William G. Sutton, CAE
President and CEO

EQUIPMENT LEASING AND FINANCE ASSOCIATION
1825 K Street NW
Suite 900
Washington, DC 20006
P 202.238.3400
F 202.238.3401
www.elfaonline.org

June 8, 2011

Officer of the Comptroller of the Currency:

By Email: regs.comments@occ.treas.gov

Office of the Comptroller of the Currency
250 E Street, SW., Mail Stop 2-3
Washington, DC 20219

Re: Credit Risk Retention
(Docket No. OCC-2010-0002)

Securities and Exchange Commission:

By Email: rule-comments@sec.gov

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Credit Risk Retention
(Rel. No. 34-64148; File No. S7-14-11)

Board of Governors of the Federal Reserve System:

By Email: regs.comments@federalreserve.gov

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Credit Risk Retention
(Docket No. R-1411)

Federal Deposit Insurance Corporation:

By Email: comments@FDIC.gov

Robert E. Feldman
Executive Secretary
Comments, Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Credit Risk Retention
(RIN 3064-AD74)

RE: DODD-FRANK RISK RETENTION REGULATIONS FOR ABS – EQUIPMENT LEASING AND LENDING

This letter is a response by the Equipment Leasing and Finance Association ("ELFA") to the requirement in P.L. 111-203 (the "Dodd-Frank Act") that the Securities and Exchange Commission, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation (collectively, the "Agencies") issue rules relating to risk retention in various classes of securitization transactions,

and to the Agencies' March 29, 2011 Notice of Proposed Rulemaking (the "NPRM") to implement the credit risk retention requirements.

Background on ELFA

ELFA is the trade association that represents financial services companies and manufacturers in the $521 billion U.S. equipment finance sector. Equipment finance provides a significant source of funding for both small and large commercial enterprises (including those serving the equipment needs of the Federal government) and federally tax-exempt, taxable and tax credit funding for State and local governments in the United States and is a significant contributor to capital formation in the U.S. and abroad. Overall, business investment in equipment and software accounts for 8.0 percent of the U.S. Gross Domestic Product (GDP) and the commercial equipment finance sector contributes about 4.5 percent to the GDP.

ELFA members are the driving force behind the commercial and State and local government equipment finance market providing credit every business day to nearly every business and State and local government sector in the country. ELFA members finance the acquisition of all types of capital equipment, including commercial and corporate aircraft, rail cars and rolling stock, trucks and transportation equipment, vessels and containers, construction and off road equipment, medical technology and equipment, IT hardware, software and capitalizable services, emergency communications, public transit, police and emergency vehicles, school buses, energy management and conservation equipment and virtually every other type of equipment.

ELFA has more than 500 members including (i) independent leasing and finance companies, (ii) captive finance companies, (iii) commercial banks, (iv) diversified financial services companies, (v) investment banks and (vi) service providers including law firms, accounting firms, trustees, servicers, custodians and others who assist in the financing of equipment leases and loans. ELFA members include (a) many of the nation's largest financial services companies and manufacturers, (b) national, regional and community banks and (c) independent medium and small finance companies throughout the country. ELFA members' clients range from Fortune 100 companies to States and large urban governments to small and medium sized business enterprises to cities, counties, school districts and other governmental units nationwide and healthcare, education and other non-profit corporations that serve the public interest.

ELFA represents virtually all sectors of the equipment finance market and its members see virtually every type of equipment financing transaction conducted in the United States. ELFA members who are service providers to the equipment finance industry (such as lawyers, accountants, trustees and vendors) have a unique vantage point of reviewing and consulting with respect to a broad range of financial transactions from initial concept to final payout and from the perspective the borrower/issuer, lender/investor and broker/other financing intermediary. ELFA truly is at the heart of equipment finance in the United States.

Background on Equipment Finance

The equipment finance sector provides a significant source of funding for small businesses and a valuable alternative source of funding for large businesses in the United States, whether the

equipment is credit card swipe machines or objects of international commerce such as aircraft or containers. We are concerned about the potential harm which inappropriate risk retention regulations could impose upon the capital formation process for equipment finance companies, particularly their access to the securitization market ("Equipment ABS") as well as to their customers, which lease or borrow to acquire essential equipment for their businesses. Equipment finance providers have already been harmed by the financial crisis in the United States and have suffered reduced access to the capital they need to continue to extend credit to their customers. Many equipment lessors and lenders may not survive additional costs and limitations on funding which would significantly decrease the availability of equipment leasing and loans to operating companies, increase equipment finance costs and harm the United States' economic recovery.

The U.S. capital markets are extremely important to equipment lessors/lenders because they operate a highly-capital intensive business, essentially financing equipment used by operating companies in the production of goods and services in exchange for cash flow (in the form of lease/loan payments) that will repay the lessors/lenders only over a period of several years. In many cases, equipment lessors will not recover their investment or realize a profit until they sell or re-lease the equipment at the end of the lease term, so this economic reality constitutes a valid form of risk by the lessor. Equipment lessors/lenders tend to be relatively highly leveraged with significant bank loans and securities issuances. During the past twenty years, equipment lessors/lenders have been significant users of securitization facilities by offering securities backed by lease/loan cash flow and equipment residual values to investors in Equipment ABS. The securitization market has been a valuable alternative at competitive pricing to the bank loan market and has provided access to institutional investors (such as pension plans, insurance companies and investment funds) that provide a meaningful complement to traditional syndicated bank loans The availability of funding at competitive prices provided by the securitization market helps to reduce the total prices paid by the businesses, which are customers of equipment lessors/lenders, for new productive assets and software. Additionally, Equipment ABS has allowed both banks and institutional investors to diversify their portfolios.

No data have indicated any correlation between practices in the equipment finance sector and causes for the U.S. financial crisis. In addition, we are not aware of any significant defaults or downgrades in securitizations involving Equipment ABS.[1] As the Federal Reserve Board noted in its October 2010 "Report to the Congress on Risk Retention", "Equipment loan and lease ABS in general, and the triple-A rated securities, in particular, have displayed strong performance throughout the financial crisis. As with auto ABS, the short maturity of the underlying equipment loans means that the level of credit enhancement increases over the life of the security." In the same report, The Federal Reserve Board noted that "[A] handful of equipment ABS classes have experienced downgrades, but most securities have had stable performance or

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[1] The modest downgrades in equipment ABS stand in stark contrast to those in RMBS and CDOs. See, for example, Moody's Investors Service, "Structured Finance Ratings Transitions: 1983-2009" (March 2010, Analyst Contacts: Julia Tung and Nicolas Weill) reporting that during 2008 and 2009, the downgrades in US Equipment Leases were 5.6% and 9.3%, compared to those in US Home Equity Loans (54.7% and 47.4%), US RMBS (37.2% and 74.7%), and US CDOs (48.1% and 66.8%) (Figure 1: "Global Structured Finance 12-Month Downgrade and Upgrade Rates by Sector in 2009, 2008 and Averaged over 2000-2009" at page 2 of that report).

even upgrades over time."[2] We believe that the relatively stronger performance of Equipment ABS is attributable in large part to the already sound practices followed by issuers in this sector, including (i) historic risk retention that is well in excess of five (5) percent, (ii) stronger underwriting practices for equipment finance contracts as compared to mortgage lending, (iii) more conservative valuations for equipment as compared to housing and (iv) the absence of the "originate to distribute" business model in the Equipment ABS sector. Consequently, both the letter and the spirit of regulations mandated by Dodd-Frank Section 941 suggest that mandatory risk retention for Equipment ABS should differ from those appropriate for mortgage-backed securities and other financial products.

This letter highlights the aspects of the NPRM which would be particularly problematic for the equipment finance industry and suggests modifications to the general risk retention rules which ought to be incorporated in the final regulations. Because we are not seeking an asset category exemption for Equipment ABS (except for Pass-Through Municipal ABS), there is no need to grapple with a definition for "equipment" which is adequately addressed in the UCC.

I. Horizontal risk retention is expected to constitute the principal risk retention method used for Equipment ABS and needs to reflect economic realities imposed by investors.

The NPRM has identified several permissible forms of risk retention: horizontal; vertical, L-shaped; retention of all risk in a representative sample of the entire securitized pool of assets; and the seller's interest in a master trust which acquires assets under a revolving line of credit. The latter two are not expected to be of general use for Equipment ABS, especially since the representative sample is better suited for fungible assets such as consumer auto loans rather than individually negotiated commercial equipment leases and loans. Additionally, the master trust format has become relatively disused during recent years, so that issuers and warehouse line of credit providers have tended to favor a revolving line of credit to a pass-through entity such as a limited liability company, rather than to a master trust. Vertical and L-shaped have not attracted much interest among investors and warehouse credit providers, who have become accustomed to risk retention in the form of overcollateralization and cash collateral accounts--both of which constitute horizontal risk retention.

For the reasons set forth below, we recommend that the final regulations permit Equipment ABS to recognize horizontal risk retention in the form of overcollateralization, which is the economic equivalent of either the seller's interest in a master trust structure, or of the most subordinated security in a structure where all of the fair market value of the assets is reflected by the special purpose entity's issuing multiple classes of securities, with the bottom-most class being held by the sponsor group and treated as an equity interest in the issuer and its assets. We also recommend that horizontal risk retention recognize that Equipment ABS includes risk retention in the form of equipment residual values. Because Equipment ABS is expected to utilize horizontal risk retention almost exclusively, it is critical that the final regulations include

[2] "Report to the Congress on Risk Retention" by The Federal Reserve Board, October 2010. at: www.federalreserve.gov/BoardDocs/RptCongress/securitization/riskretention.html#toc6g

variations which issuers and investors in this market segment have found acceptable during both good and challenging times.

A. Unlike some asset classes, Equipment ABS transactions utilize the concept of the "advance rate" which is applied to calculate the original principal amount of Equipment ABS which will be issued against the discounted balance of each lease contract or the remaining principal balance of each equipment loan in the collateral pool. For instance, a 90% advance rate would mean that $90MM of Equipment ABS would be issued against leases and loan contracts with a principal balance aggregating $100MM. The securitizer thus has risk retention of 10% of the value of the assets which have been securitized, since any losses incurred by reason of defaulted contracts would erode the cash flow payable to the securitizer on each monthly distribution date; investors in the Equipment ABS would not suffer any loss until the entire 10% risk retention had been exhausted. It is vital that the final risk retention regulations recognize that this investor practice constitutes a valid form of risk retention.

Similarly, the most subordinated classes of securities frequently are retained by an affiliate of the seller, and not sold to third party investors, doubtless because of the low rating which such classes would receive. As an economic matter, the subordinated cash flow resulting from overcollateralization (an advance rate less than 100%) is indistinguishable from the subordinated cash flow running to the most subordinated classes of securities (or to the Sponsor, as sole owner of the equity cash flow payable to the issuer). Because subordinated cash flow from an advance rate of less than 100% remains as securitizer risk retention for the entire time that the Equipment ABS are outstanding, it is unnecessary for the final regulations to require that overcollateralization be documented as a Z bond -- and it would be uneconomic (as recent structuring discussions by our member companies have demonstrated) to mandate that class A interest and principal be paid in full before any class B interest or principal be paid, and so forth.

Furthermore, it would be inappropriate, as the NPRM has inquired, for the sponsor to be permitted to receive only scheduled payments, but not its (bottom of the waterfall bucket) residual share of prepayments or recoveries from foreclosure and disposition of equipment under defaulted leases and loans. For one thing, this approach would in effect raise the risk retention percentage above the mandated five percent, as the aggregate discounted contract balance of the collateral pool declined (following prepayments and default recoveries) and the sponsor's ownership interest in the issuer remained static. More importantly, the NPRM suggestion would run counter to industry standard practice in Equipment ABS, under which all payments and proceeds from the collateral are deposited into a single collection account and allocated pursuant to a unitary waterfall--in contrast to MBS or CDO transactions, where there are separate waterfalls for interest collections and principal collections. There is a fundamental legal reason for this treatment of Equipment ABS: equipment rentals are not divided between principal and interest elements, but styled merely as rentals. There is no legal or economic reason to impose upon Equipment ABS the interest and principal waterfalls which characterize MBS and CDO deals; Equipment ABS properly treats all collections--whether scheduled payments, prepayments or default recoveries--as fungible amounts.

Additionally, equipment finance contracts experience an artificially high level of prepayments--not because obligors have sought to exit these arrangements, but because upgrades and additions

to financed equipment typically are accomplished by terminating the existing contract (and prepaying the remaining lease or loan amount) and entering into a new one for the reconfigured equipment. Frequently, this procedure is necessary because the original contract most likely will have been sold or pledged to a third party which may be unable or unwilling to refinance the upgrade on competitive terms. Hence, the equipment lessor or lender will negotiate a termination and prepayment of the original contract and the simultaneous entering into of a new agreement for the reconfigured equipment. This is particularly relevant for Equipment ABS, where the provisions of the securitization document are never expected to anticipate every possible contract rewrite and consequently the only way for the sponsor to accommodate the obligor is to arrange for termination and prepayment of the original contract.

B. It has been customary for Equipment ABS to include a reserve account. Typically, this account is fully funded at closing, thereby reducing the cash proceeds received by the securitizer, but in many Equipment ABS approximately half of the reserve account requirement may be funded at closing and the balance deposited on the ensuing three to six monthly payment dates, from a relatively high "bucket" of the cash distribution waterfall. This post-funding arrangement is driven by arm's-length negotiations between issuers and institutional investors; the latter have the upper hand in these discussions and cannot be expected to disadvantage their long-term investment risk. Furthermore, most transactions require the reserve account, once it has fallen below its maximum level, to be replenished from cash flow otherwise payable to the securitizer on each scheduled distribution date. Conversely, the securitizer is entitled to receive any excess amounts from the reserve account whenever the reserve account balance has reached the negotiated maximum. We recommend that the Agencies recognize that reserve account property not only can be released in this manner (provided that the aggregate risk retention amount remains in effect), but also utilized to pay deal-essential payments in the upper part of most waterfalls, such as trustee, rating agency and servicer fees and expenses.

The overriding policy consideration is that "cash is king" and the Agencies should issue final regulations which encourage issuers to utilize cash reserve accounts by permitting investments in other than Treasuries and FDIC-insured deposits. For instance, there are several other options that are prudent, yield more than Treasuries / FDIC-insured deposits and have been accepted for more than a decade by investors who fiercely demand that cash be invested in fundamentally safe liquid investments. We urge consideration of (i) obligations of (or guaranteed by) the United States, (ii) senior debt obligations of Fannie Mae or Freddie Mac or any other U.S. sponsored agency rated in the highest long-term rating by a rating agency, (iii) FDIC-insured deposits and other unsecured short-term obligations of a U.S. supervised banking or depository institution maturing within 360 days, which obligations have the highest short-term credit rating from a rating agency, (iv) commercial paper maturing within 270 days and having the highest short-term credit rating, (v) money market funds having the highest short-term credit rating, (vi) specified repurchase obligations secured by assets described in clauses (i) or (ii) above with the highest short-term credit rating, and (vii) any negotiable instruments, securities or other investments with the highest short-term credit rating.

C. Another unique feature of Equipment ABS is that the residual value (the fair market resale or re-lease value of the equipment at expiration or earlier termination of the lease contract) of each item of equipment owned by the securitizer also is at risk in these transactions. If there

has occurred an event of default under the related lease, then the ABS holders have the right to foreclose on the securitizer's ownership interest in the equipment as well as that contract and the rentals payable thereunder. This asset of the securitizer remains at risk until expiration of the lease contract, at which point the proceeds of remarketing the equipment typically would be released from the lien of the indenture and be payable to the securitizer, unless an ABS event of default had occurred and was continuing. Consequently, equipment residual values constitute a measure of risk retained by the securitizer with respect to each lease contract and the present value (calculated at closing of the Equipment ABS transaction) of the residual values should be recognized as an acceptable form of risk retention.

II. The Definition of Qualified Auto Loans is Unduly Restrictive.

We note that the NPRM provides for several asset based exemptions from required risk retention, including one for qualified auto loans (QALs) and one for qualified commercial loans (QCLs). Both exemptions are narrowly defined and neither QALS or QCLs currently include auto leases or equipment leases, respectively. Although auto leases are expressly excluded from the QAL definition, we understand that other industry groups may be proposing expansion of the QAL definition to include consumer auto leases and we believe that auto leases to commercial users also should be considered. Doing so would require modifications to the proposed underwriting criteria for QALs, especially in relation to the currently proposed QAL requirements regarding the maximum obligor debt to income ratio, and that monthly payments include principal and interest and not allow for deferral. In the case of leases, this requirement would need to accommodate monthly rents plus, in the case of TRAC leases[3], a lump sum payment at the end of the lease term. In addition, we note that (i) title, tax, registration and dealer fees are often permitted to be included in the total amount financed up to a maximum percentage (whether pursuant to a lease or loan) such that the proposed requirement to exclude all title, tax, registration and fees from the financing may be difficult to comply with and (ii) many states now issues electronic title records such that holding of original title certificates is no longer possible.

We also observe that it would be unprecedented for the Agencies to require the sponsor to repurchase the entire pool of loans, if the amount or percentage of required warranty repurchases exceeds a certain threshold. For one thing, such a requirement would have the perverse effect of motivating the sponsor to resist making warranty repurchases whenever they would exceed the aggregate limit. On the other hand, investors would be dismayed at having the entire transaction prematurely prepaid, solely by reason of a regulatory initiative which has never, to our knowledge, been imposed by investors in auto loan or auto lease ABS. Although ELFA is not

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[3] TRAC leases are a common form of consumer and commercial auto finance contract that provides the lessor (rather than the lessee) with the ability to depreciate the vehicle in a transaction that is economically equivalent to a secured financing. TRAC refers to a "terminal rental adjustment clause" or variable payment due from or to the lessee at termination of the lease. The terminal payment depends wholly on whether the actual resale value of the vehicle at contract expiration is greater or less than the agreed-upon residual value. If greater, then the excess proceeds are paid to the lessee (as an incentive for it to maintain the vehicle); if less, then the lessee must remit the shortfall to the lessor.

requesting expansion of the QAL category to include leases, if such an expansion is made, we request consideration of the foregoing points.

III. The Final Rules Should Provide an Asset Based Exemption from Required Risk Retention for Pass-Through Municipal ABS.

The NPRM exempts ABS that are securities issued or guaranteed by any State or by any political subdivision or public instrumentality of any State or territory that are exempt securities under Section 3(a)(2) of the Securities Act of 1933 ("Municipal Issuer ABS"). The final rules should provide an asset based exemption for ABS in the form of trust certificates, custodial receipts and similar certificates of beneficial interest issued by statutory or common law trusts or custodial arrangements ("Pass-Through Municipal ABS") that represent direct investment, partnership or other ownership interests in Municipal Issuer ABS and other State and local government bonds, notes, leases and other financing obligations that are not ABS (collectively with Municipal Issuer ABS, "Municipal Obligations"). Municipal Obligations that are securitized through Pass-Through Municipal ABS include equipment finance leases for State and local governments in the form of lease-purchase agreements, installment sale agreements and similar contractual obligations (generally referred to as "Municipal Equipment Leases") for police cars, school buses, emergency vehicles, fire trucks, transit vehicles, maintenance and recreational equipment, emergency communications, hardware and software for governmental operations, office equipment and other equipment and personal property for governmental purposes.

Other than the exemption for Municipal Issuer ABS and for ABS that constitutes a qualified scholarship funding bond within the meaning of the Internal Revenue Code of 1986, neither the Dodd-Frank Act nor the NPRM mentions Pass-Through Municipal ABS for any purpose. Pass-Through Municipal ABS is not one of the categories of ABS that has been identified specifically in either the Dodd-Frank Act or the NPRM for regulation, such as mortgage-backed securities or ABS collateralized by CRE loans, commercial loans or automobile loans. Considerations described above under "Background on Equipment Finance" regarding availability of competitive pricing, strong historical financial performance (including through the financial crisis) and conservative underwriting practices apply with equal or greater force to Pass-Through Municipal ABS. Pass-Through Municipal ABS represents the direct investment in Municipal Obligations and should be exempted from required risk retention for the same reasons as support the exemption of Municipal Issuer ABS. Alternatively, if the Agencies are unwilling to adopt such an asset based exemption, at a minimum the Agencies should consider, and design the final rules to address, the extent to which required risk retention would apply to Pass-Through Municipal ABS.

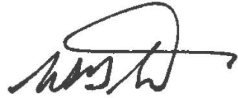
Conclusion

The ELFA appreciates the efforts of the Agencies to implement the Dodd-Frank Act and appropriately regulate the asset backed securities market to increase investor confidence in the securitization marketplace and minimize the likelihood of future financial crises that affect the capital markets. As described above, we believe that there are reasonable approaches to securitizer risk retention which would utilize current Equipment ABS investor practices and reflect the intent of Congress. The final risk retention regulations should recognize that the

variety of risk retention devices used in Equipment ABS comply with the guidelines of the Dodd-Frank Act. The final regulations also should avoid micromanaging traditional Equipment ABS, in a way that constricts access of equipment financiers to the capital markets and hence denies commercial and personal users the most advantageous financing for their equipment needs.

Thank you for your attention to this letter. We would welcome the opportunity to meet with you and discuss our suggestions and any questions which you may have.

Respectfully submitted,



William G. Sutton, CAE
President and CEO