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December 11, 2009

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

Re: 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 74 Federal Register 59066 (November 17, 2009)

Dear Mr. Feldman:

The American Bankers Association (ABA)[1] and the ABA Securities Association (ABASA)[2] wish to take this opportunity to express serious reservations regarding a proposal scheduled to be addressed by the Federal Deposit Insurance Corporation (FDIC or Corporation) at its December 15th meeting. We understand that the FDIC will consider whether to impose additional conditions on the safe harbor for securitizations under Section 360.6. That Section provides protection for treatment by the Corporation as conservator or receiver of financial assets transferred in connection with a securitization or participation (Securitization Rule). In an attachment to this letter, we also provide comments on the FDIC's Interim Final Rule (Interim Rule)[3] regarding securitizations.

It is widely believed that one of these additional conditions will require the securitizer to hold "skin in the game," i.e., to retain a portion of the credit risk of the securitized assets as an incentive to ensure proper underwriting of the underlying

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[1] The ABA brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthens America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13.6 trillion in assets and employ over 2 million men and women.

[2] ABASA is a separately chartered affiliated of the ABA that represents those holding company members of the ABA that are actively engaged in capital markets, investment banking, and broker-dealer activities.

[3] 74 *Fed. Reg.* 59066 (Nov. 17, 2009).

assets. The risk retention requirement reportedly could be set somewhere between five and ten percent of the assets.
Congress is currently considering the appropriateness of a risk retention requirement for securitizations.[4] Importantly, the proposals under consideration recognize the need to give the banking regulators and the Securities and Exchange Commission sufficient flexibility to determine whether "skin in the game" is warranted and, if so, at what level. It would seem entirely appropriate for the FDIC to wait until legislation addressing these important issues is enacted and, further, to consult with its fellow regulators before amending its securitization safe harbor rule to require "skin in the game."

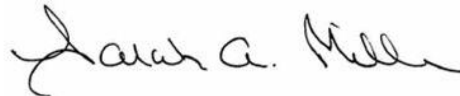
More importantly, ABA is extremely concerned that this early action by the FDIC could further harm a securitization market that is already struggling to recover from the loss of investor confidence. Our members are telling us that they cannot adequately assess the impact a credit risk retention requirement under the safe harbor could have on the continued viability of the securitization markets. Compounding their difficulties in making this assessment is the fact that many of these same participants are grappling with the potential impact of increased costs associated with legislative and regulatory proposals to reform deposit insurance and current capital adequacy requirements and to fund a consumer financial protection agency and systemic risk resolution authority.

Loan securitization and participations are important mechanisms that facilitate financial intermediation and the provision of credit. Market participants need to have certainty over the treatment of these transactions in a conservatorship or receivership of the issuer in order to continue to be willing investors or participants. The fact that the accounting treatment of these transactions will change under GAAP does not provide a compelling basis for changing long-standing FDIC policy about the treatment of these transactions in a conservatorship or receivership. To conclude otherwise would create significant obstacles to an issuer's ability to enter into securitization or participation contracts and, thus, free up capital for future loans.

[4] The Wall Street Reform and Consumer Protection Act of 2009 includes a requirement that securitizers retain five percent of the credit risk. However, the measure also provides broad authority for the banking agencies and the SEC jointly to provide for less than five percent risk retention (depending on underwriting standards). In addition, the Federal Reserve Board would be required to complete a 90-day study of the impact of various risk retention requirements and FAS 166 and 167 on the securitization market. On the Senate side, legislation before the Senate Banking Committee would require ten percent credit risk retention with similar broad exemptive authority for the regulators.

Any amendments to the FDIC's securitization rule would impact only insured depository institutions—not nonbank securitizers—thereby creating an unlevel playing field. The ABA believes that before issuing such a proposal, the FDIC should analyze the disparate impact the proposal could have on bank securitizers. A disparate impact would certainly limit the credit normally provided through securitizations and be counterproductive to efforts to restore the robust functioning of this key market.

Sincerely,



Wayne Abernathy Sarah A. Miller

cc: Sheila C. Bair, Chairman, Federal Deposit Insurance Corporation
Martin J. Gruenberg, Vice Chairman of the FDIC Board of Directors
Thomas J. Curry, Director of the FDIC Board of Directors
John C. Dugan, Comptroller of the Currency
John E. Bowman, Director of the Office of Thrift Supervision (Acting)

Enclosure

Addendum

Questions Presented in the Interim Rule.

On November 15, 2009, FDIC amended its "securitization rule" under Section 360.6 of its resolution rules to take into account the impact of bringing securitized assets back onto banks' balance sheets as may be required by FAS 166 and 167.

The securitization rule, first adopted in 2000, provides a safe harbor to assure securitizers, credit rating agencies and investors that, in the event a bank securitizer failed, FDIC as receiver or conservator would not use its repudiation authority to try to bring the securitized assets back into the estate of the failed institution. The safe harbor was conditioned on the requirement that the asset transfer met all the conditions for *sale accounting treatment under generally accepted accounting principles* (GAAP). Thus, since 2000, investors have known that in the event of a failure, they could look to securitized financial assets for payments without interference by the FDIC.

FAS 166 and 167 are effective for annual financial statement reporting periods beginning after November 15, 2009—typically after January 1, 2010. The changes will likely require many special purpose entities to be consolidated onto the securitizer's balance sheet and thus will *likely not satisfy sale accounting criteria.* The FDIC recently amended its securitization rule to provide that for transfers (or in the case of revolving securitizations, beneficial interests were issued) before March 31, 2010, the safe harbor will remain in effect despite the fact that the transfer did not satisfy sale accounting treatment (Interim Final Rule)

Thus, the Interim Final Rule effectively 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 provisions under GAAP in effect during reporting periods beginning prior to November 15, 2009, and irrespective of whether or not the participation or securitization satisfies all of the conditions for sale accounting treatment under GAAP as effective for reporting periods beginning after November 15, 2009. The FDIC is seeking comment on the following questions:

Q. 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 insured depository institutions more broadly?

A. Statement of Financial Accounting Standards No. 166, *Accounting for Transfers of Financial Assets, an Amendment of FASB Statement No. 140* (FAS 166), affects prospectively the application of the Securitization Rule to participations. While we are not aware of any changes to the Interim Rule that are needed to protect different types of participations, we wish to point out one factor that the FDIC should consider as it formulates a final rule.

As indicated in the Interim Rule, FAS 166 defines a participating interest essentially as a pari passu, pro rata interest in a financial asset. Generally, no priority of rights or subordination may be present. With this in mind, there may be participations that have priority or subordination (or other features that may prevent sale accounting) but are still legally isolated, beyond the reach of the entity, its creditors, or a bankruptcy trustee. The loan would remain on the bank's books, though it may, in fact, be legally isolated from the bank's creditors or trustees.

Legal isolation is the one aspect of a participation that is most relied upon by the lending community as assurance that interference (by the FDIC or other interested party) does not take place. Therefore, we believe that participations that are legally isolated and entered into in good faith should assume the same investor protections as contained in the Securitization Rule, whether or not sale treatment is attained for accounting purposes. We do not believe that the accounting treatment of a participation should control its treatment by the FDIC in a receivership or conservatorship of the originating lender. Rather, the FDIC should continue its policy of not repudiating loan participation contracts in order to preserve this mechanism as a viable part of the lending market.

Q. Does the Interim Rule adequately encompass all transactions that should be included within its transitional safe harbor?

A. With respect to the second question, it is possible that the changes to GAAP might impact other types of variable interest entities and other entities, such as pooled funds and joint ventures. Participations or securities held by these entities may be consolidated and recorded on bank balance sheets under certain circumstances. Again, we urge the FDIC to keep separate the issue of accounting treatment from the decision as to how to treat various transactions for purposes of the conservatorship and receivership rules.

Q. Is the transition period to March 31, 2010 sufficient to structure transactions to comply with the new GAAP?

A March 31, 2010 effective date is not likely to provide an adequate period of time to change the terms of transactions if significant changes are proposed. For certain classes of assets, there may be inventory in the pipeline that could be affected.