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October 31, 2008

Via Electronic Filing – <http://regulations.gov>

Ms. Lindsay Valdeon
Deputy Executive Secretary
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Comments Concerning Development of a Guarantee Program for Troubled Assets
Docket ID TREAS-DO-2008-00218

Dear Ms. Valdeon:

The Commercial Mortgage Securities Association (“CMSA”) submits this letter in response to the United States Department of the Treasury’s request for comment on development of a guarantee program for troubled assets under the Emergency Economic Stabilization Act of 2008 (“EESA”). CMSA is an international trade organization whose members represent a broad cross-section of firms and individuals that are actively engaged in commercial real estate capital market finance activities, including the largest banks and investment banks; insurance companies; investors such as money managers and specialty finance companies; servicers, other service providers to the industry; and the credit rating agencies. CMSA has a global membership of more than 400 firms and 5,000 individuals, and the association and its members are the leaders in setting standards and maintaining a favorable investing environment for the nearly \$1 trillion in outstanding commercial mortgage backed securities (“CMBS”) issuance in the United States.

CMSA’s primary mission is to promote the ongoing strength, liquidity, and viability of commercial real estate capital market finance worldwide. We, therefore, have a vested interest in seeing that Treasury succeeds in meeting the EESA’s objectives of restoring liquidity and stability to the nation’s financial system.

As a general matter, CMSA believes that a guarantee program for troubled assets, if structured appropriately in a revenue-neutral manner that would not detract from the Department's direct purchase of troubled assets under the Troubled Asset Relief Program ("TARP"), would be beneficial for the CMBS market and for the capital and credit markets as a whole. Our position is premised on the belief that the presence of a guarantee for an asset will enhance the liquidity of that asset, and that the restoration of liquidity is a critical step on the road to recovery for our nation's economy. Thus, we believe it is important that a guarantee program be structured so as to promote liquidity to the greatest possible extent while not defeating EESA's goals. To that end, we offer the following recommendations for structuring the troubled assets guarantee program:

- The guarantee should be transferable and irrevocable so that it travels with the asset if the holder who acquired the guarantee decides to sell the asset. The availability of transferable credit support will make a guaranteed asset more attractive to potential investors and may help to restore or even increase investor confidence in these assets, which will, in turn, promote liquidity of the assets and for markets as a whole;
- The guarantee should last for the life of the asset rather than terminating at the time that the TARP sunsets. A chronological limitation on the guarantee would unnecessarily hamper the liquidity of the asset;
- With respect to eligibility for the guarantee program, CMSA does not believe eligibility for a class of troubled assets should be tied to whether that type of asset is purchased by Treasury under the TARP. Rather, if the case can be made that a particular type of asset would benefit from the availability of a guarantee, a guarantee should be available for that category of assets regardless of whether Treasury has also purchased such assets. This would allow Treasury to get "more bang for the buck" because Treasury would not be limited solely to making purchases to enhance liquidity for a particular type of asset. In the case of CMBS, it follows that CMBS should be eligible for the guarantee program even if Treasury ultimately does not purchase CMBS under the TARP;
- As for classes of troubled assets to be covered by the guarantee program, CMSA believes the program can operate most efficiently and simultaneously achieve the goals of EESA if it is limited to guaranteeing payment on homogeneous classes of assets that are low risk but nevertheless illiquid because of current market conditions. AAA rated asset-backed securities including CMBS fit this description. And in terms of prioritizing types of assets to be guaranteed, CMSA suggests that Treasury focus on the most illiquid assets first. Thus if a particular vintage of asset-backed securities are more illiquid than others, holders of those securities should have the first opportunity to obtain guarantee coverage. In the case of CMBS, for example, this would be the 2006-2007 CMBS vintages;

- In terms of how the premiums should be calculated, CMSA and its members believe that it is critical that – however the premiums are calculated – the credit risk associated with each type of asset should be taken into account in that calculation. Thus, relatively low-risk assets should require lower premiums;
- With respect to the structure of the program, we suggest one which would provide timely payment of interest and ultimate payment of principal on the AAA rated CMBS bonds. The payment of interest would occur if the servicer advises that there will be an interest shortfall to the AAA bonds based on available trust funds and the servicer's advancing obligations pursuant to the terms of the Pooling and Servicing Agreement (PSA). In the event there is a recoupment by the trust of amounts representing such interest, such amounts would be repaid to the Treasury. The obligation to make a payment of principal under the program would not occur until losses on the pool had been realized through all bonds subordinate to the AAA bonds, at which time the guarantee would pay AAA bondholders on a dollar for dollar basis only to the extent of actual realized losses on remaining collateral backing the AAA bonds. Consequently, so long as loans in the pool have an aggregate principal balance in excess of the principal balance of the AAA bonds (plus any unpaid expenses/advances owed to the servicer or trustee), there would be no principal payment owed under the guarantee. This would apply through payoff/liquidation of the last loan in the pool, at which time any remaining AAA bond principal balance would be paid in full. The coverage could be subject to a loss deductible for the bondholder so that the bondholder is required to absorb a certain amount of the losses before the coverage applies. The deductible amounts also could vary with premium so that bondholders would have the ability to choose their coverage attachment points under the program;
- One impediment to investor participation in any guarantee program is the potential accounting treatment of any guarantees purchased under the program. Our understanding is that the financial accounting rules require a security for which a separate guarantee is purchased after issuance to be marked-to-market without consideration of the guarantee and for a separate balance sheet entry be made to account for the guarantee. The guarantee therefore will not resolve the price volatility issues we are confronting in the marketplace unless one of two things were to be true. First, the Department could purchase securities it is guaranteeing and reissue new securities that incorporate the guarantees. Alternatively, the Department could work with and encourage the Securities & Exchange Commission and the Financial Accounting Standards Board to issue guidance allowing unitary accounting treatment of a security and its guarantee under this program;
- Some of our members have raised concerns that the guarantee program could bring about an inadvertent, adverse effect on the liquidity of troubled debt instruments because of the way the addition of a government guarantee would

be treated under current tax law. This tax treatment could discourage private investment of such troubled assets, which would run counter to the goals of EESA. More specifically, Treasury Regulation Section 1.1001-3 states that if there is a “significant modification” of a debt instrument then there is a deemed taxable exchange of the old debt instrument for a new debt instrument. Regulation Section 1.1001-3(e)(4)(iv)(B) provides that an addition of a guarantee for a non-recourse loan is a significant modification. The resulting deemed taxable exchange could be a significant concern for a person who has acquired the debt at a discount. Consider a person who bought distressed debt with a face amount of \$100M for \$70M. If there is a taxable exchange then that person could be required to recognize \$30M of taxable gain due to the addition of the guarantee. This tax issue could be remedied by changes to the relevant Treasury Regulations to carve out assets that are guaranteed under the new insurance program, and CMSA urges Treasury to consider making or supporting such changes.

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CMSA appreciates this opportunity to comment on the development of a guarantee program for troubled assets. We would be pleased to provide any additional information that may assist Treasury in its consideration of our recommendations. If you have questions regarding our comments or wish to discuss these matters in more detail, please feel free to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dottie Cunningham". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Dottie Cunningham
Chief Executive Officer
Commercial Mortgage Securities Association