THE LAW OFFICES OF
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A PROFESSIONAL CORPORATION

September 20, 2019

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments/RIN 3064-AF09
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429
comments@fdic.gov

Re: RIN 3064-AF09: Federal Deposit Insurance Corporation (FDIC), Notice of Proposed Rulemaking, Securitization Safe Harbor Rule, 84 Fed. Reg. 43732 (August 22, 2019) ("Proposed Rule")

Ladies and Gentlemen:

The FDIC rather surprisingly admits that its proposal to eliminate issuer compliance with SEC Regulation AB disclosure requirements is ***intended*** to enhance proliferation of US insured institution issuance of Residential Mortgage Backed Securities (RMBS):

> The FDIC believes, however, that the number of insured banks sponsoring private RMBS, or any type of private ABS, and thereby directly affected by this proposed rule, is extremely small. In its most recent [data request], the FDIC identified fewer than 20 distinct private ABS issuances of any type sponsored by FDIC insured institutions based on a sample of issuances in 2017, some of which were different issuances by the same banks. For most of the transactions, the sponsoring banks were very large institutions.
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> This information appears generally consistent with market participants' observations that current private RMBS activity by insured banks is muted. This would suggest that ***removing the disclosures might be expected to encourage banks engaging in sponsoring private RMBS issuances to expand their activities***. It also is possible that other institutions not currently involved in issuing private RMBS could begin doing so. While the proposed rule could be expected to result in an increase in the dollar volume of private RMBS issuances, the disclosures are only one among many factors affecting the demand and supply of RMBS. Levels of RMBS outstanding suggest that demand for non-agency RMBS is still weak in the aftermath of the [2008 financial] crisis. Annual non-agency single family RMBS issuance reached a high of about $1.2 trillion in 2005, and as previously noted, was about $100 billion in 2018.[1]

Many investigations showed how excessive RMBS issuance was a leading cause of the 2008 financial crisis.[2] Even the FDIC itself in discussing Regulation AB noted, "there is no

[1] Proposed Rule, 84 Fed. Reg. at 43735, col. 2.

[2] *E.g.*, FDIC, Crisis and Response: An FDIC History, 2008-2013, Chapters 1 & 4 (2017) (avail. at https://www.fdic.gov/bank/historical/crisis/); Financial Crisis Inquiry Commission, Financial Crisis Inquiry Report, pp., xvii-xviii, 79, 94, Republican dissent (2011) (avail. at http://fcic.gov/) (recounting how the FDIC and other financial regulators engaged in gross mismanagement and "pivotal failure" in the lead-up to the 2008 financial crisis). *See also* Duffie, *Prone to Fail: The Pre-Crisis Financial System*, 33 J. of Economic Perspectives 81 (2019) (avail. at https://www.aeaweb.org/articles/pdf/doi/10.1257/jep.33.1.81) (documenting lax US regulatory oversight);

question that greater difficulties have been demonstrated in residential mortgage-backed securities."[3]

The FDIC says bringing back to the financial system increased levels of mortgage securities issuance is good because it would "increase the supply of mortgage credit".[4] But the FDIC does not show any current shortage in mortgage credit, and certainly not one that would justify the extreme measures of massively re-infecting the system with RMBS.

FDIC Chair Jelena McWilliams said, when discussing the Proposed Rule at the FDIC Board Meeting on July 16, 2019, "I think every opportunity we have to conform our regulations to those of the other agencies ... would be a good thing."[5] However, the Proposed Rule would contravene this goal, as it would be inconsistent with National Credit Union Administration (NCUA) regulations that require the very disclosure compliance with Regulation AB, even for private placements, that the FDIC now proposes to eliminate.[6] Both the FDIC and the NCUA have mission statements encompassing maintaining financial institution safety and soundness,[7] and each insure deposits with the full faith and credit of the United States,[8] making it appropriate for both agencies to apply Regulation AB with additional rigors.

The FDIC is being less than transparent by implying the SEC rejected the requirement the

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Jacobs, *Tumbling Tower of Babel: Subprime Securitization and the Credit Crisis*, Insights into the Global Financial Crisis (Research Foundation of CFA Institute, 2009) (avail. at https://www.cfainstitute.org/research/foundation/2009/tumbling-tower-of-babel-subprime). Many perceived this while it was happening, e.g., Michael Short, The Big Short: Inside the Doomsday Machine (2010); Deutsche Bank, *Shorting Home Equity Mezzanine Tranches* (Feb. 2007) (avail. at https://www.valuewalk.com/wp-content/uploads/2015/05/2007_Subprime_Shorting-Home-Equity-Mezzanine-Tranches-1.pdf); Hudson, *The New Road to Serfdom: An Illustrated Guide to the Coming Real Estate Collapse*, Harper's Magazine (May 2006) (avail. at https://michael-hudson.com/wp-content/uploads/2010/03/RoadToSerfdom.pdf).

[3] FDIC, Advanced Notice of Proposed Rulemaking: 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, 75 Fed. Reg. 934 at 936 (Jan. 7, 2010).

[4] Proposed Rule, 84 Fed. Reg. at 43735 col. 3.

[5] Webcast of FDIC Board Meeting at 21:53 (Jul. 16, 2019) (avail. at https://onlinexperiences.com/Launch/Event/ShowKey=72277).

[6] In the supplementary information included with the release of its final rule, the NCUA stated that "documents governing securitizations must, at a minimum, require disclosure for all issuances to include the types of information required under current Regulation AB or any successor disclosure requirements with the level of specificity that applies to public issuances, even if the obligations are issued in a private placement or are not otherwise required to be registered." NCUA Safe Harbor Final Rule, 82 Fed. Reg. 29699, 29702 at col. 1 (Jun. 30, 2017). Under the heading "Requirements applicable to all securitizations," the rule specifically provides that "documents [creating the securitization] must require that []information [about the obligations and the securitized financial assets] and its disclosure, at a minimum, complies with the requirements of [SEC] Regulation AB, ... even if the obligations are issued in a private placement or are not otherwise required to be registered." 12 C.F.R. § 709.9(b)(2)(i)(A). The NCUA Final Rule implemented Regulation AB compliance for private placements **7 years** after the FDIC's implementation, which undercuts the FDIC's rosy assessment in the Proposed Rule that "such a requirement is no longer necessary in view of regulatory developments relating to residential mortgages since 2010." 84 Fed. Reg. at 43734 col. 3. Perhaps regulatory conformity will be achieved later if those who persuaded the FDIC to eliminate the specific investor and systemic protections of Regulation AB likewise persuade the NCUA.

[7] About FDIC > Strategic Plans > 2018-2022 Strategic Plan (avail. at https://www.fdic.gov/about/strategic/strategic/mission.html); About NCUA: Mission and Values (avail. at https://www.ncua.gov/about-ncua/mission-values).

[8] 12 U.S.C. §§ 1828(a)(1)(B) & 1785(a)(1)(B).

FDIC now seeks to eliminate. In its memorandum recommending approval of the Proposed Rule, FDIC staff stated, "[a]s adopted in 2014, Regulation AB ... declined to require issuers to provide the same disclosure for exempt offerings as is required for registered offerings."[9] The phrase "declined to require" seems intended to imply "rejected", which would be untrue, as the requirement remained an outstanding proposal under consideration. The SEC stated in the preamble to its final rule adopting revisions to Regulation AB: "These proposals remain outstanding ... Requiring issuers to provide the same disclosure for Rule 144A offering as required for registered offerings."[10] SEC Commissioner public statements also noted that disclosure requirements remained to be expanded to private placements.[11] FDIC staff would have been more transparent had it said the SEC had "not yet adopted," rather than "declined to adopt," those investor and systemic protections that the FDIC now wishes to jettison.[12]

Therefore, eliminating investor disclosure and systemic protection requirements, as the FDIC now proposes, would not promote Chair McWilliams' desired inter-agency regulatory harmony. Rather, it would contradict the SEC, the nation's primary securities regulator, by negating a proposal the SEC stated remained outstanding, and would be inconsistent with NCUA regulations. The FDIC would sow interagency regulatory disharmony in "encouraging" issuance of RMBS, which have been demonstrably toxic to the financial system.

Debt securitizations other than for RMBS have returned to pre-financial crisis levels,[13]

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[9] Recommendation memo of Maureen E. Sweeney & Nicholas J. Podsiadly to FDIC Board of Directors, *Proposed Rule to Revise Securitization Safe Harbor Rule* (Jul. 11, 2019) (avail. at https://www.fdic.gov/news/board/2019/2019-07-16-notice-dis-c-mem.pdf).

[10] SEC, Asset-Backed Securities Disclosure and Registration; Final Rule, 79 Fed. Reg. 57184, 57190 at col. 3 (Sep. 24, 2014).

[11] *E.g.*, "It is therefore crucial that the [SEC] complete the other outstanding ABS proposals in order to address the regulatory regime in this space. These include: ... Requiring issuers to provide the same disclosure for ABS issued pursuant to private offerings and resold under Rule 144A, as is required for registered offerings … ." Comm'r Luis A. Aguilar, *Correcting Some of the Flaws in the ABS Market*, SEC (Aug. 27, 2014) (avail. at https://www.sec.gov/news/public-statement/2014-08-27-open-meeting-statement-abs-laa#_edn1); "unfortunately, the [SEC]'s work in the ABS area is not complete. ... the [SEC] has other outstanding regulatory proposals in the ABS space, including the following: (i) requiring issuers to provide the same disclosure for ABS issued pursuant to private offerings and resold under Rule 144A, as is required for registered offerings." Comm'r Luis A. Aguilar, *Skin in the Game: Aligning the Interests of Sponsors and Investors*, SEC, n.23 (Oct. 22, 2014) (avail. at https://www.sec.gov/news/public-statement/2014-spch102214laa).

[12] *See* Cadwalader, Wickersham & Taft, *At Long Law- SEC Adopts Regulation AB II*, p. 2 (Sept. 5, 2014) (avail. at https://www.cadwalader.com/uploads/cfmemos/6c1186aa6378825fd40a77c21cf10ed7.pdf) ("While these proposals were not adopted, in the Final Release the SEC expressly states that the proposals remain open, leaving open the possibility that they could be implemented in the future. ... It seems likely to us that, given the addition by Section 942 of the Dodd-Frank Act of Section 7(c) to the Securities Act, mandating the SEC to require issuers to disclose asset-level data if necessary for investors to perform due diligence, the SEC may eventually prescribe loan-level disclosure for asset classes other than those addressed in the Final Rules. Whether efforts to extend Regulation AB disclosures to private transactions again pick up momentum may depend on the success of the investor protections added by the Final Rules and the extent, if any, to which transactions may shift into the private markets to avoid some of the elements of the Final Rules.").

[13] Laurence Fletcher, *Debt securitisation rebounds to pre-crash levels: Commercial mortgage securities have bounced back — unlike the residential equivalent*, Financial Times (Sept. 18, 2019) (avail. at https://www.ft.com/content/482f7ba6-d884-11e9-8f9b-77216ebe1f17) ("it has also raised questions as to whether some areas have become overinflated and could pose another threat to financial stability, if prices in the underlying markets start to fall.").

and the FDIC admits RMBS debt securitizations would increase with the FDIC's proposed investor and systemic protection rollback. In its Proposed Rule, the FDIC invites back in the very vampires that nearly killed us before, saying the system can take it.[14] In other rulemakings, for example when the FDIC purported to override statutory protections in the Trust Indenture Act and the Bankruptcy Code, the FDIC said it needed to protect the system.[15] Which is it? The Proposed Rule is another unfortunate example of the FDIC seeking to undo important investor and systemic protections.

To ensure that the Proposed Rule is supported by reasoned decision making, before it blazes its own trail to weaken investor and systemic protections concerning RMBS by making it a Final Rule, the FDIC should (i) demonstrate a shortage of residential mortgage credit that is so dire as to require eliminating investor and systemic protections in order to increase RMBS securitizations; (ii) review and respond to the findings of the Financial Crisis Inquiry Report, especially those in the Republican Commissioners' dissent, and the FDIC's own recently published history of the financial crisis,[16] concerning the dangers of proliferation of RMBS issuance; (iii) determine and specifically find, rather than cavalierly assume with no evidence, and contrary to recent NCUA findings,[17] that the "significant body of regulation" has succeeded in eliminating the rampant fraud and issuance of residential mortgages to non-creditworthy borrowers that led to the 2008 financial crisis, to ensure that such mortgages do not end up in issued RMBS; (iv) explain how risky mortgage issuing practices will be regularly and routinely inspected, discovered, and disclosed to investors, perhaps by thoroughly testing objectively representative samples of the residential mortgages in the RMBS; and (v) include a finding that adequate and effective safeguards protecting investors and the financial system remain in place, accounting for those sought to be removed by the FDIC.

Thank you for the opportunity to comment on the Proposed Rule.

Yours truly,

[redacted]

Jeremy D. Weinstein

cc: Congressman Mark DeSaulnier
Financial Times

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[14] "While problematical or predatory mortgage practices can harm borrowers, a significant body of regulation exists to prevent such practices." Proposed Rule, 84 Fed. Reg. at 43735 col. 3.

[15] "Some of these commenters argued that parties cannot by contract alter the U.S. Bankruptcy Code's provisions, such as the administrative priority of a claim in bankruptcy, and one commenter suggested that non-covered FSI counterparties may challenge the legality of contractual stays on the exercise of default rights if a GSIB becomes distressed. Other commenters, however, argued that the provisions of the proposed rule were necessary to address systemic risks posed by the exemption for QFCs in the U.S. Bankruptcy Code." FDIC, Final Rule, Restrictions on Qualified Financial Contracts of Certain FDIC-Supervised Institutions; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions, 82 Fed. Reg. 50228 at 50245 (Oct. 30, 2017). *See* "Collateral Damage" section of: Jeremy Weinstein, *Unmasked: FirstEnergy Bankruptcy Decision Reveals Deceptions at the Core of the 2018 U.S. Resolution Stay Protocol*, Futures & Derivatives Law Report (June 2019) (avail. at http://bitly.com/UnmaskedArticle).

[16] *Supra*, footnote 2.

[17] *Supra*, footnotes 6 and 14.