also problematic is the requirement that borrowers covenant not to use the property as collateral for any other indebtedness, which appears to effectively prohibit subordinate debt.<sup>20</sup> Currently, borrowers typically are permitted to have subordinate debt upon lender approval (e.g., loans that have subordinate debt funded concurrent with the first mortgage). It follows that an outright prohibition on subordinate debt, regardless of lender approval, may be viewed by borrowers as an undue restriction of their ability to manage their finances.

That said, as part of its market standards initiative, the CRE Finance Council submitted an underwriting principles framework white paper to the regulators during the rule-making process highlighting the difficulty in creating universally objective metrics that would indicate that a loan is “low risk” in the very heterogeneous commercial mortgage space. Given the proposed rule, however, we are taking a fresh look at these issues and attempting to evaluate whether the “qualified CRE loan” construct could be re-worked to be of value for CRE loans. There are loan segments outside of the typical conduit loan structure – like large loan and single-borrower securitization deals – that may be more suited for the exemption treatment and we are evaluating what the appropriate “low risk” metrics should be for such deals.

Additionally, a fourth area of concern about the proposed rule that should be highlighted relates to the duration of retention, and a prohibition on sale or transfer of retained interest. As mentioned, the proposed rule contemplates holding the retained interest for the life of the bond, and imposes a

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<sup>19</sup> See *id.* at 306.

<sup>20</sup> See *id.* at 304.

permanent prohibition on the sale or transfer of retained risk.<sup>21</sup> Both of these features would restrict the flow of capital into the markets for an unnecessarily long time period, a situation that is even less desirable in light of the \$1 trillion in commercial mortgage maturities that will occur in the next few years, at the same time the CMBS market is struggling to recover. We also note that in the third-party retention context, a permanent prohibition on the sale or transfer of retained risk would not be acceptable to many B-piece buyers.

Our members are evaluating the extent to which the proper alignment of risk can be achieved without making the mandated retention permanent. We also believe that it is not necessary to completely restrict any sale or transfer of retained interest to achieve the risk retention regulation's goals. The CRE Finance Council's members are discussing, for example, whether these concerns could be addressed by allowing transfer of a B-piece buyer's or sponsor's retained interest to a "qualified" transferee, who would have to comply with the obligations imposed on the transferor and meet other criteria.

On all of these issues, as well as for the more technical issues that will emerge during the course of our evaluation, the CRE Finance Council intends to work with regulators on modifications that will facilitate proper alignment of risk without unduly restricting market capital and liquidity.

## **5. The CRE Finance Industry's Market Standards**

While policymakers have been working on crafting risk retention regulations with a view toward strengthening the securitization markets and fostering investor confidence, the CRE finance industry has not been idle. Rather, our members across all constituencies have devoted an extraordinary amount of time over the past year to working collaboratively and diligently on the development of market standards in the areas of representations and warranties; underwriting principles; and initial disclosures, all of which have similar aims of strengthening our market and fostering investor confidence.

We anticipate that the new industry market standards, coupled with the ongoing disclosure regime offered by our existing IRP, will create increased transparency and disclosure in underwriting and improved industry representations and warranties, which we believe will go a long way toward meeting both investor demands and Dodd-Frank objectives. Having previously have shared these projects with the regulators charged with implementing the Dodd-Frank risk retention rules, the CRE Finance Council wishes to provide some information to Congress as well about the projects.

The CRE Finance Council uses task forces and committees comprised of persons representing all constituencies to form consensus views for industry standards and best practices. These initiatives are both responsive to investor requests and reflect broad input from issuer representatives. And they are welcome standards that we expect to be widely used in the commercial real estate finance marketplace in the same vein as our IRP<sup>TM</sup> for ongoing disclosures.

### *Representations and Warranties*

Building upon existing customary representations and warranties for CMBS, the CRE Finance Council has created Model Representations and Warranties that represent industry consensus

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<sup>21</sup> See *id.* at 100.

viewpoints. Representations and warranties relate to assertions that lenders make about loan qualities, characteristics, and the lender's due diligence. The CRE Finance Council's model was the result of 200-plus hours of work by our Representations and Warranties Committee over the last six months, and represents the input of more than 50 market participants during negotiations to achieve industry consensus.

The Model Representations and Warranties were specifically crafted to meet the needs of CMBS investors in a way that is also acceptable to issuers. Such Model Representations and Warranties for CMBS will be made by the loan seller in the mortgage loan purchase agreement. Issuers are free to provide the representations and warranties of their choosing, and the representations and warranties will necessarily differ from one deal to another because representations and warranties are fact based. However, issuers will be required to present all prospective bond investors with a comparison via black line of the actual representations and warranties they make to the newly created the CRE Finance Council Model Representations and Warranties. Additionally, loan-by-loan exceptions to the representations and warranties must also be disclosed to all prospective bond investors.

Finally, the CRE Finance Council also has developed market standards for addressing and resolving breach claims in an expedited, reliable and fair fashion by way of mandatory mediation before any lawsuit can be commenced, thereby streamlining resolution and avoiding unnecessary costs.

For many investors, strengthened and new representations and warranties coupled with extensive disclosure are considered a form of risk retention that is much more valuable than having an issuer hold a 5% vertical or horizontal strip. The CRE Finance Council believes that its Model Representations and Warranties are a practical and workable point of reference that has already been vetted by the industry, and we intend to explore whether industry standard representations and warranties such as the CRE Finance Council's model could be adopted by regulators to serve as "adequate" representations and warranties as contemplated by the Dodd-Frank menu of options for risk retention for commercial mortgages.

Moreover, industry-standard representations and warranties could be used in at least two other regulatory contexts. First, the conditions on third-party retention in the proposed regulation contemplate securitizer disclosures regarding representations and warranties, and the possible use of blacklines against industry standard representations and warranties. We are exploring the possibility of suggesting use of the CRE Finance Council's model for this purpose.

In addition, Dodd-Frank Section 943(1) directs the SEC to develop regulations requiring credit rating agencies (CRAs) to include in ratings reports a description of the representations, warranties, and enforcement mechanisms available to investors for the issuance in question, along with a description of how those representations, warranties and enforcement mechanisms differ from those in "issuances of similar securities." CRAs have played an important role in the CRE Finance Council's development of Model Representations and Warranties, and we believe the Model Representations and Warranties can facilitate CRAs' fulfillment of their new reporting requirements under Dodd-Frank Section 943(1).

### *Loan Underwriting Principles*

Commercial mortgages securitized through CMBS do not easily lend themselves to the development of universally applicable objective criteria that would be indicative of having lower credit risk as envisioned under Dodd-Frank or otherwise. This is because these non-recourse loans are

collateralized by income streams from an incredibly diverse array of commercial property types that cannot be meaningfully categorized in a way that would allow for the practical application of such objective “low credit risk” criteria. For example, it is difficult to meaningfully compare property types such as hotels, malls, and office buildings, and credit risk profiles can also vary by geographic location, so that it would be even more difficult to compare a resort in Hawaii to a shopping mall in Texas or an office building in New York. In short, commercial properties are not homogeneous and do not lend themselves to a “one size fits all” underwriting standard that could be deemed “adequate.”

The industry accordingly created a framework of principles and procedures that are characteristic of a comprehensive underwriting process that enables lenders to mitigate the risk of default associated with all loans, and a disclosure regime that requires representations as to the manner in which that underwriting process was performed. The intent of the CRE Finance Council’s Underwriting Principles is to be responsive to investors and market participants; provide for the characteristics of low-risk loans; and provide for common definitions and computations for the key metrics used by lenders.

Our membership believes that this principles-based underwriting framework can and will generate the underwriting of lower credit risk CMBS loans and, when combined with necessary and appropriate underwriting transparency, will allow investors to make their own independent underwriting evaluation and be in a position to better evaluate the risk profiles of the loans included in the CMBS issuances in which they are considering investing. It is also critical to note that the majority of the underwriting principles and disclosures outlined in our Underwriting Principles are already standard industry practices, though they had not previously been formally outlined or presented.

The Underwriting Principles were developed with a view toward reducing risk through use of market analysis; property and cash flow analysis; borrower analysis; loan structure and credit enhancements; risk factors such as macro and property-type risks. With respect to defining numerical underwriting metrics, our project recognized the impossibility of imposing uniform metrics since the characteristics of a “low risk” CRE loan could vary by property type, area of the country, and even by operator, and low risk loan-to-value ratios differ by geographic area.

While we have long maintained that it is not possible or even advisable for regulators to attempt to define uniform underwriting “standards” for CRE loans due to the heterogeneous nature of commercial mortgages underlying CMBS and the dissimilarity of this market to residential, we recognize that regulators have attempted to do just that in the qualified commercial loan provisions of the proposed risk retention regulations. We wish to point out, in any event, that such criteria exclude many low-risk loans from qualifying for the exemption, and should not be viewed as the sole framework for assessing whether a commercial mortgage is low risk.

#### *“Annex A” Initial Disclosures*

The CRE Finance Council’s “Annex A” has long been a part of the package of materials given to investors as part of CMBS offering materials, and provides detailed information on the securitized mortgage loans. In conjunction with the SEC’s Spring 2010 proposal to revise its Regulation AB, our members commenced an initiative to review, update and standardize Annex A, which has resulted in changes to Annex A incorporating numerous additional data points concerning the assets underlying CMBS. This work was the effort of both issuers and investors.



These changes, together with the information already required by Annex A, closely conform Annex A with the Schedule L asset-level disclosure framework proposed by the Commission under Regulation AB. The CRE Finance Council's newly created standardized Annex A provides numerous additional data points concerning the assets underlying CMBS, including, but not limited to:

- Changes to the Loan Structure Section with regard to Disclosures on supplemental debt. Examples include, but are not limited to, detail of all rake, B-note, subordinated mortgage, mezzanine debt and preferred equity as well as information regarding the debt owner, coupon, loan type, term, amortization, debt service calculation, debt yield, cumulative debt service coverage ratio and loan-to-value calculations through the capital structure.
- Additionally, issuers will now be providing a breakdown of net operating income into revenue and expenses for historic and underwriting basis.
- Added information on the fourth and fifth largest tenants at a property to the tenant information section – most Annex As in the past would contain information on the three largest tenants at a property, that information being square footage leased, % of overall net rentable square feet, and lease expiration date.

In fact, Annex A provides more information than required under Schedule L and is available to market participants in more expedited fashion. At the same time, the new standardized Annex A is consistent with the existing practices that CMBS market issuers and other participants have developed to provide CMBS investors with clear, timely and useful disclosure and reporting that is specifically tailored for CMBS investors. We believe that such consistency will avoid unnecessary increases in transaction costs while still delivering enhanced clarity and transparency.

It follows that the CRE Finance Council's Annex A is a practical and workable framework that has already been vetted by the industry, and we believe it can be adopted by the SEC to implement the asset-level and loan-level disclosure requirements in Dodd-Frank Section 942(b), and those in Proposed Schedule L to SEC Regulation AB.

### **Conclusion**

Today, the CMBS market is showing some positive signs that it is slowly moving toward recovery, but with \$1 trillion in commercial mortgage loans maturing in the next few years, it will be critically important that risk retention regulations be implemented in way that does not severely constrict or shut down the securitization markets. The CRE Finance Council appreciates the fact that the general construct of the proposed risk retention rule attempts to customize and provide options for the commercial mortgage asset class. At the same time, our members strongly believe that the proposal needs clarification in many areas. And we also have concerns about the impact of some of the details, including concerns that these aspects could make securitization an untenable prospect for issuers and third-party investors.

The CRE Finance Council believes these concerns can, and should, be addressed in the rulemaking process, and we anticipate working with regulators on clarifications and refinements that can achieve an appropriate alignment of risk while also avoiding undue restriction of capital and liquidity in the CRE finance market.

March 25, 2010

The Honorable Christopher J. Dodd  
Chairman  
U.S. Senate Committee on Banking,  
Housing & Urban Affairs  
534 Dirksen Senate Office Building  
Washington, DC 20515

The Honorable Richard C. Shelby  
Ranking Member  
U.S. Senate Committee on Banking,  
Housing & Urban Affairs  
534 Dirksen Senate Office Building  
Washington, DC 20515

Dear Chairman Dodd and Ranking Member Shelby:

The undersigned groups represent a broad segment of the U.S. economy that provide or use credit, including builders, developers and other borrowers of all types, lenders of all sizes, investors at all levels, and other service providers, among many others. It is from each of our unique perspectives that we view financial regulatory reform and have an interest in ensuring strong and vibrant credit markets that will support an economic recovery.

As you know, the \$9 trillion structured finance markets are critical to supporting lending and overall credit availability for millions of Americans, from consumers looking to purchase or refinance a home, receive a student loan, or buy a car, to businesses that need capital to create jobs and fuel economic growth. The securitized credit markets have helped provide liquidity using private investors – such as pension funds, mutual funds, and endowments, among others – who bring their own capital to the table to fuel lending, contributing to approximately 40% of the credit in the United States over the last 15 years. Given the importance of these markets, we wholeheartedly agree with Treasury Secretary Geithner’s statement that, “[b]ecause this vital source of lending has frozen up, no financial recovery plan will be successful unless it helps restart securitization markets for sound loans made to consumers and businesses – large and small.”

Today, the securitized credit markets (which include residential and commercial mortgage loans, student loans, auto loans, credit card, small business, and corporate loans, among others) face a multitude of challenges that, when taken together, will undoubtedly impact the capital and liquidity needed to support credit availability:

- First, credit capacity remains constrained despite enormous borrower demand and significant loan maturities (e.g., \$1 trillion in commercial mortgage loans alone in the next few years), while asset values continue to decline (i.e. there is an “equity gap” between loan amount and asset value) and the overall recession has affected job growth and business performance. This combination of difficulties is most keenly affecting the commercial and residential mortgage sectors.
- Second, at the same time that the securitized credit markets are a centerpiece of recovery efforts, new and retroactive accounting changes (known as FAS 166 and 167) have been finalized, and combined with new regulatory capital guidelines, will limit balance sheet capacity and the overall amount of capital that can be directed toward such lending and investing. These changes are now being implemented during an extraordinarily challenging time.
- Third, there are new proposals – known as “risk retention” – that would require loan “originators” and/or “securitizers” to retain a percentage (e.g. 5 percent) of every loan made or bond issued, which over time limits balance sheet and lending capacity. Of even greater concern, under the new accounting rules above, financial institutions could be required to account for 100 percent of the assets on balance sheet, and to hold additional capital based on such requirements, despite no material change in real credit risk beyond the retained piece.

The combined impact of these items creates tremendous uncertainty and impacts credit availability, which has a profound effect on our overall economic recovery. In fact, while there is growing recognition among market participants and financial regulators about the complications of such reform mandates, it still remains unclear what the combined impact will be in the short and long term, and this uncertainty today serves as one of the biggest impediments to new private lending and investing. Put simply, given the totality and far reaching implications of regulatory and accounting changes, there are serious concerns about the future viability of the securitization markets that are critical to borrower access to credit and an overall recovery.

In this regard, we are not alone in expressing such caution. Federal Reserve Board Member Elizabeth Duke, for example, observed that “[i]f the risk retention requirements, combined with accounting standards governing the treatment of off-balance-sheet entities, make it impossible for firms to reduce the balance sheet through securitization and if, at the same time, leverage ratios limit balance sheet growth, we could be faced with substantially less credit availability... As policymakers and others work to create a new framework for securitization, we need to be mindful of falling into the trap of letting either the accounting or regulatory capital drive us to the wrong model.” Likewise, Comptroller of the Currency John C. Dugan recently echoed this concern: “[i]f we do not appropriately calibrate and coordinate our actions, rather than reviving a healthy securitization market, we risk perpetuating its decline – with significant and long-lasting effects on credit availability.”

Accordingly, it is absolutely crucial that any reforms aimed at the securitized credit markets, such as a risk retention mandate, be examined in greater detail and in the context of other changes in order to strengthen these markets and better serve consumers and businesses. Such a review must consider how to accomplish public policy goals, while limiting adverse or unintended consequences. It should also take into account the differences in markets and types of financial products to ensure that reforms are customized and that financial regulators have explicit direction on the potential application of statutory changes in the various and inherently different asset classes. This approach has been recommended by the International Monetary Fund (IMF), which concluded that “policies designed to put more securitizer skin in the game also risk closing down parts of securitization markets if poorly designed and implemented... Before implementing such schemes, authorities should conduct impact studies to ensure that they fully understand the potential effects of all the regulations in their totality.”

Therefore, as you seek to build a more robust financial system with improved transparency and important safeguards, we urge you to consider carefully the entirety of the reforms being contemplated in an effort to ensure that all reforms are coordinated and implemented in a way that fully supports their intended objectives. It is of vital importance that any new legislative, regulatory or accounting changes provide certainty and confidence, and that they support, and not impede, a recovery in the securitized credit markets that fuel our overall economy.

We appreciate your efforts to address challenging issues that are critical to restoring the flow of credit for consumers and businesses. We stand ready to work with you to achieve these goals.

Sincerely,



American Bankers Association  
American Hotel & Lodging Association  
American Resort Development Association  
American Securitization Forum  
Associated General Contractors of America  
Building Owners and Managers Association International  
Certified Commercial Investment Member Institute (CCIM Institute)  
Commercial Real Estate Finance Council (formerly CMSA)  
Community Mortgage Banking Project  
The Financial Services Roundtable  
Housing Policy Council  
Institute of Real Estate Management  
International Council of Shopping Centers  
Loan Syndications and Trading Association  
Mortgage Bankers Association  
NAIOP, Commercial Real Estate Development Association  
National Apartment Association  
National Association of Real Estate Investment Trusts  
National Association of Real Estate Investment Managers  
National Association of Home Builders  
National Multi Housing Council  
The Real Estate Roundtable  
Securities Industry and Financial Markets Association

cc: Members of the Senate Committee on Banking, Housing and Urban Affairs

United States House of Representatives  
Committee on Financial Services

"TRUTH IN TESTIMONY" DISCLOSURE FORM

Clause 2(g) of rule XI of the Rules of the House of Representatives and the Rules of the Committee on Financial Services require the disclosure of the following information. A copy of this form should be attached to your written testimony.

<b>1. Name:</b>  J. Christopher Hoeffel	<b>2. Organization or organizations you are representing:</b>  Commercial Real Estate Finance Council
<b>3. Business Address and telephone number:</b> 	
<b>4. Have <u>you</u> received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2008 related to the subject on which you have been invited to testify?</b>  <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	<b>5. Have any of the <u>organizations you are representing</u> received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2008 related to the subject on which you have been invited to testify?</b>  <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
<b>6. If you answered .yes. to either item 4 or 5, please list the source and amount of each grant or contract, and indicate whether the recipient of such grant was you or the organization(s) you are representing. You may list additional grants or contracts on additional sheets.</b>          	
<b>7. Signature:</b> 	

Please attach a copy of this form to your written testimony.