



January 4, 2010

VIA E-MAIL: comments@fdic.gov

Robert E. Feldman, Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
Attention: Comments

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 (RIN 3064-AD53)

Ladies and Gentlemen:

The American Securitization Forum (the “ASF”)¹ appreciates the opportunity to submit this letter in response to the request of the Federal Deposit Insurance Corporation (the “FDIC”) for comments regarding its Interim Rule entitled “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” (the “Interim Rule”). Since 2000, the FDIC has provided safe harbor protections to securitizations by confirming that in the event of a bank failure, the FDIC would not attempt to reclaim assets transferred into a securitization if an accounting sale had occurred. On June 12, 2009, the Financial Accounting Standards Board (“FASB”) published Financial Accounting Statements No. 166 and No. 167 (“FAS 166 and 167”) to go into effect on November 15, 2009. FASB’s statements modified generally accepted accounting principles (“GAAP”) and sparked concern among the ASF and its members as to

¹ The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 340 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. The ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com.

January 4, 2010

Page 2

(i) whether the FDIC's existing legal isolation safe harbor provision would apply to securitizations that met the requirements of such provision under GAAP in effect prior to November 15, 2009 and (ii) how the safe harbor provision would be modified for future securitizations. On August 26, 2009, the ASF submitted proposed changes to the legal isolation safe harbor that would allow existing and future securitization and participation transactions to have the benefits of the safe harbor following the effectiveness of the new accounting standards (see Exhibit A). After additional discussion, the ASF submitted a follow-up proposal to the FDIC on September 18th containing both a potential "Sale Approach" and a "Security Interest Approach" (see Exhibit B) to the safe harbor.

On November 12, 2009, the Board of Directors of the FDIC adopted the Interim Rule and confirmed that, at least until March 31, 2010 (the "Transition Period"), the existing safe harbor provision would apply to participations or securitizations for which financial assets were transferred if such transfer satisfied the conditions for sale accounting treatment set forth by GAAP in effect for reporting periods before November 15, 2009 (the "Transitional Safe Harbor"). The FDIC also indicated that it would publish in December 2009 a Notice of Proposed Rulemaking regarding the treatment of participations and securitizations issued after March 31, 2010. On December 15, 2009, the FDIC issued an Advance Notice of Proposed Rulemaking (the "ANPR"), which requested comment "on the standards that should be adopted to provide safe harbor treatment" after March 31, 2010 and sample regulatory text (the "Sample Regulatory Text") to "provide context for the responses to the questions posed."

With its release of the Interim Rule, the FDIC specifically asked whether the Transition Period to March 31, 2010 was "sufficient to structure transactions to comply with the new generally accepted accounting principles." However, for securitizations that involve transfers of financial assets by an insured depository institution, the answer to this question is inextricably tied to how the FDIC's safe harbor would be changed in light of the release of FAS 166 and 167. Thus, we believe the more salient question is contained in the ANPR, where the FDIC asked whether the Transition Period to March 31, 2010 was "sufficient to implement the changes required by the conditions identified by Paragraph (b) and (c)" of the Sample Regulatory Text. For this reason, the ASF and its members submit this letter solely to address whether the Transition Period is an appropriate length of time to implement the conditions identified in the Sample Regulatory Text. The ASF will submit a detailed set of comments that address the other questions posed in the ANPR by the comment deadline.

The conditions being proposed in the Sample Regulatory Text are sweeping, and securitization issuers, in particular RMBS issuers, believe that the proposed Transition Period will not be nearly sufficient time to ensure that securitizations can meet the proposed criteria. Issuers, as well as originators and servicers of financial assets, put operational processes into place to ensure accurate data is disclosed with respect to securitized assets. These operational processes are part of the due diligence done to ensure that offerings comply with securities laws and regulations. Generally, the sheer breadth of the Sample Regulatory Text

will require an extraordinary amount of time for securitization issuers to update these processes so that they can ensure compliance.

In particular, there are a few conditions that will be especially difficult for issuers to meet during the Transition Period. For instance, the Sample Regulatory Text generally requires disclosure of information, both prior to issuance and monthly thereafter, “at the *financial asset*, pool, and security-level sufficient to permit evaluation and analysis of the credit risk and performance of the obligations and financial assets” (emphasis added). It also specifically requires RMBS issuers to provide “loan level” information as to certain loan attributes including, but not limited to, type, structure, maturity and property location. Provision of “loan level” or “financial asset-level” information has been endorsed and specified by the ASF in connection with ASF Project RESTART, a broad-based industry-developed initiative to help rebuild investor confidence in mortgage-backed securities.² Through our work on this initiative, it has become clear that disclosing loan-level information at issuance and monthly thereafter requires substantial operational work and time on the part of issuers, originators and servicers. In fact, our members have indicated that implementation of monthly loan-level reporting will take 12-18 months. Furthermore, while the provision of loan-level information is appropriate to certain types of asset-backed securities, investors in other types of asset-backed securities, such as credit card ABS, have indicated that loan-level information is not practical and would be overly burdensome for issuers to produce for a master trust which can contain tens of millions of accounts. As such, the reporting of loan-level data for a credit card master trust could require even more time than the 12-18 month implementation period required for RMBS trusts.

The Sample Regulatory Text also requires that the financial asset-level or loan-level information described above, and the disclosures required for Regulation AB, be provided in private placement transactions. The private placement market consists mostly of “qualified institutional buyers,” which are experienced investors who have direct access to issuers and substantial information in the market and are capable of negotiating their own terms. Many small issuers began to utilize the private market after Regulation AB was introduced because such issuers did not have the resources to upgrade their processes and systems for Regulation AB or did not execute enough securitization transactions to make such an upgrade economical. When the final requirements for Regulation AB were published, market participants had over a year to comply with those requirements. Assuming these small issuers had the financial means to make the appropriate adjustments, it would likely take them at least a year to comply with the provisions of Regulation AB and the other loan-level conditions set forth in the Sample Regulatory Text.

The Sample Regulatory Text also would require issuers of resecuritizations, which are commonly private placements, to include the same disclosures as publicly registered transactions. In a resecuritization, a pool of RMBS certificates is sold to a securitization trust

² See <http://www.americansecuritization.com/restart>.

that issues securities representing the right to receive distributions on the underlying RMBS. Resecuritizations enable banks to create additional subordination on their existing RMBS by issuing different tranches of securities, the most senior of which will have more credit support than the underlying RMBS. Resecuritization is very common in the market today and a very important tool for risk management because it provides institutions with a means to make their outstanding RMBS and ABS more attractive to investors. The ASF believes that the additional disclosure requirements required by the Sample Regulatory Text could take several months to implement for a single res securitization transaction.

Finally, the Sample Regulatory Text requires that the “transfer and duties of the sponsor as transferor” be evidenced in a separate agreement from “its duties, if any, as servicer, custodian, paying agent, credit support provider or in any capacity other than the transferor.” As drafted, this provision may require re-documentation of existing master trust programs where the sponsor’s role as transferor and its role as servicer, custodian or paying agent are not evidenced by separate agreements. To establish this separation, issuers may be required to obtain certificateholder consent and/or ratings confirmations to amend existing agreements and make applicable changes to the registration statement. Collectively, this process would require a substantial amount of time.

Based on feedback received from our broad membership and, in particular, our securitization issuer members, the ASF believes that the Transition Period should be extended well beyond March 31, 2010. We believe that the rulemaking process alone would require a significant extension of the Transition Period as both the ANPR and the eventual Notice of Proposed Rulemaking will be open to public comment for at least 45 days following their publication in the Federal Register. This combined three month comment period, in addition to the substantial time required by the FDIC to consider the extensive and detailed comments submitted by market participants, will require a significant extension of the Transition Period. Furthermore, the FDIC will need adequate time to formulate appropriate preconditions to a new safe harbor and to allow issuers sufficient time to meet the requirements of that safe harbor. Finally, extension of the Transition Period is also appropriate given the potential necessary harmonization that Congress’ regulatory reform legislation could have on any preconditions for the new safe harbor.

Given the significant need for securitization markets to be as vibrant as possible for financial institutions to have access to capital to lend to consumers and small business, it is critical that RMBS, CMBS and ABS issuers and investors be able to plan their securitization sales and purchases well in advance. Given the extensive time needed for the legislative and regulatory process to fully consider the various alternatives in addition to the time needed for issuers to comply with any new rules, we respectfully request that the FDIC extend the Transition Period to 6-12 months after the date on which the final safe harbor rule is published in the *Federal Register*.

January 4, 2010
Page 5

We very much appreciate your consideration of our request to extend the Transition Period. Should you have any questions concerning our views and recommendations, please do not hesitate to contact me at 212.313.1135 or at tdeutsch@americansecuritization.com or our outside counsel on this matter, Andrew Faulkner of Skadden, Arps, Slate, Meagher & Flom LLP, at 212.735.2853 or at afaulkner@skadden.com.

Sincerely,

A handwritten signature in black ink that reads "Tom Deutsch". The signature is written in a cursive style with a large, stylized "T" and "D".

Tom Deutsch
Acting Executive Director
American Securitization Forum