June 29, 2010

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

Subject: Amendments to 12 C.F.R. Section 360.6 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 September 30, 2010
RIN # 3064-AD53

Dear Mr. Feldman:

The Mortgage Bankers Association[1] (MBA) welcomes the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) Notice of Proposed Rulemaking[2] regarding the FDIC's treatment as conservator or receiver of financial assets transferred by an insured depository institution in connection with a securitization or participation after May 17, 2010 (Proposed Rule). The FDIC indicates that the Proposed Rule is intended to "better align the incentives in securitization to support sustainable lending and structured finance transactions."[3]

Summary of MBA Position

MBA is concerned that key features of the Proposed Rule run counter to the FDIC's stated intention. For the reasons described below, MBA requests the FDIC withdraw

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,400 companies, including all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

[2] 75 Fed. Reg. 94, 27471-27487, (May 17, 2010).

[3] Id. at 27474.

the Proposed Rule and instead collaborate with other federal regulators to evaluate the framework for securitization oversight in a more comprehensive manner.

Background

On June 12, 2009, the Financial Accounting Standards Board (FASB) issued 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). FAS 166 and FAS 167 removed the concept of a qualifying special-purpose entity (QSPE) from generally accepted accounting principles (GAAP) and altered the criteria under which special purpose entities, like mortgage-backed securities (MBS) trusts, must be included in the issuer's or servicer's consolidated financial statements. The impact will be for hundreds of billions of dollars of MBS, previously accounted for off-balance sheet, to come onto the balance sheets of banks nationwide. If a securitization is not given sale accounting treatment under these changes to GAAP, it would be treated as a secured financing and could prevent the security holders from recovering monies due to them for up to 90 days in an FDIC receivership. During that time, interest on the securitized debt theoretically could remain unpaid. These GAAP modifications may adversely affect the way securitizations are viewed by the rating agencies and whether the securitizations can achieve ratings that are based solely on the credit quality of the financial assets, independent from the rating of the bank servicing the loans or issuing the MBS. On November 17, 2009, the FDIC issued an interim final rule amending its regulations to provide safe harbor treatment for participations and securitizations until March 31, 2010[4] (the Interim Rule).

On January 7, 2010, the FDIC issued an advanced notice of proposed rulemaking[5] (ANPR) with preliminary conclusions on the treatment of FAS 166 and FAS 167 assets in the event an insured institution is placed in conservatorship or receivership. The ANPR requested comments on the standards that should be adopted to provide safe harbor treatment in connection with participations and securitizations issued after March 31, 2010. MBA's comments expressed concern that the ANPR would impose additional transaction costs, generate regulatory uncertainty and lead to other negative consequences that could pose significant financial and operational obstacles to any securitization framework, thereby restricting an efficient and vital source of liquidity.

[4] 74 Fed. Reg. 220, 59066-59068 (Nov. 17, 2009).

[5] 75 Fed. Reg. 4, 934-942 (Jan. 7, 2010).

General Comments

The Proposed Rule Could Hinder the Market's Recovery

MBA appreciates the FDIC's desire to adopt preventive measures to avoid future calamities in the financial services system. However, MBA is concerned that in trying to prevent negative systemic events in the future, the Proposed Rule could impede recovery from the current crisis from which we are just beginning to emerge. Investors, lenders and other financial market participants thrive on clarity and certainty in order to minimize costs and make sound investment decisions. MBA is concerned that the Proposed Rule upends any semblance of predictability that was beginning to emerge with respect to secondary market transactions. As a result, financial institutions will be forced to add an uncertainty cost to their asset-backed transactions to offset the possibility their transactions may fall outside the boundaries of the FDIC's receivership safe harbor.

Proposed Holdback for Representation and Warranty Claims

The ANPR proposed for a bank to hold loans on their balance sheets for a minimum of twelve months prior to securitization. In its February 22, 2010, letter, MBA noted that selling seasoned loans is contrary to the basics of the market where participants want securitizations backed by newly-originated loans not seasoned loans. The FDIC appears to have listened to MBA and other respondents. In lieu of a 12-month holding period, the Proposed Rule would require a holdback of five percent of the proceeds from securitization to be used as a cash reserve to cover liabilities under seller representations and warranties. MBA acknowledges that the change represents an improvement from the ANPR, however, the five percent holdback poses a potential liquidity issue for some of our members. Further, the Proposed Rule does not include any rules governing the release of the holdback to satisfy claims. MBA believes that many claims under seller representations and warranties are ultimately found to be without sufficient evidence that a breach occurred or that a breach led to loss or potential for loss to the bondholder. Absent any rules governing the fair and equitable administration of claims, MBA believes that its members may end up repurchasing assets that otherwise conform to the requirements of the respective sale agreements. MBA believes that the cash reserve is much higher than expected losses on securitizations especially given the heightened underwriting standards under the Proposed Rule. MBA also notes that the five percent cash reserve is in addition to the five percent risk retention required by the Proposed Rule. This has the appearance of going beyond prudential regulation and into the realm of punitive reaction to the most recent crisis.

MBA notes that the five percent risk retention coupled with the five percent cash holdback may represent a potentially significant variable interest under FAS 167, causing even more future securitizations to come back on the balance sheet of the issuer or servicer.

Shift of Securitization Market to Non-Banks
The Proposed Rule may have the impact of shifting future securitizations to non-banks as banks exit the hold-to-sell market. This could create undue concentration risk by allocating more of the loan origination market to fewer market participants. This also could lead to fewer affordable financing options for consumers.

Securitization Oversight is a Safety and Soundness Matter
MBA reiterates the concern raised in response to the FDIC's ANPR that it would be more efficient and productive for the FDIC to review the securitization activities of insured depositories by using the agency's examination and safety and soundness authorities instead of its conservatorship/receivership authority. A receivership proceeding is a complicated matter that must be handled expeditiously and with precision. MBA firmly believes the Proposed Rule unnecessarily adds an exponential level of complexity. MBA believes careful examination and enforcement of a financial institution's risk management activities will prevent unsafe and unsound securitization activities in the first place which would ultimately reduce the need for the FDIC to exercise its receivership powers.

Securitization Oversight Benefits From Collaboration
As previously mentioned in its February 22, 2010, letter, MBA notes that securitization activities are directly regulated by a number of federal agencies including the Securities and Exchange Commission (SEC), Federal Housing Finance Agency (FHFA), Office of Thrift Supervision (OTS), Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Federal Reserve) to name just a few. By acting unilaterally, the FDIC is unnecessarily adding further disparity and regulatory burden to the financial services industry. The Proposed Rule would add further variation in supervisory oversight that would result in charter shopping and different levels of protection based on an institution's regulator. Additionally, MBA believes that other regulators may possess different levels of supervisory expertise that could be brought to bear in developing a more comprehensive and standardized approach to securitization oversight. If the FDIC chooses not to withdraw the Proposed Rule, as MBA recommends, we urge you to at least consider reissuing the Proposed Rule on an interagency basis. The lack of a consensus among members of the FDIC's board of directors regarding whether to issue the Proposed Rule may be a telling sign that the Proposed Rule would benefit from further input from other regulatory authorities.

Importance of Private Label Residential and Commercial MBS
MBA believes a full recovery of the real estate finance system hinges on the return of private investors to the capital markets. There are many households that cannot qualify for single family conventional loans eligible for delivery into securities issued by Fannie Mae or Freddie Mac or for FHA or VA loans eligible for MBS guaranteed by Ginnie Mae. These households include but are not limited to foreign national residents and households requiring loan amounts higher than the Fannie Mae, Freddie Mac or Ginnie Mae maximum levels. They also include families with prior credit history resulting from

past unemployment or large medical bills needed to fight life-threatening illness or injury. In the past, these individuals were served by financial institutions who securitized these loans into private label residential MBS.

Likewise, many multi-family housing projects cannot be financed through the Fannie Mae, Freddie Mac, of Ginnie Mae multi-family programs. Enactment of the Proposed Rule would serve to reduce rental housing alternatives available to households that do not qualify for single family mortgages. Further, much of the financing for warehouses, office buildings, hospitals, and other commercial properties have traditionally been financed using private label commercial MBS.

The private label residential and commercial MBS markets are critical to affordable housing and to the finance of commercial properties used to further commerce and economic growth in the United States. There is currently no liquidity for residential MBS other than Ginnie Mae securities. The market for such private label residential MBS has basically shut down since 2007. Other than the U.S. government, until recently, there were few market participants even buying Fannie Mae and Freddie Mac MBS which carry an implied guarantee of the U.S. government. The confluence of additional balance sheet leverage from FAS 166 and FAS 167, the need to set aside risk-based capital for assets coming on the books from FAS 166 and FAS 167, onerous new rating agency risk models that assume "100 year flood level" default and loss severity scenarios will continue to cause continued illiquidity in the MBS market, affecting the long-term viability in the housing market and the growth of commerce in the United States.

MBA believes the Proposed Rule will add further shock and uncertainty to this important market. The specter of a delay in receiving cash flows from an FDIC receiver or conservator will undoubtedly require the rating agency ratings to be heavily influenced by the financial strength of the servicer or master servicer of loans that underlie the private label MBS.

FDIC Should be More Laser-like in its Solution

MBA believes the Proposed Rule is an inappropriately blunt instrument that may permanently snuff out what little is left of the secondary market for private label MBS. The problems that underlie the recent implosion of the private label MBS securitization sector were caused, in part, by inappropriately designed products such as option ARMs and aggressive underwriting practices, including significantly reduced documentation loans. The Proposed Rule appears to try to make sweeping public policy changes that go far beyond addressing these root causes. In fact, MBA believes that the Proposed Rule has the appearance of being less prescriptive and more punitive in nature to the mortgage banking industry. MBA believes that the FDIC should leave such sweeping national policy changes to Congress. In fact, we note that the Dodd-Frank Act, as recently reported out by a House-Senate conference committee, includes statutory changes to many of the same topics addressed in the Proposed Rule. MBA provides the following examples:

- ***Five Percent Skin in the Game:*** The Proposed Rule would require the sponsor to retain an economic interest of not less than five percent of the credit risk of financial assets securitized. The net impact of FAS 166 and FAS 167 will be for hundreds of billions of dollars of securitized assets and liabilities to come onto the balance sheets of issuers, servicers or special servicers. In addition to the whole loans coming back on the balance sheet under FAS 166 or FAS 167, reporting entities will also be required to provide an allowance for credit losses for assets consolidated under FAS 167 unless they elect the fair value option. For reporting entities not electing the fair value option, the allowance for credit losses provisioning process for the newly consolidated loans will be the same for similar loans that are not securitized. For those who elect fair value for FAS 166 and FAS 167, fair value will reflect estimated future cash flows, included expected losses, discounted at a rate that reflects the uncertainties associated with the cash flow estimated and a liquidity discount if markets are inactive.

  MBA believes that this is sufficient skin in the game for sponsors. Further, MBA notes that compared to the Proposed Rule, the Dodd-Frank Act's risk retention requirements are more closely aligned with the level of risk of the underlying asset. MBA suggests that the Proposed Rule be revised to incorporate the following provisions from the Dodd-Frank Act:

  - For residential MBS, federal regulators should create a class of qualified mortgages that would be exempted from the five percent risk retention provision. Qualified residential loans would include loans that exhibit historically safer characteristics such as prime interest rates, full amortization, and complete documentation. Such loans have well known risk profiles that are easily understood by both borrowers and investors. These mortgages were not the root cause of the housing collapse and are precisely the sort of loans lenders should be encouraged to offer. Requiring originators to retain a portion of these loan on their books will only serve to increase the cost of borrowing on what are otherwise safe and affordable products.

  - For commercial MBS, the FDIC and prudential regulators need to take into account the unique nature of the commercial real estate market by considering alternate forms of risk retention. In Fact, the Dodd-Frank Act includes language from an amendment offered by Sen. Mike Crapo (D-Idaho) that addresses the unique nature of the commercial real estate market by requiring regulators to consider alternative forms of risk retention. The MBA, in support of the Crapo amendment, noted that such flexibility would permit regulators to align interests across transactional parties and help restore the commercial mortgage-backed securities market. Consequently, the required five percent risk retention in the Proposed Rule is at odds with the Dodd-Frank Act.

MBA further notes that risk retention has not been effective in the past in preventing credit losses. In the most recent credit crisis, some of the riskiest loans were subprime residential mortgages. Generally, the securitizer of subprime mortgages retained the tranche that took first losses. This caused many players in that market to go out of business when the real estate bubble burst. On the banking side, construction loans are often seen as a riskier asset class in an economic downturn. Those assets are generally not securitized, leaving the originator with 100 percent skin in the game. The point is that the FDIC should not focus on risk retention as a loss prevention measure. Risk retention may lead to additional exposure to loss of the FDIC's insurance fund. Rather, the focus of prudential regulators should be effective underwriting standards.

- ***Deferral of Compensation for Five Years:*** The Proposed Rule would defer no less than 40 percent of fees payable to credit agencies or similar third party evaluation companies for up to five years. MBA believes that this might give credit rating agencies an incentive not to downgrade securities during that five year period of time. MBA believes that the Dodd-Frank Act's credit rating agency oversight provisions, coupled with new credit rating methodologies and assumptions put in place by the rating agency are sufficient.

- ***Proposed Rule Likely to Cause More Assets to be Capitalized:*** Under the Proposed Rule, compensation to servicers shall provide incentives for servicing and loss mitigation efforts in order to maximize the value of the financial assets, as shown by a net present value analysis. Under FAS 167, this could be deemed to be a potentially significant variable interest. The Proposed Rule would also require that servicing and other agreements provide servicers with full authority to mitigate losses on financial assets. This would likely give the servicer the power to direct those activities that have the greatest economic impact on the securitization. Accordingly, the servicer is likely the party that will be required to consolidate the assets of the securitization under FAS 167 because the servicer will have both the power to direct and a significant variable interest. This will likely result in banks having even more securitization assets on their books.

- ***Proposed Credit Enhancement Guidance:*** The Proposed Rule would prohibit third party credit enhancements for a securitization at the pool level for residential MBS, allowing only the underlying financial assets to be guaranteed, insured, or otherwise credit enhanced. Most securitization structures have pool level credit enhancement. Fewer have only financial asset level credit enhancement. The Proposed Rule would actually be contrary to the existing Ginnie Mae MBS structure, which has pool level credit enhancement in the form of a U.S. Government guarantee and asset level credit enhancements in the form of FHA insurance or partial guarantee from VA. MBA's proposed solution for the future of Fannie Mae and Freddie Mac also calls for individual asset level insurance and a pool level government guarantee similar to the Ginnie Mae MBS structure.

- ***Limits on Authority to Advance Principal and Interest:*** The Proposed Rule would allow a servicer to advance delinquent payments of principal and interest for only three months. This would all but eliminate pools securitized whereby scheduled interest is advanced to the investor. MBA notes that most Ginnie Mae and GSE pools pay investors scheduled principal and interest. This could again have a negative impact on the start-up of the markets for new MBS.

MBA believes that the FDIC should leave such sweeping national policy changes to Congress and should avoid potentially conflicting with the provisions of the Dodd-Frank Act. This is yet another reason why MBA believes the Proposed Rule is premature, if not unnecessary and should be withdrawn.

Conclusion

Currently Congress and the SEC are grappling with many of the same issues that are the focus of the Proposed Rule. As demonstrated by the conflicting risk retention provisions in the Dodd-Frank Act and the Proposed Rule, new independent rules by the FDIC would add further confusion and uncertainty to the marketplace, and possibly thwart economic recovery efforts. In light of the serious objections to the Proposed Rule cited above, MBA recommends that it be withdrawn and the FDIC work collaboratively with other government agencies, including the SEC, OCC, OTS and Federal Reserve to come up with a rational, uniform regulatory framework.

Any questions about MBA's comments should be directed to Michael Carrier, Associate Vice President of Secondary and Capital Markets at (202) 557-2870 or mcarrier@mortgagebankers.org, or Jim Gross, Associate Vice President and Staff Representative to MBA's Financial Management Committee, at (202) 557-2860 or jgross@mortgagebankers.org.

Most sincerely,

John A. Courson

John A. Courson
President and Chief Executive Officer
Mortgage Bankers Association

Attachment A

MBA's Response to Specific FDIC Questions

FDIC's Question 1. *Does the Proposed Rule treatment of participations provide a sufficient safe harbor to address most needs of participants? Are there changes to the Proposed Rule that would expand protection different types of participations issued by IDI's?*

MBA's Response: MBA does not disagree with the treatment under the Proposed Rules of participations.

FDIC's Question 2. *Is there a way to differentiate among participations that are treated as secured loans by the 2009 GAAP Modifications? Should the safe harbor consent apply to such participations? Is there a concern that such changes may deplete the assets of an IDI because they would apply to all participations?*

MBA's Response: MBA does not disagree with the treatment under the Proposed Rules of participations.

FDIC's Question 3. *Is the transition period to September 30, 2010 sufficient to implement the changes required by the conditions identified in Paragraph (b) and (c)? In light of new Regulation AB, how does this transition period impact existing shelf registrations?*

MBA's Response: MBA believes that the proposed implementation date is far too aggressive.

FDIC's Question 4. *Does the capital structure for RMBS identified by paragraph (b)(1)(B)(i) provide for a structure that will allow for effective securitization of well-underwritten mortgage loan assets? Does it create any specific issues for specific mortgage assets?*

MBA's Response: The Proposed Rule would limit the capital structure to no more than six credit tranches. The most senior credit tranche would be permitted to include up to six time-based sequential pay or planned amortization sub-tranches. MBA believes that investors should be permitted to make their own decisions on the desirability of a particular investment or tranche. MBA further believes that sound investment decisions are facilitated through thorough explanations in a security's prospectus or private placement memorandum. MBA notes that the SEC is the primary regulator for securities transactions. The form and content of such disclosure documents is likewise under the SEC, not the FDIC. MBA recommends that the FDIC defer to the SEC on such matters.

FDIC's Question 5. *Do the disclosure obligations for all securitizations identified by paragraph (b)(2) meet the needs of investors? Are the disclosure obligations for RMBS identified by paragraph (b)(2) sufficient? Are there additional disclosure requirements that should be imposed to create needed transparency? How can more standardization in disclosures and in the format of presentation of disclosures be best achieved?*

MBA's Response: The form and content of securities disclosure documents is the responsibility of the SEC. The SEC is currently in the processes of amending its Regulation AB[6] (Reg AB) which specifically addresses the form and content of asset-backed securities offering documents and periodic reporting. MBA recommends that the FDIC defer to the SEC on such matters and exclude such matters from the Proposed Rule other than a reference in the Proposed Rule of securities disclosures and documentation eligible for the FDIC must comply with Reg AB.

FDIC's Question 6. *Do the documentation requirements in paragraph (b)(3) adequately describe that rights and responsibilities of the parties to the securitization that are required? Are there any other or different rights and responsibilities that should be required?*

MBA's Response: As recommended in MBA's comment letter dated February 22, 2010 to the FDIC on the ANPR, such issues should be addressed by a multi-agency task force led by the SEC that would include the OCC, the OTS, the Federal Reserve Board (Board) and the FDIC.

FDIC's Question 7. *Do the documentation requirements applicable only to RMBS in paragraph (b)(3) adequately describe the authorities necessary for servicers? Should similar requirements be applied to other asset classes?*

MBA's Response: As recommended in MBA's comment letter dated February 22, 2010 to the FDIC on the ANPR, such issues should be addressed by a multi-agency task force led by the SEC that would include the OCC, the OTS, the Federal Reserve Board (Board) and the FDIC. If such a task force mandates added servicer discretion, MBA believes a statutory safe harbor should be provided for servicers.

FDIC's Question 8. *Are the servicer advance provisions applicable only to RMBS in paragraphs (b)(3)(B)(i) effective to provide effective incentives for servicers to maximize the net present value of the serviced assets? Do these provisions create any difficulties in application? Are similar provisions appropriate for other asset classes?*

MBA's Response: As recommended in MBA's comment letter dated February 22, 2010 to the FDIC on the ANPR, such issues should be addressed by a multi-agency

[6] 17 C.F.R. Sections 229.1100-1123.

task force led by the SEC that would include the OCC, the OTS, the Federal Reserve Board (Board) and the FDIC. If such a task force mandates added servicer discretion, MBA believes a statutory safe harbor should be provided for servicers. MBA does not believe that similar provisions are appropriate for other asset classes.

FDIC's Question 9. *Is the limitation on servicer interest applicable only to RMBS in paragraph (b)(3)(B)(iii) effective to minimize servicer conflicts of interest? Does this provision create any difficulties in application? Are similar provisions appropriate for other asset classes?*

MBA's Response: The form and content of securities disclosure documents is the responsibility of the SEC. The SEC is currently in the processes of amending its Regulation AB (Reg AB) which specifically addresses the form and content of asset-backed securities offering documents and periodic reporting. MBA recommends that the FDIC defer to the SEC on such matters and exclude such matters from the Proposed Rule other than a reference in the Proposed Rule of securities disclosures and documentation eligible for the FDIC must comply with Reg AB.

FDIC's Question 10. *Are the compensation requirements applicable only to RMBS in paragraph (b)(4) effective to align incentives of all parties to the securitization for the long-term performance of the financial assets? Are these requirements specific enough for effective application? Are there alternatives that would be more effective? Should similar provisions be applied to other asset classes?*

MBA's Response: See MBA's general comments above.

FDIC's Question 11. *Are the origination or retention requirements of paragraph (b)(5) appropriate to support sustainable securitization practices? If not, what adjustments should be made?*

MBA's Response: See MBA's general comments above.

FDIC's Question 12. *Is the requirement that a reserve fund be established to provide for repurchases for breaches of representations and warranties an effective way to align incentives to promote sound lending? What are the costs and benefits of this approach? What alternatives might provide a more effective approach?*

MBA's Response: See MBA's general comments above.

FDIC's Question 13. *Is retention by the sponsor of a 5 percent "vertical strip" of the securitization adequate to protect investors? Should any hedging strategies or transfers be allowed?*

MBA's Response: See MBA's general comments above.

FDIC's Question 14. *Do you have any other comments on the conditions imposed by paragraphs (b) and (c)?*

MBA's Response: See MBA's general comments above.

FDIC's Question 15. *Is the scope of the safe harbor provisions in paragraph (d) adequate? If not, what changes would you make?*

MBA's Response: The scope of the safe harbor provisions in paragraph (d) is generally adequate, subject to the revisions and clarifications referred to in MBA's comments to Questions 16 and 18 below. The Proposed Rule was helpful in describing the FDIC's repudiation powers in the context of perfected security interests and how the FDIC would determine whether assets transferred by a failed institution are no longer part of the conservatorship or receivership estate.

FDIC's Question 16. *Do the provisions of paragraph (d)(4) adequately address concerns about the receiver's monetary default under the securitization document or repudiation of the transaction?*

MBA's Response:
MBA has the following comments regarding the provisions of paragraph (d)(4):

<u>Monetary Default</u>: In the context of a mortgage loan securitization, it is not clear what situation is being addressed by the reference to the FDIC as conservator or receiver being "in a monetary default under a securitization." Where the insured institution has transferred loans to the Issuing Entity and continues to act as the Servicer of those loans, the reference to "monetary default" would seem to include the situation where the FDIC did not make the payment of principal and interest collections to the Issuing Entity (or its investors) when required (including any grace periods). In such a case, the protections afforded by paragraph (e) would be ineffective since the funds needed to make scheduled payments to securitization investors would not be available. If, on the other hand, the reference to monetary default is meant to refer to an inability to make required payments of principal and interest due to the Issuing Entity (or its investors) solely due to the poor performance of the loans being serviced, then no conflict with paragraph (e) would be present. Hence, MBA requests clarification of the use of "monetary default."

<u>Repudiation</u>: The definition of "damages" should be expanded to include accrued interest due to the Issuing Entity (or its investors) under the securitization documents up to but excluding the date of payment of the principal. For example, if written notice of repudiation is given by the FDIC and damages are paid on the day prior to the next required payment under the securitization documents (which would often be a monthly date for mortgage loan securitizations, but could be quarterly or semi-annual), accrued

interest for the entire payment period would be lost to investors. Paragraph (e) would not provide protection in this case since no regular payments were due to be made prior to the payment of damages. Without coverage of accrued interest, securitizations involving insured institutions would be at a competitive disadvantage and may not be eligible for credit ratings. An alternative to paying accrued interest would be to undertake to pay damages on a date that is coordinated with an interest payment date under paragraph (e) so that no interest is lost.

FDIC's Question 17. *Could transactions be structured on a de-linked basis given the clarification provided in paragraph (d)(4)?*

MBA's Response: Assuming the revisions and clarifications suggested in MBA's comments to Questions 16 and 18 are addressed, transactions involving insured institutions should be able to be structured on a de-linked basis. There remains the question of what documentation and representations will be required by the credit rating agencies to establish that a securitization has complied with the requirements of paragraphs (b) and (c). However, this is an implementation issue that should not impede de-linked transactions.

FDIC's Question 18. *Do the provisions of paragraph (e) provide adequate clarification of the receiver's agreement to pay monies due under the securitization until monetary default or repudiation?*

MBA's Response: Paragraph (e) should be strengthened to make clear that the FDIC is not just consenting to the making of required payments to investors by third parties, but also agreeing that the FDIC will itself make such payments in its role as conservator or receiver for the failed institution. Where the failed institution is playing an active role in the securitization payment process, such as Servicer, this undertaking should continue until the institution can be replaced or the FDIC repudiates the applicable agreement. Without such assurance, the protections to investors provided by paragraph (e) will be limited, particularly with respect to the "exercise of contractual rights" remedies. Where there is no payment of damages by the FDIC, investors will be entirely dependent on the un-interrupted flow of payments due under the securitization documents in order to be made whole. Credit ratings would also presumably depend on such continued payments.