The Clearing House

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July 16, 2010

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

Attention: Comments

Re: 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*

Dear Mr. Feldman:

The Clearing House Association L.L.C. ("The Clearing House"[1]) appreciates the opportunity to comment on the notice of proposed rulemaking by the Federal Deposit Insurance Corporation (the "FDIC") 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 September 30, 2010" (the "NPR").[2] The NPR modifies the Sample Regulatory Text proposed by the FDIC in its Advanced Notice of Proposed Rulemaking on this subject (the "ANPR").[3]

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1 The members of The Clearing House are: Bank of America, National Association; The Bank of New York Mellon; Capital One, National Association; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; The Royal Bank of Scotland, N.V.; UBS AG; U.S. Bank, National Association; and Wells Fargo Bank, National Association.

2 75 Fed. Reg. 27471 (May 17, 2010).

3 75 Fed. Reg. 934 (Jan. 7, 2010).

Executive Summary

In the NPR, the FDIC proposes extensive amendments to its existing rule (the "Securitization Rule")[4] that provides a safe harbor from its power under Section 11(e) of the Federal Deposit Insurance Act to disaffirm or repudiate contracts in connection with certain securitizations and participations when the FDIC is appointed as conservator or receiver of an insured depository institution ("IDI"). The Clearing House supports the policy objectives that inform the FDIC's focus on reforming the securitization markets. We believe, however, that those objectives would be better served by postponing the FDIC's rulemaking until the conclusion of the ongoing legislative process and working together with the other relevant Federal regulatory authorities as contemplated by the financial reform bill to adopt a coherent and consistent framework for the regulation of securitization markets. The proposed revisions to the Securitization Rule address substantive policy concerns with respect to the conduct of securitizations as an activity that go substantially beyond considerations bearing on the FDIC's powers as receiver or conservator and appropriate conditions for a safe harbor from the FDIC's repudiation power. In addressing substantive regulatory concerns in a rule intended to provide safe harbor protection for securitizations, and doing so before the process contemplated by the financial reform bill is completed, the FDIC risks undermining the utility of the Securitization Rule by creating uncertainty as to when its safe harbors are available and subjecting IDIs to multiple layers of requirements that will become applicable to securitization activities at different times and will be administered by different regulators. This is likely to make it expensive and difficult for IDIs to access securitization markets and ultimately restrict a major funding source for IDIs and, as a consequence, the availability of credit to the market in general and to consumers in particular.

The nature of the safe harbor relief proposed in the NPR for securitizations that are not accounted for as a sale under generally accepted accounting principles as recently revised appears inadequate to preserve the utility of the rule. Many of the conditions that the FDIC seeks to impose on securitizations whether or not they qualify for accounting sale treatment are unclear and unduly burdensome. These conditions generally fail (i) to recognize important distinctions between classes of commonly securitized assets and (ii) to effectively encourage higher underwriting standards. Nor do they acknowledge alternative approaches for aligning the interests of originators and investors that may meet the FDIC's policy objectives more efficiently and effectively.

The Clearing House acknowledges that the originate-to-distribute model contributed to lax underwriting practices and played an important role in the financial crisis, but respectfully submits that the FDIC's response to these problems should be coordinated with that of other Federal regulators to assure, insofar as appropriate, consistent treatment of all originators of securitized assets and to be consistent with pending financial reform legislation in this area.

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4 12 C.F.R. 360.6.

Discussion

The Clearing House agrees with the views of many organizations that commented on the ANPR that the Securitization Rule has played a positive and critical role in facilitating IDIs' ability to access the securitization markets. The Securitization Rule has enabled IDIs to finance commercial and consumer lending that is essential for the nation's economy.

The problems with the securitization market that the FDIC cites in the NPR contributed to the 2008 financial collapse and harmed some IDIs and the economy as a whole, and The Clearing House supports the policy objectives that inform the FDIC's attempt to reform the securitization markets. The Clearing House believes, however, that these objectives would be better addressed by the FDIC working together with other Federal regulators to improve underwriting standards and capital and disclosure requirements, drawing on each of their respective areas of expertise and addressing all of their respective concerns. Subtitle D of The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (H.R. 4173), as enacted by the House and Senate ("Dodd Frank"), provides the framework for doing so. In attempting to revise the Securitization Rule to address substantive policy concerns that are remote from its central purpose and that are also being addressed by the legislative process and without proper coordination with the regulatory initiatives underway at the Securities and Exchange Commission (the "SEC"), the FDIC risks subjecting IDIs to inconsistent and burdensome regulation that will inhibit their ability to finance their core commercial and consumer lending activities, restrict credit availability to the market in general and consumers in particular and encourage further growth of the unregulated shadow-banking system.

The Clearing House appreciates that the NPR makes important improvements over the draft revisions to the Securitization Rule presented in the ANPR in December 2009. We remain, however, deeply concerned by the FDIC's attempt to use the Securitization Rule as a vehicle to impose substantive regulation on the securitization markets. We will address five general issues, and then turn to some of the specific questions on which the FDIC solicited public comment. These general issues are: (1) the adequacy of the safe harbor relief provided for securitizations not meeting sale accounting requirements; (2) the impact of certain new conditions that the NPR would impose on all securitizations; (3) the absence of asset-class specific eligibility criteria that take into account the diverse nature of the securitization markets; (4) the NPR's failure to acknowledge other, and in many cases more effective, ways of aligning the interests of originators and investors, than its proposed "one size fits all" risk retention requirements and (5) the inability of investors to determine with certainty at the closing of a securitization whether the safe harbors will apply. We recognize the proposed separate treatment for residential mortgages – which we believe severely over-restrictive – but all other asset classes would not be differentiated under the NPR.

1. ***The relief offered by the proposed safe harbor for securitizations not meeting sale accounting requirements is inadequate to delink them from the sponsor or originator and may make it impractical for IDIs to rely on the rule.***

Unlike other participants in the securitization markets, which are generally eligible debtors under the Bankruptcy Code and rely on a "true sale" analysis to establish legal isolation for financial assets that they securitize, insolvent IDIs are subject to the Federal Deposit Insurance Act and powers provided by that Act to the FDIC as receiver or conservator for IDIs that are not present in the Bankruptcy Code – most importantly, the repudiation power in Section 11(e) of the Federal Deposit Insurance Act. Consequently, the Securitization Rule has played a critical role in assuring investors in IDI-originated asset securitizations that these assets are beyond the scope of the FDIC's repudiation powers. Since its adoption in 2000, the Securitization Rule has effectively maintained a level playing field by enabling IDIs to access the securitization markets using structures and on terms that are broadly comparable to those of their unregulated competitors. Of more importance, the Securitization Rule has enabled IDIs, large and small, to originate billions of dollars of loans, primarily to consumers, that require funding in the securitization market. The Clearing House is particularly concerned that the terms of the safe harbor protection offered for securitizations not meeting sale accounting requirements as a result of the 2009 GAAP Modifications (as defined in the NPR) would reduce IDIs' access to the securitization markets and thus their ability to originate financial assets. This may in turn undermine the security of the financial system as a whole by encouraging growth of unregulated commercial and consumer lending at the expense of lending by IDIs.

The safe harbor protection offered by the NPR for securitizations not meeting sale accounting requirements would treat the securitized financial assets as assets of the failed IDI subject to a perfected security interest, apparently irrespective of whether the transfer is viewed as a legal sale under applicable state law. Based on this approach, the FDIC would retain its statutory authority to repudiate the securitization agreement but consent to the shortening of the stay period under Section 11(e)(13)(C) of the Federal Deposit Insurance Act to 10 business days after the effective date of the FDIC's notice of repudiation of the securitization agreement or 10 business days after delivery of a written request for consent under Section 11(e)(13)(C) if the FDIC is in a monetary default under a securitization. In the event of a repudiation, damages would be fixed at an amount equal to the par value[5] of the obligations outstanding on the date of receivership less any payments of principal received by the investors to the date of repudiation. As several comment letters responding to the ANPR pointed out, under the proposed safe harbor the FDIC could repudiate investors' claims and frustrate their expectations of continued access to the cash flows from the securitized assets to support the principal amount of their investment plus accrued and unpaid interest.

Treating the securitization as a secured loan rather than a sale would force investors to liquidate the securitized assets to satisfy their claims upon an IDI insolvency. In

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5 The term "par value" is not defined in the NPR, but appears not to include accrued and unpaid interest. It is also unclear how the term would apply to equity or other deeply subordinated tranches of securitizations.

addition to taking the risk that the cash flows on the securitized assets are insufficient to fund their expected payments on their asset-backed securities, they would be taking the risk that the realizable value of the securitized assets at the time of the IDI's insolvency may be insufficient to satisfy their claims. An IDI insolvency that results in large scale liquidation of securitized assets may destabilize financial markets, particularly if the liquidation occurs when the market is especially stressed because the IDI's insolvency is symptomatic of broader issues in the financial markets. The liquidation may cause losses to investors (including other IDIs) that might never have occurred had the securitizations been allowed to run their course without a forced sale of assets, and these losses may then cascade through the system weakening other institutions. The possibility of a forced sale of securitized assets at distressed values, the uncertainty inherent in the 10 business day delay contemplated by the proposed amendments and the unclear definition of the amount of damages due in the event of an FDIC repudiation of a securitization all together are likely to adversely affect the credit ratings that rating agencies assign to, and investor perceptions of the risks inherent in, IDI-originated asset securitizations. If there is a risk that the FDIC may repudiate the securitization and treat the investors like secured creditors even if the securitization qualifies for safe harbor treatment under the rule, investors will be unwilling to treat the securitization as delinked from the credit of the sponsor.

The Clearing House believes that where a transfer is viewed as a legal sale under state law, the safe harbor should continue to provide the same relief as it provides for securitizations that satisfy the conditions for sale accounting treatment and that, as is the case under state law, accounting treatment by itself should not preclude legal isolation. This is particularly important for securitizations of revolving or renewable credits (mostly credit cards and home equity lines of credit) where the FDIC's repudiation powers under Section 11(e) of the Federal Deposit Insurance Act, applied to the on-going sale of receivables under the applicable accounts, would put investors at risk. We do not believe the FDIC's repudiation powers apply to a completed sale of receivables (for example, in an automobile loan securitization), irrespective of whether the transaction is accounted for as a sale or financing for accounting purposes, if the transaction is a "true sale" for state law purposes. The broad language of the proposed revised Securitization Rule, however, would create uncertainty in that regard. We urge the FDIC to clarify, either in the final securitization rule or the related adopting release, that the Securitization Rule will not apply to a completed transfer of financial assets where the transfer is a "true sale" for state law purposes, irrespective of the accounting treatment.

2. ***The NPR's conditions to the Securitization Rule's safe harbors would make securitizations more costly and in some cases impractical, and thus would restrict the availability of credit, and especially consumer credit, by reducing IDIs' ability to originate consumer loans and other financial assets.***

The Clearing House is also concerned that many of the new conditions that the NPR would impose on all securitizations would make securitizations more costly and in some cases impractical. For example:

- The restrictions on hedging, even in cases where regulations adopted pursuant to Dodd-Frank may not impose these restrictions (such as qualified residential mortgage loans), and in particular issuing entity or pool level external credit support or guarantees in the case of RMBS, may make it more difficult for IDIs to securitize certain kinds of assets even when those assets are carefully underwritten and appropriately priced to reflect the risk, particularly in situations where a sophisticated third party would be willing and able to price and assume that risk by providing credit support for the securitization.

- The requirements as to rating agency compensation may make it more costly for IDIs to obtain ratings for their securitizations. The uncertainty introduced by the proposed holdback requirement likely will prompt rating agencies to demand higher total compensation because a large portion of their compensation will be made contingent on factors largely outside of their control.

- Similarly, the proposed one-year 5% reserve fund requirement for RMBS will increase the costs of issuance to levels that may preclude IDIs from further participation in the RMBS market.[6]

To the extent these conditions increase costs or make certain types of securitizations impractical, they will reduce IDIs' access to the securitization markets and thus their ability to originate financial assets, restricting the availability of credit, especially to consumers.

3. ***We urge the FDIC to use its joint rule-making power under Dodd-Frank rather than the Securitization Rule to address risk retention. Using the Securitization Rule to address risk retention with a largely one-size-fits all approach will unnecessarily harm the markets for mortgages and other consumer credit products.***

Unlike the SEC's asset-backed securities reform proposal[7] and the Conference Text,[8] the NPR does not provide for asset-class specific risk-retention requirements, except for the more rigorous ones for RMBS. Dodd-Frank requires the Federal banking agencies and the SEC[9] to "jointly prescribe regulations to require any securitizer to retain an economic interest in

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6 The SEC's proposed amendments to Regulation AB included in its release Asset-Backed Securities Reform (75 Fed. Reg. 23328 (May 3, 2010)) address similar concerns about investors' ability to obtain a remedy for breaches of asset representations and warranties in a manner that we believe is better calibrated to motivate higher quality underwriting of securitized assets at lower cost.

7 75 Fed. Reg. 23328 (May 3, 2010).

8 See Section 941(b) of Dodd-Frank, which amends Section 15G(c)(2) of the Securities Exchange Act of 1934.

9 The Secretary of Housing and Urban Development and the Federal Housing Finance Agency would also participate in adopting the regulations regarding residential mortgages.

a portion of the credit risk for any [asset] that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party" and that these regulations "establish asset classes with separate rules for securitizers of different classes of assets, including residential mortgages, commercial mortgages, commercial loans, auto loans, and any other class of assets that the Federal banking agencies and the [SEC] deem appropriate." For each asset class, the regulations would be required to "include underwriting standards established by the Federal banking agencies that specify the terms, conditions, and characteristics of a loan within the asset class that indicate a low credit risk with respect to the loan." These underwriting standards would serve as the basis for lower risk retention requirements. Moreover, "qualified residential mortgages", to be defined jointly by various Federal regulators taking into consideration underwriting and product features that historical loan performance indicate result in a lower risk of default, would be exempt from the risk retention requirements.

If the FDIC revises the Securitization Rule as currently proposed by the NPR, IDIs will face substantial impediments in securitizing qualified residential mortgages, commercial mortgages and other assets that would otherwise qualify for lower or alternative risk retention requirements under the regulations to be issued jointly by the FDIC and other Federal banking regulators and the SEC. Because these joint regulations would be designed to address largely the same concerns as the NPR regarding responsible financial asset underwriting and increased transparency in the market, the FDIC will be in a position to make sure that they address its policy objectives. The requirement in Dodd-Frank that the regulations apply regardless of whether the securitizer is an IDI offer the FDIC the opportunity to mandate prudent underwriting and risk retention standards for securitized assets without making it relatively more expensive for IDIs to fund their lending to consumers and small businesses and promoting the growth of the shadow-banking system. Accordingly, The Clearing House respectfully urges the FDIC to extend the grandfathering provisions adopted in its interim final rule and to postpone implementation of separate risk retention requirements under the Securitization Rule until the FDIC, together with the other relevant Federal regulators, jointly act to adopt the risk retention regulations mandated by Dodd-Frank. As a matter of process, this approach should enable to the FDIC to address its critical policy concerns without subjecting IDIs to potentially inconsistent and burdensome regulation.

4. ***The FDIC should take a broader view of the types of risk retention that would better align the interest of securitizers and investors without unnecessarily reducing the availability of consumer credit.***

The risk retention regulations required under Dodd-Frank specifies the permissible forms and minimum duration of the risk retention required, permit retention of less than 5% of the credit risk if the originator of the assets meets the underwriting standards established by the regulations, and most importantly, would apply regardless of whether the securitizer is an IDI.[10] The risk retention requirement proposed in the NPR, in contrast, would

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10 With respect to a commercial mortgage, Dodd-Frank requires the regulations to specify the permissible types, forms and amounts of required risk retention, which in the determination of the Federal banking agencies and the SEC may include retention of a specified amount of the total credit risk, retention of the

apply to all asset classes, often regardless of whether specified underwriting standards were met, and would have to be either an interest of not less than 5% of each of the credit tranches sold or transferred to the investors or a representative sample of the securitized financial assets equal to not less than 5% of the principal amount of the assets at transfer. The Clearing House supports the FDIC's inclusion of the latter alternative, which may in some transactions help the IDI obtain sale treatment under GAAP, but encourages the FDIC to take a broader view of the types of risk retention that IDIs could provide as institutions that are subject to capital and liquidity requirements. Further consideration should be given, for example, to strengthened representations and repurchase provisions as a better approach to aligning the interests of originators and investors. The Clearing House believes that the multiplier effects of capital and risk retention requirements[11] applied to the same securitization transactions may make securitization prohibitively expensive for IDIs if the risk retention requirements are adopted as proposed in the NPR.

5. ***The safe harbors provided by the Securitization Rule will lose their relevance if investors cannot be certain that they will apply for the life of the transaction when they make their investment decision.***

As others have noted in their comment letters responding to the ANPR, the usefulness of the Securitization Rule as a safe harbor depends in large part on its clarity and ease of application. It is critically important that compliance with any conditions applicable to the safe harbors be subject to determination at the outset of the transaction and that securitizations not lose their safe harbor protections because of subsequent actions by sponsors, originators or third parties. Examples of conditions that, as currently drafted, could be breached after the closing of a securitization include the following:

- The requirement for resecuritizations and CDOs in clause (b)(1)(i)(A) that disclosures be made available for the underlying assets, which would be breached if the issuer of the underlying obligations fails to meet its ongoing disclosure obligations.

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first-loss position by a third party purchaser that specifically negotiates for the purchase, holds adequate financial resources to back losses, provides due diligence on all individual assets in the pool before the issuance of the asset-backed securities, and meets the same standards for risk retention as the Federal banking agencies and the SEC require of the securitizer, a determination that underwriting standards and controls are adequate and provision of adequate representations and warranties and related enforcement mechanisms.

11 In this regard, note for example the proposal of the Basel Committee on Banking Supervision's to double the standardized supervisory haircuts applicable to securitization exposures and the possible recalibration by the Committee of the capital charges applicable to securitizations. Consultative Document: Strengthening the resilience of the banking sector, December 2009, of the Basel Committee on Banking Supervision of the Bank for International Settlements.

- The requirement in clause (b)(3)(i)(A) that the documents provide sufficient authority for the parties to fulfill their respective duties and exercise their rights under the contracts, which is subjective and may be challenged in retrospect in a troubled deal.

- The requirements in clause (b)(3)(ii)(A) as to the timing of mitigation actions and recordkeeping by the servicer, which could be breached by servicer actions outside of the control of the originator or sponsor.

- The requirement in clause (b)(5)(ii)(B) that the assets underlying an RMBS shall have been originated in compliance with all statutory, regulatory and originator underwriting requirements in effect at the time of origination, which would cause the loss of safe harbor protection for investors if noncompliance is discovered post-closing.

- The requirement in clause (c)(1) that the obligations not be sold to an affiliate or insider, which could be breached inadvertently and without the knowledge of investors after the closing.

Much of the uncertainty for investors could be mitigated if these conditions were structured as documentation requirements. In this way the risk of noncompliance would fall on the parties to the securitization rather than on the investors relying on the safe harbors.

To the extent noncompliance with conditions by an IDI sponsor or originator results in loss of a safe harbor, the wrong parties – the investors – suffer the consequences. If the availability of the Securitization Rule's safe harbors as applied to a particular transaction is uncertain, whether because investors cannot independently ascertain whether the sponsor has complied with all of the conditions, because compliance with a condition at the outset of a transaction does not assure continued compliance or because the applicable standard is subjective and may in hindsight appear not to have been satisfied if a transaction becomes troubled, investors will be unwilling to treat the securitization as delinked from the credit of the sponsor. Ultimately, the increased cost, or reduced availability of, securitization as a source of funding for IDIs reduce their lending capacity and restrict the availability of credit, particularly to consumers.

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We offer the following responses to certain of the NPR's specific Request for Comments.

3. *Is the transition period to September 30, 2010, sufficient to implement the changes required by the conditions identified by Paragraph (b) and (c)? In light of New Regulation AB, how does this transition period impact existing shelf registrations?*

Because The Clearing House believes that the conditions identified by Paragraph (b) should to a large extent be harmonized with the anticipated joint regulations required by the Conference Text and the SEC's asset-backed securities reform, we further believe that the grandfathering period under the FDIC's interim Securitization Rule should be substantially extended to allow the legislative and joint regulatory processes to come to a conclusion. Any conditions relating to disclosure that are tied to the SEC's Regulation AB should also have a transition period consistent with that provided for by the SEC. Any conditions affecting servicing agreements and third party compensation should also be subject to a sufficiently long transition period to allow the parties a reasonable opportunity to renegotiate their contractual arrangements.

11. Are the origination or retention requirements of paragraph (b)(5) appropriate to support sustainable securitization practices? If not, what adjustments should be made?

As discussed above, The Clearing House believes that to avoid unduly burdening IDIs and further shifting lending activity to the shadow-banking system, to the extent any retention requirements are incorporated in the safe harbor conditions they should be consistent with the joint regulations on retention requirements and underwriting standards to be issued under the Conference Text.

12. Is the requirement that a reserve fund be established to provide for repurchases for breaches of representations and warranties an effective way to align incentives to promote sound lending? What are the costs and benefits of this approach? What alternatives might provide a more effective approach?

The Clearing House believes that the key to aligning incentives to promote sound origination practices is to provide trustees and investors with sufficient information to ascertain whether material breaches of representations and warranties have occurred, and that the requirement of a reserve fund imposes substantial additional costs on IDIs without addressing this more important problem. A reserve fund may make it more likely that investors have a remedy for breaches by an IDI that has become insolvent, but is not an effective incentive to deter breaches as solvent IDIs will naturally assume that they will have financial responsibility for any breaches that investors prove. Although The Clearing House believes that the SEC's proposal with respect to quarterly third party review of assets not repurchased or replaced following the assertion of a breach by the trustee raises certain practical problems, it believes that the SEC's enhanced periodic asset-level disclosure requirements would improve compliance with representations and warranties by securitizers and thus better align incentives.

13. Is retention by the sponsor of a 5 percent ''vertical strip'' of the securitization adequate to protect investors? Should any hedging strategies or transfers be allowed?

The Clearing House believes that for transactions that do not satisfy the asset-specific underwriting criteria that would be adopted by the joint regulations under Dodd-Frank, a five percent vertical strip is one of several possible approaches to increasing the alignment of the interests of originators and investors. The Clearing House supports the FDIC's proposed alternative of permitting retention of a representative sample of assets, and believes that other alternatives, such as the sale of a first loss position to a sophisticated third-party that performs due diligence on the asset pool, merit further consideration. However, The Clearing House believes the appropriate venue for risk retention requirements is in the joint regulations.

14. Do you have any other comments on the conditions imposed by paragraphs (b) and (c)?

The SEC is currently engaged in a major rulemaking effort to update and strengthen the disclosure requirements for asset-backed securities applicable for both public offerings and private placements that rely its safe harbor exemptions from registration. As the principal Federal regulator responsible for investor protection, the SEC has extensive experience in these matters, and The Clearing House is confident that the SEC's rulemaking effort will dramatically improve the quality of disclosure in securitizations. The Clearing House respectfully submits that rather than the FDIC issuing its own regulations concerning asset-backed securities disclosure, the FDIC should work closely with the SEC to make sure that the FDIC's concerns about transparency and the soundness of IDIs and the security of the Deposit Insurance Fund are addressed. Absent any information that is specifically dependent on the originator's status as an IDI, the disclosure requirements should be consistent for IDIs and other securitizers because their objective is to provide investors with the information they need to make investment decisions. To the extent the FDIC believes it necessary to collect other information about securitizations sponsored by IDIs to fulfill its regulatory mandate, these requirements should be addressed separately, through interagency action with the other Federal banking regulators as appropriate.

15. Is the scope of the safe harbor provisions in paragraph (d) adequate? If not, what changes would you suggest?

The Clearing House believes that the scope of paragraph (4) is likely to increase the costs of securitizations to IDIs and as discussed above, that the Securitization Rule should not treat securitizations as if they were secured transactions with the possibility of repudiation because they do not qualify for sale accounting treatment. Sale accounting treatment is one of many factors that are relevant to a true sale analysis under state law. The 2009 GAAP Modifications reflect the accounting profession's response to the financial crisis, during which some users of off balance sheet financing provided additional financial support to off balance sheet entities that they sponsored because the securitized assets were performing poorly and the sponsors intervened in an effort to preserve their access to the market. Where the 2009 GAAP Modifications recognize that in some cases asset-backed securities investors may benefit from the IDI's support and seek to align the accounting accordingly, the relief offered by paragraph (4), since it is narrower that the relief offered by paragraph (3), would mean that asset-backed securities investors take down-side exposure to the IDI – because the IDI's insolvency may trigger a forced sale of the securitized assets – even when the investors have no legal right to the up-side exposure that were a major impetus for the 2009 GAAP Modifications.

16. Do the provisions of paragraph (d)(4) adequately address concerns about the receiver's monetary default under the securitization document or repudiation of the transaction?

It is unclear in the case of repudiation whether the term "par value" includes accrued and unpaid interest or how this term would be applied to equity or other tranches of securitizations for which there may not be a defined par value. Although The Clearing House believes that the FDIC should continue to provide the same safe harbor protection to securitizations regardless of whether they qualify for sale accounting under the 2009 GAAP Modifications, it certainly is essential that, in any alternative safe harbor, investors be made whole in the event of any monetary default or repudiation.

17. Could transactions be structured on a de-linked basis given the clarification provided in paragraph (d)(4)?

The Clearing House believes, for the reasons stated in the response to question (16), that investors may not treat securitizations as delinked from the credit risk of the IDI unless it is clear that investors will be made whole (to the extent of the value of the assets in the securitization) in the event of any monetary default or repudiation. Even so, the risk that the IDI's insolvency may trigger a forced sale of the securitized assets will likely cause many investors not to view the securitizations relying on this paragraph as delinked.

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The Clearing House acknowledges that the originate-to-distribute model contributed to lax underwriting practices and played an important role in the financial crisis, but believes that the FDIC's response to these problems should be coordinated with that of other Federal regulators to assure, insofar as appropriate, consistent treatment of all originators of securitized assets and be consistent with any pending financial reform legislation that is enacted into law.

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We hope these comments have been helpful. If you have any questions about any matter discussed in this letter, please contact me at 212-612-9234.

Very truly yours,