July 1, 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: 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)

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 Notice of Proposed Rulemaking entitled "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" (the "NPR"). We value the FDIC's ongoing support for sustainable securitization and appreciate its efforts to foster dialogue regarding targeted reforms in our market. In 2000, the FDIC adopted a regulation codified at 12 C.F.R. 360.6 (the "Securitization Rule") which provided that the FDIC as conservator or receiver would not use its statutory authority to disaffirm or repudiate contracts to reclaim, recover or recharacterize as property of an insured depository institution (an "IDI") or the receivership any financial assets transferred by the IDI in connection with a securitization or in the form of a participation, provided that the transfer met all conditions for sale accounting treatment under generally accepted accounting principles ("GAAP"). As stated in the NPR, "since its

[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.

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inception, the Securitization Rule has been relied upon 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." We appreciate the FDIC's continued recognition that legal isolation is "vital to securitization transactions." The ASF agrees that a legal isolation safe harbor is critical to reestablishing active and sustainable securitization markets, but we are concerned that the preconditions set forth in the NPR, as well as the limited scope of the protections provided to on balance sheet securitizations by the expedited consent provisions of the NPR, could greatly inhibit its effectiveness and the restart of the markets. This response letter (this "Response Letter") includes feedback on the NPR from a working group assembled by the ASF to develop a broad-based response to the FDIC's proposals, including current members of ASF committees and subforums who are particularly interested in, and have intimate knowledge of, the safe harbor and its impact on securitizations, as well as broader ASF committees and subforums, to present a comprehensive industry-wide response.[2]

[2] The ASF's FDIC working group submitted (i) a comment letter on February 22, 2010 with respect to the FDIC's Advanced Notice of Proposed Rulemaking published on December 15, 2009 (see http://www.americansecuritization.com/uploadedFiles/ASF_FDIC_ANPRResponseLetter022210.pdf)(the "February Response Letter"), (ii) a request for clarification on April 26, 2010 regarding the application of the transitional safe harbor to securitization programs with outstanding unfunded commitments (see http://www.americansecuritization.com/uploadedFiles/ASFSafeHarborRequestreUnfundedCommitments4.26.pdf), (iii) a letter on January 4, 2010 regarding the length of the safe harbor transition period (see www.americansecuritization.com/uploadedFiles/ASFFDICCommentLetterreSafeHarbor010409.pdf), (iv) a proposal on August 26, 2009 including suggested changes to the legal isolation safe harbor (see www.americansecuritization.com/uploadedFiles/ASF_Proposed_FDIC_Legal_Isolation_Revisions_8-26-09.pdf) and (v) a follow-up proposal on September 18, 2009 containing both a potential "Sale Approach" and "Security Interest Approach" (see www.americansecuritization.com/uploadedFiles/ASF_Proposal_FDIC_Stmt_of_Policy091809.pdf.).

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I. EXECUTIVE SUMMARY

NEED FOR A COORDINATED APPROACH TO SECURITIZATION REFORM. We are concerned about the potential impact of multiple layers of securitization regulation without coordination among legislators and regulators. The imposition by the FDIC of preconditions to the legal isolation safe harbor in advance of the imminent enactment of Congressional legislation, and on a unilateral rather than interagency basis, will result in multiple and possibly competing requirements for U.S. IDIs that are securitizers. Furthermore, if the proposed rule issued by the FDIC in the NPR (the "Proposed Rule") is enacted in advance of the adoption of the Congressional legislation, the FDIC would be preempting the mandate set forth in the legislation to develop regulations on an interagency basis. The Securities and Exchange Commission (the "SEC") has released for comment a major proposal with respect to disclosures and other requirements for securitizations. Provisions relating to disclosure in the Proposed Rule overlap with those proposed by the SEC. Because the comment period on the SEC proposal continues beyond the comment period on the Proposed Rule, IDIs may ultimately be subject to multiple disclosure requirements. Similarly, the risk retention requirements included in the Congressional legislation are more flexible than the preconditions relating to risk retention proposed by the FDIC. Securitization reform will require significant documentation and systems changes that will be compounded if new regulations are introduced in waves. If the requirements for securitizations by U.S. IDIs are more restrictive or onerous than those for other entities engaging in securitizations, those requirements will pose an undue burden for IDIs. We therefore believe strongly that any securitization reform should be implemented following the passage of federal legislation and in accordance with the legislation, implemented on an interagency basis.

APPROACH TO ON BALANCE SHEET SECURITIZATIONS MAY NOT WORK. In light of the amendments to FAS 166 and 167, the requirement that a transfer of assets meet the requirement for sale accounting treatment will mean that very few securitizations will meet the traditional safe harbor now set forth in paragraph (d)(3) of the NPR. For this reason, many securitizations will seek to rely on the alternative provisions set forth in paragraph (d)(4) and subsection (e) of the Proposed Rule. However, paragraph (d)(4) creates a new approach that falls far short of the protections that have been offered by the Securitization Rule. This approach is untested, complex, subject to serious objections by investors, and very difficult to implement at a technical level. We propose a simpler and more reliable alternative under which the FDIC will not seek to reclaim or recover the assets transferred by the U.S. insured depository institution in connection with a securitization, provided that the transferred assets are subject to a legally enforceable and perfected security interest. We think that this is a simple and elegant solution that would provide investors with an effective safe harbor while safeguarding the interests of the FDIC as conservator or receiver. Under this approach, so long as the required preconditions are satisfied, the FDIC would provide the same safe harbor from repudiation to an on balance sheet transaction where the transfer of financial assets are subject to a legally enforceable and perfected security interest as the FDIC currently provides to a transfer of financial assets that satisfies the conditions of sale accounting treatment. In the event that the FDIC does not adopt our suggested approach, we have also provided specific comments on the language of the Proposed Rule in Attachment 1, though we are not confident that the Proposed Rule will satisfy investor concerns even if all our comments are accepted.

THE PROPOSED RULE DOES NOT CREATE AN EFFECTIVE SAFE HARBOR. The Proposed Rule includes many preconditions that must be met in order to obtain the protections of the safe harbor. An effective safe harbor should have clearly defined conditions that can be assessed by all of the participants in the transaction and, if met at the time of the issuance of the relevant securities, should provide benefits that continue for the life of the securities. A safe harbor becomes ineffective if the preconditions are vague, if there are too many preconditions or if the preconditions are specific but ongoing, or cannot be measured or met. The preconditions in the Proposed Rule do not provide a clear and unambiguous framework for a safe harbor. Because the preconditions of paragraphs (b) and (c) apply to the safe harbor for securitizations that meet sale accounting requirements as well as for the expedited consent provisions for securitizations that do not meet sale accounting requirements, the concerns about vague, ambiguous and ongoing conditions are relevant in both cases. Rating agencies have questioned the effectiveness of the safe harbor given the uncertainty surrounding the preconditions included in the Proposed Rule. The securitization industry has historically relied on the legal isolation safe harbor to enable the de-linking of the rating of a securitization obligation from the rating of the originator or sponsor, but the Proposed Rule does not provide the expected and desired benefit of de-linked ratings. IDIs will have little incentive to comply with any of the preconditions set forth in the Proposed Rule if the safe harbor fails to achieve the ultimate objective of de-linked ratings.

SEPARATE SECURITIZATION RULES FROM SAFE HARBOR. The ASF and its membership strongly oppose linking a determination of whether financial assets have been legally isolated to preconditions addressing capital structure, disclosure, documentation, origination and compensation. Most of the preconditions set forth in the NPR have no relevance for a traditional sale or security interest analysis. Conditioning the safe harbor on the satisfaction of certain preconditions misaligns interests among transaction parties and investors. Under the NPR, investors will bear the burden of the loss of the safe harbor if any of the securitization preconditions are not satisfied by the issuer or sponsor. A separation of the securitization requirements from the safe harbor is necessary to provide sufficient comfort to investors who should bear risks associated with the assets underlying a securitization but not risks associated with the originator.

II. REFORM PROPOSALS AND THE NEED FOR A COORDINATED APPROACH

The securitization markets are currently the focus of legislation that is on the verge of adoption by the United States Congress. At the same time, the SEC has released for comment a major proposal with respect to disclosures and other requirements for securitizations. We acknowledge that legislators and regulators have a legitimate interest in fashioning effective regulations to enhance practices of issuers and confidence of investors in the securitization process, but we remain concerned that the fragile securitization markets face uncertainty and the potential for costly administrative changes if multiple layers of regulation addressing the same basic issues are introduced on a staggered basis as currently contemplated. The Proposed Rule contains preconditions that are far reaching yet overlap significantly with provisions in the Congressional legislation and revisions to Regulation AB and other rules concerning the offering process, disclosure and reporting for asset-backed securities proposed by the SEC ("New Regulation AB").

The legislation adopted by the U.S. House of Representatives and, in an earlier form, by the Senate addresses risk retention, ongoing reporting requirements, disclosure requirements and representations and warranties. Once Congress completes the legislative process and the legislation is signed into law by the President, corresponding implementing regulations will be required to be developed. In some instances, the FDIC will be required to work with other regulatory bodies as the legislation mandates an interagency approach to implementing certain regulations, while the implementation of other rules (including disclosure requirements) will be delegated specifically to the SEC. The Congressional legislation mandates that rules and regulations be adopted by the relevant regulatory authorities within a specific timeframe, in some cases 180 days and in others 270 days after the adoption of the legislation. We anticipate that regulatory proposals will be made public for comment during the prescribed period and the ASF will be an active participant in the comment process.

We believe that the FDIC should not mandate a set of securitization regulations for U.S. IDIs before the legislative and other regulatory processes that are moving rapidly forward are complete. If the FDIC imposes preconditions to the legal isolation safe harbor in advance of the legislative and regulatory process, the FDIC will be preempting the legislative mandate to develop regulations on an interagency basis and U.S. IDIs who are securitizers will ultimately be placed at a disadvantage relative to other securitizers.

The disclosure requirements set forth as preconditions to the legal isolation safe harbor are more appropriately addressed by the SEC. We understand that the FDIC is motivated to take action with respect to the implementation of securitization reform and has stated a need for greater transparency. On December 15, 2009, when the FDIC published an Advanced Notice of Proposed Rulemaking requesting comments "on the standards that should be adopted to provide safe harbor treatment" (the "ANPR"), the SEC had not yet introduced New Regulation AB. New Regulation AB was published in the *Federal Register*[3] on May 3, 2010 and the comment period for that proposal ends on August 2, 2010. Provisions relating to disclosure in the Proposed Rule overlap in many respects with provisions included in New Regulation AB. The ASF is devoting significant time and resources toward preparing a detailed response to the SEC's request for comments on New Regulation AB. Various ASF working groups are developing positions and proposals with respect to requirements of New Regulation AB, but given that the comment period for New Regulation AB extends one month beyond the comment period for the Proposed Rule, these positions and proposals have not yet been fully developed. Our comments with respect to the disclosure requirements of the Proposed Rule are therefore made in advance of completion of this deliberative process.

The disclosure requirements contained in the Proposed Rule are not, in all cases, consistent with those set forth in New Regulation AB, and in one critical case they vary substantially.

[3] 17 C.F.R. 200, 229, 230, 232, 239, 240, 243 and 249.

New Regulation AB requires specific disclosures for private placement transactions that rely on safe harbors set forth in Rule 144A and Regulation D. However, the Proposed Rule goes further and provides that transaction documents "require that such information and its disclosure, at a minimum, shall comply with the requirements of [existing Regulation AB], or any successor disclosure requirements for public issuances, *even if the obligations are issued in a private placement or are not otherwise required to be registered*" (emphasis added). This expansive provision would presumably extend to pure private placements, which do not rely on private placement safe harbors and which the SEC specifically indicated that it did not intend to regulate. The ASF is currently developing a comprehensive proposal that would address the SEC's concerns about the Rule 144A and Regulation D markets. We believe that the FDIC should track the SEC's ultimate decision on how to best regulate the private market and should not attempt to regulate a portion of that market that the SEC specifically chose not to touch.

If the terms of the Proposed Rule are implemented and become effective on October 1, 2010, prior to the enactment of a final version of New Regulation AB, U.S. IDIs would have to make significant documentation and systems changes in order to avail themselves of the benefits of the Proposed Rule. These changes would be costly and time-consuming, and we believe that most IDIs would not expend the time and resources necessary to ensure compliance with the FDIC rule requirements when further securitization reform is anticipated within the next six months or year. For example, the Proposed Rule requires disclosure of loan level data or financial asset level data for most securitizations without specifically identifying all data to be disclosed. New Regulation AB requires loan level data for most securitizations and identifies specific fields of information that should be disclosed. The SEC will likely receive substantial comments on the required loan level disclosures and may make significant changes to those requirements in a final set of rules. Sponsors will need to assess whether to incur high costs and divert significant personnel and technological resources to make the fundamental changes required to comply with the disclosure requirements of the Proposed Rule knowing that the work they do would likely need to be redone within a year to address the final SEC rules. For these reasons we request the deletion of the disclosure requirements of paragraph (b)(2) of the Proposed Rule as well as the disclosure requirements for re-securitizations in paragraph (b)(1)(i)(A).

The Proposed Rule also requires sponsors to retain an economic interest of not less than 5% of the credit risk of financial assets. This requirement overlaps with the risk retention requirement in the Congressional legislation but has less flexibility than the current Congressional legislation. We strongly urge the FDIC not to unilaterally adopt a risk retention requirement that may conflict with any risk retention requirement included in final legislation. Ideally, risk retention requirements should recognize differences in asset quality and asset type. The current Congressional proposal properly accounts for the fact that different types of loans and securitized assets present wide variations in expected credit and performance characteristics. There are various gradations in credit profiles of securitized consumer and business assets and the current Congressional proposal accounts for these differences by requiring separate rules for securitizers of different asset classes. The Proposed Rule does not address these differences. In any event, an IDI should not be subject to multiple and differing risk retention requirements. Multiple retention requirements may compound the costs of completing a securitization. Given that Congress has actively shaped a risk retention proposal for securitizations and the federal banking agencies along with the SEC will be obligated to prescribe implementing regulations, we request that the risk retention provision of paragraph (b)(5) be removed from the final rule. If a risk retention provision is included in the final rule, we request that the FDIC confirm that the risk retention requirement will be conformed to the risk retention requirement of the final legislation and implementing rules and regulations.

We continue to have concerns about the impact of any risk retention requirement on the accounting consolidation analysis for a securitization. Risk retention of 5% of a vertical slice of a pool of assets may not in and of itself trigger a requirement to consolidate assets, but, when coupled with other factors, including additional retention of securities and incentive based servicing fees to be determined pursuant to the Proposed Rule, may be significant enough to trigger consolidation. As discussed elsewhere in this Response Letter, the consequence of bringing securitization assets that would otherwise have been off balance sheet onto the originator's balance sheet is to subject the securitization to a lesser standard of protection than the Proposed Rule provides to off balance sheet securitizations.

If new rules and regulations are presented in waves, the costs of compliance will be compounded and the revitalization of the securitization markets will inevitably be slowed. With reform occurring at several levels and over time, issuers may likely exit the securitization markets with the enactment of the first set of rules only to return once all of the contemplated legislative and regulatory action has been taken. If the aggregate burden for IDIs is ultimately too great, they may significantly reduce or cease their securitization activities and rely on deposits as an alternative source of funding. This would likely lead to a contraction of available credit for consumer finance where securitization has provided a significant source of funding, including mortgage loans, auto loans and leases, small business loans and credit cards. Furthermore, if any of the requirements imposed on U.S. IDIs by the FDIC are significantly more restrictive than those imposed on other securitizers, U.S. IDIs will suffer an undue burden. We therefore believe strongly that any securitization reform should be implemented following the passage of federal legislation and addressed on an interagency basis.

III. The Proposed Rule's Approach to On Balance Sheet Securitizations Is Untested and May Not Work

The consent provisions of paragraph (d)(4) and subsection (e) of the Proposed Rule fall far short of the safe harbor protections that have been provided under the Securitization Rule. Unlike the Securitization Rule, which has been tested for a decade, the Proposed Rule does not provide a safe harbor from repudiation by the FDIC as conservator or receiver.[4] Instead,

[4] The Securitization Rule currently provides that the FDIC will not use its authority to disaffirm or repudiate contracts to reclaim, recover or recharacterize as property of a receivership or conservatorship any financial assets transferred by an insured depository institution in connection with a securitization or participation.

the Proposed Rule merely grants FDIC consent, under the automatic stay added to the Federal Deposit Insurance Act (the "FDI Act") in 2006, to allow investors to exercise contractual rights with respect to the collateral in the event that the FDIC does repudiate or default on an IDI's obligations in connection with a qualifying securitization.[5] In other words, the Proposed Rule merely seeks to provide remedies for FDIC repudiation or default rather than a safe harbor from such repudiation or default. Even if it worked as intended, therefore, the Proposed Rule at best would put investors in the position that they would have been in *without* the Securitization Rule before the adoption of the automatic stay in 2006.[6] Indeed, in the NPR the FDIC acknowledges "that, as a practical matter, the scope of comfort that would be provided by the Proposed Rule is more limited than that provided in the Securitization Rule." The FDIC does not, however, provide an explanation for abandoning a simple and well-tested safe harbor mechanism for a complex and flawed new approach.

The remedies approach of paragraph (d)(4) and subsection (e) of the Proposed Rule creates a number of technical problems that are not adequately addressed by the Proposed Rule. Most significantly, the Proposed Rule's provisions for on balance sheet securitizations (i) do not adequately address concerns regarding the amount of damages that the FDIC would pay to investors following repudiation or default, (ii) suggest, but fail to adequately implement, that in the event of repudiation or default the investors could obtain the asset pool and continue the securitization, and (iii) do not commit the FDIC to continue to perform servicing activities and make interest payments through the date of consent or repudiation. There is therefore a substantial risk that, even if all of the new conditions under the Proposed Rule are met, the Proposed Rule will fail in its goal of permitting investors to invest in a securitization without a rating linked to that of the issuer.

As an alternative to paragraph (d)(4) of the Proposed Rule, we suggest (i) using the same safe harbor from repudiation language that is now in paragraph (d)(3) of the Proposed Rule while (ii) replacing the proviso that the transfer satisfies the conditions of sale accounting treatment with a proviso that "the financial assets are subject to a legally enforceable and perfected security interest under applicable law." Under this approach, so long as all the other conditions of the Proposed Rule were satisfied, the FDIC would provide exactly the same safe harbor from repudiation to a transfer of financial assets that are subject to a legally enforceable and perfected security interest as the FDIC currently provides under Section 360.6 (and would provide under paragraph (d)(3) of the Proposed Rule) to a transfer of financial assets that satisfies the conditions of sale accounting treatment.

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[5] The Proposed Rule maintains the same protections as the Securitization Rule for participations and securitizations that meet the requirements for sale accounting treatment under GAAP (other than legal isolation) and for transactions completed through September 30, 2010. For securitizations after that date that do not meet the requirements for sale accounting treatment under GAAP, however, the Proposed Rule provides no protection against repudiation but merely grants FDIC consent to the exercise of contractual rights and to the making of ongoing payments in certain circumstances.

[6] The FDIC consent provisions of paragraph (d)(4) and subsection (e) address issues raised by the amendment to the FDI Act in 2006 that added an FDIC consent requirement to the exercise of certain rights for a 45 or 90 day period after the appointment of a conservator or receiver, respectively. The provisions of paragraph (d)(4) and subsection (e) do not, however, address the issue that prompted the original requests for the Securitization Rule which was the measure of damages that would be applied by the FDIC following repudiation.

This approach is simple, it raises no significant policy concerns,[7] and it will work.

Nonetheless, in case the FDIC does not adopt this simpler and more effective approach, we provide specific comments on the language of the Proposed Rule in Attachment 1. We are not, however, confident that the Proposed Rule will satisfy investor concerns even if all of our comments are adopted.

The basic challenge for any remedies approach is the question of damages. For securitizations to work, investors need assurance that they will be paid the par amount of principal plus interest accrued through the date of repayment. Under the Proposed Rule, there is concern that the FDIC as conservator or receiver might assert its authority to pay only "actual direct compensatory damages" which may be less than these amounts.

With respect to principal, the risk is that the FDIC could pay the lesser of par value of the obligations issued and the market value of the assets—which may well be less than par value when the FDIC has been appointed conservator or receiver. While subparagraph (d)(4)(ii) of the Proposed Rule defines damages as "the par value of the obligations outstanding on the date of receivership less any payments of principal received by the investors to the date of repudiation," the FDIC does not commit to pay such damages but to only permit investors, if they do not receive such damages, to exercise their contractual rights with respect to the financial assets serving as collateral. There is therefore a risk that investors may receive less than the par value of their securities.

With respect to interest, the risk is that the FDIC may pay interest through the date of appointment rather than the date of repayment—or even deduct any post-appointment interest payments from the damages eventually paid. If the FDIC as conservator or receiver elects to repudiate a contract under which financial assets are transferred, Section 11(e) of the FDI Act could arguably be read to allow a claim for damages calculated only as of the date of the FDIC's appointment and not as of any later date of payment. Because Section 11(e) affords the FDIC a reasonable period of time after its appointment to decide whether to repudiate any contract, and because of the potential for further delay if the transferee is required to comply with the FDIC's claims process before receiving any payment, it is very difficult to structure remedies to make investors whole in the event of repudiation or default by the FDIC.[8]

In this regard, the Proposed Rule does not address the damages that are available to investors as a result of written repudiation or "monetary default." As a general matter, the investors'

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[7] The FDIC clearly has the legal authority to grant such a safe harbor from repudiation because it has done so in the Securitization Rule and proposes to continue doing so in paragraph (d)(3) of the Proposed Rule.

[8] It was for this reason that, rather than commit to pay interest through the date of the repayment, the FDIC chose in the Securitization Rule to agree not to use its repudiation authority to reclaim, recover or recharacterize as property of the institution or receivership financial assets that had been transferred in a securitization. By agreeing not to use its repudiation authority the FDIC provided a safe harbor from repudiation in which the issue of damages was not relevant. The Proposed Rule continues this safe harbor with respect to both grandfathered securitizations and off-balance-sheet securitizations but not for securitizations that do not meet the conditions for sale accounting treatment under GAAP, and therefore reintroduces the issue of the amount of damages that may be paid to investors.

rights as secured creditors would not give them outright ownership of the financial assets serving as collateral, but would only allow them to apply any proceeds received from the collateral to their actual direct compensatory damages as determined under the FDI Act.[9] Because such damages are calculated as of the date of appointment of a conservator or receiver, it may be arguable that any interest payments made after the appointment of the conservator or receiver might have to be deducted from any damages paid to investors and that any proceeds realized from the financial assets serving as collateral in excess of such damages might have to be returned to the FDIC. This result would be unacceptable to investors and would make securitizations impracticable.[10]

Based on the NPR, the FDIC apparently believes that these concerns can be addressed by permitting investors, in the event of FDIC default or repudiation, to take control of the financial assets serving as collateral and to continue the securitization independently of the FDIC. In this regard, the NPR states that "if the FDIC repudiates [or, we assume, is in "monetary default"] and the investors are not paid the par value of the securitization obligations, they will be permitted to obtain the asset pool."[11] Although obliquely expressed, the intention seems to be that, by permitting the investors to continue the securitization in accordance with the securitization documents, the FDIC will avoid the difficulties resulting from the calculation of damages under the FDI Act.

Unfortunately, this approach is extremely difficult to implement in a way that will adequately assure investors that they will in fact be able to take the financial assets and continue the securitization. Among other things, the Proposed Rule language does not adequately address (i) the need for FDIC consents under the Uniform Commercial Code or other applicable law (not only under the FDI Act) for investors to obtain the financial assets serving as collateral, (ii) the need for such consents under 12 U.S.C. 1825(b)(2) of the FDI Act (not only under the FDIC's repudiation authority), (iii) the risk that the FDIC might seek to require investors to repay any amount recovered from the collateral in excess of "actual direct compensatory damages" under the FDI Act, (iv) the risk that the FDIC might deduct any post-appointment interest payments from any later payment of "actual direct compensatory damages," (v) the need for the FDIC as servicer to continue servicing and to make all payments through the date of release of the assets to investors,[12] (vi) the need for FDIC consent to transfer

[9] Section 9-620 of the Uniform Commercial Code may permit foreclosure on the assets in satisfaction of the investors' claims, but only with the consent of the debtor (i.e. the FDIC) which may not be granted or waived in advance.

[10] Our proposed revisions to the Proposed Rule provide that the FDIC will not assert that any interest payments made after the date of conservatorship or receivership remain the property of the IDA or may be deducted from actual direct compensatory damages. This language is consistent with the FDIC's intention as described in the NPR and is necessary (albeit perhaps not sufficient) to the viability of the FDIC consent approach taken in the Proposed Rule.

[11] 75 FR 27471 at 27481.

[12] Paragraph (e) of the Proposed Rule provides FDIC consent to the making of required payments to investors in accordance with the securitization documents and to any servicing activity required in furtherance of the securitization. In paragraph (e), however, the FDIC merely consents to the making of payments and performance of servicing activities by a third party—it does not explicitly commit that, if it is controlling the entity that acts as servicer during the receivership of that entity, it will make the required payments and perform servicing activities. The NPR states that "Unless the FDIC repudiates an agreement, as successor to the

servicing to another servicer, (vii) the risk that the FDIC's repudiation of its own obligations under the securitization documents might be deemed to terminate the obligations of other parties to the securitization, and (viii) various other technical issues. The failure to adequately address any one of these issues may mean that Proposed Rule's remedies approach for on-balance-sheet securitizations simply won't work. We have tried to address each of these issues in our comments on the Proposed Rule language in Attachment 1, but we are not confident either that all of these provisions will be implemented or even that the Proposed Rule will satisfy investor concerns even if all of our comments are adopted. We therefore repeat our suggestion that the FDIC should instead provide for on-balance-sheet securitizations the same well-tested safe harbor from repudiation that it proposes to provide to off-balance-sheet securitizations.

Finally, a single safe harbor for all securitizations is preferable for a number of other reasons. As discussed in Section VI, it will not work to apply two distinct standards to one issuing entity such as a master trust that has issued notes prior to the change in accounting rules that are grandfathered under the old Securitization Rule but will issue new notes that are not grandfathered. A transaction that is off balance sheet at the time of issuance, and entitled to the benefits of the safe harbor provisions of paragraph (d)(3), also could subsequently come back on balance sheet resulting in the loss of the protections of paragraph (d)(3) and application of the expedited consent provisions of (d)(4) and (e). Accounting treatment for a securitization can change over time. For instance, a transaction that is off balance sheet at issuance could come back on balance sheet during the life of the transaction because of a change in the relevant consolidation analysis. The new accounting rules require a continuous assessment of whether an IDI is the primary beneficiary of an issuing entity. If an IDI that acts as servicer but does not retain a significant economic interest in the assets of the issuing entity at the time of issuance subsequently acquires or is deemed to hold a significant economic interest in the issuing entity then the assets of the issuing entity may be brought back on balance sheet. If the protections for on balance sheet transactions are different from those available to off balance sheet transactions then this shift in accounting treatment would have potentially significant consequences for investors.

IV. THE PROPOSED RULE DOES NOT CREATE AN EFFECTIVE SAFE HARBOR

The Proposed Rule includes many preconditions that must be met in order to obtain the protections of the safe harbor. The preconditions of the NPR do not provide a clear and

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obligations of an IDI it would continue to perform the IDI's obligations under the securitization documents." We propose language to implement this commitment in paragraph (e) of Attachment 1.
Also, the approach taken by the Proposed Rule merely to permit the exercise of remedies for an FDIC default or repudiation means that if interest payments are made on each payment date during a receivership then there could still be a gap from the date of default or repudiation to the next monthly or quarterly payment date. For example, if interest is paid monthly on the 15th of each month and the FDIC repudiates and pays damages on the 10th day of July, investors might not receive payments of interest for the period from June 15th through July 10th. We propose language in paragraph (e) of Attachment 1 to require the payment, to the extent supported by payments received on the financial assets, of interest accrued and unpaid on the date of payment of damages or consent to the exercise of contractual rights.

unambiguous framework for a safe harbor. An effective safe harbor should have clearly defined requirements that can be measured by market participants to provide a high degree of certainty that the benefits of the safe harbor will be available for the life of the securitization. If that determination cannot be made then market participants will assume that the transaction does not have the benefits of the Proposed Rule, and the sponsor will have no incentive to comply with any such preconditions. A safe harbor becomes ineffective if the preconditions are vague, if there are too many preconditions or if the preconditions are specific but cannot be measured or met. Also, a safe harbor is less secure if there are ongoing conditions that can be breached at any time resulting in the loss of the benefits of the safe harbor. The safe harbor should allow an investor to conclude whether or not the preconditions have been met so that risks can be appropriately assessed and a transaction can be efficiently priced.

The current construction of the preconditions creates uncertainty for an investor or rating agency seeking to determine whether the safe harbor applies to a securitization transaction and presents difficulties for a law firm asked to provide a legal opinion reaching a clear conclusion that the safe harbor applies to a securitization transaction. Because the preconditions of paragraphs (b) and (c) apply to the safe harbor for securitizations that meet sale accounting requirements as well as for the expedited consent provisions for securitizations that do not meet sale accounting requirements, the concerns about vague, ambiguous and ongoing conditions are relevant in both cases. In addition, for a transaction to achieve off balance sheet treatment, accountants will generally look to an opinion provided by a law firm to support an IDI's assertion that the financial assets have been legally isolated. If such an opinion is viewed as containing inappropriate or unreasonable assumptions, and therefore not providing sufficient support for an assertion of legal isolation, the result may be a failure to achieve off balance sheet treatment and loss of the protections of the safe harbor of paragraph (d)(3).[13]

Safe Harbor Objective: De-Linked Ratings

The securitization industry has historically relied upon the legal isolation safe harbor to enable the de-linking of the rating of securitization obligations from the rating of the asset originator or sponsor. As noted in the NPR, "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." If a transaction is structured properly, it should be possible for the senior most securitization obligations to be rated in the highest rating category by one or more rating agencies, regardless of the rating of

[13] In response to comments on the ANPR, the FDIC confirmed that it does not view the safe harbor as exclusive. The FDIC also stated its view that the power to repudiate a contract is not a power to recover assets that were previously sold and are no longer reflected on the books and records of the IDI. It is our view that the power to repudiate a contract is not a power to recover assets that were previously sold in a legal sale regardless of the accounting treatment of such sale. It is also our view that the consent requirement of 12 U.S.C. 1821(e)(13)(c) applies only to the property of an IDI and that assets that have been sold in a legal sale by the IDI are not subject to the consent requirements, regardless of whether such assets are consolidated on the books of the IDI for accounting purposes.

the originator. Maintaining the ability to have the rating of securitized obligations de-linked from the rating of the sponsor is vital to the securitization markets.

Following the publication of the NPR, both Moody's Investors Service, Inc. ("Moody's") and Standard & Poor's Ratings Services ("S&P") released publications expressing concerns over the uncertainties surrounding the Proposed Rule. On May 25, 2010, Moody's published an article entitled "U.S. FDIC's Safe Harbor Remains Choppy."[14] Moody's is concerned that the Proposed Rule contains several unclear and subjective preconditions that "may make the safe harbor elusive." Moody's is also concerned that certain of these preconditions must be satisfied through the life of the transaction and that the risk of the loss of the safe harbor would be borne by investors.

On June 9, 2010, S&P published its own assessment of the Proposed Rule in an article entitled "Implications Of FDIC Proposal For A Revised Securitization Safe Harbor On S&P's Rating Analysis Of U.S. Bank-Originated Transactions."[15] S&P has raised several concerns with respect to the potential outcome, from a ratings perspective, of the insolvency of a depository institution that has securitized assets. First, they are concerned with the uncertainty that exists surrounding the application of the 2000 safe harbor or the extension of the existing safe harbor provisions 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") to existing master trusts that issue obligations after September 30, 2010. We discuss this issue in greater detail in Section VI of this Response Letter. S&P has also expressed concern regarding the FDIC's potential use of its statutory power to repudiate contracts, stating that it believes paragraph (d)(4)(ii) of the Proposed Rule only "partially mitigates the repudiation risk" with respect to securitization transactions that do not meet the requirements for sale accounting treatment but which do satisfy the preconditions set forth in the Proposed Rule. Paragraph (d)(4)(ii) says that if the FDIC, after repudiation, does not pay damages within 10 business days of the notice of repudiation, then the FDIC consents to the exercise of certain remedies. The Proposed Rule's definition of damages does not include accrued and unpaid interest as of the date of repudiation. S&P believes, absent any structural feature to cover interest in this instance, insolvency of a bank originator could lead to repudiation under the Proposed Rule which could in turn lead to a payment default on the obligations. S&P believes this would warrant a linkage of the rating of the securitization obligation to that of the originator or sponsor. Similarly, S&P opined that when the FDIC opts to not pay such damages after repudiation and investors can instead exercise remedies to obtain possession of the assets after 10 business days, absent a structural feature to cover any unpaid interest there may also be a payment default resulting in the same ratings linkage as described above.

In light of both Moody's and S&P's positions, the provisions of the Proposed Rule do not provide the expected and desired benefit of securitization ratings de-linked from those of a

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[14] See http://image.exct.net/lib/fefb127575640d/m/1/05.25.10+Credit+Card+Statement.pdf.
[15] See http://www.standardandpoors.com/ratings/articles/en/us/?assetID=1245214429388.

bank originator or sponsor. If the Proposed Rule does not achieve this objective then IDIs will have little incentive to meet any of its preconditions.

Preconditions that are Vague or Subjective

We are concerned that the provisions of the Proposed Rule may not be definitively relied upon because the Proposed Rule includes preconditions which are overly vague or subjective. For example, the requirement that the "documents creating the securitization must clearly define the payment structure and capital structure of the transaction"[16] is both vague and subjective, as it provides little guidance as to how and by whom a determination of compliance will be made. There is currently no standardized disclosure regarding payment structure or capital structure and it may be difficult for issuers to be certain that transaction documents "clearly define" the required information. We suggest that the text be changed to require that the documents "describe" the payment and capital structures of the transaction. This change would eliminate the subjective element of the requirement as currently written. Similarly, the requirement that "The documents creating the securitization must clearly define the respective contractual rights and responsibilities of all parties"[17] creates uncertainty as to whether the description in a securitization document will suffice for having "clearly defined" such rights and responsibilities. We suggest that the text be changed to require that the documents "should" define such rights and responsibilities with respect to "the relevant parties." We are also concerned that the determination as to whether the contractual rights and responsibilities of each party "provide sufficient authority for the parties to fulfill their respective duties and exercise their rights under the contracts"[18] as required under the Proposed Rule is also vague. The threshold for "sufficient authority" is unclear and may present a challenge for compliance.

Another subjective precondition is that the documents shall require that information be disclosed "at the financial asset or pool level, as appropriate for the financial assets, and security-level to enable evaluation and analysis of the credit risk and performance of the obligations and financial assets."[19] It is not clear who will determine what is "appropriate" for each asset class. We acknowledge that the FDIC has revised this provision to specify that the documents shall require information that is "appropriate" for each asset class, which addresses our concern as expressed in the February Response Letter that providing loan-level data with respect to certain asset classes would pose too great a burden with respect to those asset classes and might discourage securitization. We continue to be concerned, however, that this requirement is subjective and that what constitutes appropriate disclosure for any asset class at this time (or what may be considered appropriate going forward) remains unclear, as securitization transactions have evolved and will likely continue to evolve as market conditions change. As noted in our suggested revisions to the Proposed Rule, we believe that the disclosure requirements of the rule should be modified to include a cross-

[16] Proposed Rule Section (b)(1).
[17] Proposed Rule Section (b)(3).
[18] Proposed Rule Section (b)(3)(i)(A).
[19] Proposed Rule Section (b)(2)(i)(A).

reference to Regulation AB and any final rules adopted by the SEC with respect to disclosures.

As noted in the February Response Letter, we are also concerned that the parties to a securitization will be unable to become comfortable that transaction documents set forth "all necessary rights and responsibilities of the parties, including but not limited to representations and warranties and ongoing disclosure requirements, and any measures to avoid conflicts of interest."[20] The notion of what is unclear as an initial matter and "necessary" will evolve over time given changing market conditions. At a time of distress it may become apparent that a party is lacking an explicit right or responsibility under the securitization documentation, but that would also be the point at which the protections of the Proposed Rule would be most significant to investors who should not become subject to the loss of those protections. Accordingly, we propose to delete the words "all necessary" from the text of the Proposed Rule and replace them with "the." It is unclear what level of disclosure would be required in order to satisfy the requirement to disclose "any measures to avoid conflicts of interest." Each party to a securitization may have procedures in place to avoid or address conflicts of interest. It is not clear whether this requirement applies solely to the sponsor or to all parties to the transaction.

The Proposed Rule mandates that "a servicer must maintain sufficient records of its actions to permit appropriate review."[21] It is not only unclear what will constitute "sufficient records," but the intended meaning of "appropriate review" is also unclear. In addition, who would be performing such review? If it is determined that a servicer has not complied with the above requirements, the investors would bear the burden of such non-compliance. We are also concerned that this constitutes an ongoing condition whereby failure of a servicer to maintain sufficient records following the closing of a transaction would result in a transaction which met the safe harbor preconditions prior to closing falling out of compliance at a later date. We suggest that this provision be changed to state that the documents require that the servicer maintain records to facilitate review thereof by the trustee or other representative of the investors.

The Proposed Rule also includes terms which need further clarification or definitions. For example, a securitization may not be "an unfunded securitization or a synthetic transaction,"[22] but the rule does not define either term. Left undefined, these terms create subjectivity and uncertainty with respect to this precondition. A securitization transaction is also required to "be an arms length, bona fide securitization transaction."[23] This requirement is also vague and would require additional details or specific requirements to enable an issuer to become comfortable that a securitization transaction would meet this standard. Without further clarification, an issuer may believe that a transaction meets the requirement while the FDIC may view the requirement differently. Finally, the Proposed Rule states that a primary servicer shall not be required to "advance delinquent principal and interest for more than

[20] Proposed Rule Section (b)(3)(i)(A).
[21] Proposed Rule Section (b)(3)(ii)(A).
[22] Proposed Rule Section (b)(1)(i)(B).
[23] Proposed Rule Section (c)(1).

three payment periods, unless financing or reimbursement facilities are available."[24] It is unclear what is meant by a related provision which states that such facilities "shall not depend on foreclosure proceeds."[25] We request that this provision be clarified.

Conditions that are Ongoing

We are also concerned that the Proposed Rule contains several conditions which are ongoing obligations. Failure to comply with an ongoing obligation may result in a transaction that was determined to be in compliance with the Proposed Rule at the time of initial issuance subsequently falling out of compliance and losing protection of the safe harbor to the detriment of investors. To address comments made with respect to the ANPR, the NPR includes modifications to certain provisions including ongoing conditions. In particular the NPR includes, in many instances, the phrase "the documents shall require." This has the benefit of making an ongoing condition to the application of the Proposed Role one that can be measured by reference to the securitization documentation at closing rather than one that would require measurement and analysis over the life of the deal. We think that this approach is generally helpful. Where we believe this framework can be helpful but was not employed in the NPR we have suggested its inclusion in our proposed revisions in Attachment 1 and have described many such proposed revisions below. In some cases, however, the addition of an ongoing obligation in the securitization documents may impose a significant burden that would raise issues about the IDI's ability to live up to its promise. For instance, the NPR includes new paragraph (b)(2)(ii)(C) that requires the servicer to disclose prior to issuance and on an ongoing basis while the obligations are outstanding, any ownership interest by the servicer or an affiliate of the servicer in other whole loans secured by the same real property that secures a loan included in the financial asset pool. An example of a precondition which results in an ongoing obligation is the requirement that with respect to re-securitizations data disclosures with respect to the underlying assets must be available "while obligations are outstanding."[26] A transaction could lose the benefits of the safe harbor if a third-party originator of the underlying securities fails to provide the necessary data. Because this condition is addressed by Regulation AB we request that it be removed. If the FDIC does not remove this condition, we suggest that the condition instead require that the documentation for the re-securitization require the necessary disclosures, but note that this requirement still creates significant risk of non-compliance based on the actions or inaction of a third party.

The Proposed Rule states that "the nature and amount of compensation paid to the originator, sponsor, rating agency or third-party advisor, any mortgage or other broker and the servicer(s)"[27] and the risk of loss retained by each such party shall be disclosed in connection with the issuance of obligations. Tracking ongoing risk retention by third parties will be difficult, if not impossible. Because of concerns with compliance, we request that this provision be revised to state that the "documents shall require on or prior to the closing date"

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[24] Proposed Rule Section (b)(3)(ii)(B).
[25] Ibid.
[26] Proposed Rule Section (b)(1)(i)(A).
[27] Proposed Rule Section (b)(2)(i)(D).

the disclosure of compensation "that has been paid" and information regarding risk retention by the transaction parties.

Another requirement states that "The servicer must commence action to mitigate losses no later than ninety (90) days after an asset first becomes delinquent unless all delinquencies on such asset have been cured."[28] This is an ongoing obligation, and such servicer's failure to commence action to mitigate losses with respect to an asset in the stated timeframe would potentially cause a transaction to lose safe harbor protection. This noncompliance would result in a transaction that was determined to have satisfied the requisite preconditions at the time of initial issuance subsequently falling out of compliance and losing protection of the Proposed Rule to the detriment of investors. We suggest that this provision be changed to state that the documents require that the servicer commence loss mitigation activities within the specified timeframe.

The Proposed Rule requires that the sponsor "retain an economic interest in a material portion, defined as not less than five (5) percent, of the credit risk of the financial assets."[29] Rating agencies have expressed concern that there may be difficulties monitoring compliance with this precondition throughout the life of a transaction. We suggest that this provision be deleted, but if it remains that it be changed to state that the documents require the sponsor or an affiliate to retain the requisite interest. This will make the condition measurable at closing and allow retention by a special purpose entity in a multi-step transaction, consistent with a standard two-step structure.

Other requirements relating to the sponsor state that "The sponsor shall separately identify in its financial asset data bases the financial assets transferred into any securitization"[30] and maintain copies of closing documents, a list of outstanding securitizations and issuing entities and the most recent Form 10-K, if applicable, or other periodic financial report for each securitization and issuing entity. In addition, the Proposed Rule states that "the sponsor shall not commingle amounts received with respect to the financial assets with its own assets except for the time necessary to clear any payments received and in no event greater than a two day period."[31] Servicers with the best intentions and internal procedures may inadvertently allow commingling of cash flows. A foot fault here would potentially result in the loss of the protections of the Proposed Rule.[32] In addition, concern exists that compliance with these two ongoing requirements may not easily be measured following issuance. These concerns could be addressed by modifying these provisions to make them covenants or representations in the securitization document.

[28] Proposed Rule Section (b)(3)(ii)(A).
[29] Proposed Rule Section (b)(5)(i)(A).
[30] Proposed Rule Section (c)(7).
[31] Ibid. We note that the "two day period" should be at least "two business days."
[32] See our response to question 14 in Section IX for further discussion of our concerns regarding the commingling prohibition.

Preconditions that Cannot be Measured or Met

The revisions to the Proposed Rule have not addressed the issue of the inclusion of certain preconditions which are too difficult to measure or meet. For example, securitization documents must "use as appropriate any available standardized documentation for each different asset class."[33] As noted in the February Response Letter, while we support increased standardization of the securitization markets, we believe this is best achieved through standardized disclosure of portfolio data and reporting and only for documentation in very specific cases. Standardized documentation is an aspirational condition as there is currently no standardized documentation for most asset classes. Accordingly, it is unclear how participants in a securitization could evaluate compliance with this requirement. In addition, securitization transactions have been evolving for the past 30 years and will likely continue to evolve in light of changes in accounting rules, regulatory capital requirements and legislative and regulatory changes. Standardization requirements, once set, could cause stagnation and inhibit innovation. Accordingly, we suggest the deletion of the reference to standardized documentation.

As also discussed in the February Response Letter, it is inevitable that there will be instances of immaterial or technical noncompliance with respect to underwriting standards in connection with the origination of some residential mortgage loans. The precondition requiring that the assets be "originated in compliance with all statutory, regulatory, and originator underwriting standards in effect at the time of origination"[34] will make it difficult to conclude that any residential mortgage-backed securities ("RMBS") transaction should be entitled to the benefits of the safe harbor. We note that the preamble of the NPR states "While the Proposed Rule would require that the financial assets be originated in compliance with all regulatory standards, the FDIC does not view technical non-compliance with some standards, or occasional limited non-compliance with origination standards, as affecting the availability of the safe harbor." This standard for compliance versus non-compliance is too vague. We believe that parties to a securitization transaction are best served by including this type of compliance requirement in representations and warranties which, when breached by instances of material noncompliance, would trigger a repurchase obligation. This proposed compliance requirement will also be one that law firms will be unable or unwilling to address for a geographically diverse portfolio. We suggest that the rule be revised to require that the "documents shall contain a representation with respect to compliance in all material respects" with the relevant underwriting standards at origination.

Finally, the Proposed Rule states that "the obligations shall not be sold to an affiliate or insider."[35] As noted in the February Response Letter, the market for subordinate securities has been challenged over the last several years and we are concerned that this requirement will present difficulties in structuring transactions and selling securities. It has been common for issuers or their affiliates to retain most if not all of their rated subordinate securities during this period. As currently written, the requirement that obligations not be sold to an

[33] Proposed Rule Section (b)(3).
[34] Proposed Rule Section (b)(5)(ii)(B).
[35] Proposed Rule Section (c)(1).

affiliate or insider may be especially problematic, as issuers may not be able to find investors interested in subordinate securities and may therefore be discouraged from completing a transaction because of the concern that such transaction would not receive the benefits of the Proposed Rule. We would also like the FDIC to clarify whether or how this restriction limits a sponsor's ability to comply with the requirement that "The sponsor must retain an economic interest in a material portion . . . of the credit risk of the financial assets."[36] How is a sponsor expected to comply with this retention requirement if the issuing entity cannot sell obligations to an affiliate or insider? Does the prohibition on sales to affiliates or insiders apply to affiliates or insiders of the sponsor, rather than of the issuing entity? Rating agencies have also expressed concern that there will be difficulties in monitoring compliance with this condition, as it seems to be required to be complied with throughout the life of a transaction. We suggest that this requirement be revised to state that "the documents shall require that upon the closing of the transaction no more than 90% of the issuing entity's obligations shall be held by an affiliate or insider of the sponsor."

V. SECURITIZATION RULES SHOULD BE SEPARATED FROM SAFE HARBOR

The securitization related provisions of the Proposed Rule should be separated from the safe harbor provisions in the Proposed Rule in order to move forward toward the ultimate goal of restarting the U.S. securitization markets. A safe harbor linked to securitization rules leads to misaligned interests among transaction parties and investors. Under the Proposed Rule, investors in a securitization obligation would bear the risk if any of the preconditions were not satisfied and a transaction lost the protection of the Proposed Rule. Investors may be less likely to invest in securitization obligations given this risk allocation. Instead, bank regulatory agencies could use their oversight authority to ensure that banks follow agreed upon securitization and underwriting guidelines and enforce those guidelines as they enforce other rules to which U.S. IDIs are subject. If the FDIC's intent is to cause IDIs acting as originators, sponsors or servicers for securitization transactions to comply with a set of standards and regulations, then an IDI that fails to comply with a rule or regulation, rather than investors, should be the one suffering any penalty. With the current framework of the NPR, the receivership of an IDI poses multiple concerns for an investor because the receiver, in exercising its mandate to protect the Deposit Insurance Fund, may be motivated to identify an action of the IDI that has entered receivership as a breach of one or more of the many initial or ongoing requirements of the Proposed Rule that would then allow the receiver to refuse to provide expedited consent for the exercise of remedies and to choose to cease making ongoing required payments under the securitization documents. This is a significant concern for investors and rating agencies given the nature and number of the preconditions in the Proposed Rule. Investors in a securitization transaction should not bear the risk of an IDI's failure to comply with the securitization preconditions. Investors should only bear risks associated with the assets and not with the originator or other transaction parties. Securitization requirements should be separated from the safe harbor in order to provide investors with comfort that they will not be subject to additional risk.

[36] Proposed Rule Section (b)(5)(i)(A).

As discussed above, any new securitization rules should be the product of interagency cooperation and collaboration, with deference provided to the SEC with respect to the necessary disclosure requirements. Preconditions addressing capital structure, disclosure, documentation, origination and compensation would be more appropriately set out in a separate set of securitization rules that could provide guidelines for securitizations by U.S. IDIs, as they have no relevance for a traditional sale or safe harbor analysis.[37] Removing the preconditions from the Proposed Rule would then allow for the creation of an effective safe harbor.

VI. TRANSITION ISSUES

Under the Proposed Rule, if a master trust has issued ten series that met the preconditions of the 2000 safe harbor or the Transitional Safe Harbor for each such series and then issues a new series of notes after the end of the Transition Period, it is unclear whether the old series would continue to have the benefit of the old Securitization Rule pursuant to which the FDIC will not use its repudiation power to reclaim or recharacterize transfers of financial assets or whether all series issued from that securitization trust would only get the benefit of the expedited consent provisions of paragraphs (d)(4) and (e) of the final rule. If the lesser protections of the expedited consent provisions would apply, then it may be difficult to satisfy a condition to issuance under the securitization documents which requires an issuer to obtain a rating agency confirmation of existing ratings at the time of new issuance because the new issuance would subject outstanding securities to greater risk. It would be impractical to apply different standards to the securities of different series secured by a single pool of financial assets, e.g. the more limited comfort of the Proposed Rule for those series or tranches issued after the end of the Transition Period and the higher level of comfort for those securities issued before the end of the Transition Period. We therefore propose an explicit clarification that for securities issued from a single issuing entity, such as a master trust, for so long as any securities issued prior to the end of the Transition Period remain outstanding all securities issued by that issuing entity will have the benefit of the protections of the Securitization Rule. When the last of the securities issued prior to the end of the Transition Period is repaid, the protections of the final rule would then apply to all outstanding securities.

In addition, we would like to confirm that the references to beneficial interests or obligations which were issued on or before September 30, 2010 in paragraph (d)(2) and in the final rule entitled "Amendments to 12 C.F.R. §360.6 Defining Transitional 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 "Final Rule") extending the Transitional Safe Harbor and

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[37] The inclusion of preconditions in the Proposed Rule is inconsistent with FDIC precedent. There are no market regulatory standards as preconditions for the application of the current Securitization Rule and the FDIC has not imposed standards for substantive transaction terms in analogous circumstances. See FDIC Advisory Opinion 93-10 (February 2, 1993) and FDIC Advisory Opinion 86-8 (April 9, 1986).

approved by the Board of Directors of the FDIC on March 11, 2010, would encompass the full committed amount of beneficial interests that could be issued from time to time under a securitization up to the maximum amount permitted to be issued on September 30, 2010 or the applicable end date for the Transitional Safe Harbor (the "Transitional Safe Harbor End Date").

As described in the ASF's letter dated April 26, 2010, this interpretation is significant to any issuer with a committed securitization program that may have unfunded commitments from time to time, including programs funded through commercial paper conduits.

We request that language be added to paragraph (d)(2) as set forth in Attachment 1 hereto and that the FDIC provide written confirmation with respect to the Final Rule clarifying that the Transitional Safe Harbor encompasses obligations or beneficial interests that are issued from a series or tranche the terms of which have been set on or before September 30, 2010 (or the applicable Transitional Safe Harbor End Date), notwithstanding that the principal balance of such beneficial interests may be zero on or after that date and may fluctuate after that date, shall have the benefit of the transition period safe harbor provided that (i) on September 30, 2010 (or the applicable Transitional Safe Harbor End Date) the holders of such beneficial interests are contractually obligated to fund increases in the principal balance from time to time up to a maximum principal balance outstanding at any one time and (ii) the principal balance of such beneficial interests outstanding at any one time for any such committed facility does not exceed the amount of the applicable commitment for such committed facility on September 30, 2010 (or the applicable Transitional Safe Harbor End Date).

VII. Responses to Questions Posed by the NPR

Although we address each of the questions below individually and on its merits, we continue to believe that preconditions addressing disclosure, documentation, capital structure, origination and compensation should not be tied to the determination of whether financial assets will be treated as having been legally isolated.

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 IDIs?

This question, regarding participations, is outside the scope of the ASF's response.

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?

This question, regarding participations, is outside the scope of the ASF's response.

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

The Proposed Rule requires fundamental changes to disclosures regarding asset pools, including loan level data or financial asset level data for many classes of asset-backed securities, and the reformulation of basic documentation for securitization transactions. In isolation, we would request that the FDIC extend the Transition Period to 6-12 months after the date on which the final rule is published in the *Federal Register*. However, with legislation pending and fundamental changes to disclosure requirements out for comment from the SEC we think that it is appropriate for the Transition Period to continue at least until final rules implementing the legislation are in place.

New Regulation AB will require substantive and structural revisions to shelf registration statements. Sponsors will likely spend significant time in a process where the SEC reviews many filings prepared with the intent of complying with New Regulation AB. As noted above, the Proposed Rules would require fundamental changes to disclosures. IDIs interested in complying with any disclosure requirements of a new rule would have to consider the need to file new shelf registration statements and go through a potential SEC review in advance of the implementation of New Regulation AB. If such filings were made prior to finalization of New Regulation AB, the SEC would then need to provide comments on filings that address certain disclosure issues but might not be reflective of the SEC's developing requirements for enhanced disclosure. This could create significant confusion in the registration process until the New Regulation AB requirements are finalized. This is another reason why the FDIC should not include disclosure requirements in its safe harbor proposal and why IDIs would likely wait for final SEC rules before overhauling their disclosure documents and related systems for capturing and preparing relevant data.

4. Does the capital structure for RMBS identified by paragraph (b)(1)(ii)(A) 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?

We do not believe that structural attributes of RMBS relating to the types and number of tranches is an appropriate topic for the safe harbor. Limitations with respect to capital structure will not alone affect whether an asset pool is comprised of well-underwritten mortgage loans. Structural complexity is not itself correlated with the quality of the underlying assets. Furthermore, the structure of a transaction does not in and of itself cause the originator and sponsor's interests to be misaligned with investors in terms of asset quality. We believe that the safe harbor should not impose structural restrictions relating to the types and number of tranches with respect to a securitization transaction, but rather address those elements of securitization that have a demonstrated or apparent impact on matters within the appropriate scope of the safe harbor.

In the past, RMBS transactions were often structured to include more than six tranches. Many transactions included credit tranched classes, for example classes rated (generically): AAA, AA, A, BBB, BB, B and an unrated first loss class. The AAA class was often further subdivided into super senior and senior support classes, each rated AAA but with the latter supporting the former as to any losses not covered by the other classes. The AAA class could again be further subdivided, as discussed in greater detail below, and some structures created interest only classes from the mezzanine tranches.

Capital structures frequently included a wide variety of subclasses within the AAA class which represented the bulk of the structure. For example, interest and principal only classes were used to accommodate loans having a range of interest rates, or there were various types of classes to which amortization was directed within specified parameters to create more stable cash flow to those classes. We do not believe that structural complexity led to a decline in asset quality, but rather that such complexity resulted from high volumes of RMBS issuances in a context where it was possible to structure transactions to meet the needs of specific investors. The flexibility in structuring transactions resulted in issuers having the ability to maximize proceeds for any given issuance and lowering credit costs for consumers.

We believe that the reference to grantor trusts in paragraph (b)(1)(ii)(A) is only meant as a restriction on the use of grantor trusts in the creation of classes or subclasses of securities but not as a restriction on the use of grantor trusts as the issuing entity for a securitization, and note with approval the modification to the definition of "Obligation" that now encompasses "a debt or equity (or mixed) beneficial interest." However, we are concerned about the restriction on the use of grantor trusts within multi-class structures because that exclusion would prevent the following common transactions:

A. Real Estate Mortgage Investment Conduit ("REMIC") classes have fixed or variable interest rates but are subject to a cap of the weighted average coupon ("WAC") of the underlying mortgage loans. The securitization trust includes a third party interest rate cap or swap contract in a grantor trust portion of the transaction to pay to the classes that have reached the WAC cap the excess of their fixed or variable rates above such cap. The same effect is achieved if an interest only class provides the cap contract to the other classes out of its cash flow.

B. A REMIC is formed with fixed rate mortgage loans and all the securities issued by the REMIC classes have fixed interest rates. In order to offer a floating rate on a particular class to investors, one of the fixed rate REMIC classes is held in a grantor trust and combined with an interest rate swap contract to pay a floating rate on the grantor trust class. A grantor trust may also be used if an issuer wants to issue a class expressed in a foreign currency and seeks to do so by including a foreign currency swap contract in a grantor trust along with the REMIC class.

C. A pool of mortgage loans provides for payment of default interest or various fees, such as prepayment fees, exit fees and assumption fees, that the issuer wants to direct to a separate class or classes of investors. This cannot typically be done through the REMIC itself under applicable rules, but can easily be done by directing these payments to a grantor trust portion of the securitization trust and the issuance of certificates representing such interest or fees.

Ultimately, we do not believe that a limitation on the number of tranches would have any positive effects in terms of asset quality, transparency or appropriate alignment of incentives. Instead, we believe that imposing structural limitations will have negative effects on the ability to meet various investors' objectives and to maximize proceeds from issuances.

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?

As discussed above in Section II we expect that legislation will be enacted that will require the SEC to adopt new regulations for disclosures with respect to asset-backed securities and, in advance of that mandate, the SEC has released New Regulation AB, which proposes fundamental changes to the disclosure requirements for securitizations. For the reasons set forth in Section II we request the removal of the disclosure requirements of (b)(2) and (b)(1)(i)(A).

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 other or different rights and responsibilities that should be required?

Other than requiring that servicers be given authority to mitigated losses and modify loans, the documentation requirements of paragraph (b)(3) do not appear to attempt to describe the rights and responsibilities of the parties to a securitization. We do not think it prudent to attempt to mandate in a safe harbor rule the rights and responsibilities of the various parties to a securitization.

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?

We support the proposal that RMBS operative documents should contain provisions that authorize a wide range of loss mitigation activities, including modifications, to maximize the net present value of an asset. We agree that servicers should be given the authority to modify assets which are in default or for which default is reasonably foreseeable. While existing documents have been interpreted to authorize servicers to service pursuant to the Home Affordable Modification Program ("HAMP"), future RMBS documentation can be clearer and should authorize servicers to follow a streamlined approach to loan modifications other than the HAMP guidelines. As discussed at length in the February Response Letter, the ASF is developing a set of model servicing agreement provisions for use in RMBS transactions. The model provisions will address concerns related to servicers' abilities to effectuate loan modifications.

We also support the modifications made in the Proposed Rule to allow servicers to adopt a reasonable approach to determining net present value that is consistent with industry standards, rather than defining a specific net present value analysis in the Proposed Rule without sufficient industry input. As we develop the model servicing provisions, the industry will determine whether a single standard is feasible.

We do not believe that the safe harbor should mandate a specific timeline for servicer action following delinquency. Servicers should instead be given flexibility to take appropriate action to address delinquencies. No single timeline is appropriate for all asset classes, and even within an asset class there may be different circumstances which necessitate different courses of servicer action. While we request the removal of this restriction from paragraph (b)(3)(ii)(A), if this restriction is not removed then we suggest that the language be revised to say that the "documents shall require" the servicer to commence action within a specified time period. This change would serve to make what is currently an ongoing obligation one that is measurable at closing.

8. Are the servicer advance provisions applicable only to RMBS in paragraphs (b)(3)(ii)(A) 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?

We believe the intended reference in this question was to paragraph (b)(3)(ii)(B). We again reiterate our belief that the safe harbor should not address the extent of servicer advancing, nor should it make advancing contingent on the availability of financing. We believe these transaction provisions should be left for the market to determine.

We do not believe that similar requirements should be applied to other asset classes.

Imposing a three payment period limitation on servicer advances could have ratings consequences. Ratings address the timely payment of interest. A relatively short term event like a spike in delinquencies could create a problem for the timely payment of interest in the absence of an ongoing servicer advance obligation.

Investor members of the ASF generally believe that advancing plays a necessary liquidity function in securitization transactions, but many investors have differing opinions on the extent to which advancing should occur. For example, senior investors believe that the current standard, which is based on whether the advance is recoverable from the proceeds of the loan, is inadequate and that a better standard would be to stop advancing when the servicer expects any likelihood of liquidation. For this reason, senior investors believe that a limited period during which a servicer may advance better upholds the capital structure of the securitization. The concern is that uncapped servicing advances provide cash to pay interest on subordinate bonds (who remain outstanding because the loans have not been liquidated) to the detriment of the senior holders. Senior holders believe that a three payment period threshold is sufficient to cover borrowers who are temporarily delinquent. On the other hand, subordinate investors believe that only a servicer can adequately determine whether to stop advancing. They believe that the current standard based on recoverability is adequate. They also believe that a three payment period limit is arbitrary when considering the vastly different circumstances of delinquent borrowers.

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?

Paragraph (b)(4) begins by saying that "Compensation to parties involved in the securitization of such financial assets must be structured to provide incentives for sustainable credit and the long-term performance of the financial assets and securitization." This is an aspirational and subjective requirement and therefore we request that it be deleted. In general, we do not believe that the compensation requirements in paragraph (b)(4) would be effective to align incentives of all parties to the securitization for the long-term performance of the financial assets.

The language of paragraph (b)(4)(i) requires compensation to credit rating agencies to be payable over five (5) years after the first issuance based on the performance of surveillance services and the performance of the financial assets. The Proposed Rule provides no guidance on how to measure the performance of either surveillance services or the performance of the financial assets for purposes of determining whether ongoing compensation should be paid to a rating agency. Should performance of the financial assets be evaluated based on pool metrics such as loss and delinquency levels on the underlying assets? Performance of financial assets may vary for a variety of reasons. The proposed performance based compensation requirement could subject the rating agencies to a reduction in compensation due to poor servicing decisions, catastrophic events that would impact payment patterns of obligors on financial assets, the use of fraudulent documentation that goes undetected despite reasonable diligence efforts or simply due to future adverse market conditions. It is also unclear how performance triggers would be determined so that participants in a transaction could be comfortable that a properly constructed compensation provision has been put in place. Alternatively, performance of the financial assets could be evaluated on the basis of whether the rating agency has taken any ratings action, such as a downgrade of one or more classes of securities. However, such a measure would create a clear misalignment of interest by creating a financial disincentive for rating agencies to take prudent ratings actions.

It is difficult to effectively require the deferment of compensation. The fees charged by rating agencies for rating a transaction are negotiated from time to time. The language of paragraph (b)(4)(i) requires that no more than sixty (60) percent of the total estimated compensation should be due at closing. If the rating agencies view the remaining forty (40) percent of compensation as contingent, they may simply negotiate for higher compensation overall.

Ongoing payments to rating agencies are typically made by the sponsor. If paragraph (b)(4)(i) would allow the sponsor to benefit financially by withholding an ongoing payment to a rating agency at a time when the pool originated or assembled by the sponsor is performing badly, then it creates a clear misalignment of incentives

Linking rating agency fees to the performance of the structured product would also raise questions regarding the neutrality of rating agencies by giving them a stake in such performance. This process could, in turn, undermine regulatory and rating agency initiatives to strengthen analytical independence.

We also note that a rating agency that is not receiving compensation for ongoing ratings activities could choose to effectively resign by withdrawing its rating. This would provide less information to the securitization market about the relevant security and so would generally be a negative development for investors. When pool performance is deteriorating, the market benefits the most from active ratings surveillance and communication of ratings assessments.

For these reasons, we think that it is not prudent to require payment over time of ratings compensation with positive performance of the financial assets as a prerequisite to continued payments.

We are generally not opposed to an industry-wide effort to revamp servicing compensation for RMBS, in order to encourage optimal servicing. However, as discussed in the February Response Letter, there are a number of consequences to this approach that would have to be considered. First, there would have to be a mechanism for funding this variable cost out of transaction cash flow, which would be considerably more complex than the fixed servicing fee now widely used because the servicing fee is generally paid at the top of the cash flow waterfall ahead of payments to the securities. This would make cash flow modeling significantly more complicated. Second, there could be a significant effect on the variability of the carrying value of servicing rights as a financial asset, as the cash flows attributable to servicing rights could become significantly more volatile.

While this proposal has merit, we believe that it should be considered in the context of a broad-based industry initiative, and only if it is determined that it has significant support. The language of paragraph (b)(4)(ii) in the Proposed Rule is vague and aspirational and therefore weakens the safe harbor. We do not believe that such an ambitious reform should be a part of the safe harbor.

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

As discussed above in Section II, we expect that legislation will be enacted addressing credit risk retention. Given that Congress has developed a risk retention proposal for securitizations and the federal banking agencies along with the SEC will be obligated to prescribe implementing regulations, we request that the risk retention provision of paragraph (b)(5) be removed from the final rule and any requirements be implemented on an interagency basis.

The retention requirement of paragraph (b)(5)(i)(A) can be satisfied by the retention of "a representative sample of the securitized financial assets." If a risk retention requirement is to be included in a final rule, we would like clarification on what this provision means. In particular, we would like confirmation that this requirement can be satisfied by the retention of financial assets that are reasonably equivalent to those constituting the securitization pool but are outside of that pool and that this requirement does not necessitate the retention of a participation interest in the actual securitization pool. We propose that in order to clarify this point the language be revised to say that the sponsor or an affiliate may retain "a representative sample of financial assets substantially equivalent to those that have been securitized."

The following discussion describes the views of certain ASF member groups with respect to the issue of risk retention. Our investor members strongly believe that risk retention is necessary to align incentives among sponsors, issuers and investors in securitizations. Investors believe that different types of loans and securitized assets present wide variations in expected credit and performance characteristics and that risk retention procedures, ideally, would be calibrated to those specific risks. However, our investor members are split on how risk retention requirements should be applied to these different asset classes. Some investors believe that a standardization of risk retention requirements is ultimately necessary, as calibrating retention requirements for individual assets would be very difficult. For this reason, certain investors support the risk retention requirements set forth by the SEC in its recent proposals to replace investment grade ratings for shelf registration. The SEC permits the sponsor to either hold a 5% vertical slice of each tranche or a 5% "originator's interest" for revolving master trusts to meet the risk retention requirements.[38] For both options, the SEC proposes to require risk retention net of hedge positions directly related to the securities or exposures taken by the sponsor or its affiliate. However, hedge positions that are not directly related to the securities or exposures, such as hedges related to overall market movements, movements of market interest rates, currency exchange rates or of the overall value of a particular broad category of asset-backed securities, would not be required to be netted under the proposal. Other investors do not believe that the SEC's requirements for risk retention provide enough flexibility, as issuers of certain asset classes can retain risk in other ways, such as a horizontal slice in the case of an auto or equipment securitization or a third party purchaser of the first loss piece in the case of a commercial mortgage-backed securities transaction where such purchaser provides adequate due diligence on the assets.

Our issuer members believe that the concept of 5% risk retention across the board for all asset types is ill founded and that if risk retention is employed in this format, it should be calibrated to reflect the risk in any given asset pool. They note that the risk retention concept included in the Congressional legislation includes a calibration feature whereby the risk retention is reduced for higher quality assets. Different types of loans and securitized assets present wide variations in expected credit and performance characteristics. For example, mortgage loans made to prime borrowers will have vastly different credit risks than those made to non-prime borrowers. Given this variability, any blanket, one-size-fits-all retention requirement will be arbitrary in its application to any particular asset type, and will not reflect important differences in the expected credit and performance characteristics of that asset versus other types of assets. Issuers believe that, for example, if a 5% requirement were imposed on high quality jumbo prime loans, it would become uneconomical to securitize such loans. For high quality jumbo prime mortgage loans, originated in a manner consistent

[38] See 17 C.F.R. 239.45 at 23444.

with GSE underwriting requirements other than the maximum principal amount limitation, given strong representations and warranties and full transparency as to underwriting criteria, issuers would advocate that there should be no risk retention requirement. Instead, issuers believe that within transactions contractual provisions designed to assure asset quality should be tightened, enhanced diligence procedures should be employed both pre- and post-securitization to assure asset quality and to enforce remedies for breaches of representations and warranties, and further consideration should be given to directly regulating lending practices that have been proven to be risky. If risk retention requirements are imposed, issuers believe that a host of options should be permitted, including (i) vertical slice, (ii) horizontal slice, (iii) random exposures, (iv) originator's interest, (v) sale of the first loss piece to a third-party who specifically negotiates for it and performs diligence on the entire pool of assets and (vi) appropriate exemptions including the securitization of certain qualified loans.

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?

Certain of our members view positively the requirement for a reserve fund equal to 5% of the cash proceeds of a securitization of financial assets that include any mortgage loans to cover repurchases of assets resulting from a breach of representations and warranties. Others are concerned that this requirement would add a layer of inefficiency to transactions and that the costs of a twelve month holdback of proceeds would be borne by mortgagors. There is general agreement that the current proposal is preferred to the proposal in the ANPR that would have prohibited the securitization of residential mortgage loans for twelve months after origination.

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?

See our response to question 11.

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

Paragraph (c)(1)

Paragraph (c)(1) of the Proposed Rule includes a requirement that "the obligations shall not be sold to an affiliate or insider." The language of the ANPR included the significant qualification that "the obligations shall not be sold *predominately* to an affiliate or an insider." It is crucial to the functioning of the securitization markets, *and in fact required by the Proposed Rule*, that the final rule allow for retention of securities by an affiliate or insider of the issuing entity or sponsor. Each of the following is a circumstance where an affiliate or insider might typically hold an interest in a securitization: (i) a transferor interest in a master trust that would be held by the sponsor or in a multi-step transaction a special purpose entity ("SPE") that would be an affiliate of the sponsor, (iii) retained subordinate securities that would be held by the sponsor or an affiliated SPE, (iii) an unsold allotment that would be retained by an underwriter that is an affiliate of the sponsor, (iv) securities held by a broker-dealer affiliate of the sponsor in connection with market making activities and (v) securities retained by the sponsor or an affiliate to satisfy mandated risk retention requirements. Without flexibility for the retention of obligations many current structures for securitizations would not work. In addition, the protections of the rule could be inadvertently lost if an affiliate or insider ever purchased any obligations. This creates uncertainty with respect to the safe harbor. We therefore suggest that this portion of paragraph (c)(1) be rewritten to say "the documents shall require that upon the closing of the transaction no more than 90% of the issuing entity's obligations shall be held by an affiliate or insider of the sponsor."

Commingling

The NPR has added a new prohibition on commingling in paragraph (c)(7). This prohibition would have a significant impact on a large number of securitization transactions. Many existing transactions, such as credit card master trust securitization transactions, allow commingling of collections in certain circumstances, e.g. for so long as the Servicer maintains a required rating. Documentation may in some cases require the issuer to deposit in a trust account amounts sufficient to make payments from the waterfall before allowing any excess to be released to the sponsor. In either case for a large program, such as a large credit card securitization program, a prohibition on commingling will have a significant impact on the economics of the securitization. A prohibition on commingling would also be an administrative burden for sponsors to make daily deposits where they have not been required to do so in the past. The Proposed Rule prohibits commingling for more than two days rather than two business days. This could be a problem on weekends, especially three day weekends. We propose that the prohibition on commingling would apply except as specifically provided in the documentation for the securitization to allow for commingling that has been agreed to by the transaction parties.

15. Is the scope of the safe harbor provisions in paragraph (d) adequate? If not, what changes would you suggest?

We do not believe that the scope of the provisions in paragraph (d), and in particular (d)(4), is adequate. See our discussion of paragraph (d) in Section III.

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?

See our discussion of paragraph (d)(4) in Section III.

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

Based upon recent commentary from each of Moody's and S&P, the provisions of the Proposed Rule do not provide the expected benefit of securitization ratings de-linked from those of a bank originator or sponsor.

See our response in Section IV under the heading "Safe Harbor Objective: De-Linked Ratings."

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?

See our discussion of paragraph (e) in Section III.

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We very much appreciate your consideration of our responses and comments to the questions posed by the NPR and the other industry views outlined in this Response Letter. Should you have any questions concerning our views and recommendations, please do not hesitate to contact me at 212.412.7107 or at tdeutsch@americansecuritization.com, Evan Siegert, ASF Associate Director at 212.412.7109 or at esiegert@americansecuritization.com, or our outside counsel on this matter, Andrew Faulkner of Skadden, Arps, Slate, Meagher & Flom LLP, at 212.735.2853 or at andrew.faulkner@skadden.com.

Sincerely,

Tom Deutsch

Tom Deutsch
Executive Director
American Securitization Forum

ATTACHMENT 1

PROPOSED REVISIONS TO § 360.6

§ 360.6 Treatment of financial assets transferred in connection with a securitization or participation.

(a) Definitions.

(1) "*Financial asset*" means cash or a contract or instrument that conveys to one entity a contractual right to receive cash or another financial instrument from another entity.

(2) "*Investor*" means a person or entity that owns an obligation issued by an issuing entity.

(3) "*Issuing entity*" means an entity created at the direction of a sponsor that owns a financial asset or financial assets or has a perfected security interest in a financial asset or financial assets and issues obligations supported by such asset or assets. Issuing entities may include, but are not limited to, corporations, partnerships, trusts, and limited liability companies and are commonly referred to as special purpose vehicles or special purpose entities. To the extent a securitization is structured as a ~~two~~multi-step transfer[1], the term issuing entity would include both the issuer of the obligations and any intermediate entities that may be a transferee.

(4) "*Monetary default*" means a default in the payment of principal or interest when due, including as a result of a failure as servicer to apply payments received on financial assets to securitization obligations as required under the securitization documents,[2] following the expiration of any cure period.

(5) "*Obligation*" means a debt or equity (or mixed) beneficial interest or security that is primarily serviced by the cash flows of one or more financial assets or financial asset pools, either fixed or revolving, that by their terms convert into cash within a finite time period, or ~~upon~~may convert to cash partially by the cash proceeds from the disposition of the physical property underlying the financial assets[3], any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders issued by an issuing entity. The term ~~does not include any instrument that evidences ownership of the issuing entity, such as~~includes beneficial interests in a grantor trust, common law trust or similar issuing entity, but does not

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[1] This change recognizes the possibility that a securitization transaction may be structured with three or four steps and is consistent with the reference that follows to "any intermediate entities."

[2] This change confirms that a failure by the FDIC to fulfill its obligations as servicer to make payments to investors to the extent supported by collections would be a monetary default authorizing the investors to pursue remedies under paragraph (d)(4)(i). A proposed change to subsection (e) would also commit the FDIC as servicer to make such payments to the extent supported by collections.

[3] These changes are intended to clarify the language added to the version of the definition in the NPR that would accommodate lease securitizations. Our formulation more closely tracks the lease related language in the Regulation AB definition of "Asset-backed security."

include[4] LLC interests, common equity, or similar instruments evidencing ownership of the issuing entity.

(6) "*Participation*" means the transfer or assignment of an undivided interest in all or part of a financial asset, that has all of the characteristics of a "participating interest," from a seller, known as the "lead," to a buyer, known as the "participant," without recourse to the lead, pursuant to an agreement between the lead and the participant. "Without recourse" means that the participation is not subject to any agreement that requires the lead to repurchase the participant's interest or to otherwise compensate the participant upon the borrower's default on the underlying obligation.

(7) "*Securitization*" means the issuance by an issuing entity of obligations for which the investors are relying on the cash flow or market value characteristics and the credit quality of transferred financial assets (together with any external credit support permitted by this section) to repay the obligations.

(8) "*Servicer*" means any entity responsible for the management or collection of some or all of the financial assets on behalf of the issuing entity or making allocations or distributions to holders of the obligations, including reporting on the overall cash flow and credit characteristics of the financial assets supporting the securitization to enable the issuing entity to make payments to investors on the obligations. The term "Servicer" does not include a trustee for the issuing entity or the asset-backed securities that makes allocations or distributions to holders of the asset-backed securities if the trustee receives such allocation or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer[5].

(9) "*Sponsor*" means a person or entity that organizes and initiates a securitization by transferring financial assets, either directly or indirectly, including through an affiliate, to an issuing entity, whether or not such person owns an interest in the issuing entity or owns any of the obligations issued by the issuing entity.

(10) "*Transfer*" means:

(i) The conveyance of a financial asset or financial assets to an issuing entity~~;~~ or

(ii) The creation of a security interest in such asset or assets for the benefit of the issuing entity.

(b) ***Coverage.*** This section shall apply to securitizations that meet the following criteria:

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4 This change is intended to limit the scope of the carve out so that it would not pick up certificates of beneficial interest in a grantor trust or other beneficial interests that could be viewed as equity and that are intended to be included in accordance with the language added to the NPR – "debt or equity (or mixed) beneficial interest."

5 This addition tracks language from the definition of "Servicer" in Regulation AB.

(1) *Capital structure and financial assets*. The documents creating the securitization must ~~clearly define~~describe[6] the payment structure and capital structure of the transaction.

(i) The following requirement applies to all securitizations:

(A) [The securitization shall not consist of re-securitizations of obligations or collateralized debt obligations unless the documentation for the re-securitization shall require the disclosures required in paragraph (b)(2) below[7] of this section ~~are~~to be made available to investors for the underlying assets supporting the securitization at initiation and while obligations are outstanding][8]; and

(B) The payment of principal and interest on the securitization obligation must be primarily based on the performance of financial assets that are transferred to the issuing entity and, except for interest rate or currency mismatches between the financial assets and the obligations, shall not be contingent on market or credit events that are independent of such financial assets. The securitization may not be [an unfunded securitization[9] or] a synthetic transaction.

(ii) The following requirements apply only to securitizations in which the financial assets include any residential mortgage loans:

(A) [The capital structure of the securitization shall be limited to no more than six credit tranches and cannot include "sub-tranches," grantor trusts or other structures. Notwithstanding the foregoing, the most senior credit tranche may include time-based sequential pay or planned amortization sub-tranches~~;~~ and corresponding companion sub-tranches, as well as interest only classes;[10] and]

(B) [The credit quality of the obligations cannot be enhanced at the issuing entity or pool level through external credit support or guarantees. However, the temporary payment of principal and/or interest may be supported by liquidity facilities, including facilities designed to permit the temporary payment of interest following appointment of the FDIC as conservator or receiver. Individual financial assets transferred into a securitization may be guaranteed, insured or otherwise benefit from credit support at the loan level through mortgage and similar insurance or

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6 "Clearly define" is a subjective standard. What may seem clear at closing could be shown to be less than clear at a time of stress for the transaction.

7 This change would convert this from an ongoing requirement that could be breached by the issuer at a future date, to a requirement that can be verified at closing.

8 We request that this subsection be deleted along with the disclosure requirements of paragraph (b)(2) because in each case the disclosure requirements are addressed by New Regulation AB.

9 It is unclear what is meant by an "unfunded securitization."

10 This change would be necessary if this language remains, because planned amortization sub-tranches can only exist if there is a matching "companion" class that receives excess prepayments and because interest only classes are commonly used.

guarantees, including by private companies, agencies or other governmental entities, or government-sponsored enterprises, and/or through co-signers or other guarantees.][11]

(2) *Disclosures*.[12] The documents shall require that the sponsor, issuing entity, and/or servicer, as appropriate, shall make available to investors, information describing the financial assets, obligations, capital structure, compensation of relevant parties, and relevant historical performance data as ~~follows~~required pursuant to Regulation AB and, upon adoption and effectiveness, any final rules promulgated in accordance with Securities Act Release No. 9117 (April 7, 2010):

(i) The following requirements apply to all securitizations:

(A) The documents shall require that, prior to issuance of obligations and ~~monthly~~[13] at the time of delivery of any periodic distribution report while obligations are outstanding, information about the obligations and the securitized financial assets shall be disclosed to ~~all~~ potential investors at the financial asset or pool level, as appropriate for the financial assets[14], ~~and security-level~~ to enable evaluation and analysis of the credit risk and performance of the obligations and financial assets. The documents shall require that such information and its disclosure, at a minimum, shall comply with the ~~requirements of Securities and Exchange Commission Regulation AB, 17 CFR 229.1100 through 229.1123, or any successor disclosure requirements for public issuances, even if the obligations are issued in a private placement or are not otherwise required to be registered.~~disclosure standards that apply under the SEC's current framework, or any successor framework, for transactions registered under, or exempted from, the Securities Act of 1933.[15] Information that is unknown or not available to the sponsor or the issuer after reasonable investigation may be omitted if the issuer includes a statement in the offering documents disclosing that the specific information is otherwise unavailable;

(B) The documents shall require that, prior to issuance of obligations, the structure of the securitization and the credit and payment performance of the obligations shall be disclosed, including the capital or tranche structure, the priority of payments and specific subordination features; representations and warranties made with respect to the financial assets, the remedies for and the time permitted for cure of any breach of representations and warranties, including the

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11 We request that the limitations of proposed paragraphs (b)(1)(ii)(A) and (b)(1)(ii)(B) be removed. See our response to question 4.

12 We recommend the deletion of paragraph (b)(2). In the alternative we would request the addition of the phrase set forth at the end of the following paragraph and the deletion of clauses (A) and (B). Our suggested revisions in clauses (A) and (B) are relevant only if you chose not to adopt our initial proposals.

13 Not all deals require monthly reporting. A deal where interest is paid on a quarterly basis may only require delivery of a distribution report on a quarterly basis.

14 It is unclear what was meant by "security-level." Alternatively say "and for a pool comprised in whole or in part of securities, at the security level."

15 The change would align this Rule with standards adopted by the SEC.

repurchase of financial assets, if applicable; liquidity facilities and any credit enhancements permitted by this rule, any waterfall triggers or priority of payment reversal features; and policies governing delinquencies, servicer advances, loss mitigation, and write-offs of financial assets;

(C) The documents shall require that while obligations are outstanding, the issuing entity shall provide to investors information with respect to the credit performance of the obligations and the financial assets, including periodic and cumulative financial asset performance data, delinquency and modification data for the financial assets, substitutions and removal of financial assets, servicer advances, as well as losses that were allocated to ~~such~~each tranche and the remaining balance of financial assets supporting such tranche, if applicable; and the percentage of each tranche in relation to the securitization as a whole; and

(D) In connection with the issuance of obligations~~,~~ the documents shall require the disclosure on or prior to the closing date of the nature and amount of compensation that has been paid to the [originator, sponsor, rating agency or third-party advisor, any mortgage or other broker, and the][16] servicer(s)~~, and~~. In addition, the documents shall require the disclosure on or prior to the closing date of the extent to which any risk of loss on the underlying assets is retained by any of them for such securitization~~ shall be disclosed~~. The securitization documents shall require the issuer to provide to investors while obligations are outstanding any changes to such information and the amount and nature of payments of any deferred compensation or similar arrangements to any of the parties.

(ii) The following requirements apply only to securitizations in which the financial assets include any residential mortgage loans:

(A) Prior to issuance of obligations, sponsors shall disclose loan level information about the financial assets including, but not limited to, loan type, loan structure (for example, fixed or adjustable, resets, interest rate caps, balloon payments, etc.), maturity, interest rate and/or Annual Percentage Rate, and location of property; and

(B) ~~Prior to issuance of obligations, sponsors shall affirm~~The documents shall contain a representation with respect to compliance in all material respects[17] with all applicable statutory and regulatory standards for origination of mortgage loans, including that the mortgages are underwritten at the fully indexed rate relying on documented income, and comply with existing supervisory guidance governing the underwriting of residential mortgages, including the Interagency Guidance on Non-Traditional Mortgage Products, October 5, 2006, and the Interagency Statement on Subprime Mortgage Lending, July 10, 2007, ~~and~~as such ~~additional guidance applicable~~guidance may be amended or supplemented from time to time or,[18] for

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16 Compensation disclosure for these parties is not required under the SEC's Regulation AB proposal.

17 These changes are intended to establish a standard that can be met by sponsors and that would not provide uncertainty for investors with respect to whether the conditions for the benefits of the Proposed Rule had been satisfied.

18 This is intended to avoid locking in compliance with rules as of a specified date.

residential mortgages originated prior to the issuance of such guidance shall meet in all material respects all supervisory guidance governing the underwriting of residential mortgages in effect[19] at the time of loan origination. Sponsors shall disclose a third party due diligence report on compliance with such standards and the representations and warranties made with respect to the financial assets; and

(C) The documents shall require that prior to issuance of obligations and while obligations are outstanding, servicers shall disclose any ownership interest by the servicer or an affiliate of the servicer in other whole loans secured by the same real property that secures a loan included in the financial asset pool. The ownership of an obligation, as defined in this regulation, shall not constitute an ownership interest requiring disclosure.

(3) *Documentation and recordkeeping*. The documents creating the securitization ~~must clearly~~should[20] define the respective contractual rights and responsibilities of ~~all~~the relevant parties and include the requirements described below~~ and use as appropriate any available standardized documentation for each different asset class~~.[21]

(i) The following requirements apply to all securitizations:

(A) The documents shall set forth ~~all necessary~~[22]the rights and responsibilities of the parties, including but not limited to representations and warranties and ongoing disclosure requirements, and any measures to avoid conflicts of interest. ~~The contractual rights and responsibilities of each party to the transaction, including but not limited to the originator, sponsor, issuing entity, servicer, and investors, must provide sufficient authority for the parties to fulfill their respective duties and exercise their rights under the contracts and clearly distinguish between any multiple roles performed by any party.~~[23]

(ii) The following requirements apply only to securitizations in which the financial assets include any residential mortgage loans:

(A) Servicing and other agreements must provide servicers with full authority, subject to contractual oversight by any master servicer or oversight advisor, if any, to mitigate losses on financial assets consistent with maximizing the net present value of the financial asset. Servicers shall have the authority to modify assets to address reasonably foreseeable default, and to take such other action necessary to maximize the value and minimize losses on the securitized financial assets applying industry best practices for asset management and servicing. The documents shall require the servicer to act for the benefit of all investors, and not for the benefit of any particular

[19] This language appears in the parallel requirement of paragraph (b)(5)(ii)(B).

[20] This is a subjective standard.

[21] There is generally no standardized documentation for securitization.

[22] This is an aspirational standard.

[23] This is an aspirational and subjective requirement that could be challenged at a point of stress in the deal.

class of investors. [The documents shall require the servicer ~~must~~to commence action to mitigate losses no later than ninety (90) days after an asset first becomes delinquent unless all delinquencies on such asset have been cured.~~ A~~][24] The documents shall require the servicer ~~must~~to maintain ~~sufficient~~ records of its actions to ~~permit appropriate review~~facilitate review thereof by the trustee or other representative of the investors[25]; and

(B) [The servicing agreement shall not require a primary servicer to advance delinquent payments of principal and interest for more than three payment periods, unless financing or reimbursement facilities are available, which may include, but are not limited to, the obligations of the master servicer or issuing entity to fund or reimburse the primary servicer, or alternative reimbursement facilities. Such "financing or reimbursement facilities" under this paragraph shall not depend on foreclosure proceeds.][26]

(4) *Compensation*. The following requirements apply only to securitizations in which the financial assets include any residential mortgage loans. Compensation to parties involved in the securitization of such financial assets must be structured~~ to provide incentives for sustainable credit and the long-term performance of the financial assets and securitization~~[27] as follows:

(i) The documents shall require that any fees or other compensation for services payable by the sponsor or issuing entities to credit rating agencies or similar third-party evaluation companies shall be payable, in part, over the five (5) year period after the first issuance of the obligations based on [the performance of surveillance services[28]] and [the performance of the financial assets], with no more than sixty (60) percent of the total estimated compensation due at closing[29]; and

(ii) [Compensation to servicers shall provide incentives for servicing, including payment for loan restructuring or other loss mitigation activities, which maximizes the net present value of the financial assets. Such incentives may include payments for specific services, and actual expenses, to maximize the net present value or a structure of incentive fees to maximize the net present value, or any combination of the foregoing that provides such incentives.][30]

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24 The change in this sentence is intended to make the ongoing obligation measurable at closing. We request that this requirement be removed to give servicers latitude to adopt appropriate collection efforts.

25 The changes are suggested to remove vagueness.

26 We believe that the safe harbor should not address the extent of servicer advancing and note that it is unclear from this paragraph what form a "financing or reimbursement facility" must take in order to allow servicer advances beyond three months.

27 This is an aspirational and subjective standard.

28 This requirement assumes ongoing surveillance services from the credit rating agency.

29 We request that this language be deleted. See our response to question 10.

30 We request that this language be deleted. See our response to question 10.

(5) *Origination and Retention Requirements*.

(i) The following requirements apply to all securitizations[31]:

(A) The documents shall require the sponsor ~~must~~or an affiliate of the sponsor[32] to retain an economic interest in a material portion, defined as not less than five (5) percent, of the credit risk of the financial assets. This retained interest may be either in the form of an interest of not less than five (5) percent in each of the credit tranches sold or transferred to the investors or in a representative sample of ~~the securitized~~ financial assets substantially equivalent to those that have been securitized equal to not less than five (5) percent of the principal amount of the financial assets at transfer. This retained interest may not be ~~transferred~~sold[33] or hedged during the term of the securitization.

(ii) The following requirements apply only to securitizations in which the financial assets include any residential mortgage loans:

(A) The documents shall require the establishment of a reserve fund equal to at least five (5) percent of the cash proceeds of the securitization payable to the sponsor to cover the repurchase of any financial assets required for breach of representations and warranties. ~~The balance of such~~ Amounts in the reserve fund will be available only to cover amounts owing for claims of breaches of representations and warranties, where such claims were asserted in accordance with the documents not later than one year after the date of issuance. The documents shall provide that where the sponsor concedes that claims for breaches of representations and warranties as to specific loans are valid, the sponsor may direct that amounts in the reserve fund be applied to cover amounts owing under such claims. The documents shall provide that the balance remaining in the reserve fund, if any, ~~shall be released to the sponsor~~as of the date one year after the date of issuance~~.~~, reduced by the amount of any then pending claims, shall be promptly released to the sponsor. The documents shall also include provisions that address how any dispute will be resolved regarding the validity of any claims for breach that could be covered from amounts in the reserve fund, which may include mandatory arbitration procedures.[34]

(B) The documents shall include a representation that the assets shall have been originated in all material respects[35] in compliance with all statutory, regulatory, and originator underwriting

31 Retention requirements are covered by the Financial Services legislation that is currently pending. This section should be deleted.

32 The changes are intended to convert this to an objective test that can be met at closing and to allow retention by an SPE in a multi-step structure to be consistent with a traditional true sale analysis.

33 Because "transfer" is a defined term, its usage here does not work.

34 These changes (or other, similar changes) are needed to address dispute resolution, and to address the situation where claims are asserted before the expiration of the one year period but remain unresolved.

35 These changes are intended to establish a standard that can be met by sponsors and that would not provide uncertainty for investors with respect to whether the conditions for the benefits of the Proposed Rule had been satisfied.

standards in effect at the time of origination. Residential mortgages included in the securitization shall be underwritten at the fully indexed rate, based upon the borrowers' ability to repay the mortgage according to its terms, and rely on documented income and comply with all existing supervisory guidance governing the underwriting of residential mortgages, including the Interagency Guidance on Non-Traditional Mortgage Products, October 5, 2006, and the Interagency Statement on Subprime Mortgage Lending, July 10, 2007, ~~and~~as such ~~additional regulations or guidance applicable to insured depository institutions at the time of loan origination. Residential~~guidance may be amended or supplemented from time to time or,[36] for residential mortgages originated prior to the issuance of such guidance shall meet in all material respects all supervisory guidance governing the underwriting of residential mortgages ~~then~~ in effect at the time of loan origination.

(c) ***Other requirements*.**

(1) The transaction should be an arms length~~, bona fide securitization~~ transaction, and the documents shall require that upon the closing of the transaction no more than 90% of the issuing entity's obligations shall ~~not~~ be ~~sold to~~held by an affiliate or insider~~;~~ of the sponsor;[37]

(2) The securitization agreements are in writing, approved by the board of directors of the bank or its loan committee (as reflected in the minutes of a meeting of the board of directors or committee), and have been, continuously, from the time of execution in the official record of the bank;

(3) The securitization was entered into in the ordinary course of business, not in contemplation of insolvency and with no intent to hinder, delay or defraud the bank or its creditors;

(4) The transfer was made for adequate consideration;

(5) The transfer and/or security interest was properly perfected under the UCC or applicable state law;

(6) ~~The~~For any securitization issued from an issuing entity that did not have documentation in place prior to the effective date of this rule,[38] the transfer and duties of the sponsor as transferor must 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; and

(7) The documents shall require that the sponsor shall separately identify in its financial asset data bases the financial assets transferred into any securitization and maintain an electronic

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[36] This is intended to avoid locking in compliance with rules as of a specified date.

[37] The changes are intended to convert this into an objective test that can be verified at closing and that accommodates retention of obligations by an affiliate up to the level permitted under FAS 140 (See FAS 140, paragraph 36).

[38] Many securitization programs, including credit card master trusts, have documentation that has been in place for years and amending such documentation might require the consent of investors which may not be obtainable.

or paper copy of the closing documents for each securitization in a readily accessible form, a current list of all of its outstanding securitizations and issuing entities, and the most recent Form 10-K, if applicable, or other periodic financial report for each securitization and issuing entity. To the extent the sponsor serves as servicer, custodian or paying agent provider for the securitization, the documents shall require that the sponsor shall not comingle amounts received with respect to the financial assets with its own assets until the sum of the scheduled investor payments for the following distribution date has been accumulated except for the time necessary to clear any payments received and in no event greater than a two business day period~~.~~ and except as provided in the documentation for the securitization.[39] The sponsor shall make these records readily available for review by the FDIC promptly upon written request.

(d) ***Safe Harbor*.**

(1) *Participations*. With respect to transfers of financial assets made in connection with participations, 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 provided that such transfer satisfies the conditions for sale accounting treatment set forth by generally accepted accounting principles, except for the "legal isolation" condition that is addressed by this paragraph.

(2) *Transition period safe harbor*. With respect to any participation or securitization as defined in 12 C.F.R. 360.6 in effect prior to the effective date of this regulation for which transfers of financial assets were made or, for revolving trusts, for which obligations were issued, on or before [September 30, ~~2010,~~2010][40], 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~~transfers made on or before [September 30, 2010][41] 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 paragraph (d)(2) and the transaction otherwise satisfied the provisions of

[39] Many existing transactions, such as credit card master trust securitization transactions, allow commingling of collections in certain circumstances, e.g. for so long as the Servicer maintains a required rating. Documentation may in some cases require the issuer to deposit in a trust account amounts sufficient to make payments from the waterfall before allowing excess to be released to the sponsor. In either case for a large program, such as a large credit card securitization program, a prohibition on commingling will have a significant impact on the economics of the securitization.

[40] We request that this date be extended to the later of 12 months after publication of the final rule in the *Federal Register* and the effective date for final regulations promulgated with respect to securitizations as required by legislation.

[41] This addition is to clarify that issuances from revolving trusts during the Transition Period will continue to receive the full protection of the safe harbor after September 30, 2010. The current language may be interpreted as requiring ongoing transfers into existing revolving trusts to satisfy sale accounting requirements under FAS 140, which will be difficult to demonstrate going forward.

this section (Rule 360.6) in effect prior to [EFFECTIVE DATE OF FINAL RULE]. Obligations that are issued from a series or tranche the terms of which have been set on or before [September 30, 2010], notwithstanding that the principal balance of such beneficial interests may be zero on or after that date and may fluctuate after that date, shall have the benefit of the transition period safe harbor provided that (i) on [September 30, 2010] the holders of such beneficial interests are contractually obligated to fund increases in the principal balance from time to time up to a maximum principal balance outstanding at any one time and (ii) the principal balance of such obligations outstanding at any one time for any such committed facility does not exceed the amount of the applicable commitment for such committed facility on [September 30, 2010].[42]

(3) *For securitizations meeting sale accounting requirements*. With respect to any securitization for which transfers of financial assets were made, or for revolving trusts for which obligations were issued, after September 30, 2010, and which complies with the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section, the FDIC as conservator or receiver shall not, (i) in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership such transferred financial assets~~,~~ or (ii) require consent under 12 U.S.C. 1821(e)(13)(C) or 12 U.S.C. 1825(b)(2) with respect to such transferred assets,[43] provided that such transfer satisfies the conditions for sale accounting treatment set forth by generally accepted accounting principles in effect for reporting periods after November 15, 2009, except for the "legal isolation" condition that is addressed by this paragraph (d)(3).

(4) *For securitization not meeting sale accounting requirements*. With respect to any securitization for which transfers of financial assets were made, or for revolving trusts for which obligations were issued, after September 30, 2010, and which complies with the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section, but where the transfer does not satisfy the conditions for sale accounting treatment set forth by generally accepted accounting principles in effect for reporting periods after November 15, 2009:

[42] This addition is intended to address variable funding notes, i.e. notes issued before the transition period safe harbor date but for which the principal amount may fluctuate over time.

[43] This change confirms that an investor would not need FDIC consent under 12 U.S.C. 1821(e)(13)(C) or 12 U.S.C. 1825(b)(2) in order to exercise contractual rights with respect to transferred assets which qualify for the safe harbor of paragraph (d)(3) and therefore are not treated as property of the institution or receivership. This result is in accordance with the FDIC's press release dated November 13, 2009: "For participations and securitizations that meet those requirements, the Interim Final Rule provides that the FDIC shall not, by exercise of its authority to disaffirm or repudiate contracts, seek to reclaim, recover, or recharacterize as property of the institution or the receivership any financial assets transferred in connection with the securitization or participation, even if the transaction does not satisfy all conditions for sale accounting treatment under generally accepted accounting principles as effective for reporting periods after November 15, 2009. As a result, any financial assets transferred into such securitizations or participations will not be treated as property of the institution or receivership, and consequently the consent requirement of 12 USC §1821(e)(13)(C) will not apply." Explicit confirmation of this conclusion is needed because such transferred financial assets might instead arguably be viewed as assets of the institution or receivership and subject to the safe harbor only with respect to the FDIC's repudiation authority. We have added the reference to 12 U.S.C. 1825(b)(2) because it raises the same concern and the same logic applies.

(i) *Monetary default*. If at any time after appointment, the FDIC as conservator or receiver is in ~~a~~ monetary default under a securitization, as defined above, and remains in monetary default for ten (10) business days after actual delivery of a written request to the FDIC pursuant to paragraph (f) of this section hereof to exercise contractual rights because of such monetary default, the FDIC hereby consents pursuant to 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2)[44] to the exercise of any contractual rights~~, including obtaining possession of the financial assets, exercising self-help remedies as a secured creditor under the transfer agreements, or liquidating properly pledged financial assets by commercially reasonable and expeditious methods taking into account existing market conditions, provided no involvement of the receiver or conservator is required. The consent to the exercise of such contractual rights shall serve as full satisfaction of the obligations of the insured depository institution in conservatorship or receivership and the FDIC as conservator or receiver for all amounts due.~~[45] in accordance with the securitization documents for such a securitization[46] to the extent specified in subparagraph (iii) below.[47]

(ii) ~~*Repudiation.*~~ *Written notice of repudiation.*[48] If the FDIC as conservator or receiver of an insured depository institution provides a written notice of repudiation of the securitization agreement pursuant to which the financial assets were transferred, and the FDIC does not pay damages, defined below, within ten (10) business days following the effective date of the notice, the FDIC hereby consents pursuant to 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2)[49] to the exercise of any contractual rights~~, including obtaining possession of the financial assets, exercising self-help remedies as a secured creditor under the transfer agreements, or liquidating properly pledged financial assets by commercially reasonable and expeditious methods taking into account existing market conditions, provided no involvement of the receiver or conservator is required~~[50] in accordance with the securitization documents for such a securitization[51] to the extent specified in subparagraph (iii) below. For purposes of this paragraph, the damages due shall be in an amount equal to the sum of (A) the par value of the obligations outstanding on the date of receivership ~~less~~, (B) interest accrued through the date of receivership (to the extent supported by

44 This addition recognizes that the exercise of remedies of a secured creditor would require FDIC consent under 12 U.S.C. 1825(b)(2) as well as under 12 U.S.C. 1821(e)(13)(C).

45 The remainder of this sentence is moved to subparagraph (iii) for the reasons noted there.

46 This is a clarifying addition.

47 The following sentence, regarding full satisfaction of the FDIC's obligations, is moved to subparagraph (iii) because it may also apply under subparagraph (ii) as well as subparagraph (i).

48 This change reflects the fact that, unlike subparagraph (ii), "repudiation" under the FDI Act is not necessarily limited to the delivery of written notice.

49 See the note regarding this change in subparagraph (i).

50 See the note regarding this change in subparagraph (i).

51 See the note regarding this change in subparagraph (i).

payments received on the financial assets),[52] and (C) interest required to be paid to the investors in accordance with the securitization documents (to the extent supported by payments received on the financial assets) through the date of repudiation,[53] less (D) any payments of principal or interest received by the investors ~~to~~through the date of repudiation.[54] Upon receipt of such payment, the investor's lien on the financial assets shall be released.

(iii) *Exercise of contractual rights*.[55] The exercise under subparagraphs (i) or (ii) of any contractual rights in accordance with the securitization documents for such a securitization may include (A) obtaining possession and exercising control of the financial assets for the remaining term of the securitization regardless of the amount of any damages due,[56] (B) applying payments received on the financial assets to securitization obligations as required under the securitization documents,[57] (C) transferring servicing rights and duties with respect to the financial assets,[58] (D) exercising self-help remedies as a secured creditor under the transfer agreements, or (E) liquidating properly pledged financial assets by commercially reasonable and expeditious methods

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52 This addition is consistent with the Covered Bond Policy Statement which authorizes payment of interest accrued to the date of receivership or conservatorship.

53 This addition is consistent with the language of subsection (e) and reflects the fact that investors should receive interest in accordance with the securitization documents through the date of repudiation.

54 The changes in this sentence are intended to clarify what interest payments the FDIC will (and will not) make to investors in the event of repudiation.

55 The listing of rights that may be exercised under subparagraphs (i) and (ii) are moved to this separate subparagraph (iii) both for drafting clarity and because doing so provides the most appropriate place to address the issues raised in the last two sentences of this subparagraph.

56 These changes implement the FDIC's intention, stated in the preamble, that if the FDIC defaults then the investors "will be permitted to obtain the asset pool" (75 F.R. at 27481, col. B) and thereby continue the securitization, rather than merely permitted to apply any amounts realized on the assets to the payment of the investors' actual direct compensatory damages under Section 11(e) of the FDI Act. In order for such a continuation of the securitization to work, (i) the investors will need full ongoing control of the financial assets, (ii) such possession and control must continue for the remaining term of the securitization, and (iii) the right to such possession and control over the financial assets cannot be limited to the amount of assets needed to pay actual direct compensatory damages. (This does not, however, effect the FDIC's right to the residual seller's interest in the securitization, which would be paid to the FDIC as to other investors in accordance with the securitization documents.)

57 This addition also implements the FDIC's intention that if the FDIC defaults or repudiates then the investors may obtain the asset pool and continue the securitization. The wording reflects that in subsection (e). As modified, this provision somewhat overlaps subsection (e) so that under subsection (e) the FDIC consents to the application of collections to securitization obligations *through* the date of consent or payment of damages under paragraph (d)(4), whereas under subparagraph (d)(4)(3) the FDIC consents to such application of collections *after* the date of such consent or payment of damages. (In addition, as modified, subsection (e) requires the FDIC to apply collections to securitization obligations through the date of consent or payment of damages under paragraph (d)(4).)

58 This addition recognizes that, in exercising rights over the asset pool, the investors may need to replace the servicer for the assets.

taking into account existing market conditions, provided that such rights are not avoidable under 12 U.S.C. 1821(e)(12)[59] and that no involvement of the receiver or conservator is required other than the grant of consents, waivers, or transfers of documentation in accordance with the following sentence.[60] The FDIC shall grant such consents, waivers, or transfers of documentation as may be needed or reasonably requested in the ordinary course to facilitate statutory or customary contractual remedies as to the collateral (including but not limited to Section 9-620 of the Uniform Commercial Code as implemented in applicable state law),[61] provided that no such consent, waiver, or transfer shall deprive the FDIC or its assignees of any seller's interest or other obligation issued by the issuing entity in connection with the securitization and held by the FDIC or such assignees.[62] The exercise[63] of the rights specified in clauses (A), (D), or (E) above[64] shall serve as full satisfaction of all amounts due by the FDIC as conservator or receiver [65] with respect to the obligations of the insured depository institution in conservatorship or receivership.[66]

(iv) *Effect of disaffirmance or repudiation.* The FDIC shall not assert that its disaffirmance or repudiation of any contract in connection with such a securitization affects the contractual

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59 This is a clarifying change. Section 360.6 should not arguably affect the scope of 12 U.S.C. 1821(e)(12).

60 The "other than" exception is added to reflect the statement in the NPR that the condition that no involvement of the receiver or conservator be required in connection with the exercise of secured creditor remedies should not be of concern to investors because the provision should not be understood to encompass ordinary course consents or transfers of financial asset related documentation needed to facilitate customary remedies as to the collateral. 75 F.R. at 27481, col. B.

61 This sentence is added because investors will often need such consents, waivers, or transfers (in addition to consent under 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2)) in order to exercise their contractual rights under the previous sentence. For example, the acceptance of collateral in satisfaction of an obligation under Section 9-620 of the Uniform Commercial Code requires the consent of the debtor. It is particularly important for the FDIC to confirm that it would grant appropriate consents, waivers, or transfers in the context of investors continuing the securitization.

62 This addition confirms that, in granting consents, waiver, or transfers needed to release collateral to the investors, the FDIC will not waive any rights to its seller's interest or to other securities that it may hold in the securitization itself.

63 The deletion of "consent to the" reflects the fact that the actual exercise of the investors' contractual rights, not simply the FDIC's consent to the exercise of such rights, should release the FDIC from its obligations. Because the FDIC's consent under 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2) is given in advance, it may be ambiguous when the FDIC's obligations are released; and the fact that the investors may postpone the exercise of their rights for various reasons (including to accommodate the FDIC) should not mean that they lose all their claims on the FDIC.

64 This change recognizes that only remedies involving the release or liquidation of the collateral, not the application of payments or a transfer of servicing by themselves, should not constitute full satisfaction of the FDIC's obligations as conservator or receiver.

65 The movement of this phrase from the end of the sentence is a clarifying change.

66 This sentence has been moved here from subparagraph (i) because it may also apply under subparagraph (ii) if the FDIC provides written notice of repudiation but does not pay the damages specified in subparagraph (ii).

obligations of the issuing entity, or of any servicer, trustee, or other party to such contract (other than the obligations of the FDIC as conservator or receiver to the extent of such disaffirmance or repudiation) to apply payments received on the financial assets to securization obligations as required under the securitization documents.[67] The FDIC shall not assert that any interest payments made to investors in the obligations of such a securitization in accordance with the securitization documents by the FDIC as conservator or receiver before any such disaffirmance or repudiation (A) remain the property of the conservatorship or receivership or of the FDIC as conservator or receiver, (B) are subject to 12 U.S.C. 1821(e)(13)(C) or 12 U.S.C. 1825(b)(2), or (C) represent payments for actual direct compensatory damages that are deductible from such damages for which the FDIC as conservator or receiver is liable under 12 U.S.C. 1821(e) for such disaffirmance or repudiation.[68]

(e) ***Consent to certain actions*****.** During the ~~stay period imposed by~~period before any payment of damages, or any consent pursuant to 12 U.S.C. 1821(e)(13)(C)~~, and during the periods specified in paragraph (d)(4)(i) of this section prior to any payment of damages or consent pursuant to 12 U.S.C. 1821(e)(13)(C)~~ and 12 U.S.C. 1825(b)(2)[69] to the exercise of any contractual rights, as provided in paragraph (d)(4) of this section,[70] the FDIC as conservator or receiver of the sponsor consents pursuant to 12 U.S.C. 1821(e)(13)(C) to the making of required payments to the investors in accordance with the securitization documents, except for provisions that ~~take effect upon the appointment of the receiver or conservator,~~are avoidable under 12 U.S.C. 1821(e)(12),[71]

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67 This addition confirms that, if the investors obtain the asset pool and continue a securitization following a monetary default or written notice of repudiation under subparagraphs (i) or (ii), the FDIC's repudiation would not relieve other parties (such as the issuing entity, trustee, or a non-FDIC servicer) from their obligations to each other under the securitization documents. (Otherwise the FDIC's repudiation of, e.g., the indenture, could arguably be deemed to terminate the contract and the ongoing obligations of all parties to it.)

68 This addition confirms that the FDIC will not attempt to recover any interest payments that the FDIC may make to investors after its appointment as conservator or receiver but before any repudiation of the transfers of financial assets underlying the securitization. Most importantly, the fact that the FDI Act defines "actual direct compensatory damages" as of the date of conservatorship or receivership could arguably imply that any interest payments made after the date of conservatorship or receivership should be deducted from such damages. Any such interpretation would be inconsistent with the apparent intent of the FDIC, in the event of monetary default or written notice of repudiation, to turn the assets over to the investors in order to permit them to continue the securitization.

69 See the note regarding this change in subparagraph (d)(4)(i).

70 The deletion of "the stay period imposed by 12 U.S.C. 1821(e)(13)(C), and during the periods specified" and the movement of the reference to paragraph (d)(4) to the end of the clause resolves an ambiguity regarding the period during which paragraph (e) applies—i.e. during the stay period until consent or payment of damages, during the entire stay period, and-or until consent or payment of damages even after the stay period. While we think that the first result was intended, in view of the requirement added below for the FDIC to make servicing payments until the date of consent or payment of damages, we believe that the correct result should now be that subparagraph (e) applies until consent or payment of damages even after the stay period. In addition, the reference to subparagraph (d)(4)(i) has been broadened to refer to paragraph (d)(4), which appears appropriate both as a general matter and particularly in view of the reference to payment of damages.

71 This is a clarifying change. Section 360.6 should not arguably affect the scope of 12 U.S.C. 1821(e)(12).

and to any servicing activity required in furtherance of the securitization (subject to the FDIC's rights to repudiate such agreements), and if acting as servicer as successor to the obligations of the sponsor shall make such payments and perform such servicing activities[72] (including the payment, to the extent supported by payments received on the financial assets, of interest accrued and unpaid on the date of payment of damages or consent to the exercise of contractual rights),[73] with respect to the financial assets included in securitizations that meet the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section.

(f) ***Notice for consent.*** Any party requesting the FDIC's consent as conservator or receiver under 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2) pursuant to paragraph (d)(4)(i) of this section shall provide notice to the Deputy Director, Division of Resolutions and Receiverships, Federal Deposit Insurance Corporation, 550 17th Street, NW, F-7076, Washington DC 20429-0002, and a statement of the basis upon which such request is made, and copies of all documentation supporting such request, including without limitation a copy of the applicable agreements and of any applicable notices under the contract.

(g) ***Contemporaneous requirement***. The FDIC will not seek to avoid an otherwise legally enforceable agreement that is executed by an insured depository institution in connection with a securitization or in the form of a participation solely because the agreement does not meet the "contemporaneous" requirement of 12 U.S.C. 1821(d)(9), 1821(n)(4)(I), or 1823(e).

(h) ***Limitations***. The consents set forth in this section do not act to waive or relinquish any rights granted to the FDIC in any capacity, pursuant to any other applicable law or any agreement or contract except ~~the securitization transfer agreement or any relevant security agreements.~~as specifically set forth herein.[74] Nothing contained in this section alters the claims priority of the securitized obligations. Nothing contained in this section shall be construed as waiving, limiting, or otherwise affecting the power of the FDIC, as conservator or receiver, to disaffirm or repudiate any agreement imposing continuing obligations or duties, including with respect to the servicing

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72 This addition commits the FDIC as servicer to make required payments to investors (to the extent supported by collections) until the date of payment with respect to written notice of default or until the date of FDIC consent with respect to either monetary default or written notice of repudiation. This change goes one step further than our proposed addition to the definition of monetary default in paragraph (a)(4), in that under this added provision the FDIC would have to continue making required payments during the 10-day grace period established in subparagraph (d)(4)(i) or (ii). This change does not, however, prevent the FDIC from defaulting on or repudiating its ongoing servicing obligations as of the date of consent or payment subject to the consequences established in paragraph (d)(4).

73 This addition provides that upon default or repudiation the FDIC would pay out interest accrued (as of the date of consent or payment) since the last scheduled payment date to the extent supported by collections. Otherwise there is a timing risk that if the FDIC defaults or repudiates just before an interest payment date then investors could lose up to an entire month or quarter of accrued interest.

74 The reference to the securitization transfer agreement and any relevant security agreements is deleted because certain provisions of the Proposed Rule, particularly in the context of the continuation of a securitization, may relate to (or to the consequences of repudiation of) other securitization documents such as an indenture or a servicing agreement.

of financial assets or with respect to representations and warranties regarding financial assets, upon the insured depository institution in conservatorship or receivership.[75]

(i) ***No waiver***. ~~This~~ Except as specifically set forth herein,[76] this section does not authorize, and shall not be construed as authorizing the waiver of the prohibitions in 12 U.S.C. 1825(b)(2) against levy, attachment, garnishment, foreclosure, or sale of property of the FDIC, nor does it authorize nor shall it be construed as authorizing the attachment of any involuntary lien upon the property of the FDIC. Nor shall this section be construed as waiving, limiting or otherwise affecting the rights or powers of the FDIC to take any action or to exercise any power not specifically mentioned, including but not limited to any rights, powers or remedies of the FDIC regarding transfers taken in contemplation of the institution's insolvency or with the intent to hinder, delay or defraud the institution or the creditors of such institution, or that is a fraudulent transfer under applicable law.

(j) ***No assignment***. The right to consent under 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2) may not be assigned or transferred to any purchaser of property from the FDIC, other than to a conservator or bridge bank.[77]

(k) ***Repeal***. This section may be repealed by the FDIC upon 30 days notice provided in the *Federal Register*, but any repeal shall not apply to any issuance made in accordance with this section before such repeal.

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[75] This is a clarifying addition.

[76] This change reflects the references to 12 U.S.C. 1825(b)(2) that have been added to subsections (d) (e), (f), and (j).

[77] We recommend that paragraphs (h), (i), and (j) should be combined under the heading "Limitations."