HOUSING POLICY COUNCIL
THE FINANCIAL SERVICES ROUNDTABLE

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February 22, 2010

Robert Feldman
Executive Secretary
Attn: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington D.C. 20429

Re: RIN # 3064-AD55

Dear Secretary Feldman:

The Financial Services Roundtable and its Housing Policy Council[1] ("the Roundtable") welcome the opportunity to comment on the Advanced Notice of Proposed Rulemaking regarding the treatment by the FDIC, as receiver of an insured depository institution, of financial assets transferred by the institution in connection with a securitization or a participation after March 31, 2010 ("ANPR").

I. Transition Period and an Alternative Suggestion

We believe the FDIC should modify and extend the effective date of the Interim Rule that it had adopted in November 2009 amending its Securitization Rule (Regulation 12 CFR 360.6). That Interim Rule provides protection against the FDIC's exercise of certain rights it has under its receivership statutes only until March 31, 2010. After that date, the protection will lapse, unless extended, and the FDIC will no longer waive in advance its rights to prevent the security holders from recovering monies due to them by up to 90 days. The FDIC also will have the ability to repudiate certain contracts on a case by case basis. We agree with the statement in the APNR that such a result will lead to downgrades in ratings provided on existing securitizations and could prevent certain future securitizations.

Accordingly, we respectfully request that the FDIC modify and extend its Interim Rule to December 31, 2010. This will permit Congress to complete its deliberations on securitization and resolution practices. The modification would read as follows (modifications in bold):

[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine, accounting directly for $84.7 trillion in managed assets, $948 billion in revenue, and 2.3 million jobs. The Roundtable's Housing Policy Council represents 28 of the leading national mortgage finance companies. HPC members originate, service, and insure mortgages. We estimate that HPC member companies originate approximately 75% and service two-thirds of mortgages in the US.

> (b) The FDIC shall not, **prior to December 31, 2010,** by exercise of its authority to disaffirm or repudiate contracts under 12 U.S.C. 1821(e), reclaim, recover, or recharacterize as property of the institution or the receivership any financial assets transferred by an insured depository institution in connection with a securitization or participation, provided that such transfer meets all conditions for sale accounting treatment under generally accepted accounting principles **as those principles were in effect on June 11, 2009**, other than the ``legal isolation'' condition as it applies to institutions for which the FDIC may be appointed as conservator or receiver, which is addressed by this section. **The FDIC will not apply any modifications to this section that have adverse impact on the rights of transferees with respect to financial assets that were transferred in connection with a securitization or participation that occurred prior to the effective date of such modification.**

The Roundtable believes that during 2010, Congress will address many aspects of the questions of securitization, the role of the FDIC in resolution of failed systemic risk institutions, and use of the various receivership techniques currently found in the FDIC Act and regulations, as well as other issues that may effect a rule adopted by the FDIC to address these issues. Extending the termination date of the Interim Rule as modified will provide the FDIC time to harmonize its final rule with any changes Congress may have made. After Congress acts, our membership will need time to adjust its systems, training, and procedures to ensure they comply with the new rules.

II. General Comments

We understand the FDIC must try to maximize the returns to the receivership in each of the failed bank resolutions. We also agree that the statute provides the authority for the FDIC, as receiver, to repudiate or disaffirm executory contracts and contracts in which the property has not been legally isolated from the insured depository institution ("IDI"). Assets that are not subject to a legally enforceable and perfected security interest are subject to repudiation by the FDIC as receiver. We do not believe, however, that accounting rules should determine whether a receiver has the right to delay or deny enjoyment of a property interest in the hands of a transferee who has received unfettered legal right to the property. The assumption of the ANPR seems to be that the determination of whether the FDIC has the rights provided it under 12 U.S.C. 1821(e)(13)(C) is whether the transfer is accorded sale accounting treatment under GAAP. While that was appropriate for the Interim Rule, and would be appropriate for our recommendation for an extension of a modified rule pending a decision by Congress, it is not appropriate for a final rule. The provisions in a final rule should be guided by legal rights under insolvency, not accounting rules. We urge the FDIC to clarify that this is not the intention of the ANPR.

We urge the FDIC to reconsider the use of conditions to qualify for the safe harbor that are not related to the question of whether a legal transfer has occurred. The conditions that must be met under hypothetical Part 360.6(b) and (c) relate to capital structures, disclosures,

documentation, compensation, retention of credit risk, seasoning of assets securitized, and limits on transactions and securitization agreements, all of which are relevant topics for discussion in consideration of legislation or regulation relating to prudent lending. The Roundtable has supported many of these ideas in various forms. And, as the FDIC noted, these elements are legitimate determinants on the amount of possible bank failures and therefore the health of the Deposit Insurance Fund ("DIF"). But DIF is not involved in any specific receivership; in those cases the FDIC is acting as the receiver with a fiduciary duty to obtain the greatest possible return for the receivership estate. It is difficult to see how considerations of the health of DIF should play a role in the debate in those circumstances.

Securitizing assets has a long and laudatory history in the United States. It promotes efficient use of capital, thereby making it possible for lenders to reach more customers, consumers and businesses alike. There is merit, therefore, in governments promoting securitizations, or at least remaining neutral toward them and letting the participants in the securitizations make the decisions on whether to proceed. Government decisions that are biased may cause the securitizations to fail to reach the optimum number of participants, or should the bias provide too much encouragement, cause the securitizations to exceed the optimum number.

A pressing need for rating agencies and investors that consider securitizations is that of certainty. They need to know whether the FDIC will exercise rights it might have to delay payment of principal and interest, to repudiate the contract entirely, or do nothing. Absent certainty on that point, the rating agencies and the investors must look to the credit of the IDI, since at the end of the day that may be the only recourse. Therefore, if the FDIC utilizes conditions such as those in the ANPR, we urge the FDIC to modify them or withdraw from using those that will make it impossible for third parties to know with certainty, at the time the rating is considered or the investment is made, what the results will be if the institution fails..

For example, if periodic disclosures must be made in order to achieve qualification in the safe harbor, no one can tell at the time the securitization commences whether those disclosures will be made, so determining the appropriate risk in those securitizations will be impossible at the time the agencies rate them or the investors consider purchasing them.

We do not believe that the adoption of the Financial Accounting Standards Board's Statement of Financial Accounting Standards No. 166, *Accounting for Transfers of Financial Assets, an Amendment of FASB Statement No. 140 ("FAS 166")* and No. 167, *Amendments to FASB Interpretation No. 46(R) ("FAS 167")* has changed those rules. Assets that have been legally transferred are not subject to repudiation by the receiver, notwithstanding what the accounting treatment for such assets might be.

Finally, we believe that revitalization of the mortgage securitization market is crucial not only to the recovery of the U.S. housing market, but to the Nation's economy as well. Care should be taken that the consolidation requirements of FAS 166 and 167 are not fueled unwittingly by establishing credit risk retention standards that will trigger those requirements, thereby leading to fewer securitizations. Absent securitization, the financing needs for acceptable levels of housing in the economy will not be met. Requiring credit risk retention is designed to ensure that good underwriting standards are maintained and housing finance industry participants

originate good loans. Instead of this indirect approach, poor underwriting standards should be addressed directly. Lenders have strengthened underwriting standards, and the federal agencies have adopted regulations that address many of the underwriting weaknesses that existed in recent years. Legislation currently moving through Congress would enhance and add to the regulatory changes that have been made. These are the most effective methods to ensure appropriate mortgage underwriting standards going forward. In addition, the distribution system may have suffered from the ability of some participants to be indifferent to the continued value in assets that were distributed. This is being addressed through regulation and legislation, and market forces have impacted the securitization process and made it more conservative. Additionally, new regulations and legislative changes are impacting third parties whose opinions are utilized in investment decisions.

All concerned parties, including all parts of the government, must work together on adopting uniform and consistent rules and procedures that go directly to the problems that existed. In light of the legislation currently being considered in Congress and the implementation of the great variety of new regulations and industry practices underway, we urge the FDIC to defer reaching a final decision through the ANPR and extend its Interim Rule as modified by our suggestion until at least the end of 2010.

III. Responses to Specific Questions

a. Capital Structure

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?*

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?*

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?*

We understand, and generally agree with, the proposition that simplicity equates to less risk. However, many legitimate and useful purposes exist for unique and tailored structuring solutions. For example, the ability to structurally create bonds that match the risk appetite and duration of an investor's liabilities (such as life insurance payouts) are one of the primary benefits of these transactions, and eliminating this flexibility under all circumstances would needlessly reduce the liquidity for these instruments, and, in turn, the underlying consumer and commercial loans. Furthermore, if the intention of such a rule is to limit creation of complex RMBS structures, it would fail since the rule would only preclude IDIs from sponsoring such transactions. It would not bar IDIs from buying complex or illiquid tranches sponsored by non-insured institutions. It again emphasizes the need for comprehensive review rather than simply a rule by the FDIC for certain insolvency situations.

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?*

Resecuritization transactions are currently subject to the disclosure requirements of Rule 10b-5 under the Securities Exchange Act. Resecuritizations that are registered with the Securities and Exchange Commission are subject to additional disclosure standards under the Securities Act and Regulation AB. We believe this robust disclosure regime is appropriate and that overlaying an additional disclosure regime would be duplicative and perhaps conflicting in a field that is presently extensively addressed. We also disagree with the ANPR that resecuritizations will only be eligible for safe harbor protections if all underlying securitizations themselves satisfy all conditions in the ANPR. This would effectively exclude legacy ABS, and perhaps future non-bank ABS, from the scope of qualifying collateral. It should be understood that operationally it would be very difficult to segregate responsibility for disclosure across securitizations that are packaged into resecuritizations.

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?*

We believe that most synthetic securitizations rely on credit default swaps or other qualified financial contracts to transfer the risk associated with an identified pool of assets into the securitization structure, rather than a traditional loan sale. Because of this, these transactions already are structured to qualify for expedited treatment in the case of an insolvency of the transferring IDI under the rules applicable to qualified financial contracts. Additionally, many IDI sponsored synthetic securitizations are transactions in which IDIs are credit protection buyers, and the synthetic securitizations are a medium through which the institution transfers the credit risks of balance sheet assets to the capital markets, so it is difficult to envisage a situation where the FDIC, as receiver or conservator, would find it beneficial to repudiate these contracts.

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?*

A major regulatory goal is to reduce overall risk in the financial system. While continuation of principal and interest payments should be largely dependent on underlying collateral, we believe that external credit support has an appropriate place in the system. Requiring originators and issuers to provide all credit support to a transaction will greatly increase the cost of a securitization, particularly those collateralized by nonprime obligations. This proposal may limit the liquidity of certain types of loan products, including home equity lines of credit, and increase funding costs for IDIs. Different approaches might be considered for asset-backed commercial paper, and other unique circumstances.

b. Disclosures

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?*

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 Securities and Exchange Commission Regulation AB, 17 C.F.R. §§ 229.1100-1123, or any successor disclosure requirements?*

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?*

Transparency is critical in order to maintain investor confidence in the securitization markets. While improved data quality and transparency will help sustain liquidity, issuers and investors should be left to balance those demands and trade-offs. Transparency and disclosure are tools that mitigate the inherent informational asymmetries between issuers and investors which can cause uncertainty in quality or other features. Disclosure allows the investor to obtain necessary information concerning the investment being purchased, and along with securities law remedies, provides the investor with a certain level of contingent recourse against the issuer if the disclosure contains material mistakes or omissions. The ability of an issuer to provide disclosure, however, is not unlimited and the existing securities laws strike this balance very carefully. The existing securities laws, and the SEC's expertise in this area, are the product of decades of experience, focus, and practice.

The private sector has made strides in dealing with these questions. The American Securitization Forum ("ASF") has seen a collaboration of originators, issuers, credit rating agencies, financial guarantors, primary mortgage insurance companies, and investors launch a set of enhanced disclosures and reporting for RMBS via a project called Project RESTART. Disclosures to be provided by issuers prior to the sale of private label RMBS and a reporting package of information to be regularly updated have been detailed in the first two final published papers of the project. Similar deliverables are now being considered for credit card securitizations and those will produce a different set of disclosures.

We do not believe that securitization disclosure is a "one size fits all" affair. Qualified institutional buyers are sophisticated investors who have access to the information they need. Regulation AB's public disclosure standards are not appropriate, in all cases, for securitization structures that qualify for a transaction exemption under the SEC's Rule 144A, which permits resales to qualified institutional buyers who generally have the opportunity to negotiate for the delivery of any information they deem useful for making their investment decision. Neither are

Regulation AB's public disclosure standards, including static pool disclosure and other technical details, appropriate for privately negotiated securitization structures that qualify for a transaction exemption under Section 4(2) of the Securities Act. Different standards still might apply for asset-backed commercial paper instruments. Additionally, Regulation AB standards may not be appropriate in securitization structures that may qualify for a securities exemption under Section 3(a)(2) of the Securities Act. In many such cases, other Federal banking regulators already address the field.

Finally, the remedy doesn't seem to fit the situation. The consequences of an issuer's non-compliance with disclosure standards would be the risk that the FDIC safe harbor would not attach, and this risk would principally be borne by the investors, not the insolvent sponsoring IDI responsible for the disclosure.

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?*

The disclosure suggested may in many instances be appropriate, but it should not be a requirement for the attachment of the FDIC safe harbor rule. We believe that a robust disclosure regime is needed uniformly across the market, and that overlaying special FDIC imposed additional requirements on insured depositary institutions is not necessary for a workable safe harbor rule.

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?*

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?*

This topic is being considered by legislative policy makers at this time. We support a comprehensive approach to periodic disclosure standards that is consistent for all securitization sponsors. Again, overlaying special FDIC imposed additional requirements on insured depositary institutions is not necessary for a workable safe harbor rule.

We understand that the FDIC would like substantial flexibility in resolving insolvent institutions, notwithstanding that the rules are detailed and extensive under present law, and apt to become more detailed in the future. From a more fundamental perspective, however, the safe harbor must be established reliably at transaction origination, rather than being dependent upon future events. The market needs certainty on the protections provided by the safe harbor. The certainty diminishes if it is dependent upon subjective standards or the ongoing actions or inactions of one or more transaction counterparties.

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?*

Compensation among the participants in financial services activity is a matter of serious interest by Congress and regulatory agencies, both in the U.S. and abroad. While we support a comprehensive approach to this issue, any disclosure standards that include the nature and amount of broker, originator, rating agency or third party advisory, or sponsor compensation should reflect the limitations on the availability of the information required to be disclosed and the materiality, or lack thereof, of such disclosure to an investment decision. This is complicated, and we urge the FDIC to withdraw from any attempt to establish a free standing rule that does not take into account the ongoing debate. It is unnecessary, of course, to consider this subject in devising a workable safe harbor rule.

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?*

It is certainly true that for different kinds of securitizations, different disclosures are relevant and are provided. These disclosures are not necessary for determining a workable safe harbor rule.

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,[3] 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?*

We support a reliable safe harbor rule. The safe harbor must be established at transaction origination, and should not be dependent upon subjective factors, such as compliance with underwriting standards, that will demand the use of subjective discretion and exceptions when compensating factors exist and be later exposed to the discretion inherent in examiners' reviews and supervisors' judgments. The standards in the Interagency Guidance on Non-Traditional Mortgage Products or Interagency Statement on Subprime Mortgage Lending require qualitative judgments that are not factual in nature. The value of a safe harbor will diminish rapidly directly in proportion to the discretion that exists in the rules. Forcing compliance with underwriting rules most likely will lead to securitizations only of those loans in which the least amount of discretion is permitted, namely 30 year fixed rate prime loans, and even then, there may be some sets of such loans that by reasons of geography, size or other considerations will be an anathema to the market. Loans to others will be limited only to those for which the government assumes risk or those few that some lenders will put on their balance sheets.

c. Documentation and Recordkeeping

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?

The entire membership of the Roundtable supports loan modifications efforts, including not only those conducted through the HAMP program but those conducted outside of HAMP. The Roundtable's membership has established HOPE NOW in conjunction with other originators, insurers, servicers, and housing counseling agencies, and has made Herculean efforts to persuade borrowers to contact servicers in times of financial crises, and to work with them in order to permit them to stay in their homes. Our members have worked closely in a multi-disciplinary effort to bring everyone involved under the same rules and procedures, and we will continue to do so both with government participation and among the industry itself.

The impact of RMBS servicing contracts on loan modification results is a complex issue. Previous efforts to address these concerns have been influenced by accounting standards, REMIC tax rules, and other legal and regulatory requirements, in addition to the plain English language of the contracts themselves. While the proposal in the ANPR might not give rise to precisely the same interlocking considerations, this historic experience underscores the need for close, multidisciplinary collaboration and partnership among the FDIC and others bodies – including the FASB, the SEC, Treasury, the ASF, and others – when solving these complex, thorny, interrelated questions. We would encourage the FDIC to participate in those discussions and withdraw from using its resolution rules to attempt to solve the problem.

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?*

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?*

Servicers perform an administrative function for securitizations. They do not assume risks in the ordinary course, and are not paid for doing so. The friction referred to in this question has come from the present circumstances in which servicers have been asked (by government, industry associations, certain tranches in the securitization, or the nature of the contract language itself) to make net present value judgments in light of contractual provisions that differ from securitization to securitization and are often ambiguous or silent with respect to the question of what value and to whom. It is unlikely that in this circumstance the FDIC rules on consent under

Part 306.6 is the appropriate forum in which to attempt to answer this complicated issue. We would urge the FDIC to refrain from trying to resolve such a difficult issue in this ANPR. Such requirements are not necessary for a workable safe harbor rule, and however adopted would not likely permit the ongoing natural evolution of market practice and standards on these matters.

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 to 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?*

Servicer advances of principal and interest for extended periods of time can, in some instances, exacerbate the risk borne by senior security holders. It also might exacerbate systemic risk due to the capital markets illiquidity that often accompanies periods in which delinquency and default rates are highest. Accordingly, limiting the period of time that an RMBS servicer is required to advance principal and interest may be a worthwhile objective. A 120 day *option* for principal and interest advances to cease may serve as a starting place. However, we would urge the FDIC to refrain from incorporating such a condition in the safe harbor rule, since such a standard does not appear to be necessary for a workable safe harbor rule, and dialogue and collaboration with other important constituencies should occur before codifying rules on these matters.

d. Compensation

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?*

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?*

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

As we said in response to Question 15, compensation for all participants in the mortgage finance industry has become a major issue of debate, both in the legislative and regulatory branches of not only the U.S. government but governments in various parts of the world. No

accord has yet been reached on the questions, in part because they are difficult questions the answers to which address basic beliefs of the kinds of economic systems countries want to promote and the difficult details associated with incorporating lagging payments into a system that has variable prices, uncertain terms, and a variety of government and private incentive programs. Regulation concerning transaction compensation practices, if any, should be imposed in a consistent manner for all securitization transactions, rather than specifically applying to bank securitizations only.

Regarding the specific suggestions in the ANPR, mandated disclosures regarding the compensation paid to brokers, originators, rating agencies, third party advisors and sponsors does not appear to be relevant to an investment decision in fixed-income, often investment grade RMBS. A requirement that certain RMBS fees should be paid out over time based on the performance of the financial assets is neither practical nor efficient because the actual cost of the sale often cannot be known with reasonable certainty, so every such transaction would have an imbedded risk premium for the potential variability of these costs. Detailed rules and tracking methods would need to be established for each transaction, establishing measurements of performance and non-performance and rules for parties with varying levels of responsibility and control. The requirement to build the infrastructure and establish rules would significantly impede the return to normalcy for the securitization market. Added complexities would arise regarding how to determine these costs for an institution that might have multiple roles, such as servicer, originator, underwriter, or custodian.

As we have said in responding to other questions, it does not appear to us that incorporating conditions related to compensation is a necessary or desirable feature for an appropriate safe harbor rule.

e. Origination and Retention Requirements

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?*

Debate on this question has occupied a good deal of time in Congress, and there appears to be a good possibility that there will be extended additional debate. Similarly, federal banking regulators have debated this issue. Foreign regulators, and in some cases, foreign legislative bodies have also considered the same set of issues.

The Roundtable believes that careful adoption of regulations and statutes that mandate good underwriting practices will address the real question involved – how can we ensure that the system will create good mortgages that will be repaid. If that is solved, then the chances of the rest of the system generating the kinds of problems that caused our economic problems recently will be considerably minimized.

Mandatory originator retention of a share of the credit risk is based on the assumption that to avoid losing the amount retained the originator will maintain good underwriting practices.

If that is the case, why not bypass the secondary source (i.e., risk retention) and go directly to the primary source – good underwriting practices.

The system as currently operating has effectively returned millions of dollars of poor credits to originators through the current risk retention features such as representations and warranties. The existence of those rep and warranties did not produce by themselves the kind of excellent underwriting that was necessary to avoid those losses, although the originators knew the risk was present. Similarly, it is not uncommon in the mortgage finance industry that originators of securitizations often intentionally retain some share of the securitization, or unintentionally if the entire issue doesn't sell. Just as with reps and warranties, it is not at all clear that those loans performed better than issues in which they did not retain some of the securities.

Those considering the issue should also consider whether or not different loan features will lead to less risk and therefore should lead to less or no retention of risk in the originators. Defaults on 80/20 loans with 30 year fixed rates will be fewer than those on 100% loans with option ARM or hybrid ARM features, so the amount of credit risk retained should likely be less. Yet, if the solution to the issue is done in a way that results in a major spread between products, then plain vanilla loans will be the surviving loan product, and those who want or need other prudent loans will fail to find them.

Those considering the issue should consider various options for retaining risk, should mandatory risk retention become a requirement, notwithstanding the indirect way in which it addresses the core problem. For example, should retaining a prescribed amount of mortgages of a similar quality be compliance; what slice of risk should be mandated; and should different amounts be required depend upon what slice is taken.

Perhaps towering above all of these considerations is the question of the impact of FAS 166 and 167. While the APNR contemplates overriding the results of those standards for the limited purposes of a waiver by the receiver under 360.6, the requirement in the rule for risk retention may well lead to consolidation on the books of the originator of securitized assets, notwithstanding how the FDIC as receiver might treat the operation of the standards for 360.6 purposes. The perverse results, therefore, could be that compliance with the rule which would produce the certainty necessary to permit securitizations would eliminate most securitizations through consolidation. While we recognize there is uncertainty surrounding the implications of FAS 166 and 167 in these situations, it seems clear that such a result is entirely possible.

Finally, regulations concerning "skin in the game" options, if any, should be imposed in a consistent manner for all securitization transactions, rather than specifically applying to bank securitizations only. That can best be done in the context of Congressional action or joint agency action, not in action by the FDIC as it attempts to assemble a workable safe harbor rule under Part 360.6. The Roundtable believes that it can best be done through clear underwriting standards and proper monitoring of those within the institution and in the supervisory process.

Risk retention standards, if any, should include a variety of options to satisfy these requirements. We respectfully suggest that if such rules are to be drafted, they be drafted by a

collaboration of officials and affected parties through the normal legislative system and should consider the impact of FAS 166 and 167. We respectfully suggest that the FDIC not include such conditions in this safe harbor rule.

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?*

Origination practices should be regulated in the normal course, without any necessarily higher threshold for loans in RMBS transactions. The 12 month seasoning proposal would add to bank capital costs, expand balance sheets, and would limit bank funding options. It would also trap credit losses and other risks inside of banks that investors are willing, and in many cases, eager to assume. For example, many investors would like to have the opportunity to invest in newly issued credits. Applying the 12 month seasoning rule, unfortunately for those investors, would drive lenders to offer only loans that minimize what some investors believe are their abilities to select good loan pools compared with the ability of other lenders.

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?*

The principal purpose of representations and warranties, and associated repurchase remedies, is to protect buyers from undisclosed risks. They are not, in the ordinary course, intended to act as a direct credit substitute, credit enhancement, or guarantee.

We disagree, therefore, with the proposal to institute an FDIC-required review of specific representations and warranties post-closing for the purpose of enforcing repurchase remedies. If regulatory agencies believe that more transactional due diligence is needed, then it should be conducted before transaction execution. In that way, perceived weaknesses in loan underwriting soundness could be directly addressed.

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?*

Please refer to our answer to your Question 17 above. We also disagree with the suggestion that bank sponsors affirm compliance with certifications similar to those required under Sarbanes-Oxley. Certifications of this nature are not appropriate or needed where compliance with law is already addressed through representations and warranties in negotiated transaction documentation, and compliance with regulatory guidance must be assessed on highly

subjective standards. Accordingly, the likely benefits are remote, while the costs (in compliance process and increased liability) are significant.

f. Additional Questions

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?*

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?*

The safe harbor's application to particular financing transactions, at the time they are executed, needs to be clarified. Compliance with the requirements of the sample regulation will likely be very difficult, if not impossible, to establish with the high degree of certainty that the rating agencies and investors will demand. Legal opinions concerning the application of the safe harbor rule may not provide sufficient comfort because they must assume many matters that are purely factual, some of which will not occur until future dates. Without further clarification and certainty, we are concerned that rating agencies and investors may not be sufficiently uncomfortable that they will be reluctant to provide reasonable ratings or make otherwise reasonable investments.

In the sample regulatory text the FDIC does not appear to waive explicitly and clearly its repudiation power to reclaim assets transferred. The ANPR's sample regulatory text states that the FDIC retains the ability to repudiate the contracts memorializing the asset transfer – which appears to contravene the more desirable concepts suggested in the introductory remarks that state that the FDIC will *not* reclaim or recover assets transferred into qualifying securitizations. That language is also inconsistent with the language in 360.6 in which that clear statement is made. Appropriate clarification on this point is important because upon repudiation the FDIC would only be required to pay damages limited to the market value of the underlying collateral, which would introduce market value risk to affected transactions. We suggest that the FDIC use the same language used in the current Interim Rule, since using identical language will give comfort to the rating agencies and to investors, in that it will indicate that no change was contemplated.

More generally, the core of the ANPR concerns the FDIC's repudiation and recharacterization powers in the context of the insolvency of an insured depository institution. We concur with the ANPR that the repudiation power authorizes the FDIC to breach a contract entered into by the insolvent institution and be legally excused from further performance, but that it is not an avoiding power. However, the ANPR also provides that the safe harbor from repudiation for securitizations accounted for as sales will only apply if certain detailed criteria (which have no bearing on sale accounting characterization) are met. Accordingly, the ANPR suggests that the FDIC can recover a sold asset through its repudiation powers, even though accounted for as a sale (and even if otherwise being a sale for state law purposes). This result appears highly inconsistent with the proposition that repudiation power is not an avoidance power. We believe that the safe harbor should not imply that the FDIC has avoidance powers

that it does not have for transactions not satisfying the conditions of the safe harbor. Instead, any final rule should recognize that even cases where a transaction falls outside the safe harbor, the power to repudiate is not the power to avoid a transfer that is a sale, and the question of whether a transfer is a sale is a matter of applicable non-insolvency law.

The ANPR also states that securitizations that are not accounted for as sales could be considered an alternative form of secured borrowing, and applies a safe harbor to the FDIC's consent requirements for secured lenders if the securitization meets certain criteria not related to the question of whether the securitization was a sale. The ANPR implies that securitizations that are accounted for as secured borrowings, but that do not meet the safe harbor criteria, would be treated as secured borrowings for receivership purposes. However, the factors that influence whether a transfer is a financing rather than a sale for accounting purposes could be relevant to the legal analysis of the same question, but they are not identical. The mere fact that an SPV, for example, might be consolidated with the transferor for accounting purposes should not be the sole basis – as the ANPR implies – for consolidation in insolvency. While securitization transactions are likely to be characterized as secured financings for accounting purposes, the economic substance of such transactions has not changed as a result of the adoption of FAS 166 and 167. Affiliated corporate entities may be consolidated for accounting purposes, yet they are treated as separate for commercial and insolvency law purposes unless special circumstances justifying "substantive consolidation" arise.

Because of this, any final rule should make clear that even if a transaction falls outside the safe harbor, the fact that a transaction is accounted for as a secured borrowing should not control the legal conclusion that the transaction is a secured borrowing in insolvency, the fact that entities are consolidated for accounting purposes should not control whether those entities are consolidated for insolvency purposes, and while the accounting treatment often is a relevant factor in these questions the relevant applicable law will control.

g. Additional Observations

In addition to providing answers to many of the specific questions presented by the FDIC, we also have suggestions regarding the following additional aspects of the ANPR and sample regulatory text.

Standard Documentation, as Appropriate, Must Be Used. The ANPR would attempt to force the market towards more highly standardized documentation. The purported rational for this appears to be a desire to make it easier to obtain relative comparisons across transactions. In practice, however, this would be extremely difficult to achieve because legal documentation often reflects an individual company's loan products, computer systems, servicing practices, risk management comfort level, legal entity structure, and other organizational details, which are not simple to adjust.

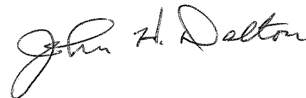
IV. Conclusion

We are pleased the FDIC adopted its Interim Rule in light of the risks presented by FAS 166 and 167. It provided the certainty that the market needed during the period covered by the rule. We urge that the FDIC now extend a modified Interim Rule as we have suggested. That will

permit the legislative process to proceed to its conclusion on many of the subjects addressed in the ANPR, and in doing so, provide uniform guidance and directions across all categories of institutions, not simply insured depository institutions. Legislation will also consider the broad effect of FAS 166 and 167, not simply its effect in the receivership rules of the institutions for which the FDIC is receiver. This approach also would allow the Congress to decide what the public policy for the country should be on such issues as credit risk retention, capital structure, disclosures, compensation, and documentation. While we have proposed an extension of the Interim Rule until the end of 2010, the FDIC may find it wiser to extend it indefinitely pending clarification from Congress and consultation with the SEC and the other financial regulatory agencies on the issues of general financial services regulatory policy in these critical areas. That would permit the FDIC to join with the other agencies in crafting policies that would address the issues in 12 CFR 360.6, as well as the broader issues addressed by the implications of some of the ideas raised in the ANPR.

Thank you for the opportunity to comment on this Advanced Notice of Proposed Rulemaking. If you have any questions or need additional information, we can be reached at (202) 289-4322.

With best wishes,



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