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INVESTMENT ADVISER
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November 30, 2012

VIA ELECTRONIC MAIL

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

Re: Request for a Temporary Exclusion of an Investment in a Securitization Vehicle as a “Commodity Interest” for Purposes of CPO and CTA Registration and Compliance

Dear Mr. Barnett:

Managed Funds Association¹ (“MFA”), the Investment Adviser Association² (“IAA”), the Investment Company Institute³ (“ICI”) and the Asset Management Group of the Securities

¹ The Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, Australia and many other regions where MFA members are market participants.

² The Investment Adviser Association is a not-for-profit association that represents the interests of investment adviser firms registered with the Securities and Exchange Commission. Founded in 1937, the IAA’s membership consists of about 550 advisers that collectively manage in excess of \$10 trillion for a wide variety of individual and institutional investors, including pension plans, trusts, investment companies, private funds, endowments, foundations, and corporations. For more information, please visit our web site: www.investmentadviser.org.

³ The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$13.8 trillion and serve over 90 million shareholders.

Industry and Financial Markets Association⁴ (“SIFMA AMG”) (together, the “Associations”) respectfully request that the Division of Swap Dealer and Intermediary Oversight (“DSIO” or the “Division”) of the Commodity Futures Trading Commission (the “Commission” or “CFTC”) grant commodity pool operators (“CPOs”) a temporary exclusion from including an investment in a securitization vehicle as a “commodity interest” for purposes of § 4.13(a)(3) and § 4.5⁵ (“Temporary Exclusion”);⁶ and that it grant such Temporary Exclusion expeditiously. The Associations submit this request to facilitate compliance with the Commission’s amendments to the registration and compliance obligations of CPOs and commodity trading advisors (“CTAs”).⁷ We respectfully request that the Division grant a 9 month Temporary Exclusion, while the Division develops guidance on the treatment of investments in securitization vehicles for operators of investment pools seeking to comply with § 4.13(a)(3) and/or § 4.5.

I. Background

The Associations’ members include operators of investment pools that invest in securitization vehicles.⁸ We have only recently become aware that a securitization vehicle that uses swaps may be considered a commodity pool (hereinafter, a securitization vehicle that is a commodity pool is referred to as “Securitization Vehicle”).⁹ Generally, investors have thought

⁴ The Asset Management Group (AMG) of the Securities Industry and Financial Markets Association’s members represent U.S. asset management firms whose combined assets under management exceed \$20 trillion. The clients of AMG member firms include, among others, registered investment companies, endowments, state and local government pension funds, private sector Employee Retirement Income Security Act of 1974 pension funds and private funds such as hedge funds and private equity funds. In their role as asset managers, AMG member firms, on behalf of their clients, engage in transactions for hedging and risk management purposes that will be classified as “security-based swaps” and “swaps” under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).

⁵ § 4.13(a)(3) provides an exemption from CPO registration for a CPO whose pool meets certain minimum “commodity interest” trading requirements, among others. § 4.5 provides an exclusion from CPO regulation for persons that operate pools that are regulated by another regulatory authority, including registered investment companies and other “qualifying entities.”

⁶ While the focus of this letter is on securitization vehicles, we request that the Commission also consider applying the Temporary Exclusion to pools that invest in real estate investment trusts (“REITs”). Although the Commission has granted relief to certain equity REITs that meet the conditions of a no-action letter (CFTC Letter No. 12-13) issued by the Commission on October 11, 2012, this no-action relief does not apply to mortgage REITs or foreign REITs. As our members that manage pools that invest in foreign REITs or mortgage REITs are unsure how to treat these investments for purposes of §4.13(a)(3) or § 4.5, we urge the Commission to extend the Temporary Exclusion to these REITs as well.

⁷ See Final Rules for Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11284 (Feb. 24, 2012), hereinafter, the “Adopting Release.”

⁸ As described by the American Securitization Forum (“ASF”), “[s]ecuritizations generally use the 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 purposes of trading in swaps or other commodity interests.” See letter from Tom Deutsch, Executive Director, ASF, to Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight, CFTC, dated August 17, 2012, requesting an exclusion from commodity pool regulation for securitization vehicles.

⁹ See, e.g., CFTC Letter No. 12-14 (Oct. 11, 2012).

interests in a securitization vehicle to be comparable to interests in debt or debt-like interests with a stated interest rate or yield and principal balance and a specific maturity date. Many of our members intend to rely on the § 4.13(a)(3) and/or § 4.5 exemptions. However, it is not clear to the Associations and their members which securitization vehicles are commodity pools and how a pool operator should calculate an investment in a Securitization Vehicle for purposes of § 4.13(a)(3) and/or § 4.5. We understand the Commission is working on new guidance on the application of §§ 4.13(a)(3) and 4.5 in the fund-of-funds context; we think it is appropriate for the Commission to grant a Temporary Exclusion while it develops this new guidance and considers how investments in Securitization Vehicles factor into the analysis.¹⁰

II. Reasons for Temporary Exclusion

In many cases, because of the lack of uniformity in the public disclosure practices by securitization vehicles, investors in securitization vehicles may lack access to, as well as the ability to compel the disclosure of, sufficient information to determine: (1) whether a particular securitization vehicle is a commodity pool; (2) whether a Securitization Vehicle that an investor has invested in is eligible for relief granted by the Commission in response to requests from SIFMA, ASF or individual issuers;¹¹ and (3) how to calculate an investment in a Securitization Vehicle for purposes of §§ 4.13(a)(3) or 4.5. While we appreciate the Division's interpretation that certain securitization vehicles issuing asset-backed securities are excluded from the definition of "commodity pool,"¹² there are many other types of securitization vehicles not addressed in the Division's interpretation.

In analyzing whether a securitization vehicle is a commodity pool, an investor needs to understand whether a securitization vehicle engages in swaps transactions. However, an issuer of a securitization vehicle may not disclose to an investor how the securitization vehicle's underlying contracts were documented, which is critical in determining whether a contract is a "swap" or a "security-based swap". Furthermore, certain issuers of securitization vehicles grant discretion to a trustee or manager to invest in and divest of swaps, which further complicates an investor's analysis of whether a particular securitization vehicle is or could be a commodity pool as the investor cannot tell in a timely manner whether or not the manager is using this authority.

In addition, the Division has and continues to issue interpretive relief to issuers of Securitization Vehicles meeting specific criteria. However, many investors may not have, and

¹⁰ See letter from the Securities Industry and Financial Markets Association ("SIFMA") and the ASF to David A. Stawick, Secretary, CFTC, dated November 15, 2012, requesting relief to address "legacy" structured finance transactions; see also letter from SIFMA to Chairman Gensler, Commissioners Sommers, Chilton, O'Malia and Wetjen and Director Barnett, dated November 14, 2012, regarding the applicability of commodity pool regulation to insurance linked securities.

¹¹ See *id.*; see also CFTC Letter No 12-14 (stating that the Division "remain[s] open to discussions with securitizations sponsors to consider the facts and circumstances of their securitization structures with a view to determining whether or not they might not be properly considered a commodity pool, or where not sufficiently assured, whether other relief might be appropriate under the circumstances").

¹² See n.9, *supra*.

may not have the ability to compel disclosure of, sufficient information to know whether a particular Securitization Vehicle is eligible for relief granted by the Division.

To comply with the Commission's regulatory requirements, our members need clarification and guidance from the Division with respect to investments in securitization vehicles. However, time is running out as we quickly approach the December 31, 2012 CPO registration (under both §§ 4.13(a)(3) and 4.5) and compliance deadline (under § 4.13(a)(3)). Thus, we respectfully urge the Division to grant a Temporary Exclusion as we do not believe every operator of a fund that invests in a securitization vehicle should be required to register with the Commission. We also do not believe such policy would achieve the objectives or the mission of the Commission by requiring wholesale registration of operators of investment funds that may invest in securitization vehicles, some with very limited indirect exposure to commodity interests.¹³

Finally, most investors/investment funds purchased interests in Securitization Vehicles when such products were not considered to be investments in "commodity pools". For some investment funds, purchases of interests in securitization vehicles were made with representations to underlying investors that the fund did not and would not be, or invest in, a commodity pool. For such investment funds and their sponsors, additional time is needed to address the myriad new compliance issues. We are also concerned that a pool operator's failure to register, if it is later deemed necessary, could potentially result in liability for its funds based on representations made to investors and ISDA counterparties, as well as in lending agreements and under other contracts with regard to its regulatory obligations.

We understand the Division is working on new fund-of-funds guidance and addressing and/or providing relief to certain issuers of Securitization Vehicles. Given that the Division is in the process of reviewing these subjects, and that neither former Appendix A nor the CFTC part 4 regulations were drafted with Securitization Vehicles in mind, we respectfully urge the Division to grant a Temporary Exclusion of 9 months while it reviews and considers an appropriate regulatory framework for products that are new to its oversight jurisdiction.

For similar reasons, we also respectfully request that a similar Temporary Exclusion be provided from including an investment in a securitization vehicle as a "commodity interest" for purposes of CTA registration determinations. We believe that such relief is consistent with other actions the Division has taken to provide a temporary delay of registration requirements where the status of certain instruments as "commodity interests" is unclear.¹⁴

¹³ The Associations' memberships include many registered CPOs and CTAs. We believe the CFTC serves an important market and regulatory oversight role and should focus its resources on market participants with a meaningful exposure to commodity interests.

¹⁴ For example, the Division recently issued time-limited no-action relief to entities in determining their status as CPOs and CTAs with respect to their foreign exchange swap and foreign exchange forward activities pending the determination of the Secretary of the Treasury to exempt such instruments from the definition of "swap" under the Commodity Exchange Act. CFTC Letter No. 12-21 (Oct. 12, 2012).

* * * * *

We appreciate the Division's consideration of our request for a Temporary Exclusion and look forward to an opportunity to meet with Commissioners and staff to discuss our concerns and recommendations with respect to an appropriate regulatory framework for investments in and advice concerning Securitization Vehicles and other non-traditional investment vehicles. If you have questions or comments, please do not hesitate to contact Stuart J. Kaswell or Jennifer Han of MFA at (202) 730-2600, Karen L. Barr of IAA at (202) 293-4222, Karrie McMillan or Sarah Bessin of the ICI at (202) 326-5835, or Tim Cameron of SIFMA AMG at (212) 313-1389.

Respectfully submitted,

/s/ Stuart J. Kaswell
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Executive Vice President & Managing Director,
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Managed Funds Association

/s/ Karen L. Barr
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cc: The Honorable Gary Gensler, Chairman
The Honorable Jill E. Sommers, Commissioner
The Honorable Bart Chilton, Commissioner
The Honorable Scott D. O'Malia, Commissioner
The Honorable Mark P. Wetjen, Commissioner
Amanda Olear, Special Counsel, Division of Swap Dealer and Intermediary Oversight
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