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July 1, 2010

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

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 September 30, 2010*
12 CFR Part 360
RIN 3064-AD53 (May 17, 2010)

Dear Mr. Feldman:

Standard & Poor's Ratings Services ("Ratings Services"), a nationally recognized statistical rating organization ("NRSRO") registered with the U.S. Securities and Exchange Commission (the "SEC") under Section 15E of the Securities Exchange Act of 1934 (the "Exchange Act"), welcomes the opportunity to comment on the proposed rule amendments contained in the notice of proposed rulemaking (the "Notice") referred to above, issued by the Federal Deposit Insurance Corporation (the "FDIC") on May 17, 2010.

Ratings Services believes strongly in the principles of transparency, accountability, and analytical independence for rating agencies and we support regulatory efforts to further those goals. We also believe it is important that there be accountability on the part of market participants, measures in place to promote the quality of the underlying data in structured finance transactions, and appropriate safeguards against potential conflicts of interest. We believe the FDIC's proposed amendments in many ways promote these principles and we are supportive of that effort.

The proposal would amend the FDIC's Securitization Rule, codified at 12 CFR § 360.6, which provides a safe harbor for financial assets transferred by an insured depository institution ("IDI") in connection with a securitization (or in the form of a participation), in order to shield the financial assets from the FDIC's authority as conservator or receiver to recover property of the IDI. We understand the FDIC's objective in revising the Securitization Rule is to address recent accounting changes that may have created uncertainty around the ability of an IDI to isolate securitized assets from recovery in an insolvency. We believe the proposed rule will likely help ensure that IDIs sponsor securitizations in a responsible and sustainable manner, and that the FDIC's actions are likely to benefit the securitization market as a whole by demonstrating best practices for an industry critical to the continuing flow of credit in the U.S. economy.

While Ratings Services is broadly supportive of the proposed amendments, we would ask the FDIC to consider modifying one area of the proposed amendments so as to harmonize them with regulatory efforts undertaken by the SEC and others to promote the important principles discussed above. Specifically, we are concerned that requiring (i) that the nature and amount of compensation paid to rating agencies be disclosed, and (ii) that, as proposed by the FDIC, fees payable to rating agencies in certain types of transactions be payable, in part, over the five-year period after first issuance of a securitization, could run counter to the efforts of rating agencies and the SEC to address the risks associated with certain rating agency-related potential conflicts of interest and to promote effective surveillance.

A. Disclosure Condition

Our first suggestion would be a slight modification to the proposed requirement that securitization documents disclose the nature and amount of compensation paid to rating agencies (the "Disclosure Condition") in order to qualify for the safe harbor. (12 CFR § 360.6(b)(2)(i)(D)). As currently written, we are concerned that this proposal could undermine important steps that rating agencies and the SEC have taken to promote analytical independence. Specifically, one important way to promote analytical independence is to maintain strict separation between analytical and commercial functions through, among other things, shielding rating analysts from information about the fees being charged for their work. To that end, NRSROs have established detailed policies and procedures to separate their commercial and analytical functions and to insulate rating analysts from involvement with or knowledge of fee negotiations and decisions.

As currently drafted, however, the Disclosure Condition would require disclosure of "the nature and amount of compensation paid to the . . . rating agency." (12 CFR § 360.6(b)(2)(i)(D), 75 Fed. Reg. at p. 27484). Our concern is that adoption of the Disclosure Condition would mean that a rating analyst who otherwise would not be exposed to information about the amount of revenue being generated by his or her work would unavoidably have access to it, since the parties to the transaction will likely satisfy this requirement by including compensation disclosure in the offering documents reviewed by investors and rating analysts alike.

In addition, a rating agency registered as an NRSRO is already subject to extensive SEC rules that address the same areas as the proposal. For example, NRSROs are prohibited by rule 17g-5(c)(6) under the Exchange Act from issuing or maintaining a rating if the fee was "negotiated, discussed, or arranged by" a rating analyst or model developer, because, in the SEC's view, "[t]his could influence the judgment they exercise in determining credit ratings or developing credit rating methodologies." (*Amendments to Rules for Nationally Recognized Statistical Rating Organizations*, Exchange Act Rel. No. 59342 (February 2, 2009), at p. 47). By providing rating analysts with access to revenue-related information during the course of their analysis, the Disclosure Condition could, if adopted, undermine the

efforts of NRSROs to promote analytical independence and, more specifically, to comply with the purpose and intent of rule 17g-5(c)(6).

In October 2009, the SEC proposed rules that would require issuers to disclose "[t]he identity of the party who is compensating the credit rating agency for providing the credit rating." (*See, e.g.*, proposed item 202(g)(6) of Regulation S-K, *Credit Ratings Disclosure*, Securities Act of 1933 Rel. No. 9070 (October 7, 2009) (the "October 2009 Proposal")). In limited circumstances where the credit rating agency or its affiliates provided non-rating services to the issuer or its affiliates, the October 2009 Proposal would require disclosure of rating fees in order to allow investors to draw a contrast between rating and non-rating fees paid. In this way, investors would be able to "gauge whether the credit rating agency's decision may have been influenced by a desire to gain or retain other business from the registrant." (October 2009 Proposal at p. 39). The SEC further explained "that when no such other non-rating services are provided, disclosure of the source of the payment for the rating . . . would sufficiently convey the potential conflict of interest." (October 2009 Proposal at p. 39). In our comment letter on the October 2009 Proposal, we noted that because investors would likely not be concerned by insignificant revenue streams, the SEC's approach would benefit from the use of a materiality threshold, such as where fees paid to a credit rating agency and its affiliates for ratings and non-ratings services aggregate to a level of 1% or more of their consolidated revenues.

In our view, the SEC's nuanced approach to the disclosure of rating fees recognizes that such disclosure may place an undue burden on parties to disclose competitive revenue information (See October 2009 Proposal at p. 47). Accordingly, we believe it may make sense to use the SEC's proposed approach to disclosure, subject to an appropriate materiality threshold, as a model for the Disclosure Condition. Under such an approach, the investor is alerted to the potential conflict of interest through information that a party involved in the securitization process is paying the rating fees. This is the key point, because without additional information to put the fee in context – for example, how significant those fees are to the rating agency's overall revenue stream – the amount of fees paid to the rating agency may not meaningfully add to the investor's understanding of the potential conflict of interest. In contrast, while the SEC's proposed approach accomplishes the goal of informing the investor about a potential conflict of interest, it is less likely—particularly with the introduction of a materiality threshold—to erode an important safeguard of analytical independence: a robust separation of analytical and commercial activities. We encourage the FDIC to examine whether the goals of the Disclosure Condition could be achieved with a similar approach.

B. Compensation Condition

Another proposed condition to the availability of the safe harbor would apply only to securitizations involving residential mortgage loans. This condition (the "Compensation Condition") would mandate that fees payable to rating agencies be payable, in part, over the

five-year period after the first issuance of the securitized obligations. (12 CFR § 360.6(b)(4)). No more than 60% of the total estimated compensation could be paid at closing. At least 40% of the rating agency's compensation would be deferred over five years, contingent upon *both* the "performance of surveillance services" *and* the "performance of the financial assets." (12 CFR § 360.6(b)(4)(i), 75 Fed. Reg. at p. 27485).

As an initial matter, we share the FDIC's view that a rating agency's continuing surveillance of its outstanding public ratings is an important aspect of the ratings process for the aftermarket that should be executed diligently. Appropriate surveillance furthers the important goal of transparency. We support regulatory efforts that promote responsible and effective surveillance activities by all rating agencies.

We are concerned, however, that the "performance" prong of the Compensation Condition may create an incentive that undermines effective surveillance. When a rating agency's surveillance procedures detect deteriorating financial assets in a changed environment or due to unforeseen circumstances, the rating agency should timely act upon that information, to the point of downgrading the transaction if appropriate or otherwise alerting the market to the deterioration. However, by linking the rating agency's compensation to the performance of the financial assets, the Compensation Condition could lead to unintended consequences; in particular, it could create strong incentives for a rating agency to delay rating actions that alert the market to a deterioration. To ensure that rating agencies are focused solely on providing appropriate, transparent, and ongoing surveillance, we believe that any contingent compensation should be tied exclusively to the performance and quality of those surveillance activities. Other aspects of the FDIC's proposed amendments could advance the FDIC's goal of ensuring that the initial selection of portfolio assets is made by parties with a financial stake in their long-term performance.

As noted above, the Compensation Condition would provide that at least 40% of rating agency compensation be paid over five years. While we believe an element of deferred compensation may promote effective surveillance activities, an inflexible minimum percentage may not achieve that goal. Fees charged for securitizations vary according to the complexity of the product being rated. Determining an initial credit rating for a complex structure can involve a significant investment of time and expense at the beginning of the rating process. In these circumstances, it is important that the rating agency have adequate revenue to support the level of resources needed to develop appropriate rating analytics; if a mandatory 60/40 split is imposed, the rating agency may have to choose between underinvesting in research and development and increasing the overall level of fees – the latter of which may not be commercially feasible. Therefore, we believe that the Compensation Condition should allow flexibility for participants in a securitization to negotiate an appropriate fee structure and timetable with rating agencies to account for the particular features of the rated securities and the nature of the underlying assets.

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We at Ratings Services appreciate the opportunity to comment on the proposal. Please feel free to contact me or Rita Bolger, Senior Vice President and Associate General Counsel, Global Regulatory Affairs, at (212) 438-6602, with any questions regarding our comments.

Sincerely yours,

David Jacob
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