February 22, 2010

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

Subject: Advance Notice of Proposed Rulemaking Regarding Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation after March 31, 2010.
RIN # 3064-AD55

Dear Mr. Feldman:

The Mortgage Bankers Association[1] (MBA) welcomes the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) Advance Notice of Proposed Rulemaking regarding the FDIC's treatment as conservator or receiver of financial assets transferred by an insured depository institution in connection with a securitization or participation after March 31, 2010[2] (ANPR).

Summary of MBA Position

MBA appreciates the FDIC's objective to increase investor confidence in a manner that balances its safety and soundness considerations with the market's need for liquidity. Like the FDIC, MBA also believes securitization is a useful funding channel for financial institutions. However, MBA is concerned that some key features of the ANPR, if enacted, would impose additional transaction costs, generate regulatory uncertainty and lead to other negative consequences that could pose significant financial and

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

[2] 75 Fed. Reg. 4, 934-942, (Jan. 7, 2010).

operational obstacles to any securitization framework, thereby restricting an efficient and vital source of liquidity. MBA therefore requests the FDIC withdraw the ANPR and collaborate with other federal regulatory agencies to evaluate the adequacy of existing supervisory requirements governing the securitization markets.

MBA's primary concerns regarding the ANPR follow a brief background description below. Attachment A contains MBA's responses to specific questions included in the ANPR.

Background

On June 12, 2009, the Financial Accounting Standards Board (FASB) issued Statement of Financial Accounting Standards No. 166, *Accounting for Transfers of Financial Assets*, *an Amendment of FASB Statement No. 140* (FAS 166) and Statement of Financial Accounting Standards No. 167, *Amendments to FASB Interpretation No. 46(R)* (FAS 167). FAS 166 and FAS 167 removed the concept of a qualifying special-purpose entity (QSPE) from generally accepted accounting principles (GAAP) and altered the criteria under which special purpose entities, like mortgage-backed securities (MBS) trusts, must be included in the issuer's or servicer's consolidated financial statements. The impact will be for hundreds of billions of dollars of MBS, previously accounted for off-balance sheet, to come onto the balance sheets of banks nationwide. If a securitization is not given sale accounting treatment under these changes to GAAP, it would be treated as a secured financing and could prevent the security holders from recovering monies due to them for up to 90 days in an FDIC receivership. During that time, interest on the securitized debt theoretically could remain unpaid. These GAAP modifications may adversely affect the way securitizations are viewed by the rating agencies and whether the securitizations can achieve ratings that are based solely on the credit quality of the financial assets, independent from the rating of the bank servicing the loans or issuing the MBS. On November 17, 2009, the FDIC issued an interim final rule amending its regulations to provide safe harbor treatment for participations and securitizations until March 31, 2010[3] (the Interim Rule).

The ANPR requests comments on the standards that should be adopted to provide safe harbor treatment in connection with participations and securitizations issued after March 31, 2010. In particular, the FDIC seeks comments on whether securitizations should meet qualitative, subjective criteria in order to qualify for safe harbor treatment. The FDIC also seeks comment on whether to bifurcate the new criteria in a manner that further limits the safe harbor eligibility of residential MBS.

[3] 74 Fed. Reg. 220, 59066-59068 (Nov. 17, 2009).

General Comments

The ANPR Could Hinder the Market's Recovery and Private Label Securitizations

MBA is heartened to see signs of the nation's measured and guarded emergence from the depths of a crisis of historic proportions. MBA believes a full recovery of the real estate finance system hinges on the return of private investors to the capital markets. The private label MBS market is critical to affordable housing and to the finance of commercial properties used to further commerce and economic growth. For example, many households cannot qualify for single family conventional loans eligible for delivery into securities issued by Fannie Mae or Freddie Mac or for Federal Housing Administration (FHA) or Veterans Administration (VA) loans eligible for MBS guaranteed by Ginnie Mae. These households include but are not limited to foreign national residents and households requiring loan amounts higher than the Fannie Mae, Freddie Mac or Ginnie Mae maximum levels. In the past, these borrowers were served by financial institutions with expertise in securitizing their loans into private label MBS.

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

The market for such private label MBS has basically shut down since 2007. Other than the federal government, there are few market participants buying even Fannie Mae and Freddie Mac MBS, which carry an implied government guarantee. The confluence of additional balance sheet leverage from FAS 166 and FAS 167, the need to set aside risk-based capital for assets coming on the books from FAS 166 and FAS 167, onerous new rating agency risk models that assume "100-year flood" level default and loss severity scenarios will continue to cause illiquidity in the MBS market, affecting the long-term viability of the housing market.

MBA is concerned that the ANPR threatens any semblance of certainty that was beginning to emerge in this important market and is critical for investors, lenders and other financial market participants to be able to minimize costs and make sound investment decisions. As a result, financial institutions will be forced to add an uncertainty cost to their asset-backed transactions to offset the possibility their transactions may fall outside the boundaries of the FDIC's receivership safe harbor. The specter of a delay in receiving cash flows from an FDIC receiver or conservator also will undoubtedly cause rating agency ratings to be heavily influenced by the financial strength of the servicer or master servicer of loans that underlie the private label MBS.

The ANPR's "Seasoning" Requirement Raises Risks and Reduces Credit Availability

Under the ANPR, safe harbor status would apply only to securities comprising loans that were previously held on a depository institution's balance sheet for a minimum of 12 months prior to securitization. According to the FDIC, the ANPR's 12-month holding period is intended to allocate credit risk to the originator thereby bolstering prudent underwriting practices. Unfortunately, this requirement also assigns other unforeseeable and unpredictable risks to the originator completely unrelated to underwriting practices. For example, the financial institution would be subject to the impact of borrower life events, natural disasters, and third party malfeasance.

MBA also notes that this requirement deviates from existing market standards and expectations. For example, investors overwhelmingly prefer pools of newly-originated mortgages to seasoned mortgage pools, so long as the issuer agrees to repurchase loans from the MBS loan pool that default within the first three months. In fact, seasoned loan securitizations generally are afforded a discount by the market. Moreover, presently, there is a sophisticated, robust and cost-efficient hedge market to protect against asset price declines until a loan is securitized during a holding period of 30 days or less. No cost effective hedges exist for 12-month holding periods.

MBA also is concerned about the 12-month seasoning requirement's impact on consumers. Our preliminary estimates suggest that the 12-month holding period would result in a 90 percent reduction in the amount of loans a depository institution can originate for sale, thus in less credit availability for consumers.

Shift of Securitization Market to Non-Depository Institutions

MBA also is concerned that by acting alone on securitization issues, the FDIC could make it uneconomic for insured depository institutions to securitize loans, pushing all securitization activities to non-FDIC regulated institutions. While the FDIC's stated motivation for issuing the ANPR is to minimize the costs of winding down a failed bank, MBA believes a likely unintended adverse consequence is reduced competitiveness in the securitization markets, and higher consumer borrowing costs as fewer and fewer financial institutions engage in securitization transactions.

Securitization Oversight is a Safety and Soundness Matter

According to the supplementary information accompanying the ANPR, the FDIC seeks to better align the incentives in securitization to support sustainable lending and structured finance transactions.[4] While MBA fully endorses this initiative, we have concerns about the FDIC's implementation strategy.

[4] Id. at 936.

For example, it is unclear why the FDIC seeks to regulate the securitization activities of insured depository institutions through its conservatorship/receivership authority. A receivership proceeding is a complex matter that must be handled expeditiously and with precision. MBA requests the FDIC to consider the expediency of imposing additional operational, analytical and procedural burdens during this time.

Moreover, MBA notes that the recent implosion of the private label securitization sector was caused, in part, by the proliferation of certain products, such as negatively amortizing loans, and overly aggressive underwriting practices, including significantly reduced documentation loans. MBA believes the FDIC's efforts to stem these imprudent practices would be more effective earlier in the business lifecycle than at the end stage of conservatorship or receivership. For example, MBA suggests the FDIC consider using its examination and safety and soundness authorities to supervise the securitization activities of insured depository institutions. We note the FDIC already has adopted supervisory guidance and a risk management examination manual for credit card securitizations. MBA believes careful examination and enforcement of a financial institution's risk management activities will prevent unsafe and unsound securitization activities proactively, thereby reducing the need for the FDIC to exercise its receivership powers.

Securitization Oversight is a Collaborative Effort

MBA notes that securitization activities are directly regulated by a number of federal agencies including the Securities and Exchange Commission (SEC), Federal Housing Finance Agency (FHFA), Office of Thrift Supervision (OTS), Comptroller of the Currency (OCC), and Board of Governors of the Federal Reserve System (Board). MBA is concerned that the unilateral approach taken by the FDIC in the ANPR could add further supervisory disparity and regulatory burden among various sectors of the financial services industry. Additionally, we believe the SEC, FHFA, OTS, OCC, Board and other regulators possess unique perspectives and supervisory expertise that could be brought to bear in developing a more comprehensive and standardized approach to securitization oversight. We believe it is particularly important to ensure that compliance with regulations pursuant to the ANPR do not duplicate or conflict with other regulatory requirements. For example, the ANPR's loan-level data disclosure requirements should be compatible with existing consumer financial privacy regulations.

MBA believes withdrawing the ANPR and collaborating with other relevant regulatory agencies to take action on an interagency basis would produce the most comprehensive regulatory regime with the least amount of redundancy.

We also note that federal legislation addressing many of the sweeping policy changes addressed in the ANPR is progressing through Congress. In order to avoid conflicting simultaneous regulatory and legislative mandates, we further request that any action by the FDIC other than withdrawing the ANPR should be deferred until these issues are settled at the statutory level.

Risk Retention

The ANPR would require the sponsor to retain an economic interest of not less than five percent of the credit risk of the assets underlying the security. According to the FDIC, this risk retention requirement is intended to prevent low-quality loan originations. MBA believes it is important to keep in mind the context in which this risk retention requirement is being proposed.

Mortgage lenders, including both depository and nondepository lenders, already have a significant stake in assuring sound origination and loan performance. For example residential lenders have a 100 percent risk retention requirement under contractual agreements to repurchase faulty loans from securitizers. Additionally, the net impact of FAS 166 and FAS 167 will be for hundreds of billions of dollars of securitized assets and liabilities to come onto the balance sheets of issuers, servicers or special servicers. In addition to the whole loans coming back on the balance sheet under FAS 166 or FAS 167, reporting entities will also be required to provide an allowance for credit losses for assets consolidated under FAS 167 unless they elect the fair value option. For reporting entities not electing the fair value option, the allowance for credit losses provisioning process for the newly consolidated loans will be the same for similar loans that are not securitized. For those who elect fair value for FAS 166 and FAS 167, fair value will reflect estimated future cash flows, including expected losses, discounted at a rate that reflects the uncertainties associated with the cash flow estimated and a liquidity discount if markets are inactive.

MBA also notes that the ANPR's five percent risk retention requirement will stifle the market for non-conforming mortgages because it will automatically result in 100 percent of the loan remaining on the balance sheet.

For these reasons, MBA believes the risk retention requirement is duplicative and unnecessary.

Compensation Deferral

The ANPR would require that any fees or other compensation for services payable to the lender, sponsor, credit rating agencies, and underwriters shall be payable, in part, over the five-year period after issuance of the securities based upon the performance of the financial assets securitized. No more than 80 percent of the total estimated compensation due any party at closing can be paid at closing. MBA is concerned that this requirement is overbroad and could inadvertently penalize many legitimate industry practitioners. For example, a borrower may experience financial difficulties from an unforeseeable life event such as a job loss or major medical expense after making up to

59 consecutive monthly payments. In this situation, an underwriter would be financially penalized no matter how carefully the loan was underwritten.

Likewise, the ANPR, in requiring a deferral of compensation for the sponsor, seems to overlook the fact that if a securitization's assets must be consolidated under FAS 167 or do not qualify for sale accounting under FAS 166, 100 percent of the income at securitization to the sponsor may be deferred.

ANPR Likely to Cause More Assets to be Capitalized

Under the ANPR, compensation to servicers shall provide incentives for servicing and loss mitigation efforts in order to maximize the value of the financial assets, as shown by a net present value analysis. Under FAS 166, this would be deemed to be a potentially significant variable interest. The ANPR would also require that servicing and other agreements provide servicers with full authority to mitigate losses on financial assets. This would likely give the servicer the power to direct those activities that have the greatest economic impact on the securitization. Accordingly, the servicer is likely the party that will be required to consolidate the assets of the securitization under FAS 167 because the servicer will have both the power to direct and a significant variable interest. This will likely result in banks having even more securitization assets on their books.

Proposed Credit Enhancement Guidance

The ANPR would prohibit third party credit enhancements for a securitization at the pool level, allowing only underlying financial assets to be guaranteed, insured, or otherwise credit enhanced. Currently, most securitization structures have pool-level credit enhancement and very few are credit enhanced only at the financial asset level. Moreover, the ANPR is contrary to the existing Ginnie Mae MBS structure, which has pool-level credit enhancement in the form of a U.S. government guarantee and asset-level credit enhancements in the form of FHA insurance or a partial VA guarantee.

Limits on Authority to Advance Principal and Interest

The ANPR would only allow a servicer to advance delinquent payments of principal and interest for three months. This would all but eliminate pools securitized whereby scheduled interest is advanced to the investor. MBA notes that most Ginnie Mae and GSE pools pay investors scheduled principal and interest.

Conclusion

MBA believes prudent securitization practices can play a vital role in a robust and sustained economic recovery by increasing the availability and affordability of credit to consumers and businesses. MBA is concerned that the FDIC's proposal, which would unilaterally impose arbitrary restrictions on some securitization market participants, has a greater potential to impede a full market recovery than a comprehensive and coordinated financial regulatory reform initiative currently being undertaken by Congress and other relevant regulators. Therefore, we urge you to consider the recommendations described above.

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

Sincerely,

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

Attachment

Attachment A

MBA's Responses to Specific ANPR Questions

FDIC Question 1. *Do the changes to the accounting rules affect the application of the pre-existing Securitization Rule to participations? If so, are there changes to the Securitization Rule that are needed to protect different types of participations issued by IDIs?*

MBA's Response: MBA believes the ANPR's safe harbor provisions with respect to participations are sufficient because participations are privately negotiated contracts. However, the ANPR includes what appears to be the FDIC's conclusion, "While the GAAP modifications have some effect on participations, most participations are likely to continue to meet the conditions for sale accounting treatment under GAAP."[5] MBA is not confident in this conclusion and believes that the nuances of each participation agreement will need to be examined to determine if there is legal isolation and that the participating interests are indeed pari-passu pro-rata interests in financial assets.

FDIC Question 2. *Is the transition period to March 31, 2010, sufficient to implement the changes required by the conditions identified by Paragraph (b) and (c)? How does this transition period impact existing shelf registrations? The following sections of this document identify different issues that could be addressed by a final rule, and follow the subdivisions within the sample regulatory text.*

MBA's Response: MBA believes that the March 31, 2010, implementation date is far too aggressive. See general comments for MBA's opinion of the proposed requirements identified in Paragraph (b) and (c).

FDIC Question 3. *Should certain capital structures be ineligible for the future safe harbor? For example, should securitizations that include leveraged tranches that introduce market risks (such as leveraged super senior tranches) be ineligible?*

MBA's Response: MBA believes that investors should be permitted to make their own decisions on the desirability of a particular investment or tranche. MBA further believes that sound investment decisions are facilitated through thorough explanations in a security's prospectus or private placement memorandum.

FDIC Question 4. *For RMBS specifically, in order to limit both the complexity and the leverage of RMBS, and therefore the systemic risk introduced by them in the market, should the capital structure of the securitization be limited to a specified number of tranches? If so, how many, and why? If no more than six tranches were permitted, what would be the potential consequence?*

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[5] Id. at 935.

MBA's Response: MBA believes that the recent problems in the mortgage industry stemmed, in part, from products such as negatively amortizing residential loans and overly aggressive underwriting practices, including significantly reduced underwriting documentation requirements. These factors, coupled with hyper-inflated real estate prices in specific markets, generated system-wide turbulence. Therefore, MBA believes it is irrelevant to set arbitrary structural constraints or leverage requirements. Given the range of unique objectives and risk tolerances in the investment community, MBA believes a more effective approach is to require comprehensive and clear disclosures about an investment's structure and risk characteristics. MBA strongly urges the FDIC to coordinate its investment disclosure requirements with the SEC and other relevant regulatory agencies.

FDIC Question 5. *Should there be similar limits to the number of tranches that can be used for other asset classes? What are the benefits and costs of taking this approach?*

MBA's Response: See response to FDIC Question 4 above.

FDIC Question 6. *Should re-securitizations (securitizations supported by other securitization obligations) be required to include adequate disclosure of the obligations including the structure and asset quality supporting each of the underlying securitization obligations and not just the obligations that are transferred in the re-securitization?*

MBA's Response: MBA believes that other regulators, such as the SEC, are uniquely qualified to address the adequacy of investment disclosures. Therefore, we urge the FDIC to undertake an interagency approach to supervisory action in this area.

FDIC Question 7. *Should securitizations that are unfunded or synthetic securitizations that are not based on assets transferred to the issuing entity or owned by the sponsor be eligible for expedited consent?*

MBA's Response: MBA believes that other regulators, such as the SEC, are uniquely qualified in the area of securities oversight. If the FDIC believes that certain practices are unsafe or unsound for deposits that it insures, we request the FDIC work with the SEC, Board, OCC and OTS on an interagency basis.

FDIC Question 8. *Should all securitizations be required to have payments of principal and interest on the obligations primarily dependent on the performance of the financial assets supporting the securitization? Should external credit support be prohibited in order to better realign incentives between underwriting and securitization performance? Are there types of external credit support that should be allowed? Which and why?*

MBA's Response: MBA notes that the prohibition of external credit support would severely limit the options for most residential mortgage securitizations as they presently exist. Securities issued by Ginnie Mae, Fannie Mae and Freddie Mac have credit enhancement at the pool level. Most private label securities are, likewise, enhanced at the pool level through over-collateralization or surety bonds. MBA believes that pool-level credit enhancements are needed to insure markets for such securities return to liquidity.

FDIC Question 9. *What are the principal benefits of greater transparency for securitizations? What data is most useful to improve transparency? What data is most valuable to enable investors to analyze the credit quality for the specific assets securitized? Does this differ for different asset classes that are being securitized? If so, how?*

MBA's Response: MBA believes that other regulators, such as the SEC, are uniquely qualified to address the adequacy of securities-related disclosures. Therefore, we urge the FDIC to undertake an interagency approach to supervisory action in this area.

FDIC Question 10. *Should disclosures required for private placements or issuances that are not otherwise required to be registered include the types of information and level of specificity required under SEC Regulation AB, 17 C.F.R. §§ 229.1100-1123, or any successor disclosure requirements?*

MBA's Response: MBA believes that other regulators, such as the SEC, are uniquely qualified to address the adequacy of securities-related disclosures. Therefore, we urge the FDIC to undertake an interagency approach to supervisory action in this area.

FDIC Question 11. *Should qualifying disclosures also include disclosure of the structure of the securitization and the credit and payment performance of the obligations, including the relevant capital or tranche structure? How much detail should be provided regarding the priority of payments, any specific subordination features, as well as any waterfall triggers or priority of payment reversal features?*

MBA's Response: MBA believes that other regulators, such as the SEC, are uniquely qualified to address the adequacy of securities-related disclosures. Therefore, we urge the FDIC to undertake an interagency approach to supervisory action in this area.

FDIC Question 12. *Should the disclosure at issuance also include the representations and warranties made with respect to the financial assets and the remedies for such breach of representations and warranties, including any relevant timeline for cure or repurchase of financial assets.*

MBA's Response: MBA believes that other regulators, such as the SEC, are uniquely qualified to address the adequacy of securities-related disclosures. Therefore, we urge the FDIC to undertake an interagency approach to supervisory action in this area.

FDIC Question 13. *What type of periodic reports should be provided to investors? Should the reports include detailed information at the asset level? At the pool level? At the tranche level? What asset level is most relevant to investors?*

MBA's Response: MBA believes that other regulators, such as the SEC, are uniquely qualified to address the adequacy of securities-related reporting requirements. Therefore, we urge the FDIC to undertake an interagency approach to supervisory action in this area.

FDIC Question 14. *Should reports included detailed information on the ongoing performance of each tranche, including losses that were allocated to such tranche and remaining balance of financial assets supporting such tranche as well as the percentage coverage for each tranche in relation to the securitization as a whole? How frequently should such reports be provided?*

MBA's Response: MBA believes that other regulators, such as the SEC, are uniquely qualified to address the adequacy of securities-related reporting requirements. Therefore, we urge the FDIC to undertake an interagency approach to supervisory action in this area.

FDIC Question 15. *Should disclosures include the nature and amount of broker, originator, rating agency or third-party advisory, and sponsor compensation? Should disclosures include any risk of loss on the underlying financial assets is retained by any of them?*

MBA's Response: MBA believes that other regulators, such as the SEC, are uniquely qualified to address the adequacy of securities-related disclosures. Therefore, we urge the FDIC to undertake an interagency approach to supervisory action in this area.

FDIC Question 16. *Should additional detailed disclosures be required for RMBS? For example should property level data or data relevant to any real or personal property securing the mortgage loans (such as rents, occupancy, etc.) be disclosed?*

MBA's Response: MBA believes that other regulators, such as the SEC, are uniquely qualified to address the adequacy of securities-related disclosures. Therefore, we urge the FDIC to undertake an interagency approach to supervisory action in this area. Moreover, MBA believes the ANPR's loan-level data disclosure requirements, if enacted, should be compatible with existing consumer financial privacy regulations.

FDIC Question 17. *For RMBS, should disclosure of detailed information regarding underwriting standards be required? For example, should securitizers be required to confirm that the mortgages in the securitization pool 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 such additional guidance applicable at the time of loan origination?

MBA's Response: MBA believes that other regulators, such as the SEC, are uniquely qualified to address the adequacy of securities-related disclosures. Therefore, we urge the FDIC to undertake an interagency approach to supervisory action in this area.

FDIC Question 18. *What are the primary benefits and costs of potential approaches to these issues?*

MBA's Response: MBA believes that other regulators, such as the SEC, are uniquely qualified to address the adequacy of securities-related disclosures. Therefore, we urge the FDIC to undertake an interagency approach to supervisory action in this area.

FDIC Question 19. *With respect to RMBS, a significant issue that has been demonstrated in the mortgage crisis is the authority of servicers to mitigate losses on mortgage loans consistent with maximizing the net present value of the mortgages, as defined by a standardized net present value analysis. For RMBS, should contractual provisions in the servicing agreement provide for the authority to modify loans to address reasonably foreseeable defaults and to take such other action as necessary or required to maximize the value and minimize losses on the securitized financial assets?*

MBA's Response: MBA recommends that such issues be addressed by a multi-agency task force led by the SEC that would include the OCC, the OTS, the Board and the FDIC. If such a task force mandates added servicer discretion, MBA believes a statutory safe harbor should be provided for servicers.

FDIC Question 20. *Loss mitigation has been a significant cause of friction between servicers, investors and other parties to securitizations. Should particular contractual provisions be required? Should the documents allow allocation of control of servicing discretion to a particular class of investors? Should the documents require that the servicer act for the benefit of all investors rather than maximizing the value of to any particular class of investors?*

MBA's Response: MBA recommends that such issues be addressed by a multi-agency task force led by the SEC that would include the OCC, the OTS, the Board and the FDIC. If such a task force mandates added servicer discretion, MBA believes a statutory safe harbor should be provided for servicers.

FDIC Question 21. *In mitigating losses, should a servicer specifically be required to commence action to mitigate losses no later than a specified period, e.g., ninety (90) days after an asset first becomes delinquent unless all delinquencies on such asset have been cured?*

MBA's Response: MBA recommends that such issues be addressed by a multi-agency task force led by the SEC that would include the OCC, the OTS, the Board and the FDIC. If such a task force mandates added servicer discretion, MBA believes a statutory safe harbor should be provided for servicers.

FDIC Question 22. *To what extent does a prolonged period of servicer advances in a market downturn misalign servicer incentives with those of the RMBS investors? To what extent do servicing advances also serve to aggravate liquidity concerns, exposing the market to greater systemic risk? Should the servicing agreement for RMBS restrict the primary servicer advances to cover delinquent payments by borrowers to a specified period, e.g., three (3) payment periods, unless financing facilities to fund or reimburse the primary servicers are available? Should limits be placed on the extent to which, foreclosure recoveries can serve as a 'financing facility' for repayment of advances?*

MBA's Response: MBA recommends that such issues be addressed by a multi-agency task force led by the SEC that would include the OCC, the OTS, the Board and the FDIC. If such a task force mandates added servicer discretion, MBA believes a statutory safe harbor should be provided for servicers.

FDIC Question 23. *What are the primary benefits and costs of potential approaches to these issues?*

MBA's Response: See general comments above. MBA points out that a likely consequence of the ANPR would be for the markets for private label CMBS and RMBS to remain frozen, resulting in continuing problems in the housing market and in the economy as a whole.

FDIC Question 24. *Should requirements be imposed so that certain fees in RMBS may only be paid out over a period of years? For example, should any fees payable to the lender, sponsor, credit rating agencies and underwriters be payable in part over the five (5) year period after the initial issuance of the obligations based on the performance of those financial assets? Should a limit be set on the total estimated compensation due to any party at that may be paid at closing? What should that limit be?*

MBA's Response: See general comments above.

FDIC Question 25. *Should requirements be imposed in RMBS to better align incentives for proper servicing of the mortgage loans? For example, should compensation to servicers be required to take into account the services provided and actual expenses incurred and include incentives for servicing and loss mitigation actions that maximize the value of the financial assets in the RMBS?*

MBA's Response: See general comments above.

FDIC Question 26. *What are the primary benefits and costs of potential approaches to these issues?*

MBA's Response: See general comments above. MBA points out that a likely consequence of the ANPR would be for the markets for private label CMBS and RMBS to remain frozen, resulting in continuing problems in the housing market and in the economy as a whole.

FDIC Question 27. *Should similar or different provisions be applied to compensation for securitizations of other asset classes?*

MBA's Response: MBA recommends that such issues be addressed by a multi-agency task force led by the SEC that would include the OCC, the OTS, the Board and the FDIC.

FDIC Question 28. *For all securitizations, should the sponsor retain at least an economic interest in a material portion of credit risk of the financial assets? If so, what is the appropriate risk retention percentage? Is five percent appropriate? Should the number be higher or lower? Should this vary by asset class or the size of securitization? If so how?*

MBA's Response: See general comments above. Further, MBA recommends that such issues be addressed by a multi-agency task force led by the SEC that would include the OCC, the OTS, the Board and the FDIC.

FDIC Question 29. *Should additional requirements to incentivize quality origination practices be applied to RMBS? Is the requirement that the mortgage loans included in the RMBS be originated more than 12 months prior to any transfer for the securitization 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? What are the implications of such a requirement on credit availability and institutions' liquidity?*

MBA's Response: MBA recommends that such issues be addressed by a multi-agency task force led by the SEC that would include the OCC, the OTS, the Board and the FDIC.

FDIC Question 30. *Would the alternative outlined above, which would require a review of specific representations and warranties after 180 days and the repurchase of any mortgages that violate those representations and warranties, better fulfill the goal of aligning the sponsor's interests toward sound underwriting? What would be the costs and benefits of this alternative?*

MBA's Response: MBA recommends that such issues be addressed by a multi-agency task force led by the SEC that would include the OCC, the OTS, the Board and the FDIC.

FDIC Question 31. *Should all residential mortgage loans in an RMBS be required to comply with all statutory and regulatory standards and guidance in effect at the time of origination? Where such standards and guidance involve subjective standards, how will compliance with the standards and guidance be determined? How should the FDIC treat a situation where a very small portion of the mortgages backing an RMBS do not meet the applicable standards and guidance?*

MBA's Response: MBA recommends that such issues be addressed by a multi-agency task force led by the SEC that would include the OCC, the OTS, the Board and the FDIC.

FDIC Question 32. *What are appropriate alternatives? What are the primary benefits and costs of potential approaches to these issues?*

MBA's Response: MBA recommends that such issues be addressed by a multi-agency task force led by the SEC that would include the OCC, the OTS, the Board and the FDIC.

FDIC Question 33. *Do you have any other comments on the conditions imposed by paragraphs (b) and (c) of the sample regulatory text?*

MBA's Response: See general comments above.

FDIC Question 34. *Is the scope of the safe harbor provisions in paragraph (d) of the sample regulatory text adequate? If not, what changes would you suggest?*

MBA's Response: Paragraph (d)(3) of the ANPR's sample regulatory text describes what actions the FDIC will take in the case of transactions that meet the ANPR's safe harbor criteria and all but the "legal isolation" condition criteria for GAAP sale treatment. MBA believes this section of the sample regulatory text would benefit from clarification. Currently, the language could be interpreted to apply to MBS serviced by an insured depository institution and issued by Fannie Mae, Freddie Mac, Ginnie Mae or a state or local housing authority. While we assume it was not the FDIC's intent to include MBS issued or insured by a government agency, government sponsored enterprise or state or local housing authority, we request that this intent be made more explicit.

Paragraph (d)(4) of the ANPR's sample regulatory text describes what actions the FDIC will take in the case of transactions that do not qualify for GAAP sale treatment, but otherwise satisfy the ANPR's safe harbor criteria. According to this paragraph, the FDIC will either (a) permit the counterparties to enforce the self-help remedies provided for by law, or (b) repudiate the contract and pay the counterparties the statutory permitted damages within a specified time frame. MBA is concerned that these remedies would make securitizations issued by an insured depository institution less attractive than similar securitizations issued by a non-FDIC regulated institution. For example, exercising the statutory rights of a secured creditor is a less attractive position than being permitted to let the securitized assets continue to pay off over time. Additionally, the payment of the statutorily permitted damages may not compensate investors for their reinvestment loss.

As a result, the ANPR exposes the investors to different terms than they bargained for which makes a securitization by an insured depository institution less attractive than a non-bank securitization. As mentioned in MBA's general comments above, this is likely to reduce the competitiveness of securitization markets and raise consumer borrowing costs because fewer financial institutions are likely to engage in securitization transactions.

FDIC Question 35. *Do the provisions of paragraph (e) of the sample regulatory text provide adequate clarification of the receiver's agreement to pay monies due under the securitization until monetary default or repudiation? If not, why not and what alternatives would you suggest?*

MBA's Response: See general comments above. MBA recommends that the ANPR be withdrawn.