Community Mortgage Banking Project

July 1, 2010

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

Re: RIN 3064–AD53

Dear Mr. Feldman:

The Community Mortgage Banking Project (CMBP) welcomes the opportunity to comment on the proposed regulations regarding the 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.

We represent community-based mortgage banking companies engaged in residential lending. Our membership includes subsidiaries or affiliates of community banks, as well as independent, privately owned mortgage-banking companies. All of our members sell most, if not all, the residential loans they originate. As an industry segment, independent mortgage banking companies originate approximately one-third of all residential mortgages and over half of all FHA-insured loans. As such our members, on behalf of the consumers they serve and themselves, have a keen interest in all federal regulatory proposals that have an effect on the residential mortgage backed securities (RMBS) market.

<u>General Comments</u>

In our previous comments on the Advanced Notice of Proposed Rulemaking that dealt with this same subject, we noted:

"*A number of observers have raised the issue of whether it is appropriate for the FDIC to include in this ANPR any conditions or standards that do not relate solely to the legal question of whether a legally sufficient transfer of assets has taken place in a securitization by an insured depository institution. We believe this legal question should drive the determination of whether the assets backing the security are beyond the effective reach of the receiver or conservator in the event of a receivership or conservatorship.*

Some of the FDIC's proposals may warrant consideration as part of a broader effort to improve the transparency and quality of securitizations. However, we strongly oppose including provisions dealing with underwriting standards, representations and warranties, loan seasoning and risk retention in regulations intended to address the legal question of whether an effective sale of assets has taken placed in a securitization, thus placing those assets beyond the reach of the receiver/conservator. Simply put, receivership regulations are not the appropriate forum to bootstrap broad securitization market reforms."

We renew our objection to what we believe constitutes regulatory overreach to impose the FDIC's beliefs on what constitutes sound rules and standards for the asset-backed securities (ABS) market, and in particular the residential mortgage-backed securities market (RMBS). This overreach is being attempted through the vehicle of receivership regulations that should deal solely with standards for determining the question of whether an effective sale of assets has taken place, so that the purchasers of securities backed by those assets can have legal certainty that the transaction will not be repudiated, should the bank be placed in receivership. A reference in the proposed regulations to a similar overreach by the Securities and Exchange Commission does not constitute an adequate justification for the pursuit of these policy objectives through an unsuitable statutory authority.

Moreover, with the imminent passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Congress has provided a comprehensive framework for the reform of the securitization markets, and particularly the RMBS market. These reforms address in detail most, if not all, of the issues that the FDIC seeks to address in this NPR that are beyond the narrow scope of receivership issue (including underwriting standards for residential mortgage loans, risk retention on ABS and RMBS, and disclosures).

With the passage of the Dodd-Frank Act, the FDIC should withdraw those portions of the NPR that are not strictly related to determining whether an effective sale of assets has taken place. These issues should be addressed in the joint rulemaking process established by Congress in the bill, which will include the FDIC, as well as the Federal Reserve, the Office of the Comptroller of the Currency, the Securities and Exchange Commission, the Department of Housing and Urban Development and the Federal Housing Finance Agency. In order to avoid a balkanization of the residential mortgage securities market, which would ill-serve the needs of consumers, issuers and investors, the FDIC should move forward solely on those issues necessary to address the legal safe harbor issue.

Specific Comments

While we strongly oppose proceeding with the full NPR, should the FDIC act unilaterally and ignore Congressional intent we offer the following comments on the proposal.

We would note at the outset an ambiguity that we have detected in the proposed regulations that we believe needs to be definitively addressed by the FDIC in the final regulations. As you are no doubt aware, the mortgage activities of three federal agencies/government sponsored enterprises, support 96% of the residential mortgage market in the U.S. today – the Government National Mortgage Association (Ginnie Mae), the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). Without these three entities, the US mortgage market would not have enjoyed even the fragile stability we see today, nor would the economic recovery be as advanced as it is today.

It is our interpretation that the proposed regulations do not affect the activities of banks that utilize Fannie Mae or Freddie Mac to securitize conventional mortgages. In a securitization transaction involving either Fannie Mae or Freddie Mac, a bank would originate and/or assemble a pool of conventional mortgages that meet the Fannie/Freddie standards, transfer those mortgages to Fannie/Freddie and receive an RMBS issued and guaranteed by Fannie/Freddie. In this instance the issuer of the RMBS is Fannie/Freddie, not the bank or any affiliate or entity controlled by the bank. Therefore these proposed regulations would not be applicable.

However, the Ginnie Mae mortgage-backed security program operates differently. In a securitization transaction involving Ginnie Mae the bank assembles a pool of eligible mortgages that are insured by the Federal Housing Administration (FHA) or guaranteed by the Veterans Administration (VA). The information on the mortgage pool is submitted to Ginnie Mae. If the mortgage pool meets Ginnie Mae requirements then Ginnie Mae will issue a guaranty of the security or securities that denote a beneficial ownership interest in the pool of eligible mortgages. In this case however the bank is the issuer of the security that is guaranteed by Ginnie Mae, and the bank has created the grantor trust that becomes the legal owner of the eligible mortgages.

As we read the proposed regulation it is not clear that the transaction that results in the creation of a Ginnie Mae mortgage-backed security by a bank, as we have described it, would be deemed to have met the safe harbor for securitizations, without also meeting all the other conditions and requirements as set forth in these proposed regulations. Since the Dodd-Frank Act specifically exempts securities issue or guaranteed by an agency of the Federal Government we suggest that the FDIC explicitly include bank securitizations that involve the issuance of an RMBS guaranteed by Ginnie Mae in the safe harbor and exempt such securitizations from all the other requirements imposed upon RMBS for inclusion in the safe harbor. Further if the FDIC agrees with our interpretation of the non-applicability of the regulations to RMBS issue by Fannie Mae and Freddie Mac, we respectfully request FDIC to make such non-applicability clear in the final regulations.

Limitation on tranches and prohibition on external credit support

The proposed regulations, in subsection (b)(ii)(A), limits the number of credit tranches for RMBS within the safe harbor to six. Additionally subsection (b)(ii)(B) prohibits RMBS within the safe harbor from employing credit enhancement at the pool or entity level through external credit support or guarantees.

We are baffled by both of these proposed provisions. Limiting the number of tranches to six strikes us as arbitrary. Additionally we fail to see how limiting the number of tranches in the securitization impacts in any way the question of whether there was an effective transfer of assets in the transaction, thus placing the assets beyond the reach of the receiver.

The prohibition on external credit support at the pool or entity level strikes us as even more baffling. There is no nexus we can see between the issue of effective and legally sufficient transfer of assets and whether or not the resulting securitization is enhanced with credit support at the pool or entity level.

What we do see is that both of these provisions could have a negative effect on the economic efficiency of securitization transactions by banks, and thus potentially discourage banks from originating or acquiring assets in order to sell those assets through securitizations. We question whether the FDIC is attempting to achieve a policy objective of discouraging the originate for sale business model by restricting securities issuances by banks, a policy objective for which the FDIC lacks Congressional authorization.

Further we would make the point that the impact of these proposed regulations will be felt far beyond the banking system because of the linchpin role played by banks in the securitization process, particularly for residential mortgages. Banks today play a critical aggregation role in the purchase of residential mortgages that they then pool and securitize. These securities are sold to capital markets investors, thus effectively transferring capital from holders to the end users – consumers seeking to buy a home or refinance their existing mortgage. These regulations threaten to severely disrupt that efficient mechanism, at a time when the recovery of the housing market is fragile at best.

When you add this potential disruption, with its implications for the US economy, to an apparent disregard for Congressional intent, we view the unnecessarily broad scope of these proposed regulations as a major threat to the housing finance system in this country driven by the FDIC's pursuit of policy objectives with scant statutory justification.

General Disclosures

Subject to our objections regarding the appropriateness of including non-germane provisions in receivership regulations, we agree with the disclosure requirements

contained in (2)(i) A – D. We believe that investors should have available information about the obligations and the securitized financial assets to enable evaluation and analysis of the credit risk and performance of the obligations and assets. We also believe that information about the structure of the securitization and the credit and payment performance of the obligations should be disclosed. Further we believe that the performance information should be provided to investors as long as the security is outstanding. We think this ongoing performance information is important for investors to use in evaluating whether the investment is meeting their financial objectives and will lead to more informed decisions on whether to hold or sell an investment.

Finally, we also agree with disclosing the nature and amount of compensation paid to originators and other parties, whether any risk is retained and whether any of the compensation is deferred. However we wonder whether this information, and specifically the compensation paid to originators, could be considered proprietary competitive information to the sponsor/issuer of the security. In addition, providing these disclosures at the individual loan originator level with unique identifiers raises privacy concerns for originators. We would suggest that the FDIC make it clear in the final regulations that this information should be presented in the aggregate, rather than on a party specific basis.

However, we believe all of these disclosures should be implemented as part of the joint rulemaking process for the entire securitization market to ensure that all securitization participants are operating under the same disclosure rules.

Disclosures specific to securities backed by mortgages

Subject to our objection voiced above regarding the appropriateness of disclosure requirements being inserted in receivership regulations, we support the proposed requirement for loan level information in securitizations that include any residential mortgage loans. In order to make a viable assessment of the potential performance of the assets loan level detail including the type of loan, the loan structure, maturity, etc. are necessary.

With respect to subparagraph (B) we believe the affirmation of compliance is reasonable, but suggest that the phrase:

"…and such additional guidance applicable at the time or loan origination."

be re-worded to be more specific. We suggest that the requirement be re-phrased to state that the loans should comply with guidance promulgated by the federal banking regulator(s) whose jurisdiction the issuing bank is subject to and which is in effect at the time of loan origination, in order to make it absolutely clear which additional guidance is included in the compliance requirement.

Origination and Retention Requirements

Our comments on Section (5) of the proposed regulations are confined to (5)(i) and (5)(ii). Our comments are subject to the same objection, that none of these provisions has any place in regulations dealing with whether or not a sale has been achieved, thus placing the subject assets outside the scope of a subsequent receivership.

Risk Retention

With respect to the risk retention provision, contained in Section (5)(i)(A), we urge FDIC to conform this provision to the final version of the Dodd-Frank Act. The Dodd-Frank Act provides the Federal Banking regulators with the authority to establish regulations that will govern risk retention as well as the authority to establish exemptions and waivers from risk retention.

More importantly the Dodd-Frank Act directs the Federal Banking regulators, together with the Federal Housing Finance Agency and the Department of Housing and Urban Development, to establish an exemption from the risk retention requirements for Qualified Residential Mortgages. The Dodd-Frank Act provides an outline for the elements of a Qualified Residential Mortgage consisting of both underwriting standards and product features.

Since the entire issue of risk retention will be subject to extensive rule making by the Federal Banking Regulators, and with respect to Qualified Residential Mortgages, the FHFA and Department of HUD as well, we urge FDIC to eliminate this risk retention provision from the final version of these receivership regulations. FDIC will have ample opportunity once the rulemaking on risk retention is completed to determine whether risk retention provisions are needed in these regulations, which we believe will not be the case, and if they are needed to incorporate the jointly developed risk retention requirements, together with jointly established exemptions including, and most especially the Qualified Residential Mortgage exemption.

Reserve Fund

In our comments to FDIC on the Advanced Notice of Proposed Rulemaking on this same subject, we opposed the one-year seasoning requirement for residential mortgages contained in those draft regulations on two grounds. First such a requirement had no place in receivership regulations. Second such a requirement would be unduly burdensome, create unnecessary expense for bank issuers and either restrict mortgage credit access to consumers or drive up the cost of that credit, or both.

We oppose the proposed establishment of a reserve fund, contained in (5)(ii)(A), on

the same grounds. A bad idea does not improve by being repackaged into a different format. It remains a bad idea.

Aside from our standing objection that the proposed reserve fund has no business in receivership regulations, the cost of such a reserve fund would be passed through to mortgage borrowers. That additional cost would make mortgage credit obtained from bank-issued securities more expensive than mortgage credit in general. One of two results would flow from this fact. Either banks would find fewer opportunities to participate in mortgage lending funded by bank-issued securities, because there would be less demand due to the higher cost for borrowers, or banks would feel the competitive pressure to loosen underwriting standards in order to attract credit-challenged borrowers who were finding it difficult to obtain mortgage credit elsewhere. Neither outcome is particularly desirable.

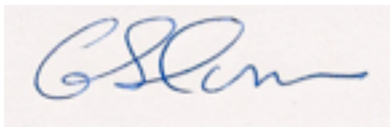
We urge the FDIC to eliminate the proposed reserve requirement. Our country needs a revival of a purely private mortgage market, one that does not feature Federal agencies or instrumentalities as primary participants. Banks that are experienced in residential mortgage lending will be key actors in this revival unless they are sidelined by this proposed reserve fund provision.

Conclusion

Thank you for the opportunity to comment on these draft regulations. We reiterate our call for the FDIC to restrict this rulemaking solely to those matters necessary to establish whether an effective sale of assets has taken place so that investors have legal certainty that the transaction will not be repudiated, should the issuing bank be placed in receivership. We urge the FDIC to address matters related to broader reforms of securitization in the context of the framework established by the Dodd-Frank Act.

We would be pleased to supply additional information or to answer any questions that you might have.

Sincerely,



Glen S. Corso
Managing Director