

**Commercial Mortgage Securities Association
Mortgage Bankers Association
Real Estate Roundtable**

November 4, 2009

Mr. Joshua D. Odintz
Acting Tax Legislative Counsel
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

RE: Application of Final REMIC Regulations to Collateral Releases

Dear Mr. Odintz:

On behalf of the Commercial Mortgage Securities Association (CMSA), the Mortgage Bankers Association (MBA), and the Real Estate Roundtable (RER), we would like to echo concerns that have been raised by the American Securitization Forum (ASF) in its letters of September 30, 2009 and October 13, 2009 to you regarding the final real estate mortgage investment conduit (REMIC) regulations that recently were issued under Sections 860A and 860G of the Internal Revenue Code of 1986, as amended. We also wish to express our support for the changes to the final REMIC regulations that have been proposed by the ASF with regard to collateral releases.

The CMSA, MBA and RER collectively represent the entire spectrum of the commercial real estate industry, including borrowers, mortgage bankers, lenders, servicers and investors, all of whom participate in transactions that represent the vast majority of the outstanding commercial mortgage-backed securities (CMBS) market. As a group, we very much appreciate the consideration the Treasury Department and Internal Revenue Service have given to the need for

commercial borrowers to make changes to their collateral, regardless of whether such changes constitute “significant modifications” which generally are not permitted under the REMIC regulations. Nevertheless, our members have expressed widespread and deep concern that the final regulations, in their current form, will have serious and lasting consequences to both the CMBS market and the broader commercial real estate industry. We believe that the changes proposed by ASF will address these immediate and significant issues, and we urge you to adopt these changes.

Of most pressing concern is the requirement in the final regulations that a mortgage loan which has undergone a non-significant modification—and, in particular, a modification pursuant to a unilateral option of the borrower to release collateral—be retested to determine whether it continues to be “principally secured by an interest in real property.” While we question the need for this requirement at all in the case of non-significant modifications as a matter of both tax policy and commercial reality, the ASF letter has proposed limited exceptions from this requirement for certain releases of collateral that at least would cover common transactions where the borrower has the unilateral option to obtain a release of collateral (or, in the case of condemnation or casualty, the release is beyond the control of both parties).

The retesting requirement provided in the final regulations for non-significant modifications will present servicers with the insoluble dilemma of either breaching a borrower’s contractual right to the release or causing the mortgage loan to no longer be a REMIC-eligible “qualified mortgage loan”. It is important to note that a very significant number of loans spanning a large number of CMBS transactions contain exactly such unilateral release options, based upon both IRS interpretation and industry application of the REMIC regulations prior to the changes that were made in the final REMIC regulations. Loans with unilateral borrower

release rights that were not conditioned upon compliance with a reapplication of the “principally secured” requirement were accepted into REMIC structures by CMBS issuers specifically because such releases were not “significant modifications” which generally are prohibited by the REMIC regulations.

As you know, many commercial real estate markets have seen significant declines in property values. Consequently, properties that initially were valued at 120 percent or more of the original loan amount may now be well below the 80-percent threshold required under the “principally secured” test, even though many of these loans continue to perform. In these instances, the borrower’s right to release real property collateral typically arises because:

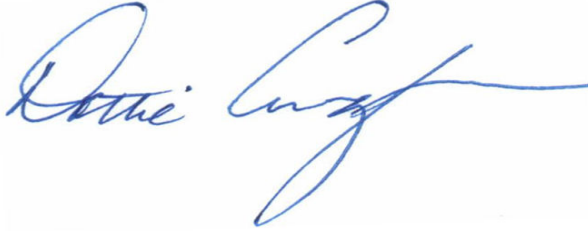
- the borrower makes a proportional principal pay-down as set forth in the loan documents;
- the property was never considered in underwriting the loan and therefore no consideration was deemed necessary for the collateral release; or
- the loan took into account the borrower’s need to release an individual cross-collateralized property from a group of loans secured by multiple properties.

In the brief period of time since the final regulations were released, there already has been a growing number of instances in which servicers have had to await a determination of whether a post-release valuation would satisfy the “principally secured” test before honoring the borrower’s right to such a release. We simply cannot imagine that it was intended under the final regulations that fulfilling the lender’s obligations under a loan suddenly causes the loan to cease being a “qualified mortgage” and risks catastrophic consequences to the REMIC status of the trust.

While we emphasize the problems caused by generally requiring that modified mortgage loans be retested for compliance with the “principally secured” standard upon a release of collateral (including instances of casualty or condemnation), we also are particularly concerned about the problems that will arise under the final REMIC regulations in connection with partial releases made in an effort to restore or resolve mortgage loans that are in default or as to which default is reasonably foreseeable (including situations where there is a significant risk of default under Rev. Proc. 2009-45). We believe that reasonable rules need to be applied to these cases, recognizing that a servicer has a contractual and fiduciary obligation not to release real property unless the REMIC is left in a better position to collect on the loan than it would be under any other foreseeable alternative. In our view, the ASF letters appropriately respond to your policy concerns in this regard, and the proposed changes to the final regulations would provide the practical approach that is necessary in these instances.

We appreciate the close attention that you have been paying to the troubled condition of the commercial real estate industry and the CMBS market, and we are grateful for the tax guidance and other measures that already have been taken to address the severe and mounting problems currently afflicting commercial real estate. We hope that you will seriously consider the changes to the final REMIC regulations that have been proposed by the ASF so that these regulations do not have the unintended and counterproductive effect of exacerbating these problems.

Very truly yours,



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cc:

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