

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 13-661, 13-664 Caption [use short title]

Motion for: Leave to File Amicus Curiae Brief

Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago, et al v. The Bank of New York Mellon

Set forth below precise, complete statement of relief sought:

Motion of Securities Industry and Financial Markets Association ("SIFMA") and The Clearing House Association L.L.C. for leave to file amicus curiae brief supporting Defendant-Respondent-Cross-Petitioner

MOVING PARTY: SIFMA and The Clearing House L.L.C. OPPOSING PARTY: Retirement Board, et al

Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Martin Seidel OPPOSING ATTORNEY: Beth Kaswan

[name of attorney, with firm, address, phone number and e-mail]

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Court-Judge/Agency appealed from: William H. Pauley III, U.S. District Court, Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Has this relief been previously sought in this Court? Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney: /s/ Martin Seidel Date: 3/4/2013 Service by: CM/ECF Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT: CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

# 13-661, -664

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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**RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF  
THE CITY OF CHICAGO, WESTMORELAND COUNTY EMPLOYEE RETIREMENT  
SYSTEM, CITY OF GRAND RAPIDS GENERAL RETIREMENT SYSTEM AND  
CITY OF GRAND RAPIDS POLICE AND FIRE RETIREMENT SYSTEM  
(on Behalf of Itself and Similarly Situated Certificate Holders),**

*Plaintiffs-Petitioners-Cross-Respondents,*

- against -

**THE BANK OF NEW YORK MELLON,  
(as Trustee Under Various Pooling and Servicing Agreements)**

*Defendant-Respondent-Cross-Petitioner.*

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ON PETITION FOR INTERLOCUTORY APPEAL FROM AN ORDER  
OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK  
CIVIL ACTION NO. 1:11-CV-05459-WHP

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**MOTION OF SECURITIES INDUSTRY AND FINANCIAL MARKETS  
ASSOCIATION AND THE CLEARING HOUSE ASSOCIATION L.L.C. FOR  
LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF  
DEFENDANT-RESPONDENT-CROSS-PETITIONER**

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**RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

*Amicus curiae* Securities Industry and Financial Markets Association hereby certifies that it is a non-profit corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

*Amicus curiae* The Clearing House Association L.L.C. (“The Clearing House”) is a limited liability company and as such has no shareholders. Each member holds a limited liability company interest in The Clearing House that is equal to each other member’s interest, none of which is more than a 10% interest in The Clearing House.

Pursuant to Federal Rule of Appellate Procedure 29(b), the Securities Industry and Financial Markets Association (“SIFMA”) and The Clearing House Association L.L.C. (“The Clearing House”) respectfully move this Court for leave to file an *amicus curiae* brief, attached hereto as Exhibit A, in support of Defendant-Respondent-Cross-Petitioner The Bank of New York Mellon (“BNYM”)’s petition for immediate appellate review of the District Court’s memorandum and order entered April 3, 2012 (the “Order”)<sup>1</sup> applying the Trust Indenture Act of 1939, as amended, 15 U.S.C. §§ 77aaa *et seq.* (the “TIA”), to SEC-registered mortgage pass-through certificates. SIFMA and The Clearing House have received BNYM’s consent for the filing of this motion. Plaintiffs-Petitioners-Cross-Respondents have advised SIFMA and The Clearing House that they oppose this motion.

### **INTEREST OF AMICUS CURIAE**

SIFMA is a securities industry trade association representing the interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth and trust and

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<sup>1</sup> *Retirement Bd. of Policemen’s Annuity & Ben. Fund of Chi. v. Bank of N.Y. Mellon*, No. 11 Civ. 5459, 2012 WL 1108533 (S.D.N.Y. Apr. 3, 2012), *reconsideration denied, interlocutory appeal certified*, 2013 WL 593766 (S.D.N.Y. Feb. 14, 2013).

confidence in the financial markets. SIFMA has offices in New York and Washington, D.C., and is the United States regional member of the Global Financial Markets Association.

SIFMA regularly files *amicus curiae* briefs on legal issues arising under the federal securities laws that are of vital concern to the participants in the securities industry. These cases include: *Janus Cap. Grp., Inc. v. First Deriv. Traders*, 131 S. Ct. 2296 (2011); *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011); *Morrison v. National Aus. Bank Ltd.*, 130 S. Ct. 2869 (2010); *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010); *Jones v. Harris Assocs. L.P.*, 130 S. Ct. 1418 (2010); *Willow Creek Cap. Partners v. UBS Sec. LLC*, No. 11-122 (2d Cir.) (pending); and *New Jersey Carpenters Health Fund v. RALI Series 2006-Q01 Trust*, 477 F. App'x 809 (2d Cir. 2012).

The Clearing House was established in 1853. It is the United States oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people and hold more than half of all U.S. deposits. The Clearing House 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. The Clearing House frequently represents the interests of the banking industry as *amicus curiae* in litigation concerning a variety of systemically important banking issues, including in recent cases in the United States Supreme Court, the United States Courts of Appeals for the First, Second, Third, Fifth, Ninth, Eleventh, and Federal Circuits, and United States District Courts.

SIFMA and The Clearing House respectfully seek to be heard on their members' behalf because: (i) the Order is inconsistent with decades of SEC and Congressional guidance that mortgage pass-through securities are not subject to the TIA, and (ii) the Order may impose substantial uncertainty on the multi-hundred billion dollar mortgage-backed security ("MBS") market. The members of SIFMA and The Clearing House, and their affiliates, have participated in the MBS market as, among other things, trustees, issuers, servicers, market-makers and investors. For nearly four decades, the members of SIFMA, The Clearing House and other market participants have understood that the TIA does not apply to mortgage pass-through certificates.

Accordingly, the members of SIFMA and The Clearing House have a strong interest in a prompt and definitive resolution to the uncertainty imposed by

the Order upon the MBS market. This is particularly true given that many of SIFMA and The Clearing House's members serve as trustees (including BNYM and its affiliates), who face significant uncertainty and potentially protracted litigation regarding the proper performance of their obligations as a result of the Order.

### **DESIRABILITY AND RELEVANCE OF *AMICUS CURIAE* BRIEF**

SIFMA and The Clearing House bring an industry-wide perspective distinct from that of the parties with respect to the uncertainties that may be imposed by the Order on all market participants, including members of SIFMA and The Clearing House, as well as with respect to broader practical and policy implications. *See Neonatology Assocs., P.A. v. Commissioner*, 293 F.3d 128, 132 (3d Cir. 2002) (An *amicus* brief “may provide important assistance to the court” by “explain[ing] the impact a potential holding might have on an industry or other group”) (citation omitted). In the proposed brief, SIFMA and The Clearing House demonstrate that the Order contravenes decades of SEC guidance and market practice and creates uncertainty with respect to both prospective and completed transactions totaling hundreds of billions of dollars. In certifying the Order for interlocutory appeal, the District Court acknowledged that the “applicability of the TIA to mortgage-backed securities” is “unsettled,” and thus “underscores the existence of substantial grounds for difference of opinion.” *Retirement Bd. of*

*Policemen's Annuity & Ben. Fund of Chi. v. Bank of N.Y. Mellon*, No. 11 Civ. 5459, 2013 WL 593766 (S.D.N.Y. Feb. 14, 2013).

SIFMA and The Clearing House's interest in obtaining immediate appellate review of the Order's application of the TIA to pass-through certificates is relevant to the disposition of the underlying action. The District Court concluded that the Order is appropriate for interlocutory appeal because, *inter alia*, "this action . . . may be considerably streamlined if the claims involving the twenty-five New York trusts are dismissed." 2013 WL 593766, at \*5. The District Court further acknowledged that "under these circumstances, the prompt resolution of this issue on appeal may materially advance the termination of this litigation."

*Id.*



**CONCLUSION**

For these reasons, and those more fully expressed in the proposed brief, SIFMA and The Clearing House respectfully request leave to file an *amicus curiae* brief in support of BNYM's petition for immediate appellate review of the Order.

Dated: March 4, 2013  
New York, New York

Respectfully submitted,

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# **EXHIBIT A**

# 13-661, -664

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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**RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF  
THE CITY OF CHICAGO, WESTMORELAND COUNTY EMPLOYEE RETIREMENT  
SYSTEM, CITY OF GRAND RAPIDS GENERAL RETIREMENT SYSTEM AND  
CITY OF GRAND RAPIDS POLICE AND FIRE RETIREMENT SYSTEM  
(on Behalf of Itself and Similarly Situated Certificate Holders),**

*Plaintiffs-Petitioners-Cross-Respondents,*

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**THE BANK OF NEW YORK MELLON,  
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*Defendant-Respondent-Cross-Petitioner.*

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ON PETITION FOR INTERLOCUTORY APPEAL FROM AN ORDER  
OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK  
CIVIL ACTION NO. 1:11-CV-05459-WHP

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***AMICUS CURIAE* BRIEF OF SECURITIES INDUSTRY AND  
FINANCIAL MARKETS ASSOCIATION AND THE CLEARING HOUSE L.L.C.  
IN SUPPORT OF DEFENDANT-RESPONDENT-CROSS-PETITIONER'S  
PETITION FOR PERMISSION TO APPEAL PURSUANT  
TO 28 U.S.C. § 1292(b)**

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**RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

*Amicus curiae* Securities Industry and Financial Markets Association hereby certifies that it is a non-profit corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

*Amicus curiae* The Clearing House Association L.L.C. (“The Clearing House”) is a limited liability company and as such has no shareholders. Each member holds a limited liability company interest in The Clearing House that is equal to each other member’s interest, none of which is more than a 10% interest in The Clearing House.

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**STATEMENT OF IDENTITY, INTEREST OF *AMICI CURIAE*,  
AND SUMMARY OF ARGUMENT<sup>1</sup>**

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The members of the Securities Industry and Financial Markets Association (“SIFMA”) and The Clearing House L.L.C. (“The Clearing House”) (together, the “*Amici*”),<sup>2</sup> play a significant role in the mortgage-backed securities (“MBS”) market as, among other things, trustees, issuers, servicers, market-makers and investors. Accordingly, the *Amici* bring an industry-wide perspective distinct from that of the parties with respect to the costs and uncertainties that may be imposed on all market participants by the District Court’s April 3, 2012

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<sup>1</sup> In accordance with Local Rule 29.1(b), no party’s counsel authored this brief in whole or in part, no party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no other individual or entity contributed money that was intended to fund preparing or submitting this brief.

<sup>2</sup> SIFMA is a securities industry trade association representing the interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth and trust and confidence in the financial markets. SIFMA is the United States regional member of the Global Financial Markets Association.

The Clearing House was established in 1853. It is the United States’ oldest banking association and payments company. It is owned by the world’s largest commercial banks, which collectively employ 1.4 million people and hold more than half of all U.S. deposits. The Clearing House 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, 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.

memorandum and order (the “Order”)<sup>3</sup> applying the Trust Indenture Act of 1939, as amended (15 U.S.C. §§ 77aaa *et seq.*) (the “TIA”), to SEC-registered mortgage pass-through certificates issued pursuant to Pooling and Servicing Agreements (“PSAs”).<sup>4</sup> The Order retroactively imposes unanticipated duties and liabilities on transaction parties that are contrary to decades of Securities and Exchange Commission (“SEC”) guidance and market practice. The Order also creates substantial complexity, costs and uncertainty with respect to future pass-through securitizations. These issues are directly relevant to the *Amici’s* mission of promoting the economic growth and strength of the financial services industry. A prompt resolution of the uncertainty created by the Order will benefit the members of the *Amici* and the multi-hundred billion dollar market for MBS. This is particularly true given that many of the *Amici’s* members serve as trustees (including The Bank of New York Mellon (“BNYM”) and its affiliates). The *Amici* respectfully support’s BNYM’s petition for appellate review pursuant to 28 U.S.C. § 1292(b).

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<sup>3</sup> *Retirement Bd. of Policemen’s Annuity & Ben. Fund of Chi. v. Bank of N.Y. Mellon*, No. 11 Civ. 5459, 2012 WL 1108533 (S.D.N.Y. Apr. 3, 2012), *reconsideration denied, interlocutory appeal certified*, 2013 WL 593766 (S.D.N.Y. Feb. 14, 2013).

<sup>4</sup> Please note that the views expressed in this memorandum do not necessarily represent those of SIFMA’s asset management group, some members of which may hold different or opposing views to those expressed herein.

## ARGUMENT

### POINT I

#### THE ORDER UPENDS MORE THAN THREE DECADES OF SEC GUIDANCE AND MARKET PRACTICE

Throughout the 36-year history of the SEC-registered MBS market, both the SEC and Congress have repeatedly taken steps to craft an appropriate regulatory scheme. However, they have never imposed the provisions of the TIA, despite ample opportunities to do so. To the contrary, the SEC has made clear that the TIA does not apply to pass-through certificates, including, as discussed below, in the context of its review of hundreds of 1933 Act registration statements, in Interpretive Response 202.01 (and the predecessor Telephone Interpretation), in its efforts to modernize the TIA, in several “no-action” letters and, implicitly, in its efforts to adopt and revise Regulation AB. Indeed, only the Order and its progeny<sup>5</sup> have concluded that the TIA is applicable to pass-through certificates.

SEC Interpretative Response 202.01 clearly provides that pass-through certificates are exempt from the TIA. SEC Div. of Corp. Fin., *Trust Indenture Act of 1939 – Interpretive Response Section 202.01* (last updated May 3, 2012), available at <http://www.sec.gov/divisions/corpfin/guidance/>

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<sup>5</sup> See *Policemen’s Annuity & Ben. Fund of Chi. v. Bank of Am., N.A.*, No. 12 Civ. 2865, 2012 WL 6062544, at \*16 (S.D.N.Y. Dec. 7, 2012).

[tiainterp.htm](#).<sup>6</sup> Far from a “conclusory” statement, Interpretative Response 202.01 represents the long-standing position of the SEC implemented over nearly four decades.<sup>7</sup>

The SEC declined to apply the TIA to pass-through certificates at the very inception of the market. Because mortgage pass-through securities had previously been issued exclusively by Fannie Mae, Freddie Mac and Ginnie Mae, which enjoy special status under the federal securities laws, the entire Commission considered certain Securities Act of 1933 (“1933 Act”) and Securities Exchange Act of 1934 (“1934 Act”) issues raised by a ground-breaking Bank of America offering in 1977. *See Bank of Am. Nat’l Trust & Sav. Ass’n*, 1977 SEC No-Act. LEXIS 1343 (May 19, 1977); *Bank of Am. Nat’l Trust & Sav. Ass’n*, Rel. No. 34-14446, 14 SEC Dkt. 113 (Feb. 6, 1978). Section 305 of the TIA requires the SEC to issue an order refusing to permit a registration statement to become effective if it

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<sup>6</sup> Although, in May 2012, the SEC supplemented its interpretative response to note that “[t]he staff is considering CDI 202.01 in light of [the Order],” *id.*, ten months have passed, and to date the SEC has not amended its guidance.

<sup>7</sup> Interpretative Response 202.01 merely repeats Item 11 of the “Telephone Interpretations” under the Trust Indenture Act published in July of 1997, which attempted to codify prior SEC staff interpretations. *See* SEC Div. of Corp. Fin., *Manual of Publicly Available Telephone Interpretations (Trust Indenture Act of 1939)*, No. 11 (July 1997), available at [http://www.sec.gov/interps/telephone/cftelinterps\\_tia.pdf](http://www.sec.gov/interps/telephone/cftelinterps_tia.pdf). “No-action” letters issued in 1984 and 1988 are in accord with Interpretative Response 202.01 and the predecessor 1997 Telephone Interpretation. *See Marion Bass Sec., Inc.*, 1984 SEC No-Act. LEXIS 2473 (July 9, 1984); *Harbor Fin., Inc.*, 1988 SEC No-Act. LEXIS 1463 (Oct. 31, 1988).

finds that a security lacks a required indenture. 15 U.S.C. § 77eee. No such TIA-related “stop order” was issued with respect to that (or any other) MBS offering, demonstrating the SEC’s determination that the TIA is not applicable to mortgage pass-through certificates. *See* Walter G. McNeill, “Securities Law Aspects of Mortgage-Backed Securities,” 250 PLI/Real 399, 421 (PLI Sept. 24, 1984).

In 1984, the Secondary Mortgage Market Enhancement Act (“SMMEA”) was enacted to remove impediments to the development of a secondary market for residential mortgage-backed securities (Pub. L. No. 98-440, 98 Stat. 1689 (1984)). While SMMEA was under consideration, the SEC amended Rule 415 under the 1933 Act to permit “mortgage related securities” (as defined in SMMEA) to be offered on a “shelf-registered” basis. *See Final Rule: Shelf Registration*, Rel. Nos. 33-6499, 34-20384, 1983 SEC LEXIS 315 (Nov. 17, 1983). To address an obstacle to the growth of the market, the Tax Reform Act of 1986 created a new tax vehicle, commonly called a REMIC, to facilitate the issuance of multi-class mortgage pass-through certificates by eliminating “double taxation” of those securities. *See* Pub. L. No. 99-514, 100 Stat. 2085 (1986). However, none of this legislation or rulemaking applied the TIA to pass-through certificates.

The SEC also was the driving force behind the Trust Indenture Reform Act of 1990 (the “TIA Reform Act”) (Pub. L. No. 101-550, § 401, 104 Stat. 2721 (1990) (codified as amended at 15 U.S.C. §§ 77ccc-77eee, 77iii-77rrr

and 77vvv)), which revised the TIA “to adjust the requirements of the law to contemporary financing instruments and techniques.” *See* Statements on Introduced Bills & Joint Resolutions: S. 2566 (Sen. Proxmire), 134 Cong. Rec. S8561 (daily ed. June 24, 1988). Indeed, the original version of that legislation was drafted by the SEC, and an SEC memorandum in support of the legislation notes that the SEC sought to expand the exemptive authority contained in Section 304 of the TIA to, in part, accommodate collateralized mortgage obligations (a type of asset-backed securities (“ABS”) that is indisputably subject to the TIA). *See* Memorandum of SEC in Support of Trust Indenture Reform Act of 1987, 134 Cong. Rec. S8566 (daily ed. June 24, 1988). Although clearly aware of the MBS market, the SEC again did not alter the TIA treatment of pass-through certificates.

In 1992, the SEC adopted Rule 3a-7 under the 1940 Act to exclude the issuers of most ABS, including MBS, from SMMEA. *See Final Rule: Exclusion from the Definition of Investment Co. for Structured Financings*, Rel. No. IC-19105, 1992 SEC LEXIS 3086 (Nov. 19, 1992). Two years later, Congress passed legislation to amend the 1934 Act to include commercial mortgages in the definition of “mortgage related security,” permitting highly-rated commercial mortgage-backed securities (“CMBS”) to obtain the same favored treatment SMMEA afforded to highly-rated residential mortgage-backed securities (“RMBS”). *See* Reigle Cmty. Dev. & Reg. Improvement Act of 1994, Pub. L. No.

103-325, § 347, 108 Stat. 2241 (1994). The SEC also created a specially-tailored 1933 Act framework to permit the use of “structural term sheets” and “computational materials” to market ABS. *See Mortgage & Asset-Backed Sec.*, 1994 SEC No-Act. LEXIS 525 (May 20, 1994). Once again, neither the SEC nor Congress applied the TIA to pass-through certificates.

In 2004, the SEC proposed Regulation AB and other ABS rules to “address comprehensively the registration, disclosure and reporting requirements for asset-backed securities.” *Proposed Rule: Asset-Backed Sec.*, Rel. Nos. 33-8419, 34-49644, 2004 SEC LEXIS 934, at \*1 (May 3, 2004). The SEC emphasized that “[t]he staff has to date addressed the lack of a defined set of regulatory requirements for asset-backed securities *through the filing review process* and, where necessary, through staff no-action letters *or interpretive statements*.” *Id.* at \*32 (emphasis added); *see also Final Rule: Asset-Backed Sec.*, Rel. Nos. 33-8518, 34-50905, 2004 SEC LEXIS 3068, at \*\*1, 37-38 (Dec. 22, 2004). Regulation AB did not alter the TIA treatment of pass-through certificates. To the contrary, SEC Staff Interpretive Response 202.01, which was published two years later, reiterated the SEC’s long-standing position.

In response to the crisis in the financial markets, the SEC proposed significant amendments to Regulation AB and other ABS-related rules to “improve investor protection and promote more efficient asset-backed markets.” *Proposed*

*Rule: Asset-Backed Sec.*, Rel. Nos. 33-9117, 34-61858, 2010 SEC LEXIS 1493, at \*12 (May 3, 2010). The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, § 619, 124 Stat. 1623 (2010) (codified at 12 U.S.C. § 1851(d)(1))) addressed perceived shortcomings in the ABS regulatory framework, and the SEC has adopted or proposed various rules in response thereto. *See, e.g., Final Rule: Issuer Review of Assets in Offerings of Asset-Backed Sec.*, Rel. Nos. 33-9176, 34-63742, 2011 SEC LEXIS 234 (Jan. 20, 2011). Again, neither Congress nor the SEC applied the TIA to pass-through certificates.

Because Regulation AB was intended to “comprehensively” address the treatment of ABS, it is particularly significant that none of the Regulation AB releases discussed above applied the TIA. To the contrary, although the releases make clear that the SEC considered the structural aspects of ABS transactions, including the functions of PSAs, and although Item 1109 of Regulation AB imposed specific disclosure requirements in connection with the obligations of trustees, the SEC did not change its longstanding position that the TIA does not apply to pass-through certificates.



## POINT II

### **THE ORDER'S APPLICATION OF THE TIA TO THE MULTI-HUNDRED BILLION DOLLAR MBS MARKET CREATES CONSIDERABLE INDUSTRY UNCERTAINTY**

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The non-agency RMBS and CMBS markets collectively included outstanding securities of \$1.279 trillion as of the end of 2012. *See* SIFMA, *U.S. Mortgage-Related Issuance & Outstanding (Table 2.1)* (last updated Feb. 4, 2013), available at [http://www.sifma.org/uploadedFiles/Research/Statistics/Statistics Files/SF-US-Mortgage-Related-SIFMA.xls](http://www.sifma.org/uploadedFiles/Research/Statistics/Statistics%20Files/SF-US-Mortgage-Related-SIFMA.xls).<sup>8</sup> This includes thousands of transactions totaling hundreds of billions of dollars that were effected on the well-founded belief that the TIA did not apply, but that are now subject to legal uncertainty as a result of the Order. Transaction parties may be subjected to potential obligations and liabilities that were neither expected nor bargained for and for which trustees, in particular, were never compensated.

Trustees and other transaction parties already are being compelled to defend a number of lawsuits brought by investors, while simultaneously attempting

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<sup>8</sup> Notwithstanding the financial markets crisis, the SEC continues to believe that “[s]ecuritization can provide liquidity to nearly all major sectors of the economy including the residential and commercial real estate industry . . .” and that the drastic decrease in new issuances of ABS following the financial crisis “has negatively impacted the availability of credit.” *Proposed Rule: Asset-Backed Sec.*, 2010 SEC LEXIS 1493, at \*\*13, 15.

to assess their TIA status and TIA obligations in the case of thousands of securitizations. Parties that are contemplating or are currently in the process of structuring SEC-registered pass-through transactions also face significant uncertainty as a result of the Order. This could delay the recovery of the private label RMBS market, thereby suppressing the availability of mortgage credit. The Order also raises novel and complex questions regarding the manner in which certain TIA provisions should be construed in the mortgage pass-through context.<sup>9</sup>

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<sup>9</sup> The TIA was drafted using terminology that is not well-suited to pass-through certificates, *e.g.*, it references “obligors” and “default.” In the pass-through certificate context, the identity of the “obligor” is unclear and “events of default” typically do not relate to credit events with respect to the securities. Ambiguity regarding the identity of the “obligor” will raise questions regarding the construction of, and the potential need to comply with Section 314, which imposes extensive reporting requirements on “obligors” (15 U.S.C. § 77nnn). A similar interpretive problem arises under Section 314(d) of the TIA, which imposes appraisal requirements upon an “obligor” if an indenture “is to be secured by the mortgage or pledge of property or securities.” *Id.* § 77nnn(d).

The meaning of “default” also is pivotal, because pass-through trustees could be compelled to consider whether they have a “conflict of interest” for purposes of Section 310 of the TIA, requiring them to either eliminate the conflict, resign or seek a “stay” order from the SEC. *Id.* § 77jjj. This requirement could be particularly problematic if Section 310 were deemed to require a separate trustee, following a “default,” for each of the multiple classes of MBS issued in a particular offering. Trustees also may be compelled to determine whether they must provide security holders with the notice of default required by Section 315(b) of the TIA and whether they are subject to heightened duties under the TIA. *Id.* § 77ooo(b). Even if no “default” has occurred, trustees may need to consider whether any events have occurred that might require them to transmit to security holders, and file with the SEC, a report pursuant to Section 313(a) of the TIA. *Id.* § 77mmm(a).

**CONCLUSION**

For the foregoing reasons, this Court should grant BNYM's petition to appeal.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,547 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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