November 15, 2010

VIA ELECTRONIC FILING – rule-comments@sec.gov

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

Re: Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,
File Number S7–24–10

Dear Ms. Murphy:

On behalf of the Commercial Real Estate (CRE) Finance Council, we appreciate the opportunity to comment on the SEC's proposed rule concerning disclosure for asset-backed securities under Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[1] The CRE Finance Council is the collective voice of the entire $3.5 trillion commercial real estate finance market, including issuers; investors such as insurance companies, pension funds, and money managers; portfolio and commercial mortgage-backed securities (CMBS) lenders; commercial and investment banks; rating agencies; accounting firms; servicers; and other service providers.

Our principal missions include setting market standards, facilitating market information, and education at all levels, particularly related to securitization, which has been a crucial and necessary tool for growth and success in commercial real estate finance. To this end, we have worked closely with policymakers in an effort to ensure that legislative and regulatory actions do not negate or counteract economic recovery efforts in the CRE market. We will continue to work with policymakers on this effort, as well as our ongoing work with market participants and policymakers to build on the unparalleled level of disclosure and other safeguards that exist in the CMBS market, prime examples of which are our "Annex A" initial disclosure package and our Investor Reporting Package™ for ongoing disclosures.

[1] Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Proposed Rule, 75 Fed. Reg. 62718 (Oct. 13, 2010) (hereafter, "Proposing Release").

I. Overview

The CRE Finance Council has long been an advocate within the CRE industry for enhanced transparency and sound practices, and our comments are based on the experience of our membership in advocating these aims. On the whole, we have no objection to the SEC's Proposing Release. In this letter, we seek to provide information and offer recommendations specific to the CMBS market. More generally, we urge the SEC to be mindful of the fact that while investors need pertinent information in as transparent an environment as is possible, it is just as important that disclosure rules avoid overburdening investors with information that is not material. Attention to the volume and type of mandated disclosures is particularly important given the CMBS market's nascent recovery, as disclosures should facilitate, and not obscure, investors' ability to meaningfully assess information that is material to an investment decision.

With respect to the requirement that nationally recognized statistical rating organizations (NRSROs) provide information about representations and warranties as part of a credit rating report, we note that part of the obligation this would impose on NRSROs is to make a comparison between the representations and warranties in the rated issuance and those in "issuances of similar securities."[2] We recommend that this requirement be clarified in two respects. First, "similar securities" should be defined to mean, at a minimum, securities in the same asset class. Secondly, NRSROs should be able to rely (if they so choose) on industry-developed frames of reference to aid their comparisons of representations and warranties in CMBS issuances. We note that industry-standard representations and warranties currently do not exist for commercial mortgages and CMBS loans due to the complex, heterogeneous nature of commercial mortgage lending. Nevertheless, the CRE Finance Council is presently working on industry "best practices" for representations and warranties among other matters, which we believe will be an informative point of reference for NRSROs to use when doing a comparative analysis of representations and warranties in CMBS. We plan to share our best practice recommendations when in final form with policymakers, and urge the SEC to allow NRSROs to rely on such industry standards as part of their reporting on representations and warranties. Having such uniform benchmarks to reference, as agreed upon by all CMBS industry participants, should reduce uncertainty in the CRE market, which will aid in its recovery.

Our comments will begin with a brief background discussion of the current state of the CRE market, followed by a description of the current mechanism for addressing repurchase and replacement requests for CMBS, and finally, our specific observations regarding the Proposing Release.

II. Background

A. Current State of CRE Market and CMBS

The CRE market has been greatly impacted by the recent downturn in the economy – especially high unemployment, low consumer confidence and falling property values. With more

[2] *See id.* at 62727.

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than $1 trillion in commercial mortgages maturing in the next several years (many of which face an "equity gap" between property value and loan amount), the CRE Finance Council has a particular interest in facilitating a revival of the CMBS market, which presently represents approximately 25% of all outstanding commercial mortgage debt and accounted for approximately 50% of all CRE lending in 2007.

Today, uncertainty related to regulatory and accounting changes remains a major impediment to private lending and investing that is critical to a CRE recovery. There are serious questions about the viability of the CMBS market, for example, when considering the combined impact of reforms on the market and concerns about whether implementing regulators will coordinate reforms and customize risk retention requirements for inherently different classes of ABS, as directed by Section 941(b) of Dodd-Frank. Likewise, market participants are concerned about the impact of other requirements imposed by Dodd-Frank, such as the disclosure requirements addressed in the Proposing Release, and whether the new disclosure framework will appropriately take into account market realities and investor needs. For example, the threshold for reporting a repurchase request should strike a balance between investors' legitimate need for information that will be useful in identifying originators with underwriting deficiencies and issuers' concern that the disclosure system should not give undue weight and encouragement to speculative repurchase requests.

Unlike some asset classes, such as residential mortgage-backed securities (RMBS), which remain relatively dormant, we believe it is important to note that the CMBS market is showing signs of revitalized activity, which makes deliberate and coordinated policy even more crucial at this critical time. In fact, there have been seven CMBS deals completed this year with a total issuance of $4.5 billion through the third quarter. Further, industry analysts predict that CMBS issuance for the fourth quarter 2010 alone will range from an additional $4 billion to $8 billion, with expectations for as much as $35 billion of CMBS issuance in 2011, depending on a number of factors, including regulatory certainty. These figures are small compared to the $238 billion in issuance in 2007, but the progress is timely given the number of CRE loan maturities in the next few years, and encouraging given that private issuance ceased for six quarters until the first non-TALF deal was issued in December 2009.

It also is worth noting that the CMBS transactions that have recently taken place have been structured with low-leveraged and well-underwritten loans, and feature even greater transparency that further amplifies the differences between CMBS and other asset classes. We are also acutely aware, however, that even though the new requirements imposed under Dodd-Frank will have a significant impact on the commercial real estate securitization markets, they appear to be driven primarily by subpar performance in the subprime and prime residential markets.

B. <u>How Repurchase and Replacement Requests Are Currently Addressed for CMBS</u>

We understand that significant representation breach issues in the RMBS context were the primary impetus for Congress to adopt Section 943(2) of Dodd-Frank. We wish to point out, however, that CMBS transactions typically contain extensive representations and warranties that have developed organically over the past twenty years as a result of interactions and negotiations

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between the various stakeholders in CMBS transactions. Consequently, participants in the CMBS industry are generally knowledgeable about the content of these representations and warranties. In the typical CMBS transaction, the party or parties (commonly referred to as "loan sellers") that sell mortgage loans to the securitization vehicle make, and have liability for, representations and warranties regarding those mortgage loans. Under the provisions of current governing transaction documents, upon becoming aware of a potential breach of a representation or warranty (which could be discovered by a trustee or servicer or brought to their attention by security holders), parties to the transaction documents, typically the servicer or special servicer, are required to pursue the remediation of such breach if they determine that a breach of a material and adverse nature does indeed exist.

The CRE Finance Council is cognizant of the fact that, notwithstanding the existence of an established regime of representations and warranties and remedies for breaches thereof, there have been relatively few formal repurchases in CMBS sector. As a result, the CRE Finance Council recognizes the need for improvements with respect to the enforcement mechanisms for representations and warranties breaches.

To this end, the CRE Finance Council is presently developing a set of industry best practices with regard to representations and warranties (discussed in more detail below), among other matters. As part of this initiative, a standing committee of the CRE Finance Council is working on improved mechanisms for enforcing representations and warranties, with the aim of increasing the mechanical clarity of the existing mechanisms in the CMBS marketplace and possibly incorporating alternative dispute resolution mechanisms. Overall, our goal is to provide even greater enhancement of the efficacy and efficiency of the repurchase and replacement request process for CMBS. We expect to complete our work on these best practices by the end of this month and we will share our best practices with policymakers and regulators as they consider final rules for ABS transactions.

III. Specific Requests for Clarification Regarding Disclosure of Repurchase or Replacement Requests

A. Repurchase Reporting Should Be Done Prospectively

The Proposing Release proposes to require a five year look-back in reporting information on repurchase requests and repurchases in an initial Form ABS-15G filing, and seeks comment on whether the disclosure requirement should only be applied prospectively.[3] We strongly recommend that the requirement be implemented on a prospective basis. CMBS transactions have not required, and do not presently require, any party to track the information necessary to satisfy the disclosure requirements in the Proposing Release. It is unlikely that securitizers have methodically tracked such information, and they would likely need to rely heavily on trustees or servicers although the securitizer would have liability for the information under the Exchange Act. Trustees and servicers may not have recorded information in a manner that is easily obtainable and would need to

[3] *Id.* at 62721, 62724 (Question 9).

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undertake the burdensome task of reviewing paper files in an attempt to assemble the necessary data. As a consequence, we anticipate that any compiled data would be incomplete.[4]

Moreover, to the extent data exists, disclosures regarding that data are likely to be misleading. Since no party was required to maintain repurchase request data, we anticipate that there will be wide variation in the amount and type of information reported by various securitizers. These inconsistencies will make the historic data less valuable to investors who are trying to compare underwriting by securitizers and originators, and can present an inaccurate picture of underwriting strength. For example, an entity that maintained relatively few records could benefit from that fact compared to an entity with more thorough recordkeeping. We recognize the Commission's attempt to address these issues by allowing securitizers to add a footnote indicating that information is unavailable, however, this would not address concerns regarding the completeness and potentially misleading nature of information that is reported.

In contrast, with prospective implementation, transaction parties will have an opportunity to build recordkeeping requirements into transaction agreements, which will ensure the capture of all information required by the Proposing Release. In that regard, we also recommend a transition period of at least 18 months from the effective date of this rule to afford sufficient time for securitizers to design and institute systems for tracking and recording repurchase requests in accordance with the rule. Such a transition period will also be necessary should the Commission decide to require five year historical reporting, to allow securitizers, trustees and servicers sufficient time to assemble and verify the required information.

Alternatively, if the Commission maintains the five year retroactive reporting requirement, we request that such reporting be limited to actual repurchases, as documentation regarding actual repurchases is more likely to be available than documentation concerning requests that did not result in repurchases.

B. Reportable "Repurchase or Replacement Requests" Must Be Defined More Precisely

The Proposing Release appears to require disclosure of any demand for repurchase or replacement regardless of whether it is made in accordance with the requirements in the transaction agreement for such requests, and the Release seeks comment on whether the Commission should impose this requirement.[5] While we agree on the importance of making available information concerning replacement and repurchase requests, we urge the Commission not to adopt the proposed approach. Instead, we strongly encourage that the Commission require disclosure of those repurchase and replacement requests that are made in accordance with the requirements of the transaction agreement.

As the Commission acknowledges, there are concerns that a disclosure framework for repurchase and replacement requests can potentially "create incentives for sponsors and possibly

[4] For these reasons, if the Commission requires reporting of information predating the effective date of the rule, we request that securitizers not be subject to Exchange Act liability for reporting such information, as there were insufficient controls in place to ensure the accuracy of this information.

[5] *Id*. at 62724 (Question 15).

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trustees to ask for repurchase or replacement of poorly performing assets that represent no breach of representations and warranties" in certain circumstances.[6] We would add that any party empowered to make repurchase and replacement requests could engage in such misuse. And the ability to footnote such a request does not adequately address issuers' concerns about misuse.

While it may not be possible to completely eliminate the potential for misuse, the potential can be reduced by focusing disclosure on those requests that are made in accordance with the transaction agreement. Transaction agreements have various specific requirements for repurchase and replacement requests, for example: a required method of notice, a requirement that the breach be described with specificity, and a materiality component. By requiring disclosure of requests made in compliance with the transaction documents, the disclosure regime can best balance investors' concerns that they have relevant and material information with issuers' concerns that the threat of repurchase demands could be used for inappropriate leverage.

Equally important, limiting disclosure to demands made in accordance with the transaction documents will minimize the reporting of potentially misleading information. A requirement to report all demands, including "shot gun" repurchase requests that are rejected by the trustee or a servicer as improperly made, and those that are withdrawn after the obligated party has demonstrated that no breach occurred, will make it more difficult for investors to distinguish demands arising from actual underwriting deficiencies from demands that are motivated by tactical considerations and other factors unrelated to the quality of underwriting. For this reason, reporting of demands and repurchases should be based only upon demands made in accordance with the procedures and requirements set forth in the transaction documents. If the Commission declines this request, it should impose some minimum requirement for a reportable repurchase demand to help preserve the integrity of the disclosure process rather than leaving this critical concept undefined. At a minimum, a reportable request should be one that: a) is made by a party with standing under the relevant transaction document to make a repurchase request; b) cites, with specificity, the representation and warranty allegedly breached; c) provides evidence that the breach meets the standard (such as a materiality standard, if specified) for repurchase set forth in the transaction documents; and d) is in writing.

C. Information to Be Reported on Form ABS 15G

The Proposing Release seeks comment on whether detailed reporting, for example, a narrative discussion, should be required to describe reasons why assets were not repurchased or why requests are pending.[7] We strongly recommend that whether, and to what extent such detail is provided, be left to the judgment of each individual securitizer, rather than mandated. Information of this nature can be highly sensitive, and may be the subject of confidentiality agreements. Avoiding such a mandate will alleviate concerns that the disclosure rules could create conflicts with loan sellers' obligations under confidentiality agreements.

[6] *See id*. at 62721, n.25. (citing the Commission's discussion of this issue in the proceeding to revise Regulation AB).

[7] *See id*. at 62724 (Question 14).

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D. Reporting Should Be Done Separately By Each Asset Class, Rather Than Aggregated on a Single Form

The Proposing Release would require each securitizer to report on a single Form ABS-15G repurchase requests for all asset classes in which the securitizer has repurchase obligations (where securities are held by non-affiliates). We recommend, however, that repurchase request information be reported across all trusts consisting of the same asset class securitized by a securitizer, on a separate form for each asset class, rather than having information for all asset classes aggregated on a single form. The reasons for repurchase or for denial of a repurchase request can vary widely among asset classes. It follows that repurchase information concerning one asset class offers little insight for purposes of an analysis of underwriting for a different asset class, recognizing that investors make such evaluations on an asset-specific basis.

Moreover, large diversified financial institutions engaging in securitization of multiple asset classes have expressed concern that if they are required to provide five years of historical repurchase request data and are unable to provide or verify the data for one asset class, this inability may prevent them from accessing the securitization market for another asset class where the requisite data is available, with the anomalous result that securitization is impeded in some market segments. While we acknowledge that the Commission may have sought to minimize administrative burdens through requiring a single form, and that our recommendation may require some securitizers to file more than one disclosure form, we believe that asset class-specific repurchase reports will provide investors with more consistent, clear information.

E. Periodic Reporting Should Be Quarterly Rather Than Monthly, and Should Not Be Required Where There Is No Activity to Report

The Proposing Release proposes to require submission of repurchase data on a monthly basis. However, the repurchase cycle for assets is rarely tied to the monthly remittance cycle for transactions. Pooling and servicing agreements or other securitization transaction agreements typically provide a 60- to 90-day period following a demand for repurchase in which the representing party is entitled to cure the breach. It follows that, practically, it would be of little use to report the disposition of the repurchase demand in the same monthly reporting cycle in which it is made, and the reporting party will not be in a position to know what percentage of demands made in the period did not result in repurchase. While we recognized that the Commission has attempted to address this concern by allowing securitizers to report repurchases that are "pending," this will not provide investors any useful information until after the cure period has expired.

Additionally, to enable a securitizer to verify as much of the information as practicable before the filing deadline, Form ABS-15G should be due no sooner than 30 days from the end of each fiscal quarter.

We also request that the Commission specify that periodic filing of Form ABS-15G is not required unless repurchase/replacement request activity has occurred. Such additional reporting would not provide any meaningful information to investors, and places additional administrative burden and expense on securitizers who must also comply with several enhanced disclosure requirements imposed by recently enacted Commission rules and other legislative and regulatory initiatives.

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F. Clarification Is Necessary Concerning Reporting Obligations When the Securitizer Does Not Receive Information About a Repurchase/Replacement Request

A specific suggestion concerning the proposed table for reporting follows on the SEC's observation that repurchase and replacement requests may be made to the trustee, and securitizers may not have access to historical information regarding any or all requests made of the trustee because the trustee may not have tracked investor demands prior to this rule becoming effective.[8] The SEC proposes to allow securitizers to footnote the tabular disclosure to specify instances where the securitizer is unable to obtain information from the trustee about requests made before the rule's effective date.[9] It is important to note that in the CMBS context, the master servicer or special servicer may also have information regarding these requests, as they have power under the transaction documents to pursue a remedy for an alleged breach. The rule should accordingly clarify that a securitizer may footnote the table to indicate circumstances where it is unable to obtain historical information from either the trustee or the servicer, as the case may be.

IV. Specific Requests for Clarification Regarding NRSRO Reports Concerning Representations and Warranties

To implement Dodd-Frank Section 943(1), the SEC proposes to require that NRSROs include in any report accompanying a credit rating a description of the representations, warranties, and enforcement mechanisms available to investors in the issuance and a description of how they differ from the representations, warranties, and enforcement mechanisms in issuances of similar securities. The rationale behind this requirement is to give investors a sense of how the representations, warranties and enforcement mechanisms associated with a particular issuance compare to others, with the aim of helping investors determine whether or not they compare favorably.

As a preliminary matter, the Proposing Release does not define "similar securities," and seeks comment on whether the term should be defined.[10] We strongly recommend that "similar securities" be defined, at least by asset class. Accordingly, in the CMBS context, representations and warranties for a CMBS issuance would be compared to those in other CMBS issuances.

To facilitate the comparative part of this analysis, the SEC suggests that NRSROs could continually review the representations, warranties, and enforcement mechanisms in issuances to establish a "benchmark" for various types of securities.[11] The Proposing Release also seeks comment on whether the SEC should require comparisons to industry standards.[12]

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[8] *See* Proposing Release, 75 Fed. Reg. at 62722.

[9] *Id.*

[10] *Id*. at 62728 (Question 31).

[11] *Id*. at 62728, n.63.

[12] *Id*. at 62728 (Question 33).

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Our members believe that industry standards would be an efficient and accurate alternative for NRSROs to rely upon, where standards exist. In the commercial space, the CRE Finance Council is presently working on industry "best practices" for representations and warranties, among other matters, that would logically be a very relevant point of reference for NRSROs in performing a comparative analysis of representations and warranties. It is our expectation that these best practices representations and warranties will be adopted in material part by securitizers/sponsors/loan sellers in future CMBS transactions.

Our project has the benefit of having experts representing a broad spectrum of stakeholders as contributors. Preliminary work on the project was done by a CRE Finance Task Force subcommittee that included representatives of investors, rating agencies, special servicers, and B-piece buyers, several of whom have considerable experience constructing, negotiating, and interpreting representations and warranties. The project is now in the hands of a larger committee that has representation from all CRE Finance Council constituencies, including issuers.

Our goal for the resulting product is a set of best practices designed to balance the interest of investors and issuers by offering investors effective representations and warranties that, at the same time, are not unreasonably onerous for issuers. Equally important, these best practices would be tailored to the unique characteristics of CMBS. The importance of tailored regulatory mandates are a principle Congress has already embraced in its directions for adopting risk retention rules, and the SEC has likewise acknowledged in the Proposing Release by suggesting the establishment of benchmarks "for various types of securities."[13]

The CRE Finance Council's best practices will include the recommendation that representations, warranties and enforcement provisions, plus loan-specific representation exceptions (collectively, the "Representations Package") will be reported to all potential investors prior to the sale of any new issue CMBS. It will also be recommended that a comparison be provided to investors as to how the specific representations and warranties provided for each given CMBS transaction compares to the Model Representations Package that has been agreed to as an industry standard.

We believe that this will constitute a major step forward in CMBS reporting transparency, and it will give NRSROs the tools they need to meet their Dodd-Frank Act requirements. Note that disclosure of the detailed Representations Package to investors with a comparison to our agreed-upon Model Representations Package will allow investors to directly evaluate the quality of the representations provided by a loan seller, without having to place their sole reliance on related analysis by NRSROs. The CRE Finance Council supports giving investors the tools they need to take responsibility for their own analysis, should they seek to supplement the opinions provided by NRSROs.

Once the Model Representations Package is in final form, we plan to share our best practice recommendations with policymakers, and urge the SEC to allow NRSROs to use them in their evaluations of CMBS issuers' representations and warranties.

[13] *Id.*

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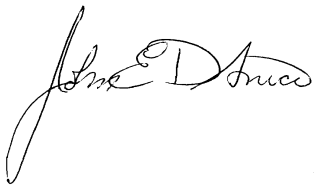
V. Conclusion

We appreciate your consideration of our comments regarding disclosure of repurchase requests and NRSRO reporting on representations and warranties, and we stand ready to provide any additional assistance that may be helpful.

Respectfully submitted,



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