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Securities Act of 1933 Sections 12(a) and (g) of the Securities Exchange Act of 1934 Trust Indenture Act of 1939

July 15, 2011

Office of Capital Market Trends
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Attention: Amy Starr

Re: Request for No-Action Relief for Certain Security-Based Swaps Referencing
Loans and Narrow-Based Indices of Loans

Dear Ms. Starr:

We are writing to request confirmation by the staff of the Division of Corporation Finance (the "Division") of the Securities and Exchange Commission (the "Commission") that, for the period described below, the staff of the Division will not recommend that the Commission take enforcement action under the Securities Act of 1933 (the "Securities Act") (other than Section 17(a) thereof), Sections 12(a) and (g) of the Securities Exchange Act of 1934 (the "Exchange Act"), or the Trust Indenture Act of 1939 (the "Trust Indenture Act") with respect to the offer or sale to ECPs (as defined below) of those security-based swaps that would constitute security-based swap agreements under Section 2A of the Securities Act as in effect prior to the effective date (the "Effective Date") of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), including having material terms (other than price and quantity) that are subject to individual negotiation, but for the fact that such

security-based swaps reference one or more loans¹ and not securities (such security-based swaps, “Loan SBS”), if such offers and sales are conducted in reliance on Rule 240 under the Securities Act as though such Loan SBS constitute security-based swap agreements. We also request confirmation by the staff of the Division that it will not recommend that the Commission take enforcement action under Sections 12(a) and (g) of the Exchange Act if ECPs do not register under Section 12(g) of the Exchange Act a class of Loan SBS offered or sold without registration under the Securities Act in reliance on the foregoing relief. We are submitting this request with respect to the offer and sale of Loan SBS by market participants generally, based on consultations we have had with a number of our clients that are globally active swap and security-based swap dealers and that include active participants in the Loan SBS market.

BACKGROUND

On July 1, 2011, the Commission adopted interim final rules providing exemptions under the Securities Act, the Exchange Act and the Trust Indenture Act for those security-based swaps that under current law are security-based swap agreements and will be defined as “securities” under the Securities Act and the Exchange Act as of the Effective Date due solely to the provisions of Title VII of Dodd-Frank (the “Interim Securities Act Exemption”).² Specifically, under the Interim Securities Act Exemption, the Securities Act (other than Section 17(a) thereof), Sections 12(a) and (g) of the Exchange Act, and the Trust Indenture Act will not apply to any security-based swap that is (1) a “security-based swap agreement,” as defined in Section 2A of the Securities Act as in effect prior to the Effective Date, and (2) entered into between eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act as in effect prior to the Effective Date, other than a person who is an ECP under Section 1a(12)(C) of the Commodity Exchange Act as in effect prior to the Effective Date) (“ECPs”). The Interim Securities Act Exemption will expire on the compliance date for final rules that the Commission may adopt further defining both the terms security-based swap and ECP.

The definition of “security-based swap agreement” limits its application to a swap agreement of which a material term is based on the price, yield, value, or volatility of any security or group or index of securities, or any interest therein.³ As a result, certain swaps referencing loans and indices of loans may not qualify as security-based swap agreements.

¹ As used in this letter, the term “loan” refers to any instrument of indebtedness that does not qualify as a “security” as that term is defined in the Securities Act or the Exchange Act.

² Release Nos. 33-9231, 34-64794, 39-2475 (July 1, 2011), 76 Fed. Reg. 40605 (July 11, 2011).

³ See Section 206B of the Gramm-Leach-Bliley Act, 15 U.S.C. § 78c note.

Under Dodd-Frank, however, many loan-related swaps will be within the definition of security-based swap.⁴

The measures adopted by the Commission and staff to provide appropriate temporary relief during the period following the Effective Date but before the compliance dates of relevant Commission final rules under Dodd-Frank represent necessary and appropriate steps to prevent the disruption of the security-based swap markets and ensure an orderly implementation of Dodd-Frank. Many market participants, including our clients, are concerned, however, that Loan SBS will, upon the Effective Date, become subject to the Securities Act and the Exchange Act as “securities” but, because they do not qualify as security-based swap agreements, will not be eligible for the Interim Securities Act Exemption.

Accordingly, we are writing to request confirmation that the staff of the Division will not, during the period for which the Interim Securities Act Exemption is in effect, recommend that the Commission take any enforcement action under the Securities Act (other than Section 17(a) thereof), Sections 12(a) and 12(g) of the Exchange Act, or the Trust Indenture Act with respect to the offer or sale of Loan SBS to ECPs, if such offers and sales are conducted in reliance on Rule 240 under the Securities Act as though such Loan SBS constitute security-based swap agreements. We also request confirmation by the staff of the Division that it will not recommend that the Commission take enforcement action under Sections 12(a) and (g) of the Exchange Act if ECPs do not register under Section 12(g) of the Exchange Act a class of Loan SBS offered or sold without registration under the Securities Act in reliance on the foregoing relief.

DISCUSSION

We understand that, like security-based swaps that qualify as security-based swap agreements, certain Loan SBS may, at least in the case of Loan SBS based on an index, be widely traded and the solicitation of offers of Loan SBS may occur other than in the context of bilateral negotiations:

- For instance, we understand that the market in swaps on the LCDX index is relatively liquid and trading occurs in such swaps relatively often. Rules proposed by the Commission and the Commodity Futures Trading Commission contain a number of criteria relevant in determining whether the LCDX index will be regarded as a “narrow-based security index,” including rules governing the impact of information availability.⁵ Until those rules are

⁴ See Section 3(a)(68)(A)(ii)(II) and (III) of the Exchange Act, as amended by Dodd-Frank (defining as a “security-based swap” any swap based on a “single security or loan, including any interest therein or on the value thereof” and any swap based on the “occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer”).

⁵ See Release No. 33-9205, 34-64372 (Apr. 29, 2011), 76 Fed. Reg. 29818, 29850-53 (June 1, 2011).

finalized, however, it is not clear whether a swap on the LCDX index would be regarded as a “swap” or “security-based swap.”⁶

- We also understand that participants in the Loan SBS market are adhering parties to the Novation Protocol established by the International Swaps and Derivatives Association to facilitate secondary market activity.
- Finally, we understand that transactions in Loan SBS are sometimes effected on electronic trading platforms, such as indicative quote screens sponsored by swap dealers.⁷

Although it is likely that activity currently conducted in Loan SBS would, if analyzed in the fullness of time and with the benefit of final Commission rules under Dodd-Frank, be exempt from the registration requirement of the Securities Act, market participants are not generally in a position to complete that analysis before the Effective Date. For example, although there is substantial overlap, the ECP and accredited investor definitions are not coterminous. As a result, market participants need additional time to determine which, if any, of their counterparties or potential counterparties in Loan SBS may, despite qualifying as ECPs, not qualify as accredited investors.

As with security-based swaps that qualify as security-based swap agreements, market participants will need additional time to acquire and configure necessary systems or to modify existing practices and systems, engage and train necessary staff, and develop and implement necessary policies and procedures to comply with the Securities Act with respect to their Loan SBS activity. Furthermore, some of these changes cannot be undertaken until certain rules are finalized (such as rules governing the impact of information availability in determining whether an index is narrow-based or broad-based).

REQUEST FOR RELIEF

Based on the foregoing, we respectfully request the Division staff’s confirmation that, during the period for which the Interim Securities Act Exemption is in effect, staff of the Division will not recommend that the Commission take any enforcement action under the Securities Act (other than Section 17(a) thereof), Sections 12(a) and 12(g) of the Exchange Act, or the Trust Indenture Act with respect to the offer or sale of Loan SBS to ECPs, if such offers and sales are conducted in reliance on Rule 240 under the Securities Act as though such Loan SBS constitute security-based swap agreements. We also request confirmation by the staff of the

⁶ We note that some of the clients with whom we have consulted in connection with this letter are equity investors in Markit, which sponsors the LCDX index.

⁷ Although some Loan SBS may, or may in the future, be cleared, many Loan SBS are not cleared, and a particular transaction may in some cases be submitted for clearing some period after it was entered into by the parties.

Ms. Amy Starr
Securities and Exchange Commission
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Division that it will not recommend that the Commission take enforcement action under Sections 12(a) and (g) of the Exchange Act if ECPs do not register under Section 12(g) of the Exchange Act a class of Loan SBS offered or sold without registration under the Securities Act in reliance on the foregoing relief.

* * *

If you have any questions regarding this letter, please do not hesitate to contact the undersigned at 212-225-2820 or Leslie N. Silverman at 212-225-2380.

Sincerely,

A handwritten signature in black ink, appearing to read 'ER', written over a faint horizontal line.

Edward J. Rosen

cc: Leslie N. Silverman, Esq.