July 1, 2010

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

Re: 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 September 30, 2010 (RIN 3064-AD53)

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to submit this letter in response to the request of the Federal Deposit Insurance Corporation ("FDIC") for comments regarding the above-referenced notice of proposed rulemaking (the "NPR"). The NPR sets forth a proposed rule ("Proposed Rule") that would amend the current safe harbor rule set forth in 12 CFR 360.6 (the "Original Safe Harbor") relating to securitizations and participations issued after September 30, 2010. The Proposed Rule follows the promulgation by the FDIC in December 2009 of an Advance Notice of Proposed Rulemaking ("ANPR")[2] relating to such safe harbor treatment, and adopts, with certain modifications, the same approach as the sample text for a new safe harbor set forth in the ANPR.[3]

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[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

[2] 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, 75 Fed. Reg. 935 (Jan. 7, 2010).

[3] We commented on the ANPR in a letter to the FDIC dated February 22, 2010.

The Original Safe Harbor was promulgated in 2000[4] in response to the adoption by the Financial Accounting Standards Board of Statement of Financial Accounting Standards No. 140, Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities ("SFAS 140"), and was structured to provide comfort to accountants regarding satisfaction of SFAS 140's requirement that for a transfer of assets to a securitization to qualify as a sale under generally accepted accounting principles ("GAAP") the transfer must result in the assets being legally isolated from the transferor in the event of the transferor's insolvency (the "legal isolation requirement"). The Original Safe Harbor rendered such comfort by providing that if a transfer of assets by an insured deposit institution ("IDI") to a securitization met all of the requirements (other than the legal isolation requirement) for sale accounting treatment under GAAP, then the FDIC would not, through the use of its power to repudiate contracts of insolvent IDIs, seek to recover such assets in the event of the IDI's insolvency. Although the Original Safe Harbor was initially intended to provide comfort regarding satisfaction of the legal isolation requirement in GAAP, over the years investors, rating agencies and other market participants have come to regard it as providing important assurance as to how the FDIC will treat assets previously transferred by an IDI to a securitization in the event of the IDI's insolvency.

As the FDIC notes in the ANPR and the NPR, changes to GAAP effectuated by Statement of Financial Accounting Standards No. 166, Accounting for Transfers of Financial Assets ("SFAS 166"), and Statement of Financial Accounting Standards No. 167, Amendments to FASB Interpretation No. 46R ("SFAS 167"), result in many IDI securitizations that would have met the requirements for sale accounting treatment under SFAS 140 no longer qualifying as GAAP sales and, accordingly, not qualifying for the Original Safe Harbor. In the Proposed Rule, the FDIC proposes to revise the Original Safe Harbor to address these accounting changes.

Significantly, the FDIC proposes to condition the availability of the revised safe harbor on requirements, aimed not at strengthening the conclusion that a GAAP sale has occurred (because in many cases it will not) or the legal conclusion that assets transferred by an IDI to a securitization would be legally isolated in the event of the insolvency of the IDI, but rather on reforming the securitization process.

Summary

Historically, securitization has been a key source of consumer and residential mortgage lending in the United States. As of June 2009, nearly 19% of the more than $18 trillion worth of real estate loans and consumer credit was funded through private-label securitization.[5] Private-label mortgage-backed securities issued by primary lenders constituted 26% and 16%, respectively, of all commercial and residential mortgage lending.[6] Empirical studies demonstrate

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[4] See 65 Fed. Reg. 49,189 (Aug. 11, 2000).

[5] Navigating the Financial Challenges Ahead, Global Financial Stability Report, World Economic and Financial Surveys, International Monetary Fund (Oct. 2009), 78.

[6] Id.

that securitization both increases the availability of credit and decreases its costs.[7] Securitization provides IDIs with access to non-government back-stopped liquidity and with an effective tool for managing credit risk.

As the International Monetary Fund ("IMF") recently observed, although conditions in the credit markets have improved, the availability of private sector credit is likely to remain limited for the foreseeable future as banks continue to deleverage and as burgeoning sovereign financing demands increase the competition for funding, further constraining the availability of private sector credit. We agree with the IMF, that under such circumstances, restarting the securitization markets on a reformed basis is essential to support credit, particularly for consumers and small- and medium-sized enterprises.[8] It is also essential to providing IDIs with the liquidity and credit risk management tools they need to address the challenges of the current economic environment.

SIFMA supports coordinated, comprehensive securitization reforms that will help to restart the securitization markets. SIFMA also supports revising the Original Safe Harbor to provide the required certainty to investors, rating agencies and other market participants with respect to the legal isolation of assets in an IDI securitization. However, in SIFMA's view, the Proposed Rule, as currently drafted, would achieve neither of these goals.

Specifically, SIFMA believes that the Proposed Rule falls short in the following respects:

1. The Proposed Rule Will Impede, Not Further, Comprehensive Securitization Reform and the Ability of IDIs to Again Access the Securitization Markets Which, in Turn, Will Reduce the Availability of Credit to Consumers and Small Businesses. A coordinated approach to comprehensive securitization reform is essential to the revitalization of the securitization markets. If securitizations are subject to multiple and inconsistent regulations, IDIs are likely to conclude that the burdens and costs of securitization are too great and will significantly reduce or eliminate their use of securitization. Congress is close to enacting legislation (the "Financial Reform Legislation")[9] containing a comprehensive framework for securitization reform that covers many of the same matters as are covered by the Proposed Rule and that directs the FDIC to coordinate with the Office of the Comptroller of the Currency ("OCC") and the Federal Reserve Board (together with the FDIC, the "Bank Regulatory

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[7] Id. at 79.

[8] Meeting New Challenges to Stability and Building a Safer System, Global Financial Stability Report, World Economic and Financial Surveys, International Monetary Fund (Apr. 2010), xii, 40.

[9] The House and the Senate have both passed versions of the Financial Reform Legislation (H.R. 4173, the "Wall Street Reform and Consumer Protection Act," passed by the House on December 11, 2009, and S. 3217, the "Restoring American Financial Stability Act of 2010," passed by the Senate on May 20, 2010). The two versions have been reconciled by a conference committee, and the House has passed the reconciled version of the bill which is now known as the "Dodd-Frank Wall Street Reform and Consumer Protection Act" and the Senate is expected to pass the reconciled version in the near future. References herein to provisions of the Financial Reform Legislation are to the conference committee's final version, *available at* http://financialservices.house.gov/Key_Issues/Financial_Regulatory_Reform/Conference_report_final_3.pdf.

Agencies") and with the Securities and Exchange Commission ("SEC") and, in the case of transactions involving residential mortgage assets, the Federal Housing Finance Agency (the "FHFA") and the Secretary of Housing and Urban Development (together with the SEC, the FHFA and the Bank Regulatory Agencies, the "Applicable Regulators") on certain of such matters. In addition, as the FDIC notes in the NPR, the SEC has proposed for comment sweeping changes to its disclosure and reporting requirements for asset-backed securities ("Proposed Regulation AB II"). The Proposed Rule's conditions address many of the same issues as are addressed in the Financial Reform Legislation and Proposed Regulation AB II, but in some significantly different ways.

We believe that the FDIC's actions to impose these conditions on IDIs on a unilateral basis, and before the similar (or in some cases, conflicting) requirements in the Financial Reform Legislation and Proposed Regulation AB II are finalized, will impede, not further, comprehensive securitization reform. Moreover, it places IDIs at a disadvantage to non-IDIs in using securitization as a liquidity and credit risk management tool. If IDIs are incentivized not to use securitization, credit availability for consumers and businesses may be adversely affected or credit may increase outside the regulated banking sector with reduced protections for consumers. IDIs may also become increasingly reliant upon FDIC-insured deposits for funding, and liquidity for residential mortgage loans and certain other asset classes may continue to be substantially limited to that made available by government or government-sponsored entities.

2. The Proposed Rule Will Not Provide Adequate Assurances with Respect to Legal Isolation. For an insolvency safe harbor rule to provide adequate assurance with respect to the treatment of securitized assets in an IDI insolvency, it must be clear and unambiguous, its application in a specific transaction must be easily and objectively verifiable with finality at the time of issuance of the securitization, and it must be based upon well-developed and understood principles of law regarding legal isolation (and not be conditioned on requirements that are contrary to such principles). If it is not, investors, rating agencies and other market participants will be unwilling to rely upon the safe harbor rule, making it difficult, and in some cases impossible, for IDIs to access the securitization markets.

The Proposed Rule fails to meet these basic requirements. Like the sample text in the ANPR, portions of the Proposed Rule predicate the availability of the safe harbor on certain conditions that are vague or subjective and whose satisfaction can change or be reassessed after the closing date of a securitization. This creates risk for investors, the intended beneficiaries of the safe harbor, in that the safe harbor, though appearing to be available at the time they make their investment, will be lost thereafter.[10] In addition, most of the Proposed Rule's conditions are completely unrelated (and in some cases, such as the proposed risk retention requirement, are contrary) to well-developed and understood principles of law governing when legal isolation in a securitization has been achieved.

[10] See Section II.B.4 below for a discussion of these points.

In addition, the Proposed Rule, like the sample text in the ANPR, creates two different safe harbor rules for securitizations, depending not on principles of law with respect to legal isolation, but on whether the securitization is accounted for as a sale or as a financing under GAAP. Although labeled a "safe harbor," the rule applicable to securitizations accounted for as financings (the "accounting financing safe harbor rule") does not, in fact, guarantee investors that an IDI's insolvency will not affect the return of principal and interest owed to investors pursuant to the contractual terms of their investment and is otherwise unclear as to the protections it provides.

3. Action Requested. The FDIC has promulgated an interim safe harbor rule ("Interim Safe Harbor Rule") which provides that, until September 30, 2010, the Original Safe Harbor will apply to securitizations for which financial assets are transferred if such transfer satisfies the conditions for sale accounting treatment for periods before November 15, 2009.[11] For the foregoing reasons, SIFMA requests that the FDIC extend the Interim Safe Harbor Rule until the FDIC, in conjunction with the other Applicable Regulators, promulgate final regulations under the Financial Reform Legislation. At that time the FDIC can assess whether such regulations, together with progress that the SEC has made on the disclosure requirements contained in Proposed Regulation AB II, provide a satisfactory unified framework for comprehensive securitization reform. Assuming such a determination is made, we would hope that the Proposed Rule could be revised to provide a safe harbor rule which is not linked to securitization reform, is clear and unambiguous, is based on well developed and accepted legal principles, and contains the features suggested in this comment letter.

Discussion

I. The FDIC Should Coordinate with the Other Applicable Regulators to Develop a Uniform Approach to Securitization Reform.

As the FDIC is aware, Congress is close to passing the Financial Reform Legislation which contains significant new requirements with respect to risk retention, disclosure and many of the other securitization reforms that the FDIC seeks to effect on a unilateral basis in the Proposed Rule. In addition, the SEC has promulgated Proposed Regulation AB II which would effect sweeping new changes to the disclosure and reporting of securitization transactions. While the Proposed Rule, the Financial Reform Legislation and Proposed Regulation AB II all seek to achieve the same goal, they differ in significant respects.

We believe that it is essential that efforts with respect to securitization reform be undertaken by the Applicable Regulators on a coordinated basis, result in a consistent set of requirements and be finalized in similar time frames. If securitizations are subject to multiple and inconsistent regulations by such authorities, IDIs are likely to conclude that the burdens of funding in the securitization markets are too great and the restart of the securitization markets

[11] See 74 Fed. Reg. 59,066 (Nov. 17, 2009). The Interim Safe Harbor Rule initially applied until March 31, 2010, but its application was extended through September 30, 2010. See 75 Fed. Reg. 12,962 (Mar. 18, 2010).

will be impeded. If the FDIC acts in advance of the other Applicable Regulators, the FDIC will place IDIs at a disadvantage relative to non-IDIs in using securitization as a liquidity and credit risk management tool. If IDIs are incentivized not to use securitization, credit availability for consumers and businesses may be adversely affected or credit may increase outside the regulated banking sector with reduced protections for consumers. Additional disincentives to IDIs using securitizations would be particularly unfortunate at this time because conditions in the credit and secondary loan markets remain fragile. The proposed safe harbor requirements would also come on top of the Bank Regulatory Agencies' December 2009 amendments to their regulatory capital standards requiring an IDI to keep risk-based capital against on-balance-sheet securitizations at the same level regardless of the amount of credit risk the IDI has economically transferred through such securitizations – a requirement which is already disincentivizing many IDIs from using securitization as a credit risk management tool.[12]

Two areas where multiple, disparate regulations are certain to impede the restart of the securitization markets are (i) risk retention and (ii) disclosure and reporting requirements for securitizations. Recognizing that inconsistent rules with respect to risk retention are, as a practical matter, unworkable, the Financial Reform Legislation mandates that the FDIC and the other Applicable Regulators jointly prescribe a single set of risk retention requirements. In addition, although the Financial Reform Legislation, like the Proposed Rule, contains a 5% risk retention requirement, the Financial Reform Legislation risk retention requirements would properly require the consideration of differences among asset classes, underwriting standards and other factors and permit exemptions or exceptions where appropriate. In contrast, the Proposed Rule sets an inflexible 5% risk retention requirement and does not allow consideration of any of these factors.[13]

Disclosure and reporting requirements is another area where uniform regulation is not only desirable but essential. If, as proposed, the Proposed Rule's disclosure and reporting requirements become effective on October 1, 2010, we believe that most IDIs will conclude that accessing the securitization markets between that time and the date Proposed Regulation AB II is finalized would be too burdensome, because it would require them to make documentation and system changes to address the requirements of the Proposed Rule only to have to make a second set of changes when Proposed Regulation AB II is finalized. Even if, prior to the time Proposed Regulation AB II is finalized, some IDIs are willing to make changes necessitated by the Proposed Rule, we expect October 1, 2010 will be too soon for many of them to do so. Accordingly, there will be a period after October 1, 2010 during which many IDIs will be unable to access the securitization markets.

[12] See 75 Fed. Reg. 4,636 (Jan. 28, 2010).

[13] The Proposed Rule also prohibits any hedging of the retained risk. However, unlike the Financial Reform Legislation that gives regulators the power to exempt transactions from the hedging prohibition or Proposed Regulation AB II that only prohibits direct hedging but does not prohibit hedges on market interest rates, currency exchange rates or the overall value of a particular broad category of asset-backed securities, the Proposed Rule would impose a blanket prohibition on hedging retained risk during the term of the securitization.

The Proposed Rule would also, commencing October 1, 2010 (and therefore likely before the SEC finalizes its Proposed Regulation AB II), impose the current Regulation AB disclosure and reporting requirements on all privately placed securitizations (including those offered under the statutory Section 4(2) exemption and resold under the so-called Section 4(1½) exemption) and on securities that are exempt from registration ("exempted securities") under the Securities Act of 1933 (the "Securities Act"). This goes far beyond the SEC's Proposed Regulation AB II which would impose such requirements only on private placements that rely on the safe harbors provided by Rule 144, Rule 144A and Rule 506 under the Securities Act and not on privately placed securities offered under the statutory Section 4(2) exemption or resold under the Section 4(1½) exemption or exempted securities. Applying Regulation AB disclosure and reporting requirements to private placements, where investors have always been presumed to be able to fend for themselves, represents a significant change and will impose substantial additional requirements on asset-backed securities which could effectively prevent many issuers that have relied on the private securitization markets from accessing those markets. The SEC has therefore requested comments on all aspects of its approach.[14] The Proposed Rule could also be read to impose Regulation AB disclosure and reporting requirements on overseas offerings that are exempt from registration under the Securities Act pursuant to the SEC's Regulation S, something the SEC has never required, and is not proposing to require, in Proposed Regulation AB II.

We believe that the proper disclosure and reporting requirements for asset-backed securities should be determined by the SEC through the comment process on Proposed Regulation AB II, and not by the FDIC. We strongly urge the FDIC to defer to that process before subjecting IDIs to requirements which the SEC has yet to, and may never, adopt and which could turn out to be significantly different from the requirements in Proposed Regulation AB II.

II. For the FDIC's Safe Harbor to Provide Adequate Assurances to Investors and Other Market Participants, it Must Be Based on Well-Developed and Understood Principles of Law (Not on GAAP Accounting Principles), it Must Be Clear and Unambiguous and its Availability Must Be Easily and Objectively Verifiable With Finality at the Closing Date of the Securitization.

Securitizations depend critically on legally isolating financial assets from the assets of the IDI effecting the securitization. Unless investors are highly confident at the time they make their investment decision that assets underlying a securitization have been legally isolated from an IDI, they will not invest in such securitization and the IDI will not be able to sell its asset-backed securities to them.

In accordance with well-developed and understood principles of law, most securitizations by IDIs use two-step transactions to achieve legal isolation. In the first step, assets are transferred by the IDI to a "bankruptcy-remote" special purpose vehicle ("SPV") in a transaction that would be regarded as a true sale under such principles. In the second step, the bankruptcy-

[14] See 75 Fed. Reg. 23,328, 23,397 (May 3, 2010).

remote SPV transfers the assets to the issuer for the securitization in a transfer that may or may not constitute a legal true sale, and that may or may not result in the securitization being characterized as an accounting sale by the IDI under GAAP.

Legal isolation is achieved, irrespective of GAAP accounting treatment, because:

(1) the transfer to the first tier SPV can be characterized under appropriate legal principles as a legal true sale and not a secured borrowing (the "Legal True Sale Determination"), and

(2) the SPV is structured so that it will be respected as a "separate entity" from the IDI in the event that the IDI becomes insolvent (the "Non-Consolidation Determination").

As the FDIC has recognized, the Legal True Sale Determination is a legal, and not an accounting, determination:

> "A transaction that purports to be a sale … of all of a financial asset … which would be characterized as a sale under the general legal view, should not need to be encompassed by the rule." [15]

Similarly, with respect to the Non-Consolidation Determination, the FDIC has asserted:

> "The FDIC applies well-defined standards to determine whether to treat such [SPVs and subsidiaries] as "separate" from the IDI. If a subsidiary or SPV, in fact, has fulfilled all requirements for treatment as a "separate" entity under applicable law, the FDIC as conservator or receiver has not applied its statutory powers to the subsidiary's or the SPV's contracts with third parties. While the determination of whether the subsidiary or SPV has been organized and maintained as a separate entity from the IDI must be determined based on the specific facts and circumstances, the standards for such decisions are set forth in generally applicable judicial decisions and in the FDIC's regulation governing subsidiaries of insured state banks, 12 C.F.R. 362.4."[16]

Over the years, investors, rating agencies and others have widely relied upon these and similar FDIC pronouncements in structuring, investing in and rating IDI securitizations.

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[15] 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, 65 Fed. Reg. 49,189, 49,191 (Aug. 11, 2000).

[16] FDIC Covered Bond Policy Statement, 73 Fed. Reg. 43,754, 43,755 (July 28, 2008). See also FDIC Legal Advisory Letter 86-8 (April 9, 1986), reprinted in [1988-89 Transfer Binder] FED. BANKING L. REP (CCH) ¶ 81,037.

Surprisingly, the NPR suggests that in making its determination of how to treat assets in a conservatorship or receivership, legal isolation may depend, not just upon an analysis as to whether assets securitized by an IDI have been legally isolated, but also upon "whether [the] assets [being securitized] are treated under GAAP as part of the IDI's balance sheet."[17] Such suggestion is difficult to understand, given the FDIC's long-standing position that the determination as to whether assets have been legally isolated is based on applicable law, not accounting treatment. Unfortunately, this suggestion has led many market participants to question whether securitizations that are not accounted for as accounting sales would, absent being covered by a safe harbor rule, be viewed by the FDIC as being legally isolated.[18]

The Proposed Rule creates further uncertainty and confusion by creating two separate safe harbor rules, whose application depends not on legal true sale principles, but solely on whether the securitization "meets" or does not "meet" sale accounting requirements, and investors are provided with significantly different protections on that basis.[19] As further discussed below, the accounting financing safe harbor does not guarantee investors that the insolvency of a transferor IDI will not affect the return of principal and interest owed to them pursuant to the contractual terms of their investment.

The Proposed Rule creates additional uncertainty by making the two safe harbors contingent upon vague or subjective conditions which are not easily and objectively verifiable and whose application can change or be reassessed after the closing date of the securitization. This creates the risk to investors that the safe harbor, though appearing to be available at the time they make their investment, will later be lost.

The Proposed Rule creates additional confusion by conditioning the application of the safe harbors — which are intended to provide certainty regarding legal isolation — on compliance with conditions unrelated to, and in some cases inconsistent with traditional legal principles of legal isolation. For example, under such principles, risk retention in the form of the Proposed Rule's 5% risk retention requirement would generally be considered a negative factor when evaluating whether a legal true sale has occurred. Whatever risk retention requirements may be made applicable pursuant to the rulemaking process contemplated by the Financial Reform Legislation, it seems inconsistent for a safe harbor aimed at ensuring legal isolation to impose conditions *contrary* to legal isolation.

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[17] See 75 Fed. Reg. 27,471, 27,475 (May 17, 2010). In the NPR, the FDIC further states that it "recognizes that the power to repudiate a contract is not the power to recover assets that were previously sold *and are no longer reflected on the books and records of an IDI* [emphasis added]," suggesting that assets that are sold yet remain on the IDI's books might be recoverable.

[18] To cite one significant example, Standard & Poor's has already concluded that it would likely not provide a securitization rating to an IDI securitization that is accounted for as a financing and that is not covered by a safe harbor rule. See Standard & Poor's "Implications of FDIC Proposal For a Revised Securitization Safe Harbor on S&P's Rating Analysis of U.S.-Originated Transactions." (June 9, 2010).

[19] In the preface to the NPR, the FDIC readily concedes that "as a practical matter, the scope of the comfort that would be provided by the Proposed Rule is more limited than that provided in" the Original Safe Harbor. See 75 Fed. Reg 27,471, 27,473 (May 17, 2010).

SIFMA believes that, in order to provide required certainty to investors and other market participants and transparency in the securitization markets, any revised safe harbor rule must be clear and unambiguous, its satisfaction must be easily and objectively verifiable with finality at the time of issuance of the securitization, and it must be based on well-developed and understood principles of law (and not be conditioned on requirements that are contrary to such principles). In SIFMA's view, the safe harbor provisions in the Proposed Rule fail to meet these requirements. We therefore suggest the following modifications to such provisions.

A. <u>There Should be a Single Safe Harbor Whose Application Does Not Depend on GAAP Accounting Treatment</u>.

As discussed above, the Proposed Rule would create separate safe harbors for securitizations that meet, and do not meet, sale accounting treatment under GAAP. Because we believe that the safe harbor should depend upon legal principles, and not upon GAAP, we propose that the FDIC adopt a single safe harbor rule which provides that the FDIC as conservator or receiver will not reclaim, recover or recharacterize as property of the IDI or the conservatorship or receivership any assets transferred by an IDI to a securitization if the securitization meets the definition of "securitization" in the Proposed Rule and such transferred assets have been validly transferred to the issuer under applicable non-insolvency laws or are subject to a first priority security interest that is enforceable by the issuer under such laws.

The rule would recognize that although GAAP has changed as a result of the implementation of SFAS 166 and SFAS 167, the legal and economic substance of securitization transactions has not, and would provide a clear and objectively verifiable standard, based on legal principles, whose satisfaction can be determined with finality at issuance of the securitization, as to when safe harbor treatment will be available.

B. <u>If the FDIC Decides to Retain Separate Safe Harbors Depending on Accounting Treatment, the Accounting Sale Safe Harbor and Accounting Financing Safe Harbor Should Be Modified to Clarify Their Terms and to Address the Deficiencies Discussed Above</u>.

If the FDIC decides to apply separate safe harbors for transactions that meet and do not meet sale accounting treatment, we request the FDIC make the following changes:

1. The FDIC should clarify that the accounting sale safe harbor will apply to certain two-tier securitizations.

The FDIC should clarify that the accounting sale safe harbor will apply in, among other circumstances, a two-tier securitization in which:

(i) the transfer by the IDI to the first-tier SPV would qualify for sale accounting treatment under SFAS 166 but for the fact that the SPV is a consolidated subsidiary of the IDI, or

(ii) if treated as a consolidated subsidiary of the IDI, the SPV would be required by GAAP to recognize the financial assets transferred to it in its separate company financial statements if it prepared such financial statements.[20]

2. The FDIC should clarify, as it did in promulgating the Interim Safe Harbor Rule,[21] *that, not only will it not use its repudiation powers to recover assets transferred to a securitization that meets the accounting sale safe harbor, but that assets transferred in such a securitization will not otherwise be deemed to be part of the IDI's conservatorship or receivership estate or be subject to the stay contained in Section 11(e)(13)(C) of the Federal Deposit Insurance Act.*

3. The FDIC should modify the accounting financing safe harbor to assure investors that the return of principal and interest owed to them pursuant to the contractual terms of their investment will not be affected by the insolvency of a transferor IDI.

Although in the preface to the Proposed Rule the FDIC claims to have addressed this risk, we continue to believe the accounting financing safe harbor does not eliminate the possibility that if the FDIC repudiates a securitization, the market value of the securitization assets at such time could be less than the amount of the obligations owed to investors under the contractual terms of the securitization and that investors will be at risk for the deficiency. In this regard, the Proposed Rule does not prohibit the FDIC from repudiating a securitization accounted for as a financing without paying the required amount of damages. If that were to happen, it is not clear why investors would not be exposed to market risk relating to the securitization pool. Although in the preface to the Proposed Rule the FDIC states that if the FDIC repudiates a securitization agreement and investors are not paid the par value of their securities "they will be permitted to obtain the asset pool," it is unclear how a securitization that has been repudiated could continue so that investors are in the same position as if the repudiation had not occurred. Accordingly, we request that the FDIC provide that it will not repudiate a securitization when the market value of the asset pool is not sufficient to pay the par value of the securities plus accrued and unpaid interest that is contractually owed on them. Further, it appears that the "damages" for repudiation provided for in the Proposed Rule includes only principal, and not accrued and unpaid interest that is contractually owed, thus exposing investors to the loss of such interest. Accordingly, we believe the FDIC should clarify that in addition to principal, investors are entitled to receive such interest.

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[20] In this regard we note that Paragraph 26A of SFAS 166 provides that if, in connection with a particular transfer of financial assets "the transferee is a consolidated subsidiary of the transferor (its parent), the transferee shall recognize the transferred financial assets in its separate company financial statements, unless the nature of the transfer is a secured borrowing with a pledge of collateral (for example a repurchase agreement that would not be accepted as a sale under the provisions of paragraphs 47-49)."

[21] See FDIC Press Release "FDIC Board Adopts Proposed Interim Final Rule to Provide A Transitional Safe Harbor For All Participations and Securitizations" (Nov. 13, 2009), *available at* http://www.fdic.gov/news/news/press/2009/pr09208.html, which states that "any financial assets transferred into such securitizations or participations will not be treated as property of the institution or receivership, and consequently the consent requirement of 12 USC §1821(e)(13)(C) will not apply."

Finally, the Proposed Rule conditions the exercise of remedies by investors on there being no need to involve the conservator or receiver. The FDIC states that this should not be of concern because "the provision should not be understood to encompass ordinary consents or transfers of financial asset-related documentation needed to facilitate customary remedies as to the collateral." Despite this statement, we believe the meaning of this condition remains unclear. We therefore request that the FDIC eliminate the condition. Alternatively, if the condition is retained, the FDIC should clarify the circumstances in which such condition would prevent an investor from exercising remedies, so that these circumstances are clear to investors, rating agencies and other market participants and can be avoided through the inclusion of appropriate requirements in the relevant securitization documents.[22]

4. The conditions to the application of the Proposed Rule safe harbors which do not relate to legal isolation should be eliminated.

One of the merits of the Original Safe Harbor was that it contained only a few conditions and they were clear and unambiguous, thus enabling investors, rating agencies and other market participants to determine with a high degree of certainty that the conditions were satisfied with finality at the closing of the securitization.

In contrast, the Proposed Rule would impose numerous conditions, many of which are subjective or can change or be reassessed after the closing date of the securitization, making it difficult to determine whether they have been satisfied and putting investors at risk of losing the benefit of the safe harbor if it is later determined that the conditions have not been satisfied. For example, the conditions require that the documents creating the securitization "clearly define" the respective contractual rights of all parties, that they use "as appropriate" any available "standardized" documentation for each different asset class, that they set forth all "necessary" rights and responsibilities of the parties, and that they provide "sufficient authority" for the parties to fulfill their respective duties and exercise their rights under the contracts. Each of these requirements requires subjective determinations that can subsequently be second-guessed with 20/20 hindsight. Similarly, the conditions require that information be disclosed at the financial asset or pool level, "as appropriate" for the financial assets, which again requires a subjective determination that can later be questioned.

The Proposed Rule also contains numerous ongoing obligations, which although satisfied at the issuance date, can cease to be complied with thereafter, thereby resulting in investors losing the benefit of the safe harbor. Among these obligations are: the risk retention obligation discussed above; the obligation of the servicer in a securitization of residential mortgage loans to mitigate losses no later than 90 days after an asset first becomes delinquent; the obligation that

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[22] The recent decision of the 11th Circuit Court of Appeals in Bank of America National Association v. Colonial Bank highlights the appropriateness of such clarification. The text of the decision can be found at http://caselaw.lp.findlaw.com/data2/circs/11th/0914739p.pdf. In that case, the FDIC successfully argued that as receiver it could cause the trustee for the investors in an asset-backed commercial paper program to adjudicate, in the FDIC's receivership claims process, their rights to the underlying collateral with no ability to exercise self-help remedies or recourse to the courts until completion of such process.

the servicer in a securitization of residential mortgage loans disclose at the time of issuance and on an on-going basis any ownership interest it or an affiliate has in other whole loans secured by the same real property that secures a loan included in the financial asset pool; the obligation of the sponsor to separately identify in its financial asset data bases the financial assets transferred into any securitization and to maintain copies of closing documents, a list of outstanding securitizations and issuing entities and recent Securities Exchange Act reports; the obligation not to sell securities issued in the securitization to an affiliate or insider; and the obligation of the sponsor not to commingle securitization collections with its own assets for more than two days.

In addition, some of the Proposed Rule's conditions run contrary to a legal conclusion that legal isolation has occurred. For example, risk retention, in the form of the proposed 5% risk retention requirement, is generally a negative factor in evaluating whether a legal true sale has occurred. Whatever risk retention requirements may ultimately be made applicable pursuant to the rulemaking process contemplated by the Financial Reform Legislation, we believe that an insolvency safe harbor rule designed to give investors, rating agencies and others comfort with respect to legal isolation should not be conditioned on factors that from a legal standpoint either alone or in combination with other factors would be regarded as weighing against legal isolation.

To be clear, we do not question that IDI securitizations should meet appropriate standards. However, we believe that it is highly doubtful that investors will purchase IDI asset-backed securities where the legal isolation of the assets backing such securities is dependent on numerous conditions that are not easily and objectively verifiable and whose satisfaction can change or be reassessed during the life of the securitization. Accordingly, we urge the FDIC to eliminate such conditions as preconditions to the availability of the safe harbor. We believe that many of the standards set forth in the proposed conditions will be imposed on IDI securitizations as a result of the Financial Reform Legislation and Proposed Regulation AB II. However, to the extent that they are not, the FDIC and the other Applicable Regulators can issue regulations and guidelines, as appropriate, and use their enforcement authority to ensure that IDIs comply with them. The penalty for failure to comply would then be on the IDI, not on investors, and the possibility of the failure to comply at any time during the life of the securitization would not discourage investors from investing in the first place.

C. Certain Other Issues.

1. The Proposed Rule's definitions should be modified to clarify that securitizations covered by the safe harbor include securitizations, such as certain asset-backed commercial paper programs, which are sponsored by entities that do not themselves transfer assets into the securitization.

In many securitization structures, the sponsor who organizes and initiates the securitization does not itself transfer assets to the issuing entity for the securitization. For example, in a typical asset-backed commercial paper program, the sponsor organizes and administers the issuer, and the issuer purchases assets from third-party sellers (who may include IDIs) into the conduit. The sponsor also generally provides liquidity or credit enhancement to

the asset-backed commercial program, but the sponsor does not typically sell assets into the program.

The Proposed Rule defines: “securitization” to mean “the issuance by an issuing entity of obligations for which the investors are relying on the cash flow or market value characteristics and the credit quality of the transferred assets (together with any external credit support permitted by [the Proposed Rule]) to repay the obligations”; “issuing entity” to mean an entity that is created at the direction of a sponsor; and “sponsor” to mean a person that organizes and initiates a securitization by transferring financial assets to an issuing entity. The Proposed Rule would therefore exclude from its coverage securitizations, such as the typical asset-backed commercial paper program, in which the sponsor does not itself transfer assets to the issuing entity. We believe this result was inadvertent. Accordingly, we request that the FDIC modify the Proposed Rule such that the issuer need not be created by a “sponsor” as defined in the Proposed Rule in order for the resulting transaction to be a “securitization” covered by the safe harbor.

2. The Proposed Rule should permit securities issued in an IDI securitization to be sold or otherwise transferred to an affiliate.

The Proposed Rule currently prohibits securities issued in an IDI securitization to be sold to an affiliate. There may be many legitimate business reasons why an IDI may want to transfer such securities to an affiliate. In the current market environment, it may be difficult for many IDIs to sell unrated or non-investment grade tranches of its securitization to a third party, and the IDI itself may not wish to retain such securities. In such a case, it would seem perfectly appropriate for the IDI to sell such tranches to an affiliate so that such affiliate, and not the IDI, retains the risk of holding the securities. In master trust structures, an IDI or one of its affiliates is required to retain an originator’s interest for rating purposes. Additionally, asset-backed securities are typically marketed through an underwriter or placement agent which, in the case of an IDI, frequently is or includes a broker-dealer affiliate of the IDI (who may also act as a market-maker for the asset-backed securities after the initial sale of the securities). As an underwriter of the securities on a firm commitment basis (which is generally the case for asset-backed securities offerings), the broker-dealer affiliate would be contractually obligated to purchase all securities and would have to retain any unsold allotment until ultimately sold.

We see no compelling regulatory reason why an IDI should be prohibited from selling or otherwise transferring its asset-back securities to an affiliate, and we therefore suggest deleting such requirement.

3. The requirement applicable to residential mortgage asset-backed securitizations that the capital structure of the securitization should be limited to no more than six tranches should be eliminated.

The Proposed Rule limits the capital structure of a residential mortgage securitization to six credit tranches that cannot include sub-tranches or other structures (other than time-based sequential pay or planned amortization sub-tranches of the most senior credit tranche). This

limit is arbitrary, and we believe this requirement unduly limits the ability of IDIs to structure their securitizations to maximize proceeds and address investor objectives and should be deleted.

4. The prohibition that a sponsor which acts as servicer, custodian or paying agent not commingle collections pending distribution to security holders except for a two-day period should be deleted from the Proposed Rule.

While SIFMA members differ on whether such a prohibition would be desirable in transactions, there is agreement that conditioning the safe harbors on this feature is inappropriate. Implementation of a blanket prohibition on commingling collections, regardless of the credit quality of the sponsor, could materially affect the economics of IDI securitizations because it would deprive IDIs of the inter-payment date float on collections, which can be significant. Given such potential impact, we believe the imposition of such a prohibition deserves further study. In any event, we believe that if some form of such prohibition is imposed, it should not be imposed as a condition to the safe harbor, where its violation could result in investors losing the safe harbor. Further, we are unaware of any issues created by this customary right for servicers to commingle collections so long as they have the requisite short-term unsecured ratings or collateralize their obligation to deposit collections at the end of a collection period. Finally, a two-day period is too limiting, because it does not take into account weekends and holidays.

5. The limitation on servicing advances should be eliminated.

The Proposed Rule would prohibit primary servicers from advancing delinquent payments of principal and interest for more than three payment periods, unless financing or reimbursement facilities are available, which may not depend on foreclosure proceeds. We believe that a limit on servicing advances is not an appropriate condition for a safe harbor. Based on input from member-investors, we also believe that investors perceive servicing advances, conditioned on a recoverability analysis, to be to their advantage. They believe that the recoverability standard provides the appropriate measurement and that conditioning safe harbor treatment on an arbitrary three payment period limit harms their interests. Accordingly, we urge the FDIC to delete this requirement.

Conclusion

In conclusion, SIFMA would like to reiterate its support for coordinated, comprehensive securitization reform and for a safe harbor rule that provides the required certainty to investors, rating agencies and other market participants. In our view, the Proposed Rule fails to achieve either goal. For that reason, SIFMA requests that the FDIC extend the Interim Safe Harbor Rule until the FDIC, in conjunction with the other Applicable Regulators, promulgates final regulations under the Financial Reform Legislation. At that time the FDIC can assess whether such regulations, together with progress that the SEC has made on the new disclosure requirements contained in Proposed Regulation AB II, provide a satisfactory unified framework for comprehensive securitization reform. Assuming such a determination is made, we would hope that the Proposed Rule could be revised to provide a safe harbor rule which is de-linked from securitization reform and contains the features suggested in this comment letter.

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SIFMA thanks the FDIC for providing it with the opportunity to comment on the Proposed Rule. If you have any questions concerning these comments or would like to discuss these comments further, please contact Christopher Killian, Vice President, Securitization Group, at (212) 313-1126 or via e-mail at ckillian@sifma.org, or our outside counsel on this matter, Daniel M. Rossner of Sidley Austin LLP at (212) 839-5533.

Sincerely,

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