May 29, 2012

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

Attention: Comments

Re: Assessments, Large Bank Pricing Definition Revisions Notice of Proposed Rulemaking (Revised Definitions of Higher-Risk Consumer and C&I Loans and Securities); 77 Federal Register 18109, March 27, 2012; 12 CFR Part 327; RIN 3064–AD92[1]

Mr. Feldman:

The American Bankers Association, American Securitization Forum, The Clearing House Association L.L.C., The Financial Services Roundtable, The Loan Syndications and Trading Association, and The Risk Management Association appreciate the opportunity to comment on the proposed definitions of "higher-risk" consumer and commercial and industrial (C&I) loans and securities used in the Large Bank Pricing (LBP) system for assessments by the Federal Deposit Insurance Corporation (FDIC).[2] Our associations collectively represent all of the banks that are or may be subject to the proposed definitions. The comments and suggestions in this letter reflect the consensus of opinion developed across more than a dozen conference calls that included bankers from nearly all the LBP banks.

We commend the FDIC staff for their willingness to discuss the concerns of the industry and entertain changes to an existing rule. The ultimate purpose of these changes is to improve relative deposit insurance assessment pricing among LBP banks. We share with the FDIC the goal of reasonable, consistent, and workable measurement of comparative risk in the loan and securities portfolios of LBP banks in order to produce fair pricing of FDIC assessments. Therefore, all banks affected by the proposed definitions have a very strong interest in getting them right. **The collaborative process used in development of this proposal is a model for how industry and regulators can work together to achieve a reasonable result.**

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[1] 77 *Federal Register* 18109 (March 27, 2012), www.gpo.gov/fdsys/pkg/FR-2012-03-27/pdf/2012-7268.pdf, hereafter referred to as "the proposal."

[2] Descriptions of the signatory associations are provided at the end of this letter.

LBP institutions believe that the proposed definitions are far superior to those in the original rule. The proposal reflects dozens of open and frank discussions between bankers and FDIC staff. For the industry, we have a greater appreciation of the FDIC's goals and objectives; for the FDIC, we believe there is a better understanding of current industry standards, practices, and the enormous challenges in developing systems and processes to report required data. For banks, the proposed definitions better correspond to industry standards and practices of classification of these types of loans and are significantly less expensive to capture and report. For the FDIC, the result is better definitions of "higher-risk" consumer and C&I loans and securities that more closely reflect risk exposures and can be applied by banks in a more consistent fashion.

The detailed comments offered in this letter are provided in the same spirit of cooperation. We believe the recommendations put forward below will add to the clarity and workability of the definitions. As we all realized with the original definitions, there are often many unintended consequences of any new rule or change in a rule. We hope that by continuing to work together to find solutions, the FDIC and the industry can address any unexpected problems that may arise as these new changes are implemented.

Before turning to our specific recommendations, it is important to understand the current efforts of banks to meet the expected new requirements. The emergency extensions, which allowed banks to report balances based on preexisting regulatory definitions, have been very helpful to give banks some opportunity to consider the steps needed to meet the compliance obligations. LBP institutions have already begun the difficult process of developing the requisite policies, modifying systems, installing reporting procedures, establishing enhanced review, audit and validation procedures, and training credit staff to be ready to classify loans and securities under the new "higher-risk" definitions in order to meet an October 1, 2012 start date. This is an enormous undertaking, and most banks do not expect their automated processes to be fully operational for reporting in fourth quarter Call Reports. Instead, they anticipate using manual processes initially. We suspect that, as LBP institutions put the final definitions in place, additional issues will arise and will pose important challenges that have not yet been considered. We ask that reviews of these reporting structures take into consideration these extraordinary efforts.

We also note that these changes in definitions and reporting come at a time when many other regulatory changes are being considered by the regulators. For example, the FDIC and other federal banking agencies have also proposed that large banking firms simultaneously develop more involved classification systems for "leveraged" commercial lending, with "leveraged" and "higher-risk" (as proposed) defined differently. In addition, banking firms with over $50 billion in assets, subject to the Comprehensive Capital Analysis and Review (CCAR), would be required by a Federal Reserve proposal to develop or enhance over the next few months extensive reporting for their entire loan portfolios. We urge the bank regulators to understand and make allowances for the cumulative impact of all these changes and to consider compliance effective dates—including this change in the LBP rule—that recognize the immense time and effort needed to develop the multiple monitoring systems for these banking firms' credit portfolios all at the same time.

Because of the complexity of the proposed changes, we anticipate many banker questions on the new definitions. We encourage the FDIC staff to schedule implementation conference calls well in advance of October 1, 2012 to answer banker questions.

Summary of Priority Issues

LBP institutions support the significant improvements that embody the FDIC proposal. As with any proposal, refinements to improve the clarity and effectiveness are needed. Bankers have carefully considered the proposed definitions and have developed numerous suggestions. Below are some key issues that they feel are most important to address. Further detail on each is presented in sections that follow, together with additional suggestions that we believe would strengthen the overall proposal.

- The final rule should specify that the time period for observed default rates used in determining the probability of default for consumer loans will be updated every two years; the re-estimation interval should be predefined and not arbitrary.
- The FDIC should provide at least three quarters advance notice prior to a change in the specifications for estimation of the probability of default for consumer loans.
- The cutoff probability of default for "higher-risk consumer loans and securities" should remain invariant after a potential adjustment following first reporting under the new definition.
- Simplified reporting of the "higher-risk consumer loans and securities" balance should be permitted for small LBP banks with minimal exposure.
- An increase in a credit card credit line or a change in the interest rate should not be considered a refinance, and especially should not be given less favorable treatment than other types of consumer lending.
- The requirement that a LBP bank, in making a C&I loan or investing in a C&I security, must trace back the purpose and magnitude of every financing for the borrower over the prior seven years to determine whether the asset may be "higher-risk" is highly problematic and should be changed.
- Unplanned overdrafts should not be considered as potential "higher-risk" C&I exposures.
- The asset-based lending exclusion should not require a new borrowing base certificate or validation of assets at each draw or advance on a loan.
- The asset-based lending exclusion should clarify that assets other than self-liquidating accounts receivable and inventory may be included, but not relied upon, in the borrowing base.
- Springing dominion of cash should be permitted under the asset-based lending exclusion.
- The dealer floor plan exclusion should not require lenders to obtain audited financial statements from borrowers.
- We encourage the FDIC to rethink the definitions of "higher-risk" and "nontraditional mortgage" securitizations.

Higher-Risk Consumer Loans and Securities

We believe the proposed system of using probability of default (PD) as the base determinant for reporting "higher-risk" consumer loans is more accurate and meaningful than the methodology adopted in the current rule. We commend the FDIC for looking for reasonable alternatives to what was originally proposed, and the industry supports this direction.

With any new approach, there will be challenges. For the last six months the industry has been discussing how a PD framework might work with the FDIC, the credit reporting agencies, Fair Isaac Corporation, and VantageScore Solutions. We believe this approach holds great promise. However, everyone is keenly aware that this is a new concept that is yet untested and requires cooperation, particularly with the credit reporting agencies to ensure that banks' portfolios can easily be mapped to PD bands. We urge the FDIC to monitor the implementation process to be sure that it can be accomplished in the necessary time frame and that it does not create a host of additional costs for the LBP banks.

The LBP bankers have identified several areas where changes are warranted in the proposed system:

Priority Issues

- **The final rule should specify that the time period for observed default rates used in determining the probability of default for consumer loans will be updated every two years; the re-estimation interval should be predefined and not arbitrary, as proposed.**[3]

  It is standard industry practice to recalibrate credit models regularly, at least once a year. Credit model parameters more than two years old stretch credible tolerance limits. Accordingly, the proposal acknowledges that the FDIC will need to periodically update the time period for estimation of the probability of default.[4]

  We recommend that the final rule specify a regular interval for PD re-estimation for consumer loans, and that every two years should be workable for the FDIC as well as LBP institutions. For example, in 2014 the observation period should be re-specified as the average of the two periods July 2009 to June 2011 and July 2011 to June 2013. Alternately, it could be specified as the average of the three periods July 2007 to June 2009, July 2009 to June 2011, and July 2011 to June 2013.

  Specifying the recalibration schedule would make the process more predictable and allow institutions to plan and adjust in advance of changes. This regularity would avoid unanticipated shifts in affected banks' credit policies and, since these institutions account for nearly half of all consumer credit in the United States, promote a more stable flow of credit.[5]

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[3] The proposal at page 18123.
[4] The proposal at page 18115.
[5] According to data from the FDIC's "Statistics on Depository Institutions" and the Federal Reserve's *Flow of Funds*, banking firms with LBP subsidiaries (banks with over $10 billion in assets) accounted for $1.2 trillion, 47.8 percent, of the $2.5 trillion in (non-mortgage) consumer credit outstanding at year-end 2011.

- **The FDIC should provide *at least* three quarters advance notice prior to a change in the specifications for estimation of the probability of default for consumer loans.**

  It is important to recognize that LBP institutions' credit modelers and model risk managers have work streams already at capacity with internal priorities and rising supervisory expectations and are not prepared to add a major project without reasonable advance notice.[6] One quarter notice, as proposed, would not provide sufficient time for re-estimation of models and validations of the re-estimations, integration of new parameters into decision processes, and retraining credit staff.[7]

- **The cutoff probability of default for "higher-risk consumer loans and securities" should remain invariant after a potential adjustment following first reporting under the new definition.**

  Setting the PD cutoff in the definition of "higher-risk" consumer credit is critical as it has broad implications for product offerings by LBP banks and, in particular, will affect the price and availability of credit for borrowers that qualify as "higher-risk." Bankers believe that this cutoff level will become an important factor for consumer loans and securities beyond the scope of FDIC assessments. Thus, the initial setting and any change in the future may have significant unintended consequences for consumer credit.

  This new framework and the proposed cutoff level may lead to significant changes in the amounts reported under the new definition for "higher-risk consumer loans and securities," as compared to what has been reported as "subprime loans." Given the changes being made and the potential need to recalibrate the LBP model based on the new reporting, the FDIC may reconsider the preliminary 20 percent PD cutoff level following the initial reporting under the revised definition. Establishing the appropriate cutoff at inception is very important and care needs to be exercised to assure it is providing a reasonable measure of relative risk for high-risk consumer loans.

  Once the appropriate PD is confirmed, LBP banks feel strongly that ***this value should thereafter be viewed as invariant and not be changed without due consideration***. The amounts to be reported as "higher-risk" exposures under the new definitions are intended to capture risk when originated by LBP banks. Any change in the "higher-risk" cutoff would violate this principle. For example, were the FDIC to change the threshold from 20 percent to 19 percent a year after adoption, loans on the books with PDs just below 20 percent, which were not considered "higher-risk" when underwritten, would suddenly be deemed "higher-risk." The potential for such a change is highly problematic for LBP institutions' credit policies and pricing. For this reason, several bankers suggest that, ***if the FDIC were to adjust the "higher-risk" PD threshold, then the status of loans and credit lines already on the books should be grandfathered at the prior cutoff level.***

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[6] See OCC 2011-12 (Supervisory Guidance on Model Risk Management) and, equivalently, the Federal Reserve Board's SR 11-7 (Guidance on Model Risk Management).

[7] The proposal at page 18123.

The proposal would allow the FDIC to modify the 20 percent PD threshold without going through notice-and-comment rulemaking.[8] We believe that ***consideration of any change in the "higher-risk" PD cutoff—including an initial recalibration soon after the new definition becomes effective—should be subject to the normal public notice and approval process, to allow bankers and the public to comment.*** This request is justified by the fact that the cutoff threshold will determine a Call Report balance.

If a change were implemented, a reasonable adjustment period of at least three quarters would be necessary for banks to comply, as LBP banks would need time to modify data systems and models. The one-quarter notice that is proposed is simply too short a time frame for banks to reasonably comply with the change. Perhaps more importantly, changing the cutoff changes the economics of originating these types of loans, in many cases leading to reconsideration by the institution of the pricing and credit policies for these types of products.

♦ **Simplified reporting of the "higher-risk consumer loans and securities" balance should be permitted for small LBP banks with minimal exposure.**

While easier to use and a better measure of risk than the "subprime" definition in the current LBP rule, the proposed definition of "higher-risk" consumer assets will require significant implementation time and cost for LBP institutions. For those with meaningful exposures, the benefits to the FDIC may easily justify the cost. However, it is not clear that this is the case for banks with insignificant exposures. This is particularly the case for those whose credit policies do not permit an appreciable amount of lending that would be deemed "subprime" or "higher risk."

We suggest that the FDIC simplify reporting for small LBP banks with minimal exposure. For example, if the ratio of subprime loans to Tier 1 capital and reserves were below one percent, then the amount of the bank's subprime loans could be reported as the "higher-risk consumer loans and securities" balance—where subprime is defined based on the 2001 interagency supervisory guidance.[9] This approach could result in some over-reporting of the balance relative to the proposed "higher-risk" definition because the supervisory guidance definition is generally broader. The banks that would consider this approach would weigh the potential added assessment impact against the savings in compliance costs.

♦ **An increase in a credit card credit line or a change in the interest rate should not be considered a refinance; credit card lines do not warrant less favorable treatment than other types of consumer lending.**

In previous discussions with the FDIC on this topic, LBP bankers recommended that a non-temporary credit card line increase should not be considered a refinance. Institutions active in credit cards point out that such increases do not involve origination of risk exposure, as increases are normally not based on new credit analyses and are not provided for troubled accounts. Indeed, such increases are usually provided only to customers who have demonstrated a pattern of creditworthiness and meet reasonable credit criteria.

8 The proposal at page 18123.

9 FDIC, Federal Reserve, Office of the Comptroller of the Currency, and Office of Thrift Supervision, "Expanded Guidance for Subprime Lending Programs," January 2001.

As proposed, an increase of less than 10 percent in a line of credit for all types of consumer credit ***except credit cards*** would not qualify as a refinance triggering classification as potentially "higher-risk."[10] There is no basis for ***credit card accounts to have less favorable treatment than other forms of consumer credit.*** As with other consumer credit, an incremental increase in a credit card line of up to ten percent should not be considered a refinance.

Moreover, it is common for a bank to establish a credit limit that is not fully accessible to a customer at inception. This is an important risk management tool that enables increases in the draw amount as the customer demonstrates sound credit behavior without undergoing a full, new credit review. Therefore, ***when a bank has internally approved a higher credit line than it has made available to a customer, providing access to this additional credit should not be considered a refinance,*** **as the bank has not underwritten "new" risk.**

The proposal further specifies that any increase or decrease in the interest rate on a credit card line would count as a refinance (triggering reevaluation of the "higher-risk status).[11] While rate changes may correspond with reassessment of the risk exposure for other types of consumer credit, this is typically not the case for credit cards.

Rate changes for credit card accounts, up or down, are commonplace. Examples include formulaic adjustments tied to underlying indices, expirations of introductory rates and special rates for balance transfers, and changes mandated by law (*e.g.*, the Credit CARD Act). Such changes could be made to a card account multiple times a year. Such changes are not typically the result of re-underwriting the account or re-evaluation of credit scores. In contrast, rate changes for other types of loans, such as mortgages, are infrequent and generally accompanied by re-underwriting.

The frequency of such changes means that, if LBP banks were required to reassess the "higher-risk" status with each rate change, this would impose a non-trivial cost and burden. And yet, the portfolio risk implications of such common changes are negligible. Thus, while there would be no real benefit to the FDIC, there would be significant cost to credit card issuing banks. ***We therefore propose exclusion of rate changes for credit cards from the definition of refinance for consumer loans.***

Other Issues

♦ **When the new "higher-risk" definition is implemented, banks should be allowed to use the oldest data available to evaluate the probability of default for consumer loans.**

There has been no reason in the past for LBP banks to keep all of the data needed to assess as of origination all the consumer loans currently on their books against the FDIC's proposed "higher risk" classification. However, they may have data to assess the loans at some point in the past. To lessen the start-up costs of the new definition, yet maintain the intent that LBP banks measure risk as nearly as possible to origination, we suggest that, only during the first quarter in which the definition goes into effect, the oldest information on file may be used to determine

[10] The proposal at page 18124.
[11] The proposal at page 18124.

whether a loan meets the definition if credit information at origination is not available. We suggest the following wording changes:[12]

> For consumer and residential real estate loans and securities (other than securitizations) originated or purchased prior to October 1, 2012, an institution would have to determine whether the loan or security met the definition of a higher-risk consumer loan or security no later than December 31, 2012, using information as of the date of the origination or subsequent refinance of the loan or security if the institution had that information.[FN] If the institution did not have that information, it ~~would have to~~ could use either refreshed data or the oldest information on file to determine whether a loan or security met the definition. Refreshed data would be defined as the most recent data available as if the loan or security were being originated in the fourth quarter of 2012. In all instances, the refreshed data used would have to be as of July 1, 2012 or later.

The phrase "or subsequent refinance" should be added to make the treatment of loans made prior to October 1, 2012, consistent with that for loans made after that date; a refinance in the past should trigger reclassification of a loan just as it will in the future.

- **When an institution acquires a consumer loan or security, it should have up to one year to determine whether the asset meets the "higher-risk" definition where it must obtain refreshed data from the borrower or other appropriate third-party.**

We believe that the proposal greatly underestimates the difficulty of obtaining information regarding the origination criteria, as well as the time needed to obtain refreshed data in an acquisition of a loan portfolio or a bank merger. Some of the necessary data elements may not be available when the loan is acquired. This would be particularly true where the seller of the loan portfolio is not an LBP bank and, therefore, is not required to maintain data in conformance with this FDIC rule. Obtaining refreshed data from the borrower or other appropriate third-party will be a manual and time-consuming task. Accordingly, obtaining refreshed data as of a date that is no earlier than three months before the acquisition of the consumer loan or security (as proposed) would be extremely difficult, if not impossible.[13]

Accordingly, we suggest that the final rule should provide that a LBP bank is expected to make a ***reasonable effort*** to obtain risk-rating information as of the time an acquired asset is originated, so that assessment pricing will correspond with risk at inception. However, an acquiring bank should not be required to go to extraordinary lengths to obtain a credit score or PD from the originating lender. ***The final rule should provide that a bank may use the best available data at the time of acquisition***. For these reasons, we recommend that the above provision be revised as follows:[14]

> When an institution acquires a consumer loan or security, it must determine whether the loan or security meets the definition of a higher risk consumer loan or security using the origination criteria and analysis performed by the original lender. If this information is

12 The passage to which the suggested revisions apply is on pages 18118 and 18124 of the proposal. The footnote, denoted "FN" here, is number 37 on page 18118 and 22 on page 18124.

13 The proposal at page 18120.

14 See page 18119 of the proposal.

> unavailable or cannot reasonably be obtained, the institution ~~must~~ may obtain credit information from an appropriate third-party as of the time the asset was originated, or else it may use refreshed data from the borrower or other appropriate third-party. If this information is unavailable, the institution should use the best available information at the time of the acquisition, including, where possible, ~~must obtain~~ refreshed data from the borrower or other appropriate third-party. Refreshed data for consumer loans and securities is defined as the most recent data available. ~~However, the data must be as of a date that is no earlier than three months before the acquisition of the consumer loan or security.~~ The acquiring institution must also determine whether an acquired loan or securitization is higher risk as soon as reasonably practicable, but in no case ~~not~~ later than ~~three months~~ one year after the date of the acquisition.

The same timing issues arise with respect to the acquisition of C&I and residential real estate loans and securities, as well as when an institution acquires loans or securities from another entity on a recurring or programmatic basis.[15]

- **The final rule should clarify expectations for grading as potentially "higher-risk" and for categorization (in the probability of default distribution table) of a consumer loan or credit account where there is no credit history.**

The proposal does not consider how LBP banks are to treat consumer credit customers with no credit histories or ratings. This issue is relevant for all forms of consumer credit, since at some point in time every consumer had no credit history, and may especially pertain to student loans and credit card accounts.

LBP banks with sufficient "no score" data may expect to develop internal models to evaluate the PD distribution for such consumer credit applicants. However, these PD mappings would, by definition, be based on "originations," not "account management" data, in conflict with the proposed PD modeling specifications. ***The final rule should clarify that this modeling is acceptable, subject to the same specifications as other PD estimation models with respect to the estimation period and quantity of observations, and similarly subject to FDIC review.***

For LBP banks that do not internally model PDs for credit customers, the default presumption would seem to be that a "no score" credit applicant would be classified as "higher-risk" and in the highest PD band unless and until there is a refinance on the account. Such treatment is unduly severe and would make it harder and more expensive for consumers to obtain their first credit cards, student loans, *etc.* Accordingly, we suggest the following wording for the final rule:[16]

> Accounts with no credit history are initially to be reported in the highest PD band and as "higher-risk." Such accounts may be reevaluated when credit scoring data is established for the consumer for the first time, no later than within a year of establishment. After such a

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15 Similar changes would be appropriate for the wording on acquisitions of C&I loans and securities (on pages 18111 and 18119 of the proposal), as well as for the wording on acquisitions of residential mortgage loans and securities (on pages 18116 and 18123 of the proposal).

16 The suggested paragraph would be added pages 18113 and 18121 of the proposal.

reevaluation, the PD band and "higher-risk" status will be retained unless and until there is a refinance of the loan or credit line.

LBP bankers have indicated that "no-score" credit accounts exist primarily because the consumer has not established a credit history, not because the bank failed to obtain one. Presuming such accounts to be "higher-risk" at the outset is, one could argue, excessively conservative, but is generally acceptable to LBP bankers if subsequent reevaluation is permitted. Once the consumer borrows, he or she will establish credit and can be appropriately classified for risk purposes. However, it normally takes longer than a quarter to establish a credit tracked by a national credit reporting agency. Most will have credit bureau credit scores within six to nine months post-booking; very few will have scores within the first three months. In fact, the percent of accounts scored in the sixth month is substantial, so a full three quarters is required.

Student loans present a special challenge. Many student loans held by LBP banks are backed by a government guarantee program or else co-signed by parents. In cases where there is no guarantee or cosigner, and no basis for credit histories, the final rule should clarify how the loan is to be graded. Based on LBP banks' experience, it would be unduly harsh to rank all such loans as "higher-risk"—especially considering that there is seldom an opportunity for refinance for several years. One approach would be to allow the PD distribution to be calculated and reported based on the bank's long-term experience with such loans once credit scores became available, absent significant changes in credit policies.

- **The FDIC should consider issues specific to risk-grading loans from foreign markets.**

Given the diversity of national credit markets, pervasive lack of standardized industry risk scores in the international space, and difficulty in applying the U.S.-specific rules to many other markets, we request that the final rule permit the use of other reasonably available information in assessing the probabilities of default on these loans. Such information could include the Basel II long-term probability of default or other measures that the banks consider to be reasonable indications of a cyclical view adjusted for the difference in default definition and timing of account risk assessment. The institution may exercise judgment in making its determination, given that not all of the information required under the proposed definition may be reasonably available.

- **Data collected from reports of the "Outstanding Balance of Consumer Loans by Two-Year Probability of Default" table should not be disclosed or used in public statements.**

As with other data reported specifically for LBP, individual banks' information should remain confidential. When the FDIC publishes this reporting form for comment, it should reaffirm that a responding bank's table will be kept confidential. Moreover, the banking agencies should realize that the FDIC's specifications for calculation of probabilities of default, designed primarily to produce consistent measurements among LBP banks, will likely not reflect individual banks' measurements of PDs. Therefore, the agencies should refrain from using the data to produce results used in public statements.

Higher-Risk Commercial and Industrial Loans and Securities

The industry is strongly supportive of the changes made by the FDIC. The original $1 million *de minimis* level was simply too low and would have captured large numbers of small business loans that would not be considered high-risk or leveraged. The increase to $5 million is a significant improvement to address this problem. The "waterfall" tests—*i.e.*, where a loan must first meet a purpose test, then an EBITDA test, and then a selective collateral test—also are important steps to more accurately capture higher risk loans. This also is consistent with current regulatory expectations and industry practices. While many banks continue to believe that additional considerations of other collateral and other mitigating factors would be appropriate, the steps the FDIC has taken represent a significant effort to identify the pool of higher risk loans.

There are further improvements to this strong framework that we suggest.

Priority Issues

- The requirement that a LBP bank, in making a C&I loan or investing in a C&I security, must trace back the purpose and magnitude of every financing for the borrower over the prior seven years to determine whether the asset may be "higher-risk" is highly problematic and should be changed.

  In order to determine the "higher-risk" status of a loan or security, the proposal would require LBP banks to review the purpose and magnitude of funded debt increase of every single financing for a commercial borrower over the past seven years.[17] According to LBP bankers, it would be very difficult for lenders to track back seven years to the purpose and magnitude for every single borrowing for commercial credit customers. The range of suggestions on this issue reflects the very strong agreement among LBP bankers that the proposed seven-year look-back at all of a commercial borrower's debt would be highly problematic. ***We would welcome a direct dialog with FDIC staff on this issue to talk through the problem and discuss alternatives that would provide a mutually agreeable solution.***

  Most banks require and consider borrower financial statements and supporting data from prospective clients only for the past three years, and small increases in total funded debt—*e.g.*, 20 percent—over that period are seen as normal business financing. Having to collect and record the information for debt that was incurred within the past seven years as proposed would, therefore, be a major undertaking for LBP bankers, especially as it relates to tracing the debt history of commercial borrowers whose securities are not publicly traded or that have banked with another institution in the past.

  This requirement would also be a burden to commercial borrowers, who would have to provide evidence of and attest to the purpose and magnitude of a funded debt increase in borrowings from years ago. While on the surface this may not seem to present a problem, the practical experience of banks is that natural turnover of a borrower's business staff and gaps in records retention, as well as the likely inability or unwillingness of other institutions to share this

[17] Condition (a)(i) and corresponding footnotes 12 and 13 to which the suggested revision applies is on page 18111 of the proposal.

information, would severely complicate the tracking of past borrowings. Firms would naturally prefer non-LBP lenders that do not ask for this information, placing LBP banks at a competitive disadvantage in commercial lending. LBP bankers also expressed concerns that the reporting requirements may lead to constraints on the availability of credit to U.S. companies, including investment-grade firms and firms in specific industries (*e.g.*, public utilities), or else force them to price credit to these customers at levels that are not competitive with what institutions not subject to LBP rules can offer. Moreover, they fear that any borrower tagged as having "higher-risk" debt could have a difficult time finding affordable financing in any form for an extended time period.

We suggest six changes as follows to the "Purpose Test" to make it more workable:

1. **The final rule should acknowledge the sufficiency of reasonable due diligence in determining the purpose and magnitude of a funded debt increase of past debt.** This is necessary to allow internal bank Compliance, Audit, Risk Management, and supervisors to sign off on a bank's reporting under the "higher-risk" definition. Without this wording, the underwriters of commercial credit would need to go to unreasonable lengths to make loans and then flag them as "higher-risk" or not.

2. **Retired debt should not factor into consideration of the purpose of new or re-financed exposure.** LBP banks accept that a firm is generally a higher-risk borrower when it borrows a significant amount to finance a material acquisition, buyout or capital distribution that substantially raises its operating leverage. They accept further that the elevated risk exposure does not terminate if the firm simply refinances that debt. However, their internal risk rating systems view the risk on that debt as extinguished once that debt is paid off. The "higher-risk C&I loans" definition should explicitly recognize this.

3. **The look-back at the purpose and magnitude of funded debt increase should apply only in the case of refinance of debt currently outstanding; for new debt, only the purpose and magnitude of funded debt increase of that debt is relevant.** The intent of the revised "higher-risk" definition is to identify risk when it is created. When a new loan is extended, one that does not refinance debt currently on the borrower's books, the particulars of that debt are the only considerations relevant to the risk exposure created. If, on the other hand, the loan is a refinance of all or a part of the debt currently on the borrower's books, determination of the risk-at-creation should take into consideration the existing debt, because the risk created does not simply vanish with a refinancing. In this case, it would be appropriate for the lending bank to judge the risk of the new loan based on its size and magnitude of increase in funded debt, the borrower's leverage, and the purpose of the debt being refinanced—*i.e.*, whether the original loan financed a material acquisition, buyout, or capital distribution. Symmetrically, if the loan is refinanced again, then the original purpose should remain—at least for a period of time which the LBP bankers recommend to be a period of no more than five years and preferably less. Beyond that point, the original purpose of the debt loses its relevance.

4. **A $5 million threshold should be part of the purpose test.** A loan of less than $5 million at origination or refinance would not be classified as sufficiently material to be "higher-risk" even if it finances an acquisition, buyout or capital distribution. Therefore, a loan of this scale in a borrower's credit history should not cause subsequent borrowing to be classified as

"higher-risk." Without this provision, financings of trivial acquisitions, buyouts or capital distributions would significantly affect the cost and availability of credit to a borrower for the length of the look-back period for the purpose test, and LBP lenders would face an immense burden in tracing back such inconsequential past financings.

5. **A five-year look-back period should replace the proposed seven years.** Most LBP institutions track the past borrowing history of a borrower only three years back through a review of their financial statements. Further in the past, the purpose of specific debt becomes murky as sources and uses of multiple layers and types of debt become fungible. While we believe that even a five-year look-back is too long, such a period would help avoid the problems of determining the purpose and size of specific lending in the past—a problem which grows exponentially for each additional year of the look-back period.

6. **The proposed 20 percent threshold for materiality should be reconsidered**.[18] LBP bankers uniformly feel very strongly that a 20 percent increase in a firm's total funded debt does not represent a material risk exposure. They note that the proposed 20 percent increase threshold would scope in loans made to firms for routine acquisitions in the normal course of business (*e.g.*, a uniform rental business buying customer lists). Similarly, financing for a reasonably modest stock redemption or establishing a basic dividend program would be captured at a 20 percent threshold, yet are well below bankers' views of what constitutes elevated risk.

   Based on experience with business customers, we feel that ***a 50 percent increase in total funded debt is a truer demarcation line for a "material" increase in debt.*** An increase of this scale would mean that a third of the debt had come from the new financing. An increase in debt on this scale is more consistent with the way most LBP banks identify higher risk transactions. In fact, several feel that the threshold should be even higher because their internal classifications of higher risk transactions involve doubling or tripling of the debt level.

   In support, we note that the interagency "proposed leveraged lending guidance" suggests 50 percent deleveraging as a guideline.[19] Moreover, the OCC *Comptroller's Handbook* suggests that a bank should classify higher-risk "leveraged lending" as when the "transaction results in a substantial increase in borrower's leverage ratio. Industry benchmarks include a ***twofold*** increase in the borrower's liabilities …" (*emphasis added*).[20]

   By demonstration, a 20 percent increase in total funded debt on 2½× business borrowing results in 3× leverage, a modest additional reliance on EBITDA. In contrast, a 50 percent increase results in 3¾× leverage, with an additional 15-month reliance on EBITDA. This latter increase reflects the elevated risk the "higher-risk" definition intends to capture.

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18 The proposal at pages 18111, 18112, and 18120.

19 FDIC, Federal Reserve and Office of the Comptroller of the Currency, "Proposed Guidance on Leveraged Lending," 77 *Federal Register* 19417 (March 30, 2012) at page 19421. The proposal says, "Underwriting standards should consider … a borrower's capacity to repay and its ability to de-lever to a sustainable level over a reasonable period. As a general guide, base case cash-flow projections should show the ability over a five-to-seven year period to fully amortize senior secured debt or repay at least 50 percent of total debt."

20 Office of the Comptroller of the Currency, *Comptroller's Handbook: Leveraged Lending*, February 2008, page 2.

In sum, we suggest that the test, condition (a)(i) in the definition of a "higher-risk" C&I assets, should be revised as follows to incorporate these six points:[21]

(a)(i) The purpose[FN 12] of any of the borrower's outstanding debt~~FN 12~~ being originated or refinanced (whether owed to the evaluating insured depository institution or another lender) is currently, or ~~that~~ was, in the last five years in the case of a refinance, incurred ~~within the previous five years was~~ to finance a buyout, acquisition or capital distribution and such debt ~~was~~ is material;[FN 13]

An institution is required to use reasonably available information to determine whether debt incurred in the past financed a material acquisition, buyout, or capital distribution. Reasonably available information includes a borrower's financial statements, other data routinely obtained in a bank's credit underwriting processes, and/or assertions from the borrower's management.

FN 12: The "purpose of the borrower's debt" is determined at the time the debt was incurred by the borrower. ~~An institution would be required to determine if the borrower has incurred any debt in the last five years that meets met the purpose test.~~

FN 13: … Material means the debt being originated or refinanced (including funded and unfunded amounts) is at that time $5 million or greater and result~~sing~~ in a 50 percent or greater increase in the total funded debt of the borrower anytime within 12 months of the borrowing ~~in the total funded debt of the borrower (including all funded debt assumed, created, or refinanced)~~. Debt is also material if it exceeded $5 million at origination and if, before the debt was incurred, the borrower had no funded debt.

Note that we have suggested inserting the phrase "of the borrowing" into the footnote. There is some confusion as to whether a bank would have to look backwards or forward in time after making a loan for an acquisition, buyout or capital distribution. The proposed insertion should help clarify this.

- **Unplanned overdrafts should not be considered as potential "higher-risk" C&I exposures.**

Unplanned overdrafts do not involve the creation of risk exposure for a bank in the sense that they are normally incidental, overnight mismatches in the balances of deposit accounts. Most "cure" within a few days at most. As such, LBP banks have not developed tracking systems for such transient exposures. Thus, it would be very difficult for the banks to evaluate and flag such transient exposures against the "higher-risk" criteria.

For these reasons, the Federal Reserve has determined ***not*** to require reporting of unplanned commercial overdrafts in the risk assessment data it requires from large banking firms. For the commercial loan balances in Schedule FR Y-14 of the Federal Reserve's 2012 Comprehensive

[21] Condition (a)(i) and corresponding footnotes 12 and 13 to which the suggested revision applies is on page 8111 of the proposal.

Capital Assessment Review (CCAR), institutions are instructed to "exclude loan level detail for all unplanned overdrafts (as used in the FR Y-9C)."[22] A similar exemption for unplanned overdrafts would be warranted for LBP reporting.

However, if a bank offers overdraft facilities, we can support those overdrafts being deemed "higher-risk," consistent with the Federal Reserve's CCAR process as reported in Schedule FR Y-14.

Asset-Based Lending Exclusion

- **The asset-based lending exclusion from characterizing C&I loans as "higher-risk" should not require a new borrowing base certificate or validation of assets at each draw or advance on a loan.**

It is not standard practice amongst ABL lenders to obtain a new borrowing base certificate at each draw or advance on a loan. Given that the lender has control over the borrower's depository account and cash flow through a blocked account and lock box, it is not unusual for draws to occur on a daily basis.

Nor is it standard practice in ABL lending to validate assets at each draw. Requiring such action would impose a major administrative burden on banks and their borrowers, such that it would eviscerate the use of this exclusion.

Moreover, these requirements are inconsistent with the language in Section D of the proposal[23] and are not necessary given the other strictures in the proposal. We suggest that ***the ABL borrowing base certification and validation requirements should be consistent with Section D*** and that this provision should be revised in the final rule as:[24]

> A ~~new~~ current (within 60 days) borrowing base certificate is required at each draw or advance on the loan. ~~At the time of each draw the insured depository institution must validate the assets that compose the borrowing base certificate (by requesting from the borrower a listing of accounts receivable by creditor and a listing of individual pieces of inventory) and certify that the outstanding balance of the loan remains within the collateral formula prescribed by the loan agreement.~~

- **The final rule should clarify that assets other than self-liquidating accounts receivable and inventory may be included, but not relied upon, in the borrowing base under the ABL exclusion.**

If a loan or credit facility qualifies for the ABL exclusion based on accounts receivable and inventory collateral, and additional collateral of another type is held in order to provide the bank extra protection, the ABL exclusion should clarify that the additional collateral does not

[22] See Federal Reserve, "FR Y-14Q: Corporate Loan Data Schedule Instructions," page 1, www.federalreserve.gov/reportforms/formsreview/FRY14Q_20111216_f.pdf.
[23] The proposal at page 18125.
[24] The paragraph to which the suggested revision applies is on page 18121 of the proposal.

disqualify the credit facility from eligibility for the ABL exclusion. The proposal should be revised to provide that other assets may be included in the borrowing base, but a facility may only be excluded from an institution's higher-risk C&I loan totals if it is fully secured by properly margined accounts receivable and inventory. The proposal should also clarify that there may be instances whereby a revolving credit facility, and not the related term loan, would qualify for exclusion. We suggest the addition of two sentences following "If the loan is a credit facility (revolving or term loan), it must be fully secured by self-liquidating assets such as accounts receivable and inventory":[25]

> This provision recognizes that it is common practice for the borrowing base to include other assets as collateral in addition to accounts receivable and inventory, including those taken to effect cross-collateralization provisions or as an abundance of caution. In order for the facility to be excluded from classification as higher-risk, the outstanding balance on the revolving credit facility and/or term loan must be fully secured by the portion of the borrowing base comprised only of properly margined self-liquidating assets, such as accounts receivable and inventory, with no projected dependence during the life of the loan on the other assets held as collateral.

- **Springing dominion of cash should be permitted under the ABL exclusion.**

Springing dominion is common in ABL, where a notice of sole control can be given upon the occurrence of an event, typically when excess availability drops below a threshold. Requiring "unconditional ability to take dominion of cash through account control agreements"[26] would not recognize this practice.

Moreover, "unconditional" is not required by the Uniform Commercial Code (UCC). The proposed rule should follow UCC §9-104(a) guidelines for perfection of deposit accounts. UCC §9-104(a) provides three ways to obtain control over a deposit account, including where "the debtor, the secured party, and the institution have agreed in an authenticated record that the institution will comply with instructions originated by the secured party directing disposition of the funds in the account without further consent by the debtor." The comments to this section state: "An agreement to comply with the secured party's instruction suffices for 'control' of a deposit account under this section even if the institution's agreement is subject to specified conditions, *e.g.*, that the secured party's instructions are accompanied by a certification that the debtor is in default." (If the condition is the debtor's further consent, the statute explicitly provides that the agreement would not confer control.) Although the arrangements giving rise to control may themselves prevent, or may enable the secured party at its discretion to prevent, the debtor from reaching the funds on deposit, UCC §9-104(b) makes clear that the debtor's ability to reach the funds is not inconsistent with "control."

We suggest the following revision to the ABL exclusion:[27]

> The insured depository institution has taken, or has the legally enforceable ~~unconditional~~ ability to take, dominion of cash through ~~account control agreements over the borrower's~~

25 The proposal at page 18121.
26 The proposal at page 18121.
27 The paragraph to which the suggested revision applies is on page 18121 of the proposal.

> ~~depository~~ blocked accounts such that proceeds of collateral are applied to the loan balance as collected.

Replacing "account control agreements over the borrower's depository" with "blocked" would make the terminology and definitions consistent with Section D of the proposal.

Dealer Floor Plan Exclusion

- **The dealer floor plan exclusion from characterizing C&I loans as "higher-risk" should not require lenders to obtain audited financial statements from borrowers.**

Each of the Original Equipment Manufacturers (OEMs) has its own financial statement format that is used by its dealers. Further, the captive finance companies of the OEMs do not require audited financial statements in support of their dealer floor plan lines of credit, making it competitively difficult for banks to require them to do so. Bank inventory audits, which are usually conducted monthly, are sufficient to ensure that adequate controls are in place. We suggest the following rewording:[28]

> The insured depository institution must obtain and review ~~audited~~ financial statements (*e.g.*, audit, review, tax returns, company-prepared, or statements prepared by an accountant) of the borrower on at least a quarterly basis to ensure that adequate controls are in place.

Other Issues

Higher-Risk C&I Exposures

- **Clarification is requested regarding the requirement in the definition of "outstanding balance" to aggregate multiple loans to a borrower.**

LBP bankers are unclear as to the intent of the language regarding the aggregation of "multiple loans to one borrower" in the definition of the "original amount" of a C&I loan.[29] The proposal's wording does not make clear whether the aggregation is intended to apply to multiple facilities of one borrower originated or refinanced at the same time, or whether it refers to all debt to the same borrower, irrespective of when originated. Further, it is unclear whether the requirement to aggregate extends beyond just assessing whether loans are "higher risk" to include reporting the amount of those loans designated as "higher risk." For example, assume a company borrowed $6 million that did not meet the definition of a "higher risk" loan, but two years later borrowed an additional $10 million at a time when the "higher risk" criteria were met. Does the aggregation rule require all loans to the borrower (*i.e.*, $16 million) to be reported as "higher risk," even though the original $6 million loan was not designated as "higher risk" and was not refinanced? Perhaps the aggregation rule is intending to apply to multiple loans originated at the same time. In either case, the FDIC needs to provide clarification in order to achieve consistency in application and enable LBP bankers to properly implement the final rule.

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28 The paragraph to which the suggested revision applies is on page 18121 of the proposal.
29 The proposal at page 18120.

- **We seek clarification of the proposal's intention for inclusion of "revocable commitments" as potential "higher-risk" C&I exposures.[30]**

  The term "revocable commitments" is not used by the industry because, in fact, a credit line that is revocable is clearly not a commitment. Thus, bankers are unsure of the intended meaning. We suggest that the FDIC provide examples of the types of account intended for the "higher-risk" definition.

  As an example, in order to streamline the credit approval process a bank may approve internally an amount it is willing to lend to a borrower over a period in the future (a so-called "guidance account") but does not communicate that amount to the borrower. Such an internal credit limit cannot be considered a commitment because it is not an established credit line where the borrower is authorized to draw down the entire amount. In fact, the borrower is not even aware of the existence of this "account."

  Such "non-commitments" (including uncommitted, unused advised and guidance lines) are not currently reported. Only legally binding commitments and contingents are included in the Call Report and FR Y-9C (on Schedules RC-L and HC-L, respectively, for unfunded lending exposures). ***We suggest that the final rule should confirm that only exposures that are currently reported are to be graded as potentially "higher-risk."***

- **The final rule should clarify that a bank may, if it chooses, evaluate whether a loan to a subsidiary of a firm is "higher-risk" based solely on the financials of that subsidiary.**

  In many instances, a subsidiary firm does not produce financial statements separately from those of its parent. The proposal clarifies when a loan to such a subsidiary should be evaluated based on the condition of the parent.[31] However, the proposal's wording obscures the option to evaluate a subsidiary based on its own merits. We believe that it is the FDIC's intent that this be permitted and request affirmation of this point in the final rule.

- **We question whether the definition of "higher-risk C&I loans and securities" should include a condition that "(b) Any of the borrower's debt (whether owed to the evaluating institution or another lender) is designated as a highly leveraged transaction (HLT) by a syndication agent."[32]**

  We have no objection to this condition. However, we note that there is no clear, generally agreed-to definition of "HLT" and we question the continuing relevance of this term. We note

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30 On pages 18111 and 18119, the proposal states "higher-risk commercial and industrial (C&I) loans and securities would include … Any commercial loan (funded or unfunded, including irrevocable and revocable commitments) owed by a borrower …"

31 On page 18120, the proposal states: "The debt-to-EBITDA ratio must be calculated using the consolidated financial statements of the borrower unless the loan is to a subsidiary of a larger organization. In that case, the ratio may be calculated using consolidated financial statements of the parent company provided that the parent company and all of its major operating subsidiaries have unconditionally and irrevocably guaranteed the borrower's debt to the reporting large institution or highly complex institution."

32 The proposal at pages 18111 and 18119.

further that the proposed leverage lending guidance makes no reference to HLT designation in defining leveraged finance.[33]

- **The final rule should affirm that a syndicated loan that is fully secured by a cash deposit would not be graded as "higher-risk" for any of the syndication participants.**

  As proposed, a bank that claims the exclusion would be required to hold the cash deposit pursuant to an irrevocable assignment.[34] In a loan syndication, however, the lead bank typically holds the collateral on behalf of the participating banks. We believe that the intent of the proposal is that this exclusion be available to all participant banks, not just the bank that holds the collateral. We request that the final rule confirm this interpretation by modifying the language as follows:[35]

  > In order to exclude a loan based on cash collateral, the cash would be required to be in the form of a savings or time deposit held by the insured depository institution, or, in the case of a syndication where participant banks do not hold the deposit individually, by the lead or agent bank. The insured depository institution, or lead or agent bank in the case of a syndication, would be required to have in place a signed collateral assignment of the deposit account, which is irrevocable for the remaining term of the loan or commitment, and ~~the insured depository institution~~ would be required to place a hold on the deposit account that alerts the institution's employees to an attempted withdrawal…

- **The definition of "capital distribution" should be modified to avoid capturing ordinary business actions that improve a bank's business prospects and that enhance shareholder value.**

  As proposed, a "capital distribution' is defined to mean debt incurred "to finance a dividend payment or to finance other transactions designed to enhance shareholder value, such as a repurchase of stock."[36] Because all business activities are conducted for the purpose of improving the revenue or financial condition of the borrower, we are concerned that this definition could unintentionally capture financing in the ordinary course of business. Accordingly, we recommend that the definition be modified to encompass debt incurred "to finance a dividend payment, a repurchase of stock or similar action."

- **Assets should be excluded from "higher-risk" classification to the extent that they are collateralized by securities held under signed collateral agreements and issued by the U.S. Government, its agencies, or Government-sponsored agencies.**

  As proposed, a consumer or commercial loan or security would be excluded from classification as "higher-risk" to the extent that the balance is recoverable from the U.S. Government, its

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[33] FDIC, Federal Reserve and Office of the Comptroller of the Currency, "Proposed Guidance on Leveraged Lending," 77 *Federal Register* 19417 (March 30, 2012) at page 19421.

[34] The proposal, at pages 18111, 18114, and 18120.

[35] The suggested wording would modify footnote 15 on page 18111 and footnote 26 on page 18114 of the proposal.

[36] The proposal at page 18111.

agencies, or Government-sponsored agencies under guarantee or insurance provisions.[37] Government and agency securities held as collateral provide the same protection as government-issued cash collateral and Government and agency guarantees. The final rule should equally recognize the equivalent collateral protection.

- **The final rule should recognize brokerage account collateral with restrictions that provide full and continuous protection of the loan.**[38]

  We suggest further that loans fully and continuously secured by brokerage account collateral should be exempt from classification as "higher-risk." To assure full and continuous protection, we suggest the following restrictions on the collateral and lending bank: (1) the securities held as collateral must be held in a brokerage account within the bank or, if with an unaffiliated brokerage account, a control agreement must be in place; (2) the bank must have a system in place to monitor the market values of the securities on a daily basis; (3) the loan covenant must provide that the total value of the collateral securities must continually be in excess of the current balance and accrued interest on the loan such that; (4) should the market value of the collateral decline below a prescribed threshold above that amount, this would automatically trigger sale of the securities, a call for additional collateral, pay-down of the loan balance, or similar action to fully protect the loan.

- **Determination of "higher-risk C&I securities" should be based on a "reasonable effort."**

  We suggest addition of the following wording at the end of the first bullet under "2. Higher-risk commercial and industrial (C&I) loans and securities":[39]

  > For the purposes of determining whether a security meets conditions specified in (a) or (b) above, an institution must use reasonable efforts to obtain information necessary for this evaluation, including obtaining the issuer's available financial statements, offering memoranda, and other information provided by the issuer. Sufficient information necessary for an institution to make a definitive determination may not, in every case, be available through reasonable efforts to the institution. In such a case, the institution may exercise judgment in making its determination.

[37] The proposal at pages 18111 and 18114.

[38] Brokerage account collateral, with restrictions that provide full and continuous protection, should also be recognized in the definition of "higher-risk" consumer loans.

[39] The proposal at page 18119.

Asset-Based Lending and Dealer Floor Plan Exclusions

- **The provision in the proposed ABL exclusion on advance rates should be consistent with Section D of the proposal.**[40]

We suggest the following rewording:[41]

> Advance rates should generally not exceed 75 percent to 85 percent of eligible accounts receivable and 85 percent of the net orderly liquidation value (NOLV) of eligible inventory when an appraisal is obtained or a readily determinable market price is available. ~~and~~ The bank's lending policy should address maintenance of an accounts receivable and inventory loan agreement that includes the items detailed in the Accounts Receivable and Automobile Dealer Floor Plan Lending Guidance included in Section D of this Appendix.

And also:[42]

> Loans against inventory should ~~normally be made with advance rates no more than 65 percent of eligible inventory (at the lower of cost valued on a FIFO basis or market) based on an analysis of realizable value. When an appraisal is obtained, up to~~ generally not exceed 85 percent of the NOLV of ~~the~~ eligible inventory ~~may be financed~~ when an appraisal is obtained or a readily determinable market price is available.

The suggested revisions are consistent with Section D as well as with the proposal's requirement that "Advance rates on accounts receivable should ***generally*** not exceed 75 percent to 85 percent of eligible receivables and 65 percent of eligible inventory"[43] (*emphasis added*). Further, the suggested language acknowledges that there are limited instances where a higher advance rate on inventory may be prudent. For example, lending at a 90 percent advance rate is prevalent in the retail sector.

- **A higher advance rate against accounts receivable financing should be permitted when appropriate under the ABL exclusion.**

The proposal states: "Advance rates on accounts receivable should ***generally*** not exceed 75 percent to 85 percent of eligible receivables and 65 percent of eligible inventory …"[44] (*emphasis added*). This language acknowledges that there are limited instances where a higher advance rate may be prudent. For example, lending at a 90 percent advance rate against insured receivables or credit card receivables is prevalent in the retail sector. We suggest the following change to the ABL exclusion:[45]

> Loans secured by accounts receivable should generally be made with advance rates at or below 75 percent to 85 percent of eligible receivables, based on the receivable quality,

[40] The proposal at page 18125.
[41] The paragraph to which the suggested revision applies is on page 18121 of the proposal.
[42] The paragraph to which the suggested revision applies is on page 18125 of the proposal.
[43] The proposal at page 18121.
[44] The proposal at page 18121.
[45] The paragraph to which the suggested revision applies is on page 18124 of the proposal.

concentration level of account debtors, and performance of receivables as related to the terms of sale."

- **Appraisals for accounts receivable or readily priceable commodity collateral should not be required under the ABL exclusion.**

  LBP bankers report that an appraisal for inventory is required in most ABL financing, as acknowledged in Section D of the proposal,[46] but is often unnecessary for commodity inventory that is readily priceable. For accounts receivable collateral, however, appraisals are very seldom performed. Receivables vary hour-to-hour and would be nearly impossible and impractical to appraise. Accordingly, we suggest the following change to the ABL exclusion requirements:[47]

  > ~~Assets must~~ Inventory should generally be valued or appraised by an independent third-party appraiser using net orderly liquidation value (NOLV), fair value, or forced sale value (*versus* a "going concern" value), whichever is appropriate, to arrive at a net realizable value. When there is a readily determinable market price for the inventory, frequent price quotations, and a readily available market (*e.g.*, for steel or other commodities), inventory may be valued using the market value of standardized interchangeable units.

- **Clarification is sought regarding the revolving loan amount in the ABL exclusion.**

  We suggest some additional phrases to clarify the meaning:[48]

  > For purposes of calculating the ratio, a revolving loan amount (the numerator) is the amount of the loan if fully drawn at the time of origination of the facility to the maximum permitted borrowing base available to the borrower at the time of origination.

- **An additional condition may be included in the ABL exclusion, consistent with industry prudent lending standards.**

  We suggest addition of the following condition under the "Asset-Based Lending Exclusion"[49]

  > The insured depository institution must have the ability to withhold funding of a draw or advance on the loan if the outstanding balance of the loan is not within the collateral formula prescribed by the loan agreement.

- **More flexibility in the frequency of borrowing base reporting should be permitted under the ABL exclusion.**

  Borrowing base reporting is typically done monthly, sometimes weekly, and in rare circumstances quarterly. Daily reporting may be instituted when appropriate for severely

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[46] The proposal at page 18125.
[47] The paragraph to which the suggested revision applies is on page 18121 of the proposal.
[48] The paragraph to which the suggested revision applies is on page 18121 of the proposal.
[49] The suggested condition would be added to the list on page 18121 of the proposal.

troubled borrowers or when a borrower has material intra-month swings in collateral availability. To provide reasonable flexibility, we suggest the following change to the ABL exclusion: [50]

> Borrowing base reporting must be performed and validated (through asset-based tracking reports) at least on a monthly (or, in rare circumstances, quarterly) basis and supplemented by periodic, but no less than annual, field examinations audits to be performed by individuals who are independent of the credit origination or administration process.

- **Clarification is sought regarding requirements for an accounts receivable loan agreement under the ABL exclusion.**

We suggest the following rewording:[51]

> "An institution's lending policy or procedures should address the maintenance of an accounts receivable loan agreement with the borrower. This loan agreement should establish a percentage advance rate against acceptable receivables, include a maximum dollar amount due from any one account debtor (whether expressed as a dollar amount or as a percentage of the borrowing base), address the financial strength of debtor accounts, and define acceptable receivables."

This wording would be in conformance with the way in which this provision is typically expressed in ABL agreements.

- **A provision for accounts receivable is also appropriate for inventory as ABL collateral.**

To provide consistency with the requirements in Section D under "1. Accounts Receivable," we suggest that the following sentences be added to Section D under "2. Inventory":[52]

> An institution's lending policy or procedures should address the maintenance of an inventory loan agreement with the borrower. This loan agreement should establish a percentage advance rate against acceptable inventory, advance appraisal and valuation requirements, and define acceptable and ineligible inventory.

- **The provision for control over a "blocked account" under the ABL exclusion should conform to the Uniform Commercial Code.**

It should also recognize that the exercise of control may be immediate or upon giving notice of sole control, and that no blocked account agreement is necessary for control if the lender is the bank. Accordingly, we suggest the following revision to the definition of "blocked account" in Section D:[53]

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50 The paragraph to which the suggested revision applies is on page 18121 of the proposal.
51 The paragraph to which the suggested revision applies is on page 18125 of the proposal.
52 The proposal at page 18125.
53 The paragraph to which the suggested revision applies is on page 18125 of the proposal.

> An account that is ~~controlled~~ governed by an agreement that provides a lender with control over an account (whether immediately or upon giving notice to the depository institution) or stipulates that all cash transferred out of the account under hold must go to the lender. Blocked accounts are controlled (as that term is defined in the Uniform Commercial Code) by the lender. In full dominion transactions, the borrower ~~can~~ may make deposits into the blocked account, but maintains no signature authority on the account.

- **Section title "D. Accounts Receivable and Automobile Dealer Floor Plan Lending Guidance"[54]should be replaced with "D. Asset-Based Lending Guidance"**

Section D covers accounts receivable, inventory and automobile floor plan financing, so it is appropriate that "Asset-Based Lending" replace "Accounts Receivable" in the title.

Section D as currently drafted is confusing, as many of the terms and requirements outlined therein do not apply to automobile dealer floor plan financing. For example, blocked accounts and lock boxes are not normally used or required in an automobile dealer floor plan facility. We recommend that "Automobile Dealer Floor Plan" should be removed from the section title and a new section "E. Automobile Dealer Floor Plan Lending Guidance" should be created.

- **The dealer floor plan financing exclusion should recognize that a manufacturer repurchase agreement may not be available.**

Manufacturer repurchase agreements are not made available to floor plan lenders by all manufacturers. Further, the terms "aggressive" and "strict" are undefined. We suggest the following rewording:[55]

> The advance rate of 100 percent of dealer invoice plus freight charges on new vehicles and the advance rate of the cost of a used vehicle at auction or the wholesale value may only be used where there is a manufacturer repurchase agreement or an ~~aggressive~~ appropriate curtailment program in place that is tracked by the institution over time and subject to ~~strict~~ appropriate controls.

Nontraditional Mortgage Loans

- **The FDIC should reconsider the definition of "nontraditional mortgage loans" as soon as the regulatory definition of "Qualified Residential Mortgage" (QRM) is finalized.**

The proposal states that the FDIC may reconsider the definition of "nontraditional mortgage loans" after the definition and capital treatment for a QRM is finalized by regulation.[56]

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[54] The proposal at page 18124.
[55] The paragraph to which the suggested revision applies is on page 18121 of the proposal.
[56] Dodd-Frank Act §1412 establishes and requires the Federal Reserve and CBPB to define by regulation a "Qualified Mortgage" (QM) with ability-to-repay requirements and limits on prepayment penalties. Dodd-Frank Act §941 establishes and requires multiple regulators to define by regulation a "Qualified Residential Mortgage" (QRMs) as one with "underwriting and product features that historical loan performance data

We strongly recommend this reconsideration. LBP bankers have found that few of the mortgage loans scoped in by the current "nontraditional" definition can realistically be considered as "higher-risk." Interest-only and other customized mortgage solutions are offered almost exclusively out of the LBP banks' Private Bank or Wealth Management units and only to high-net-worth customers as "customized solutions" under specialized circumstances. Loss rates on these products have been extremely low, demonstrating that the loans do not represent elevated risk exposure.

Securitizations

Priority Issue

- **We encourage the FDIC to rethink the definitions of "higher-risk" and "nontraditional mortgage" securitizations.**

LBP bankers appreciate that the proposal would allow them to categorize "higher-risk" and "nontraditional" securitizations based on the underlying assets of securitizations if they have the ability to do so. They further appreciate that the proposal provides guidance relative to reasonable efforts to classify securitizations. Nevertheless, the proposed means of categorizing securitizations remains unworkable.

We believe that it is vital that the final rule recognize that LBP institutions frequently acquire securitization exposures as investors rather than as originators. They remain concerned about their ability to make "higher-risk" determinations in this context. As investors, LBP institutions receive information that is based on market and regulatory requirements developed over 25 years. Securitizing agents and servicers are not developing systems to categorize assets under the FDIC definitions. Therefore, a LBP institution would not be able to invest in securitizations without relying on these agents' certifications concerning the underlying assets. LBP bankers are concerned that their supervisors, who tend to interpret Call Report instructions strictly, will not be satisfied with this approach. As a consequence, banks will be more reluctant to invest in securitization transactions, further negatively impacting a market that is already struggling to recover and impeding the flow of credit to consumers and businesses.

The information provided in many securitizations where LBP institutions act as investors does not include loan-level data. Instead, the data provided is aggregated across the securitized asset pool. For consumer loans, even when loan-level data is available, the data provided is normally in the form of FICO scores and therefore is not adequate to allow a loan-level probability of default to be determined as is required under the proposal. Further, even if data available would allow the determination of a two-year PD, it is not prudent practice to use such a PD since, in general, securitizations fund for the life of the underlying assets, which would rarely be in sync with a two-year period. For C&I loans, the CLO transactions in which such loans are securitized do not typically report the purpose of each underlying loan or any of the other metrics required to make a determination as to whether a given C&I loan is "higher-risk."

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indicate result in a lower risk of default." A mortgage lender is not required to retain five percent of the exposure when a QRM mortgage is sold into a private securitization.

The issue of the FDIC-prescribed information is particularly acute with respect to securitizations of small and medium sized enterprises (SME's), which are typically originated by non-bank finance companies. The unworkable nature of the proposed treatment of securitizations threatens to negatively affect credit to this critical part of the economy.

Because of the significant and often unworkable information requirement in the proposal, it is crucial that the final rules give specific latitude to LBP institutions in determining if underlying assets in a securitization are "higher-risk" in order to avoid costly and market constraining disputes.

In redrafting for the final rule, ***we urge the FDIC to weigh the costs of its proposal with respect to securitizations against the benefits***. The implementation and monitoring costs will be extremely high for LBP institutions. There will also be detrimental effects on the overall economy because this system is certain to discourage investment by LBP banks in securitizations, which provide credit to consumers and businesses of all sizes. As to benefits, we appreciate the intent to impartially and systematically allocate assessments among banks. In our view, however, ***shares of the overall assessment burden can be reasonably apportioned with other approaches to categorizing "higher-risk" securitizations***.

<u>Other Issues</u>

- **The final rules should give deference to reasonable efforts made by LBP institutions in determining whether a securitization is "higher-risk."**

We strongly believe that the final rule should clarify that LBP institutions are to make a reasonable effort to determine whether more than 50 percent of the assets held by a securitization are "higher-risk," considering the list of items that the LBP institution ***may*** consider, but that the institution is not required to check all of the items on the list in every case. We suggest the following rewording:[57]

> An institution would be required to use information reasonably available to a sophisticated investor in reasonably determining whether a securitization meets the 50 percent threshold. Information reasonably available to a sophisticated investor ~~should~~ <u>may</u> include, but is not limited to, offering memorandums, indentures, trustee reports, and requests for information from servicers, collateral managers, issuers, trustees, or ~~similar~~ <u>other</u> third parties. When determining whether a revolving trust or similar securitization would meet the threshold, an institution could use established criteria, model portfolios, or limitations published in the offering memorandum, indenture, trustee report or similar documents. <u>An institution is not required to include all of these sources of information in every case.</u>

In addition***, the FDIC should not overturn a determination made by an LBP institution that a securitization exposure is not a "higher-risk" securitization without a compelling reason to do so***. As discussed above, the information available to LBP institutions in making such determinations is incomplete at best for many transactions. The right reserved by the FDIC

[57] The paragraphs to which the suggested wording applies is on pages 18113, and 18116 of the proposal.

in the proposal to audit determinations by LBP institutions of what constitute "higher-risk" securitizations should be used judiciously in situations where the LBP institution has acted in good faith based on available sources and has appropriately documented its methodology; the final rule should incorporate this as a precept. Otherwise, a "chilling effect" will occur whereby LBP institutions will err on the side of conservatively categorizing exposures, which will lead to fewer and more costly securitizations.

If the FDIC is unwilling to provide this flexibility, then the FDIC should allow LBP institutions that invest in additional securitizations after October 2012 to continue to use the transition guidance for "leveraged" and "subprime" loans, as outlined in the General Instructions (Instructions) for Schedule RC-O of the Consolidated Reports of Condition and Income Memorandum items 6 through 15. Continuation of such interim guidance would be necessary because LBP institutions that invest in securitizations may not have access to the information necessary to determine whether the underlying assets meet the definitions of "higher risk" loans included in the proposed rule.

- **We strongly encourage the FDIC to reconsider its decision not to take structure into account in determining whether an exposure is a "higher-risk" securitization.**

We respect the FDIC's intent to ensure that "higher-risk" assets do not escape detection by being packaged into securitizations. Nevertheless, we feel that the proposal misses the critical point that the risk of an interest in a securitization depends on both the nature of the underlying assets and the structure (including credit enhancements) of the securitization structure itself. The proposed approach fails to differentiate between the positions of security holders in the cash flow waterfall, as well as credit enhancements inherent in the securitization structure. In our view, recognizing securitization structure will result in the most appropriate measure of risk, while ignoring structure will lead to unnecessarily higher costs and reduced liquidity for high quality securitization exposures that are important to the economy. Not accounting for structure could also incent LBP institutions to acquire lesser quality, subordinated interests in securitization transactions, since the effect on assessments of doing so (as compared to acquiring more senior interests) will be the same.

Responding to the industry's earlier request that the risk grading of securitizations be based on more than the underlying collateral, the proposal cites an interagency proposal of December 2011: "during the crisis, a number of highly rated senior securitization positions were subject to significant downgrades and suffered substantial losses."[58] We observe that, judging by agency ratings, the extensive downgrades of securitizations in the recent financial turmoil have, for the most part, been overcome. For example, the table on the next page shows that Aaa ratings have a long-term 89 percent stability rate and no transitions to Caa or below.

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[58] FDIC, Federal Reserve, Office of the Comptroller of the Currency, and Department of the Treasury, "Risk-Based Capital Guidelines: Market Risk; Alternatives to Credit Ratings for Debt and Securitizations Positions," 76 *Federal Register* 79380 (December 21, 2011), page 79395.

U.S. CLO Cumulative Rating Transitions by Original Rating (as of 12/31/11)

Rating Dec. 2011→ Original ↓	Aaa	Aa	A	Baa	Ba	B	Caa-C
Aaa	89.21%	10.21%	0.33%	0.08%	0.08%	0.08%	
Aa	21.01%	63.04%	14.01%	1.19%	0.60%		0.15%
A	7.79%	14.48%	46.18%	28.69%	2.19%	0.41%	0.27%
Baa	1.78%	3.34%	6.91%	32.78%	45.26%	4.91%	5.02%
Ba	0.35%	1.23%	1.05%	5.62%	57.82%	23.90%	10.02%
B				0.14%	21.43%	35.71%	35.71%

The rows indicate the initial ratings and the columns indicate the ratings as of 12/31/11 or prior to withdrawal.
Source: Moody's Investors Service, Structured Finance Rating Transitions: 1983-2011, March 23, 2012

Second, the proposal notes that "Even where losses have not yet been realized (as in many collateralized loan obligations), the market value of these securitizations declined precipitously during the crisis, reflecting the decline in the market value of the underlying assets and the increased risk of loss."[59] We agree that certain investment grade securitization exposures saw significant declines in market value during the crisis. However, the market value on many such asset classes has since recovered fully. For instance, the price on the average CLO AAA note declined from 96.5 percent in December 2007 to 69.0 percent by April 2009; however, the average CLO AAA note market value has since recovered to 94.8 percent.[60]

Finally, the experienced loss rate for many investment grade securitization tranches has been quite low and sometimes even lower than that on investment grade corporates. For instance, according to Moody's Investors Service, the five-year loss rates on investment grade corporates was 0.61 percent.[61] In contrast, the five-year loss rate on investment grade global CLOs was 0.80 percent, on investment-grade asset backed securities (excluding home equity loans) was 0.92 percent, and on investment-grade Asia-Pacific ABS, CMBS and RMBS was just 0.30 percent.[62]

We recognize the use of ratings to determine the credit quality of securitization exposures is problematic in light of the requirements of Section 939A of the Dodd-Frank Act. As an alternative, we suggest a two-step process for identifying a "higher-risk" securitization: first, available information as described herein would be used to determine whether a securitized asset pool is more than 50 percent collateralized by "higher-risk" assets, and, second, if so collateralized, a determination would be made as to whether the applicable securitization position should be treated as "higher-risk" based on the risk-weighting methodologies that are currently being developed by the FDIC, Federal Reserve and OCC for securitization exposures as a replacement for the ratings-based methodologies in the current regulatory capital rules.[63]

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59 The proposal at page 18113.

60 Morgan Stanley Research.

61 Moody's Investors Service, *Annual Default Study: Corporate Default and Recovery Rates, 1920-2011*, February 29, 2012.

62 Moody's Investors Service, *The Performance of Moody's Structured Finance Ratings*, December 5, 2011.

63 The American Securitization Forum recommended in a meeting with staff from these Agencies on November 10, 2011, that securitization exposures with risk weights of 200-250 percent or greater (and that are therefore viewed to be below "investment grade" quality by both LBP institutions and the market) be treated as "higher-risk" assets.

- **Further guidance is needed for LBP institutions to determine whether a securitization is more than 50 percent collateralized by "higher-risk" assets.**

  If the FDIC does not accept the proposal above, the final rule should clarify how LBP institutions are to measure whether more than 50 percent of the assets collateralizing a securitization transaction consist of "higher-risk" assets. Specifically, many securitizations are collateralized by assets that are assigned a zero value for purposes of the transaction. For example, in a revolving warehouse securitization, as a matter of convenience all of the assets of a given type could be sold to the securitization special purpose entity and used to collateralize the securitization transaction. The lenders or investors in such a transaction, however, may assign a zero collateral value to certain assets that do not meet specific eligibility criteria. "Higher-risk" assets that are assigned zero value in these transactions should not be counted in determining whether the transaction is more than 50 percent collateralized by "higher-risk" assets, provided that collateral coverage tests for the relevant securitization position are otherwise being met.

- **The final rule should specify that a securitization should be graded only at acquisition—not continually reassessed—even though the underlying assets may change in an open-ended securitization.**

  If the acquiring bank does not have direct control over the underlying collateral, it would be operationally impractical to try to obtain continuing information regarding the securitized assets on a loan-by-loan basis. Moreover, actively managed securitization transactions are governed by indentures that require managers to keep credit quality within certain bounds. Thus, even though there is turnover in the portfolio, the securitization is bounded by limitations around the credit quality of the portfolio. If the securitization fails an ongoing credit quality test, it will often go through a deleveraging process that protects the senior noteholders. For this reason, a securitization portfolio could be graded at inception; thereafter, as long as it remains within the bounds of its indenture, it does not need to be re-graded.

Flexibility to Adjust Individual Bank Assessments is Needed

The proposal indicates that, in consideration of the improved "higher-risk" definitions, only in rare cases the FDIC will adjust an LBP bank's assessment rate based on mitigants to the "higher-risk" concentration measure.[64] ***We recommend that the FDIC adjust individual banks' assessments when justified by demonstrated mismeasurements under the LBP model.*** For example, the LBP model does not take into consideration many of the means banks use to mitigate credit risk, including non-cash liquid collateral, guarantees other than those from the Government, its agencies and GSE guarantees, hedging, and the seniority of assets. Banks that can demonstrate that their risk mitigations substantially defray the measured risk are due consideration for assessment adjustments. Moreover, some of the Highly Complex Institutions (HCI) have pointed out that they are due adjustments because the balances reported for their largest and top-twenty derivative counterparty exposures are far higher under the FDIC's rules than the values used to calibrate the HCI pricing model.

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[64] The proposal at page 18116.

Conclusion

The undersigned associations appreciate the opportunity to comment on the proposed definitions of "higher-risk" consumer and C&I loans and securities. The proposed definitions are far superior to those under the original rule. We commend the FDIC for recognizing the concerns of the industry and providing an opportunity to work cooperatively to improve these definitions and to make the reporting more manageable. The detailed comments that we have provided are intended to further clarify the definitions and to make the entire system more workable. We look forward to continuing to work with FDIC staff to resolve the remaining issues to make the final definitions as effective as possible.

Sincerely,

James Chessen
Executive Vice President and Chief Economist
American Bankers Association

Richard M. Whiting
Executive Director and General Counsel
The Financial Services Roundtable

Tom Deutsch
Executive Director
American Securitization Forum

R. Bram Smith
Executive Director
The Loan Syndications and Trading Association

Brett Waxman
Vice President and Associate General Counsel
The Clearing House Association L.L.C.

William F. Githens
President and Chief Executive Officer
The Risk Management Association

Signatory Associations

The **American Bankers Association** represents banks of all sizes and charters and is the voice for the nation's $13.9 trillion banking industry and its 2.1 million employees. The majority of ABA's members are banks with less than $165 million in assets. Learn more at www.aba.com.

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Established in 1853, **The Clearing House** is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively employ over 2 million people and hold more than half of all U.S. deposits. The Clearing House Association L.L.C. is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs and white papers—the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the U.S. *See* The Clearing House's web page at www.theclearinghouse.org.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

The Loan Syndications and Trading Association is a not-for-profit trade association that is made up of a broad and diverse membership involved in the origination, syndication, and trading of commercial loans. The 321 members of the LSTA include commercial banks, investment banks, broker-dealers, hedge funds, mutual funds, insurance companies, fund managers, and other institutional lenders, as well as service providers and vendors. The LSTA undertakes a wide variety of activities to foster the development of policies and market practices designed to promote just and equitable marketplace principles and to encourage cooperation and coordination with firms facilitating transactions in loans. Since 1995, the LSTA has developed standardized practices, procedures, and documentation to enhance market efficiency, transparency, and certainty.

Founded in 1914, **The Risk Management Association** is a 501(c)(6) not-for-profit, member-driven professional association whose sole purpose is to advance the use of sound risk principles in the financial services industry. RMA helps banking and nonbanking institutions identify and manage the impacts of credit risk, operational risk, and market risk on their businesses and customers. RMA is the only association that specializes in promoting effective and prudent risk management practices for institutions of all sizes, across the entire financial services industry. RMA has approximately 2,500 institutional members that include banks of all sizes as well as nonbank financial institutions. They are represented in the association by 16,000 risk management professionals who are chapter members in financial centers throughout North America, Europe, and Asia/Pacific. See RMA's web site at www.rmahq.org.