(30) San Diego-Carlsbad-San Marcos, CA—consisting of the San Diego-Carlsbad-San Marcos, CA MSA;

(31) San Jose-San Francisco-Oakland, CA—consisting of the San Jose-San Francisco-Oakland, CA CSA, plus the Salinas, CA MSA and San Joaquin County, CA;

(32) Seattle-Tacoma-Olympia, WA—consisting of the Seattle-Tacoma-Olympia, WA CSA, plus Whatcom County, WA;

(33) Washington-Baltimore-Northern Virginia, DC–MD–VA–WV–PA—consisting of the Washington-Baltimore-Northern Virginia, DC–MD–VA–WV CSA, plus the Hagerstown-Martinsburg, MD–WV MSA, the York-Hanover-Gettysburg, PA CSA, and King George County, VA; and

(34) Rest of U.S.—consisting of those portions of the United States and its territories and possessions as listed in 5 CFR 591.205 not located within another locality pay area.

[FR Doc. 2010–24495 Filed 9–29–10; 8:45 am]

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 360

RIN 3064–AD55

Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation After September 30, 2010

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation ("FDIC") has adopted an amended regulation regarding the treatment by the FDIC, as receiver or conservator of an insured depository institution, of financial assets transferred by the institution in connection with a securitization or a participation (the "Rule"). The Rule continues the safe harbor for financial assets transferred in connection with securitizations and participations in which the financial assets were transferred in compliance with the existing regulation. The Rule also imposes further conditions for a safe harbor for securitizations or participations issued after a transition period. On March 11, 2010, the FDIC established a transition period through September 30, 2010. In order to provide for a transition to the new conditions for the safe harbor, the Rule provides for an extended transition period through December 31, 2010 for securitizations and participations. The Rule defines the conditions for safe harbor protection for securitizations and participations for which transfers of financial assets are made after the transition period; and clarifies the application of the safe harbor to transactions that comply with the new accounting standards for off balance sheet treatment as well as those that do not comply with those accounting standards. The conditions contained in the Rule will serve to protect the Deposit Insurance Fund ("DIF") and the FDIC's interests as deposit insurer and receiver by aligning the conditions for the safe harbor with better and more sustainable securitization practices by insured depository institutions ("IDIs").

DATES: Effective September 30, 2010.

FOR FURTHER INFORMATION CONTACT: Michael Krimminger, Office of the Chairman, 202–898–8950; George Alexander, Division of Resolutions and Receiverships, (202) 898–3718; Robert Storch, Division of Supervision and Consumer Protection, (202) 898–8906; or R. Penfield Starke, Legal Division, (703) 562–2422, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Background

In 2000, the FDIC clarified the scope of its statutory authority as conservator or receiver to disaffirm or repudiate contracts of an insured depository institution with respect to transfers of financial assets by an IDI in connection with a securitization or participation when it adopted a regulation codified at 12 CFR 360.6 (the "Securitization Rule"). This rule provided that the FDIC as conservator or receiver would not use its statutory authority to disaffirm or repudiate contracts to reclaim, recover, or recharacterize as property of the institution or the receivership any financial assets transferred by an IDI in connection with a securitization or in the form of a participation, provided that such transfer met all conditions for sale accounting treatment under generally accepted accounting principles ("GAAP"). The rule was a clarification, rather than a limitation, of the repudiation power. Such power authorizes the conservator or receiver to breach a contract or lease entered into by an IDI and be legally excused from further performance, but it is not an avoiding power enabling the conservator or receiver to recover assets that were previously sold and no longer reflected on the books and records on an IDI.

The Securitization Rule provided a "safe harbor" by confirming "legal isolation" if all other standards for off balance sheet accounting treatment, along with some additional conditions focusing on the enforceability of the transaction, were met by the transfer in connection with a securitization or a participation. Satisfaction of "legal isolation" was vital to securitization transactions because of the risk that the pool of financial assets transferred into the securitization trust could be recovered in bankruptcy or in a bank receivership. If the transfer satisfied this condition, the Securitization Rule confirmed that the transferred assets were "legally isolated" from the IDI in an FDIC conservatorship or receivership. The Securitization Rule, thus, addressed only purported sales which met the conditions for off balance sheet accounting treatment under GAAP.

Since its adoption, the Securitization Rule has been relied on by securitization participants as assurance that investors could look to securitized financial assets for payment without concern that the financial assets would be interfered with by the FDIC as conservator or receiver. However, the implementation of new accounting rules has created uncertainty for securitization participants.

Modifications to GAAP Accounting Standards

On June 12, 2009, the Financial Accounting Standards Board ("FASB") finalized modifications to GAAP through Statement of Financial Accounting Standards No. 166, *Accounting for Transfers of Financial Assets, an Amendment of FASB Statement No. 140* ("FAS 166") and Statement of Financial Accounting Standards No. 167, *Amendments to FASB Interpretation No. 46(R)* ("FAS 167") (the "2009 GAAP Modifications"). The 2009 GAAP Modifications are effective for annual financial statement reporting periods that begin after November 15, 2009. The 2009 GAAP Modifications made changes that affect whether a special purpose entity ("SPE") must be consolidated for financial reporting purposes, thereby subjecting many SPEs to GAAP consolidation requirements. These accounting changes may require some IDIs to consolidate an issuing entity to which financial assets have been transferred for securitization onto their balance sheets for financial reporting purposes primarily because an affiliate of the IDI retains control over the financial assets.[1] Given the 2009 GAAP Modifications, legal and accounting treatment of a transaction may no longer be aligned. As a result, the safe harbor provision of the Securitization Rule may not apply to a transfer in connection with a securitization that does not qualify for off balance sheet treatment.

FAS 166 also affects the treatment of participations issued by an IDI, in that it defines participating interests as pari-passu pro-rata interests in financial assets, and subjects the sale of a participation interest to the same conditions as the sale of financial assets. Statement FAS 166 provides that transfers of participation interests that do not qualify for sale treatment will be viewed as secured borrowings. While the GAAP modifications have some effect on participations, most participations are likely to continue to meet the conditions for sale accounting treatment under GAAP.

FDI Act Changes

In 2005 Congress enacted Section 11(e)(13)(C) [2] of the Federal Deposit Insurance Act (the "FDI Act").[3] In relevant part, this paragraph provides that generally no person may exercise any right or power to terminate, accelerate, or declare a default under a contract to which the IDI is a party, or obtain possession of or exercise control over any property of the IDI, or affect any contractual rights of the IDI, without the consent of the conservator or receiver, as appropriate, during the 45-day period beginning on the date of the appointment of the conservator or the 90-day period beginning on the date of the appointment of the receiver. If a securitization is treated as a secured borrowing, Section 11(e)(13)(C) could prevent the investors from recovering monies due to them for up to 90 days. Consequently, securitized assets that remain property of the IDI (but subject to a security interest) would be subject to the stay, raising concerns that any attempt by securitization noteholders to exercise remedies with respect to the IDI's assets would be delayed. During the stay, interest and principal on the securitized debt could remain unpaid. The FDIC has been advised that this 90-day delay would cause substantial downgrades in the ratings provided on existing securitizations and could prevent planned securitizations for multiple asset classes, such as credit cards, automobile loans, and other credits, from being brought to market.

Analysis

The FDIC believes that several of the issues of concern for securitization participants regarding the impact of the 2009 GAAP Modifications on the eligibility of transfers of financial assets for safe harbor protection can be addressed by clarifying the position of the conservator or receiver under established law. Under Section 11(e)(12) of the FDI Act,[4] the conservator or receiver cannot use its statutory power to repudiate or disaffirm contracts to avoid a legally enforceable and perfected security interest in transferred financial assets. This provision applies whether or not the securitization meets the conditions for sale accounting. The Rule clarifies that prior to repudiation or, in the case of a monetary default, prior to the date on which the FDIC's consent to the exercise of remedies becomes effective, required payments of principal and interest and other amounts due on the securitized obligations will continue to be made. In addition, if the FDIC decides to repudiate the securitization transaction, the FDIC will pay damages equal to the par value of the outstanding obligations, less prior payments of principal received, plus unpaid, accrued interest through the date of repudiation. The payment of such damages will discharge the lien on the securitization assets. This clarification in paragraphs (d)(4) and (e) of the Rule addresses certain questions that were raised about the scope of the stay codified in Section 11(e)(13)(C).

An FDIC receiver generally makes a determination of what constitutes property of an IDI based on the books and records of the failed IDI. Given the 2009 GAAP Modifications, there may be circumstances in which a sale transaction will continue to be reflected on the books and records of the IDI because the IDI or one of its affiliates continues to exercise control over the assets either directly or indirectly. The Rule provides comfort that conforming securitizations which do not qualify for off balance sheet treatment will have access to the assets in a timely manner irrespective of whether a transaction is viewed as a legal sale.

If a transfer of financial assets by an IDI to an issuing entity in connection with a securitization is not characterized as a sale and is properly perfected, the securitized assets will be viewed as subject to a perfected security interest. This is significant because the FDIC as conservator or receiver is prohibited by statute from avoiding a legally enforceable and perfected security interest, except where such an interest is taken in contemplation of insolvency or with the intent to hinder, delay, or defraud the institution or the creditors of such institution.[5] Consequently, the ability of the FDIC as conservator or receiver to reach financial assets transferred by an IDI to an issuing entity in connection with a securitization, if such transfer is characterized as a transfer for security, is limited by the combination of the status of the entity as a secured party with a perfected security interest in the transferred assets and the statutory provision that prohibits the conservator or receiver from avoiding a legally enforceable and perfected security interest.

Thus, for securitizations that are consolidated on the books of an IDI, the Rule provides a safe harbor in a conservatorship or receivership. There are two situations in which consent to expedited access to transferred assets will be given—(i) monetary default under a securitization by the FDIC as conservator or receiver or (ii) repudiation by the FDIC of the securitization agreements pursuant to which the financial assets were transferred. The Rule provides that in the event the FDIC is in monetary default under the securitization documents due to its failure to pay or apply collections from the financial assets received by it in accordance with the securitization documents and the default continues for a period of ten (10) business days after written notice to the FDIC, the FDIC will be deemed to consent pursuant to Sections 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2) to the exercise of contractual rights under the documents on account of such monetary default, and such consent shall constitute satisfaction in full of obligations of the IDI and the FDIC as conservator or receiver to the holders of the securitization obligations.

The Rule also provides that in the event the FDIC repudiates the securitization asset transfer agreement, the FDIC shall have the right to discharge the lien on the financial assets included in the securitization by paying damages in an amount equal to the par value of the obligations in the securitization on the date of the

[1] Of particular note, Paragraph 26A of FAS 166 introduces a new concept that was not in FAS 140, as follows: "* * * the transferor must first consider whether the transferee would be consolidated by the transferor. Therefore, if all other provisions of this Statement are met with respect to a particular transfer, and the transferee would be consolidated by the transferor, then the transferred financial assets would not be treated as having been sold in the financial statements being presented."

[2] 12 U.S.C. 1821(e)(13)(C).

[3] 12 U.S.C. 1811 *et seq.*

[4] 12 U.S.C. 1821(e)(12).

[5] 12 U.S.C. 1821(e)(12).

appointment of the FDIC as conservator or receiver, less any principal payments received by the investors through the date of repudiation, plus unpaid, accrued interest through the date of repudiation. The payment of accrued interest is dependent on whether the FDIC has received those funds through payments on the financial assets. If such damages are not paid within ten (10) business days of repudiation, the FDIC will be deemed to consent pursuant to Sections 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2) to the exercise of contractual rights under the securitization agreements.

The Rule also confirms that, if the transfer of the assets in a securitization is viewed as a sale for accounting purposes (and thus the assets are not reflected on the books of an IDI), the FDIC as receiver will not, in the exercise of its authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership the transferred assets. However, this safe harbor only applies if the transactions comply with the requirements set forth in paragraphs (b) and (c) of the Rule.

Pursuant to 12 U.S.C. 1821(e)(13)(C), no person may exercise any right or power to terminate, accelerate, or declare a default under a contract to which the IDI is a party, or to obtain possession of or exercise control over any property of the IDI, or affect any contractual rights of the IDI, without the consent of the conservator or receiver, as appropriate, during the 45-day period beginning on the date of the appointment of the conservator or the 90-day period beginning on the date of the appointment of the receiver. In order to address concerns that the statutory stay could delay repayment of investors in a securitization or delay a secured party from exercising its rights with respect to securitized financial assets, the Rule provides for consent by the conservator or receiver or, if the FDIC is acting as servicer, for the agreement of the FDIC in that capacity, to continue making required payments under the securitization documents and continued servicing of the assets. In addition, the Rule allows for the exercise of self-help remedies during the stay period of 12 U.S.C. 1821(e)(13)(C) ten (10) business days after notice is given following a monetary default by the FDIC or, in the event that the FDIC does not timely pay repudiation damages.

The FDIC recognizes that, as a practical matter, the scope of the comfort that is provided by the Rule is more limited than that provided in the Securitization Rule. However, the FDIC believes that the requirements are necessary to support sustainable securitizations. The safe harbor is not exclusive, and it does not address any transactions that fall outside the scope of the safe harbor or that fail to comply with one or more safe harbor conditions. The FDIC believes that its safe harbor should promote responsible financial asset underwriting and increase transparency in the market.

Previous Rulemakings

On November 12, 2009, the FDIC issued an Interim Final Rule amending 12 CFR 360.6, Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation, to provide for safe harbor treatment for participations and securitizations until March 31, 2010, which was further amended, on March 11, 2010, by a Final Rule extending the safe harbor until September 30, 2010 (as so amended, the "Transition Rule"). Under the Transition Rule, all existing securitizations as well as those for which transfers were made or, for revolving trusts, for which beneficial interests were issued, on or prior to September 30, 2010, were permanently "grandfathered" so long as they complied with the pre-existing Section 360.6.

At its December 15, 2009 meeting, the Board adopted an Advance Notice of Proposed Rulemaking ("ANPR") and, at its May 11, 2010 meeting, the Board adopted a Notice of Proposed Rulemaking ("NPR"), each of which sought public comment on the scope of amendments to Section 360.6 as well as on the requirements for the application of the safe harbor. The FDIC considered all of the comments received in response to the ANPR in formulating the NPR. The NPR and the public comments received are discussed below in Sections III and IV.

Purpose of the Rule

The FDIC, as deposit insurer and receiver for failed IDIs, has a unique responsibility and interest in ensuring that residential mortgage loans and other financial assets originated by IDIs are originated for long-term sustainability. The supervisory interest in origination of quality loans and other financial assets is shared with other bank and thrift supervisors. Nevertheless, the FDIC's responsibilities to protect insured depositors and resolve failed insured banks and thrifts and its responsibility to the DIF require that when the FDIC provides a safe harbor consenting to special relief from the application of its receivership powers, it must do so in a manner that fulfills these responsibilities.

The evident defects in many subprime and other mortgages originated and sold into securitizations requires attention by the FDIC to fulfill its responsibilities as deposit insurer and receiver in addition to its role as a supervisor. The defects and misalignment of incentives in the securitization process for residential mortgages were a significant contributor to the erosion of underwriting standards throughout the mortgage finance system. While many of the troubled mortgages were originated by non-bank lenders, insured banks and thrifts also made many troubled loans as underwriting standards declined under the competitive pressures created by the returns achieved by lenders and service providers through the "originate to distribute" model.

Defects in the incentives provided by securitization through immediate gains on sale for transfers into securitization vehicles and fee income directly led to material adverse consequences for insured banks and thrifts. Among these consequences were increased repurchase demands under representations and warranties contained in securitization agreements, losses on purchased mortgage and asset-backed securities, severe declines in financial asset values and in mortgage- and asset-backed security values due to spreading market uncertainty about the value of structured finance investments, and impairments in overall financial prospects due to the accelerated decline in housing values and overall economic activity. These consequences, and the overall economic conditions, directly led to the failures of many IDIs and to significant losses to the DIF. In this context, it would be imprudent for the FDIC to provide consent or other clarification of its application of its receivership powers without imposing requirements designed to realign the incentives in the securitization process to avoid these devastating effects.

The FDIC's adoption of 12 CFR 360.6 in 2000 facilitated legal and accounting analyses that supported securitization. In view of the accounting changes and the effects they have upon the application of the Securitization Rule, it is crucial that the FDIC provide clarification of the application of its receivership powers in a way that reduces the risks to the DIF by better aligning the incentives in securitization to support sustainable lending and structured finance transactions.

The Rule is fully consistent with the position of the FDIC in the Final Covered Bond Policy Statement of July 15, 2008. In that Policy Statement, the

FDIC Board of Directors acted to clarify how the FDIC would treat covered bonds in the case of a conservatorship or receivership with the express goal of thereby facilitating the development of the U.S. covered bond market. As noted in that Policy Statement, it served to "define the circumstances and the specific covered bond transactions for which the FDIC will grant consent to expedited access to pledged covered bond collateral." The Policy Statement further specifically referenced the FDIC's goal of promoting development of the covered bond market, while protecting the DIF and prudently applying its powers as conservator or receiver.[6]

The Rule is also consistent with the amendments to Regulation AB proposed by the Securities and Exchange Commission ("SEC") on April 7, 2010 (as so proposed to be amended, "New Regulation AB"). The proposed amendments represent a significant overhaul of Regulation AB and related rules governing the offering process, disclosure requirements and ongoing reporting requirements for securitizations. New Regulation AB would establish extensive new requirements for both SEC registered publicly offered securitization and many private placements, including disclosure of standardized financial asset level information, enhanced investor cash flow modeling tools and on-going information reporting requirements. In addition New Regulation AB requires certain certifications to the quality of the financial asset pool, retention by the sponsor or an affiliate of a portion of the securitization securities and third party reports on compliance with the sponsor's obligation to repurchase assets for breach of representations and warranties as a precondition to an issuer's ability to use a shelf registration. The disclosure and retention requirements of New Regulation AB are consistent with and support the approach of the Rule.

To ensure that IDIs are sponsoring securitizations in a responsible and sustainable manner, the Rule imposes certain conditions on securitizations that are not grandfathered by the Rule's transition provision and additional conditions on non-grandfathered securitizations that include residential mortgages ("RMBS"), including those that qualify as true sales, as a prerequisite for the FDIC to grant consent to the exercise of the rights and powers listed in 12 U.S.C. 1821(e)(13)(C) with respect to such financial assets. To qualify for the safe harbor provision of the Rule, the conditions must be satisfied for any securitization (i) for which transfers of financial assets were made on or after December 31, 2010 or (ii) from a master trust or revolving trust established after adoption of the Rule, or from an open commitment not in effect on the date of adoption of the Rule or which otherwise does not qualify to be grandfathered under the transition provisions.

II. The NPR

On January 7, 2010, the FDIC published its Advance Notice of Proposed Rulemaking Regarding Treatment by the FDIC as Conservator or Receiver of Financial Assets Transferred by an IDI in Connection with a Securitization or Participation After March 31, 2010 in the **Federal Register** (75 FR 935 (Jan. 7, 2010)) soliciting public comment to proposed amendments to the Securitization Rule. On May 17, 2010, the FDIC published its Notice of Proposed Rulemaking Regarding Treatment by the FDIC as Conservator or Receiver of Financial Assets Transferred by an IDI in Connection with a Securitization or Participation After September 30, 2010 (75 FR 27471 (May 17, 2010)). The NPR solicited public comment on the Proposed Rule for 45 days.

III. Summary of Comments on the NPR

The FDIC received 22 comment letters on the Proposed Rule and held one teleconference at which details of the NPR were discussed. The letters included comments from trade associations, banks and rating agencies, among others.

Several entities commented specifically on the need for greater disclosure, and the comments included support for the requirement of loan level data for residential mortgage loans. In addition, support was expressed for risk retention; however, there were differing views as to the level of required risk retention.

A number of commenters had objections to the Proposed Rule. Objections fell mainly into the following categories: (1) With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the FDIC should only adopt conditions jointly with the other federal regulators; (2) certain criteria were deemed to be too qualitative in nature; (3) certain conditions were viewed as potentially increasing costs to IDIs; and (4) the remedies available under the safe harbor and legal isolation were perceived as lacking clarity.

Joint action by the agencies. The FDIC undertook to revise its safe harbor in light of accounting changes that came into effect for reporting periods after November 15, 2009. At that point in time, the outcome of financial regulatory reform proposals was unclear. The FDIC did not delay its efforts because the accounting and legal bases for the pre-existing safe harbor did not apply after November 2009. Given the changed facts, industry urged the FDIC to evaluate the safe harbor and provide guidance in light of the 2009 GAAP Modifications.

Beginning in the fall of 2009, FDIC staff discussed differing approaches to the safe harbor regulation with the staff of all relevant federal financial regulators and the Department of Treasury. Accordingly, earlier this year the Securities and Exchange Commission proposed New Regulation AB to govern required disclosures for shelf registrations and private placements that were fully consistent with the additional transparency requirements contained in the Proposed Rule. As a result, the Rule and the SEC's proposed regulations are fully consistent.

Nothing in the Rule is inconsistent with the Dodd-Frank legislation. The provisions of the Dodd-Frank legislation substantively address only the risk retention requirements and, pending further regulatory action, require five percent risk retention. This is fully consistent with the Rule as well.

Section 941 of Dodd-Frank requires the federal banking agencies, including the FDIC, and the SEC to jointly prescribe regulations to require any securitizer to retain an economic interest in a portion of the credit risk for any assets involved in a securitization. Dodd-Frank also requires regulations addressing retention of credit risk for residential mortgages, and requires the agencies to define "qualified residential mortgages" which are exempt from risk retention. Section 941 authorizes the rulemaking agencies to consider whether additional exemptions, exceptions, or adjustments are appropriate. The regulations covering securitizations involving residential mortgages must be jointly issued by the foregoing agencies along with the Secretary of the Department of Housing and Urban Development and the Federal Housing Finance Agency. These regulations must be adopted within 270 days of enactment of the Dodd-Frank legislation. In order to assure consistency between the Rule and these required interagency regulations, the Rule provides that upon the effective date of final regulations required by

[6] FDIC Covered Bond Policy Statement, 73 FR 43754 *et seq.* (July 28, 2008).

Section 941(b), such final regulations shall exclusively govern the requirement to retain an economic interest in a portion of the credit risk of the financial assets under the Rule.

An important consideration is that different regulatory agencies have different regulatory jurisdiction. The FDIC has regulatory jurisdiction over the rules applied in the resolution of failed IDIs, as the SEC has jurisdiction over disclosure requirements under the securities laws. In exercising their different responsibilities, the agencies may have to adopt rules addressing the same issues within their regulatory mandate. In those cases, those rules should be harmonized except where differences are appropriate to accomplish their different regulatory missions. For the FDIC's safe harbor rule, the FDIC is setting the conditions that define how it will apply its receivership powers and, thereby, what types of transactions will be entitled to the safe harbor protecting them from application of certain of those powers. This was precisely what the FDIC did in 2000 when it adopted the original version of Section 360.6. The interagency risk retention rule required by the Dodd-Frank legislation will not address all of the issues relevant to the application of those receivership rules or to the availability of the safe harbor. In exercising the FDIC's regulatory jurisdiction, the Rule addresses risk retention as well as the other components of the safe harbor whereas the interagency rule will solely address risk retention.

Certain criteria were too qualitative in nature. A number of commenters noted that reliance on qualitative criteria or requirements for continuing actions, such as ongoing disclosures, would make it more difficult to de-link the rating of a securitization from that of the sponsor. It is a debatable proposition that rating agencies cannot evaluate qualitative information when they must rely on changing, qualitative information in any ongoing surveillance of a rating. Nonetheless, the Rule reflects revisions from the text of the Proposed Rule and ties disclosures and many other requirements solely to the contractual terms of the securitization documents. This will permit a clearer assessment of whether a transaction meets the conditions in the Rule. Certain other conditions included in the Proposed Rule that were asserted to be vague were also modified to clarify terminology and respond to the concerns expressed in comments.

Conditions potentially increase costs for IDIs. Comments received in opposition to the conditions included disagreement that such requirements would serve to promote more long-term sustainability for loans and other financial assets originated by IDIs and assertions that the conditions would impose additional costs on IDIs and competitively disadvantage IDIs in relation to non-regulated securitization sponsors.

These comments reflect a misunderstanding of the purpose of the conditions. The conditions are designed to provide greater clarity and transparency to allow a better ongoing evaluation of the quality of lending by banks and reduce the risks to the DIF from opaque securitization structures and the poorly underwritten loans that led to the onset of the financial crisis. In addition, these comments fail to recognize that securitization as a viable liquidity tool in mortgage finance will not return without greater transparency and clarity because investors have experienced the difficulties provided by the existing model of securitization. However, greater transparency is not solely for investors, but will serve to more closely tie the origination of loans to their long-term performance by requiring disclosures of that performance. These conditions are supported by New Regulation AB.

Remedies available under the safe harbor and legal isolation. A number of commenters were concerned that damages payable for repudiation of securitization transfer agreements would not include payment of interest to the date of repudiation. The Rule has been revised to specifically include in the calculation of repudiation damages accrued interest through the date of repudiation, to the extent received through payments on financial assets through the date of repudiation.

Credit rating agencies expressed concern that in the absence of clarification by the FDIC regarding the continuation of payments after an IDI's failure and the payment of damages in the event of repudiation, an IDI securitization might need to be linked to the IDI's credit rating. The Rule addresses these issues in its provisions consenting to payments being made prior to repudiation and in its provisions relating to the amount of damages payable in the event of repudiation by a conservator or receiver.

Some commenters also objected to the safe harbor's reliance on the accounting treatment of the transfers of financial assets being securitized and were critical of the Rule's treatment of financial assets that did not obtain off balance sheet accounting treatment as property of an insolvent IDI. Commenters suggested that the FDIC focus instead on a legal sale analysis in determining whether a transfer of assets was eligible for the safe harbor.

The FDIC has rejected this position because the Securitization Rule as adopted in 2000, as well as the FDIC's longstanding evaluation of the assets potentially subject to receivership powers, has been based on the treatment of those assets as on or off balance sheet. This was explicitly stated in the Securitization Rule. Moreover, it is appropriate for the FDIC to rely on the books and records of a failed IDI in administering a conservatorship or receivership and consider how to apply a safe harbor for assets that are deemed part of the IDI's balance sheet under GAAP.

Objections to the treatment of securitization transfers that do not meet the requirements for off balance sheet treatment under the new accounting rules are misplaced. Prior to the Securitization Rule, securitization transactions were typically treated as secured transactions or sales. As a result, under the Rule, if the transfer does not meet the standards for off balance sheet treatment, the FDIC will consider the transaction as a secured transaction if it meets the requirements imposed on such transactions under the Rule and state law. In this way, investors in securitization transactions that do not qualify for off balance sheet treatment may still receive benefits of expedited access to the securitized financial assets if they meet the conditions specified in the Rule.

Comments relating to specific provisions of the NPR are discussed below in the description of the Rule.

IV. The Rule

The Rule replaces the Securitization Rule as amended by the Transition Rule. Paragraph (a) of the Rule sets forth definitions of terms used in the Rule. It retains many of the definitions previously used in the Securitization Rule but modifies or adds definitions to the extent necessary to accurately reflect current industry practice in securitizations. Pursuant to these definitions, the safe harbor does not apply to certain government sponsored enterprises ("Specified GSEs"), affiliates of certain such enterprises, or any entity established or guaranteed by those GSEs. In addition, the Rule is not intended to apply to the Government National Mortgage Association ("Ginnie Mae") or Ginnie Mae-guaranteed securitizations. When Ginnie Mae guarantees a security, the mortgages backing the security are assigned to Ginnie Mae, an entity owned entirely by the United States government. Ginnie

Mae's statute contains broad authority to enforce its contract with the lender/issuer and its ownership rights in the mortgages backing Ginnie Mae-guaranteed securities. In the event that an entity otherwise subject to the Rule issues both guaranteed and non-guaranteed securitizations, the securitizations guaranteed by a Specified GSE are not subject to the Rule.

Paragraph (b) of the Rule imposes conditions to the availability of the safe harbor for transfers of financial assets to an issuing entity in connection with a securitization. These conditions make a clear distinction between the conditions imposed on RMBS from those imposed on securitizations for other asset classes. In the context of a conservatorship or receivership, the conditions applicable to all securitizations will improve overall transparency and clarity through disclosure and documentation requirements along with ensuring effective incentives for prudent lending by requiring that the payment of principal and interest be based primarily on the performance of the financial assets and by requiring retention of a share of the credit risk in the securitized loans.

The conditions applicable to RMBS are more detailed and include additional capital structure, disclosure, documentation and compensation requirements as well as a requirement for the establishment of a reserve fund. These requirements are intended to address the factors that caused significant losses in current RMBS securitization structures as demonstrated in the recent crisis. Confidence can be restored in RMBS markets only through greater transparency and other structures that support sustainable mortgage origination practices and require increased disclosures. These standards respond to investor demands for greater transparency and alignment of the interests of parties to the securitization. In addition, they are generally consistent with industry efforts while taking into account proposed legislative and regulatory initiatives.

Capital Structure and Financial Assets.

For all securitizations, the benefits of the Rule should be available only to securitizations that are readily understood by the market, increase liquidity of the financial assets and reduce consumer costs. Consistent with New Regulation AB, the documents governing the securitization will be required to provide that there be financial asset level disclosure as appropriate to the securitized financial assets for any resecuritizations (securitizations supported by other securitization obligations). These disclosures must include full disclosure of the obligations, including the structure and the assets supporting each of the underlying securitization obligations, and not just the obligations that are transferred in the re-securitization. This requirement applies to all re-securitizations, including static re-securitizations as well as managed collateralized debt obligations.

The Rule provides that securitizations that are unfunded or synthetic transactions are not eligible for expedited consent under the Rule. To support sound lending, the documents governing all securitizations must require that payments of principal and interest on the obligations be primarily dependent on the performance of the financial assets supporting the securitization and that such payments not be contingent on market or credit events that are independent of the assets supporting the securitization, except for interest rate or currency mismatches between the financial assets and the obligations to investors.

For RMBS only, the Rule limits the capital structure of the securitization to six tranches or less to discourage complex and opaque structures. The most senior tranche could include time-based sequential pay or planned amortization and companion sub-tranches, which are not viewed as separate tranches for the purpose of the six tranche requirement. This condition will not prevent an issuer from creating the economic equivalent of multiple tranches by re-securitizing one or more tranches, so long as they meet the conditions set forth in the rule, including adequate disclosure in connection with the re-securitization. In addition, RMBS cannot include leveraged tranches that introduce market risks (such as leveraged super senior tranches). Although the financial assets transferred into an RMBS will be permitted to benefit from asset level credit support, such as guarantees (including guarantees provided by governmental agencies, private companies, or government-sponsored enterprises), co-signers, or insurance, the RMBS cannot benefit from external credit support at the issuing entity or pool level. It is intended that guarantees permitted at the asset level include guarantees of payment or collection, but not credit default swaps or similar items. The temporary payment of principal and interest, however, can be supported by liquidity facilities. These conditions are designed to limit both the complexity and the leverage of an RMBS and therefore the systemic risks introduced by them in the market. In addition, the Rule provides that the securitization obligations can be enhanced by credit support or guarantees provided by Specified GSEs. However, as noted in the discussion of the definitions above, a securitization that is wholly guaranteed by a Specified GSE is not subject to the Rule and thus not eligible for the safe harbor.

Comments in response to the NPR expressed concern that a limitation on the number of tranches of an RMBS would negatively affect the ability of securitizations to meet investor objectives and maximize offering proceeds. In addition, commenters argued that there should be no restriction on external third party pool level credit support, while one commenter stated that guarantees in RMBS transactions should be permitted at the loan level only if issued by regulated third parties with proven capacity to ensure prudent loan origination and satisfy their obligations.

In formulating the Rule, the FDIC was mindful of the need to permit innovation and accommodate financing needs, and thus attempted to strike a balance between permitting multi-tranche structures for RMBS transactions, on the one hand, and promoting readily understandable securitization structures and limiting overleveraging of residential mortgage assets, on the other hand.

The FDIC is of the view that permitting pool level, external credit support in an RMBS can lead to overleveraging of assets, as investors might focus on the credit quality of the credit support provider as opposed to the sufficiency of the financial asset pool to service the securitization obligations. However, the Rule has been revised to permit pool level credit support by Specified GSEs.

Finally, although the Rule excludes unfunded and synthetic securitizations from the safe harbor, the FDIC does not view the inclusion of existing credit lines that are not fully drawn in a securitization as causing such securitization to be an "unfunded securitization." The provision is intended to emphasize that the Rule applies only where there is an actual transfer of financial assets. In addition, to the extent an unfunded or synthetic transaction qualifies for treatment as a qualified financial contract under Section (11)(e) of the FDI Act, it would not need the benefits of the safe harbor provided in the Rule in an FDIC receivership.[7]

[7] 12 U.S.C. 1821(e)(10).

Disclosure

For all securitizations, disclosure serves as an effective tool for increasing the demand for high quality financial assets and thereby establishing incentives for robust financial asset underwriting and origination practices. By increasing transparency in securitizations, the Rule will enable investors (which may include banks) to decide whether to invest in a securitization based on full information with respect to the quality of the asset pool and thereby provide additional liquidity only for sustainable origination practices.

The data must enable investors to analyze the credit quality for the specific asset classes that are being securitized. The documents governing securitizations must, at a minimum, require disclosure for all issuances to include the types of information required under current Regulation AB (17 CFR 229.1100–1123) or any successor disclosure requirements with the level of specificity that applies to public issuances, even if the obligations are issued in a private placement or are not otherwise required to be registered.

The documents governing securitizations that will qualify under the Rule must require disclosure of the structure of the securitization and the credit and payment performance of the obligations, including the relevant capital or tranche structure and any liquidity facilities and credit enhancements. The disclosure must be required to include the priority of payments and any specific subordination features, as well as any waterfall triggers or priority of payment reversal features. The disclosure at issuance will also be required to include the representations and warranties made with respect to the financial assets and the remedies for breach of such representations and warranties, including any relevant timeline for cure or repurchase of financial assets, and policies governing delinquencies, servicer advances, loss mitigation and write offs of financial assets. The documents must also require that periodic reports provided to investors include the credit performance of the obligations and financial assets, including periodic and cumulative financial asset performance data, modification data, substitution and removal of financial assets, servicer advances, losses that were allocated to each tranche and remaining balance of financial assets supporting each tranche as well as the percentage coverage for each tranche in relation to the securitization as a whole. Where appropriate for the type of financial assets included in the pool, reports must also include asset level information that may be relevant to investors (*e.g.* changes in occupancy, loan delinquencies, defaults, etc.). The FDIC recognizes that for certain asset classes, such as credit card receivables, the disclosure of asset level information is less informative and, thus, will not be required.

The securitization documents must also require disclosure to investors of the nature and amount of compensation paid to any mortgage or other broker, the servicer(s), rating agency or third-party advisor, and the originator or sponsor, and the extent to which any risk of loss on the underlying financial assets is retained by any of them for such securitization. The documents must also require disclosure of changes to this information while obligations are outstanding. This disclosure should enable investors to assess potential conflicts of interests and how the compensation structure affects the quality of the assets securitized or the securitization as a whole.

For RMBS, loan level data as to the financial assets securing the mortgage loans, such as loan type, loan structure, maturity, interest rate and location of property, will also be required to be disclosed by the sponsor. Sponsors of securitizations of residential mortgages will be required to affirm compliance in all material respects with applicable statutory and regulatory standards for origination of mortgage loans, including that the mortgages in the securitization pool are underwritten at the fully indexed rate relying on documented income [8] and comply with supervisory guidance governing the underwriting of residential mortgages, including the Interagency Guidance on Non-Traditional Mortgage Products, October 5, 2006, and the Interagency Statement on Subprime Mortgage Lending, July 10, 2007, and such other or additional guidance applicable at the time of loan origination. None of the disclosure conditions should be construed as requiring the disclosure of personally identifiable information of obligors or information that would violate applicable privacy laws.

The Rule also requires sponsors to disclose a third party due diligence report on compliance with such standards and the representations and warranties made with respect to the financial assets.

Finally, the Rule requires that the securitization documents require the disclosure by servicers of any ownership interest of the servicer or any affiliate of the servicer in other whole loans secured by the same real property that secures a loan included in the financial asset pool. This provision does not require disclosure of interests held by servicers or their affiliates in the securitization securities. This provision is intended to give investors information to evaluate potential servicer conflicts of interest that might impede the servicer's actions to maximize value for the benefit of investors.

Documentation and Recordkeeping

For all securitizations, the operative agreements are required to use as appropriate available standardized documentation for each available asset class. It is not possible to define in advance when use of standardized documentation will be appropriate, but certainly when there is general market use of a form of documentation for a particular asset class, or where a trade group has formulated standardized documentation generally accepted by the industry, such documentation must be used.

The Rule also requires that the securitization documents define the contractual rights and responsibilities of the parties, including but not limited to representations and warranties, ongoing disclosure requirements and any measures to avoid conflicts of interest. The documents are also required to provide authority for the parties to fulfill their rights and responsibilities under the securitization contracts.

Additional conditions apply to RMBS to address a significant issue that has been demonstrated in the mortgage crisis by requiring that servicers have the authority to mitigate losses on mortgage loans consistent with maximizing the net present value of the mortgages. Therefore, for RMBS, contractual provisions in the servicing agreement must provide servicers with the authority to modify loans to address reasonably foreseeable defaults and to take other action to maximize the value and minimize losses on the securitized financial assets. The documents must require servicers to apply industry best

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[8] Institutions should verify and document the borrower's income (both source and amount), assets and liabilities. For the majority of borrowers, institutions should be able to readily document income using recent W–2 statements, pay stubs, and/or tax returns. Stated income and reduced documentation loans should be accepted only if there are mitigating factors that clearly minimize the need for direct verification of repayment capacity. Reliance on such factors also should be documented. Mitigating factors might include situations where a borrower has substantial liquid reserves or assets that demonstrate repayment capacity and can be verified and documented by the lender. A higher interest rate is not considered an acceptable mitigating factor.

practices related to asset management and servicing.

The RMBS documents may not give control of servicing discretion to a particular class of investors. The documents must require that the servicer act for the benefit of all investors rather for the benefit of any particular class of investors. Consistent with the forgoing, the documents must require the servicer to commence action to mitigate losses no later than ninety (90) days after an asset first becomes delinquent unless all delinquencies on such asset have been cured. A servicer must also be required to maintain sufficient records of its actions to permit appropriate review of its actions.

The FDIC believes that a prolonged period of servicer advances in a market downturn misaligns servicer incentives with those of the RMBS investors. Servicing advances also serve to aggravate liquidity concerns, exposing the market to greater systemic risk. Occasional advances for late payments, however, are beneficial to ensure that investors are paid in a timely manner. To that end, the servicing agreement for RMBS must not require the primary servicer to advance delinquent payments of principal and interest by borrowers for more than three (3) payment periods unless financing or reimbursement facilities to fund or reimburse the primary servicers are available. However, such facilities shall not be dependent for repayment on foreclosure proceeds.

Compensation

The compensation requirements of the Rule apply only to RMBS. Due to the demonstrated issues in the compensation incentives in RMBS, in this asset class the Rule seeks to realign compensation to parties involved in the rating and servicing of residential mortgage securitizations.

The securitization documents are required to provide that any fees payable credit rating agencies or similar third-party evaluation companies must be payable in part over the five (5) year period after the initial issuance of the obligations based on the performance of surveillance services and the performance of the financial assets, with no more than sixty (60) percent of the total estimated compensation due at closing. Thus payments to rating agencies must be based on the actual performance of the financial assets, not their ratings.

A second area of concern is aligning incentives for proper servicing of the mortgage loans. Therefore, the documents must require that compensation to servicers must include incentives for servicing, including payment for loan restructuring or other loss mitigation activities, which maximizes the net present value of the financial assets in the RMBS.

Responses to the NPR stated that compensation to rating agencies should not be linked to performance of a securitization because such linkage will interfere with the neutral ratings process, and a rating agency expressed the concern that such linkage might give rating agencies an incentive to delay rating actions that would alert the market to a deterioration. Concern was also expressed that this provision could incentivize a rating agency to rate a transaction at a level that is lower than the level that the rating agency believes to be the appropriate level.

The FDIC notes that rating agencies must have procedures in place to protect analytic independence and ensure the integrity of their ratings. The comments misconstrue the precise terms of the safe harbor requirement, which requires that compensation must be linked to the performance of the assets, not the ratings. Accordingly, there is no incentive to delay ratings actions.

Origination and Retention Requirements

To provide further incentives for quality origination practices, several conditions address origination and retention requirements for all securitizations. For all securitizations, the sponsor must retain an economic interest in a material portion, defined as not less than five (5) percent, of the credit risk of the financial assets. The retained interest may be either in the form of an interest of not less than five (5) percent in each credit tranche or in a representative sample of the securitized financial assets equal to not less than five (5) percent of the principal amount of the financial assets at transfer. This retained interest cannot be sold, pledged or hedged during the life of the transaction, except for the hedging of interest rate or currency risk. If required to retain an economic interest in the asset pool without hedging the credit risk of such portion, the sponsor will be less likely to originate low quality financial assets. The Rule provides that upon the effective date of final regulations required by Section 941(b) of the Dodd-Frank legislation, such final regulations shall exclusively govern the requirement to retain an economic interest in a portion of the credit risk of the financial assets under the Rule.

The Rule requires that RMBS securitization documents require that a reserve fund be established in an amount equal to at least five (5) percent of the cash proceeds due to the sponsor and that this reserve be held for twelve (12) months to cover any repurchases required for breaches of representations and warranties. This reserve fund will ensure that the sponsor bears a significant risk for poorly underwritten loans during the first year of the securitization.

In addition, the securitization documents must include a representation that residential mortgage loans in an RMBS have been originated in all material respects in compliance with statutory, regulatory and originator underwriting standards in effect at the time of origination and were underwritten at the fully indexed rate and rely on documented income and comply with all existing supervisory guidance governing the underwriting of residential mortgages, including the Interagency Guidance on Non-Traditional Mortgage Products, October 5, 2006, and the Interagency Statement on Subprime Mortgage Lending, July 10, 2007, and such other or additional regulations or guidance applicable at the time of loan origination.

The FDIC believes that requiring the sponsor to retain an economic interest in the credit risk relating to each credit tranche or in a representative sample of financial assets will help ensure quality origination practices. A risk retention requirement that did not cover all types of exposure would not be sufficient to create an incentive for quality underwriting at all levels of the securitization. The recent economic crisis made clear that, if quality underwriting is to be assured, it will require true risk retention by sponsors, and that the existence of representations and warranties or regulatory standards for underwriting will not alone be sufficient.

Additional Conditions

Paragraph (c) of the Rule includes general conditions for all securitizations and the transfer of financial assets. These conditions also include requirements that are consistent with good banking practices and are necessary to make the transactions comply with established banking law.[9]

The transaction should be an arms-length, bona fide securitization transaction and the documents must limit sales to affiliates, other than to wholly-owned subsidiaries which are consolidated with the sponsor for accounting and capital purposes, and insiders of the sponsor. The securitization agreements must be in

[9] *See,* 12 U.S.C. 1823(e).

writing, approved by the board of directors of the bank or its loan committee (as reflected in the minutes of a meeting of the board of directors or committee), and have been, continuously, from the time of execution, in the official record of the bank. The securitization also must have been entered into in the ordinary course of business, not in contemplation of insolvency and with no intent to hinder, delay or defraud the bank or its creditors.

The Rule applies only to transfers made for adequate consideration. The transfer and/or security interest need to be properly perfected under the UCC or applicable state law. The FDIC anticipates that it will be difficult to determine whether a transfer complying with the Rule is a sale or a security interest, and therefore expects that a security interest will be properly perfected under the UCC, either directly or as a backup.

The governing documents must require that the sponsor separately identify in its financial asset data bases the financial assets transferred into a securitization and maintain an electronic or paper copy of the closing documents in a readily accessible form, and that the sponsor maintain a current list of all of its outstanding securitizations and issuing entities, and the most recent Form 10–K or other periodic financial report for each securitization and issuing entity. The documents must also provide that if acting as servicer, custodian or paying agent, the sponsor is not permitted to commingle amounts received with respect to the financial assets with its own assets except for the time necessary to clear payments received, and in event for more than two business days. The documents must require the sponsor to make these records available to the FDIC promptly upon request. This requirement will facilitate the timely fulfillment of the receiver's responsibilities upon appointment and will expedite the receiver's analysis of securitization assets. This will also facilitate the receiver's analysis of the bank's assets and determination of which assets have been securitized and are therefore potentially eligible for expedited access by investors.

In addition, the Rule requires that the transfer of financial assets and the duties of the sponsor as transferor be evidenced by an agreement separate from the agreement governing the sponsor's duties, if any, as servicer, custodian, paying agent, credit support provider or in any capacity other than transferor.

The Safe Harbor

Paragraph (d)(1) of the Rule continues the safe harbor provision that was provided by the Securitization Rule with respect to participations so long as the participation satisfies the conditions for sale accounting treatment set forth by generally accepted accounting principles. In addition, last-in first-out participations are specifically included in the safe harbor, provided that they satisfy requirements for sale accounting treatment other than the pari-passu, proportionate interest requirement that is not satisfied solely as a result of the last-in first-out structure.

Paragraph (d)(2) of the Rule provides that for (i) any participation or securitization for which transfers of financial assets are made on or before December 31, 2010 or (ii) obligations of revolving trusts or master trusts which issued one or more obligations on or before the date of adoption of this Rule, or (iii) obligations issued under open commitments up to the maximum amount of such commitments as of the date of adoption of this Rule if one or more obligations are issued under such commitments by December 31, 2010, the FDIC as conservator or receiver will not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership the transferred financial assets notwithstanding that the transfer of such financial assets does not satisfy all conditions for sale accounting treatment under generally accepted accounting principles as effective for reporting periods subsequent to November 15, 2009, so long as such transfer satisfied the conditions for sale accounting treatment under generally accepted accounting principles in effect for reporting periods prior to November 15, 2009. This provision is intended to continue the safe harbor provided by the Transition Rule.

Paragraph (d)(3) of the Rule addresses transfers of financial assets made in connection with a securitization for which transfers of financial assets were made after December 31, 2010 or securitizations from a master trust or revolving trust established after the date of adoption of this Rule or from an open commitment not satisfying the requirements of paragraph (d)(2), that (in each case) satisfy the conditions for sale accounting treatment under GAAP in effect for reporting periods after November 15, 2009. For such securitizations, the FDIC as conservator or receiver will not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership any such transferred financial assets, provided that such securitizations comply with the conditions set forth in paragraphs (b) and (c) of the Rule.

Paragraph (d)(4) of the Rule addresses transfers of financial assets in connection with a securitization for which transfers of financial assets were made after December 31, 2010 or securitizations from a master trust or revolving trust established after the date of adoption of the Rule or from an open commitment not satisfying the requirements of paragraph (d)(2) or (d)(3), that (in each case) satisfy the conditions set forth in paragraphs (b) and (c), but where the transfer does not satisfy the conditions for sale accounting treatment under GAAP in effect for reporting periods after November 15, 2009.

Paragraph (d)(4)(i) provides that if the FDIC is in monetary default due to its failure to pay or apply collections from the financial assets received by it in accordance with the securitization documents, and remains in monetary default for ten (10) business days after actual delivery of a written notice to the FDIC requesting exercise of contractual rights because of such default, the FDIC consents to the exercise of such contractual rights, including any rights to obtain possession of the financial assets or the exercise of self-help remedies as a secured creditor, provided that no involvement of the receiver or conservator is required, other than consents, waivers or the execution of transfer documents reasonably requested in the ordinary course of business in order facilitate the exercise of such contractual rights. This paragraph also provides that the consent to the exercise of such contractual rights shall serve as full satisfaction for all amounts due.

Paragraph (d)(4)(ii) provides that if the FDIC as conservator or receiver gives a written notice of repudiation of the securitization agreement pursuant to which assets were transferred and the FDIC does not pay the damages due by reason of such repudiation within ten (10) business days following the effective date of the notice, the FDIC consents to the exercise of any contractual rights, including any rights to obtain possession of the financial assets or the exercise of self-help remedies as a secured creditor, provided that no involvement of the receiver or conservator is required other than consents, waivers or the execution of transfer documents reasonably requested in the ordinary course of business in order facilitate the exercise of such contractual rights. Paragraph 4(d)(ii) also provides that the damages due for these purposes shall be an amount equal to the par value of the obligations outstanding on the date of receivership less any payments of principal received by the investors through the date of repudiation, plus unpaid, accrued interest through the date of repudiation to the extent actually received through payments on the financial assets received through the date of repudiation, and that upon receipt of such payment all liens on the financial assets created pursuant to the securitization documents shall be released.

In computing amounts payable as repudiation damages, consistent with the FDI Act the FDIC will not give effect to any provisions of the securitization documents increasing the amount payable based on the appointment of the FDIC as receiver or conservator.[10]

Comments as to the scope of the safe harbor expressed concern with the risk of repudiation by the FDIC, in particular, the risk that the FDIC would repudiate an issuer's securitization obligations and liquidate the financial assets at a time when the market value of such assets was less than the amount of the outstanding obligations owed to investors, thus exposing investors to market value risks relating to the securitization asset pool.

The Rule addresses this concern. It clarifies that repudiation damages will be equal to the par value of the obligations as of the date of receivership, less payments of principal received by the investors to the date of repudiation, plus unpaid, accrued interest through the date of repudiation to the extent actually received through payments on the financial assets received through the date of repudiation. The Rule also provides that the FDIC consents to the exercise of remedies by investors, including self-help remedies as secured creditors, in the event that the FDIC repudiates a securitization transfer agreement and does not pay damages in such amount within ten business days following the effective date of notice of repudiation. Thus, if the FDIC repudiates and the investors are not paid the par value of the securitization obligations, plus unpaid, accrued interest through the date of repudiation to the extent actually received through payments on the financial assets received through the date of repudiation, they will be permitted to obtain the asset pool. Accordingly, exercise by the FDIC of its repudiation rights will not expose investors to market value risks relating to the asset pool.

The comments also included a request that the safe harbor not condition the FDIC's consent to the exercise of secured creditor remedies on there being no involvement of the receiver or conservator. The Rule clarifies that the FDIC will give ordinary course consents and waivers in connection with the exercise of secured creditor remedies.

Comments also included concern that non-proportionate participation arrangements, such as LIFO participations, entered into after September 30, 2010 that do not satisfy the criteria for "participating interests" under the 2009 GAAP Modifications would no longer qualify for sale treatment because the safe harbor is available only to participations which satisfy sale accounting treatment. The vast majority of participations are expected to satisfy the sale accounting requirement. The Rule includes an additional provision to address LIFO participations.

Consent to Certain Payments and Servicing

Paragraph (e) provides that prior to repudiation or, in the case of monetary default, prior to the effectiveness of the consent referred to in paragraph (d)(4)(i), the FDIC consents to the making of, or if acting as servicer agrees to make, required payments to the investors during the stay period imposed by 12 U.S.C. 1821(e)(13)(C). The Rule also provides that the FDIC consents to any servicing activity required in furtherance of the securitization (subject to the FDIC's rights to repudiate the servicing agreements), in connection with securitizations that meet the conditions set forth in paragraphs (b) and (c) of the Rule.

Miscellaneous

Paragraph (f) requires that any party requesting the FDIC's consent pursuant to paragraph (d)(4), provide notice to the FDIC together with a statement of the basis upon the request is made, together with copies of all documentation supporting the request. This includes a copy of the applicable agreements (such as the transfer agreement and the security agreement) and of any applicable notices under the agreements.

Paragraph (g) of the Rule provides that the conservator or receiver will not seek to avoid an otherwise legally enforceable agreement that is executed by an insured depository institution in connection with a securitization solely because the agreement does not meet the "contemporaneous" requirement of 12 U.S.C. 1821(d)(9), 1821(n)(4)(I), or 1823(e).

Paragraph (h) of the Rule provides that the consents set forth in the Rule will not act to waive or relinquish any rights granted to the FDIC in any capacity, pursuant to any other applicable law or any agreement or contract except as specifically set forth in the Rule, and nothing contained in the section will alter the claims priority of the securitized obligations.

Paragraph (i) provides that except as specifically set forth in the Rule, the Rule does not authorize, and shall not be construed as authorizing the waiver of the prohibitions in 12 U.S.C. 1825(b)(2) against levy, attachment, garnishment, foreclosure, or sale of property of the FDIC, nor does it authorize nor shall it be construed as authorizing the attachment of any involuntary lien upon the property of the FDIC. The Rule should not be construed as waiving, limiting or otherwise affecting the rights or powers of the FDIC to take any action or to exercise any power not specifically mentioned, including but not limited to any rights, powers or remedies of the FDIC regarding transfers taken in contemplation of the institution's insolvency or with the intent to hinder, delay or defraud the institution or the creditors of such institution, or that is a fraudulent transfer under applicable law.

The right to consent under 12 U.S.C. 1821(e)(13)(C) or 12 U.S.C. 1825(b)(2) may not be assigned or transferred to any purchaser of property from the FDIC, other than to a conservator or bridge bank. The Rule can be repealed by the FDIC upon 30 days notice provided in the **Federal Register**, but any repeal will not apply to any issuance that complied with the Rule before such repeal.

V. Regulatory Procedure

A. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires an agency to provide a Regulatory Flexibility Analysis, unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603–605. The FDIC hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities, as that term applies to insured depository institutions.

[10] *See,* 12 U.S.C. 1821(e)(13).

B. Paperwork Reduction Act

This rule contains new information collection requirements subject to the Paperwork Reduction Act (PRA).

The burden estimates for the applications are as follows:

1. 10K Annual Report

Non Reg AB Compliant:

Estimated Number of Respondents: 50.

Affected Public: FDIC-insured depository institutions.

Frequency of Response: 1 time per year.

Average Time per Response: 27 hours.

Estimated Annual Burden: 1350 hours.

Reg AB Compliant:

Estimated Number of Respondents: 50.

Affected Public: FDIC-insured depository institutions.

Frequency of Response: 1 time per year.

Average Time per Response: 4.5 hours.

Estimated Annual Burden: 225 hours.

2. 8K—Disclosure Form

Non Reg AB Compliant:

Estimated Number of Respondents: 50.

Affected Public: FDIC-insured depository institutions.

Frequency of Response: 2 times per year.

Estimated Number of Annual Responses: 100.

Average Time per Response: 27 hours.

Estimated Annual Burden: 2,700 hours.

Reg AB Compliant:

Estimated Number of Respondents: 50.

Affected Public: FDIC-insured depository institutions.

Frequency of Response: 2 times per year.

Estimated Number of Annual Responses: 100.

Average Time per Response: 4.5 hour.

Estimated Annual Burden: 450 hours.

3. 10D Reports

Non Reg AB Compliant:

Estimated Number of Respondents: 50.

Affected Public: FDIC-insured depository institutions.

Frequency of Response: 5 times per year.

Estimated Number of Annual Responses: 250.

Average Time per Response: 27 hours.

Estimated Annual Burden: 6750 hours.

Reg AB Compliant:

Estimated Number of Respondents: 50.

Affected Public: FDIC-insured depository institutions.

Frequency of Response: 5 times per year.

Estimated Number of Annual Responses: 250.

Average Time per Response: 4.5 hours.

Estimated Annual Burden: 1,125 hours.

4. 12b–25

Estimated Number of Respondents: 100.

Affected Public: FDIC-insured depository institutions.

Frequency of Response: 1 time per year.

Estimated Number of Annual Responses: 100.

Average Time per Response: 2.5 hours.

Estimated Annual Burden: 250 hours.

C . Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the rule is not a "major rule" within the meaning of the relevant sections of the Small Business Regulatory Enforcement Act of 1996 ("SBREFA") (5 U.S.C. 801 *et seq.*). As required by SBREFA, the FDIC will file the appropriate reports with Congress and the General Accounting Office so that the rule may be reviewed.

List of Subjects in 12 CFR Part 360

Banks, Banking, Bank deposit insurance, Holding companies, National banks, Participations, Reporting and recordkeeping requirements, Savings associations, Securitizations.

■ For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation hereby amends 12 CFR part 360 as follows:

PART 360—RESOLUTION AND RECEIVERSHIP RULES

■ 1. The authority citation for part 360 continues to read as follows:

Authority: 12 U.S.C. 1821(d)(1), 1821(d)(10)(C), 1821(d)(11), 1821(e)(1), 1821(e)(8)(D)(i), 1823(c)(4), 1823(e)(2); Sec. 401(h), Pub. L. 101–73, 103 Stat. 357.

■ 2. Revise § 360.6 to read as follows:

§ 360.6 Treatment of financial assets transferred in connection with a securitization or participation.

(a) *Definitions.*

(1) *Financial asset* means cash or a contract or instrument that conveys to one entity a contractual right to receive cash or another financial instrument from another entity.

(2) *Investor* means a person or entity that owns an obligation issued by an issuing entity.

(3) *Issuing entity* means an entity that owns a financial asset or financial assets transferred by the sponsor and issues obligations supported by such asset or assets. Issuing entities may include, but are not limited to, corporations, partnerships, trusts, and limited liability companies and are commonly referred to as special purpose vehicles or special purpose entities. To the extent a securitization is structured as a multi-step transfer, the term issuing entity would include both the issuer of the obligations and any intermediate entities that may be a transferee. Notwithstanding the foregoing, a Specified GSE or an entity established or guaranteed by a Specified GSE shall not constitute an issuing entity.

(4) *Monetary default* means a default in the payment of principal or interest when due following the expiration of any cure period.

(5) *Obligation* means a debt or equity (or mixed) beneficial interest or security that is primarily serviced by the cash flows of one or more financial assets or financial asset pools, either fixed or revolving, that by their terms convert into cash within a finite time period, or upon the disposition of the underlying financial assets, and by any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders issued by an issuing entity. The term may include beneficial interests in a grantor trust, common law trust or similar issuing entity to the extent that such interests satisfy the criteria set forth in the preceding sentence, but does not include LLC interests, partnership interests, common or preferred equity, or similar instruments evidencing ownership of the issuing entity.

(6) *Participation* means the transfer or assignment of an undivided interest in all or part of a financial asset, that has all of the characteristics of a "participating interest," from a seller, known as the "lead," to a buyer, known as the "participant," without recourse to the lead, pursuant to an agreement between the lead and the participant. "Without recourse" means that the participation is not subject to any agreement that requires the lead to repurchase the participant's interest or to otherwise compensate the participant upon the borrower's default on the underlying obligation.

(7) *Securitization* means the issuance by an issuing entity of obligations for which the investors are relying on the cash flow or market value characteristics and the credit quality of transferred financial assets (together with any external credit support

permitted by this section) to repay the obligations.

(8) *Servicer* means any entity responsible for the management or collection of some or all of the financial assets on behalf of the issuing entity or making allocations or distributions to holders of the obligations, including reporting on the overall cash flow and credit characteristics of the financial assets supporting the securitization to enable the issuing entity to make payments to investors on the obligations. The term "servicer" does not include a trustee for the issuing entity or the holders of obligations that makes allocations or distributions to holders of the obligations if the trustee receives such allocations or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer.

(9) *Specified GSE* means each of the following:

(i) The Federal National Mortgage Association and any affiliate thereof;

(ii) Federal Home Loan Mortgage Corporation and any affiliate thereof;

(iii) The Government National Mortgage Association; and

(iv) Any federal or state sponsored mortgage finance agency.

(10) *Sponsor* means a person or entity that organizes and initiates a securitization by transferring financial assets, either directly or indirectly, including through an affiliate, to an issuing entity, whether or not such person owns an interest in the issuing entity or owns any of the obligations issued by the issuing entity.

(11) *Transfer* means:

(i) The conveyance of a financial asset or financial assets to an issuing entity or

(ii) The creation of a security interest in such asset or assets for the benefit of the issuing entity.

(b) *Coverage.* This section shall apply to securitizations that meet the following criteria:

(1) *Capital Structure and Financial Assets.* The documents creating the securitization must define the payment structure and capital structure of the transaction.

(i) *Requirements applicable to all securitizations:*

(A) The securitization shall not consist of re-securitizations of obligations or collateralized debt obligations unless the documents creating the securitization require that disclosures required in paragraph (b)(2) of this section are made available to investors for the underlying assets supporting the securitization at initiation and while obligations are outstanding; and

(B) The documents creating the securitization shall require that payment of principal and interest on the securitization obligation must be primarily based on the performance of financial assets that are transferred to the issuing entity and, except for interest rate or currency mismatches between the financial assets and the obligations, shall not be contingent on market or credit events that are independent of such financial assets. The securitization may not be an unfunded securitization or a synthetic transaction.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) The capital structure of the securitization shall be limited to no more than six credit tranches and cannot include "sub-tranches," grantor trusts or other structures. Notwithstanding the foregoing, the most senior credit tranche may include time-based sequential pay or planned amortization and companion sub-tranches; and

(B) The credit quality of the obligations cannot be enhanced at the issuing entity or pool level through external credit support or guarantees. However, the credit quality of the obligations may be enhanced by credit support or guarantees provided by Specified GSEs and the temporary payment of principal and/or interest may be supported by liquidity facilities, including facilities designed to permit the temporary payment of interest following appointment of the FDIC as conservator or receiver. Individual financial assets transferred into a securitization may be guaranteed, insured or otherwise benefit from credit support at the loan level through mortgage and similar insurance or guarantees, including by private companies, agencies or other governmental entities, or government-sponsored enterprises, and/or through co-signers or other guarantees.

(2) *Disclosures.*

The documents shall require that the sponsor, issuing entity, and/or servicer, as appropriate, shall make available to investors, information describing the financial assets, obligations, capital structure, compensation of relevant parties, and relevant historical performance data set forth in paragraph (b)(2) of this section.

(i) *Requirements applicable to all securitizations:*

(A) The documents shall require that, on or prior to issuance of obligations and at the time of delivery of any periodic distribution report and, in any event, at least once per calendar quarter, while obligations are outstanding, information about the obligations and the securitized financial assets shall be disclosed to all potential investors at the financial asset or pool level, as appropriate for the financial assets, and security-level to enable evaluation and analysis of the credit risk and performance of the obligations and financial assets. The documents shall require that such information and its disclosure, at a minimum, shall comply with the requirements of Securities and Exchange Commission Regulation AB, 17 CFR 229.1100 through 1123 (to the extent then in effect) or any successor disclosure requirements for public issuances, even if the obligations are issued in a private placement or are not otherwise required to be registered. Information that is unknown or not available to the sponsor or the issuer after reasonable investigation may be omitted if the issuer includes a statement in the offering documents disclosing that the specific information is otherwise unavailable;

(B) The documents shall require that, on or prior to issuance of obligations, the structure of the securitization and the credit and payment performance of the obligations shall be disclosed, including the capital or tranche structure, the priority of payments and specific subordination features; representations and warranties made with respect to the financial assets, the remedies for and the time permitted for cure of any breach of representations and warranties, including the repurchase of financial assets, if applicable; liquidity facilities and any credit enhancements permitted by this rule, any waterfall triggers or priority of payment reversal features; and policies governing delinquencies, servicer advances, loss mitigation, and write-offs of financial assets;

(C) The documents shall require that while obligations are outstanding, the issuing entity shall provide to investors information with respect to the credit performance of the obligations and the financial assets, including periodic and cumulative financial asset performance data, delinquency and modification data for the financial assets, substitutions and removal of financial assets, servicer advances, as well as losses that were allocated to such tranche and remaining balance of financial assets supporting such tranche, if applicable, and the percentage of each tranche in relation to the securitization as a whole; and

(D) In connection with the issuance of obligations, the documents shall require that the nature and amount of compensation paid to the originator, sponsor, rating agency or third-party advisor, any mortgage or other broker, and the servicer(s), and the extent to which any risk of loss on the underlying assets is retained by any of them for such securitization be disclosed. The securitization documents shall require the issuer to provide to investors while obligations are outstanding any changes to such information and the amount and nature of payments of any deferred compensation or similar arrangements to any of the parties.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) Prior to issuance of obligations, sponsors shall disclose loan level information about the financial assets including, but not limited to, loan type, loan structure (for example, fixed or adjustable, resets, interest rate caps, balloon payments, etc.), maturity, interest rate and/or Annual Percentage Rate, and location of property; and

(B) Prior to issuance of obligations, sponsors shall affirm compliance in all material respects with applicable statutory and regulatory standards for origination of mortgage loans, including that the mortgages are underwritten at the fully indexed rate relying on documented income, and comply with supervisory guidance governing the underwriting of residential mortgages, including the Interagency Guidance on Non-Traditional Mortgage Products, October 5, 2006, and the Interagency Statement on Subprime Mortgage Lending, July 10, 2007, and such other or additional guidance applicable at the time of loan origination. Sponsors shall disclose a third party due diligence report on compliance with such standards and the representations and warranties made with respect to the financial assets; and

(C) The documents shall require that prior to issuance of obligations and while obligations are outstanding, servicers shall disclose any ownership interest by the servicer or an affiliate of the servicer in other whole loans secured by the same real property that secures a loan included in the financial asset pool. The ownership of an obligation, as defined in this regulation, shall not constitute an ownership interest requiring disclosure.

(3) *Documentation and Recordkeeping.* The documents creating the securitization must specify the respective contractual rights and responsibilities of all parties and include the requirements described in paragraph (b)(3) of this section and use as appropriate any available standardized documentation for each different asset class.

(i) *Requirements applicable to all securitizations.* The documents shall define the contractual rights and responsibilities of the parties, including but not limited to representations and warranties and ongoing disclosure requirements, and any measures to avoid conflicts of interest; and provide authority for the parties, including but not limited to the originator, sponsor, servicer, and investors, to fulfill their respective duties and exercise their rights under the contracts and clearly distinguish between any multiple roles performed by any party.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) Servicing and other agreements must provide servicers with authority, subject to contractual oversight by any master servicer or oversight advisor, if any, to mitigate losses on financial assets consistent with maximizing the net present value of the financial asset. Servicers shall have the authority to modify assets to address reasonably foreseeable default, and to take other action to maximize the value and minimize losses on the securitized financial assets. The documents shall require that the servicers apply industry best practices for asset management and servicing. The documents shall require the servicer to act for the benefit of all investors, and not for the benefit of any particular class of investors, that the servicer must commence action to mitigate losses no later than ninety (90) days after an asset first becomes delinquent unless all delinquencies on such asset have been cured, and that the servicer maintains records of its actions to permit full review by the trustee or other representative of the investors; and

(B) The servicing agreement shall not require a primary servicer to advance delinquent payments of principal and interest for more than three payment periods, unless financing or reimbursement facilities are available, which may include, but are not limited to, the obligations of the master servicer or issuing entity to fund or reimburse the primary servicer, or alternative reimbursement facilities. Such "financing or reimbursement facilities" under this paragraph shall not be dependent for repayment on foreclosure proceeds.

(4) *Compensation.* The following requirements apply only to securitizations in which the financial assets include any residential mortgage loans. Compensation to parties involved in the securitization of such financial assets must be structured to provide incentives for sustainable credit and the long-term performance of the financial assets and securitization as follows:

(i) The documents shall require that any fees or other compensation for services payable to credit rating agencies or similar third-party evaluation companies shall be payable, in part, over the five (5) year period after the first issuance of the obligations based on the performance of surveillance services and the performance of the financial assets, with no more than sixty (60) percent of the total estimated compensation due at closing; and

(ii) The documents shall provide that compensation to servicers shall include incentives for servicing, including payment for loan restructuring or other loss mitigation activities, which maximizes the net present value of the financial assets. Such incentives may include payments for specific services, and actual expenses, to maximize the net present value or a structure of incentive fees to maximize the net present value, or any combination of the foregoing that provides such incentives.

(5) *Origination and Retention Requirements.*

(i) *Requirements applicable to all securitizations.*

(A) Prior to the effective date of regulations required under new Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.,* added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the documents shall require that the sponsor retain an economic interest in a material portion, defined as not less than five (5) percent, of the credit risk of the financial assets. This retained interest may be either in the form of an interest of not less than five (5) percent in each of the credit tranches sold or transferred to the investors or in a representative sample of the securitized financial assets equal to not less than five (5) percent of the principal amount of the financial assets at transfer. This retained interest may not be sold or pledged or hedged, except for the hedging of interest rate or currency risk, during the term of the securitization.

(B) Upon the effective date of regulations required under new Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.,* added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, such final regulations shall exclusively govern the requirement to retain an economic interest in a portion of the credit risk of the financial assets under this rule.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) The documents shall require the establishment of a reserve fund equal to at least five (5) percent of the cash proceeds of the securitization payable to the sponsor to cover the repurchase of any financial assets required for breach of representations and warranties. The balance of such fund, if any, shall be released to the sponsor one year after the date of issuance.

(B) The documents shall include a representation that the assets shall have been originated in all material respects in compliance with statutory, regulatory, and originator underwriting standards in effect at the time of origination. The documents shall include a representation that the mortgages included in the securitization were underwritten at the fully indexed rate, based upon the borrowers' ability to repay the mortgage according to its terms, and rely on documented income and comply with all existing supervisory guidance governing the underwriting of residential mortgages, including the Interagency Guidance on Non-Traditional Mortgage Products, October 5, 2006, and the Interagency Statement on Subprime Mortgage Lending, July 10, 2007, and such other or additional regulations or guidance applicable to insured depository institutions at the time of loan origination. Residential mortgages originated prior to the issuance of such guidance shall meet all supervisory guidance governing the underwriting of residential mortgages then in effect at the time of loan origination.

(c) *Other requirements.* (1) The transaction should be an arms length, bona fide securitization transaction. The documents shall require that the obligations issued in a securitization shall not be predominantly sold to an affiliate (other than a wholly-owned subsidiary consolidated for accounting and capital purposes with the sponsor) or insider of the sponsor;

(2) The securitization agreements are in writing, approved by the board of directors of the bank or its loan committee (as reflected in the minutes of a meeting of the board of directors or committee), and have been, continuously, from the time of execution in the official record of the bank;

(3) The securitization was entered into in the ordinary course of business, not in contemplation of insolvency and with no intent to hinder, delay or defraud the bank or its creditors;

(4) The transfer was made for adequate consideration;

(5) The transfer and/or security interest was properly perfected under the UCC or applicable state law;

(6) The transfer and duties of the sponsor as transferor must be evidenced in a separate agreement from its duties, if any, as servicer, custodian, paying agent, credit support provider or in any capacity other than the transferor; and

(7) The documents shall require that the sponsor separately identify in its financial asset data bases the financial assets transferred into any securitization and maintain an electronic or paper copy of the closing documents for each securitization in a readily accessible form, a current list of all of its outstanding securitizations and issuing entities, and the most recent Form 10–K, if applicable, or other periodic financial report for each securitization and issuing entity. The documents shall provide that to the extent serving as servicer, custodian or paying agent for the securitization, the sponsor shall not comingle amounts received with respect to the financial assets with its own assets except for the time, not to exceed two business days, necessary to clear any payments received. The documents shall require that the sponsor shall make these records readily available for review by the FDIC promptly upon written request.

(d) *Safe harbor*—(1) Participations. With respect to transfers of financial assets made in connection with participations, the FDIC as conservator or receiver shall not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership any such transferred financial assets, provided that such transfer satisfies the conditions for sale accounting treatment under generally accepted accounting principles, except for the "legal isolation" condition that is addressed by this section. The foregoing paragraph shall apply to a last-in, first-out participation, provided that the transfer of a portion of the financial asset satisfies the conditions for sale accounting treatment under generally accepted accounting principles that would have applied to such portion if it had met the definition of a "participating interest," except for the "legal isolation" condition that is addressed by this section.

(2) *Transition period safe harbor.* With respect to:

(i) Any participation or securitization for which transfers of financial assets were made on or before December 31, 2010 or

(ii) Any obligations of revolving trusts or master trusts, for which one or more obligations were issued as of the date of adoption of this rule, or

(iii) Any obligations issued under open commitments up to the maximum amount of such commitments as of the date of adoption of this rule if one or more obligations were issued under such commitments on or before December 31, 2010, the FDIC as conservator or receiver shall not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership the transferred financial assets notwithstanding that the transfer of such financial assets does not satisfy all conditions for sale accounting treatment under generally accepted accounting principles as effective for reporting periods after November 15, 2009, provided that such transfer satisfied the conditions for sale accounting treatment under generally accepted accounting principles in effect for reporting periods before November 15, 2009, except for the "legal isolation" condition that is addressed by this paragraph and the transaction otherwise satisfied the provisions of § 360.6 in effect prior to the effective date of this regulation.

(3) *For securitizations meeting sale accounting requirements.* With respect to any securitization for which transfers of financial assets were made after December 31, 2010, or from a master trust or revolving trust established after adoption of this rule or from any open commitments that do not meet the requirements of paragraph (d)(2) of this section, and which complies with the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section, the FDIC as conservator or receiver shall not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership such transferred financial assets, provided that such transfer satisfies the conditions for sale accounting treatment under generally accepted accounting principles in effect for reporting periods after November 15, 2009, except for the "legal isolation" condition that is addressed by this paragraph (d)(3).

(4) *For securitization not meeting sale accounting requirements.*

With respect to any securitization for which transfers of financial assets were made after December 31, 2010, or from a master trust or revolving trust established after adoption of this rule or from any open commitments that do not meet the requirements of paragraph (d)(2) or (d)(3) of this section, and which complies with the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section, but where the transfer does not satisfy the conditions for sale accounting treatment set forth by generally accepted accounting principles in effect for reporting periods after November 15, 2009:

(i) *Monetary default.* If at any time after appointment, the FDIC as conservator or receiver is in a monetary default under a securitization due to its failure to pay or apply collections from the financial assets received by it in accordance with the securitization documents, whether as servicer or otherwise, and remains in monetary default for ten (10) business days after actual delivery of a written notice to the FDIC pursuant to paragraph (f) of this section requesting the exercise of contractual rights because of such monetary default, the FDIC hereby consents pursuant to 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2) to the exercise of any contractual rights in accordance with the documents governing such securitization, including but not limited to taking possession of the financial assets and exercising self-help remedies as a secured creditor under the transfer agreements, provided no involvement of the receiver or conservator is required other than such consents, waivers, or execution of transfer documents as may be reasonably requested in the ordinary course of business in order to facilitate the exercise of such contractual rights. Such consent shall not waive or otherwise deprive the FDIC or its assignees of any seller's interest or other obligation or interest issued by the issuing entity and held by the FDIC or its assignees, but shall serve as full satisfaction of the obligations of the insured depository institution in conservatorship or receivership and the FDIC as conservator or receiver for all amounts due.

(ii) *Repudiation.* If the FDIC as conservator or receiver provides a written notice of repudiation of the securitization agreement pursuant to which the financial assets were transferred, and the FDIC does not pay damages, defined in this paragraph, within ten (10) business days following the effective date of the notice, the FDIC hereby consents pursuant to 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2) to the exercise of any contractual rights in accordance with the documents governing such securitization, including but not limited to taking possession of the financial assets and exercising self-help remedies as a secured creditor under the transfer agreements, provided no involvement of the receiver or conservator is required other than such consents, waivers, or execution of transfer documents as may be reasonably requested in the ordinary course of business in order to facilitate the exercise of such contractual rights. For purposes of this paragraph, the damages due shall be in an amount equal to the par value of the obligations outstanding on the date of appointment of the conservator or receiver, less any payments of principal received by the investors through the date of repudiation, plus unpaid, accrued interest through the date of repudiation in accordance with the contract documents to the extent actually received through payments on the financial assets received through the date of repudiation. Upon payment of such repudiation damages, all liens or claims on the financial assets created pursuant to the securitization documents shall be released. Such consent shall not waive or otherwise deprive the FDIC or its assignees of any seller's interest or other obligation or interest issued by the issuing entity and held by the FDIC or its assignees, but shall serve as full satisfaction of the obligations of the insured depository institution in conservatorship or receivership and the FDIC as conservator or receiver for all amounts due.

(iii) *Effect of repudiation.* If the FDIC repudiates or disaffirms a securitization agreement, it shall not assert that any interest payments made to investors in accordance with the securitization documents before any such repudiation or disaffirmance remain the property of the conservatorship or receivership.

(e) *Consent to certain actions.* Prior to repudiation or, in the case of a monetary default referred to in paragraph (d)(4)(i) of this section, prior to the effectiveness of the consent referred to therein, the FDIC as conservator or receiver consents pursuant to 12 U.S.C. 1821(e)(13)(C) to the making of, or if serving as servicer, shall make, the payments to the investors to the extent actually received through payments on the financial assets (but in the case of repudiation, only to the extent supported by payments on the financial assets received through the date of the giving of notice of repudiation) in accordance with the securitization documents, and, subject to the FDIC's rights to repudiate such agreements, consents to any servicing activity required in furtherance of the securitization or, if acting as servicer the FDIC as receiver or conservator shall perform such servicing activities in accordance with the terms of the applicable servicing agreements, with respect to the financial assets included in securitizations that meet the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section.

(f) *Notice for consent.* Any party requesting the FDIC's consent as conservator or receiver under 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2) pursuant to paragraph (d)(4)(i) of this section shall provide notice to the Deputy Director, Division of Resolutions and Receiverships, Federal Deposit Insurance Corporation, 550 17th Street, NW., F–7076, Washington, DC 20429–0002, and a statement of the basis upon which such request is made, and copies of all documentation supporting such request, including without limitation a copy of the applicable agreements and of any applicable notices under the contract.

(g) *Contemporaneous requirement.* The FDIC will not seek to avoid an otherwise legally enforceable agreement that is executed by an insured depository institution in connection with a securitization or in the form of a participation solely because the agreement does not meet the "contemporaneous" requirement of 12 U.S.C. 1821(d)(9), 1821(n)(4)(I), or 1823(e).

(h) *Limitations.* The consents set forth in this section do not act to waive or relinquish any rights granted to the FDIC in any capacity, pursuant to any other applicable law or any agreement or contract except as specifically set forth herein. Nothing contained in this section alters the claims priority of the securitized obligations.

(i) *No waiver.* Except as specifically set forth herein, this section does not authorize, and shall not be construed as authorizing the waiver of the prohibitions in 12 U.S.C. 1825(b)(2) against levy, attachment, garnishment, foreclosure, or sale of property of the FDIC, nor does it authorize nor shall it be construed as authorizing the attachment of any involuntary lien upon the property of the FDIC. Nor shall this section be construed as waiving, limiting or otherwise affecting the rights or powers of the FDIC to take any action or to exercise any power not specifically mentioned, including but not limited to any rights, powers or remedies of the FDIC regarding transfers or other conveyances taken in contemplation of the institution's insolvency or with the intent to hinder, delay or defraud the institution or the creditors of such institution, or that is a fraudulent transfer under applicable law.

(j) *No assignment.* The right to consent under 12 U.S.C. 1821(e)(13)(C) or 12 U.S.C. 1825(b)(2), may not be assigned or transferred to any purchaser of property from the FDIC, other than to a conservator or bridge bank.

(k) *Repeal.* This section may be repealed by the FDIC upon 30 days notice provided in the **Federal Register**, but any repeal shall not apply to any issuance made in accordance with this section before such repeal.

By order of the Board of Directors.

Dated at Washington, DC, this 27th day of September 2010.

Robert E. Feldman,

Executive Secretary, Federal Deposit Insurance Corporation.

[FR Doc. 2010–24595 Filed 9–28–10; 4:15 pm]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0907; Directorate Identifier 2010–SW–044–AD; Amendment 39–16436; AD 2010–20–02]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France (Eurocopter) Model AS332C, L, L1, and L2 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) for the specified Eurocopter model helicopters. This action requires replacing each affected hydraulic pump with an airworthy hydraulic pump. This amendment is prompted by the loss of the proper functioning of a hydraulic pump because of the deterioration of the pump seals and the loss of hydraulic fluid caused by incorrect positioning of the piston liner. The actions specified in this AD are intended to prevent loss of hydraulic power and subsequent loss of control of the helicopter.

DATES: Effective October 15, 2010.

Comments for inclusion in the Rules Docket must be received on or before November 29, 2010.

ADDRESSES: Use one of the following addresses to submit comments on this AD:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You may get the service information identified in this AD from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, TX 75053–4005, telephone (800) 232–0323, fax (972) 641–3710, or at *http://www.eurocopter.com.*

Examining the Docket: You may examine the docket that contains the AD, any comments, and other information on the Internet at *http://www.regulations.gov,* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Operations office (telephone (800) 647–5527) is located in Room W12–140 on the ground floor of the West Building at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Ed Cuevas, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Safety Management Group, 2601 Meacham Blvd., Fort Worth, Texas 76137, telephone (817) 222–5355, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Emergency AD No. 2010–0043R1–E, dated March 26, 2010, to correct an unsafe condition for the specified Eurocopter model helicopters. EASA advises of the loss of the right-hand (RH) hydraulic power system on an AS332L2 helicopter. The pilot saw the hydraulic system "low level" warning light come on during the approach phase. Investigation revealed a hydraulic fluid leak from the hydraulic pump casing due to deterioration of the pump seals resulting from an incorrectly positioned compensating piston liner. EASA states that this non-compliant repair process was used by the following repair stations: HELIKOPTER SERVICE, ASTEC HELICOPTER SERVICE, and HELI-ONE. They further state that if this condition occurs on both pumps of a helicopter, it could result in loss of the RH and left-hand (LH) hydraulic power systems and consequently may lead to the loss of helicopter controllability.

Related Service Information

Eurocopter has issued an Emergency Alert Service Bulletin (EASB) with two numbers (01.00.78 and 01.00.43), dated March 11, 2010. EASB No. 01.00.78 applies to United States type-certificated Model AS332C, L, L1, and L2 helicopters; civil Model AS332C1 not type-certificated in the United States; and military Model AS332B, B1, M, M1, and F1 helicopters that are not type-certificated in the United States. EASB No. 01.00.43 applies to military Model AS532A2, U2, UC, AC, UL, AL, SC, and UE helicopters that are not type-certificated in the United States. The EASB specifies identifying affected hydraulic pumps, prohibiting flights for all helicopters fitted with two of the affected hydraulic pumps until at least one of the affected pumps is replaced, replacing all affected hydraulic pumps with airworthy pumps within 10 months, and returning any affected hydraulic pump to have it checked and, where necessary, reconditioned.

EASA classified this EASB as mandatory and issued EASA Emergency AD No. 2010–0043R1–E, dated March 26, 2010, to ensure the continued airworthiness of these helicopters.

FAA's Evaluation and Unsafe Condition Determination

These helicopters have been approved by the aviation authority of France and are approved for operation in the United States. Pursuant to our bilateral agreement with France, EASA, their technical representative, has notified us of the unsafe condition described in the EASA AD. We are issuing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs.

Differences Between This AD and the EASA AD

We refer to flight hours as hours time-in-service (TIS). We require each affected hydraulic pump be replaced with an airworthy pump within 15 hours TIS. We do not use the calendar date used in the EASA AD because that date has already passed.

FAA's Determination and Requirements of This AD

This unsafe condition is likely to exist or develop on other helicopters of the same type design. Therefore, this AD is