



November 7, 2011

**VIA ELECTRONIC FILING – rule-comments@sec.gov**

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

**Re:** Advance Notice of Proposed Rulemaking; Withdrawal; Treatment of Asset-Backed Issuers Under the Investment Company Act, Release No. IC-29779; File No. S7-35-11

Dear Ms. Murphy:

The Commercial Real Estate (“CRE”) Finance Council® appreciates the opportunity to respond to the request of the Securities and Exchange Commission (the “Commission”) for comments on possible amendments to Rule 3a-7 under the Investment Company Act (the “Act”) and Section (3)(c)(5) of the Act, which provide certain asset-backed securities (“ABS”) issuers with an exemption from registration as investment companies under the Act.<sup>1</sup>

The CRE Finance Council, recognizes the importance of the investor protection goals the Commission seeks to promote by considering changes to the Rule 3a-7 and Section (3)(c)(5) exemptions for ABS issuers. However, our members have grave concerns about the impact changes to Rule 3a-7 and Section (3)(c)(5) would have on the market for commercial mortgage-backed securities (“CMBS”), especially considering the present fragile state of this market, and considering the fact that the present Rule 3a-7 and Section (3)(c)(5) framework has not failed to meet its intended investor protection purpose in the CMBS markets.<sup>2</sup>

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<sup>1</sup> Advance Notice of Proposed Rulemaking; Withdrawal; Treatment of Asset-Backed Issuers Under the Investment Company Act, Release No. IC-29779; File No. S7-35-11, 76 Fed. Reg. 55309 (Sept. 7, 2011) (the “Release”).

<sup>2</sup> CMBS trusts, which acquire commercial mortgage loans, rely on Section 3(c)(5)(C) as the primary exemption from the Act. However, CMBS trusts also rely on Rule 3a-7 because many fixed-rate commercial mortgage loans contain “defeasance” provisions, which permit the borrower in a loan that is otherwise subject to some type of prepayment restriction to replace the real property securing the mortgage loan with U.S. government securities that will be used to pay off the loan. The Commission has previously interpreted Section (3)(c)(5) to mean that at least 55% of the subject assets must consist of mortgages and other liens on and interests in real estate

We are aware that the American Securitization Forum (“ASF”) is submitting comments in this proceeding that concur and amplify these views on behalf of all asset classes comprising the securitization industry. The CRE Finance Council endorses ASF’s comments, and our members wish to add two observations specific to the commercial real estate finance market.

First, we must emphasize that any contemplated changes to the Act’s exemptions come at a sensitive time for the CMBS market. With continued global economic difficulties and the sovereign debt concerns that came to light this summer, there has been a slow-down in CMBS issuance. Total issuance for the year is expected to reach \$30 billion, which is at the low end of predictions made at the beginning of 2011. Furthermore, a major CMBS issuer recently announced that it is exiting the CMBS market, which has generated serious concerns within the market that there may be a trend toward the market contracting.

A significant pull-back in the CMBS market at this point in time would create considerable difficulties because the CRE industry faces an increasing number of mortgage maturities for which capital will be required, either in the form of debt or equity, to avoid further declines in commercial property values. Through 2017 for example, approximately \$600 billion of CMBS loans and more than \$1.2 trillion in outstanding commercial mortgages will mature. Borrower demand to re-finance these mortgages will be at an all-time high. We accordingly believe that it would not be prudent to create additional regulatory uncertainty at a time when the markets are fragile and when the existing regulatory framework for ABS is working well.

Second, the Commission should be aware that CMBS investors do not view the contemplated changes as necessary to protect their interests. Unlike some other asset classes, CMBS are backed by pools of assets and securitization structures that are pre-determined and are designed to remain static for the life of the related CMBS. CMBS pools are also relatively small in comparison to other asset classes, enabling investors to perform detailed, asset-level analyses. Investors, accordingly, are able to perform diligence on the asset pool and the securitization structure, and rely on the information they collect themselves about these characteristics, rather than relying exclusively on credit ratings. CMBS investors are able to satisfy themselves as to the acceptability and soundness of a securitization structure. For these reasons, CMBS investors do not view the current Investment Company Act registration exemption criteria to be flawed, or the contemplated changes thereto to be necessary to protect their interests.

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

Our principal functions include setting market standards, facilitating the free and open flow of market information, and education at all levels, particularly related to securitization.

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and at least 80% of the subject assets must be real estate-related assets. Accordingly, in the event that more than 20% of the mortgage loans in a CMBS pool were to exercise their defeasance provisions, the exemption provided by Section (3)(c)(5) would be called into question.

Securitization is one of the essential processes for the delivery of capital necessary for the growth and success of commercial real estate markets. One of our core missions is to foster the efficient and sustainable operation of CMBS. To this end, we have worked closely with policymakers to educate and inform legislative and regulatory actions to produce efficient and practical regulatory structures. We look forward to continuing to work with policymakers on this effort. We also continue our ongoing work with all market constituencies to develop industry standards which provide marked improvements in the CRE finance arena. Prime examples of our work include enhancements of both the CRE Finance Council's "Annex A" initial loan-level disclosure package and the Investor Reporting Package ("IRP")<sup>TM</sup> for ongoing disclosures and surveillance by investors.

The CRE Finance Council appreciates the Commission's consideration of our comments regarding the Release. We stand ready to provide any additional assistance that may be helpful.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephen M. Renna", with a long horizontal flourish extending to the right.

Stephen M. Renna  
Chief Executive Officer  
CRE Finance Council