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February 22, 2010

VIA ELECTRONIC FILING

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Treatment by the Federal Deposit Insurance Corporation ("FDIC") as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution ("IDI") in Connection With a Securitization or Participation After March 31, 2010

RIN # 3064-AD55

Dear Mr. Feldman:

Wells Fargo & Company ("Wells Fargo") welcomes the opportunity to comment on the Advance Notice of Proposed Rulemaking entitled "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 March 31, 2010," which was published in the Federal Register on January 7, 2010 (the "ANPR").

INTRODUCTION

We are at a pivotal junction in determining the future of securitizations, as any new regulations will have a profound effect on whether securitizations continue to be viable. The ANPR states, "The FDIC supports sustainable securitizations to provide balance sheet liquidity and, where appropriate, off balance sheet transactions that enhance prudent credit availability." However, there are numerous examples of unintended, negative consequences resulting from well-intentioned regulations. Therefore, if the FDIC fully believes in the value of securitizations in helping to propel the economy forward, we need to be clear about the causes of the failures in securitizations and try to remedy such failures in a careful and prudent manner. We recommend that the FDIC provide a clear safe harbor without the numerous conditions contained in the ANPR. Separately, the FDIC should also engage other regulators and legislators to work together in providing a framework for regulation which will help to restart a sound, stable and vibrant securitization market.

THE SAFE HARBOR CANNOT BE EFFECTIVE AS PROPOSED

We understand and agree with the desire of the FDIC for a more stable securitization market. However, using the FDIC's legal isolation safe harbor as the entry point for comprehensive and substantive regulation of the securitization markets is not the appropriate method by which to achieve this result because it will lead to very detrimental consequences. First, the party who would have the responsibility for compliance with the conditions of the safe harbor (the depositor, issuing entity or other seller of all or a portion of assets into a securitization) is not the same party who will suffer injury due to non-compliance with those conditions. Instead, investors would bear the burden of contract repudiation or other actions that could be taken by the FDIC. In addition, attempting to use the safe harbor as the basis for sweeping regulation would create uncertainty for investors at the inception of a securitization because compliance would only be determined after the event of the bankruptcy of an IDI. Finally, the FDIC would be making this determination at the precise moment when it has a tangible economic interest in the outcome. Each of these problems would produce new barriers to the restart of a viable securitization market, and we summarize those problems in more detail below.

Specifically, under the current FDIC proposal, it is investors who will be punished for the non-compliance by the IDI with the rules contained in the ANPR if a securitization contract is repudiated. Further, an assessment will be made by the FDIC about whether the preconditions to the safe harbor have been satisfied at the very time when third party investors would be most reliant upon the terms of the safe harbor, namely, when an IDI is put into receivership by the FDIC. This will mean that when an investor makes a decision about whether or not to purchase an asset-backed security, it would be unaware at that time whether or not the specific transaction would comply with the legal isolation safe harbor, both because of the difficulty in obtaining certainty regarding whether all the relevant rules involving disclosures or other "up front" requirements were satisfied, but also because some of the proposed rules involve compliance with periodic reporting or other ongoing matters that only occur at a later date. Thus, using the safe harbor as the means for substantive regulation of securitizations will be undesirable, since the parties who will bear the risk of noncompliance with such regulation will be unable to assess their risk when purchasing asset-backed securities.

Furthermore, upon a bankruptcy of an IDI, the FDIC will be the sole judge of compliance with the safe harbor. Presumably, this exercise of judgment will need to occur on a case-by-case basis for each securitization. However, at that point, the FDIC, as receiver or conservator, will have an economic interest in the outcome and, therefore, a "springing" conflict of interest will arise. In this regard, especially because some of the proposed rules are quite subjective (for example, a determination that the representations and warranties were the "market standard" at the time of securitization), it may not be very difficult for the FDIC to make an argument for non-compliance and contract repudiation, when the economic incentives are so great to do so.

As drafted, the safe harbor will be of no use to market participants for the reason that investors require certainty. For example, at the close of a securitization transaction, investors and rating agencies would likely require an opinion from a law firm stating that the safe harbor would be available. However, such an opinion would be impossible to render without substantial qualifications that would render the opinion virtually useless. The sheer number of requirements contained in the ANPR increases the complexity of analyzing compliance. In addition, any opinion that might possibly be given would only be good as of the closing date of the securitization because many of the requirements are on-going; a transaction that may have complied at issuance could later violate a provision of the safe harbor. Therefore, by their very nature, the conditions contained in the ANPR are inconsistent with providing an effective safe harbor.

USING A SAFE HARBOR AS A WAY TO REGULATE THE SECURITIZATION MARKET IS INAPPROPRIATE

We are very concerned that the FDIC is not considering the ANPR in conjunction with pending legislative and regulatory proposals that deal with similar matters. The result of this may be inconsistent regulations and voluminous requirements imposed on the securitization market that will likely change based on new Congressional actions and further proposals from other federal agencies. For example, the U.S. Congress is actively considering legislation that would apply to securitizations, including risk retention parameters. In addition, the SEC has indicated that it is close to proposing significant changes to Regulation AB. The FDIC should allow these processes to continue and work in conjunction with such regulations. As stated above, a unilateral undertaking by the FDIC to promulgate extensive regulations through the applicability of the legal isolation safe harbor is not the appropriate route for proposed federal regulations. A better approach would be for regulatory reform to result from a collaboration among all of the relevant federal regulatory agencies which, in addition to the FDIC, should include the SEC, the OCC, the OTS and the Federal Reserve. Only a multi-agency approach to regulations would be able to achieve any desired results. Accordingly, we have provided comments below to many of the substantive provisions of the ANPR to express some of our opinions on any multi-regulatory agency dialogue that may occur as a result of the ANPR.

THE ANPR ASSUMES ONE SIZE FITS ALL FOR RMBS TRANSACTIONS, AND THIS WILL NEGATIVELY IMPACT CREDIT AVAILABILITY AND AFFORDABILITY FOR CONSUMERS

As the largest originator of residential mortgage loans in the nation, Wells Fargo is particularly concerned that some of the standards proposed for the RMBS market would represent regulatory "overkill", especially since the ANPR does not seem to make any distinctions regarding the various sub-sectors of the residential mortgage market. Our view is that a "one size fits all" set of standards is undiscerning and may negatively impact the availability of mortgage loans as well as likely drive up the cost of housing credit even for prime-credit residential mortgage loans. These results may prolong the current economic environment that is marked by substantial financial difficulties for consumers.

Risk Retention

At least two of the proposals included in the ANPR need to be seriously reconsidered as they may be applied to the RMBS market. One of these proposals is the risk retention requirement. There are two major issues here. First, as discussed in more detail above, the FDIC should consider legislation currently being examined by Congress on this matter since risk retention provisions are included in both the pending Senate and House bills related to financial regulatory reforms. Secondly, the ANPR questions regarding the proposed origination and retention requirements are preceded by the following statement: "if a sponsor were required to retain an economic interest in the asset pool without hedging the risk of such portion, the sponsor would be less likely to originate low quality financial assets." In this connection, we recognize that one of the causes of the distress in the mortgage and housing markets was a lack of alignment of incentives among borrowers, lenders and investors in the subprime and "Alternative A" residential sectors. However, to the extent that risk retention as a type of "skin in the game" proposal is intended to align those incentives for the creation of better quality assets, there are compelling reasons why risk retention need not apply to prime credit mortgage loans. The first reason is that by definition these mortgage loans are already underwritten to a higher standard and the high quality underwriting characteristics of the originations can be confirmed by loan level transparency and disclosure from the sponsor of the securitization. In addition, other mechanisms can be effective to achieve "skin in the game" and align the incentives of transaction parties. In this regard, RMBS market participants certainly recognize the need for improvements and have been developing enhanced due diligence procedures, very specific loan level transparency standards, extensive sets of loan level representations and warranties, and repurchase governance standards to be set forth in new securitization contracts that will clearly delineate the responsibilities of designated parties and specify the procedures that would need to be followed regarding possible breaches of the representations and warranties.

Another large concern related to mandated risk retention involves the substantial changes recently adopted by the FASB, and the potential related impact on private label, "plain vanilla," prime RMBS transactions. While the current accounting interpretations following the implementation of FAS 166/167 seem to indicate that retaining a 5% interest in each credit tranche may still allow for sale-accounting treatment, these rules are relatively new and subject to further review and interpretation. In addition, and of major importance, we cannot be certain that a federally mandated risk retention requirement, even at the 5% level such as the proposal from the FDIC, will not prompt a change in accounting interpretations deeming such 5% retention "significant" and cause such RMBS securitizations to lose their sale-accounting treatment. Based upon conversations with representatives from some of the large accounting firms, we have reason to believe that this may be the case.

Loan Seasoning

Another proposal that we believe does not need to be applied to residential mortgage loans, and particularly to prime credit loans, is that all such loans must have been originated more than 12 months prior to their transfer into a securitization vehicle. This seasoning requirement appears to be prompted by the reference in the ANPR that there was a "high number of early payment defaults in some securitizations during the crisis." This statement may be true for some securitizations; however, those securitizations were predominantly backed by subprime and "Alternative A" mortgage loans. Early stage defaults were not a significant problem for securitizations of prime credit residential mortgage loans. Further, industry participants have expended massive efforts to improve quality control, and have implemented new fraud prevention and detection mechanisms designed to reduce early payment defaults. In addition, a twelve month seasoning requirement would unduly restrict investment options. Many investors prefer purchasing securities backed by newly-originated residential loans, and they do not wish to be limited to investing only in later period cash flows. As discussed elsewhere in this letter, having a broad investor base facilitates a stronger, more stable securitization market. Once again, rather than a seasoning requirement, we believe that loan level transparency and disclosure, due diligence procedures, and extensive representations and warranties together with related repurchase governance standards, would be sufficient to accommodate the securitization of newly-originated residential mortgage loans and, particularly, prime credit mortgage loans.

Consumer Credit Affordability and Availability

It should also be stressed that a dominant feature of the current residential mortgage origination market is that the underwriting standards typically applied are prime or even "super-prime" in nature. However, the cost differential to the borrower between conventional conforming mortgage loans that are within the Fannie Mae and Freddie Mac loan balance limits and prime credit mortgage loans that exceed those limits is historically wide (very recently, a difference in the mortgage coupon rate of approximately 75 basis points for a 30 year fixed rate loan). One of the major reasons for this wide differential is that the private label RMBS market for new issuances is essentially closed. While we agree that the adoption of well-balanced and transparent market standards and practices is needed to guide all types of new securitizations, we are extremely concerned that applying some of the "cures" proposed in the ANPR to all non-conforming jumbo residential originations (especially the risk retention and loan seasoning requirements) would likely delay the much needed restart of a vibrant private label RMBS market. Such a delay would likely exacerbate the current economic environment in which credit availability is constricted because of the lack of liquidity for mortgage lenders. This delay will also be expected to lengthen the time that the current wide interest rate differential will be maintained between prime conforming and prime jumbo mortgage loans.

In addition, to the extent that the proposed risk retention and loan seasoning requirements were mandated as conditions of restarting the private label RMBS market, substantial capital and hedging costs for loan originators would arise and likely be passed along to borrowers. In an attempt to quantify these incremental costs, we assessed the relative impact on mortgage coupon rates from the potential execution of the sale of prime-credit and newly-originated 30 year, fixed rate, jumbo mortgage loans through a private label RMBS issuance without any mandated risk retention requirement, and we compared that potential execution to either: (1) a similar RMBS transaction that could occur only after the identical loans were seasoned for twelve months, and (2) a similar RMBS transaction with full balance sheet consolidation because, as discussed above, a 5% mandated risk retention requirement might produce consolidation under FAS 166/167 (meaning that *all* of the underlying assets and liabilities may need to be consolidated by the sponsor of the securitization and remain on balance sheet during the entire life of the mortgage loans). The result of this assessment was that we estimated that the mortgage rate charged to the borrower would likely increase by approximately 50 to 100 basis points with the adoption of loan seasoning requirements or such mandated risk retention. This estimate, which we believe is relatively conservative, took into account incremental capital and hedging costs as well as repurchase reserves for possible breaches of representations and warranties that would need to be held in connection with the securitization.

Based on the foregoing, if the FDIC's proposals are adopted, we are concerned that a narrowing of the differential between conforming and non-conforming mortgage rates may not occur; rather, there may even be further widening. In addition, credit availability may remain restricted. It should also be noted that such substantially higher mortgage rates would be the result even for loans with principal balances only slightly over the Fannie Mae and Freddie Mac loan limits and where identical underwriting guidelines were applied.

We recognize that in order to exempt prime residential mortgage loans from any risk retention or loan seasoning requirement as we would propose, an acceptable definition of a "prime" mortgage loan would be needed. In this regard, we look forward to working with the FDIC and other federal regulators to help develop appropriate guidelines for such a definition that might apply to private label RMBS transactions.

MANY OF THE SUBSTANTIVE PROVISIONS PROPOSED IN THE ANPR ARE UNNECESSARY, EXCESSIVE OR UNCLEAR

While the above discussion focuses on RMBS, this is only one example of the adverse impact that could result from mandated risk retention provisions. Since the FDIC proposes to apply these provisions to all asset classes, a similar type of analysis could be done for other high quality assets types, such as prime auto loans and leases, as well as prime credit card receivables. Therefore, we believe that risk retention is unnecessary for other prime assets due to their inherent enhanced quality. Additionally, many of the alternative mechanisms discussed above for aligning the interests of borrowers, originators and investors to produce higher quality assets would be equally applicable to these other asset types. Further, rigid risk retention requirements should not be applied to the CMBS market in view of the unique characteristics of CMBS transactions, such as special servicing powers and various investor rights built into almost all of these transactions.

Unclear and Subjective Standards

The specific risk retention proposals are also unclear and would lead to substantial uncertainty for the securitization markets. First, the sponsor of a securitization must retain at least an economic interest in a material portion, defined as not less than 5%, of the credit risk of the financial assets. This retained interest may be either in the form of an interest in each of the credit tranches of the securitization or in a representative sample of the securitized financial assets equal to at least 5% of the principal amount of the financial assets at transfer. This is uncertain in both its scope and its duration. It is also unclear how this 5% would be calculated. For example, would the FDIC require 5% in terms of par value or 5% in terms of the market value? If a sponsor retained an interest in each of the credit tranches, does it have to be an equal percentage or is the sponsor free to choose the retained percentage of each tranche? What would constitute a representative sample of the securitized financial asset? Would "similar" or "comparable" loans held in the portfolio of the IDI count toward the 5% representative sample? Furthermore, is there a duration requirement for such retention? In other words, does the IDI have to retain a 5% interest for the entire life of the deal? Does this 5% have to be held constant as the economics of a deal change? Would the 5% credit tranche retention requirement include a requirement to hold residual tranches, which have significantly lower retention thresholds for triggering consolidation under FAS 166/167?

The ANPR also contains statements mandating compliance with current market standards. Not only are market standards unclear and subjective, standards evolve over time, and many times for the better. For example, the ANPR requires that the representations and warranties related to the underlying financial assets are "consistent with industry best practices." There is no one defined standard for representations and warranties. While there has been an effort on the part of the market participants to develop appropriate guidelines with respect to this issue, these guidelines provide for flexibility for different types of financial assets and different circumstances. Furthermore, if there is a variance from the market standard, the FDIC's judgment as to what is "best" may vary from a rating agency's, investor's and sponsor's view of what is "best." Another example is the requirement that sponsors "use as appropriate any available standardized documentation for each different asset class." Again, this is extremely unclear. In addition, as transactions vary due to differences in assets, investor preferences, etc., the documents should vary accordingly. At what point does a variance in "standardized documentation," if such standardized documentation ever exists, constitute going too far so as to cause a transaction to lose its safe harbor reliance? As stated above, any provisions in the ANPR that are unclear or subjective will preclude market participants from relying upon the safe harbor.

Excessive and Unwarranted Provisions

<u>Credit Tranche Limitations</u>

There are also aspects of the ANPR which do not seem to achieve the goal of enhancing safety and soundness in securitization transactions. For example, the limitation that residential mortgage loan securitizations have no more than six credit tranches appears arbitrary and unnecessary. There is no evidence of a correlation between the number of credit tranches and the performance of a securitization. Furthermore, sponsors generally create tranches at the request of investors to cater to investors' individual investing needs, such as a certain maturity date or an interest-only security. The markets are more efficient by having a broad base of investors, and the only way to achieve this is to allow for tailored tranches addressing individual investor needs.

<u>External Credit Support</u>

Similarly, banning monoline insurers and other parties from providing credit support would not seem to have the desired effect of encouraging safety and soundness in the securitization markets. There is no evidence that these deals have performed any worse; therefore, the utility of such prohibitions is unclear. Further, many investors request external credit support for securitized transactions.

<u>Private Placements</u>

Requiring that all private placement transactions comply with SEC Regulation AB disclosure will bar certain market participants from accessing the securitization markets because they would be unable to comply with the complete provisions of Regulation AB. Such a rigid rule would not allow for any flexibility in disclosure. For example, a mortgage loan originator or sponsor may be able to provide almost every aspect of Regulation AB disclosure but may fall short in minor, immaterial ways. Under the ANPR, this originator or sponsor would be shut out of the securitization market. In addition, this requirement does not take into account the benefits of allowing flexibility of the private securitization market for sophisticated investors. One would expect that failing to completely comply with Regulation AB disclosure would be reflected in the pricing of a transaction, namely, investors would demand a higher return if they perceive there to be an increased risk because of the unavailability of certain information. Thus, investors should be afforded the flexibility to decide whether the failure to fully comply with Regulation AB results in greater risk.

Re-Securitizations

A similar argument can be made for re-securitizations. While it is clear that often disclosure about the underlying assets is important, if a seller is unable to comply with this requirement for only a small portion of the deal (for example, only for a handful of mortgage loans), such a transaction should not be completely prohibited from the marketplace. Rather, this shortcoming should be disclosed to potential investors so that they can make the appropriate risk and price adjustments. In addition, as a useful credit tool for balance sheet risk management, a sponsor may re-securitize securities that it did not issue itself. In such instances, the underlying information may not be available, which, coupled with the fact that all transactions need to be in compliance with Regulation AB, may eliminate appropriate re-securitizations in cases where the underlying securities were not originally issued by the sponsor.

Compensation

The way that the ANPR is currently drafted, it is unclear as to specifically which fees are required to be disclosed in a securitization transaction. Compensation payments that come from the assets of the trust should be disclosed and, for the most part, are disclosed. However, requiring compensation disclosure for payments that are not coming from the income of the trust would require entities to disclose confidential pricing information. This may deter innovative vendors from wanting to transact business with securitization market participants. In addition, pricing information can often be misleading. Fees vary based on relationships, deal volume, basic contract negotiation, and a myriad of other factors that are irrelevant to the riskiness of a transaction. For example, a law firm may charge less to a client when they handle a high volume of similar transactions, while they may charge a lower volume client more due to reduced efficiencies. We are also concerned about the proposed requirement in the ANPR that, for RMBS securitizations, compensation to certain transaction parties be payable over a five year period based on the performance of the financial assets securitized. Such a proposal raises many substantial questions, including how deferred fees might be accommodated in a securitization structure, how extremely complex performance results might be applied to adjustments in compensation, and other equitable concerns.

Synthetic Securitizations

Currently in the ANPR, sponsors will not be able to rely upon the safe harbor when issuing synthetic securitizations. It should be noted, however, that for pure synthetic securitizations there is never a transfer of assets by the sponsor into a securitization vehicle, rather, there is a "reference pool." As such, the safe harbor would not be needed by the parties to a synthetic securitization. In addition, synthetic securitization structures are useful when an entity would like to buy credit protection against a group of assets that they may not want to sell. For example, a sponsor may own a pool of mortgage loans that they wish to retain because of borrower relationships, but they would like to manage the risk in their overall portfolio. These two objectives can be achieved through the use of a synthetic securitization, either through a straight synthetic transaction or a hybrid cash and synthetic transaction. As discussed below, removing tools for market participants to manage their portfolios will lead to increased pricing for the underlying assets which will likely be passed on to consumers.

Servicing Provisions

The ANPR contains various proposals directed toward the adoption of certain uniform standards for inclusion in servicing agreements, which standards would only apply to RMBS transactions. We agree that, subject to contractual oversight by a master servicer or an "oversight advisor," the agreements need to provide primary servicers with the full authority to mitigate losses on the underlying assets, and they should have the authority to modify assets to address reasonably foreseeable default. We also agree that the securitization documents should require the servicer to act for the benefit of all investors and not only for the benefit of any particular class of investors. However, we are concerned that the FDIC's attempt to create uniformity in servicing agreements will be too restrictive or create standards that cannot be reasonably adopted or implemented without legal challenges. For example, we do not agree that there should be a regulatory requirement that a servicer service in accordance with "industry best practices for asset management and servicing" since that standard is too subjective. As indicated previously, this type of requirement would be ineffective as a condition to the availability of the safe harbor because market participants cannot judge compliance at the time of the securitization issuance. Further, the ANPR requirement that a servicer must "mitigate losses on financial assets consistent with maximizing the net present value of the financial asset, as defined by a net present value analysis" would be an inflexible and problematic contractual standard. The FDIC should make clear that the servicer will have satisfied its servicing duties if it reasonably applies a net present value analysis for the benefit of a securitization trust and reasonably evaluates and selects among various loss mitigation alternatives that may be available.

In addition, the ANPR proposes that servicing agreements for RMBS transactions must restrict primary servicer advances to cover borrower delinquencies to a short period such as three months, unless there are financing facilities which would fund or reimburse the servicers. Such a restriction would not appear to recognize that there are many large primary servicers who do not need the benefit of any third party financing facility. As to the proposed limitation regarding the time period during which a servicer would be obligated to advance, we would generally agree that terminating principal and interest advancing at some specified point may well be advisable in order to provide certainty to servicers and investors. Our preliminary view is that stopping such advancing after a 120 day period may be the most appropriate standard because of the relatively low likelihood that borrower delinquencies will be cured after that time; however, we do not believe that any new standard should be adopted without significant industry discussions, as servicing advancing involves complicated considerations. In addition, the FDIC's question regarding whether servicing compensation for RMBS transactions should include multiple incentive fees to servicers for handling certain specified loss mitigation activities is a significant question that should be explored by industry participants. Therefore, similar to other proposals included in the ANPR, limiting servicer advances to certain time periods and adjusting servicer compensation are complex matters that should not be conditions to the availability of a legal isolation safe harbor.

CONCLUSION

We do not deny that there were significant problems with many securitization transactions that had a profound impact on the credit crisis. However, market participants have already taken many steps to address these problems. For example, investors will no longer accept the types of securitizations that they accepted in the past and have been in frequent dialogue with issuers, originators and servicers about new requirements for securitization transactions going forward. In addition, it is clear that because of the severe problems experienced in the securitization markets and in the broader economy, regulators and legislators want to adopt regulations to correct some of the previous errors. As a result, we do not believe that the rules proposed in the ANPR are appropriate. First, the essence of a safe harbor is to provide clarity and certainty for market participants about specific criteria that need to be met in order to rely upon such safe harbor. As we state throughout this letter, the safe harbor conditions that the FDIC is proposing do not provide such clarity and do not provide the certainty that investors need, thus rendering any positive intent of the safe harbor ineffective. Secondly, many of the conditions contained in the ANPR are being addressed simultaneously by market participants and other regulators or legislators, and we believe that these efforts should be coordinated in order to achieve the best possible guidelines. Third, many of the solutions presented in the ANPR can be achieved through alternative mechanisms that would have less of a negative impact on restarting a stable securitization market and would not severely impact credit availability or affordability for consumers. Many of these alternative mechanisms for achieving improvements in the securitization markets have been identified and developed through intense industry focus as we highlight above. Therefore, we recommend that the FDIC provide a clear safe harbor without the numerous conditions contained in the ANPR. Separately, the FDIC should also engage other regulators and legislators to work together in providing a framework for regulation which will help to restart a sound, stable and vibrant securitization market.

Sincerely,

David L. Moskowitz
Deputy General Counsel
Wells Fargo & Company