MOODY'S
INVESTORS SERVICE

7 World Trade Center
250 Greenwich St
New York, NY 10007
www.moodys.com

July 1, 2010

By Electronic Mail

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

Re: Notice of Proposed Rulemaking for the 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, RIN 3064-AD53 (the "NPR")

Dear Mr. Feldman:

Moody's Investors Service ("**MIS**") appreciates the opportunity to provide comments to the Federal Deposit Insurance Corporation ("**FDIC**") on the Notice of Proposed Rulemaking ("**NPR**") regarding proposed amendments concerning 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 after September 30, 2010. With respect to our comments in response to the preceding Advanced Notice of Proposed Rulemaking ("**ANPR**"), MIS limited our comments to two areas: (1) the proposals relating to increased disclosures in the securitization market, and in particular the proposal to require the disclosure of the nature and amount of compensation paid to credit rating agencies ("**CRAs**") ("**Fee Proposal**"), and (2) the proposal to require that fees payable to CRAs for the rating of RMBS products be linked to the performance of the underlying financial assets ("**Payment Proposal**"). The NPR includes the same Fee Proposal and the Payment Proposal as the ANPR. Our views regarding these two proposals remain the same, and we therefore attach as Annex 1 the comment letter we submitted in response to the ANPR to this letter and incorporate it by reference here.[1]

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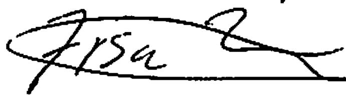
[1] That letter also included by annex MIS's Sector Comment, *Moody's: FDIC's Advance Notice on Proposed Safe Harbor Unclear on Protection against Repudiation Risk* (January 6, 2010), which addresses other aspects of the ANPR. It is included here as well. In addition, we attach as Annex 2 MIS's Sector Comment, *U.S. FDIC's Safe Harbor Remains Choppy* (May 2010), which likewise addresses other aspects of the NPR.

Once again, we appreciate the opportunity to comment on the ANPR. We would be pleased to discuss our comments further with the FDIC or its staff.

Sincerely,



Fariza Zarin
Managing Director, Global Regulatory Affairs
Moody's Investors Service

ANNEX 1

Moody's
INVESTORS SERVICE

7 World Trade Center
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www.moodys.com

February 22, 2009

By Electronic Mail

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

Re: Advance Notice of Proposed Rulemaking for the Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver, RIN 3064-AD55 (the "ANPR")

Dear Mr. Feldman:

Moody's Investors Service ("MIS") appreciates the opportunity to provide comments to the Federal Deposit Insurance Corporation ("FDIC") on the Advance Notice of Proposed Rulemaking ("ANPR") regarding proposed amendments concerning the treatment by the FDIC, as receiver and conservator of an insured depository institution, of financial assets transferred by the institution in connection with a securitization or a participation after March 31, 2010. We limit our comments to two areas: (1) the proposals relating to increased disclosures in the securitization market, and in particular the proposal to require the disclosure of the nature and amount of compensation paid to credit rating agencies ("CRAs") ("Fee Proposal"), and (2) the proposal to require that fees payable to CRAs for the rating of RMBS products be linked to the performance of the underlying financial assets ("Payment Proposal").[1]

With respect to the first issue, which we address in more detail in Section I below, we strongly support the FDIC's view that disclosure serves as an effective way to improve the quality of the information in the marketplace, and believe that issuers should be required to make robust disclosures to the market concerning information about structured finance products. We are concerned, however, that public disclosure of CRA fees could jeopardize the independence of the rating process by undermining the firewalls that the Securities and Exchange Commission ("SEC") previously required Nationally Recognized Statistical Rating Organizations ("NRSROs") to establish to bolster analytical independence. The SEC and other authorities have stressed the importance of insulating rating analysts and committees from commercial influences. Publicly disclosing fees paid to rating agencies would expose analysts and rating committees to more commercial information about rated issuers than we presently permit.

With respect to the second issue, which we address in more detail in Section II below, we appreciate the FDIC's goal of providing incentives for sustaining credit and long-term performance. We are concerned, however, that linking payment to CRAs with the performance of the structure undermines CRA objectivity by embedding CRAs – which are intended and expected to be impartial commentators –

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[1] MIS has published a Sector Comment, *Moody's: FDIC's Advance Notice on Proposed Safe Harbor Unclear on Protection against Repudiation Risk* (January 6, 2010), which addresses other aspects of the ANPR. We attach the Sector Comment as Annex A to this submission.

into the structuring process, thereby directly undermining the quality of their credit ratings. We are not opposed, however, to requiring CRAs to establish a system of payment reasonably designed to promote and enhance the analytical integrity of *both* the initial assignment of a rating as well as surveillance of ratings over time.

I. Increased Disclosures in the Securitization Market

A. Increasing Transparency in the Structured Market Would Restore Confidence

MIS is strongly in favor of the FDIC's efforts to increase transparency in the structured market. We believe that one of the most significant steps that can be taken to restore confidence in the structured finance market is to improve the availability and quantity of underlying information for structured securities. Unlike in the corporate market, where investors and other market participants can reasonably develop their own informed opinions based on publicly available information, in the structured finance market, there is insufficient public information to do so. Continuing disclosure requirements for publicly offered securities do not require the public dissemination of sufficient information about the structure or underlying assets of a securitization to afford reliable analysis. Indeed, under this limited information disclosure model, CRAs must ask for additional information to analyze and rate securities.

In the absence of sufficient data, investors are unable to conduct their own analysis and develop their own independent views about potential or existing investments. Furthermore, CRAs are unable to effectively offer unsolicited ratings and research, restricting the range of information available to investors and increasing the potential for ratings shopping. Finally, since they are not subject to similar public scrutiny as corporate issuers, structured finance issuers may feel less responsibility for the quality of information related to their securitized products.

To address these problems in the structured finance market, MIS recommends expanding Regulation AB's disclosure requirements to underlying assets. Regulation AB currently requires the disclosure of information about asset pools on an aggregate basis, supplemented by some additional information about significant obligors. We support more disclosure about obligors so that investors could assess more thoroughly the information about the assets underlying the securities. Options could include: (1) broadening the definition of "significant obligor" to increase the amount of information available about the related assets; (2) requiring disclosure about the characteristics of each obligor (instead of just on an aggregate basis); or (3) requiring disclosure about the characteristics of a statistically significant sample of individual obligors. In this vein, we support, *e.g.*, the FDIC's proposals to require additional detailed disclosures for RMBS, including property loan level data or data relevant to any real or personal property securing the mortgage loans, detailed information on underwriting standards, and the representations and warranties made with respect to the financial assets and the remedies for such breach of representations and warranties.

While MIS (along with other market participants) is committed to implementing various initiatives that will address shortcomings in this sector, we also believe that confidence in structured finance markets will not be restored unless there is an enhanced and updated mandatory disclosure regime for structured

finance products. In our view, updating the disclosure regime will yield three principal benefits:

1. Giving investors access to more information would reduce the risk of investor over-reliance on credit ratings. Such access also would have the effect of enhancing investors' ability to meaningfully assess the work of the CRAs.
2. Embedding enhanced information requirements in offering documents intended for investors likely will improve the information quality about structures and assets. This approach, which is analogous to the approach taken in corporate debt markets, aligns responsibility for information quality with the party who: (i) has the greatest control over the information in the first place; and (ii) will enjoy the greatest benefit from access to the securities markets. We believe that these disclosures in the corporate market are the very reason that the corporate market has performed well during the credit crisis as compared to the structured market.
3. Making more information publicly available to all investors will broaden the range of opinions and analysis available, including from all CRAs. If sufficient information is made available to investors, then it is necessarily also available to those CRAs not selected to rate a securitization. As a result, all CRAs (as well as a host of other market commentators) would be in a position to offer ratings and research, which would broaden the range of information available to investors. This lack of transparency is not an issue in the corporate market where the information is available in SEC filings and audited financial statements.

B. Fee Disclosures Would Undermine Firewalls Designed to Promote Analytical Independence

While we support increased transparency in the structured markets, we believe increased disclosures should be balanced against the fact that the SEC and other authorities have stressed repeatedly the importance of insulating rating analysts and committees from commercial influences. Consistent with the International Organization of Securities Commissions' ("IOSCO") Revised Code of Conduct Fundamentals for Credit Rating Agencies ("IOSCO Code")[2] and a recently adopted SEC rule,[3] MIS prohibits anyone who participates in determining or monitoring credit ratings or developing or approving rating methodologies from participating in discussions regarding the fees paid for the rating. A separate team within MIS handles discussions about fees and payment of fees for rating services, relationships with rated issuers and commercial strategy, while Moody's Analytics ("MA"), a separate legal entity affiliated with MIS, sells MIS's credit ratings and research to subscribers. These arrangements are intended to bolster analytical independence and ensure that rating quality is not diminished by commercial interests. The extension, strengthening and ongoing maintenance of these firewalls have involved a significant investment of time and resources.

If, however, the Fee Proposal is adopted, information about the payment for credit ratings from each person that paid the CRA to issue or maintain a credit rating (a "Payor") would expose our analysts and rating committees to more commercial information about rated issuers than we presently allow them to see. Easy access to such information would undermine our efforts and those of regulators globally to

[2] The Revised IOSCO Code is a framework Code of Conduct published by IOSCO revised in May 2008. It was developed through cooperative efforts of international securities regulatory authorities, rating agencies, issuers, investors and other market participants. MIS has publicly endorsed the Revised IOSCO Code.

[3] Specifically, Rule 17g-5(c)(6) implementing the Credit Rating Agency Reform Act of 2006.

shield analysts from such information in order to promote independence in the credit rating process. Accordingly, we oppose any rule requiring public disclosure of CRA fees.

We also note that the SEC, as the regulator of those CRAs that are NRSROs, is currently considering a related rule proposal that would require CRAs to disclose publicly information about revenues attributable to persons paying for credit ratings.[4] We would find it difficult to abide by rules promulgated by the FDIC that could inadvertently undermine our efforts to comply with our obligations under SEC imposed rules.

II. Payment Proposal Would Undermine CRA Independence

MIS understands the FDIC's desire to provide incentives for sustainable credit and the long-term performance of structured products. We believe, however, that CRA payment should not be linked with the performance of the structure because such a rule would convert CRAs from impartial observers to participants in this process; this, in turn, would jeopardize their objectivity, thereby directly undermining the quality of their credit ratings. In other words, under the Payment Proposal, CRAs would have a stake in the outcome of the product's performance, which could create incentives for CRAs to help the originator structure the transaction, which could undermine the CRA's independence.

Moreover, we also are concerned that linking payments directly to the performance of the structure could provide incentives for CRAs to publish initial ratings that are not of higher quality, but are merely more conservative. In other words, CRAs could be encouraged to publish initial ratings that are lower than the CRA believes so that they do not risk not being paid.

While we do not support such linkage proposed, we are not opposed to requiring CRAs to establish a system of payment reasonably designed to promote and enhance the analytical integrity of *both* the initial assignment of a rating as well as surveillance of ratings over time. While we do not believe that any payment system can *guarantee* the high predictive performance of ratings over time, we do appreciate the importance of CRAs monitoring the credit that they rate and therefore support creating incentives to help achieve this goal.

Importantly, we also believe that measures can be taken outside the payment structure to encourage high quality surveillance systems. For instance, for our part, in 2004, we started to separate the surveillance function from the initial rating function in the RMBS team, and have continued that separation on a more global level. In the past two and a half years, since the onset of credit crisis, we have also:

- Created a new Group Managing Director position under the title of Structured Finance Global Surveillance Coordinator to oversee structured finance surveillance operations worldwide.
- Increased resources devoted to ratings surveillance and established dedicated surveillance teams where practical and effective. In general, for certain asset classes, for example U.S. RMBS, we have determined that dedicated surveillance teams can more effectively review existing credits than can analysts who are rating new transactions at the same time.

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[4] *See* MIS Comment Letter Re: Proposed Rules for Nationally Recognized Statistical Rating Organizations (File No. S7-28-09) (February 10, 2010), available on the Regulatory Affairs webpage at moodys.com.

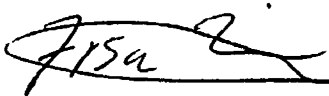
- Enhanced our structured finance surveillance function by conducting annual reviews of each sector, including an analysis of the asset classes, industries, rating methodologies, rating models, key rating assumptions and existing ratings. This initiative will lead to changes in assumptions, methodologies and models where warranted. These changes will be communicated to the market.

We believe that these initiatives have – and will continue to – improve the quality of our surveillance ratings.

* * *

Once again, we appreciate the opportunity to comment on the ANPR. We would be pleased to discuss our comments further with the FDIC or its staff.

Sincerely,



Fariza Zarin
Managing Director, Global Regulatory Affairs
Moody's Investors Service

Annex A

MOODY'S
INVESTORS SERVICE

SECTOR COMMENT

Moody's: FDIC's Advance Notice on Proposed Safe Harbor Unclear on Protection against Repudiation Risk

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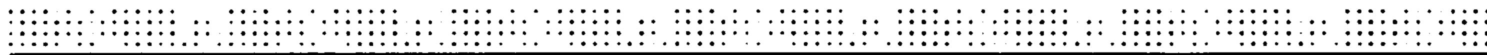
On December 15, the FDIC published its Advance Notice of Proposed Rulemaking (ANPR) regarding its treatment of assets transferred to bank sponsored securitization vehicles if the bank enters FDIC receivership or conservatorship.[1] In the ANPR, the FDIC effectively waives its right to delay payments under its stay powers; however, the FDIC doesn't explicitly and clearly waive its repudiation power to reclaim assets transferred to bank sponsored securitized vehicles. This is important because upon repudiation, the FDIC would only have to pay ABS investors damages limited to the market value of the underlying assets, which may be less than the par value of the ABS, thereby introducing market value risk to the ABS.[2]

Our ABS ratings typically address credit losses on the underlying assets in a scenario where the assets are held to maturity pursuant to the promise made by the issuer.[3] Adding exposure to market value risk would dramatically alter the credit analysis since, in addition to credit losses, the asset pool would be subject to being valued under potentially harsh or illiquid market conditions following the sponsor's failure. This risk becomes more likely to materialize the weaker the credit strength of the sponsor bank.

If the FDIC's repudiation power isn't waived or otherwise mitigated in the final version of the rule, the credit quality of bank sponsored ABS issued after the rule's effective date will be more highly linked to the credit quality of its bank sponsor than is the case now. Bank sponsors rated below "Aa" would be unlikely to achieve "Aaa" ratings for their ABS if this risk isn't mitigated.[4]



General Approach of the ANPR. The ANPR is the FDIC's first draft at a final rule to be effective after the expiration of the interim final rule. The interim final rule extended a safe harbor from the FDIC's repudiation and stay powers in connection with bank sponsored securitizations. For securitizations issued after the expiration of the interim final rule (currently March 31, 2010), the ANPR attempts to provide a safe harbor against certain actions that the FDIC may be entitled to take as conservator or receiver of a failed bank so long as those securitizations meet numerous and wide ranging conditions set forth in the ANPR.

The conditions cover such items as:

» limiting the complexity of the capital structure of the securitization,

» requiring enhanced disclosure to market participants,

» requiring sponsors to retain "skin in the game,"

» prohibiting external credit support,

» giving more flexibility for servicers to modify underlying loans,

» requiring minimal seasoning for the underling pool of assets, and

» setting limits on and disclosing how compensation to transaction parties is paid.

Many of the conditions are focused on residential mortgage-backed securitizations (RMBS), with commentary asking whether the conditions should be extended to other asset classes.

Repudiation Risk. In September we outlined additional credit risk exposure for certain bank sponsored ABS if the FDIC repudiation safe harbor, Rule 360.6[5] was lost.[6] Those transactions were in danger of losing the safe harbor protection against FDIC repudiation because Rule 360.6 required GAAP sale treatment and such treatment became virtually unattainable after the implementation of new accounting rules, FAS 166 and 167.

In November, the FDIC issued an interim final rule that extended the Rule 360.6 safe harbor protection to all bank sponsored ABS issued through March 31, 2010.[7] The interim final rule stated that the FDIC wouldn't reclaim assets transferred in connection with a securitization if the securitization transaction met the safe harbor conditions relying on GAAP sale treatment that was in effect prior to the new accounting rules. As a result, the interim final rule addressed our credit concerns regarding repudiation risk for ABS issued on or prior to March 31, 2010.[8]

For securitizations after such date, the ANPR is unclear on whether securitizations that meet the additional conditions will also be afforded a safe harbor from the FDIC's repudiation power. For instance, in the ANPR's sample regulatory text the FDIC retains its ability to repudiate the contracts transferring the assets. However, this is contrary to the ANPR's introduction.[9]

Stay Risk. Like the interim final rule, the sample regulatory text in the ANPR effectively addresses stay risk. The credit concern we identified regarding stay risk is that following a failure of a bank sponsor, the FDIC could exercise its stay powers to delay payments to ABS investors for up to 90 days. In paragraph (e) of the ANPR "the FDIC, as conservator or receiver of the sponsor, consents to the payment of regularly scheduled payments to the investors made in accordance with the securitization documents and to any servicing activity with respect to the financial assets included in securitizations that meet the requirements of [the ANPR]." If a bank sponsor failed, the FDIC would allow payments to be made according to the terms of the securitization documents without using its stay powers to delay those payments.

Other Potential Credit Issues

The ANPR highlights two additional potentially credit negative issues.

(1) Repudiation may lead to intra payment period interest shortfalls. Repudiation damages include accrued interest prior to the date the FDIC is appointed as conservator or receiver.[10] But if the FDIC exercised its repudiation powers some time after it was appointed, the repudiation payment wouldn't include interest accrued between the FDIC's appointment and the repudiation. The ANPR seems to mitigate this shortfall by having the FDIC consent to make regularly scheduled payments. However, there could still be an interest shortfall if the FDIC repudiated in the middle of a payment period. In such a case, ABS investors would not receive accrued interest from the last payment date until the date of repudiation.

(2) Ambiguity regarding the term "regularly scheduled payments". In the ANPR, the FDIC's consent to "regularly scheduled payments" is not explicitly defined. We think a reasonable interpretation is that the term only includes payments that would be payable to investors had the sponsor not gone into receivership. We think that increased or different payment priorities caused by events of default related to receivership would be most likely beyond the scope of regularly scheduled payments.

It is unclear to us whether the term "regularly scheduled payments" includes changes to payment priorities (i.e., an acceleration of principal payments) due to performance-based amortization triggers breached prior to receivership. If the FDIC doesn't consent to these "performance" or "amortization" payments being made, a transaction could revert back to the pre-amortization period waterfall for a period of up to 90 days. This would reduce anticipated payments to bondholders.

Conclusion

The ANPR is a call for comments from the marketplace that attaches a draft of sample regulatory text, which the FDIC notes, is subject to considerable change.[11] There are some important discrepancies between the sample regulatory text and the FDIC's introductory comments on the FDIC's treatment of its repudiation powers in bank sponsored securitizations, which, depending on what view is controlling would significantly change our credit analysis on certain bank sponsored ABS.[12]

[1] "Advance Notice of Proposed Rulemaking Regarding 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" (December 15, 2009).

[2] See Federal Deposit Insurance Act, Section 11(e)(1),(3). Also see, for example, the FDIC's Covered Bond Policy Statement (April 2008): In the case of repudiation "the par value of the covered bonds plus interest accrued to the date of the appointment of the FDIC as conservator or receiver would be paid in full up to the value of the collateral."

[3] Evaluation of market value risk is material to our ratings analysis in certain asset classes, such as rental car ABS

[4] See Moody's Special Comment, "Safe Harbor Uncertainty Leads to Uncharted Waters for Card ABS" (September 25, 2009).

[5] 12 C.F.R. section 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."

[6] See Moody's Special Comment, "Safe Harbor Uncertainty Leads to Uncharted Waters for Card ABS" (September 25, 2009).

[7] Amendments to 12 C.F.R. § 360.6 Defining Safe Harbor Protection for 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 (November 12, 2009).

[8] See Moody's Sector Comment, "FDIC's Interim Rule on Asset Transfers Positive for U.S. ABS" (November 16, 2009).

[9] In section (d)(4) of the sample regulatory text the FDIC retains its right to repudiate contracts transferring assets as part of a securitization. However, in the introductory remarks the FDIC states that "in the case of a securitization that satisfies the standards set forth in the ANPR, the conservator or receiver will not, in the exercise of its statutory repudiation power, attempt to reclaim or recover financial assets transferred by an [insured bank] in connection with a securitization if the financial assets are subject to a legally enforceable and perfected security interest under applicable law." (Page 7 of the ANPR).

[10] Federal Deposit Insurance Act, Section 11(e)(3).

[11] In the FDIC's own words "this draft of regulatory text should be considered one example of regulatory text, and not a proposal." (page 2 of ANPR).

[12] See footnote 9.

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MOODY'S
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ANNEX 2

MOODY'S
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SECTOR COMMENT

U.S. FDIC's Safe Harbor Remains Choppy

Extracted from "Moody's Weekly Credit Outlook", dated May 17, 2010.

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On 11 May, the Federal Deposit Insurance Corp. (FDIC) published its Notice of Proposed Rulemaking (NPR) regarding its treatment of assets transferred to bank-sponsored securitization vehicles if the bank enters FDIC receivership or conservatorship. The so-called "safe harbor" rule legally isolates bank-sponsored securitizations from the sponsoring bank's failure, and allows the securitization to be rated on the basis of the quality of the underlying assets and the securitization structure rather than linking the rating more strongly to the rating of the sponsoring bank.

While the proposed safe harbor addresses our concerns with the FDIC's repudiation rights, it requires certain conditions that may make the safe harbor elusive and places the risk of the loss of the safe harbor squarely on the shoulders of investors. Following a comment period on the proposed safe harbor, the FDIC plans to replace the interim safe harbor (which expires on 30 September),[1] with a final safe harbor.

Repudiation Rights Fixed. The new proposed safe harbor explicitly says that if the FDIC reclaims an asset transfer but doesn't pay damages equal to the par value of the ABS, the investors can keep the collateral and do what they want with it. This eliminates our concern that the FDIC would wield its statutory repudiation rights to reclaim securitized assets at market value. [2] Left unwaived, this power introduces market value risk into the transaction, leaving investors exposed to an early redemption at less than the par value on the ABS. Of course, the fix to the repudiation rights only exists if the safe harbor applies.

Conditions for Safe Harbor Unchartered. As currently drafted, it's unclear whether the safe harbor would be available when a bank fails. This issue arises because the proposed safe harbor requires satisfaction of various ongoing and subjective conditions through the life of the transaction. Most of these conditions are in the control of the bank sponsor rather than the investors, who might suffer if the bank fails. Without certainty about the continuity of the safe harbor, previous concerns about repudiation risk for bank-sponsored securitizations closing after 30 September return.[3] Also without the safe harbor, the FDIC's automatic stay rights kick-in, and scheduled interest and principal payments on the ABS may be missed.

What is Moody's Weekly Credit Outlook?

Moody's Weekly Credit Outlook provides our research clients with timely opinions on breaking credit market developments and trends. Published every Monday morning, the newsletter will help you start your week informed of Moody's latest opinions from across the organization.

[1] The FDIC's interim safe harbor continues protection against repudiation risk, notwithstanding changes to the new GAAP sale accounting rules (effective November 15, 2009). The interim safe harbor also grandfathers master trust structures as long as all their ABS series are issued before the final safe harbor's effectiveness.

[2] See Moody's Special Comment, "Moody's: FDIC's Advance Notice on Proposed Safe Harbor Unclear on Protection against Repudiation Risk" (January 6, 2010).

[3] Our ABS ratings typically address credit losses on the underlying assets in a scenario where the assets are held to maturity pursuant to the promise made by the issuer. In certain asset classes, such as rental car ABS, evaluation of market value risk is material to our ratings analysis.

Ongoing Conditions. Below are a few of the ongoing conditions required to maintain safe harbor qualification:

- The sponsor must retain at least 5% of the credit risk of the issued ABS during the term of the securitization.
- And affiliate or insider cannot buy the ABS obligations. (We assume this means an affiliate or insider of the originator and issuer but are unclear on how this relates to the above retention requirement or the subordination typically provided in transactions.)
- Any compensation paid to, and the risk of loss in the transaction retained by, the originator, sponsor, rating agency, or third-party advisor must be disclosed, including changes occurring after closing.

Subjective Conditions. Below are a few of the subjective conditions that likewise need to be satisfied for safe-harbor qualification:

- Transaction documents must clearly define all necessary rights and responsibilities of the transaction parties. (We view this as a challenge since what is "necessary" changes over time depending on market experience.)
- Transaction documents must provide sufficient authority for the transaction parties to carry out their roles. (The term "sufficient authority" is also a moving target.)

Two-Step True Sale Not a Haven. For bank-sponsored transactions closing through 30 September, we think that a two-step true sale that achieves legal isolation of the transferred assets relieves bank-sponsored transactions from the need to qualify for the interim safe harbor. But after the final safe harbor's adoption, we'll revisit this assumption for transactions that do not achieve a GAAP sale.

In its proposed safe harbor, while the FDIC recognizes that state or common law determines legal true sale, it makes clear its intention to treat any assets consolidated on the bank's books as assets of the bank. As a result, ABS investors may have to petition the FDIC to recognize their property rights unless they benefited from either a GAAP sale or qualified for the safe harbor.

Comment Period. During the 45-day comment period for the proposed safe harbor, market participants, especially investors, are likely to focus on establishing objective standards for safe harbor treatment that are measurable at the closing of the transaction.

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