January 7, 2015

TO: Board of Directors

FROM: Bret D. Edwards
Director
Division of Resolutions and Receiverships

Richard J. Osterman, Jr.
Acting General Counsel
Legal Division

SUBJECT: Proposed Rule to Revise 12 C.F.R. Section 360.6 "Treatment of financial assets transferred in connection with a securitization or participation"

RECOMMENDATION

Staff recommends that the Board approve a notice of proposed rulemaking (the "NPR") to revise 12 C.F.R. Section 360.6, "Treatment of financial assets transferred in connection with a securitization or participation" (the "Securitization Safe Harbor Rule"), in order to clarify (i) the date on which compliance with the credit risk retention requirements adopted under Section 15G of the Securities Exchange Act ("Section 15G") will need to be specified in the documentation governing a securitization transaction in order for the transaction to qualify for special treatment, (ii) that the Securitization Safe Harbor Rule requirement as to the such regulations (the "Section 15G Regulations") relates to the securitization documentation but is not intended to require continuous compliance with the Section 15G Regulations and (iii) that the Securitization Safe Harbor Rule condition relating to the Section 15G Regulations does not require that there be changes to documents governing an asset-backed security issuance that closes before the date on which compliance with the Section 15G Regulations is required for such type of issuance. The

NPR, if approved by the Board, would request public comment on the proposed revisions to the Securitization Safe Harbor Rule.

DISCUSSION

The Securitization Safe Harbor Rule provides for special treatment for securitization transactions that satisfy the conditions set forth in the Rule. It provides with respect to certain transfers of financial assets in connection with securitization transaction that the FDIC, in its capacity as receiver or conservator of an insured depository institution, will not in the exercise of its authority to repudiate contracts, recover or reclaim such financial assets where the conditions and the requirements of the Rule are met. For other transactions that comply with its requirements, the Securitization Safe Harbor Rule provides for the exercise of certain remedies on an expedited basis. The Securitization Safe Harbor Rule was amended and restated in 2010 to include additional conditions for safe harbor treatment for transactions that were not grandfathered by the Rule; these additional conditions included, among others, a credit risk retention requirement. The 2010 restatement provides that upon the effective date of the joint rulemaking establishing credit risk retention requirements under Section 15G, the credit risk retention requirements adopted by that rulemaking replace the specific risk retention requirements included in the Securitization Safe Harbor Rule.

Paragraph (b)(5)(i) of the Securitization Safe Harbor Rule sets forth the conditions relating to credit risk retention that apply to transfers of financial assets in connection with securitization transactions (other than those grandfathered by the 2010 restatement). Under paragraph (b)(5)(i)(A), prior to the effective date of the Section 15G Regulations, the documents governing such securitization transactions must require that the sponsor retain an economic interest in not

less than five (5) percent of the credit risk of the financial assets relating to the securitization. Paragraph (b)(5)(i)(B) provides that, upon the effective date of the Section 15G Regulations, such regulations shall exclusively govern the requirement to retain an economic interest in the credit risk of such financial assets.

Section 15G provides that regulations issued thereunder become effective with respect to residential mortgage securitizations one year after the date on which the regulations are published in the Federal Register and, with respect to all other securitizations, two years after such publication date. The Federal Register publication of the Section 15G Regulations specifies "compliance dates" that correspond to these effective dates. However, in accordance with Federal Register editorial conventions (which require that a Federal Register publication specify as the effective date the date on which a rule affects the current Code of Federal Regulations) the Federal Register publication also specifies February 23, 2015 as the "effective date" of the Section 15G Regulations. The proposed rule included in the NPR is intended to eliminate any confusion that might be created by the use of "effective date" in this way by clarifying that paragraph (b)(5)(i)(B) requires that the documents governing a securitization transaction are not required to require compliance with the Section 15G Regulations until the date on which compliance with the Section 15G Regulations is required with respect to that type of securitization transaction pursuant to Section 15G.

Staff has also identified two points related to paragraph (b)(5)(i) of the Securitization Safe Harbor that it recommends be clarified. The first clarification would make clear that paragraph (b)(5)(i) is intended to require that, upon and following the effective date of the Section 15G Regulations, the Securitization Safe Harbor Rule requirements as to risk retention are satisfied if

the governing documents of a securitization transaction require retention of an economic interest in financial assets relating to a securitization transaction in accordance with the Section 15G Regulations, and that if the documentation satisfies this condition (and assuming all other conditions of the Securitization Safe Harbor Rule are satisfied), the transaction will not lose the benefits of the safe harbor solely on the basis of any actual non-compliance with the Section 15G Regulations risk retention requirements by the sponsor or another applicable party.

The second clarification would make clear that paragraph (b)(5)(i)(B) of the Securitization Safe Harbor Rule does not require that any action be taken with respect to issuances of asset-backed securities that comply with paragraph (b)(5)(i)(A) and close prior to the effective date of the Section 15G Regulations.

CONCLUSION

It is recommended that the Board of Directors approve the revisions to the Securitization Safe Harbor Rule proposed by staff and authorize publication of the attached Federal Register notice.

Staff Contacts

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