National Council of Higher Education Resources

NCHER

Formerly the National Council of Higher Education Loan Programs, Inc.

October 30, 2013

Office of the Comptroller of the Currency
Legislative and Regulatory Activities Division
400 7th Street, SW
Suite 3E-218, Mail Stop 9W-11
Washington, DC 20219
Docket Number OCC-2013-0010

Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attn.: Robert deV. Frierson, Secretary
Docket No. R-1411

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attn.: Comments, Robert E. Feldman, Executive Secretary
RIN 3064-AD74

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn.: Elizabeth M. Murphy, Secretary
File Number S7-14-11

Federal Housing Finance Agency
Constitution Center, (OGC) Eighth Floor
400 7th Street SW
Washington, DC 20024
Attn.: Alfred M. Pollard, General Counsel
Comments/RIN 2590-AA43

Department of Housing and Urban Development
Office of General Counsel
Regulations Division
451 7th Street, SW
Room 10276
Washington, DC 20410-0500
RIN 2501-AD53

Re: Credit Risk Retention

Ladies and Gentlemen:

This is in response to the above described notice, jointly issued by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the U.S. Securities and Exchange Commission, the Federal Housing Agency and the Department of Housing and Urban Development (collectively, the "Agencies"), in which the Agencies re-propose rules (the "Re-Proposed Rules") implementing the credit risk retention requirements of section 15G of the Securities and Exchange Act of 1934 (the "Exchange Act"), as added by section 941 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

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Web Site: www.ncher.us

The National Council of Higher Education Resources (NCHER) appreciates the opportunity to comment on the Re-Proposed Rules. NCHER is a trade association that represents a nationwide network of lenders, secondary markets, loan servicers, guaranty agencies, collection agencies, postsecondary schools and others who administer loan programs that make financial assistance available to students and parents to pay for the costs of postsecondary education. NCHER members who issue securities to finance education loans include a variety of State public entities ("State Issuers"), nonprofit organizations ("Nonprofit Issuers")[1] and for-profit corporations ("For Profit Issuers"). On July 22, 2011 we submitted comments to the initial credit risk retention notice of proposed rulemaking (the "Initial NPRM), though we did so under our previous name – the National Council of Higher Education Loan Programs (NCHELP).

Securities issued to fund education loans are collateralized by two distinct asset classes: federally sponsored education loans made under the Federal Family Education Loan Program (the "FFELP" and "FFELP Loans") and supplemental education loans ("Supplemental Loans"). Such securities are typically issued on a nonrecourse basis with respect to the general assets of the issuer, but are secured by pledged collateral that generally includes an equity contribution.

Our specific comments on the Re-Proposed Rules are as follows:

I. The Agencies Should Provide a General Asset Class Exemption for Asset-backed Securities Collateralized by FFELP Loans

We respectfully request that the Re-Proposed Rules provide a full exemption for any security that is collateralized solely by FFELP Loans (and cash or investment securities consistent with rating agency approved criteria). While the Re-Proposed Rules contain such a full general class exemption for certain securities backed by federally guaranteed assets, the class exemption provided for securities collateralized by FFELP Loans is more limited and fails to treat such securities equitably. The discussion notes that FFELP Loans are subject to a guaranty that ranges from 97 to 100 percent. Consequently, the Re-Proposed Rules provide that, in lieu of a 5 percent risk retention requirement, the risk retention requirement is from 0 to 3 percent, or the inverse of the guaranty. The risk retention requirement for securities collateralized with FFELP Loans guaranteed at different levels would be that applicable to the lowest guarantee amount of loans included in the collateral. Since a majority of the outstanding FFELP Loans are more recent loans guaranteed at 97%, it is likely that any FFELP-backed security would have a 3 percent risk retention requirement under this rule. Given that some of the pledged FFELP Loans would carry 98% and 100% guarantees, this means that even if all the pledged loans defaulted (which will not happen), the risk retention would be greater than the loss exposure. We believe this goes well beyond the intended scope and spirit of the law.

[1] We note that Nonprofit Issuers include but are not limited to issuers whose activities are limited to comply with Section 150(d) of the Internal Revenue Code ("Qualified Scholarship Funding Bond Issuers"). Under Section 150(d), qualified scholarship funding bonds may be issued only by not-for-profit corporations that are formed at the request of a State or political subdivision exclusively for the purpose of financing FFELP Loans.

While the approach set forth in the Re-proposed Rule may appear to make conceptual sense, the result is inequitable. In a change from the Initial NPRM, the Re-Proposed Rule provides a full exemption to any securitization transaction that is collateralized solely by residential, multifamily and health care facility mortgage loan assets that are insured or guaranteed (in whole or in part) as to payment of principal and interest by the United States or an agency of the United States (and cash or investment securities consistent with rating agency approved criteria).[2] The federal guarantee of residential, multifamily and health care facility mortgage loan assets can be much lower than 97 or 98 percent, but they are given a full exemption. Also, as recent history shows, the loss experience on residential mortgages is much higher than for FFELP Loans. The loss on FFELP Loans stems from those that do default, and then is limited to the 2 or 3 percent not guaranteed. Furthermore, because no FFELP Loans have been made since July 2010, and since most defaults occur early in the life cycle of a FFELP Loan, defaults will decline as portfolios age. The actual loss experience therefore is extremely low. The discussion section makes a point of saying that fairly extensive post-default servicing must be properly performed as a prerequisite to guaranty payment.[3] This is inaccurate, as the loans are filed for claim upon default. Upon payment on the guaranty, the loans are removed from the trust and transferred to the guarantor. While it is true that there are regulations governing pre-default servicing, these rules are well understood and every servicer of FFELP Loans has fine-tuned its servicing systems to comply with the rules. Accordingly, the loss experience for faulty servicing is close to zero.

For all these reasons, FFELP Loan-backed securities should be exempt from the risk retention rules. If the Agencies do not find these arguments compelling, we suggest that the 5 percent risk retention requirement apply solely to the portion of the pledged assets that is not guaranteed. Two conclusions would flow from this approach. First, for loans for which the uninsured portion is 3 percent, the 5 percent risk retention requirement would apply solely to the 3 percent, resulting in a 0.15 percent risk retention requirement. Secondly, since a securitization likely would include a mix of guaranteed loans with different rates of guarantee, the requirement should be weighted based on the mix of the loans in the pool instead of basing the requirement on the loans with lowest guaranteed amount.

II. The Agencies Should Clarify That the Risk Retention Requirement Can Be Met Through Overcollateralization

Under industry practice, many issuers of student loan-backed securitizations pledge an initial equity contribution as part of the transaction. We request that the final rule make clear that any initial equity contribution or other overcollateralization required by the rating agencies or financial markets be specifically included as an acceptable form of risk retention and counted in meeting any risk retention calculation. The protection to investors in these cases is economically the same as in cases where the issuer holds a 5 percent interest in the securities. This protection could be provided, for example, if the principal amount of the bonds issued is less than 95 percent of the principal amount of the securitized assets. If the Agencies believe it

[2] See §__19(b)(1)(i). 78 Fed. Reg. 58043. Sept. 20, 2013.
[3] 78 Fed. Reg. 57971. Sept. 20, 2013.

necessary, it would be possible to include a requirement that the transaction be structured in a way to give assurance that at least the 5 percent overcollateralization be maintained over the period for which the risk retention requirement applies. We request that the Agencies make clear in the final rule that any overcollateralization required by the rating agencies or financial markets be specifically included as an acceptable form of risk retention and counted in meeting any risk retention calculation.

III. The Agencies Should Provide a Full Class Exemption for all Student Loan Backed State and Municipal Securities

At the outse, we request that the current full class exemption set forth in §__19(b)(3)-(4) for securities issued by a State Issuer (including a political subdivision or public instrumentality of a State) and securities that meet the definition of a qualified scholarship funding bond be retained in the final rule. This exemption, authorized by Section 15G(c)(1)(G)(iii) of the Exchange Act, as added by the Dodd-Frank Act, is vital to State Issuers and Qualified Scholarship Funding Bond Issuers. Any lack of clarity on this point might seriously compromise efforts by these public purpose issuers. We also would respectfully request that the final rule or the accompanying adopting release explicitly confirm that this exemption extends to securities issued on a federally taxable as well as on a federally tax-exempt basis. The decision on whether to issue taxable or tax exempt debt is driven solely by the availability of tax exempt cap. There is no basis for believing that Congress intended to differentiate between these substantially identical securities or groups of public purpose issuers.

Second, we request that the protection provided to securities issued by State Issuers (including a political subdivision or public instrumentality of a State) and to securities that meet the definition of a qualified scholarship funding bond be expanded to cover student loan backed securities issued by all municipal issuers. This could be accomplished by expanding the exemption for "State and municipal securitizations" found in §__19(b)(3) to also include any security that is exempt from the registration requirements of the Securities Act of 1933 by reason of section 3(a)(4) of that Act (as well as section 3(a)(2)). The protections available to investors of both types of securities are substantially the same, and it would be inequitable to treat them differently for purpose of the risk retention rule. We think there is a similar justification for excluding student loan backed securities issued by other nonprofit issuers that have received 501(c)(3) designations under the Internal Revenue Code. These issuers are generally required by law to use all of the organization's assets in the furtherance of their charitable and nonprofit purposes and are restrained in their ability to raise or otherwise acquire capital that might be necessary to meet the risk retention requirement of the Re-Proposed Rules. Subjecting these issuers to the risk retention requirement would interfere with, and perhaps totally impede, the ability of these nonprofit issuers to provide low cost education loans in furtherance of their public missions.

With respect to the assets that back these financings, we must take strong issue with the statement in the preamble to the Re-Proposed Rule that "the agencies believe that nonprofit student loan lending differs little from for-profit student loan lending and that there does not appear to be anything inherent in the underwriting practices of nonprofit student loan lending

to suggest that these securitization align interests of securitizers with the interests of investors".[4] Municipal issuers have a long history of strictly following lending policies that protect borrowers and investors, including:

- Fixed interest rates – Fixed rates remove the revenue uncertainty associated with variable rate loans,
- School certification required – Certification provides a vital check to ensure students are borrowing responsibly and loan amounts do not exceed cost of attendance less other aid,
- Strong credit underwriting standards that assure the borrower has the ability to repay the loan – in nearly all cases this means the loans have co-borrowers or cosigners,
- Continued oversight of the collateral through retention of servicing responsibility throughout the life of the loan collateral, and
- Retention of the residual interest.

As a result, as far as we know there have been no payment defaults on student loan securities issued by municipal issuers due to the quality of the student loan collateral. If the Agencies have any concern over the continuation of polices that assure high level collateral, they could establish standards for "qualified Supplemental Loans" similar to those already in place for qualified mortgages, and then grant an exemption from the risk retention requirement for securities backed solely by these loans.

Nonprofit Issuers issue limited recourse revenue bonds (some of which may be issued through special purpose vehicles[5]) that are secured by and payable from the pledged student loans financed. Nonprofit Issuers retain the residual interest in the financings and oversee (and are liable for) the servicing of the pledged loans. This further incentivizes issuers to carefully underwrite and monitor the assets they originate and securitize. The result is completely different than the result in a traditional securitization structure, in which the asset originator or sponsor sells the securitized assets, directly or indirectly, to the issuing entity for cash, with the result being that the asset originator has no "skin in the game."[6] The misalignment of interests in certain ABS transactions (not involving student loans) was the basis for the risk retention requirement. However, this concern does not exist in the case of securities where the originator/issuer retains the residual and oversees servicing throughout the term of the security. In addition, the significant overcollateralization and cash flow structures of transactions provide more than adequate protection to investors. We believe special consideration should be given to

[4] 78 Fed. Reg. 57972. Sept. 20, 2013.

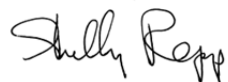
[5] Special purpose funding vehicles are used to protect investors against any possible bankruptcy of the issuer.

[6] Many Nonprofit Issuers directly issue asset backed securities and do not use special purpose funding vehicles. Pursuant to Section __.3(a) of the Re-Proposed Rule, a "sponsor" of a securitization transaction (or a majority owned affiliate of the sponsor) is required to comply with the risk retention requirements set forth in the Re-Proposed Rule. The Re-Proposed Rule defines sponsor as "a person who organizes and initiates a securitization transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity." A key feature included in this definition is that an entity ***sale*** or ***transfer*** assets directly or indirectly to the issuing entity. Direct issue revenue bonds do not include selling or transferring assets to an issuing entity. In these cases, the issuers own all of the student loans and retain them on their balance sheet. Therefore, they should not be subject to require risk retention.

Nonprofit Issuers of Supplemental Loan securities because it is in the public interest and for the protection of investors. At a time when students and their families are looking for funds to pay for increasing college costs, many nonprofit public benefit companies are the best source of funding as their mission is to offer the lowest cost loans available. The Agencies have authority to grant an exemption to the risk retention requirement for Supplemental Loan securities issued by State Issuers and Nonprofit Issuers under Section 15G(c)(1)(G)(i) of the Exchange Act, as added by the Dodd-Frank Act, because it would be appropriate in the public interest and for the protection of investors. The nonprofit mission of helping families obtain affordable financing to cover the cost of higher education seems to be precisely the type of public interest exemption to the risk retention requirement that the statutory authority set forth in Section 15G(c)(1)(G)(i) is designed to provide. And this can be done while still protecting investors.

Thank you for the opportunity to comment on the Re-Proposed Rules. Should you have any questions, please contact me at [redacted] or [redacted].

Sincerely,



Sheldon Repp
President