August 17, 2012

Transmitted Via Email

Mr. Gary Barnett
Director
Division of Swap Dealer and Intermediary Oversight
United States Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Re: Request for Exclusion from Commodity Pool Regulation for Securitization Vehicles

Dear Mr. Barnett:

The American Securitization Forum ("ASF")[1] is submitting this letter in connection with the efforts of the Commodity Futures Trading Commission (the "Commission") to implement Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). ASF supports appropriate reforms within the over-the-counter ("OTC") derivatives market as it relates to the securitization market. ASF was founded as a means to provide industry consensus on market and regulatory issues, and we have established an extensive track record of providing meaningful comment to various regulatory agencies on issues affecting our market. Our views as expressed in this letter are based on feedback received from our broad membership.

The Dodd-Frank Act effectuates a sweeping overhaul of the United States financial regulatory system and will transform the swaps market into a highly regulated market in which participants, transactions and infrastructure entities are subject to complex regulations. In Title VII it achieves this in part by adding swaps

[1] The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 330 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com.

regulation into the existing framework of the Commodity Exchange Act (the "CEA"). In the case of the Commission's commodity pool operator regulations, however, we believe that the melding of existing commodity futures regulation with new swaps regulation, especially in relation to existing transactions and structures, may lead to outcomes that impose significant burdens on market participants without advancing the goals of the Dodd-Frank Act. This is a particular concern for ASF in the context of securitization vehicles that make limited use of swaps for hedging purposes.

We are concerned that the Commission's existing interpretations of the CEA may result in classification of many of such vehicles as commodity pools after the effective date of changes in law that bring swaps within the definition of commodity interests, even when these vehicles do not satisfy key aspects of the criteria for commodity pools. Being treated as a commodity pool could also cause securitization vehicles that are funding manufacturing and other businesses in the real economy to lose their ability to rely on the end-user exemption from clearing. We are also concerned that many securitization vehicles, including those that will not enter into additional swaps, are structured in a way that will make compliance with commodity pool operator regulations difficult or impossible. Finally, we believe that the Commission's approach to the definition of commodity pools, coupled with the proposal to treat commodity pools as covered funds under the Volcker Rule regulations, creates a risk that bank sponsors of securitizations may be forced to terminate their relationship with and/or investment in securitization vehicles that allow them to provide hundreds of billions of dollars of consumer financing, with serious adverse effects for the economy as a whole.[2]

Securitizations generally use funding vehicles that issue fixed-income securities to third-party investors. These securities are typically paid out of the cash flows on a pool of loan receivables or other debt obligations and are not established for the purpose of trading in swaps or other commodity interests. Most of these vehicles are completely passive. We believe that securitization vehicles that make or have made incidental use of swaps for hedging purposes are not "operated for the purpose of trading in commodity interests" and thus are not commodity pools. We understand that the Commission could take the view that "commodity pool" includes any vehicle holding a passive interest in a swap for hedging purposes—even if such vehicle has done nothing more than enter into such swap at the date of its formation and has not issued new securities since the date of its formation. We do not believe such a reading is consistent with the plain language of the Dodd-Frank Act, which added the definition of "commodity pool" to the CEA and requires that a commodity pool be "operated for the purpose of trading in commodity interests," given that (i)

[2] The Volcker Rule clearly states that it is not intended to prevent the securitization of loans, and such a result therefore seems contrary to Congressional intent. Moreover, to the extent that this regulatory impact forces banks to divest themselves of interests in securitizations, these forced sales could also result in "price discovery" which could result in re-marking similar securities at lower prices, potentially eroding bank capital.

the passive holding of existing swaps positions does not constitute trading, and (ii) the purpose of securitization vehicles is to securitize loan or lease receivables, not to trade in swaps.[3] Moreover, we do not believe that the statute provides the Commission with the authority to retroactively recharacterize existing securitization vehicles as commodity pools and subject market participants associated with them to regulation,[4] especially when such securitization vehicles are neither transacting in swaps after swaps become "commodity interests" nor issuing new securities or other interests.

Given the potential for the Commission to assert overbroad authority, however, securitization market participants are placed in a difficult position. If they are termed commodity pool operators by the Commission, they do not want to be out of compliance initially for having failed to register or properly claim an exemption until there is further judicial review. Alternatively, those parties that might be considered "operators" of securitization vehicles do not want to effectively concede such commodity pool operator status by registering or claiming an exemption. In light of the potential Volcker Rule overlay, the characterization of securitizations as commodity pools could have significant adverse consequences for many banks, and these consequences should not be tied to the efforts of a regulatory agency to extend its authority without notice and meaningful opportunity for comment.

We believe that a permanent solution would likely require the adoption of a formal exclusion by the Commission, legislative clarification or a judicial interpretation beyond any interim no-action guidance. In the interests of time, we are seeking an industry-wide solution in 2012 before the product definitions become effective that will leave open the larger issue of the status of securitization vehicles while ensuring that market participants are not exposed to the risk of regulatory enforcement based on an interpretation that would expand the concept of a

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[3] In this regard, we note that the Commission has interpreted the term "trading" quite narrowly in its own rules, while treating it expansively when used by Congress. For instance, in the recently finalized End-User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42560 (July 19, 2012), the Commission stated:

> As noted above, several commenters expressed concern regarding the inclusion of ''trading'' in § 39.6(c)(2)(i). In the context of the rule, ''trading'' is not used to mean simply buying and selling. Rather, a party is using a swap for the purpose of trading under the rule in this context when the party is entering and exiting swap positions for purposes that have little or no connection to hedging or mitigating commercial risks incurred in the ordinary course of business. ''Trading,'' as used in § 39.6(c)(2)(i), therefore would not include simply the act of entering into or exiting swaps if the swaps are used for the purpose of hedging or mitigating commercial risks incurred in the ordinary course of business.

Id. at 42574 (footnotes omitted).

[4] Because securitization vehicles are not commodity pools, it is difficult to identify the party to such securitizations that might be characterized as the "commodity pool operator." Possible entities include a sponsor, depositor, trustee, collateral manager, servicer, master servicer or administrator, but none of these entities "operate" the pool in a manner consistent with the typical role of a commodity pool operator.

"commodity pool" well beyond the scope set forth in the statutory language. Furthermore, we believe the Commission should coordinate with the other joint regulators in taking Volcker to its final form, whatever that may be, before taking an overly broad interpretation of such language that may result in thousands of securitization vehicles that are neither private equity funds nor hedge funds, and that provide a critical funding source to support consumer lending, being subject to Volcker prohibitions. In defining the relief we are seeking we are focused on the following three sets of vehicles:

- Securitization vehicles formed before the effective date of the Commission's product definition release that hold swaps positions but are neither engaging in ongoing swaps activity nor issuing new securities or other interests after such date. "Operators" of these vehicles should not fall within the Commission's jurisdiction and should be provided relief without confirmation that existing swap positions fall within a *de minimis* standard. We fail to see how the Commission has any interest in regulating any participant associated with any vehicle that is ***neither transacting in commodity interests nor issuing interests in the vehicle.*** We are therefore requesting broad-based no-action relief for any potential "operator" of such vehicles.

- Securitization vehicles that enter into swaps and/or issue new interests after the effective date of the Commission's product definition release, but that satisfy a *de minimis* standard. In the case of publicly registered securitizations that meet the rigorous definition of "asset-backed security" under the Securities and Exchange Commission's Regulation AB, we are seeking an approach comparable to that in the Commission's Rule 4.5.[5] For other vehicles that issue securities that would constitute "asset-backed securities" under the definition in the Securities Exchange Act of 1934 ("Exchange Act ABS"), as well as asset-backed commercial paper conduits ("ABCP conduits") and covered bonds,[6] we are seeking an approach comparable to that in the Commission's Rule 4.13(a)(3), but with a definition of the *de minimis* standard that is more reflective of the way in which such vehicles use swaps.

[5] We note that now-revoked 4.13(a)(4) would have potentially provided relief for some securitzation vehicles but that 4.13.(a)(3) as currently constituted does not provide relief, as it is drafted in a way that is inapplicable to securitization products.

[6] Although we do not consider ABCP conduits and covered bonds to fall within the definition of Exchange Act ABS, we believe they present a similar profile in that they have a purpose of holding financial assets and may make incidental use of swaps.

- Securitization vehicles for which a participant concludes that registration as a commodity pool operator is required. For those vehicles and their operators, we are requesting relief from the requirements to provide audited financial statements and net asset value calculations, neither of which we believe relevant in the context of securitizations.

We are, accordingly, seeking the following no-action relief in the form of a letter addressed to the ASF that includes the following aspects:

a. No enforcement action will be taken against any participant in any ***existing*** securitization vehicle for failing to register as a CPO so long as:

   i. All swaps were acquired before the effective date of the swaps product definitions, other than (x) amendments that do not change the primary economic terms of the swap and (y) replacements of existing swaps that have had a termination event or event of default.

   ii. The securitization vehicle is not issuing new interests or securities.

   iii. The existing swaps held by the vehicle are reported to a swap data repository (SDR) in accordance with the Commission's reporting rules.

   iv. Notice is given that refers to the ASF letter and states that, although no determination has been made as to whether the vehicle is a commodity pool, to the knowledge of the person providing notice, no person intends to register as a CPO with respect to the securitization vehicle.[7]

[7] We acknowledge the potential view that the Commission has an interest in determining which industry participants are utilizing a no-action position. Given the legal issues relating to this potential view of the scope of "commodity pool," as noted above, we do not believe a no-action approach that requires either formal or tacit consent to the characterization of a securitization vehicle as a "commodity pool" provides a workable solution for the securitization industry. We do not believe the Commission should insist on a formal acknowledgement of its authority to claim relief with respect to activity (or, in the case of existing vehicles described in this clause (a), an absence of activity) that the Commission is not interested in regulating. We therefore believe that a notice that identifies the vehicle in question and states that no person is going to register as a commodity pool operator, but that does not acknowledge that such vehicle is a commodity pool or that any person associated with it is a commodity pool operator, strikes the appropriate balance.

b. No enforcement action will be taken against any participant in any ***existing or new*** Exchange Act ABS vehicle, commercial paper conduit or covered bond vehicle for failing to register as a CPO so long as:

   i. The vehicle makes *de minimis* use of swaps.

      1. For purposes of this determination, a securitization vehicle that has registered the offer and sale of its securities with the SEC as asset-backed securities under Regulation AB and that meets the tests set forth in amended Rule 4.5 (i.e. that uses swaps for bona hedging purposes, and the amount (if any) not used for bona fide hedging purposes does not exceed the 5% test or fail to satisfy the alternative net notional test) would qualify for the *de minimis* exception.

      2. For purposes of this determination, a vehicle selling only to investors that would meet the requirements under Rule 4.13(a)(3) and that either (x) would otherwise meet the Rule 4.13(a)(3) criteria for *de minimis* use of swaps if it were a commodity pool, or (y) has entered into swaps with a notional amount that does not exceed the face amount of its cash (not synthetic) assets at the time of entry into the swap, would qualify for the *de minimis* exception.

   ii. All swaps entered into by the vehicle are reported to an SDR in accordance with the Commission's reporting rules.

   iii. Notice is given that refers to the ASF letter and states that, although no determination has been made as to whether the vehicle is a commodity pool, to the knowledge of the person providing notice, no person intends to register as a CPO with respect to the securitization vehicle.

c. No enforcement action will be taken against the registered operator of any Exchange Act ABS vehicle for failing to provide audited financial statements or net asset value calculations for such vehicle.

With respect to Exchange Act ABS, we note that Congress included a number of specific provisions expanding the regulation of Exchange Act ABS in Title IX of the Dodd-Frank Act, including provisions relating to risk retention, loan-level disclosures and reporting, but indicated an intention to exclude such securitizations from other provisions of Dodd-Frank, such as Section 619, that might otherwise be read to compromise the continued use of securitization as a funding source.[8] We therefore believe, given the separate regulation of Exchange Act ABS by both the SEC and the prudential banking regulators and the Title IX expansion of that regulation, that our requested position—which reflects our belief that Exchange Act ABS vehicles that are either passively holding existing swaps positions or engaging in a *de minimis* amount of swaps activity that is incidental to their real purpose are not commodity pools—is consistent with the overall intent of the regulation of Exchange Act ABS envisioned by Congress.

I. Overview

The CEA and the Commission's rules thereunder define a commodity pool as an "investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests."[9] Although most securitization vehicles should not fall within this definition, the Commission has historically interpreted its authority very broadly with respect to vehicles that own commodity interests.[10] We are therefore concerned that securitization vehicles that are counterparties to swaps may be swept into the Commission's interpretation of "commodity pool," and that the sponsors or service providers to those securitizations may be deemed by the Commission to be "commodity pool operators" ("CPOs") even though most securitizations are financing transactions that bear little resemblance to the investment vehicles the operators of which have been historically regulated as commodity pool operators. Such an expansive reading, together with the elimination or modification of key exemptions from CPO registration, may create significant burdens for participants in the securitization markets and have a chilling effect on new securitizations, without achieving greater protection of investors or otherwise facilitating the Commission's goals of reducing risk, increasing transparency and promoting market integrity within the financial system.

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[8] We further note that Congress did not include commodity pools in its list of the types of entities that would be considered "hedge funds" or "private equity funds" for purposes of Section 619, even though it was well aware of the existence of commodity pools, instead referring to funds exempt from registration under Section 3(c)(1) or 3(c)(7) of the Investment Company Act.

[9] *See, e.g.,* CEA Section 1a(11). "Commodity interests" will include swaps after the effective date of the Commission's and SEC's joint release, Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Release No. 33-9338; 34-67453; File No. S7-16-11, RIN 3235-AK65 (the "Product Definitions Release").

[10] *See, e.g.,* Commission no-action letters nos. 00-49, 00-50 and 00-53 (each dated March 24, 2000), each finding that certain real estate investment trusts would be commodity pools even if they made very limited investments in commodity interests. *See also* Section III of this letter, *infra*.

Our primary concern in submitting this letter is to achieve clarity for those securitization vehicles and other special purpose vehicles that are counterparties to swaps but that are not, and should not be regulated as, commodity pools. Securitizations generally use special purpose vehicles to hold pools of financial assets, such as credit card receivables, auto loans and leases or corporate loans. They typically issue fixed-income securities, with periodic interest and/or principal payments and a specified maturity date, rather than participation interests that share in the profits and losses on the assets. The concept of "net asset value" is not relevant to securitizations. Securitizations do not trade commodity futures or securities future products, and a large portion of existing vehicles that hold swap positions—all of which, by definition, acquired swap positions *before* those swap positions were "commodity interests" under the CEA's CPO provisions—will never enter into another swap.

Virtually all securitizations that issue "asset-backed securities," as defined under the Securities and Exchange Commission's Regulation AB,[11] use swaps only to hedge any mismatch between the interest rate or currency of their financial assets and the interest rate or currency of their securities, and the vast majority of other securitization vehicles also use swaps only to hedge interest rate or currency risk. The value of an investment in a securitization that uses a hedging swap does not fluctuate with the value of the swap.[12] The securitization's swap obligations are secured by the securitized assets but no margin is paid and there is no leverage in the swap. In other words, even after the inclusion of swaps as commodity interests under the CPO rules, these securitizations will not be commodity pools. Part II of this letter describes certain types of securitization vehicles and their use of swaps in more detail.

In addition, we are concerned that many of the Commission's CPO rules have little relevance in the context of securitization entities. In some cases it will be impossible to comply with these rules, and in other cases it will be expensive and inefficient without adding value. We therefore consider it essential that the Commission address the compliance challenges that its rules, designed for another context, will present for securitization vehicles that the Commission considers to be commodity pools. Section VI of this letter discusses certain specific issues our members have identified in the application of the CPO rules to their securitizations.

II. Securitizations and the role of swaps

As noted above, securitizations are transactions in which financial assets are pooled in a special purpose vehicle that then issues securities that are paid out of the cash flows on those financial assets. Although securitizations can encompass a wide

[11] 17 C.F.R. Section 29.1100 et. seq.

[12] If the swap terminates and the securities are left unhedged, the market value of the securities may reflect the greater risk the securities pose without the hedge. We believe this is a substantially different circumstance than having a valuation per share that includes the mark-to-market value of an existing swap.

variety of assets and structures, for purposes of this letter, we have focused by way of example on "classic securitizations": those issuing "asset-backed securities" as defined under Regulation AB, with underlying asset classes such as credit card receivables, auto loans and leases, equipment loans and leases, student loans and residential mortgage loans. In classic securitizations the issuing entity may enter into an interest rate or currency swap, generally only at the time it issues securities, to eliminate mismatches between the underlying assets and the securities.

In a classic securitization, the financial assets are generally loan receivables, such as credit card receivables or auto loans, and the securitization is a way for the originating bank or captive finance company to finance the assets. For example, a bank or captive finance company may lend various consumers $1 billion in the aggregate to purchase cars. If the lender then pools this $1 billion of loan receivables in a trust and sells fixed-income securities payable from collections on the assets in the trust through the capital markets, the lender obtains funding to make new loans. If the lender cannot securitize or otherwise sell the loan receivables, then it will have to hold them as an asset on its books, which will limit its ability to make new loans—and thus may make it harder or more expensive for consumers to get financing to buy new cars. This is a key reason why securitization is such a critical part of the United States economy.

In the auto loan example, the bank or captive finance company originating the loan receivables would typically transfer them to a special purpose vehicle that then issues securities that are paid out of the cash flows on the receivables. In other words, as borrowers make their car payments, those payments are distributed to investors in the securitization. The loan receivables are transferred to and segregated in a special purpose vehicle so that the investor can invest in securities supported directly by the financial assets, rather than making a loan to the lender or an operating business. The transfer is structured as a "true sale," meaning that if the originating lender were to enter bankruptcy, receivership or other insolvency proceedings, the securitization vehicle would be acknowledged as the owner of the receivables. Frequently this is achieved by a two-step process involving an initial transfer to a wholly owned subsidiary of the originator, and a deposit of the assets by that intermediate subsidiary into the issuing entity for the securitization. The intermediate subsidiary is therefore often referred to as the "depositor."[13]

In this example, the auto loans would typically be fixed rate loans, because car buyers usually want to have certainty about their borrowing costs. But when the lender goes to the capital markets to securitize those loans, it may find that some investors want to buy floating rate securities. If the lender decides to cause the issuing entity to sell floating rate securities, it will likely also cause it to enter into a fixed-to-floating interest rate swap with a notional amount matched to the face amount of the floating rate securities. The notional amount of the swap will decrease

[13] In a one-step bank securitization, the originating bank would be the "depositor."

over time as the securities are repaid out of borrowers' car payments. Unless the swap counterparty defaults or is downgraded, the vehicle will not enter into any additional swaps at any time. The swap provides hedging protection to support timely payments to investors, but investors will neither benefit from nor be at risk for changes in the valuation of the swap.

There are variations on this model for different asset classes and structures,[14] but this is a typical model for classic securitizations of loans and loan receivables. Another model, for revolving pools, is seen in credit card securitizations and dealer floor plan finance securitizations. Credit card receivables are revolving assets—borrowers can pay down their credit lines and re-borrow continually—and tend to bear interest at floating rates, though they may have fixed rates in limited circumstances. Likewise, dealer floorplan receivables revolve as borrowers sell merchandise to consumers and purchase new merchandise for their inventory. Revolving receivables are typically securitized through master trusts, which issue multiple tranches of securities supported by the same receivables pool. In such deals, any interest rate swap would typically be entered into when any particular tranche of securities was issued and would have a notional amount matched to the outstanding principal amount of the hedged tranche. A master trust might therefore enter into more than one swap over its period of existence, but generally only when it issues a new tranche of securities. The credit card issuing bank or auto finance company (or one of its affiliates) would typically hold a "seller interest" in the master trust that entitles it to the residual value of the pool assets. No third-party investors would benefit from or be at risk for changes in the valuation of the swap.[15]

Finally, if an originator of U.S. dollar denominated loan receivables wanted to issue securities in a classic securitization denominated in a currency other than U.S. dollars, for instance to expand its funding opportunities into new markets, it would have to make sure the securitization included a currency swap that would convert the U.S. dollars received on the loan receivables into the currency in which the issuing entity would be obligated to make payments to the investors. Aside from the inclusion of a currency swap, a classic securitization involving a mismatch between the currency of its assets and the currency of its securities would use the same structures as described above.

Asset-backed securities offered and sold in registered public offerings on the SEC's Form S-3 virtually always reflect the very limited use of swaps described for classic securitizations, if they are used at all. The definition of "asset-backed security" under Regulation AB (17 C.F.R. Part 229.1100 et seq.) requires that the security be:

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[14] For instance, securitization warehouses may be established where receivables are financed on an interim basis until they are adequately "seasoned" or accumulated in a sufficient amount. These entities may enter into additional swaps at the time new receivables are sold into the warehouse.
[15] See note 8 *supra.*

> primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders; provided that in the case of financial assets that are leases, those assets may convert to cash partially by the cash proceeds from the disposition of the physical property underlying such leases.

In addition, Regulation AB requires that the activities of the issuing entity be limited to "passively owning or holding the pool of assets, issuing the asset-backed securities supported or serviced by those assets, and other activities reasonably incidental thereto." Other securities that would satisfy these conditions are sometimes issued in the Rule 144A or Regulation S markets, often because of concerns regarding the expense or timing of a public offering.

In addition to securities that would qualify for registration on Form S-3, there are a number of securitizations that follow the above model but may include a higher proportion of delinquent or defaulted assets (such as in the case of non-performing mortgage loan transactions) or may rely too heavily on the residual values of underlying assets to meet the SEC's criteria. In addition, UK residential mortgage securitizations typically use master trust structures even though they do not have revolving assets. These transactions do not fall within the definition of "asset-backed security" in Regulation AB but otherwise are generally consistent with the classic securitization model. Where a securitization includes a discrete pool of assets, the issuing entity has limited purposes consistent with the SEC criteria, and swaps are used to hedge interest rate or currency risk related to the issued securities, we believe (i) the vehicle can be clearly distinguished from commodity pools and (ii) the use of swaps by the vehicle either would satisfy the Commission's definition of *bona fide* hedging or would satisfy a *de minimis* test that looked to whether the notional amount of the swap did not exceed the face amount of the assets or the face amount of the securities.[16]

III. The Commission should analyze the status of securitization vehicles under the commodity pool regulations in light of the statutory language and the criteria set forth in *Lopez v. Dean Witter Reynolds*

Prior to the enactment of the Dodd-Frank Act, the CEA defined "commodity pool operator" to mean:

[16] Our members have expressed concern that the Commission's existing approach to the *de minimis* test, which looks to margin posted or an alternative net notional test based on the liquidation value of the pool assets, examines the wrong metrics in the context of a securitization, where margin is not posted, all of the assets of the securitization generally support the swap subject to a contractual priority of payments, and the vehicle holds illiquid assets for which liquidation value is not calculated.

> any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility, except that the term does not include such persons not within the intent of the definition of the term as the Commission may specify by rule, regulation, or order.[17]

The term "commodity pool" was not defined at all in the statute, and the Commission's regulations defined "pool" by repeating the statutory language. The parties to securitizations, which do not trade in commodities for future delivery, were not commodity pool operators under this definition.

The Dodd-Frank Act expanded the definition of "commodity pool operator" and added a new definition of "commodity pool." Under the Dodd-Frank Act definition of "commodity pool" and the modified definition of "commodity pool operator," a commodity pool continues to be an "investment trust, syndicate or similar form of enterprise," but the purpose of such a pool has been expanded. Instead of looking to whether the pool is operated "for the purpose of trading in any commodity for future delivery" on or subject to the rules of an exchange, the new definitions include any pool that is operated "for the purpose of trading in commodity interests, including any . . . commodity for future delivery, security futures product, or swap."

In *Lopez v. Dean Witter Reynolds Inc.*,[18] the United States Court of Appeals for the 9th Circuit cited existing case law to identify the four key aspects of a commodity pool:

> (1) an investment organization in which the funds of various investors are solicited and combined into a single account for the purpose of investing in commodity futures contracts; (2) common funds used to execute transactions on behalf of the entire account; (3) participants share pro rata in accrued profits or losses from the commodity futures trading; and (4) the transactions are traded by a commodity pool operator in the name of the pool rather than in the name of any individual investor.[19]

Although this language does not reference swaps, we believe it continues to be relevant to an understanding of what it means to be "an investment trust, syndicate or similar form of enterprise" for purposes of the CEA.

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[17] CEA Section 1a(5), 7 U.S.C. Section 1a(5) (2010).
[18] 805 F.2d 805 (1986)
[19] 805 F.2d at 884 (citations omitted).

Most securitizations do not satisfy key aspects of the *Lopez* criteria. These vehicles do not have multiple equity participants, pro rata allocations of accrued profits or losses, a purpose of trading in swaps or other commodity interests, or actual trading (as opposed to entering into a single or limited number of hedging positions to be held for their entire term). The Commission, however, has taken an expansive view of its authority with respect to vehicles transacting in commodity futures, and appears to be taking a similarly expansive approach with respect to swaps. For instance, the Commission suggests that an entity may become a commodity pool by holding a single swap position. In its release relating to the elimination or modifications of certain exemptions from CPO registration (the "CPO Release"), the Commission explained its need to include swaps in the *de minimis* threshold under the Section 4.13(a)(3) exemption as follows:

> If swaps were excluded, any swaps activities undertaken by a CPO would result in that entity being required to register because there would be no de minimis exclusion for such activity. As a result, one swap contract would be enough to trigger the registration requirement.[20]

As we have indicated, notwithstanding the Commission's statement here, we do not believe that entering into a single swap to hedge interest rate or currency risk for a pool of receivables would cause such a vehicle to be operated "for the purpose of trading" in swaps. Moreover, many of such vehicles are not collective investment vehicles. We believe the Commission's pronouncements exceed its regulatory authority, and we are therefore requesting, at a minimum, no-action relief to relieve securitization market participants of the regulatory uncertainty created by such pronouncements.

IV. Issues for securitization vehicles holding swaps if treated as commodity pools

No clear party to act as a CPO for many vehicles. The Commission noted in the Final CPO Release that it had received a number of comments requesting clarification as to which party would be the CPO for registered investment companies if the Commission's Section 4.5 exclusion did not apply. In the context of securitizations, it may be even harder to identify an entity that would be treated as a CPO if the securitization vehicle were a commodity pool. For passive pools, including those that are used by banks or lending businesses to obtain capital markets funding for their loan portfolios, there is no "operator" and there are no "operations." These transactions may have a trustee who holds the assets and facilitates reporting to investors, one or more servicers responsible for collecting the assets, a depositor that may only act to transfer interests into the issuing pool and may itself be a special purpose vehicle, a sponsor that caused the securitization to be established and

[20] Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11252, 11258 (Feb. 24, 2012).

underwriters that handled the initial placement of the securities. But these entities are generally not considered to "operate" the vehicle.

Moreover, imposing CPO requirements on a service provider to an established securitization vehicle that is not offering new interests serves little purpose under the CEA. These service providers are unlikely to have employees with the correct certifications and licenses and will likely have little or no experience with regulation under the CEA. Especially for passive vehicles, it is also unlikely that the securitization will enter into new swaps, leaving a regulatory burden that does not serve the purposes of the CEA.[21]

Need to be operated by a registered CPO or a CPO exempt from registration to achieve eligible contract participant (ECP) status. Under the Commission's final entity definitions rule promulgated jointly by the SEC and the CFTC, in some circumstances an entity that is a commodity pool must have a registered or exempt commodity pool operator to be considered an ECP. Thus, to the extent there is uncertainty about the status of securitization vehicles as commodity pools and there is no person involved with them that clearly constitutes a commodity pool operator and is willing to register as such, the securitization vehicles may not be ECPs. This could be a significant problem if the vehicle needs to amend an existing swap—for instance to accommodate counterparties who are making their swaps portfolios compliant with the Dodd-Frank Act—or needs to replace an existing swap, for instance because of an issue with a counterparty.

Securitizations with publicly offered securities and holding de minimis positions in swaps will not be able to rely on the Commission's de minimis exclusion in Section 4.5 and exemption in Section 4.13(a)(3). Many of the securitizations about which we are concerned are outside of the Commission's area of focus but may not be within the letter of its regulatory exemptions. For instance, the Commission has stated that "overseeing entities with less than five percent exposure to commodity interests is not the best use of the Commission's limited resources."[22] However, even though publicly offered securitizations that use swaps for hedging purposes generally would be expected to fall within the quantitative limits of the *de minimis* exemption under Section 4.13(a)(3) of the Commission's rules, they would not satisfy the requirements that the interests be exempt from registration and not offered to the public. For example, a publicly offered credit card or auto securitization trust that provided robust offering disclosure and monthly reports pursuant to Regulation AB, and only used swaps for hedging the mismatch between the yield on its assets and the yield on its securities, might be treated by the Commission as a commodity pool with no clear CPO exemption, while an identical securitization offered pursuant to Rule

[21] We note that the existence and terms of the swap will be reported under Commission rules so this aspect is addressed. See Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 Fed. Reg. 35200 (June 12, 2012).
[22] Final CPO Release, 77 Fed. Reg. at 11261.

144A and Regulation S under the Securities Act of 1933 would have an available CPO exemption if it were a commodity pool. Likewise, because securitizations do not have the features of a mutual fund and are not registered as such, they will not be able to rely on the exclusion under Section 4.5 of the Commission's rules even though they would again satisfy the *de minimis* threshold. We are not aware of an exclusion or exemption that would apply to the operator of a public securitization if such securitization were a commodity pool, even though such securitizations are passive vehicles with a high degree of transparency.

Securitization vehicles that are not Section 3(c)(1) or 3(c)(7) funds may inadvertently develop Volcker Rule issues if they are treated as commodity pools and commodity pools are treated as "covered funds." Developing financial regulations, including those to implement Section 619 of the Dodd-Frank Act (the "Volcker Rule") create more significant repercussions for entities designated as commodity pools. In particular, the proposed regulations would treat commodity pools as "covered funds," meaning that if securitization vehicles were treated as commodity pools they would also become covered funds. Currently, a large number of securitization vehicles, especially those involving registered public offerings, would not be covered funds because they rely on Rule 3a-7 under the Investment Company Act or Section 3(c)(5) of the Investment Company Act, rather than relying on Section 3(c)(1) or 3(c)(7), the private funds exemptions that are implicated in the Volcker Rule regulations of private equity and hedge funds. As set forth in our prior comments on the Volcker Rule proposals, we believe that the proposed Volcker Rule regulations were too expansive even before the recent changes to the Commission's regulations, encompassing a variety of securitizations that have none of the attributes of the private equity or hedge funds that Congress sought to address in the Volcker Rule. We believe that further expansion of the scope of the proposed Volcker regulations to encompass a far broader array of securitization vehicles would be inappropriate and is inconsistent with Congressional intent. Congress did not specifically include "commodity pools" in the definition of hedge fund or private equity funds under the Volcker Rule. Instead, the concept of a commodity pool as a covered fund was added by the Joint Regulators in the proposed Volcker Rule regulations. The primary stated rationale for doing so is that such entities "are not generally subject to the Federal securities laws due to the instruments in which they invest or the fact that they are not organized in the United States or one or more States." In this letter, we do not seek to address the general treatment of commodity pools under the Volcker Rule. However, we strongly believe that the stated rationale for treating commodity pools as covered funds does not apply in the case of securitization vehicles, which issue securities and, therefore, are subject to the Federal securities laws. If securitization vehicles are treated as commodity pools, and commodity pools are treated as covered funds, then the banking entities that sponsor them would not be able to maintain their ownership interests and other relationships they currently have with these vehicles. This result would put a critical source of funding for consumer financing at risk.

V. Treating securitization vehicles as commodity pools will not advance the goals of the Dodd-Frank Act or the Commission

We do not believe that securitization vehicles using swaps as described above fall within the intended scope of the amendment to the definition of "commodity pool operator" and the inclusion of the definition of "commodity pool" effected by the Dodd-Frank Act. These entities are not trading in swaps, or using swaps as a way to trade other commodity interests. Instead, these securitizations are using swaps only to hedge the risks of the (non-commodity interest) financial assets they hold. To avoid arbitrary outcomes for existing entities where neither of these circumstances fully defines their use of swaps, we believe broad relief is appropriate for these securitizations.

Further, we believe that treating newly formed securitization entities as commodity pools if they include hedging swaps will have the effect of discouraging hedging, rather than the effect of causing the persons associated with them to become registered as CPOs—especially where inclusion of a hedging swap could mean the difference between forming a securitization vehicle that is not a covered fund under the Volcker Rule and forming a securitization vehicle that is effectively prohibited under that rule. The Commission has generally acknowledged that hedging activity should be encouraged, and has excluded many swaps that serve as hedges from key restrictions in its new swaps regulations. A broad interpretation of "commodity pool" will not support this goal.

We also note that the Commission will be able to obtain significant information about these entities, consistent with its goal of increased transparency for the swaps market. As a result of the new regulatory reporting requirements, securitizations or their counterparties will need to report their swaps to a swap data repository. If these entities are not engaging in additional swaps activity, the Commission will not have any applicable activity to regulate that would justify the burdens of requiring registration and will have comprehensive information about existing swaps.

Finally, we note that the extraterritorial implications of an overly broad interpretation of "commodity pool" could be significant. In addition to the impact of treating domestic issuers of asset-backed securities as "commodity pools" on the market, such a position would have broader impacts when applied in a cross-border context. Investor interest within the U.S. for asset-backed securities and covered bonds from issuers based outside the U.S. has grown significantly in the last several years, as U.S. supply of equivalent assets has declined. Increasingly, both originators and investors think globally and look to diversify funding sources and investment exposures across markets, products and regions. The free and efficient flow of investment capital and opportunities into and out of the U.S. is of great importance to both U.S. lenders (and the consumers and businesses they serve) and U.S. asset managers (and their investors).

Providing U.S. investors with access to investments in asset-backed securities and covered bonds originated abroad allows those investors to better diversify the credit, product and geographic mix of their portfolios. If securitization trusts or guarantor entities used in structured covered bond transactions are determined (incorrectly, in our view) to be commodity pools, non-U.S. securitizers and covered bond issuers seeking to access the U.S. investor base could inadvertently find themselves subject to regulation as commodity pool operators, as well as being subject to potential Volcker Rule implications, which would at a minimum discourage cross-border activity. Additionally, lack of clarity on the potential impact of commodity pool regulation on non-U.S. issuers engaging in securitizations and covered bonds, including potential Volcker Rule implications, could lead non-U.S. banks to avoid issuing these transactions in the U.S. altogether in order to escape the costs of compliance and impact of regulatory uncertainty. Given the importance of funding in the U.S. both for the non-U.S. banks and other issuers raising capital in the U.S. and for U.S. investors diversifying their investment portfolios, the potential disruption to the U.S. and global economy of such avoidance by non-U.S. issuers could be significant.

VI. The Commission's Part 4 rules generally have little relevance in the context of securitizations

Securitizations have very different features than commodity pools and thus an entity deemed to be a commodity pool operator for a securitization will have difficultly complying with the Part 4 requirements, and investors will be little served by such compliance. The SEC spent many years addressing similar issues in the context of its registration rules for operating companies, where many such requirements—such as to provide audited financial statements—were inapplicable to or inappropriate for securitization vehicles. The SEC finally codified its ad hoc guidance and no-action positions in Regulation AB in 2005. Prior to this codification, issuers and other market participants had the ability to address relevant issues with the SEC before taking any action, such as filing a registration statement, that would make them subject to SEC review. In the case of the inclusion of "swaps" in the definition of "commodity interests," however, the Commission would be taking the position that existing securitization vehicles have been transformed into commodity pools by operation of law, and without any intentional action. Moreover, because these entities are special purpose vehicles, they may not have available excess cash flows to reimburse a service provider for additional reporting or audits, and such costs may thus come out of funds that would otherwise be distributed to investors.

To the extent that the Commission classifies securitization vehicles as "commodity pools," we believe it will be necessary for the Commission to provide guidance to commodity pool operators as to how to comply with the Part 4 rules, or how they should be modified, in this context. In particular, we believe the Part 4 rules with respect to financial reporting and calculation of net asset value will need to

be modified to accommodate securitizations and the disclosure rules will need to be modified to accommodate existing vehicles.

* * * *

ASF very much appreciates the opportunity to provide the foregoing concerns. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact me at 212.412.7107 or at tdeutsch@americansecuritization.com, Evan Siegert, ASF Managing Director, Senior Counsel, at 212.412.7109 or at esiegert@americansecuritization.com, or ASF's outside counsel on this matter, Ellen Marks of Latham & Watkins LLP at 312.876.7626 or at ellen.marks@lw.com.

Sincerely,

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