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July 1, 2010

**VIA ELECTRONIC FILING**
Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
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, RIN 3064-AD53

Dear Mr. Feldman:

The Commercial Real Estate (CRE) Financial Council appreciates this further opportunity to provide comments on the Federal Deposit Insurance Corporation's proposed treatment of assets transferred by an insured depository institution in connection with a securitization or participation when such institutions enter FDIC conservatorship or receivership.[1] The CRE Finance Council is the collective voice of the entire commercial real

[1] Notice of Proposed Rulemaking, 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, 75 Fed. Reg. 27471 (May 17, 2010) (NPRM).

The CRE Finance Council was previously known as the Commercial Mortgage Securities Association (CMSA) and under that name, submitted comments on this subject in response to the FDIC's Advanced Notice of Proposed Rulemaking (ANPR) that was published in 75 Fed. Reg. 934 (Jan. 7, 2010). These earlier comments will be referred to here as "ANPR Comments" and are available at:

http://www.crefc.org/uploadedFiles/CMSA_Site_Home/Government_Relations/CMSA_Issues/TALF_Treasury_Plans/022210_CMSA_FDIC_Safe_Harbor_Response.pdf?n=7529.

estate finance market, including investors such as insurance companies, pension funds, and money managers; commercial and investment banks; rating agencies; accounting firms; servicers; and other service providers.

Because our membership consists of all constituencies across the entire market, the CRE Finance Council has been able to develop comprehensive responses to policy questions to promote increased market efficiency and investor confidence. For example, our members have, and will continue, to work closely with policymakers in Congress, the Administration, and financial regulators, providing practical advice on measures designed to restore liquidity and facilitate lending in the commercial mortgage market, such as the Term Asset-Backed Securities Loan Facility (TALF), and testifying multiple times at Congressional hearings on the state of the CRE market and on financial regulatory overhaul measures. The CRE Finance Council is also recognized as a leader in the development of standardized practices and in ensuring transparency, such as through our Investor Reporting Package (IRP), in the commercial real estate finance industry.

Thus, we have a distinct perspective on the tremendous challenges facing the $3.5 trillion market for commercial real estate finance and the need to craft regulatory reforms so that they support, rather than undermine, the recovery of the commercial real estate sector and that of the nation's economy as a whole. The CRE Finance Council continues to raise awareness about the importance of securitization, which has been a crucial and necessary tool for growth and success in commercial real estate finance, and to ensure that actions taken by policymakers do not contradict or negate recovery efforts.

## I. OVERVIEW

As stated in our ANPR Comments, our members agree that the FDIC's existing safe harbor rule must be updated to account for recent changes in accounting rules that will affect the ability of securitizations to meet the criteria for an accounting sale that are presently necessary to comply with the safe harbor's legal isolation requirement.

We commend the FDIC for responding to some of the concerns raised by the CRE Finance Council and others regarding the effectiveness of the proposed safe harbor framework and the importance of ensuring that investors have a reasonable level of confidence in the protections afforded by the safe harbor. An example of a constructive clarification is the NPRM's proposal to condition safe harbor eligibility on the incorporation of the mandated disclosure and reporting requirements in the securitization documents, rather than conditioning the safe harbor protections on the issuer's ongoing compliance with those disclosure and reporting obligations.

The CRE Finance Council urges the FDIC (and financial regulators more broadly) to:

1) Engage in the "joint" rulemaking dictated by H.R. 4173, the "Wall Street Reform and Consumer Protection Act" (hereafter, "Dodd-Frank");

2) Ensure that more narrowly-focused items (such as "safe harbor" modifications, Regulation AB, and other disclosures) are given careful consideration and separated from credit risk "retention" as directed by Congress in Dodd-Frank); and

3) Avoid proposals that will inhibit investment in bank-sponsored asset-backed securities (ABS) that are critical to credit availability and an overall economic recovery.

***The FDIC Should Reflect Congressional Intent on Securitization Reform***. As a fundamental matter, Congress has clearly articulated the direction securitization reform will follow in the Dodd-Frank legislation, which will provide a comprehensive federal statute outlining how reforms should be promulgated. The FDIC's safe harbor proposal is inconsistent with this new directive from Congress in at least two critical respects: First, Dodd-Frank contemplates a joint rulemaking by the agencies of jurisdiction (which also includes the Federal Reserve Board (Federal Reserve), Office of Comptroller of the Currency (OCC), and Securities and Exchange Commission (SEC)) on securitization reform, as opposed to any unilateral action by any single financial regulator in this area. We agree with this approach by Congress that effectively serves to promote collaboration and regulatory uniformity since a fragmented and potentially inconsistent regulatory scheme would only create uncertainty and an unlevel playing field, both of which Congress wisely has sought to avoid. Second, Dodd-Frank directs that rules governing securitizations be developed by "asset class," which is critically important to ensure that measures designed to strengthen the financial markets and foster investor confidence do not inadvertently create negative implications for capital, liquidity, and credit availability through a "one-size-fits-all" approach.

It follows that any rulemaking by the FDIC or other financial regulators regarding securitization reform should be considered and proposed within the coordinated framework developed by Congress, and must follow the substantive guidelines established in any new federal statute. Thus, for example, the recently agreed to Conference Report before Congress requires that regulators jointly consider and adopt a "skin-in-the-game" requirement that is appropriate to a particular asset class, including very specific criteria for the commercial mortgage-backed securities (CMBS) market. In contrast to Dodd-Frank, the FDIC proposal would unilaterally adopt a strict risk retention standard without giving consideration to the unique characteristics of the various types of assets that may be involved, as well as the specific direction offered by Congress for commercial mortgages. While the FDIC's duty to safeguard the assets of insured depository institutions (IDIs) is a singular one, attention to the unique characteristics of the various classes of ABS should not undermine the FDIC's protective mission.

It is worth noting, however, that the CRE Finance Council concurs that "skin-in-the-game" – and the alignment of interests more broadly among lenders, issuers, and investors – is an important component of securitization reform, and we have long been an advocate within the industry for enhanced transparency and sound practices. To further that objective, the Council is currently working to build on the unparalleled level of disclosure and other safeguards that exist in the CMBS market, and we would look forward to assisting financial regulators in these areas during the required joint rulemaking process. In the meantime, we urge financial policymakers to help promote certainty and confidence by working within Dodd-Frank, which mandates consideration of credit risk retention jointly by the financial regulatory agencies.

***The FDIC Is Acting Outside Congressional Mandates***. Since Congress has set the course for coordinated development of securitization regulations, the unilateral adoption of new securitization regulations outside the process Congress developed is beyond the FDIC's purview.

Moreover, the safe harbor rules can be revised to address the issues created by the new sale accounting rules without coupling this update with securitization reform. Therefore, the CRE Finance Council advocates a revision to the safe harbor rules that is limited to addressing the legal isolation requirements that are a condition for safe harbor eligibility

***The Proposal Will Inhibit Investment in Bank-Sponsored Asset-Backed Securities.*** A significant safeguard built into the coordinated regulatory framework conceived by Congress is that the securitization reform mandates would apply across the board to all securitizations. This coordination helps alleviate the concern that securitization reforms would apply only to IDIs. On the other hand, rules such as those contemplated here, which would apply only to IDIs, risk putting IDIs a competitive disadvantage to non-bank originators and sponsors, and also risk driving markets to foreign banks.

***Three Month Lead Time for New Rule Implementation is Insufficient***. The NPRM proposes that the new safe harbor rules would go into effect September 30, 2010, a mere three months after the July 1, 2010 end of the comment period in this proceeding. Given the unlikelihood that the FDIC would publish a final rule on the date the comment period closes, a September 30 implementation date means lead time of even less than three months after issuance of a final rule. A period of less than three months is far too short a time for affected entities to adapt, particularly if the FDIC includes new requirements that securitizations must meet. The CRE Finance Council's ANPR Comments recommended that any new safe harbor requirement become effective no sooner than 12 months after *Federal Register* publication of the final rules, and we reiterate that request here as the minimum amount of time that should be allowed as a transition period. Significantly, Dodd-Frank allots the regulators 270 days to promulgate proposed rules for a retention mandate, and then imposes an effective date for assets other than residential mortgages of two years after *Federal Register* publication of the final rules, all of which could extend the final effective date into 2013. Moreover, Dodd-Frank directs that two securitization reform-related studies be conducted by regulators and that any recommendations from those studies be considered in promulgating any final retention-related regulations.[2] The FDIC should defer to the decision of Congress regarding the amount of time it believes is necessary to develop, finalize, and implement rules in the critical area of securitization reform.

The following discussion will update the CRE Finance Council's earlier comments concerning the troubled state of the commercial real estate market and the importance of securitization in aiding the market's recovery. General observations regarding the NPRM's approach will then be discussed, followed by a discussion of the CRE Finance Council's

[2] See Wall Street Reform and Consumer Protection Act, H.R. 4173, § 941 (c) (the Federal Reserve, in coordination and consultation with the OCC, OTS, FDIC, and SEC, must conduct a study of the combined impact on each individual class of ABS of the risk retention requirements in the legislation and the new securitization accounting rules in Financial Accounting Standard (FAS) 166 and 167, and must report statutory and regulatory recommendations for eliminating any negative impacts on the viability of ABS markets and credit availability no later than 90 days after the legislation is enacted), and § 946 (the newly created Financial Services Oversight Council must study the macroeconomic effects of the risk retention requirements that would be required by the legislation, and must report its findings to Congress within 180 days of the legislation's enactment).

remaining concerns about specific safe harbor conditions that are proposed in the NPRM, particularly those relating to capital structure and financial assets.

## II. AN UPDATE ON THE CURRENT STATE OF THE COMMERCIAL REAL ESTATE MARKET AND THE IMPORTANCE OF SECURITIZATION

Since the filing of the CRE Finance Council's ANPR Comments, the $7 trillion CRE market remains in a troubled state, as the market faces the following challenges:

- **Limited Liquidity/Lending with CMBS Dormant.** – Even in normal economic conditions, the primary banking sector lacked the capacity to meet CRE borrower demand. That gap has been filled over the course of the last two decades by securitization (specifically, CMBS) which utilizes sophisticated private investors – pension funds, mutual funds, and endowments, among others – who bring their own capital to the table and fuel lending. CMBS accounts on average for approximately 25% of all outstanding CRE debt, and as much as 50% at the peak, while readily identifiable properties funded by CMBS exist in every state and congressional district. However, the volume of new CRE loan originations and thus of new CMBS has plummeted from $240 billion in 2007 (half of all CRE lending in 2007) to $12 billion in 2008 $2 billion in 2009, and $2.4 billion through June 2010. CMBS issuance in 2009 and year-to-date 2010 is due in large part to the success of the TALF program, which injected stability into both the secondary and primary CMBS markets.

- **Significant Loan Maturities.** – At the same time, approximately $1 trillion in CRE loans mature over the next several years, but the capital necessary to refinance these loans is still relatively constrained, and more significant, many loans require additional "equity" to refinance given the decline in CRE asset values.

- **Severe U.S. Recession.** – With a prolonged recession (first housing-led, and then consumer-driven) and unemployment at 9.7% (as of May 2010), there is no greater impact on CRE than jobs and the economy, as commercial and multifamily occupancy rates, rental income and property values have subsequently been severely impacted and perpetuate the downturn. Those impacts persist even as the recession has abated.

- **"Equity Gap."** – The biggest challenge today is the reality that CRE assets have depreciated in value by 30% to 50% since 2007, creating an "equity gap" between the loan amount and the equity needed to extend or re-finance a loan, which impacts even "performing" properties that continue to support the payment of monthly principal and interest on the underlying loans.

Significantly, it is important to note several additional points with respect to the current state of CRE finance. First, the average CMBS securitized loan is $8 million, which makes CMBS a significant source of capital for lending to small businesses. Without a revival of the CMBS markets, loans for smaller businesses will continue to be significantly strained, placing more pressure on small and regional banks, with troubling effects on local economies. Second, the near-dormant CMBS market has virtually eliminated the key outlet for "take-out" financing

particularly for small institutions – securitizing bank balance sheet construction loans after the projects are ready to come on line, for example. Third, more than 1,500 U.S. banks (mostly smaller community banks) have CRE exposure greater than 300% of their tier 1 capital, meaning that they are considered "at risk" under the metrics employed by the FDIC. This debt (construction loans, land loans, etc.) is not securitized.

As many independent research analysts have noted, while the overall CRE market will experience serious strain (driven by poor consumer confidence and business performance, high unemployment and property depreciation), it is this non-securitized debt on the books of small and regional banks that will be most problematic on a relative basis, as the projected default rates for such unsecuritized commercial debt have been, and are expected to continue to be, significantly higher than CMBS loan default rates.

## III. THE FDIC's PROPOSAL DOES NOT ADHERE TO CONGRESS' MANDATED SECURITIZATION REFORM PROCESS OR PRINCIPLES

The most significant general concern the NPRM raises is that it seeks to effect unilateral regulatory reform for securitization in a manner that is not consistent with the framework that has been developed by Congress in financial regulatory reform legislation. In contrast with a coordinated approach, piecemeal regulation will only lead to prolonged investor uncertainty, which in turn, leads to the unavailability of capital that has caused such unprecedented upheaval in the financial markets.

### A. Lack of Coordinated Effort Leads to Piecemeal Regulation and Market Uncertainty

Piecemeal regulation is one of the very ills Congress is attempting to avoid through the legislation. This legislative aim is reflected in Congress's direction that there be a joint rulemaking by the agencies of jurisdiction, rather than prescribing unilateral agency action on securitization reform. Coordinated regulatory action has long been advocated by the CRE Finance Council as an important part of a framework for recovery of the financial markets. The lack of coordination thus far has created tremendous uncertainty and serves as an impediment to private lending and investing as the markets attempt to anticipate what impact the various regulatory and legislative developments may have on capital and liquidity.

In recognition of the importance of coordination, and concern about the impact of securitization reform on credit availability, the legislation directs that two separate studies be conducted before any final rulemaking is done on the new retention requirements. First, regulators are directed to study the combined impact of recent securitization accounting rule changes (FAS 166 and 167) and other regulatory changes (such as risk retention) on credit availability, and to make statutory and regulatory recommendations on how to lessen the impact. Second, the Financial Stability Oversight Council is directed to study the macroeconomic effects of risk-retention requirements on an economic recovery, including whether any adjustments should be made to the requirements.[3]

[3] See note 2, supra.

Given the focus of Congress on coordinated regulation, and its well founded concern about the effects that securitization reform could have on credit, the CRE Finance Council urges the FDIC to advance any securitization reform initiatives as part of the joint rulemaking required by Congress, which will be informed by the studies of market impact. Since the congressional mandates would apply across the board to all securitizations, this coordination will also alleviate the concern that securitization reforms would apply only to IDIs, thus putting them at a competitive disadvantage, and reducing the risk of driving markets to foreign institutions.

With respect to the specific subject of disclosures, and as the CRE Finance Council stated in its ANPR comments, we applaud the desire to provide enhanced disclosure requirements for securitizations. Moreover, we appreciate the FDIC's acknowledgement in the NPRM that the FDIC's disclosure requirements should be consistent with those being developed by the SEC as part of its revision of SEC Regulation AB and the shelf registration requirements.

To ensure broad market efficiency and adequate liquidity, we believe expanded disclosure requirements should be applied to all securitization issuers, and not just to insured depository institutions seeking to comply with the safe harbor rules. SEC Regulation AB is intended to achieve uniformity in disclosures among all types of issuers, and overall, disclosure requirements should remain in the province of the SEC. Accordingly, if the FDIC elects to proceed with unilateral rulemaking on securitization reform, we suggest that the best approach to promote consistency and uniform transparency is for the FDIC to adopt a rule providing that compliance with the SEC's shelf registration requirements will be deemed sufficient to satisfy any and all disclosure conditions necessary for safe harbor protection. The imposition of any disclosure obligations on IDIs beyond those required by Regulation AB (such as those regarding credit and payment performance, capital structure and compensation proposed in the NPRM) would put IDIs at a competitive disadvantage to other sectors of the market.

B. <u>Congress Rejected a One-Size-Fits-All Approach to Securitization Reform</u>

The other significant aspect of the financial reform legislation is its requirement that new rules for securitizations be developed by asset class. Such customization is critically important to ensure that measures designed to strengthen the financial markets and foster investor confidence do not inadvertently create negative implications for capital, liquidity, and credit availability through a one-size-fits-all approach.

Tailoring regulation will be especially important in addressing assets such as CMBS, which have innate characteristics that minimize the risky securitization practices that policymakers wish to address. More specifically, as described in our ANPR Comments, the unique characteristics that set CMBS apart from other types of assets relate not only to the type and sophistication of the borrowers, but to the structure of securities, the underlying collateral, and the existing level of transparency in CMBS deals. These characteristics will be briefly recapped here:

*1. Commercial Borrowers*

Part of the difficulty for securitization as an industry arose from practices in the residential where, for example, loans were underwritten in the subprime category for borrowers who may not have been able to document their income, or who may not have understood the

effects of factors like floating interest rates and balloon payments on their mortgage's affordability. In contrast, commercial borrowers are highly sophisticated businesses with cash flows based on business operations and/or tenants under leases. Additionally, securitized commercial mortgages have different terms (generally 5-10 year "balloon" loans), and they are, in the vast majority of cases, non-recourse loans that allow the lender to seize the collateral in the event of default.

### 2. *Structure of CMBS*

There are multiple levels of review and diligence concerning the collateral underlying CMBS, which help ensure that investors have a well informed, thorough understanding of the risks involved. Specifically, in-depth property-level disclosure and review are done by credit rating agencies as part of the process of rating CMBS bonds. Moreover, non-statistical analysis is performed on CMBS pools. This review is possible given that there are far fewer commercial loans in a pool (traditionally, between 100-200 loans; while the recent issuances have had between 30 and 40 loans) that support a bond, as opposed, for example, to residential pools, which are typically comprised of between 1,000 and 4,000 loans. The more limited number of loans in the commercial context allows market participants (investors, rating agencies, etc.) to gather detailed information about income producing properties and the integrity of their cash flows, the credit quality of tenants, and the experience and integrity of the borrower and its sponsors, and thus conduct independent and extensive due diligence on the underlying collateral supporting their CMBS investments.

### 3. *First-loss Investor ("B-Piece Buyer") Re-Underwrites Risk*

CMBS bond issuances typically include a first-loss, non-investment grade bond component. The third-party investors that purchase these lowest-rated securities (referred to as "B-piece" or "first-loss" investors) conduct their own extensive due diligence (usually including, for example, site visits to every property that collateralizes a loan in the loan pool) and essentially re-underwrite all of the loans in the proposed pool. Because of this, the B-piece buyers often negotiate the removal of any loans they consider to be unsatisfactory from a credit perspective, and specifically negotiate with bond sponsors or originators to purchase this non-investment-grade risk component of the bond offering. This third-party investor due diligence and negotiation occurs on every deal before the investment-grade bonds are issued.

### 4. *Greater Transparency*

CMBS market participants already have access to a wealth of information through the CRE Finance Council Investor Reporting Package (IRP), which provides access to loan-, property-, and bond-level information at issuance and while securities are outstanding, including updated bond balances, amount of interest and principal received, and bond ratings. Our reporting package has been so successful in the commercial space that it is now serving as a model for the residential mortgage-backed securities market. By way of contrast, in the residential realm, transparency and disclosure are limited not only by servicers, but by privacy laws that limit access to borrowers' identifying information. Importantly, the CRE Finance Council is currently working with market participants to make even further improvements to the IRP.

As the FDIC is aware, a risk retention provision is included in Dodd-Frank.[4] In that legislation, Congress specifically concluded that with respect to commercial mortgages and CMBS, "skin-in-the game" measures or the "alignment of risk" could take a number of permissible forms, including representations and warranties, underwriting controls and guidelines, and the potential retention by an originator, securitizer, or a third-party investor who performs due diligence and retains this risk in accordance with the statute. The Council's membership is united in the view that the alignment of the interests of lenders, issuers and investors in the securitization process is essential.

As such, Dodd-Frank ensures that risk retention rules are coordinated and customized to fit the unique aspects of the various classes of asset-backed securities. And as mentioned, Congress also directed that a study be done of the effects of risk retention requirements particularly as they interact with other regulatory standards like accounting rules, to give policymakers a more complete understanding of these matters. In contrast, the FDIC proposed rule would unilaterally adopt a rigid risk retention standard for all sponsors and for all types of ABS that does not reflect the optionality contemplated by Congress. The risks of such an approach have already been acknowledged by Congress and other policymakers.[5] Therefore, the CRE Finance Council continues to urge the FDIC to work within the framework created by Congress. And, at a minimum, if the safe harbor protections are to be premised on compliance with securitization reform measures, the FDIC should seek to appropriately customize risk retention requirements to the assets involved.

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[4] H.R. 4173, § 941 (b) (adding Securities Exchange Act § 15G (c)).

[5] _See, e.g.,_ Daniel Tarullo, Federal Reserve Governor, Statement Before The House Committee on Financial Services (Oct. 26, 2009) ("A credit exposure retention requirement may thus need to be implemented somewhat differently across the full spectrum of securitizations in order to properly align the interests of originators, securitizers, and investors without unduly restricting the availability of credit or threatening the safety and soundness of financial institutions."); John C. Dugan, Comptroller of the Currency, Statement on the Federal Deposit Insurance Corporation's Advance Notice of Proposed Rulemaking on Securitizations (Dec. 15, 2009), at 1-3 ("[R]ecent studies note that a policy of requiring a rigid minimum retention requirement risks closing down parts of securitization markets if poorly designed and implemented. Before proposing and implementing such a requirement for all securitizations, further analysis is needed to ensure an understanding of the potential effects of the different ways in which risk could be retained.").

Similarly, the International Monetary Fund has warned that "[p]roposals for retention requirements should not be imposed uniformly across the board, but tailored to the type of securitization and underlying assets to ensure that those forms of securitization that already benefit from skin in the game and operate well are not weakened. The effects induced by interaction with other regulations will require careful consideration." International Monetary Fund, "Restarting Securitization Markets: Policy Proposals and Pitfalls," Chapter 2, Global Financial Stability Report: Navigating the Financial Challenges Ahead (October 2009), at 109 ("Conclusions and Policy Recommendations" section) available at http://www.imf.org/external/pubs/ft/gfsr/2009/02/pdf/text.pdf.

C. The Importance of Considering the Combined Effects of Regulation

The potential for harming the credit markets is heightened when reforms like minimum risk retention are coupled with the new consolidation requirements in FAS 166/167. Not only do FAS 166/167 make "sales treatment" more difficult to achieve, as the FDIC recognizes, the combination of a required minimum retained risk and consolidated accounting would lead to capital and credit constriction, a consequence also pointed out by regulatory policymakers.[6]

In fact, under these new and retroactive accounting rules, some financial institutions could be required to account for 100% of securitized assets on balance sheet (i.e. "consolidation"), despite having retained only a small percentage of the securitized pool, based on a facts and circumstances analysis. At a minimum, a retention mandate creates additional uncertainty under FAS 166 and 167 related to whom would "consolidate" 100% of assets on balance sheet at issuance or over time given the variable nature of consolidation. Despite no change in real credit risk, certain institutions are required to hold changing amounts of capital (beyond the retention) against the consolidation, which ultimately impacts credit availability.

It would obviously be undesirable if reforms designed to strengthen a market end up stifling it instead. This is one of the reasons that Congress directs that a study of the effects of securitization reform coupled with other regulations, including accounting standards, be done before final reforms such as risk retention are imposed. The CRE Finance Council suggests that the FDIC take a similar, deliberate approach if it decides to proceed with adopting restrictions on securitizations, and only adopt such restrictions after attaining a thorough understanding of their effect in combination with the new accounting rules.

## IV. OBSERVATIONS CONCERNING SPECIFIC ASPECTS OF THE PROPOSED SAFE HARBOR CONDITIONS

Our observations concerning the parts of the NPRM that relate more directly to the determination of whether assets will be treated as legally isolated are as follows:

First, we appreciate the FDIC's consideration of the concern expressed by the CRE Finance Council and other that the safe harbor framework would be ineffectual if the sponsor's failure to comply with certain ongoing conditions, such as periodic disclosures, would make application of the safe harbor uncertain over time. Since the market will require certainty on the critical protections provided by the safe harbor, we commend the FDIC for revising the proposal to provide that the safe harbor conditions will be satisfied if the securitization documents contain provisions imposing the necessary disclosure obligations. We concur that the more effective

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[6] *See, e.g.,* Elizabeth Duke, Federal Reserve Board Member, Speech Before The AICPA National Conference on Banks and Savings Institutions (Sept. 14, 2009) ("As policymakers and others work to create a new framework for securitization, we need to be mindful of falling into the trap of letting either the accounting or regulatory capital drive us to the wrong model. This may mean we have to revisit the accounting or regulatory capital in order to achieve our objectives for a viable securitization market."); December 15, 2009 Dugan Statement at 3 ("The suggested five percent retention would also make sales treatment more difficult to achieve under FAS 166/167, with capital and credit constriction implications.").

approach from the investors' perspective is not to make the safe harbor protections dependent upon subjective standards or the ongoing actions or inactions of one or more transaction counterparties.

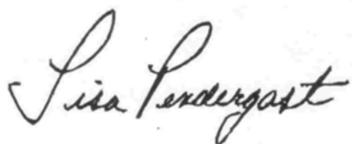
We also commend the more circumscribed approach to re-securitizations, that will require the underlying, existing transactions to comply with the new disclosure rules, but will permit the omission of information that is not available to the sponsor or issuer after reasonable investigation so long as there is disclosure as to the types of information omitted and the reason for the omission.[7]

However, on the matter of capital structure and financial assets, we continue to disagree that the safe harbor should be limited to securitizations that require payments of principal and interest on the obligations to be primarily dependent on the performance of the financial assets supporting the securitization. The CRE Finance Council believes external credit enhancement should be an available tool for banks to use when sponsoring securitization transactions. Although the NPRM acknowledges that insurance and guarantees are acceptable in the residential context, it does not clearly provide for other approaches in other unique contexts. We are concerned that such limitations may limit the liquidity of certain types of loan products and increase funding costs for banks, and may also limit the ability of banks to provide seller's loss coverage and other seller-provided external credit support to transactions that would actually be consistent with the alignment of the incentives the FDIC's suggested condition seeks to achieve.

## V. CONCLUSION

The CRE Finance Council appreciates the steps taken by the FDIC to address several of the concerns raised in our ANPR Comments regarding the specific conditions for the safe harbor. However, we urge the FDIC to seriously consider the hazards presented by a piecemeal regulatory approach to securitization reform, and to work within the coordinated framework that Congress has clearly articulated as the appropriate and required approach.

Sincerely,



Lisa Pendergast
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Jeffries & Company; and
President
CRE Finance Council

Dottie Cunningham
Chief Executive Officer
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[7] 75 Fed. Reg. at 27478.