FEDERAL DEPOSIT INSURANCE CORPORATION
12 CFR Part 360
RIN ____

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

AGENCY: Federal Deposit Insurance Corporation (FDIC)

ACTION: Interim Rule with request for comments

SUMMARY: The Federal Deposit Insurance Corporation ("FDIC") is amending its regulation codified at 12 C.F.R. section 360.6, Defining Safe Harbor Protection for Treatment By The Federal Deposit Insurance Corporation As Conservator Or Receiver Of Financial Assets Transferred In Connection With A Securitization Or Participation. The amendment adds a new subparagraph (b)(2) in order to continue for a limited time the safe harbor provision of section 360.6(b) for participations or securitizations that would be affected by recent changes to generally accepted accounting principles. In effect, the Interim Rule "grandfathers" all participations and securitizations for which financial assets were transferred or, for revolving securitization trusts, for which securities were issued prior to March 31, 2010 so long as those participations or securitizations complied with the preexisting section 360.6 under generally accepted accounting principles in effect prior to November 15, 2009. The transitional safe harbor will apply irrespective of whether or not the participation or securitization satisfies all of the conditions for sale accounting treatment under generally accepted accounting principles as effective for reporting periods after November 15, 2009.

The FDIC is intending to publish in December 2009, a Notice of Proposed

Rulemaking to amend section 360.6 further regarding the treatment of participations and securitizations issued after March 31, 2010.

DATES: The Interim Rule became effective on November 12, 2009, following its adoption by the Board of Directors of the FDIC. Comments on the Interim Rule must be received by [**INSERT DATE 45 DAYS AFTER FEDERAL REGISTER PUBLICATION**].

ADDRESSES: You may submit comments on the Interim Rule, by any of the following methods:

- Agency Web Site: http://www.FDIC.gov/regulations/laws/federal/notices.html. Follow instructions for submitting comments on the Agency Web Site.
- E-mail: Comments@FDIC.gov. Include RIN #_____ on the subject line of the message.
- Mail: Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429.
- Hand Delivery: Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Instructions: All comments received will be posted generally without change to http://www.fdic.gov/regulations/laws/federal/propose.html, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Michael Krimminger, Office of the Chairman, 202-898- 8950; George Alexander, Division of Resolutions and

Receiverships, 202 898-3718; or R. Penfield Starke, Legal Division, 703-562-2422, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Background

In 2000, the FDIC clarified the scope of its statutory authority as conservator or receiver to disaffirm or repudiate contracts of an insured depository institution ("IDI") with respect to transfers of financial assets by an IDI in connection with a securitization or participation when it adopted a regulation codified at 12 C.F.R. section 360.6 ("the Securitization Rule"). This rule provides that the FDIC as conservator or receiver will not use its statutory authority to disaffirm or repudiate contracts to reclaim, recover, or recharacterize as property of the institution or the receivership any financial assets transferred by an IDI in connection with a securitization or participation or in the form of a participation, provided that such transfer meets all conditions for sale accounting treatment under generally accepted accounting principles ("GAAP"). The rule was a clarification, rather than a limitation, of the repudiation power because such power authorizes the conservator or receiver to breach a contract or lease entered into by an IDI and be legally excused from further performance but it is not an avoiding power enabling the conservator or receiver to recover assets that were previously transferred by the IDI in connection with the contract. The Securitization Rule provided a "safe harbor" to permit transfers of financial assets by IDIs to an issuing entity in connection with a securitization or in the form of a participation to satisfy the "legal isolation" condition of GAAP as it applies to institutions for which the FDIC may be appointed as conservator or receiver.

To satisfy the legal isolation condition, the transferred financial asset must have been presumptively placed beyond the reach of the transferor, its creditors, a bankruptcy trustee, or in the case of an IDI, the FDIC as conservator or receiver. Since its adoption, the Securitization Rule has been relied on by securitization participants, including rating agencies, as assurance that investors could look to securitized financial assets for payment without concern that the financial assets would be interfered with by the FDIC as conservator or receiver.

Recently, the implementation of new accounting rules has created uncertainty for securitization participants. On June 12, 2009, the Financial Accounting Standards Board ("FASB") finalized modifications to GAAP through Statement of Financial Accounting Standards No. 166, *Accounting for Transfers of Financial Assets, an Amendment of FASB Statement No. 140* ("FAS 166") and Statement of Financial Accounting Standards No. 167, *Amendments to FASB Interpretation No. 46(R)* ("FAS 167")(the "2009 GAAP Modifications"). The 2009 GAAP Modifications are effective for annual financial statement reporting periods that begin after November 15, 2009. For most IDIs, the 2009 GAAP Modifications will be effective for reporting periods beginning after January 1, 2010. The 2009 GAAP Modifications made changes that affect whether a special purpose entity ("SPE") must be consolidated for financial reporting purposes, thereby subjecting many SPEs to GAAP consolidation requirements. These accounting changes will require some IDIs to consolidate an issuing entity to which financial assets have been transferred for securitization on to their balance sheets for financial reporting purposes. Given the likely accounting treatment, securitizations could be considered to be an alternative form of secured borrowing. As a result, the safe harbor provision of the

Securitization Rule may not apply to the transfer.

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

The 2009 GAAP Modifications affect the way securitizations are viewed by the rating agencies and whether they can achieve ratings that are based solely on the credit quality of the financial assets, independent from the rating of the IDI. Rating agencies are concerned with several issues, including the ability of a securitization transaction to pay timely principal and interest in the event the FDIC is appointed receiver or conservator of the IDI. Moody's, Standard & Poor's, and Fitch have expressed the view that because of the 2009 GAAP modifications and the extent of the FDIC's rights and powers as conservator or receiver, bank securitization transactions are unlikely to receive AAA ratings and would have to be linked to the rating of the IDI. Securitization practitioners have asked the FDIC to provide assurances regarding the position of the conservator or receiver as to the treatment of both existing and future securitization transactions to enable securitizations to be structured in a manner that enables them to achieve de-linked ratings. This Interim Rule addresses securitizations and participations issued before March 31, 2010.

II. The Interim Rule

The Interim Rule amends the Securitization Rule by renumbering existing paragraph (b) as clause (b)(1) of paragraph (b). The Interim Rule inserts a new clause (b)(2) of the Securitization Rule that addresses any participation or securitization (i) for which transfers of financial assets were made or (ii), for revolving securitization trusts, for which beneficial interests were issued on or before March 31, 2010. The rule provides that, for these participations or securitizations, the FDIC as conservator or receiver shall not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership any such transferred financial assets notwithstanding that such transfer does not satisfy all conditions for sale accounting treatment under generally accepted accounting principles as effective for reporting periods after November 15, 2009, if such transfer satisfied the conditions for sale accounting treatment set forth by generally accepted accounting principles in effect for reporting periods before November 15, 2009, except for the "legal isolation" condition that is addressed by the rule.

III. Solicitation of Comments

The FDIC is soliciting comments on all aspects of the Interim Final Rule. The FDIC specifically requests comments responding to the following:

1. Do the changes to the accounting rules affect the application of the Securitization Rule to participations? If so, are there changes to the Interim Rule that are needed to protect different types of participations issued by IDIs more broadly?
2. Does the Interim Rule adequately encompass all transactions that should be included within its transitional safe harbor?
3. Is the transition period to March 31, 2010 sufficient to structure transactions to comply with the new generally accepted accounting principles?

IV. Regulatory Procedure

A. Administrative Procedure Act

The Administrative Procedure Act ("APA") provides that general notice of a proposed rulemaking shall be published and that interested persons shall have an opportunity to participate in the rulemaking by submitting written data, views, or arguments, except where the agency finds for good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. The FDIC for good cause finds that notice and public procedure with respect to this Interim Rule would be impracticable, unnecessary, or contrary to the public interest because the 2009 GAAP Modifications become effective as of the financial reporting period starting on or after November 15, 2009 and retroactively apply to existing securitizations. The FDIC believes that it is in the best interest of the U.S. banking industry and economic for

the FDIC to provide assurances with respect to the treatment of existing securitizations that will be affected by the 2009 GAAP Modifications.

The APA also provides that publication of a substantive rule shall be made not less than 30 days before its effective date except as otherwise provided by the agency for good cause found and published with the rule. Because of the retroactive application of the 2009 GAAP Modifications and the immediate need for assurances for securitization participants and the banking industry with respect to existing securitizations and participations, the FDIC invokes this good cause exception to make this Interim Rule effective as of November 12, 2009. Nevertheless, the FDIC desires to have the benefit of public comment before adopting a final rule and thus invites interested parties to submit comments during a 45-day comment period. The FDIC will revise the Interim Rule as appropriate after consideration of the comments received.

B. Community Development and Regulatory Improvement Act

The Riegle Community Development and Regulatory Improvement Act (CDRIA) requires that any new rule prescribed by a Federal banking agency that imposes additional reporting, disclosures, or other new requirements on insured depository institutions take effect on the first day of a calendar quarter. 12 U.S.C. section 4802. This requirement does not apply because the Interim Rule does not impose additional reporting, disclosures, or other new requirements on insured depository institution.

C. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. section 601 et seq.), it is certified that the Interim Rule will not have a significant economic impact on

a substantial number of small business entities. The Interim Rule merely extends the safe harbor of section 360.6(b) to securitizations issued before March 31, 2010 and does not represent a change in the law.

E. Small Business Regulatory Enforcement Fairness Act

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

F. Paperwork Reduction Act

No collection of information pursuant to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. section 3501 et seq.) is contained in the final rule. Consequently, no information was submitted to the Office of Management and Budget for review.

List of subjects in 12 CFR § 360.6:

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

For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation amends title 12 of the Code of Federal Regulations by amending Part 360 by amending § 360.6 as follows:

Renumber paragraph (b) of Rule§ 360.6 as paragraph (b)(1).

Insert a new paragraph (b)(2) as follows:

(2) With respect to any participation or securitization (i) for which transfers of financial assets were made or (ii), for revolving securitization trusts, for which beneficial interests were issued on or before March 31, 2010, the FDIC as conservator or receiver shall not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership any such transferred financial assets notwithstanding that such transfer does not satisfy all conditions for sale accounting treatment under generally accepted accounting principles as effective for reporting periods after November 15, 2009, provided that such transfer satisfied the conditions for sale accounting treatment set forth by generally accepted accounting principles in effect for reporting periods before November 15, 2009, except for the "legal isolation" condition that is addressed by this rule.