February 22, 2010

*VIA E-MAIL: **comments@fdic.gov***

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

Re: Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation After March 31, 2010 (RIN 3064–AD55)

Ladies and Gentlemen:

The American Securitization Forum (the "ASF")[1] appreciates the opportunity to submit this letter in response to the request of the Federal Deposit Insurance Corporation (the "FDIC") for comments regarding its Advance Notice of Proposed Rulemaking entitled "Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation After March 31, 2010" (the "ANPR"). We value the FDIC's ongoing support for sustainable securitization and appreciate its efforts to further dialogue regarding targeted reforms in our market. We also appreciate the FDIC's continued recognition that the legal isolation safe harbor serves as a "central component of securitization" and provides necessary assurances to investors that securitized assets will not be "interfered with by the FDIC as conservator or receiver." The ASF agrees that a legal isolation safe harbor is critical to reestablishing an active and sustainable securitization market but we are concerned that the conditions set forth in the ANPR could greatly inhibit its effectiveness and the restart of the market.

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[1] The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 340 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. The ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com.

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I. EXECUTIVE SUMMARY

BENEFITS OF SECURITIZATION AND CURRENT INDUSTRY REFORMS. Securitization plays an essential role in the financial system and the broader U.S. economy and provides many benefits, including efficiency of financing, incremental credit creation, credit cost reduction, liquidity creation and risk transfer. Recent data collected by the Federal Reserve Board shows that securitization has provided over 25% of outstanding U.S. consumer credit.[2] In addition, small businesses, which employ approximately 50% of the nation's workforce, depend on securitization to supply credit that is used to pay employees, finance inventory and investment, and other business purposes. The ASF has been a strong advocate for targeted reforms in this critical market and we continue to work constructively with policymakers to identify and implement them. The ASF has introduced numerous reforms through ASF Project RESTART[3], a broad-based industry initiative that develops commonly accepted and detailed standards for transparency, disclosure and diligence. Through Project RESTART, the ASF has developed loan-level Disclosure and Reporting Packages, a unique identification number for tracking assets called the ASF LINC™, the ASF RMBS Bond-Level Reporting Package, and the ASF Model RMBS Representations and Warranties. The ASF will also be developing model repurchase provisions, model servicing provisions and due diligence standards throughout 2010.

IMPORTANCE OF AN EFFECTIVE FDIC SAFE HARBOR. The ASF and its membership strongly oppose linking a determination of whether financial assets have been legally isolated to preconditions addressing capital structure, disclosure, documentation, origination and compensation. Most of the preconditions set forth in the ANPR have no relevance for a traditional sale or security interest analysis. Under the ANPR, investors will bear the burden of the loss of the safe harbor if any of the securitization preconditions are not satisfied by the issuer or sponsor. This result is diametrically opposed to the primary goal of the safe harbor noted in the ANPR, namely, "that investors could look to securitized financial assets for payment without concern that the financial assets would be interfered with by the FDIC as conservator or receiver." Instead, an effective safe harbor should have clearly defined conditions that can be assessed by all of the participants in the transaction and, if met at the time of the issuance of the relevant securities, should provide benefits that continue for the life of the securities. A separation of the securitization requirements from the safe harbor is necessary to provide sufficient comfort to investors who should bear risks associated with the assets underlying a securitization but not risks associated with the originator.

ADOPT SECURITIZATION REFORM ON INTERAGENCY BASIS. We are concerned about the potential impact of multiple layers of securitization legislation and regulation without coordination among legislators and regulators. The imposition by the FDIC of preconditions to the legal isolation safe harbor in advance of the legislative process, and on a unilateral rather than interagency basis, could result in multiple and possibly competing requirements for U.S. insured depository institutions that are securitizers. If the requirements for

[2] Federal Reserve Board of Governors, "G19: Consumer Credit," (September 2009), www.federalreserve.gov/releases/g19/current/g19.htm.
[3] For more information on ASF Project RESTART, see www.americansecuritization.com/restart.

securitization by U.S. insured depository institutions are more restrictive or onerous than those for other entities engaging in securitizations, those requirements will pose an undue burden for U.S. insured depository institutions. For example, there theoretically could be two different retention requirements imposed in the U.S. on insured depository institutions: one imposed by the FDIC as a precondition to the safe harbor and a second imposed by regulators through regulatory reform legislation. Furthermore, under new regulatory capital rules, U.S. insured depository institutions will be required to maintain risk based capital as if there had been no risk transfer through securitization on the basis that they have *retained too much risk*. At the same time, they would be required under the ANPR to retain at least 5% of the credit risk of the transferred assets *to assure a sufficient exposure to risk* to encourage improved underwriting of loans. Combined, these seemingly contradictory regulations will force U.S. insured depository institutions to face a reduction in potential financing for their assets through securitization at the same time they would be bearing the cost of increased capital requirements. Furthermore, as discussed in this letter, we believe that there are more effective ways to promote asset quality than a blanket, one-size-fits-all retention requirement.

REFORMS WILL COLLECTIVELY IMPEDE SECURITIZATION. By imposing blanket requirements such as 5% risk retention, financial asset-level and other modified disclosure across all asset classes, limits on the number of tranches, compensation restrictions and a twelve-month seasoning requirement for RMBS transactions, the ANPR would fundamentally change the economics of securitization. Imposing these changes risks an adverse impact that most significantly could be the elimination of securitization in some sectors. U.S. insured depository institutions that no longer have the accounting and regulatory capital benefits associated with securitization will carefully analyze the additional costs imposed by the new requirements. Ultimately, if the aggregate burden for U.S. insured depository institutions is too great, it could prevent them from reengaging in the securitization market and force them to rely on deposits or other sources of funding. Without securitization, U.S. insured depository institutions may find it increasingly difficult to transfer assets, which could expose the Deposit Insurance Fund to unnecessary risk. Furthermore, these events would likely prolong the unavailability of credit for consumers and small businesses.

INCLUDE SAFE HARBOR FOR TRANSACTIONS WITH ENFORCEABLE SECURITY INTEREST. In light of the amendments to FAS 166 and 167, the requirement that a transfer of assets meet the requirement for sale accounting treatment will mean that very few securitizations will meet the traditional safe harbor now set forth in Section (d)(3) of the ANPR. For this reason, many securitizations will seek to rely on the alternative safe harbor set forth in Section (d)(4) of the ANPR. However, Section (d)(4) creates a new approach that would limit investors solely to the exercise of their remedies as secured creditors. This approach is untested, complex, subject to serious objections by investors, and very difficult to implement at a technical level. We propose a simpler and more reliable alternative under which the FDIC will not seek to reclaim or recover the assets transferred by the U.S. insured depository institution in connection with a securitization, provided that the transferred assets are subject to a legally enforceable and perfected security interest. We think that this is a simple and elegant solution that would provide investors with an effective safe harbor while safeguarding the interests of the FDIC as conservator or receiver.

II. INTRODUCTION

Since 2000, the FDIC has provided safe harbor protections to securitizations by confirming that in the event of a bank failure, the FDIC would not attempt to reclaim assets transferred into a securitization if an accounting sale had occurred. On June 12, 2009, the Financial Accounting Standards Board ("FASB") published Financial Accounting Statements No. 166 and No. 167 ("FAS 166 and 167") to go into effect on November 15, 2009. FASB's statements modified generally accepted accounting principles ("GAAP") and sparked concern among the ASF and its members as to (i) whether the FDIC's existing legal isolation safe harbor provision would apply to securitizations that met the requirements of such provision under GAAP in effect prior to November 15, 2009 and (ii) how the safe harbor provision should be modified for future securitizations. On August 26, 2009, the ASF submitted to the FDIC proposed changes to the legal isolation safe harbor that would allow existing and future securitization transactions to have the benefits of the safe harbor following the effectiveness of the new accounting standards.[4] After additional discussion, the ASF submitted a follow-up proposal to the FDIC on September 18, 2009 containing both a potential "Sale Approach" and a "Security Interest Approach" to the safe harbor.[5]

On November 12, 2009, the Board of Directors of the FDIC (the "Board") adopted an Interim Final Rule entitled "Defining Safe Harbor Protection for Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation" (the "Interim Final Rule"), and confirmed that, at least until March 31, 2010 (the "Transition Period"), the existing safe harbor provision would apply to participations or securitizations for which financial assets were transferred if such transfer satisfied the conditions for sale accounting treatment set forth by GAAP in effect for reporting periods before November 15, 2009 (the "Transitional Safe Harbor"). The FDIC also indicated at that time that it would publish in December 2009 a Notice of Proposed Rulemaking regarding the treatment of participations and securitizations issued after March 31, 2010. On December 15, 2009, the FDIC issued the ANPR, which requested comment "on the standards that should be adopted to provide safe harbor treatment" after March 31, 2010, and sample regulatory text (the "Sample Regulatory Text") to "provide context for the responses to the questions posed."

On January 4, 2010, the ASF and its members submitted a letter[6] solely to address whether the Transition Period set forth in the Interim Final Rule is an appropriate length of time to implement the conditions identified in the ANPR. In that letter, the ASF indicated that securitization issuers, in particular residential mortgage-backed securities ("RMBS") issuers, believe that the proposed Transition Period would not be nearly enough time to ensure that securitizations can meet the proposed criteria. In addition, we noted that the substantial time required by the FDIC to consider the extensive comments submitted by market participants regarding the ANPR and the eventual Notice of Proposed Rulemaking, and the additional

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[4] See www.americansecuritization.com/uploadedFiles/ASF_Proposed_FDIC_Legal_Isolation_Revisions_8-26-09.pdf.
[5] See www.americansecuritization.com/uploadedFiles/ASF_Proposal_FDIC_Stmt_of_Policy091809.pdf.
[6] See www.americansecuritization.com/uploadedFiles/ASFFDICCommentLetterreSafeHarbor010409.pdf.

time required to formulate appropriate preconditions to a new safe harbor and to allow issuers sufficient time to meet the requirements of that safe harbor would effectively require a substantial lengthening of the Transition Period. In our letter, we requested that the FDIC extend the Transition Period to 6-12 months after the date on which the final safe harbor rule is published in the *Federal Register*.[7] We reiterate our request that an extension of the Transition Period be granted as soon as possible to minimize disruption to potential issuance in April 2010 and beyond.

As set forth throughout this response letter (the "Response Letter"), the ASF and its membership strongly oppose linking a determination of whether financial assets have been legally isolated to preconditions addressing capital structure, disclosure, documentation, origination and compensation. Most of the preconditions set forth in the Sample Regulatory Text have no relevance for a traditional sale or security interest analysis. We encourage the FDIC to adopt a safe harbor with clear bright line conditions that can be measured once, at the time of issuance, to allow investors and other market participants to rely upon the safe harbor without fear that its benefits could disappear at any time. The inclusion of the securitization preconditions in the legal isolation safe harbor allocates the greatest risk from noncompliance to investors who face the loss of legal isolation protection from a U.S. insured depository institution's receivership when that institution fails to live up to its obligations. A separation of the securitization requirements from the safe harbor is necessary to provide sufficient comfort to investors, who should bear risks associated with the assets underlying a securitization but not risks associated with the originator.

III. ASF MEMBERSHIP AND THE FDIC WORKING GROUP

The ASF is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 340 firms, including investors, mortgage and consumer credit lenders and securitization issuers, financial intermediaries, legal and accounting firms, and other professional organizations involved in the securitization markets. Our members represent the securitization industry across all of its constituencies and are at the forefront of industry changes and developments. The ASF and its membership were the first market participants to act upon recognition that the introduction of FAS 166 and 167 would impact the FDIC's existing legal isolation safe harbor and, as noted above, proposed solutions to the FDIC. The FDIC's later release of the Interim Final Rule eased the concerns of many market participants regarding most outstanding securitizations but it left open the question of how the safe harbor would be applied to future securitizations (or issuances in the case of securitizations involving master trusts) and our membership anxiously awaited the release of the ANPR.

When the FDIC released the ANPR, ASF Staff began devising the process by which an extensive and detailed response on behalf of the securitization industry could be formulated. To facilitate a representative and efficient development process, the ASF assembled a broad-

[7] Please see our response to question 2 of the ANPR for further discussion of this issue.

based working group (the "FDIC Working Group") to aid in the development of this Response Letter. The FDIC Working Group consists of current members of ASF committees and subforums who are particularly interested in, and have intimate knowledge of, the safe harbor and its impact on securitization, including credit card, RMBS and auto issuers, investors, outside counsel, rating agencies, servicers and financial intermediaries. The ASF also solicited input and comment from the broader ASF committees and subforums to facilitate a more fulsome industry-wide response. What results is a Response Letter encompassing the comments and views of our membership on the role of securitization, current industry initiatives, regulatory reform, the safe harbor, the questions posed by the ANPR and the Sample Regulatory Text.

IV. The Role And Importance of Securitization to the Financial System and U.S. Economy

Background and History

In order to understand the full impact that the conditions set forth in the ANPR will have on the securitization industry, it is important to describe exactly what securitization means to the U.S. and world economies. Securitization generally refers to the process by which consumer and business assets are pooled and securities, the payment of which depends primarily on the performance of those underlying assets, are issued in the capital markets.

Securitization plays an essential role in the financial system and the broader U.S. economy. Over the past 25 years, securitization has grown from a relatively small and unknown segment of the financial markets to a mainstream source of credit and financing for individuals and businesses, representing a vital sector of today's financial markets. The first collateralized mortgage obligations (the predecessor securities to today's mortgage-backed securities) were issued in June 1983 by Freddie Mac and were rapidly replicated by private industry as investors recognized the flexible nature of the obligations and demanded increased issuance thereof. Between 1990 and 2006, issuance of mortgage-backed securities grew at an annually compounded rate of 13%, from $259 billion to $2 trillion a year.[8] In the same time period, issuance of asset-backed securities ("ABS") secured by auto loans, credit cards, home equity loans, equipment loans, student loans and other assets, grew from $43 billion to $753 billion.[9] In 2006, just before the downturn, nearly $2.9 trillion in mortgage- and asset-backed securities were issued. The importance of securitization becomes even more evident by observing the significant proportion of consumer credit it has financed in the U.S. It is estimated that securitization has funded between 30% and 75% of lending in various markets, including an estimated 59% of outstanding home mortgages.[10]

[8] National Economic Research Associates, Inc. (NERA), "Study of the Impact of Securitization on Consumers, Investors, Financial Institutions and the Capital Markets," pg. 16 (June 2009), www.americansecuritization.com/uploadedFiles/ASF_NERA_Report.pdf.
[9] SIFMA, "U.S. ABS Issuance," www.sifma.org/uploadedFiles/Research/Statistics/SIFMA_USABSIssuance.pdf.
[10] Citigroup, "Does the World Need Securitization?" pg. 10-11 (Dec. 2008), www.americansecuritization.com/uploadedFiles/Citi121208_restart_securitization.pdf.

Securitization plays a critical role in non-mortgage consumer credit as well. Historically, most banks have securitized 50-60% of their credit card assets.[11] Meanwhile, in the auto industry, a substantial portion of automobile sales are financed through auto ABS.[12] Overall, recent data collected by the Board of Governors of the Federal Reserve System (the "Federal Reserve Board") show that securitization has provided over 25% of outstanding U.S. consumer credit.[13] Securitization also provides an important source of commercial mortgage loan financing throughout the U.S., through the issuance of commercial mortgage-backed securities ("CMBS").

Benefits of Securitization

Over the years, securitization has grown in large measure because of the benefits and value it delivers to transaction participants and to the financial system. Among these benefits and value are the following:

- **Efficiency and Cost of Financing**. By linking financing terms to the performance of a discrete asset or pool of assets, rather than to the future profitability or claims-paying potential of an operating company, securitization often provides a cheaper and more efficient form of financing than other types of equity or debt financing.

- **Incremental Credit Creation**. By enabling capital to be recycled via securitization, lenders can obtain additional funding from the capital markets that can be used to support incremental credit creation. In contrast, loans that are made and held in a financial institution's portfolio occupy that capital until the loans are repaid.

- **Credit Cost Reduction**. The economic efficiencies and increased liquidity available from securitization can serve to lower the cost of credit to consumers. Several academic studies have demonstrated this result. A recent study by National Economic Research Associates, Inc., concluded that securitization lowers the cost of consumer credit, reducing yield spreads across a range of products including residential mortgages, credit card receivables and automobile loans.[14]

- **Liquidity Creation**. Securitization often offers issuers an alternative and cheaper form of financing than is available from traditional bank lending, or debt or equity financing. As a result, securitization serves as an alternative

[11] Ibid., pg. 10.
[12] Ibid., pg. 10.
[13] Board of Governors of the Federal Reserve System, "G19: Consumer Credit," (September 2009), www.federalreserve.gov/releases/g19/current/g19.htm.
[14] National Economic Research Associates, Inc. (NERA), "Study of the Impact of Securitization on Consumers, Investors, Financial Institutions and the Capital Markets," (June 2009), pg. 16, www.americansecuritization.com/uploadedFiles/ASF_NERA_Report.pdf.

and complementary form of liquidity creation within the capital markets and primary lending markets.

- **Risk Transfer**. Securitization allows entities that originate credit risk to transfer that risk to other parties throughout the financial markets, thereby allocating that risk to parties willing to assume it.

- **Customized Financing and Investment Products**. Securitization technology allows for precise and customized creation of financing and investment products tailored to the specific needs of issuers and investors. For example, issuers can tailor securitization structures to meet their capital needs and preferences and diversify their sources of financing and liquidity. Investors can tailor securitized products to meet their specific credit, duration, diversification and other investment objectives.[15]

Government Recognition of the Importance of Securitization

Recognizing these and other benefits, policymakers globally have taken steps to help encourage and facilitate the recovery of securitization activity. The G-7 finance ministers, representing the world's largest economies, declared that "the current situation calls for urgent and exceptional action…to restart the secondary markets for mortgages and other securitized assets."[16] The U.S. Department of the Treasury (the "Treasury Department") stated last March that "while the intricacies of secondary markets and securitization…may be complex, these loans account for almost half of the credit going to Main Street,"[17] underscoring the critical nature of securitization in today's economy. In 2008, the Chairman of the Federal Reserve Board noted that securitization "provides originators much wider sources of funding than they could obtain through conventional sources, such as retail deposits" and also that "it substantially reduces the originator's exposure to interest rate, credit, prepayment, and other risks."[18] Echoing that statement, Federal Reserve Board Governor Elizabeth Duke stated in September 2009 that the "financial system has become dependent upon securitization as an important intermediation tool,"[19] and the International Monetary Fund (the "IMF") noted in its *Global Financial Stability Report* issued in October 2009 that "restarting private-label securitization markets, especially in the United States, is

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[15] The vast majority of investors in the securitization market are institutional investors, including banks, insurance companies, mutual funds, money market funds, pension funds, hedge funds and other large pools of capital. Although these direct market participants are institutions, many of them—pension funds, mutual funds and insurance companies, in particular—invest on behalf of individuals, in addition to other account holders.

[16] G-7 Finance Ministers and Central Bank Governors Plan of Action (Oct. 10, 2008), www.treas.gov/press/releases/hp1195.htm.

[17] U.S. Department of the Treasury, "Road to Stability: Consumer & Business Lending Initiative," (March 2009), www.financialstability.gov/roadtostability/lendinginitiative.html.

[18] Bernanke, Ben S., "Speech at the UC Berkeley/UCLA Symposium: The Mortgage Meltdown, the Economy, and Public Policy, Berkeley, California." *Board of Governors of the Federal Reserve System* (Oct. 2008), www.federalreserve.gov/newsevents/speech/bernanke20081031a.htm.

[19] Duke, Elizabeth A., "Speech at the AICPA National Conference on Banks and Savings Institutions, Washington, D.C." *Board of Governors of the Federal Reserve System* (Sept. 2009), www.federalreserve.gov/newsevents/speech/duke20090914a.htm.

critical to limiting the fallout from the credit crisis and to the withdrawal of central bank and government interventions."[20] There is clear recognition in the official sector of the importance of the securitization process and the access to financing that it provides lenders, and of its importance to the availability of credit that ultimately flows to consumers, businesses and the real economy.

Restoration of function and confidence to the securitization markets is a particularly urgent need, in light of capital and liquidity constraints currently confronting financial institutions and markets globally. With the process of bank de-leveraging and balance sheet reduction still underway, and with increased bank capital requirements on the horizon, the funding capacity previously provided by securitization cannot be replaced with deposit-based financing alone in the current or foreseeable economic environment. In October 2009, the IMF estimated that a financing "gap" of $440 billion will exist between total U.S. credit capacity available for the nonfinancial sector and U.S. total credit demand from that sector for the year 2009.[21] Moreover, non-bank finance companies, which have played an important role in providing financing to consumers and small businesses, are particularly reliant on securitization to fund their lending activities, since they do not have access to deposit-based funding. Small businesses, which employ approximately 50% of the nation's workforce, depend on securitization to supply credit that is used to pay employees, finance inventory and investment, and other business purposes. A lack of financing for mortgages hampers the housing industry. A constriction of trade receivable financing can adversely affect employment opportunities in the manufacturing sector. Simply put, the absence of a properly functioning securitization market, and the funding and liquidity this market has historically provided, adversely impacts consumers, businesses, financial markets and the broader economy. The recovery and restoration of confidence in securitization is therefore a necessary ingredient for economic growth to resume, and for that growth to continue on a sustained basis into the future.

V. INDUSTRY IMPROVEMENTS TO THE SECURITIZATION MARKET INFRASTRUCTURE

ASF Project RESTART

The ASF has been a strong and vocal advocate for targeted securitization market reforms and we continue to work constructively with policymakers to identify and implement them. We believe that any reforms to the securitization market need to be considered and implemented on an interagency basis to ensure that there is a level playing field for all market participants. The ASF is also actively identifying, designing and implementing numerous industry-driven market standards and practice improvements to rebuild and strengthen the securitization infrastructure. It is important that any reform of the securitization market impose mechanisms to encourage appropriate extension of credit to deserving borrowers while not

[20] International Monetary Fund, "Restarting Securitization Markets: Policy Proposals and Pitfalls." *Global Financial Stability Report: Navigating the Financial Challenges Ahead* (Oct. 2009), pg.33, www.imf.org/external/pubs/ft/gfsr/2009/02/pdf/text.pdf.
[21] International Monetary Fund, "The Road to Recovery." *Global Financial Stability Report: Navigating the Financial Challenges Ahead* (Oct. 2009), pg. 29, www.imf.org/external/pubs/ft/gfsr/2009/02/pdf/text.pdf.

going so far as to inhibit the many benefits of securitization outlined above. With this ultimate goal of industry self-assessment and self-policing in mind, the ASF launched its Project on Residential Securitization Transparency and Reporting ("Project RESTART" or the "Project")[22], which is a broad-based industry-developed initiative to help rebuild investor confidence in mortgage and asset-backed securities, restore capital flows to the securitization markets, enhance market lending discipline and, ultimately, increase the availability of affordable credit to all Americans. The Project has sought to identify areas of improvement in the process of securitization and refashion, in a comprehensive and integrated format, the critical aspects of securitization with market-based solutions and expectations. It has been recognized by senior policymakers and market participants as a necessary industry initiative to improve the securitization process by developing commonly accepted and detailed standards for transparency, disclosure and diligence that each appropriate market participant will be recommended to implement.

The origins of Project RESTART begin in the fall of 2007, when a number of RMBS market participants began meeting to explore market challenges and identify potential areas of improvement. In early 2008 at ASF's annual industry conference, a broad-based group of ASF members comprised of critical transaction parties came together to develop the core concepts and objectives of the Project. Subsequently, in its March 2008 Policy Statement on Financial Market Developments, the President's Working Group (the "PWG") on the Financial Markets recommended that the ASF develop templates for disclosure in securitization that support efforts to improve market discipline.[23] The Project's objectives were further accelerated by and are directly responsive to the PWG's request. On June 24, 2008, Acting Under Secretary for Domestic Finance Anthony W. Ryan announced that the PWG had engaged the ASF as the private sector group to develop best practices regarding disclosure to investors in securitized credits.[24] Since its inception, ASF members participating actively in the Project include institutional investors, issuers, originators, financial intermediaries, servicers, rating agencies, due diligence professionals, trustees, outside counsel, outside consultants, data modelers and vendors, as well as ASF's professional staff.

ASF RMBS Disclosure and Reporting Packages

On July 15, 2009, the ASF released final versions of the first two deliverables of the Project, a disclosure package of loan-level information to be provided by issuers prior to the sale of private-label RMBS transactions (the "ASF RMBS Disclosure Package" or the "Disclosure Package") and a reporting package of loan-level information to be updated on a monthly basis by RMBS servicers throughout the life of an RMBS transaction (the "ASF RMBS

[22] For more information on Project RESTART, see www.americansecuritization.com/restart.
[23] "Policy Statement on Financial Market Developments," The President's Working Group on Financial Markets (March 2008), page 13. See www.ustreas.gov/press/releases/reports/pwgpolicystatemktturmoil_03122008.pdf.
[24] Assistant Secretary Anthony W. Ryan, Remarks at Euromoney's Global Borrowers Investors Forum (June 24, 2008). See www.treas.gov/press/releases/hp1053.htm.

Reporting Package" or the "Reporting Package").[25] Both of these packages increase and standardize critical data at issuance and throughout the life of a transaction, which will enable investors to better perform deal and loan-level analysis on the basis of the credit quality of the underlying mortgage loans. By increasing data and standardizing available information, institutional investors will be able to better distinguish pools of high quality loans from lesser quality pools. The resulting differentiation will produce greater market discipline, as market forces will serve to reward originators who deliver higher quality packages of mortgage loans, while penalizing those who do not. In addition, by giving owners of outstanding RMBS and potential purchasers of outstanding RMBS more expansive and robust information on the performance of the loans in existing pools, this new transparency should appreciably aid moving distressed assets from troubled institutions to purchasers better able to bear the credit risk of those assets and generate much needed secondary market liquidity.

The ASF believes that the release of the Disclosure and Reporting Packages is an important step forward in restarting the securitization markets. The release is also timely given the Administration's proposals for regulating financial markets. On June 17, 2009, the Treasury Department released a proposal titled "Financial Regulatory Reform," which states that the "SEC should continue its efforts to increase the transparency and standardization of securitization markets and be given clear authority to require robust reporting by issuers of asset backed securities (ABS)" and that "[i]nvestors and credit rating agencies should have access to the information necessary to assess the credit quality of the assets underlying a securitization transaction at inception and over the life of the transaction, as well as the information necessary to assess the credit, market, liquidity, and other risks of ABS."[26] About a month later, the Administration followed its Financial Regulatory Reform proposal with proposed legislation that sought to implement the recommendations contained in the broader proposal.[27] Since then, separate versions of this legislation were released as discussion drafts by members of the Senate Banking Committee[28] and the House Financial Services Committee, with the latter being incorporated into the Wall Street Reform and Consumer Protection Act of 2009 which was recently passed by the House.[29] Each of these bills specifically calls for issuers of ABS to disclose "asset-level or loan-level data necessary for investors to independently perform due diligence." The ASF and its members believe that implementation of the Disclosure and Reporting Packages by market participants will achieve the objectives of the Treasury Department proposals for RMBS as well as satisfy the general disclosure requirements of the proposed legislation.

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[25] For more information on the Disclosure and Reporting Packages, see www.americansecuritization.com/uploadedFiles/ASF_Project_RESTART_Final_Release_7_15_09.pdf.

[26] "Financial Regulatory Reform, A New Foundation: Rebuilding Financial Regulation and Supervision," U.S. Department of the Treasury, pages 44-45. See www.financialstability.gov/docs/regs/FinalReport_web.pdf.

[27] The provisions of the proposed legislation relating to securitization can be found at www.treasury.gov/press/releases/reports/title%20ix%20subt%20e%20securitization%207222009%20fnl.pdf.

[28] See Title IX, Subtitle D "Improvements to the Asset-Backed Securitization Process" at http://banking.senate.gov/public/_files/AYO09D44_xml.pdf.

[29] See Title I, Subtitle F "Improvements to the Asset-Backed Securitization Process" at http://financialservices.house.gov/Key_Issues/Financial_Regulatory_Reform/FinancialRegulatoryReform/hr4173eh.pdf.

ASF LINC™

In connection with the development of the Disclosure and Reporting Packages, the ASF also created a unique loan identification number, known as the ASF LINC™, for securitization reporting purposes to facilitate the monitoring of mortgage loans from origination through the securitization process. One of the problems in the securitization market has been the inconsistent fashion in which loans have been identified. In a typical securitization, the originator, primary servicer, master servicer and trustee could all assign different numbers to identify the loan on each particular system. Implementation of the ASF LINC™ remedies this problem by assigning numbers that will be standard across the entire industry, enabling market participants to track a loan throughout its life regardless of who holds legal title to or services it at any particular time. The ASF LINC™ will be linked to information contained in an industry data repository, which will assemble massive amounts of data in one place and enable market participants to easily access a particular loan's characteristics. The data repository will contain all of the information from the Disclosure and Reporting Packages and will create a gateway between market participants and borrower credit information and, potentially, subordinate lien information, each of which has been mostly unavailable due to privacy concerns. The ASF LINC™ would enable market participants from across the globe to access information about mortgage loans, regardless of where or when they were securitized.

ASF Model RMBS Representations and Warranties

The ASF also believes that one of the drivers of future success of the RMBS market will be an increase in the standardization of the agreements governing transactions. Capital commitment decisions by loan originators, financial intermediaries and fixed-income investors, as well as risk assessments by rating agencies, are more easily and efficiently made when contractual provisions are relatively consistent across issuers. Increased standardization in a securitization transaction creates additional liquidity in the market because the due diligence process required to make an investment decision becomes more efficient. For example, the type and form of representations and warranties in past transactions varied greatly, and investors have often complained about a lack of transparency of the representations and warranties given across issuers. A broad-based working group, consisting of issuers, originators, rating agencies, financial guarantors, primary mortgage insurance companies and investors, met extensively to address those concerns by providing a baseline set of representations and warranties for RMBS transactions and a more transparent process for determining whether departures from that baseline have occurred in a given transaction.

After releasing a broad request for comment in the summer of 2009, the ASF released on December 15, 2009 the final version of a model set of representations and warranties for RMBS transactions (collectively, the "ASF Model RMBS Representations and Warranties" or the "Model Reps")[30], which is the third deliverable of Project RESTART. The Model

[30] For more information on the ASF RMBS Model Representations and Warranties, see www.americansecuritization.com/uploadedFiles/ASF_Project_RESTART_Reps_and_Warranties_121509.pdf.

Reps have been developed to more clearly allocate origination risks between issuers and investors and provide enhanced investor protections over what had been previously provided in "pre-crisis" transactions. The Model Reps seek to allocate these risks in light of the originator's ability to monitor, process and verify critical borrower and loan information. The Model Reps provide enhancements to the traditional representations and warranties provided in RMBS transactions while also enabling investors to more easily and better assess the allocation of origination risk in a given transaction by making the provision of representations and warranties more transparent. Given the importance of enhancement and standardization of representations and warranties to restoring investor confidence in the RMBS markets, the development of the Model Reps is an important phase of the Project and vital to drawing investor capital back to the residential securitization industry.

ASF Model RMBS Repurchase Provisions

The ASF is aware that a standardized set of representations and warranties is only half of the equation. For these Model Reps to be effective, the repurchase process in place for breaches would need to be reformulated. In most existing transactions, pooling and servicing agreements ("PSAs") call for the trustee or another specified party to demand repurchase when defects have been discovered. Throughout the development of the Model Reps, many deficiencies in the current repurchase process were raised by investors, who believe that most PSAs do not provide a strong enforcement mechanism for the party making the repurchase demand and also do not clearly provide sufficient means and guidance needed to enable the party enforcing a repurchase obligation to pursue such matters. In a benign economy, these inadequacies are far less significant because the loans in a pool generally perform well and repurchase demands are minimal. However, the current economic situation has caused a significant increase in loan defaults, and the ensuing increase in repurchase demands has required depositors and loan sellers to contest repurchase demands where appropriate. In light of these issues, members of Project RESTART have begun developing a uniform set of procedures (the "ASF Model RMBS Repurchase Provisions" or the "Model Repurchase Provisions") to enforce the Model Reps by, among other things, clearly delineating the roles and responsibilities of transaction parties in the repurchase process and allowing greater access[31] into the mortgage loan files so that breaches can be discovered. The Model Repurchase Provisions will be the fourth deliverable of Project RESTART and ASF hopes to release a request for comment in the next few months.

Other Initiatives

On November 10, 2009, the ASF released for comment the proposed ASF RMBS Bond-Level Reporting Package (the "Bond-Level Reporting Package").[32] The proposed package consists of 28 data fields that provide enhanced and standardized reporting of bond-level information throughout the life of an RMBS transaction. Standardization of trustee reports

[31] Providing greater access to the mortgage loan files will create many challenges including, among other things, how to balance the need to discover and remedy breaches with concerns relating to cost and certain privacy and legal issues.

[32] For more information on the ASF RMBS Bond-Level Reporting Package, see www.americansecuritization.com/uploadedFiles/ASFProjectRESTART_RMBSTrusteeRFC_Nov2009.pdf.

would provide investors and rating agencies with consistent fields of information across issuers and enable them to efficiently review bond performance information. In addition, it is expected that the bond information contained in the Bond-Level Reporting Package will be integrated with the loan information contained in the ASF RMBS Disclosure and Reporting Packages through a link created between the CUSIP for each bond and the industry-wide loan identifier, the ASF LINC™. This linkage will enable investors and rating agencies to easily acquire information about the specific loans underlying a particular bond.

The ASF will also be producing model servicing provisions for PSAs which will create more standardized documentation provisions and work rules in key areas, such as loss mitigation procedures that servicers may employ in dealing with delinquent or defaulting loans, and will release standards for pre-securitization due diligence, including originator reviews, in order to create market confidence in the adequacy of the mortgage origination and underwriting process and the data provided to market participants through the Disclosure Package. Finally, although the initial focus of Project RESTART has been on the private-label RMBS market which required the most serious transparency enhancements, similar efforts may be pursued over time in other major asset classes such as credit card, student loan and automobile securitizations, as the need arises.

VI. LEGISLATIVE AND REGULATORY CONCERNS

Reform Proposals and the Need for a Coordinated Approach

The ANPR has been released at a time when both houses of the U.S. Congress are active in adopting or proposing financial services legislation that includes securitization specific provisions, and the Securities and Exchange Commission (the "SEC") has announced that it is undertaking a review of its securitization disclosure requirements as well. In addition, securitization issues have been addressed by the European Parliament and other international legislative and regulatory bodies. New rules and proposals with respect to rating agencies, derivatives, and financial institutions will also add costs to the execution of traditional securitizations.[33] While acknowledging that legislators and regulators at many levels have an interest in addressing past securitization problems, we are concerned about the impact of multiple layers of securitization legislation and regulation. If each interested regulatory body adopts a separate proposal to address concerns with past securitization practices, the fragile securitization markets face the threat of regulatory overload. Legislative or regulatory changes may require U.S. insured depository institutions to make systems changes as well as documentation changes. These changes can be very costly. Successive waves of securitization regulation and legislation will compound those costs and will inevitably slow down the restart of the securitization markets. One potential outcome will be issuers exiting the market when an initial set of securitization rules is adopted and then waiting for any

[33] For instance, under rules recently adopted by the SEC, with a compliance date of June 2, 2010, issuers of rated asset-backed securities are obligated to establish password protected websites to post all information provided to a hired rating agency during a ratings process and then allow that information to be accessed by non-hired rating agencies.

remaining legislation and regulation to be adopted before making necessary adjustments to their securitization program. Ultimately, if the aggregate burden for U.S. insured depository institutions is too great, it could lead them to significantly reduce the amount of their securitization activities or abandon securitization altogether and rely on deposits as an alternative source of funding.[34] This would likely lead to a contraction of available credit for consumer finance where securitization has provided a significant source of funding, including mortgage loans, auto loans and leases, small business loans and credit cards.

The legislation adopted by the U.S. House of Representatives[35] addresses risk retention, ongoing reporting requirements, disclosure requirements and representations and warranties.[36] There is significant overlap between the House legislation and the matters covered by the ANPR. In many instances, the legislation would require the appropriate agencies to prescribe implementing regulations. A natural progression would be for the legislative process to be completed followed by the development of responsive regulations in accordance with the mandate set out in the legislation. The imposition by the FDIC of preconditions to the legal isolation safe harbor in advance of this legislative process, and on a unilateral rather than interagency basis, could result in multiple requirements for U.S. insured depository institutions that are securitizers. For instance, there theoretically could be two different retention requirements imposed in the U.S. on insured depository institutions: one imposed by the FDIC as a precondition to the legal isolation safe harbor and the second imposed by Congress as part of federal legislation and implementing regulations. Those retention requirements could be structured differently and implemented at different points in time. This would be disadvantageous for U.S. insured depository institutions relative to other securitizers. In general, securitization reforms that apply only to U.S. insured depository institutions will have a disparate impact on those entities. If the requirements for securitization by U.S. insured depository institutions are significantly more restrictive or onerous than those for other entities engaging in securitizations, those requirements will pose an undue burden for U.S. insured depository institutions. We therefore believe that any regulation of securitization should be implemented following the adoption of any securitization legislation that may be enacted at the federal level and addressed on an interagency basis with reference to global initiatives.

The legislation adopted by the House would require the SEC to adopt new disclosure requirements. In addition, the SEC has announced that it has initiated a review of its ABS disclosure requirements.[37] Disclosure requirements with respect to offerings of ABS are

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[34] A recent *Global Financial Stability Report* issued by the International Monetary Fund states: "While most of the current proposals are unambiguously positive for securitization markets and financial stability, some proposals—such as those designed to improve the alignment of securitizer and investor interests and accounting changes that will result in more securitized assets remaining on balance sheets—may be combined in ways that could halt, not restart, securitization, by inadvertently making it too costly for securitizers." John Kiff, Andy Jobst, Michael Kisser and Jodi Scarlata, Chapter 2, *Restarting Securitization Markets: Policy Proposals and Pitfalls*, (October 10, 2009) at 77, available at www.imf.org/external/pubs/ft/gfsr/2009/02/pdf/chap2.pdf.

[35] Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 1503 (2009).

[36] The U.S. Senate is expected to take up financial services legislation this year and, as with a Senate bill proposed last year, the legislation is expected to address securitization.

[37] Speech by SEC Chairman Mary Schapiro: "*The Road to Investor Confidence*", October 27, 2009: "I have asked the staff to broadly review our regulation of ABS including disclosures, offering process, and reporting of

traditionally and appropriately overseen by the SEC. The ASF and its members believe that the SEC is the appropriate federal agency to further develop securitization disclosure requirements in response to recent problems in the securitization markets.

Regulatory Capital

Capital relief has been and continues to be an objective and advantage of securitization. Risk based capital requirements are intended to reflect risks associated with on-balance sheet exposures as well as off-balance sheet exposures. GAAP has generally been used as an initial measure to determine whether an asset is treated as on or off-balance sheet for risk based capital purposes. With the implementation of FAS 166 and 167 the assets of most formerly off-balance sheet securitizations have come back on-balance sheet for accounting purposes and new transactions using the same traditional structures will generally be on-balance sheet going forward. Under current guidance this means, when the new capital requirements are fully phased in, that U.S. insured depository institutions will be required to maintain risk based capital against securitization assets that are now on-balance sheet as if they had not been securitized. The agencies believe that this will better reflect the banks' exposure to credit risk.[38] Thus, U.S. insured depository institutions are being required to maintain risk based capital as if there had been no risk transfer through securitization on the basis that they have retained too much risk. At the same time, they would be required under the Sample Regulatory Text to retain an economic interest of not less than 5% of the credit risk of the transferred assets to assure a sufficient exposure to risk to encourage improved underwriting of loans. We are concerned about reforms that impose significant costs on U.S. insured depository institutions yet are justified by diametrically opposed rationales. If the retention requirement in the Sample Regulatory Text was included in a final legal isolation rule, U.S. insured depository institutions would face a reduction (by the amount retained) in the potential amount of financing for their assets through securitization at the same time they would be bearing the cost of increased capital requirements resulting from the banking agencies' position that risk had not been effectively transferred from bank securitizers to investors. However, if in evaluating whether the retention requirement had been satisfied, the FDIC would give credit to on-balance sheet securitization assets, even where there has been a true sale of those assets, these concerns would not apply. If that is the case the language of the retention requirement should be clarified.

Additionally, the retention of an economic interest in a material portion of the credit risk of the financial assets in a securitization could cause the assets of a securitization that would otherwise be off-balance sheet to be brought back on-balance sheet for accounting purposes triggering the requirement for increased capital. If the minimum 5% interest retained by a U.S. insured depository institution is viewed as a significant economic interest in a variable interest entity under FAS 167 and the U.S. insured depository institution is also the servicer or is viewed as having the power to direct the activities of the securitization vehicle that

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asset-backed issuers. The staff is considering a number of proposed changes, which are designed to enhance investor protection in this vital part of the market."

[38] "[T]he agencies believe that the effects of FAS 166 and FAS 167 on banking organizations' risk-based capital ratios will result in regulatory capital requirements that better reflect, in many cases, banking organizations' exposure to credit risk." Risk Based Capital Release Risk Based-Capital Guidelines, 75 Fed. Reg. 4,636 (Jan. 28, 2010) (to be codified at 12 C.F.R. pts. 3, 208, 225, 325, and 567).

significantly impact the securitization vehicle's economic performance, then such an interest could cause the consolidation of the securitization entity's assets onto the balance sheet of the U.S. insured depository institution. For example, in a prime RMBS transaction, an insured depository institution's obligations as servicer of the mortgage loans, coupled with 5% risk retention of such loans, may cause a consolidation of the securitized assets onto such institution's balance sheet. This result could have a significant negative impact on the availability and affordability of credit for potential homeowners.

Even if the assets of the securitization entity were not consolidated onto the balance sheet of the U.S. insured depository institution, the retention of the 5% interest along with other perceived risk retained by the bank could prompt the relevant bank regulator to impose an additional capital requirement, including treating the securitization entity as if it were consolidated onto the bank's balance sheet and then requiring the bank to hold capital against the securitization entity's exposure.[39] The 5% retention requirement could also have a capital impact if (for example, in a situation where the sponsor also held subordinate certificates) it prevented a sponsor from obtaining a true sale opinion necessary to support an assertion that the assets had been legally isolated in accordance with the requirements of Paragraph 9a of FAS 166, thereby preventing the sponsor from satisfying a requirement for sale accounting treatment when it might otherwise have been possible in a given structure. For each of these reasons, the risk retention requirement could result in an increased capital requirement for U.S. insured depository institutions.

VII. THE IMPORTANCE OF AN EFFECTIVE SAFE HARBOR

What Makes an Effective Safe Harbor

An effective safe harbor should have clearly defined conditions comprised of bright line tests that, if met, provide defined benefits. The conditions of the safe harbor should be ones that can be assessed by all of the participants in the transaction and, if met at the time of the issuance of the relevant securities, should provide benefits that continue for the life of the securities. It should allow an investor to conclude that the conditions have been met or allow a clear determination that the conditions have not been met so that risks can be appropriately assessed and a transaction can be efficiently priced. A safe harbor becomes ineffective if the conditions are vague, if there are too many conditions or if the conditions are specific but cannot be measured or met. Also, a safe harbor is less secure for investors seeking to rely upon it if there are ongoing conditions that can be breached at any time resulting in the loss of the benefits of the safe harbor.

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[39] John C. Dugan, Comptroller of the Currency, *"Securitization, 'Skin-in-the-Game' Proposals, and Minimum Mortgage Underwriting Standards,"* (February 2, 2010): "The issue is this: where a securitizer retains a material risk of loss on loans transferred in a securitization, the new accounting and regulatory capital rules may require that all loans in the securitization vehicle be kept on the bank's balance sheet – not just the amount of risk required to be retained. This could significantly increase the regulatory capital charge for such securitizations." See www.occ.treas.gov/ftp/release/2010-13a.pdf at pg. 7.

Concerns Regarding Preconditions in Sample Regulatory Text

We are concerned that the safe harbor embodied in the Sample Regulatory Text could not be relied upon because it has conditions that are overly vague. Examples include the requirement to provide disclosure that is "presented in such detail and in such format as to facilitate investor evaluation and analysis of the obligations and financial assets securitized, and, at a minimum, shall comply with the requirements of Securities and Exchange Commission Regulation AB."[40] The disclosure requirements of Regulation AB are principles based. They are generally not specific to any asset class. The sponsor will use its judgment in making disclosure decisions based on what it believes is material to investors. Those decisions could be second guessed especially at a time of distress, creating, from an investor perspective, the possibility that disclosure decisions at the time of issuance could be viewed as flawed in hindsight resulting in the loss of the benefits provided by the safe harbor. Furthermore, a determination of materiality can only be given by the SEC or a court of competent jurisdiction, meaning an action would have to be brought by the SEC or an investor to determine actual compliance with Regulation AB. Such actions would likely be inhibited if the sought-after result meant losing the benefits of the safe harbor.

Another concern is that the documentation for the securitization is required to include representations and warranties "consistent with industry best practices."[41] While the ASF, through Project RESTART, has developed the Model Reps for RMBS, they are primarily meant to express customary market representations and warranties in the same, transparent language across transactions and provide a "baseline" against which investors and rating agencies can measure the representations and warranties contained in a particular transaction. Parties to a given transaction are free to determine which of the Model Reps are appropriate for such transaction and whether modifications to the language or form of the Model Reps should be made. They are intended as a point of reference but not as a mandate. There currently are no accepted industry best practice model representations and warranties for most asset classes. It is unclear what the result would be for a type of ABS where there are no settled industry best practice representations and warranties. Rating agencies and other industry participants also issue criteria for representations and warranties from time to time, and each has different views on preferred practices and there is a possibility of conflicting standards proposed by different industry participants. It is unclear in most cases how compliance with this standard could be determined.

The disclosure requirements also mandate that a sponsor must "use as appropriate any available standardized documentation for each different asset class."[42] While the ASF supports increased standardization of the securitization markets, we believe that this is best achieved through standardized disclosure of portfolio data and reporting and only for documentation in very specific cases.[43] A general requirement for documentation standardization is an aspirational condition and it is unclear how participants in a

[40] Sample Regulatory Text Section (b)(2)(A)(i).
[41] Sample Regulatory Text Section (b)(3)(A)(i), discussed further below in our response to question 12.
[42] Sample Regulatory Text Section (b)(3).
[43] Please see the discussion relating to the Model Repurchase Provisions above.

securitization could evaluate compliance with this requirement. There currently is no standardized documentation available for most asset classes. To the extent that there currently are documentation differences across securitization programs for the same asset type, it is not clear how they would be reconciled. Who will be the standard setter and, as discussed above, what will be the outcome if there are multiple standards? Securitization transactions have been evolving for the past 30 years. There have been significant improvements in structures over that time. Given the significant changes in accounting rules, regulatory capital requirements and possibility of legislative and regulatory changes, securitization structures will need to evolve in order to survive. There is a risk that a standardization requirement could cause stagnation and inhibit innovation. It should also be noted that many asset classes with revolving asset pools issue from time to time out of existing master trusts. The basic documentation for those trusts does not change from deal to deal and has been in place for a large number of issuers for many years. It is advantageous to continue using a single vehicle for issuance to eliminate performance differentiation across multiple trusts and to reduce transaction costs. This requirement and the requirement to separate out transfer provisions[44] would pose a greater burden on existing revolving asset programs which could be forced to attempt to amend existing documents than for newly originated discrete pool programs.

In addition, there is a requirement that the documentation "must define all necessary rights and responsibilities of the parties including…appropriate measures to avoid conflicts of interest."[45] It is unclear how a U.S. insured depository institution could become comfortable that it has satisfied that requirement. For instance, the SEC has expressed the concern that there is a conflict of interest inherent in having an issuer pay a rating agency when that rating agency provides a rating of the issuer's securities. Must the documentation for a securitization, in order to be compliant with the Sample Regulatory Text, prohibit an issuer pay transaction? There is no other pay model currently in use for ratings, and the SEC in recently implemented rules has chosen to address this issue through disclosure rather than by prohibiting the payments by issuers. Investors are concerned that aspirational requirements could be determined later to have been inadequately addressed in a securitization transaction. We believe that the safe harbor should contain only conditions and requirements for which an objective determination can readily be made with respect to compliance. Brighter lines are needed to allow reliance on the safe harbor.

Another concern with respect to the construction of the safe harbor is the inclusion of too many conditions. The greater the number of conditions, the greater the likelihood that someone could find an incident of immaterial or technical noncompliance with the rule. In addition, the greater the number of conditions, the higher the cost of verification that the conditions have been complied with or met. By imposing requirements such as risk retention of a minimum of 5%, loan-level or financial asset-level and other modified disclosure requirements, and limits on the number of tranches, compensation restrictions and a twelve-month seasoning requirement for RMBS transactions, the Sample Regulatory Text would fundamentally change the economics of securitization which would discourage future

[44] Sample Regulatory Text Section (c)(6), discussed further below in our response to question 33.
[45] Sample Regulatory Text Section (b)(3)(i)(A).

securitization activity. By imposing fundamental changes on the securitization process in the Sample Regulatory Text, the FDIC risks an adverse impact that most significantly could be the elimination of securitization in some sectors. U.S. insured depository institutions that will no longer have the accounting and regulatory capital benefits associated with securitization will carefully analyze the additional costs imposed by the new requirements. For institutions that determine to no longer securitize, the amount of funding available for consumer assets that have traditionally been funded through securitization will be more limited resulting in a reduction in available credit for consumers. Investors would lose access to a significant sector of the capital markets.

Finally, with respect to the construction of the safe harbor there is the issue of specific conditions that are too difficult to measure or meet. One example in the Sample Regulatory Text is the requirement that, for securitizations in which the financial assets include residential mortgage loans, "all assets shall have been originated in compliance with all statutory, regulatory and originator underwriting standards in effect at the time of origination." As discussed in our response to question 31, there will inevitably be some cases where there are incidents of immaterial or technical noncompliance. To have this as a gate keeping condition for the safe harbor would make it extremely difficult to ever conclude that an RMBS transaction should be entitled to the benefits of the rule. The parties to the securitization are best served by having a compliance statement like this be embodied in the representations and warranties, with material noncompliance triggering a repurchase obligation. In addition, participants, such as underwriters and rating agencies, are likely to look to the lawyers for the sponsor to provide a legal opinion with respect to satisfaction of the requirements of the rule. This type of requirement would be characterized as a "compliance with all laws" requirement that law firms would not be willing or able to address for a geographically diversified portfolio.[46]

Another example of a condition that is too difficult to meet is the requirement for all securitizations that "information about the obligations and the securitized financial assets shall be disclosed to all potential investors at the financial asset, pool, and security—level."[47] For securitizations in which the financial assets include residential mortgage loans there is a separate requirement for disclosure of loan-level information.[48] While the Sample Regulatory Text does not explicitly require loan-level information for all securitizations, a financial asset as defined is equivalent to a loan. If the intention of the draft is that loan-level information be provided for all asset classes, that would pose too great a burden on some asset classes and sponsors might determine to exit the market. Investors have generally acknowledged that loan-level information is not necessary or helpful for some asset classes, such as credit card securitizations where a single issuance trust might include receivables arising in tens of millions of accounts.[49] In that case, the volume of information that would need to be

[46] Provisions that are difficult to measure are a recurring theme in the Sample Regulatory Text. These types of provisions will cause law firms to greatly qualify their legal opinions or not deliver them at all.
[47] Sample Regulatory Text Section (b)(2)(A)(i), discussed further below in our response to question 9.
[48] Sample Regulatory Text Section (b)(2)(B)(ii).
[49] According to recent publicly available information, as of January 7, 2010 there were rights to receive collections from receivables in 64,249,801 credit card accounts in BA Master Credit Card Trust II, as of December 31, 2009 there were rights to receive collections from receivables in 40,211,284 credit card accounts

provided to comply with such a requirement would exceed the capacity of large institutional investors to process that information. So the bar would be set too high without real benefit. Requiring compliance with unnecessary and inflexible conditions will slow down the restart of the securitization market.

Another concern is that, because the safe harbor as set forth in the Sample Regulatory Text has ongoing conditions, such as compliance with periodic reporting requirements, a transaction that is determined to be in compliance at the time of initial issuance could subsequently fall out of compliance resulting in a loss of the protections of the safe harbor to the detriment of investors who purchased their securities in reliance upon the benefits of the safe harbor. Any conditions that look to future performance would require participants in transactions, including counsel who would be asked to provide legal opinions regarding the applicability of the safe harbor, to make assumptions as to future behavior. We encourage the FDIC to adopt a safe harbor with clear bright line conditions that are not too onerous or inflexible and that can be measured once, at the time of issuance, to allow investors and other market participants to rely upon the safe harbor without fear that its benefits could disappear at any time. These considerations are of paramount importance for our investor members who have indicated that their desire to purchase securities would be materially decreased if safe harbor protection could be lost over time, especially due to a technicality. Investors are in favor of minimizing risks, not introducing new ones. With respect to the ratings process and transactions structured to rely on the safe harbor for legal isolation, the rating agencies need to know at the time they are providing their initial ratings that the conditions required to be met have been met.

Effect of Preconditions on Ratings

Another critical feature of the construction of a safe harbor is the benefit that is provided. The benefit sought by the industry is the ability to delink the rating of the securitization obligations from the rating of the asset originator or sponsor. In a properly structured transaction, the senior most securitization obligations should be able to be rated in the highest rating category by one or more rating agencies, regardless of the rating of the originator. On January 6, 2010, Moody's Investors Service, Inc. published an article entitled "Moody's: FDIC's Advanced Notice on Proposed Safe Harbor Unclear on Protection Against Repudiation Risk."[50] For securitizations not meeting sale accounting requirements, Moody's has raised several concerns. First, they are concerned that a receiver could repudiate a securitization agreement and pay "actual direct compensatory damages" which, with respect to principal repayment, could be limited to the market value of the underlying assets at the time of repayment and may be less than the par value of the ABS. This creates market value risk for investors. In addition, the FDIC could limit the amount of interest paid at the time of repayment to the amount of interest accrued through the date of receivership, while the date of repudiation or repayment could be significantly later. While the language of the safe

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in the Chase Issuance Trust, as of September 27, 2009 there were rights to receive collections from receivables in 33,102,539 credit card accounts in the Citibank Credit Card Master Trust I and as of December 31, 2009 there were rights to receive collections from receivables in 27,973,843 accounts in the American Express Credit Account Master Trust.

[50] See http://v3.moodys.com/researchdocumentcontentpage.aspx?docid=PBS_SF190147.

harbor provides a pre-consent during the stay period imposed by 12 U.S.C. §1921(e)(13)(C) to the payment of regularly scheduled payments to investors made in accordance with the securitization documents, Moody's is concerned that any final payment, if it were to occur on a date other than a payment date, could be for less than the amount of accrued interest if such payment is made post-receivership, because the security holders might not receive accrued interest from the last scheduled payment date until the date of repudiation. Primarily for these reasons, Moody's stated that "Bank sponsors rated below "Aa" would be unlikely to achieve "Aaa" ratings for their ABS if [repudiation] risk isn't mitigated."

VIII. DELINK SECURITIZATION RULES FROM SAFE HARBOR

Based on the concerns discussed above and elsewhere in this Response Letter, the safe harbor provisions of the rule must be delinked from the securitization related provisions. Preconditions addressing disclosure, documentation, capital structure and compensation should not be tied to the determination of whether financial assets will be treated as having been legally isolated. Most of the preconditions have no relevance for a traditional sale or security interest analysis. Delinking securitization rules from the legal isolation safe harbor would allow for the construction of an effective safe harbor. Certain provisions of the current proposal could be embodied in a separate set of securitization rules that could set parameters for securitizations by U.S. insured depository institutions. However, such rules should be developed on an interagency basis with deference regarding any disclosure requirements to the SEC.

Delinking securitization rules from the legal isolation safe harbor would lead to a better alignment of interests. Under the Sample Regulatory Text, the significant burden of the loss of legal isolation protection if any of the securitization preconditions are not satisfied is borne by the investors in the securitization obligations. It would be better to have the bank regulatory agencies use their oversight authority to require banks to follow agreed upon securitization guidelines and then enforce those guidelines as is current practice with respect to other rules to which U.S. insured depository institutions are subject. The party to the securitization transaction that violates the rule should be the one suffering any penalty. The inclusion of the securitization preconditions in the legal isolation safe harbor allocates the greatest risk from noncompliance to investors who face the loss of legal isolation protection from a U.S. insured depository institution's receivership when that institution fails to live up to its obligations. A separation of the securitization requirements from the safe harbor is necessary to provide sufficient comfort to the investors, who should only bear risks associated with the assets and not risks associated with the originator.

IX. RESPONSES TO QUESTIONS POSED BY THE ANPR

Although we address each of the questions below individually and on its merits, we continue to believe that preconditions addressing disclosure, documentation, capital structure and compensation should not be tied to the determination of whether financial assets will be treated as having been legally isolated. A safe harbor becomes ineffective if the conditions are vague, if there are too many conditions or if the conditions are specific but cannot be measured or met. Also, a safe harbor is less secure if there are ongoing conditions that can be breached at any time resulting in the loss of the benefits of the safe harbor. The safe harbor should allow an investor to conclude whether or not the conditions have been met so that risks can be appropriately assessed and a transaction can be efficiently priced.

2. If the FDIC were to adopt changes to the conditions required for the safe harbor similar to those contained in the preliminary regulatory text, what transition period would be required to permit implementation? Do you have other comments on the transitional safe harbor current in place until March 31, 2010?

As noted in our letter to the FDIC dated January 4, 2010[51], the conditions being proposed in the Sample Regulatory Text are sweeping, and securitization issuers, in particular RMBS issuers, believe that the proposed Transition Period will not be nearly enough time to ensure that securitizations can meet the proposed criteria. In our letter, we briefly discuss a few of the conditions that would require massive system and documentation changes, including the provision of financial asset or loan-level data, Regulation AB requirements for private and resecuritization transactions, and documentation changes relating to the sponsor's role as transferor and servicer of the assets. Based on that sampling of the broader conditions contained in the ANPR, we requested that the FDIC extend the Transition Period to 6-12 months after the date on which the final safe harbor rule is published in the *Federal Register*. That request was a very rough estimate of the time period needed to implement changes of the type proposed in the ANPR's Sample Regulatory Text. The ASF believed that submitting a proposed implementation period to the FDIC was critical given that the Interim Final Rule was due to expire less than three months from the date we submitted our letter. We had expected to propose a more specific implementation period when we submitted this detailed Response Letter.

However, after further review of the ANPR and its Sample Regulatory Text, the ASF and its membership do not believe that we can respond to questions regarding implementation of a rule that has not yet been officially recommended. In fact, it is unclear whether the Sample Regulatory Text has even been proposed. The Board notes in the ANPR that the Sample Regulatory Text "should be considered as one example of regulatory text, and not the only option to be considered" and that "[t]he Board's approval of the ANPR should not be considered as signifying adoption or recommendation of the preliminary regulatory text, but the text does provide context for response to the questions." The latter statement provides further confusion when considering that the questions posed in the ANPR do not reflect all of the conditions contained in the Sample Regulatory Text. Meaning, it is unclear whether any

[51] See www.americansecuritization.com/uploadedFiles/ASFFDICCommentLetterreSafeHarbor010409.pdf.

of the Sample Regulatory Text is meant to be taken at face value. The Board even notes that the contextual purpose of the Sample Regulatory Text "does not imply that the Board will not make significant changes to the preliminary regulatory text at a later stage of the rulemaking." For these reasons, the ASF and its membership do not believe that a realistic implementation period can be proposed at this time.

With respect to the Interim Final Rule, we would very much appreciate confirmation of an interpretation of the language of the transitional safe harbor as currently in place. The transitional safe harbor applies to "any… securitization for which transfers of financial assets were made or, for revolving securitization trusts, for which beneficial interests were issued on for before March 31, 2010." With respect to variable funding notes, which have a principal amount that can be increased or decreased over the life of a transaction and used, in part, to fund seasonal fluctuations in pool balances or growth of a pool over time, and with respect to unfunded conduit commitments, we would like to confirm that the phrase "for which beneficial interests were issued on or before March 31, 2010" would encompass the full committed amount of beneficial interests that could be issued from time to time under such a securitization up to the maximum amount permitted to be issued on March 31, 2010 or the applicable end date for the transitional safe harbor (the "Transitional Safe Harbor End Date"). Variable funding notes can generally be issued from time to time after an initial closing date and are acquired by purchasers who are committed to purchase those notes up to a maximum amount subject to the satisfaction of agreed upon conditions. For example an issuer may have completed a transaction where one or more purchasers, such as asset-backed commercial paper conduits, have committed to purchase a maximum amount of $100 million of variable funding notes but only $50 million of notes are issued prior to the Transitional Safe Harbor End Date. We would like confirmation that additional notes issued after the Transitional Safe Harbor End Date up to the $100 million maximum commitment that was in place before the Transitional Safe Harbor End Date would have the benefit of the safe harbor. Another scenario is a program with a $100 million commitment that is fully funded on the Transitional Safe Harbor End Date but then is paid down to $10 million after the Transitional Safe Harbor End Date and subsequently increased back up to $100 million. Again we believe that the beneficial interests issued up to the $100 million commitment maximum after the Transitional Safe Harbor End Date should have the benefit of the safe harbor. Finally, a program may have a $100 million commitment in place prior to the Transitional Safe Harbor End Date but have no outstanding variable funding notes on the Transitional Safe Harbor End Date. We believe that the beneficial interests issued up to the $100 million commitment maximum after the Transitional Safe Harbor End Date should have the benefit of the safe harbor.

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?

We do not think that any specific capital structure should be ineligible for the benefits of the safe harbor. Our investor members expressed the view that the assets are of paramount importance and that there should not be prohibitions on different capital structures so long as they are clearly and fully described.

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?

As a general observation, we believe that structural attributes of RMBS relating to the types and number of tranches is not an appropriate topic for the safe harbor. Structural complexity at the level of the RMBS being issued does not in and of itself either obscure the nature and quality of the underlying assets, or cause the originator and sponsors' interests to be misaligned with investors in terms of asset quality. While we believe that future RMBS structures will likely be less complex than many of those that appeared in the past, we do not believe the safe harbor or other reform proposals need to or should adopt simplicity as a goal per se. Rather, to the extent that the safe harbor focuses at all on structural elements, it should only focus on elements that have a demonstrated or apparent impact on matters within the appropriate goals of the safe harbor.

Past RMBS transactions have in many cases had more than six tranches. Many transactions included credit tranched classes, for example classes rated (generically): AAA, AA, A, BBB, BB, B and an unrated first loss class. In may cases, the AAA class was subdivided into super senior and senior support classes, each rated AAA but with the latter supporting the former as to any losses not covered by the other classes. Setting aside further subdivision of the AAA class (discussed below), there could be additional tranches resulting from creating interest only classes from the mezzanine tranches. As to any given RMBS offering, the number of tranches could also be significantly increased if the transaction included multiple loan groups within a single trust.

Frequently, within the AAA class (representing the bulk of the structure), there was a wide variety of subclasses. The Sample Regulatory Text contemplates that there will be an exclusion from the six tranche limit for multiple "time-based sequential pay sub-tranches" within "the most senior credit tranche". While in some cases these classes were purely sequentially paid (for example, all senior cash flow to class A-1 until paid in full, then to class A-2 until paid in full, etc), there were many other possibilities. For example there were various types of classes to which amortization was directed within specified parameters, thereby creating more stable cash flow to those classes. Also, interest only and principal only classes were frequently used as a structuring technique, to accommodate pools of loans having a range of interest rates. We believe that this level of structural complexity did not in any way contribute to the decline in asset quality. Rather, we believe complexity was a result (not the cause) of high volumes of RMBS issuance, in a context where it was possible to design structures that met specific investor's objectives, with the overall result of maximizing proceeds from any given issuance and lowering credit costs for consumers.

The question also suggests a relationship between the number of classes in an RMBS structure and the degree of leverage embedded in the structure, from a systemic risk perspective. The ability to leverage any given tranche of RMBS is primarily dependent on its rating, or other evaluation of its credit quality. Ratings for the various credit tranches are derived from an assessment of the risks of the underlying assets. Complex structuring of subtranches within the senior tranche does not reduce or otherwise affect the amount of enhancement needed to support the senior class. Complex structuring within the senior tranche does not increase the total size of that class. Accordingly, we do not believe that the ability to have an unlimited number of tranches in an RMBS securitization contributes to the ability of investors in the aggregate to maintain higher leverage, than would be the case with a limitation to six tranches.

A limitation on the number of tranches in an RMBS securitization, in our view, would only have negative effects on the ability to meet various investor's objectives and to maximize offering proceeds. We do not believe such a limitation would have any positive effects in terms of asset quality, transparency or appropriate alignment of incentives.

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?

For the same reasons as outlined above, we do not believe there is any benefit to a limitation on the number of tranches for asset types other than residential mortgages. We do not believe there is a relationship between structural complexity in terms of the number of classes and asset quality. We do not believe that there is a relationship between structural complexity and transparency with respect to the nature of the underlying assets. Generally, we do not believe there is a relationship between structural complexity, and alignment of interests of all transaction participants in respect of asset quality, provided that there is appropriate disclosure about the underlying assets.

Aside from complexity per se, it may be appropriate to consider whether there are other structural elements that could contribute to a misalignment of interests as to servicing of the pooled assets in the best interests of all investors collectively. For example, one structural feature of some RMBS that is of particular concern to investors, are loss and delinquency triggers that determine whether residual cash flows can be released to first loss interest holders. The concern is that these triggers typically do not look forward to anticipated future losses, and therefore may in effect allow cash flows that otherwise would be used as enhancement to leak out of the transaction. We anticipate that market participants in the future will focus closely on subtle elements such as these, to ensure that the structures are sound and avoid any misalignment of interests with respect to servicing. However, we believe that this will be an evolutionary process which should be left to the markets, and that cannot be addressed by regulation.

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?

In addressing resecuritizations, it is important to distinguish between (a) resecuritizations that involve a fixed pool of identified underlying securities (such as RMBS or other ABS) and (b) transactions such as collateralized debt obligations that involve a managed pool of underlying securities which may not be identified to the investor. The term "resecuritization" is sometimes used to include the latter type of transaction, which has been criticized due to the lack of transparency about the underlying assets. Generally, we are in favor of identification to investors of all underlying securities in a resecuritization. Our comments below address resecuritizations in which all underlying securities are identified to investors.

In a resecuritization, a pool of preexisting RMBS or ABS is sold to a securitization trust that issues securities representing the right to receive distributions on the underlying RMBS or ABS. Resecuritizations enable banks to create additional subordination on their existing RMBS or ABS by issuing different tranches of securities, the most senior of which will have more credit support than the underlying RMBS or ABS. Resecuritization is very common in the market today and a very important tool for risk management because it provides institutions with a means to make their outstanding RMBS and ABS more attractive to investors. To the extent that the new safe harbor makes resecuritizations by banks impractical, it will prevent banks from using a legitimate tool to remove risk from their balance sheets.

Most resecuritizations are issued in offerings that are not registered under the Securities Act of 1933 (the "Securities Act"), typically in reliance on Rule 144A thereunder. As such, disclosure for these offerings is not directly regulated under Regulation AB. However, most resecuritizations involve underlying securities that are RMBS which were themselves initially issued in offerings that were registered under the Securities Act and that were subject to Regulation AB. As a result, generally, resecuritizations of RMBS involve underlying securities where there is available disclosure that complied with Regulation AB at the time the underlying securities were issued, but as to which that disclosure cannot be fully updated without unreasonable effort or expense. To the extent that, under SEC rules, a publicly offered resecuritization would be required to provide fully updated disclosure about the underlying securities, which requirements are not practicable to comply with, the issuer would generally look to make that offering under Rule 144A. Because this fact pattern is so typical, prevailing market practices for resecuritizations have developed in this context.

There are two elements of SEC rules which are relevant to required disclosure in a resecuritization: Rule 190 under the Securities Act and Regulation AB. Rule 190 essentially provides that, in a publicly offered resecuritization, if the sponsor of the resecuritization could not sell the underlying securities without registration under the Securities Act, then the resecuritization must be treated in effect as a continuation of the original offering of the underlying securities, which in turn must have been a registered offering. Certain updating requirements may apply as a result of this requirement, which applies regardless of the concentration level of any of the underlying securities. If the sponsor of the resecuritization acquired the underlying securities in bona fide secondary transactions, then Rule 190 does not apply.

Regulation AB contains a separate set of disclosure and reporting requirements for resecuritizations, that apply as to any underlying security that represents 10% or more of the total underlying securities in that resecuritization. Generally, these requirements include that (a) current disclosure be provided for each such underlying security meeting the requirements of Regulation AB as to the pooled assets, static pool information, disclosure about transaction participants, and other matters, and (b) reporting be provided in accordance with the Securities Exchange Act of 1934 (the "Exchange Act") on each underlying security, even if the requirement to provide such reporting at the underlying security level has lapsed. Importantly, these requirements apply regardless of whether the underlying security could be resold by the sponsor of the resecuritization without registration under the Securities Act.

For resecuritization sponsors that are investors who did not act as issuer, sponsor or underwriter of the underlying securities, as is frequently the case for RMBS held in bank portfolios, those sponsors will not have any contractual right or practical ability to obtain updated prospectus level disclosure, or to obtain an extension of reporting under the Exchange Act if such reporting has lapsed, that would be required under Regulation AB for concentrations of 10% or more. As a result, as stated above, resecuritizations of RMBS are generally offered pursuant to Rule 144A, because the Regulation AB requirements cannot be complied with.

In practice, disclosure about the underlying securities in a resecuritization of RMBS offered under Rule 144A consists of information that would be available to a purchaser of the underlying security in a secondary transaction, including: the base prospectus and prospectus supplement from the initial offering of the underlying security, the principal operative document for the underlying security (such as a PSA) and recent distribution reports provided to investors. In light of investor acceptance of this level of disclosure, and the extreme difficulty in providing current Regulation AB compliant disclosure on the underlying securities in most cases, we would advocate that the safe harbor should not impose a specific requirement on disclosure for underlying securities in a resecuritization.

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?

There should not be any issue with respect to legal isolation for a synthetic securitization because there are no transfers of assets in a true synthetic. The same analysis applies for unfunded synthetic transactions. We are not sure what is meant by "unfunded… securitizations," but if it is not meant to be "unfunded synthetic securitizations" then we note that issuers often do "prefunded" securitizations where a portion of the collateral is acquired or originated after the initial closing and paid for from the proceeds of the initial issuance. We do not believe there should be a prohibition of prefunded transactions. We also believe that there should be no restriction on variable funding notes or unfunded asset-backed conduit commitments (as discussed in our response to question 2).

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?

There are certain common securitization structures for which a limitation that payments must be "primarily dependent on the performance of the financial assets" can be an issue, for example, auto lease and equipment lease securitizations. This issue could be addressed by adding the following language: "provided that in the case of financial assets that are leases, those assets may convert to cash partially by the cash proceeds from the disposition of the physical property underlying such leases." There is currently overlap and inconsistency in the definitions of "Obligation" and "Securitization" in the Sample Regulatory Text which could be addressed by adding the language proposed in the preceding sentence to the end of the first sentence of the definition of "Obligation" and ending the first sentence of the definition of "Securitization" with the word "obligations" where it first appears in that sentence.

External credit support should not be prohibited. Third-party credit enhancement has been present in securitizations since their inception. Investors view external enhancement as important to the securitization markets to address investor specifications with respect to a transaction. External enhancement serves the useful purpose of bringing an additional party to the transaction to review collateral and express views on the structure and risks associated with the underlying assets. Concerns that undue reliance on third party enhancement led to reduced vigilance on the part of underwriters and investors with respect to underlying securitization assets are best addressed by focused regulation at the loan origination level and improved transparency.

Risk transfer is beneficial to U.S. insured depository institutions and third party credit enhancement is one means of achieving risk transfer for those institutions. Prohibiting third party credit enhancement would be a fundamental change to securitizations and could have unintended consequences. For instance, government guarantees should not be inadvertently prohibited. Also, there should be no limitation on liquidity facilities or credit enhancement from monoline or multi-line financial guarantors. If the condition regarding third party credit enhancement is intended to address the concern that third party credit enhancement may mask credit risk inherent in a securitization, an alternative approach would be to require that "unwrapped" ratings of transactions be obtained by the sponsor and made public so investors can evaluate the risk in a transaction if the enhancer were to default.

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?

Transparency is a key measure to facilitate effective risk identification, assessment and management in respect of securitizations by investors and other market participants and is in line with ASF's ultimate goal of restoring confidence in the securitization market. Disclosure reforms for this market should take into account the information which is meaningful and appropriate for investors and the practical ability of market participants to efficiently produce such information. Issuers, as well as originators and servicers of financial assets, put operational processes into place to ensure accurate data is disclosed with respect to securitized assets. These operational processes are part of the due diligence done to ensure that offerings comply with securities laws and regulations. Any reforms related to disclosure should incorporate the views of investors, servicers, originators, rating agencies and dealers, as all incur either costs or benefits from enhanced disclosure. It is important to fully vet proposals relating to disclosure and transparency with the entire industry so that the consequences of such proposals do not result in cost inefficiencies within the market, resulting in higher costs for transaction parties and, ultimately, consumers. The ASF took such an industry-wide approach when it launched Project RESTART, which is discussed above. Through Project RESTART, the ASF has sought to identify areas of improvement in the process of securitization and refashion, in a comprehensive and integrated format, the critical aspects of securitization with market-based solutions and expectations.

The Sample Regulatory Text generally requires disclosure of information, both prior to issuance and monthly thereafter, "at the *financial asset*, pool, and security-level sufficient to permit evaluation and analysis of the credit risk and performance of the obligations and financial assets" (emphasis added). It also specifically requires RMBS issuers to provide "loan level" information as to certain loan attributes including, but not limited to, type, structure, maturity and property location. Provision of "loan level" or "financial asset-level" information has been endorsed and specified for RMBS in connection with Project RESTART and the Disclosure and Reporting Packages. Loan-level information is desirable in the case of RMBS because it aids in evaluating the credit quality of the underlying mortgage loans and is manageable for a discrete pool of assets. However, the same is not necessarily for true for other asset classes and each asset would have to be evaluated by market participants to determine which, if any, loan-level information was desired by investors and practical (or realistic) for issuers to produce. For example, credit card ABS investors have indicated to the ASF that loan-level information is not practical for an analysis of a revolving pool of assets in a master trust, which can contain tens of millions of accounts. Furthermore, issuers of credit card ABS believe that producing and auditing loan-level data would be so costly for a master trust that such a requirement could potentially prevent future securitizations in that market. As to other ABS, we believe that appropriate loan-level disclosure must be vetted among investors and issuers based upon need and practicality.

Additionally, from our investor members' perspective, more information than what is currently provided is always welcomed and in many cases will enable better analyses of securities. For example, investors (in assets other than RMBS, which is covered by Project RESTART) would like increased disclosure of pool-level information to enable a better assessment of the risk profile and the layering of risks present in a pool of loans or receivables. Information that promotes transparency of the risk profile of the financial assets and the ongoing performance of those assets are especially valuable. Investors also seek standardization across issuers, both in how certain items are disclosed and how they are defined. However, many investors are aware that provision of additional information usually comes at a cost to issuers, who securitize for many reasons, not least of which is the economic benefit. For this reason, it is important for investors and issuers to work together to determine the types of data that can be provided.

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 CFR 229.1100–1123, or any successor disclosure requirements?

We would advocate that the safe harbor not include an express disclosure requirement for securitizations issued in offerings that are not registered under the Securities Act. As is the case with securities generally, the Securities Act does not regulate the content of offering documents for ABS that are offered under Rule 144A, or another exemption from registration under the Securities Act. However, Rule 10b-5 under the Exchange Act imposes on issuers in all offerings, both registered and exempt, liability for material errors and omissions in any offering documentation that is used.

While many issuers of ABS also follow the disclosure required by Regulation AB in their private offerings because issuer, originator and servicer systems were overhauled to produce the information required by Regulation AB prior to its implementation, in some cases, it may be necessary to structure an offering as exempt, rather than registered, in cases where providing a specific item of disclosure proved to be impossible (for example, static pool information) or would require undue effort or expense. Additionally, many small issuers began to utilize the private market after Regulation AB was introduced because such issuers did not have the resources to upgrade their processes and systems for Regulation AB or did not execute enough securitization transactions to make such an upgrade economical. In each case these transactions are subject to the existing securities laws with respect to disclosure.

The private placement market consists mostly of "qualified institutional buyers," which are experienced investors who have direct access to issuers and substantial information in the market and are capable of negotiating their own terms. Because exempt offerings do not involve offers to the public and are limited to sophisticated investors, decisions as to the appropriate scope of disclosure are left to market participants. This is consistent with the framework of the federal securities laws since the adoption of the Securities Act. Imposing a mandatory disclosure regime on issuers in exempt offerings is not necessary for investor protection, would be at odds with longstanding practice and could place insured depository institutions at a competitive disadvantage.

In addition, Regulation AB provides guidelines for information to be included in an ABS disclosure document. Some transactions, such as sales of securities to asset-backed commercial paper conduits, are conducted on a purely private basis without the use of a disclosure document. In those transactions the buyer is given an opportunity to request and review the information that it believes is necessary for its investment decision. That information may be more detailed in some respects than the related Regulation AB requirements and less detailed in other respects, based upon the specific assets and structure.

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?

The ASF and its members support disclosure of the capital structure of the securitization, including the items listed in this question. However, this type of information is already required by Item 1113 and, in certain cases, Item 1114 of Regulation AB[52]. In those sections, the SEC requires a host of information about the capital structure and credit enhancement of

[52] See www.sec.gov/rules/final/33-8518fr.pdf.

the transaction and the credit and payment characteristics of the securities. To understand the breadth of these sections, it is important to review them in their entirety. However, for purposes of this question, we note a few requirements including the types of securities offered; the flow of funds; the payment allocations, rights and distribution priorities; credit enhancement; description of the interest rates; payment of principal; default and performance triggers; the extent of overcollateralization or cross-collateralization; fees and expenses; excess cash flow; optional or mandatory redemption; and prepayment, maturity and yield considerations. The ASF believes that the disclosure requirements of Regulation AB are sufficient with respect to the capital structure of the transaction. Our investor members have not raised any objections or comments with respect to the current disclosure of the capital structure of securitizations of any asset class. That said, it is important to note that the materiality threshold governing prospectus disclosure must continue to play an important role in ensuring that the prospectus includes the information needed by investors and that there is adequate flexibility such that the disclosure makes sense across transaction structures and varying party roles. There are infinitely many items that could be material to an investor in a securities offering and a "principles based" materiality threshold is the only way to require those items to be disclosed in the prospectus.

Our investor members believe that the transaction documents, including the indenture or PSA, can also be relevant to an investment decision, especially for reviewing cashflows and the capital structure. They indicate that they would like greater access to these documents, especially during the new issue sales process, to the extent the securities laws permit such access.

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 of representations and warranties and related repurchase provisions is required by Item 1111(e) of Regulation AB. In that section, the SEC requires disclosure of a summary of the representations and warranties provided. In line with Regulation AB, the general practice within the securitization industry is to include a summary of the representations and warranties in the offering document and the full list of representations and warranties in the transaction documents, which would be filed on the EDGAR system in the case of a public deal. Item 1111(e) also requires a description of "the remedies available if those representations and warranties are breached, such as repurchase provisions." As such, a more fulsome description of the repurchase provisions or other remedies of the transaction are generally included. Our investor members have indicated that it would be helpful to include in the offering document a full list of the representations and warranties included in the transaction documents. As for repurchase provisions, ASF members acknowledge that, although disclosure of repurchase provisions was generally adequate, a retooling of the repurchase process for RMBS transactions is necessary. As noted above, the next phase of Project RESTART is to reformulate the repurchase process for RMBS transactions.

There is another reference to representations and warranties in the Sample Regulatory Text although it is not discussed in any of the questions contained in the ANPR. In Sample Regulatory Text Section (b)(3)(A)(i), the Board notes that "the documentation must define all necessary rights and responsibilities of the parties, including but not limited to representations and warranties consistent with industry best practices." We are concerned with the Board's use of the term "industry best practices" in this provision as it is rather subjective and it would be irreconcilable as a precondition to a securitization safe harbor. Securitization transactions vary based on many factors, including the underlying collateral, the associated transaction parties, the types of bonds issued and the ultimate investors. For example, the Model Reps for RMBS transactions were developed primarily to express customary market representations and warranties in the same, transparent language across transactions and provide a "baseline" against which investors and rating agencies can measure the representations and warranties contained in a particular transaction. The Model Reps provide a starting point in the negotiation process among issuers, investors and other transaction parties and should be considered living and flexible within a broad range of RMBS transactions. Investors have differing needs and risk tolerances and depending on the transaction, investors and/or issuers may be willing or unwilling to assume certain risks and certain Model Reps may be inapplicable. Parties to a given transaction are free to determine which of the Model Reps are appropriate for such transaction and whether modifications to the language or form of the Model Reps should be made. The purpose of the Model Reps is to enable market participants to easily determine the type of representations and warranties included in a transaction and the extent to which they are more or less expansive than the Model Reps.

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?

Through the ASF's work on Project RESTART, the RMBS market has already come together to determine that the loan-level information contained the Reporting Package is important for determining performance on an ongoing basis. However, there has not been an industry-wide meeting of the minds in other ABS markets. That being said, many of our investor members have indicated that additional information in periodic reports is critical to evaluating performance. However, the type of information would depend on the particular asset class. For example, credit card ABS investors have indicated to the ASF that loan-level information is not desirable for a master trust which can contain tens of millions of accounts. As to other ABS, we believe that appropriate loan-level disclosure must be vetted among investors and issuers based upon need and practicality. For the most part, additional pool-level and tranche-level information is always desired in ongoing reporting.

Our investor members also believe that an update of the statistical and stratification information that was provided in the offering memorandum or prospectus would be helpful to analyze performance. They also are always in favor of standardization of reporting and definitions across issuers. As for financial asset-level data, investors believe that it would be helpful for some asset classes to the extent issuers could audit the information and produce it without unreasonable expense. Investors in auto ABS have indicated that it would be helpful to receive static pool data based on quarter of loan origination.

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?

The ASF and its members support adequate disclosure of the ongoing performance of the securities issued in a securitization and have developed a proposed Bond-Level Reporting Package (discussed above) to standardize how such disclosure is delivered. Furthermore, the items listed in this question, including other security-related information, are already required for each tranche by Item 1121 of Regulation AB. In that section, the SEC requires various information including, but not limited to, record dates, accrual dates and determination dates; cash flows received; itemized distribution of the flow of funds; beginning and ending balances of securities; interest rates; credit enhancement information; account information; and delinquency and loss information. As to tranche-level information, investors believe that the current information required to be disclosed is adequate for ongoing reporting. Ongoing reporting of tranche performance can only be provided in respect of the related distribution period for the ABS.

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?

As an organization with a wide variety of constituencies included in its membership, we find that there are a wide variety of views on the utility of disclosure of the nature and amount of compensation as a mechanism to promote asset quality or deal performance.

Our investor members believe that disclosures relating to the nature and amount of compensation paid to brokers, originators, rating agencies or third-party advisories, and sponsors may be relevant in certain situations. For example, how a broker or originator is compensated when extending a loan to a borrower might indicate whether either one of these parties has an interest in the ongoing performance of that loan. On the other hand, many are of the view that disclosing the amount of any upfront compensation would not be material, inasmuch as compensation levels are generally set by the market in a competitive environment. This topic is an area where we believe there should be consistency throughout the securitization industry, and not a different rule applicable only to securitizations by insured depository institutions.

Along the same lines, investors would also be interested in whether any of these parties retained a risk of loss on the underlying financial assets because it may indicate that such parties are interested in seeing those assets perform. Indeed, disclosure about any voluntarily retained risk of loss could result in securitization pricing advantages as compared to transactions where risk was not retained. As discussed in our response to question 28 below, we do not support mandatory risk retention. However, if there is a perceived value to investors of voluntary risk retention as a means of assuring asset quality, then such pricing advantages may result from voluntary risk retention.

Rating agencies, however, believe that public disclosure of rating agency fees could jeopardize the objectivity of the ratings process by undermining the firewalls they have established to bolster analytical independence. In particular, regulators have stressed the importance of shielding rating analysts and committees from commercial influences. If rating agency fees are disclosed, rating analysts and committees would be exposed to more commercial information about rated issuers than they ever have before.

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?

For RMBS, we do support efforts to provide more detailed loan-level information to investors on a uniform basis and in a consistent format. The ASF has made this one of its highest priorities as part of its Project RESTART. As discussed above, final versions of the Disclosure and Reporting Packages were issued on July 15, 2009. The Disclosure and Reporting Packages (i) standardize the presentation of all data to allow institutional investors to easily compare with analytical rigor loans and transactions across all issuers, and (ii) provide substantially more critical data, both at the pool-level and loan-level, than has been available to institutional investors, rating agencies and other eligible RMBS market participants relating to the underlying mortgage loans in private-label RMBS. Project RESTART considered input from investor members regarding the scope of desirable loan-level information as well as new data elements suggested by the rating agencies in their releases and requests for comment. The Disclosure Package includes two to three times the number of data fields typically used in the past for residential mortgage loan pools. The new fields include more detailed information on income verification, debt-to-income ratio ("DTI"), origination channel, subordinate liens and property value.

We believe that our work on the Disclosure and Reporting Packages represents a strong industry-based response to the question of what specific loan-level data should be provided to investors in RMBS. However, it is understood that certain fields within those packages will be more important for particular transactions than others. For example, investors may decide not to purchase, and rating agencies may decide not to rate, deals that are missing certain fields that the parties deem "required." Likewise, those same fields may be populated in another transaction and investors and rating agencies may consider them to be irrelevant. While the ASF recommends, in the interest of transparency, that all applicable fields be populated in every transaction as the new market matures, it is clear that investors and rating agencies on a transaction will determine which fields are "required" in making an investment decision or setting levels, which fields are "helpful" and which fields may be irrelevant. In light of this, we strongly believe that it is not necessary or desirable for the safe harbor to seek to define what loan-level data should be provided to investors in RMBS.

17. For RMBS, should disclosure of detailed information regarding underwriting standards be required? For example, should securitizers be required to confirm that the mortgages in the securitization pool are underwritten at the fully indexed rate relying on documented income, and comply with existing supervisory guidance governing the underwriting of residential mortgages, including the Interagency Guidance on Non-Traditional Mortgage Products, October 5, 2006, and the Interagency Statement on Subprime Mortgage Lending, July 10, 2007, and such additional guidance applicable at the time of loan origination?

As to these questions, we believe that a combination of loan-level disclosure consistent with the Disclosure Package, as well as typical representations and warranties, appropriately address these concerns. For example, existing representations and warranties relating to underwriting guidelines generally require that loans be underwritten in all material respects in accordance with the originator's underwriting guidelines. The Underwriting Rep included in the ASF RMBS Model Representations and Warranties takes this concept a step further by also requiring that, where loans have not been underwritten in conformance with an originator's underwriting guidelines, the originator document any compensating factors in the mortgage loan file. This documentation requirement is an important enhancement as it provides a record of the compensating factors and a potential source of evidence in the case of a repurchase request.

Detailed disclosure about a specific originator's underwriting standards and procedures are not necessarily desirable. Each originator's underwriting standards are essentially a detailed procedures manual. In practice, each originator may have within its own guidelines varying definitions of concepts such as DTI and full documentation. Moreover, underwriting guidelines generally permit variances from specific requirements due to compensating factors, which are determined on a case by case basis. Accordingly, we believe that rather than providing detailed information about the originator's underwriting standards, the better approach is a combination of (i) disclosure based on key metrics of the actual characteristics of the loans under objectively defined criteria and (ii) appropriate diligence as to whether the originator's underwriting standards and procedures were followed together with disclosure of the results.

For example, the Disclosure Package contains a field that indicates what level of borrower income verification was used. It defines five different levels of income verification using simple, objective standards. Based on a loan tape prepared under the Disclosure Package, an RMBS issuer could quantify and disclose to investors the percentage of loans in the pool in the various levels of income verification. This would be simpler and more transparent than disclosing each originator's definition of "full documentation", which may vary from originator to originator. Similarly, the Disclosure Package includes a field for DTI, but also includes additional fields showing the fully indexed rate, as well as a field with a code showing whether the DTI is based on the fully indexed payment (as opposed to the start rate or other payment).

With respect to disclosure about the extent of variances from underwriting guidelines due to underwriter discretion or compensating factors, as well as diligence regarding compliance with underwriting guidelines, we note that industry best practices are evolving, in part through the ASF's work on due diligence practices for Project RESTART. The determination of whether a loan complies with the applicable underwriting criteria is to some extent a qualitative assessment that requires judgment. An emerging set of practices is that: a third party diligence service will be engaged to diligence a sample of the loans in an RMBS transaction to assess whether they were originated in accordance with the applicable underwriting guidelines; such sample will be a statistically significant sample; the results of each loan review are expressed as a grade; and summary disclosure about the results of the diligence will be provided to investors. Loan review grades would typically range from A to D, with A indicating full compliance, B indicating substantial and sufficient compliance (which may be based on compensating factors) but not full compliance, C indicating an unacceptable level of noncompliance (which may include, for example, compensating factors that are deemed inadequate by the reviewer, or an assessment that the borrower's ability to repay is questionable), and D indicating that the loan file is incomplete. Under the above set of practices, instead of a costly diligence review of every loan in the pool, the results of the statistically significant sample would be considered indicative of the pool as a whole.

We believe that practices such as those outlined above are appropriate. However, a strict representation as to the percentage of the pool underwritten using underwriter discretion would not be necessary or appropriate, as in each case that assessment of the underwriting is in effect a judgment call.

Regarding compliance with applicable law, a standard representation and warranty for loans sold into an RMBS transaction is that the loans complied at the time of origination in all material respects with all applicable federal, state and local laws, including laws such as truth in lending and real estate settlement procedures laws, as well as predatory lending laws. The Interagency Guidance and Statement referenced in the Sample Regulatory Text are generally not covered by this representation. We recommend that reference not be made to the Interagency Guidance and Statement, in order to keep insured depository institutions on a level playing field with other RMBS issuers.

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

Generally, we believe that between existing SEC regulations as to disclosure, and established as well as developing industry practices on disclosure, there is sufficient focus on adequacy of disclosure for RMBS. We also note that the SEC has announced that it is considering an extensive round of amendments to Regulation AB, which would address disclosure and other issues. Accordingly, we do not believe that there is significant value in developing an additional RMBS disclosure regulatory regime for insured depository institutions. Moreover, the potential for such a separate set of rules adds to the relatively high degree of regulatory uncertainty that exists today in the re-emerging RMBS markets.

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?

We agree that RMBS operative documents should contain provisions that authorize a wide range of appropriate loss mitigation procedures, including modifications, for loans that are in default or for which default is reasonably foreseeable. While existing documents by and large so provide, and have been interpreted to authorize servicers to service pursuant to the Home Affordable Modification Program ("HAMP"), the provisions could in many cases be clearer. In particular, future RMBS documents should authorize servicers to follow a streamlined approach to loan modifications other than the HAMP guidelines, for application to loans that are not eligible under HAMP. As indicated above, the ASF is working to develop a set of model servicing agreement provisions for use in RMBS transactions, which will address the concerns raised by this question.

We believe that any regulations should not define any specific net present value analysis. There should be flexibility for a servicer to adopt a reasonable approach to determining net present value that is consistent with industry standards. In developing model servicing provisions, the ASF will see if a single standard is feasible. We also believe that all provisions related to servicer discretion should be considered in light of any effect that these provisions may have on the issuer's desired accounting treatment for the transaction under GAAP.

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?

We are in favor of contractual provisions that make it clear that the servicer's duty is to maximize proceeds for the benefit of investors in the aggregate, and that the servicer does not have any duty to maximize proceeds for any specific class of investors. Another provision that should be considered is an ability for a servicer to sell a defaulted loan out of a mortgage pool at a discounted fair market value price, if that would maximize proceeds to investors.

We are in favor of allowing flexibility for there to be a specified class of investors that has the ability to direct servicing decisions. This feature is used in a number of different transactions, and particularly with CMBS. Any conflict of interest issues related to this provision should be considered carefully and adequately disclosed by the transaction parties. We would not advocate that this feature be required in any given transaction and believe that its use should be determined by the parties and investors in a particular transaction.

As stated above, the ASF is developing a set of model servicing agreement provisions for use in RMBS transactions, which will address the concerns raised by this question.

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

We do not believe that the safe harbor should mandate a specific timeline for servicer action following delinquency. We believe there needs to be flexibility for servicers to adopt and follow appropriate guidelines that promptly address delinquencies, but that there is no single timeline that is appropriate for all asset types, and that within any asset types different circumstances may give rise to different timelines for action.

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

We believe that the safe harbor should not address the extent of servicer advancing, or make advancing contingent on the availability of an advance facility. We believe these transaction provisions should be left to the market to determine.

Generally, servicing advance requirements are linked to a determination that the amounts advanced will be ultimately recoverable. It may be true that in adverse market conditions, continued advancing may benefit the servicer in that its compensation stream continues pending final liquidation, while at the same time benefiting the first loss tranche holder by continuing interest payments and increasing the ultimate size of the loss on final liquidation. However, it should also be noted that the concept of advancing reflects a desire to create liquidity for investors and for as long as advances are being made, all investors are receiving payments on their RMBS. Moreover, the servicing obligations, while they include the requirement to advance as long as the advance is recoverable, are qualified by the servicing standard which generally requires maximizing benefits to the whole trust. If this creates a misalignment of interests with the servicer that defers resolution of defaulted loans, we believe that is better addressed by possible changes in servicing compensation (see question 25 below) and market negotiation.

With respect to the question of whether a servicer's incentives are misaligned with investors during a market downturn because of the need and expense of the advances required in this event, servicers are still currently bound by contract to continue to advance for as long as the advance is determined to be recoverable. Historically, advances were created in order to provide an even cash flow stream (liquidity, not credit enhancement) for the benefit of investors. However, the fact remains that such continued advancing is extremely expensive and should, in the future, be considered in connection with negotiating the servicer's advancing requirements.

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

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

Please refer to our responses to questions 19 through 22 above.

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?

As an organization with a wide variety of constituencies included in its membership, we find that there are a wide variety of views on the utility of deferred compensation as a mechanism to promote asset quality.

Investors are attracted to the concept of deferred compensation for various transaction parties. However, there is significant concern that this provision would not materially alter an individual's behavior, for a variety of reasons. The deferred portion of the compensation may be viewed as of speculative value, as opposed to an income stream that the individual reasonably expects to receive. The deferred portion may be viewed as a transaction cost or tax, with recipients viewing only the cash portion as the "true" fee. Within any given corporate entity that is required to defer compensation, it is possible that such entities might nevertheless make compensation payments to individual employees based on the estimated present value of the deferred compensation.

Another issue is the lack of accountability imbedded in the proposal. The concept is that all persons earning fees for origination and issuance would have a portion of their compensation deferred and dependent on the future performance of the assets. Yet performance may vary for a wide variety of reasons. For example, investors and rating agencies could suffer if loans were originated using fraudulent documentation provided by a loan broker, which was not detected despite reasonable diligence efforts. An underwriter's compensation could be withheld if the securities are downgraded due to a defect in the rating agencies' models. And all participants' compensation could be withheld if the asset performance is impaired by poor servicing decisions, beyond the control of any party involved in origination or issuance, or simply by future adverse market conditions.

To the extent that there is no linkage between payment of the deferred portion of compensation to any party and actions or inactions taken by that same party, we question whether the arrangement creates any incentives towards better asset quality. Yet even without introducing such a linkage, there are many practical questions. How would such deferred compensation be escrowed and funded? Who would determine whether the payout conditions had been met? What are the tax considerations of any such arrangement? We believe there are many practical questions about the implementation of the proposal.

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

Finally, we believe that there should not be regulatory caps set on compensation for various transaction participants. We believe that the market should set compensation. In this regard, we note that after the contraction in origination and RMBS issuance volume, the market for these types of services is quite competitive.

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?

We are generally not opposed to an industry-wide effort to revamp servicing compensation for RMBS, in order to encourage optimal servicing. Such an approach could be designed to encourage specific objectives, such as rapid return of delinquent loans to current pay status, entry into sustainable and documented loan modifications where warranted, and rapid resolution of defaulted loans where no option other than liquidation is available. Under such an approach, servicing would in effect become a variable cost.

There are a number of consequences to this approach that would have to be considered. First, there would have to be a mechanism for funding this variable cost out of transaction cash flow, which would be considerably more complex than the fixed servicing fee now widely used because the servicing fee is generally paid at the top of the cash flow waterfall ahead of payments to the securities. This would make cash flow modeling significantly more complicated. Second, there could be a significant effect on the variability of the carrying value of servicing rights as a financial asset, as the cash flows attributable to servicing rights could become significantly more volatile.

While this proposal has merit, we believe that it should be considered in the context of a broad-based industry initiative, and only if it is determined that it has significant support. We do not believe that such an ambitious reform should be considered as part of the safe harbor.

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

Please refer to our responses to questions 24 and 25 above.

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

Please refer to the second and third paragraphs of our response to question 25.

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?

The ASF does not believe that an across-the-board mandatory credit retention is the optimal way to enhance the alignment of incentives towards asset quality. While the idea continues to have some threshold appeal as a solution, on reflection we find it to be a blunt instrument that should not be employed. Instead, we believe that within transactions contractual provisions designed to assure asset quality should be tightened, enhanced diligence procedures should be employed both pre- and post-securitization to assure asset quality and to enforce remedies for breaches of representations and warranties, and further consideration should be given to directly regulating lending practices that have been proven to be risky (see question 32 below).

We believe that the focus should be on measures that directly assure asset quality. Mere retention of a portion of credit risk by an originator or securitization sponsor will not, in our view, necessarily result in improved asset quality. The Comptroller of the Currency, John C. Dugan, agreed in a recent speech that "while lax underwriting is plainly a fundamental problem that needs to be addressed, mandatory risk retention for securitizers is an imprecise and indirect way to do that, and is by no means guaranteed to work. How much retained risk is enough? And what type of retained risk would work best – first loss, vertical slice, or some other kind of structure?"[53] Indeed, there are many examples of originators in the run up to the credit crisis that retained substantial credit risk in the form of residual interests in securitizations, and in the form of covenants to repurchase loans that become delinquent within the first few monthly payments. Many of these originators were involved in subprime and alt-A loans. As is well known, many of these originators were forced into insolvency due to these exposures. We are not aware of any evidence that suggests that these originators

[53] John C. Dugan, Comptroller of the Currency, *"Securitization, 'Skin-in-the-Game' Proposals, and Minimum Mortgage Underwriting Standards,"* (February 2, 2010). www.occ.treas.gov/ftp/release/2010-13a.pdf at pg. 5.

made better quality loans than otherwise would have been the case, absent that level of risk retention.

Generally, we are very concerned that the risk retention proposal will prevent originators and securitization issuers from being able to transfer 100% of the credit risk in an asset pool into the capital markets via securitization. We believe that it is necessary for such exposure to be transferable, in order to permit originators to make needed loans to consumers and businesses without exhausting their capital. As recently noted by the IMF in its *Global Financial Stability Report*, "policies designed to put more securitizer skin in the game also risk closing down parts of securitization markets if poorly designed and implemented. In particular, the analysis presented demonstrates that variations in schemes that force securitizers to retain some slices of their securitization products can have dramatic effects on the incentives to improve loan screening, in some cases with the unintended effect of making some types of securitization too costly to execute, effectively shutting down these markets."[54]

Furthermore, a 5% retention requirement coupled with a prohibition on transferring or hedging the risk conflicts with numerous other valid goals and purposes of securitization, including the ability to redeploy capital to fund credit for consumers and small businesses, the reduction and management of risk held by financial institutions, and achieving legal isolation of transferred financial assets. The ASF does not believe that deposits alone can support the credit needs of consumers and small businesses, and a 5% retention requirement will further reduce the ability of lenders to finance new credit required for economic recovery, growth and job creation, as valuable capital will need to be maintained against the retained positions. The current economic environment requires the implementation of policies that lead to credit creation, not credit reduction. For this reason, we believe that retention proposals should not address a portion of the credit risk, but rather should address the entire risk that the assets do not conform to representations made to investors.

Instead, the principal goal of any risk retention initiative should be to establish and reinforce commercial incentives for originators and sponsors to create and fund assets that conform to stated underwriting standards and securitization eligibility criteria, thereby making those parties economically responsible for the stated attributes and underwriting quality of securitized loans. For this reason, the ASF continues to advocate that risk retention or skin in the game for originators and issuers of RMBS be implemented through the representations and warranties that originators and issuers provide with respect to the mortgage loans sold into the securitization trust coupled with meaningful remedial mechanisms designed to ensure their enforcement. Strong representations and warranties and repurchase provisions, like the Model Reps and the Model Repurchase Provisions developed through Project RESTART, facilitate responsible lending and more disciplined and efficient funding of consumer assets via securitization. Without exception, our originator, issuer and investor members view representations and warranties as risk retention for RMBS transactions. We support a 100% repurchase of a loan where its characteristics do not materially conform to

[54] International Monetary Fund, "Restarting Securitization Markets: Policy Proposals and Pitfalls." Global Financial Stability Report: Navigating the Financial Challenges Ahead (Oct. 2009), pg.109, www.imf.org/external/pubs/ft/gfsr/2009/02/pdf/text.pdf.

the stated characteristics set forth by the originator. For this reason, we believe that risk retained through representations and warranties results in an even greater amount of skin in the game than the 5% risk retention requirements proposed in the Sample Regulatory Text. Risk retention requirements based on a percentage of each loan in a securitization trust do not stand up to a full repurchase of the defective loans at which risk retention requirements are aimed.

We also believe that the concept of 5% risk retention across the board for all asset types is ill founded. If risk retention is employed in this format, it should be calibrated to reflect the risk in any given asset pool. We note that the risk retention concept included in H.R. 4173 includes a calibration feature whereby the risk retention is reduced for higher quality assets. Different types of loans and securitized assets present wide variations in expected credit and performance characteristics. For example, mortgage loans made to prime borrowers will have vastly different credit risks than those made to non-prime borrowers.[55] Given this variability, any blanket, one-size-fits-all retention requirement will be arbitrary in its application to any particular asset type, and will not reflect important differences in the expected credit and performance characteristics of that asset versus other types of assets. We believe that, for example, if a 5% requirement were imposed on high quality jumbo prime loans, it would become uneconomical to securitize such loans. For high quality jumbo prime mortgage loans, originated in a manner consistent with GSE underwriting requirements other than the maximum principal amount limitation, given strong representations and warranties and full transparency as to underwriting criteria, we would advocate that there should be no risk retention requirement.

We also note that mandatory risk retention can create in some circumstances (for example, where the sponsor retains subordinate bonds) an inability to issue a legal true sale opinion for a securitization. Furthermore, the requirement could cause issuers to be unable to achieve sale treatment for purposes of FAS 166 and 167. We believe these are drastic and very negative consequences for a proposal that purports to help the recovery of the securitization markets.

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?

With respect to RMBS, a major step in the direction of better assuring asset quality is the ASF Model RMBS Representations and Warranties. While considered a best practice or starting point for negotiations, by having a standardized model as a benchmark investors will be much better able to gauge exactly what assurances are being made about the quality of the loans. The ASF's work on developing Model Repurchase Provisions is also a critical part to

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[55] The relative high quality of prime mortgage loans can generally be confirmed by the loan-level disclosure recommended in Project RESTART.

ensuring that the Model Reps are appropriately enforced. These initiatives, combined with the standardized Disclosure Package data fields, will enable investors to compare mortgage pools on an "apples to apples" basis for criteria such as income documentation and underwriting to the fully indexed rate. We believe, however, that the Model Reps should not be mandated by regulation, but instead agreed to by the transaction parties with full disclosure to investors.

As described above in our response to question 17, emerging pre-securitization third party diligence practices will help assure the quality of loans going into transactions, and will give investors a clearer picture as to the extent of underwriting guideline exceptions.

We strongly disagree with the concept that there should be 12 months of seasoning of any RMBS pool before securitization. Ultimately, this proposal could prevent some types of loans from being made that should be made. Applied to all residential loan originations, this would prevent originating banks from using securitization as a funding vehicle contemporaneously with origination, and would expose them to market risk during the seasoning period. Moreover, we believe this proposal puts non-GSE loans at a serious competitive disadvantage, as compared to GSE eligible loans which can be hedged forward in the TBA markets thus protecting the originator from market risk.[56] If an originating bank did intend to use securitization as a long term funding vehicle for new originations following the 12 month seasoning period, we believe that the bank would have to be prepared to incur potentially significant costs due to changes in market value of the loans during the seasoning period, resulting from interest rate changes or other factors. These costs would necessarily have to be passed along to the consumer in the form of a higher interest rate or increased fees. In addition to burdening the consumer, this would place originating banks at a competitive disadvantage with other originators of non-GSE loans. We believe that this cost disparity could well cause it to be uneconomical for insured depository institutions to originate non-GSE eligible loans in reliance on a securitization funding strategy. This result would be detrimental to the recovery of RMBS, and would discourage new lending by insured depository institutions as to non-GSE eligible loans.

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?

We are in favor of proposals for post-securitization third party diligence as a means of assuring asset quality, and also to assist with enforcement of representations and warranties. However, we believe that the development of these procedures should be left to market participants. As discussed above, as part of Project RESTART the ASF will develop a set of

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[56] "TBA markets" refers to the practice under which GSE securities to be issued in the near future can be sold in forward delivery trades based on minimal trade stipulations such as size, coupon, maturity date, etc. The ability to sell these securities on a forward delivery basis effectively allows an originator to hedge market risk for the period between loan origination and securities issuance.

Model Repurchase Provisions designed to assure enforcement of representations and warranties.

With respect to third party diligence to review for underwriting defects or other breaches of representations and warranties, other proposals under discussion include: review of each mortgage loan after a specified period of delinquency; and review of a specified sample of the pool periodically, where the sample size would increase if the pool performs worse than expected. We would envision that such third party diligence review could result in a determination expressed as a letter grade, as outlined in the response to question 17 above, reflecting the reviewer's judgment as to whether there was a material breach or a representation and warranty. Procedures would need to be worked out for the disclosure of the results of this review to investors.

However, the results of the third party diligence would not be dispositive of the matter. It would be up to the securitization trustee, or another party designated to represent the interests of investors, to evaluate and make any claims for repurchase against the sponsor or seller. The sponsor or seller in turn may have good faith grounds for contesting any repurchase claim. We believe that developing improved procedures for evaluating, making and disposing of claims for breaches of representations and warranties will be complex and challenging. In our view, this should be left to the industry to determine through Project RESTART, and should not be the subject of regulation.

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 see the discussion above under question 17 regarding regulatory compliance. We believe that any requirement in this regard should be limited to requiring that a standard representation and warranty be made that the loans comply with all applicable law, without reference to the Interagency Guidance and Statement. It should be left to market participants to determine what level of diligence should be employed with respect to regulatory compliance. If there are any breaches of such representation and warranty, given appropriate enforcement provisions within the transaction documents this will simply result in the removal of any loan that breaches that representation and warranty from the pool. We believe that this would be the appropriate result. We do not believe that it would be helpful or appropriate for eligibility for the safe harbor to be denied merely because some loans in the transaction breach that representation and warranty.

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

We are concerned that the ANPR, like other reform proposals being considered, rely too much on indirect incentives to bolster the quality of assets transferred into securitizations, which may or may not work as intended. With respect to RMBS and underlying residential mortgage loans, it is foreseeable that at some future point, given enough stabilization in the markets, lending standards will again loosen and that the volume of assets originated for securitization as well as investor demand will increase. At that time, originators and securitization sponsors may again become subject to competitive pressures to loosen standards further in order to gain or protect market share. Despite needed improvements as recommended in this Response Letter for disclosure, diligence procedures, representation and warranty enforcement and the like, the risk here is not that these new loans will not be of the credit quality represented to investors, but rather that the lending standards themselves will move far enough towards loosening to again encourage excessive leverage by borrowers or inflated home values. Under these circumstances, it is possible for market participants generally to have their incentives aligned towards looser underwriting standards. We are concerned that proposals such as risk retention and deferred compensation fundamentally miss the mark of avoiding a recurrence of excessive credit standard loosening in the future under such circumstances.

We believe that as an alternative to risk retention and many of the other concepts included in the ANPR, one might consider carefully constructed regulations that would apply to all residential mortgage loan originators and that specifically target certain risky lending practices. It is apparent that many of the problems that occurred with RMBS in recent years were as a result not of the structures, and not of securitization itself as means of accessing the capital markets, but rather of a broad-based decline in the quality of assets going into securitizations and particularly RMBS as a result of poor underwriting.

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

Section (c)(1) of the Sample Regulatory Text says "The transaction should be an arm's length, bona fide securitization transaction," but does not provide guidance as to what would constitute a "bona fide securitization transaction." That requirement should be clarified or removed.

Section (c)(1) of the Sample Regulatory Text also introduces a new requirement that "the obligations shall not be sold predominantly to an affiliate or insider." We are concerned that the level of retention by the obligor, its affiliates or insiders that would be viewed as excessive is not clear, but that if it means a mere majority it could be too low under current market conditions when applied together with other requirements in the Sample Regulatory Text. If third party credit enhancement were prohibited, subordination would be the only way to structure a highly-rated senior class of securities. Over the last couple of years, the market for subordinated securities has been very challenged. It has been common for issuers to retain most if not all of their rated subordinate securities during this period. Over the same time period, as portfolio performance has declined for some issuers and as rating agencies and their methodologies have been under intense scrutiny, enhancement levels have been increasing. The Sample Regulatory Text includes a retention requirement of a minimum of 5%. Where an affiliate is retaining subordinate securities and the sponsor retains a minimum of 5% of the economic interests in the trust, the combined amount of securities retained by a U.S. insured depository institution and its affiliates could be quite significant. Affiliates of U.S. insured depository institutions also frequently act as underwriters and dealers in the securities issued in securitizations. Where an issuer and its affiliates already retain a significant portion of the outstanding securities, there is the risk that the retention by an affiliated underwriter of an unsold allotment could cause the amount of retained interests to exceed this threshold and thereby result in loss of the benefits of the safe harbor. This risk could discourage firm commitment underwritings by syndicates, including an affiliate of the U.S. insured depository institution. We think that a higher, clearer threshold, if any, should be used.

Section (c)(6) of the Sample Regulatory Text imposes a new requirement to split provisions in securitization documents relating to the transfer and duties of the sponsor as transferor from provisions relating to its duties, if any, as servicer, custodian, paying agent, credit support provider or in any capacity other than the transferor. Securitization documentation frequently includes transfer and servicing agreements or PSAs that combine transfer provisions with servicing provisions. This condition will require a careful parsing and separation of duties that may be quite difficult for some asset classes. For credit card revolving master trust programs, this requirement would force the amendment of existing documentation to bifurcate existing provisions. The final safe harbor rule should grandfather securitizations that are in existence prior to the effective date of the final rule even if new obligations are issued after the effective date of the final rule. Without a grandfathering provision, credit card issuers would need to go through an amendment process that might require the consent of holders of outstanding notes which could be costly and time-consuming, and potentially unsuccessful, in which case those existing programs could not be used for future issuance.

Section (c)(7) of the Sample Regulatory Text includes the following requirement: "The bank properly segregates any financial assets and records that relate to the securitization from the general assets and records of the bank." It is unclear what this would require for many asset classes where the records with respect to the financial assets are in electronic form on the computer systems of the sponsor and parties providing processing services for the sponsor. We request that this condition be deleted. If the objective is to require that the financial assets be clearly identifiable on the books and records of the bank, that specific requirement could be included in lieu of Section (c)(7) (and not create the undue expense). Language similar to that of Section (c)(7) also appears as the last sentence of the definition of "Securitization". Having similar language in both places is redundant. The last sentence of "Securitization" should be removed. In addition, Section (b)(3)(A)(i) requires the sponsor to maintain records of its securitizations separate from records of its other business operations. Further clarification is necessary with respect to this standard.

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?

Section (d)(1) of the Sample Regulatory Text

This section, regarding participations, is outside the scope of the ASF's responsibilities.

Section (d)(2) of the Sample Regulatory Text

Section (d)(2) carries forward the transition period safe harbor that was embodied in the Interim Final Rule adopted on November 12, 2009. The safe harbor protection provided by the Interim Final Rule was intended to continue for the life of a participation or securitization if the financial assets were transferred into the transaction or, for revolving securitization trusts, beneficial interests were issued on or before March 31, 2010 and the participation or securitization complied with Section 360.6. Under the Interim Final Rule, participations or securitizations were deemed to comply with the Section 360.6 requirement that any transfers into the transaction meet all conditions for sale accounting treatment under GAAP, other than the 'legal isolation' condition, if the transfers satisfied GAAP in effect for reporting periods prior to November 15, 2009. While the language of Section (d)(2) of the Sample Regulatory Text is consistent with that of the Interim Final Rule, under the Sample Regulatory Text a "securitization" is defined differently than it is under existing Section 360.6. In addition, the introductory language of Section (b) says "This section shall apply to securitizations that meet the following criteria" and it then goes on to list the preconditions of Section (b). Therefore, as drafted, the transition period safe harbor in the Sample Regulatory Text would only be available for "securitizations" that satisfy the preconditions of Section (b). This was likely not the intended result, and could have serious consequences for securitizations that otherwise meet the criteria of Section (d)(2). This problem could be corrected by clarifying in Section (d)(2) that the term "securitization" shall have the meaning given to it in Section 360.6 as in effect prior to the effective date of the new rule.

Section (d)(3) of the Sample Regulatory Text

Section (d)(3) provides that, for any securitization outside the scope of Section (d)(2) of the Sample Regulatory Text, the FDIC as conservator or receiver will not exercise its statutory repudiation authority to "reclaim, recover, or recharacterize as property of the institution or the receivership" financial assets transferred in connection with such a securitization provided that (i) certain securitization criteria are met and (ii) the transfer "satisfies the conditions for sale accounting treatment set forth by generally accepted accounting principles in effect for reporting periods after November 15, 2009, except for the 'legal isolation' condition that is addressed by this rule." This safe harbor, in which the FDIC agrees not to reclaim, recover, or recharacterize the transferred financial assets, is essentially the same approach taken in existing Section 360.6. We strongly support this approach, which provides a simple and effective safe harbor that we believe will satisfy the concerns of investors in connection with qualifying securitizations. We note, however, that (i) the securitization criteria necessary to qualify for the safe harbor should be subject to the comments we have made above with respect to paragraphs (b) and (c) of the Sample Regulatory Text and (ii) in view of the amendments to FAS 166 and 167, the requirement that a transfer of assets must meet the requirement for sale accounting treatment will mean that in fact very few securitizations will qualify for the safe harbor of Section (d)(3).

Section (d)(4) of the Sample Regulatory Text

The scope of the safe harbor in Section (d)(4) is not adequate. The critical problem is that, instead of the proven "will not reclaim, recover, or recharacterize" approach of existing Section 360.6 (and Sections (d)(1), (2) and (3) of the Sample Regulatory Text), Section (d)(4) would instead create a "security interest" approach that would merely authorize investors to exercise their remedies as secured creditors. This approach is untested, complex, subject to serious objections by investors, and very hard to make work at a technical level. Indeed, we believe that, for various legal and policy reasons, as a practical matter the FDIC is unlikely to be able to resolve each of the issues raised by this approach in a way that will satisfy the concerns of investors. We therefore propose a simpler and more reliable alternative that is based directly on both Section (d)(3) of the Sample Regulatory Text and the FDIC's statements in the ANPR itself.

As an initial matter, it is important to distinguish between two meanings of a "transfer" of financial assets. Under the Sample Regulatory Text, the "transfer" of financial assets is defined to include (i) the conveyance of financial assets to an issuing entity as well as (ii) the creation of a security interest in such assets for the benefit of the issuing entity.[57] Defining "transfer" to include a conveyance (i.e. an assignment) of financial assets is consistent with the safe harbor provided by existing Section 360.6 and Sections (d)(1), (2), and (3) of the Sample Regulatory Text—by agreeing not to "reclaim, recover, or recharacterize" the transferred assets as property of the institution or receivership, the FDIC represents that (if the threshold criteria are satisfied) the FDIC as conservator or receiver will effectively recognize the assignment of the transferred assets in accordance with the securitization documents and will not seek to claim that such assigned assets are instead assets of the institution or receivership.[58] This is the safe harbor that the market has relied upon since the

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[57] Sample Regulatory Text, Section 360.6(a)(10), 75 Fed. Reg. 934 at 939 (1/07/2010).

[58] In the absence of the safe harbor, such a claim would usually be made on the basis that the purported assignment of the transferred assets did not qualify as a "sale" or "true sale" under applicable law but that the transaction was instead a financing in which only a security interest had been transferred to investors. (A legal "sale" or "true sale" for this purpose is *not* equivalent to sale accounting treatment as set forth in generally accepted accounting principles.) As clearly expressed by the preamble to existing Section 360.6, the safe harbor is needed only for an assignment that does not qualify as a "sale" or "true sale" under applicable law: "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; the FDIC would not be able to recover transferred assets as a result of repudiation. In the case of a completed sale, the FDIC would have nothing to repudiate if no further performance is required." 65 Fed. Reg. 49189 at 49191 (August 11, 2000). In other words, the meaning of "reclaim, recover, or recharacterize" in existing Section 360.6 and Sections (d)(1), (2) and (3) of the Sample Regulatory Text is that the FDIC as conservator or receiver will recognize a qualifying assignment in accordance with the securitization documents even if it arguably might not qualify as a "sale" or "true sale" under applicable law. Similarly, in its press release announcing the Interim Final Rule, which takes the same "reclaim, recover, or recharacterize" approach as Section (d)(3) of the Sample Regulatory Text, the FDIC stated that "For participations and securitizations that meet those requirements, the Interim Final Rule provides that the FDIC shall not, by exercise of its authority to disaffirm or repudiate contracts, seek to reclaim, recover, or recharacterize as property of the institution or the receivership any financial assets

adoption of existing Section 360.6—which is very different from merely allowing a secured creditor to exercise its remedies with respect to the "transfer" of a security interest. While existing Section 360.6 also covers the transfer of a security interest, it is the FDIC's promise not to "reclaim, recover, or recharacterize" any financial assets *assigned* pursuant to the securitization documents in connection with a qualifying securitization that has satisfied investor concerns for the past decade.

The ANPR states that:

> "The FDIC believes that several of the issues of concern for securitization participants regarding the impact of the 2009 GAAP Modifications can be addressed simply by clarifying the position of the conservator or receiver under established law. The ability of the FDIC as conservator or receiver to reach financial assets transferred by an IDI to an issuing entity in connection with a securitization is limited by the statutory provision prohibiting the conservator or receiver from avoiding a legally enforceable or perfected security interest, except where such an interest is taken in contemplation of insolvency or with the intent to hinder, delay, or defraud the institutions or the creditors of such institution. Accordingly, *in the case of a securitization that satisfies the standards set forth in the ANPR, the conservator or receiver will not, in the exercise of its statutory repudiation power, attempt to reclaim or recover financial assets transferred by an IDI in connection with a securitization if the financial assets are subject to a legally enforceable and perfected security interest under applicable law*."[59]

In other words, provided that the transferred financial assets are subject to a legally enforceable and perfected security interest (and that the securitization otherwise satisfies the standards set by the FDIC), the FDIC will respect a securitization and will not seek to reclaim, recover, or recharacterize the assets transferred by the insured depository institution in connection with it. This is essentially the same approach that is taken under the existing rule and under Section (d)(3) of the Sample Regulatory Text, except that under the ANPR statement the FDIC's promise not to reclaim or recover the financial assets is conditioned on a legally enforceable and perfected security interest rather than on satisfying the GAAP conditions for sale accounting treatment. Under this approach, as under existing Section 360.6, the FDIC as conservator or receiver would agree to leave a qualifying securitization intact by recognizing that the U.S. insured depository institution has effectively transferred ownership of the financial assets pursuant to the securitization documents. Therefore, the FDIC would not use its repudiation power to reclaim, recover, or recharacterize the transferred assets (although the FDIC could, of course, repudiate any executory contractual provisions imposing servicing or other ongoing obligations on the FDIC). We think that this is a simple and elegant solution that would provide investors with an effective safe harbor

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transferred in connection with the securitization or participation [...]. As a result, any financial assets transferred into such securitizations or participations will not be treated as property of the institution or receivership [...]." FDIC Press Release, "FDIC Board Adopts Proposed Interim Final Rule To Provide A Transitional Safe Harbor For All Participations And Securitizations" (November 13, 2009).

[59] 75 Fed. Reg. 934 at 935 (1/07/2010) (emphasis added).

while safeguarding the interests of the FDIC as conservator or receiver.[60] This is the same "will not reclaim, recover, or recharacterize" approach that has been taken in existing Section 360.6 (as well as in Sections (d)(1), (2) and (3) of the Sample Regulatory Text), and it has worked well.

Unfortunately, however, the language of Section (d)(4) does not implement the above proposal, but instead proposes a highly complex "security interest" approach under which the FDIC consents in advance to the exercise of the rights of a secured creditor following the occurrence of "monetary default" or formal repudiation by the FDIC and the expiration of a 10-day time period, "provided no involvement of the receiver or conservator is required." Such a "security interest" approach might work in theory, but in practice it would be extremely difficult to implement in a way that satisfied investor concerns without raising legal and policy concerns about the scope of the FDIC's authority (especially with respect to the definition of actual direct compensatory damages). This creates a serious risk that, after all the work that is going into the proposal, at a technical level the safe harbor just won't work.

In order to be effective, a "security interest" approach would have to adequately address each of the following investor concerns:

- **Automatic stay**. A 2006 amendment to the FDI Act added Section 11(e)(13)(C), which provides that no person may exercise any right to terminate, accelerate, or declare a default under a contract to which a U.S. insured depository institution is a party, or to obtain possession of or exercise control over any property of the U.S. insured depository institution, or affect any contractual rights of the U.S. insured depository institution, without the consent of the conservator or receiver, as appropriate, for 45 days after the appointment of a conservator or 90 days after the appointment of a receiver. This is the *only* issue that is addressed by Section (d)(4), which authorizes the exercise of the rights of a secured creditor if certain criteria are met. Under the Sample Regulatory Text, therefore, the only benefit of qualifying for Section (d)(4) would be to put investors and rating agencies in essentially the same position that they would have been *without* the safe harbor of Section 360.6 at any time before the 2006 amendment that added the consent requirement of Section 11(e)(13)(C). We believe that this very narrow approach will not satisfy investor concerns.[61]

[60] Clearly the FDIC has the authority to take this approach, because it has done so in existing Section 360.6 and in Sections (d)(1), (2) and (3) of the Sample Regulatory Text.
[61] It could be argued that a broader safe harbor is not necessary because securitizations did take place before the adoption in 2000 of the safe harbor in existing Section 360.6. There are differing views, however, on the extent to which investors in the 1990s relied solely on their security interest or on a belief that the FDIC would not repudiate a bona fide securitization. In any case, as a result of market developments since that time, including the financial crisis of 2007-2009, we believe that investors today would not be willing to rely solely on a security interest approach unless the issues discussed above were adequately addressed. *See, e.g.*, Moody's assessment of the Sample Regulatory Text discussed above.

- **Timely payment**. Securities ratings are based on the timely payment of accrued interest when due and of principal at maturity. Section (d)(4) of the Sample Regulatory Text provides a mechanism whereby the rights of a secured party may be exercised after 10 days from the date of "monetary default" or written notice of repudiation by the FDIC as conservator or receiver. This creates a risk that investors will fail to receive payments of principal or accrued interest not only for the 10-day period, but for the entire payment period leading up to the 10-day period. Thus, if interest payments are scheduled monthly, quarterly, or semi-annually, investors could lose interest for the entire payment period plus the 10-day period. This poses a much more serious repayment risk for investors than the 10-day period itself.[62]

- **Damages to date of payment**. In the event of default, investors expect payment of accrued interest to the date of payment of principal and interest. The FDI Act, however, requires the FDIC as conservator or receiver, upon repudiation of a contract, to pay "actual direct compensatory damages" to the date of appointment of the FDIC as conservator or receiver.[63] In addition to the timely payment risk discussed above, therefore, Section (d)(4) leaves open the possibility that the FDIC as conservator or receiver could take the position that any interest payments made after the date of appointment must be included in actual direct compensatory damages and therefore deducted from any damages paid upon repudiation of the securitization agreements.[64]

- **Market value of collateral**. The FDIC has taken the position that its obligation to pay a secured creditor on a valid claim upon the repudiation of a secured obligation is effectively limited to the value of the collateral securing

[62] This issue could be addressed through a clear statement that the FDIC will pay, or damages will include, interest accrued through the start of the ten-day period. We believe that the FDIC as conservator or receiver has the authority to pay principal or such accrued interest, in addition to any actual direct compensatory damages that are ultimately paid upon repudiation of the securitization agreements, either under the securitization agreements as in effect until they are repudiated or as an administrative expense of the conservator or receiver. If not, then only a "will not reclaim, recover, or recharacterize" approach would adequately address this issue.

[63] Although the ANPR repeatedly emphasizes that the FDIC does not have statutory authority to repudiate a bona fide security interest, the FDIC *is* authorized to repudiate an obligation secured by such a security interest, in which case the FDIC's liability (regardless of the amount of security) is limited to "actual direct compensatory damages," as defined in the FDI Act, on the secured creditor's claim. In other words, although the FDIC cannot repudiate the security interest itself, it can repudiate the underlying obligation and pay only "actual direct compensatory damages" on the claim. It is the potential repudiation of the secured obligation, not the security interest, that is the main concern of investors.

[64] This issue could be addressed through a clear statement that the FDIC would not deduct any interim payments under the securitization agreements from actual direct compensatory damages paid upon repudiation of the securitization agreements. We believe that the FDIC as conservator or receiver has the authority to make such interim payments, in addition to any actual direct compensatory damages that are ultimately paid upon repudiation of the securitization agreements, either under the securitization agreements as in effect until they are repudiated or as an administrative expense of the conservator or receiver. If not, then only a "will not reclaim, recover, or recharacterize" approach would adequately address this issue.

the claim.[65] In the event of repudiation of a securitization under Section (d)(4), therefore, the FDIC could potentially pay less than par value on the principal amount of the securities if the market value of the assets at the time of repudiation and repayment were less than such par value. This creates market value risk for investors. As discussed above, Moody's has highlighted this risk in their assessment of the Sample Regulatory Text and on the basis of this risk and the other risks associated with repudiation, has taken the position that ratings for securitizations that rely for legal isolation on the safe harbor in the Sample Regulatory Text would be linked to the rating of the sponsor.[66] This result could undermine the entire purpose of securitizations.

- **Involvement of the FDIC**. Section (d)(4) permits a secured creditor, after certain criteria are satisfied, to exercise its contractual rights including obtaining possession of the transferred financial assets, exercising self-help remedies, or liquidating property pledged as collateral — but only "provided no involvement of the receiver or conservator is required." In most cases, however, the insolvent institution will have been acting as servicer of the transferred financial assets, which will make it impracticable for a secured party to exercise its rights over the assets without involving the FDIC as conservator or receiver.[67] In this context, as discussed below, the fact that the FDIC consents in Paragraph (e) of the Sample Regulatory Text to certain payments in accordance with the securitization documents and to any servicing activity with respect to financial assets transferred in connection with the securitization, does not mean that the FDIC as conservator or receiver will itself make such payments or conduct such servicing activity.[68]

A "security interest" approach would have to adequately address each of the above issues in order to provide a safe harbor that would satisfy the concerns of investors.[69] Section (d)(4) of the Sample Regulatory Text, however, addresses only the first issue (the automatic stay), and for that reason is inadequate as a safe harbor.

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[65] See 12 U.S.C. 1821(e)11)(A); FDIC Covered Bond Policy Statement, 73 Fed. Reg. 43754 (July 28, 2008) ("if there were insufficient collateral pledged to cover all valid claims by the secured parties, the amount of the claims in excess of the pledged collateral would be unsecured claims in the receivership").
[66] This issue might conceivably be addressed through a mechanism under which the FDIC as conservator or receiver would agree to release the transferred financial assets to a trustee or others who would be permitted to maintain the securitization on an ongoing basis. But such a mechanism would be complex, would require amending the documentation for existing securitizations, and is certainly not implemented by Section (d)(4) of the Sample Regulatory Text. In addition, such an approach would involve the FDIC giving up its residual interest in the financial assets precisely at a time when that interest is likely to be undervalued, making it unclear what benefit the FDIC might gain by retaining the flexibility to exercise its repudiation authority to "reclaim, recover, or recharacterize" the transferred assets in such a case.
[67] Of course, the FDIC may at any time repudiate its servicing obligations and transfer servicing to a third party, but unless and until it has done so it may be effectively impossible for a secured party to exercise control over the assets without involving the FDIC as servicer.
[68] Potential solutions to this problem are discussed below in connection with the wording of Paragraph (e).
[69] The "Security Interest Approach" proposal contained in the ASF's letter dated September 18, 2009 did address each of these issues, but as a result was necessarily far more complex than the Sample Regulatory Text.

In this regard, it is important to note that a failure to adequately address *any one* of the above issues is likely to render the safe harbor unusable: a "security interest" approach necessarily has many moving parts and if one of them is missing or broken then the entire mechanism just won't work. In addition, for various reasons relating to the FDIC's legal authority as well as an understandable reluctance to limit the flexibility of the FDIC as conservator or receiver, we are highly skeptical that as a practical matter the FDIC will be able to resolve each of the above issues in a way that will adequately address the concerns of investors. For that reason, we strongly recommend that the FDIC return to the simple and proven "will not reclaim, recover, or recharacterize" safe harbor of both existing Section 360.6 and Sections (d)(1), (2) and (3) of the Sample Regulatory Text.

Suggested Changes to Section (d)(4)

As a means to implement the "will not reclaim, recover, or recharacterize" approach for Section (d)(4), we suggest (i) using the same operative language that is now in Section (d)(3) of the Sample Regulatory Text while (ii) replacing the proviso that the transfer satisfies the conditions of sale accounting treatment with a proviso that "the financial assets are subject to a legally enforceable and perfected security interest under applicable law" — language taken directly from the ANPR as quoted above. Thus, so long as any other conditions of the safe harbor were satisfied, the FDIC would provide exactly the same safe harbor to a transfer of financial assets that are subject to a legally enforceable and perfected security interest as the FDIC currently provides under Section 360.6 (and would provide under Section (d)(3) of the Sample Regulatory Text) to a transfer of financial assets that satisfies the conditions of sale accounting treatment. This solution is simple, it raises no significant policy concerns, and—most important—we know that it will work.

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?

In Paragraph (e) of the Sample Regulatory Text the FDIC consents, under the "automatic stay" or "consent requirement" of Section 11(e)(13)(C) of the FDI Act, (i) to the making of certain payments in accordance with the securitization documents and (ii) to any servicing activity with respect to financial assets transferred in connection with the securitization. This consent therefore permits (i) a trustee to make such payments or (ii) a third-party servicer to conduct such servicing activity. We believe that a clear authorization or confirmation that such parties may make such payments or conduct such activities will be necessary to satisfy investor concerns under any approach to Section (d)(4) of the Sample Regulatory Text.[70] We do not believe, however, that such an authorization or confirmation by itself will be sufficient to satisfy investor concerns with respect to the consent requirement of Section 11(e)(13)(C).

[70] Although existing Section 360.6 does not address the automatic stay of Section 11(e)(13)(C), we understand that investors have accepted this situation because of their confidence that the FDIC as conservator or receiver will not rely on the new authority provided by Section 11(e)(13)(C) to take actions inconsistent with the underlying policy of Section 360.6. The situation would be very different if, after the enactment of Section 11(e)(13)(C), the FDIC failed to address the issue in connection with revisions to Section 360.6.

In particular, because the consent requirement of Section 11(e)(13)(C) does not apply to the FDIC itself, Paragraph (e) does not appear to promise that the FDIC as conservator or receiver will itself make payments in accordance with the securitization documents or conduct servicing activities with respect to transferred financial assets. This reading is consistent with the qualification in Section (d)(4) of the Sample Regulatory Text that limits a secured party's remedies to those for which "no involvement of the receiver or conservator is required." In the context of a "security interest" approach such as Section (d)(4) of the Sample Regulatory Text, however, the possibility that the FDIC as conservator or receiver might refuse to make payments or arrange an orderly transfer of servicing obligations with respect to transferred financial assets under its control—and that a secured party would have no remedy for such behavior under either Section (d)(4) or Paragraph (e)—creates a serious risk for investors. As a result, we believe that if Paragraph (e) were adopted in the context of Section (d)(4) of the Sample Regulatory Text then the wording of Paragraph (e) would *not* provide adequate clarification of the FDIC's agreement to pay monies due under the securitization until monetary default or repudiation.[71]

Paragraph (e) might be more effective if it were adopted in the context of a "will not reclaim, recover, or recharacterize" approach such as existing Section 360.6, Sections (d)(1), (2) or (3) of the Sample Regulatory Text, or the language that we have proposed above to replace Section (d)(4) of the Sample Regulatory Text—but only if the FDIC is willing to provide additional guidance regarding its rights and responsibilities. As noted above, the risk for investors that is created by the consent requirement of Section 11(e)(13)(C) is that the FDIC as conservator or receiver might refuse or materially fail either to make payments in accordance with the securitization documents or to conduct servicing activities in connection with transferred assets—and might rely on the consent requirement to delay for up to 90 days any action by investors seeking a remedy for such behavior. We see two possible ways to address this risk.

One approach would be for the FDIC to confirm that a refusal or material failure by the FDIC as conservator or receiver to make payments in accordance with the securitization documents or to conduct essential servicing activities (until it has arranged an orderly transfer of servicing obligations) in connection with transferred assets would constitute a de facto repudiation of the securitization agreements as a result of which the FDIC would have effectively "reclaimed, recovered, or recharacterized" the transferred assets—and that such behavior would therefore be inconsistent with the FDIC's promise not to reclaim, recover, or recharacterize the transferred assets under the language we propose for Section (d)(4). In that case, the wording of Paragraph (e), together with our proposed language for Section (d)(4), *would* provide adequate clarification of the receiver's agreement to pay monies due under the securitization until monetary default or repudiation. In order to satisfy investor concerns, however, under this approach the FDIC would have to clearly state that its agreement not to "reclaim, recover, or recharacterize" the transferred financial assets for purposes of the language that we propose for Section (d)(4) would also preclude it from

[71] Under the security interest approach, it may be difficult to address this issue without a clear statement by the FDIC of its agreement, as conservator or receiver, to make such payments and arrange for an orderly transfer of servicing obligations.

refusing or materially failing either to make payments in accordance with the securitization documents or to conduct servicing activities in connection with transferred assets.[72]

A second, more direct approach would be for the FDIC to confirm that the consent requirement does not apply to transferred assets that the FDIC has agreed not to "reclaim, recover, or recharacterize." In this regard, the FDIC Press Release adopting the Interim Final Rule said in part that:

> "For participations and securitizations that meet those requirements, the Interim Final Rule provides that the FDIC shall not, by exercise of its authority to disaffirm or repudiate contracts, seek to reclaim, recover, or recharacterize as property of the institution or the receivership any financial assets transferred in connection with the securitization or participation, even if the transaction does not satisfy all conditions for sale accounting treatment under generally accepted accounting principles as effective for reporting periods after November 15, 2009. *As a result, any financial assets transferred into such securitizations or participations will not be treated as property of the institution or receivership, and consequently the consent requirement of 12 USC §1821(e)(13)(C) will not apply*."[73]

In other words, financial assets that are transferred in accordance with the criteria of the Interim Final Rule (which takes the same "will not reclaim, recover, or recharacterize" approach as both Section (d)(3) and our proposed language for Section (d)(4) of the Sample Regulatory Text) will not be considered property of the institution or receivership and so will not be subject to the consent requirement of Section 11(e)(13)(C). If a similar statement were to be made with respect to all transfers that satisfy the revised requirements of Section (d) (including our proposed language for Section (d)(4)) of the Sample Regulatory Text then Paragraph (e) would no longer be necessary. We believe including such language in the final rule would be the cleanest and most direct approach to addressing investor concerns with respect to the consent requirement of Section 11(e)(13)(C) of the FDI Act.

[72] The alternative interpretation is that the "reclaim, recover, or recharacterize" language that we propose for Section (d)(4) would *not* be triggered by a refusal or material failure by the FDIC as conservator or receiver either to make payments in accordance with the securitization documents or to conduct servicing activities in connection with transferred assets—in which case the language of Paragraph (e) would not appear to prevent the FDIC from relying on the automatic stay provision of Section 11(e)(13)(C) to delay any action by investors seeking a remedy for such behavior. If the FDIC takes that view then the wording of Paragraph (e) does *not* provide adequate clarification of the receiver's agreement to pay monies due under the securitization until monetary default or repudiation.

[73] FDIC Press Release, "FDIC Board Adopts Proposed Interim Final Rule To Provide A Transitional Safe Harbor For All Participations And Securitizations" (November 13, 2009) (emphasis added).

X. COMMENTS TO DEFINITIONS USED IN SAMPLE REGULATORY TEXT

The reference in the definition of "Issuing Entity" to "two-tier transfer" should be changed to "multi-tier transfer".

"Obligations" as defined excludes "any instrument that evidences ownership of the issuing entity." By contrast, Section 360.6 uses the defined term "Beneficial interest" which includes "debt or equity (or mixed) interests or obligations of any type issued by a special purpose entity…" Securitizations take many forms, including, for example, grantor trusts where the securities issued are certificates of beneficial interest in a trust that may be viewed as equity. The definition of "Obligations" should be expanded to encompass certificates of beneficial interest in a trust and other interests in securitizations that have equity-like characteristics. This issue could be addressed by incorporating the definition of "Fixed-income securities" from Investment Company Act Rule 3a-7 which is as follows:

Fixed-income securities means any securities that entitle the holder to receive:

i. A stated principal amount; or

ii. Interest on a principal amount (which may be a notional principal amount) calculated by reference to a fixed rate or to a standard or formula which does not reference any change in the market value or fair value of eligible assets; or

iii. Interest on a principal amount (which may be a notional principal amount) calculated by reference to auctions among holders and prospective holders, or through remarketing of the security; or

iv. An amount equal to specified fixed or variable portions of the interest received on the assets held by the issuer; or

v. Any combination of amounts described in paragraphs (b)(2) (i), (ii), (iii), and (iv) of this section;

   Provided, That substantially all of the payments to which the holders of such securities are entitled consist of the foregoing amounts.

The definition of "Obligations" should also be modified to encompass lease transactions as discussed above in our response to question 8.

With respect to the definition "Securitization," please see our responses to question 8 and question 33 where we address Section (c)(7) of the Sample Regulatory Text.

The definition of "Servicer" should be conformed to the definition of "Servicer" appearing in Regulation AB, including the second sentence thereof.[74]

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We very much appreciate your consideration of our responses and comments to the questions posed by the ANPR and the other industry views outlined in this Response Letter. Should you have any questions concerning our views and recommendations, please do not hesitate to contact me at 212.313.1135 or at tdeutsch@americansecuritization.com, Evan Siegert, ASF Associate Director at 212.313.1178 or at esiegert@americansecuritization.com, and either of our outside counsel on this matter, Andrew Faulkner, Partner, Skadden, Arps, Slate, Meagher & Flom LLP, at 212.735.2853 or at afaulkner@skadden.com, or Stephen Kudenholdt, Partner, Sonnenschein Nath & Rosenthal LLP, at 212.768.6847 or at skudenholdt@sonnenschein.com.

Sincerely,

Tom Deutsch

Tom Deutsch
Executive Director
American Securitization Forum

[74] The Regulation AB definition is as follows: "*Servicer* means any person responsible for the management or collection of the pool assets or making allocations or distributions to holders of the asset-backed securities. The term *servicer* does not include a trustee for the issuing entity or the asset-backed securities that makes allocations or distributions to holders of the asset-backed securities if the trustee receives such allocations or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer." 17 CFR §229.1101.