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July 1, 2010

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

Re: RIN 3064–AD53
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

Ladies and Gentlemen:

This letter is submitted by the Section of Business Law of the American Bar Association (the "Section") on behalf of its Committee on Securitization and Structured Finance and its Committee on Banking Law (the "Committees") in response to the request for comments by the Federal Deposit Insurance Corporation (the "FDIC") on the FDIC's Notice of Proposed Rulemaking referenced above (the "NPR").[1] The views expressed in this letter have not been approved by the American Bar Association's House of Delegates or Board of Governors and therefore should not be construed as representing the policy of the American Bar Association.

The FDIC's current rule, 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, 12 C.F.R. 360.6 (the "Securitization Rule"), establishes a safe harbor to ensure that the FDIC, as conservator or receiver of an insured depository institution ("IDI") that has failed, will not use its repudiation powers to attempt to recover or reclaim financial assets transferred in a securitization, or to recharacterize them as property of the failed institution or the receivership. Under the original terms of the Securitization Rule, only transfers of assets that were treated as sales for financial accounting purposes received the benefits of the safe harbor.[2] As the FDIC has noted, modifications to generally accepted accounting principles

[1] 75 Fed. Reg. 27471 (May 17, 2010).

[2] The FDIC promulgated the Securitization Rule specifically to support the ability of IDIs to continue to achieve sale accounting treatment for transfers of assets to securitizations. In the process of developing its Statement of Financial Accounting Standards No. 140, Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities ("FAS 140"), the Financial Accounting Standards Board ("FASB") expressed the view that certain asset transfers by IDIs that were documented as sales might be challenged by the FDIC and, as a result, subject to a

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through Statement of Financial Accounting Standards No. 166, Accounting for Transfers of Financial Assets, and Statement of Financial Accounting Standards No. 167, Amendments to FASB Interpretation No. 46(R), have made it significantly more difficult to achieve sale accounting treatment for transfers of assets in securitizations. Among other effects of the accounting changes, entities to which IDIs have historically transferred assets as part of their securitization structures will, in many instances, need to be consolidated with the IDI for financial accounting purposes. As a result of these accounting changes, many securitizations sponsored by IDIs will no longer be able to satisfy the conditions for the safe harbor articulated in the Securitization Rule.

We appreciate the efforts the FDIC has made to revise the safe harbor in light of these accounting changes, including the adoption of interim safe harbors that have allowed the securitization markets to continue to function while these important issues are resolved. We appreciate the FDIC's view, as well, that "better aligning the incentives in securitization to support sustainable lending and structured finance transactions" will further the FDIC's overriding mission of protecting the Deposit Insurance Fund (the "DIF"). We support the FDIC's goal of encouraging a strong securitization market that will not jeopardize the DIF.

In revising the preliminary regulatory text included in the Advance Notice of Proposed Rulemaking,[3] the FDIC has made significant efforts to reflect comments received from investors, rating agencies and issuers, among others. We appreciate these efforts, especially those that are intended to make the availability of the safe harbor more readily ascertainable at issuance. However, as lawyers who will be asked to give legal opinions relating to the safe harbor, we continue to be concerned that we will not be able to deliver opinions that provide real comfort to market participants. In Part II of this letter, we have parsed the language of the proposed rule contained in the NPR (the "Proposed Rule") in an effort to clarify our concerns, and where possible we have suggested alternative language or approaches. We are concerned, however, that even if our suggested language changes were adopted, the framework of the Proposed Rule may not support meaningful legal opinions, a point that we try to explain in this letter.

As you know, after the FDIC voted on May 11, 2010 to issue the NPR, the United States Senate on May 20, 2010 passed legislation (H.R. 4173, the "Restoring American Financial Stability Act of 2010") relating to risk retention, securitization disclosures, and other matters addressed by the NPR. The United States House of Representatives previously passed its own version of H.R. 4173 on December 11, 2009. As we write this, the Senate and the House are working to reconcile their versions of the legislation and to propound final legislation for adoption by the House and the Senate and for signature by

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claims process and potential control by the FDIC. Prior to adopting FAS 140, the FASB stated that sales of assets by IDIs might therefore not satisfy the requirement of FAS 140, as then proposed, that the assets be put presumptively beyond the reach of the transferor and its creditors, even in bankruptcy or other receivership. As noted in the NPR, the Securitization Rule clarified the FDIC's policy with respect to transferred assets and was not a change in policy.

[3] 75 Fed. Reg. 934 (January 7, 2010), Advance 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 March 31, 2010 (the "ANPR")..

the President. As you note in the NPR, the Securities and Exchange Commission ("SEC") has also promulgated a proposal on asset-backed securities[4] (the "SEC Proposing Release") that addresses many of these same matters. Without knowing the final requirements of the legislation, we cannot say with certainty what aspects of those requirements will be inconsistent with the Proposed Rule, but there are a number of significant inconsistencies among the requirements of the current text of H.R. 4173 being considered by the House-Senate Conference Committee (the "Conference Bill"), the SEC Proposing Release and the Proposed Rule. In Part I of this letter, we have tried to identify specific areas where we believe the Proposed Rule is inconsistent with the pending legislation, the SEC Proposing Release, or both, as well as those areas where Congress is likely to direct the promulgation of definitive regulations to be done on an interagency basis. We believe these matters will need to be addressed in a unified statutory and regulatory regime in order to have a workable framework for securitization going forward

When market participants began discussing revisions to the safe harbor with the FDIC over a year ago, the FDIC expressed the view, which has continued through the NPR, that conditioning the safe harbor on changes to securitization practices was the most effective tool it had to impose those securitization reforms. We understand that position and the very powerful tool the safe harbor has provided as a means to influence market behavior. However, given the very real likelihood that the FDIC will receive new statutory powers that would allow it, and indeed require it, to adopt securitization reforms that would address many of the same matters that are reflected in the proposed conditions to the safe harbor, the reasons articulated by the FDIC to link these reforms to the safe harbor have been ameliorated. We hope that you will appreciate that our expression of concern about this *linkage* is not an objection to the *reforms*. Instead, it reflects our belief that the satisfaction of the safe harbor conditions must be able to be verified with some degree of certainty at the time the relevant securities are issued; our view that the securitization reforms embedded within the safe harbor will make it difficult to achieve that certainty; our concern that adoption of reforms outside of the process outlined by Congress may lead to inconsistent requirements; and our concern either that IDIs may incur significant unnecessary costs trying to adapt to requirements in the safe harbor that may change as a result of the joint rulemaking process, or that IDIs may feel it necessary to abandon the securitization markets entirely until that process has been completed to avoid incurring such costs. The FDIC has taken an important leadership role in ensuring that fundamental changes *will* occur in the securitization markets, and in shaping the form of those changes. In our view, the FDIC's goals will now be best served by developing direct substantive regulations on an interagency basis, and allowing the safe harbor to retain the clarity it has had since its adoption. Accordingly, where the same market reforms can be achieved through regulations separate from the safe harbor, we would again ask the FDIC to consider delinking these reforms from the safe harbor.

In preparing this letter, we have generally refrained from commenting on provisions that raise business or economic issues, which we expect will be addressed by industry participants. We ask that you not interpret our silence as to these points as endorsement or acquiescence.

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[4] 75 Fed. Reg. 23328 (May 3, 2010)

EXECUTIVE SUMMARY

The following concepts are those we have identified as being most critical to achieving the goals we have articulated:

1. We believe that the Congress, the SEC and the FDIC have a generally consistent goal, which is to bring about a more transparent securitization market with stronger alignments of interest. The requirements of the Proposed Rule are, however, in certain key respects (particularly in such matters as risk retention and disclosure), materially different from the requirements proposed by Congress and the SEC to accomplish this goal. We consider it critically important that all governmental efforts to reform securitization—at least those that will be codified in United States laws and regulations—coalesce around a single set of requirements that are consistently applied across regulatory agencies. We therefore urge the FDIC to de-link the safe harbor from securitization reform and repropose a more streamlined version of the safe harbor, in the interim further extending the existing safe harbor. We believe work on the regulations to implement these substantive reforms should take place outside this process, on an interagency basis if required by the legislation, as soon as the precise parameters of the final legislation are known.

2. In the Proposed Rule, the FDIC seeks to expand the disclosure requirements of Regulation AB to every securitization transaction, regardless of any applicable exemption from securities laws registration. Although the SEC has proposed expansion of Regulation AB to the private markets to an unprecedented degree, the FDIC's proposal would go further still and apply disclosure requirements to transactions that are offered pursuant to specific statutory exemptions. The SEC has historically had the primary mandate to determine the scope of offering disclosure and the circumstances in which it is required (subject to statutory limits) and the Conference Bill reflects a continuing intention by Congress to entrust the specifics of disclosure in securitization transactions to the SEC. The FDIC historically has deferred to the SEC in regard to the scope and substance of offering disclosures. We believe that the SEC is uniquely suited─by experience and authority─to evaluate the circumstances in which specific disclosure requirements should be mandated and their potential effects on investors, issuers and the securitization markets as a whole. In addition, the SEC Proposing Release evidences a substantial and thoughtful undertaking to address disclosure issues, including those that have been of most concern to the FDIC, in the securitization context. We would ask the FDIC to defer to the SEC with respect to the final standards, as it has done historically

3. We believe implementation of the regulatory requirements arising out of the proposed legislation, the SEC Proposing Release and the Proposed Rule as written, especially new disclosure requirements, will require extensive modifications to current securitization processes and practices. We are concerned that IDIs will be unable to effect the necessary changes by the FDIC's September 30, 2010 proposed effective date, and as a consequence, will be excluded from the securitization markets for an extended period of time. We therefore strongly

encourage the FDIC to provide an extended period before effectiveness, similar to those contemplated by the Conference Bill.

4. Over the last decade, the Securitization Rule has provided certainty to investors, issuers, rating agencies and their legal counsel that, when assets were transferred by an IDI in a securitization that met the conditions of the safe harbor, the FDIC as conservator or receiver of a failed IDI would respect the transfer and not use its repudiation powers to attempt to recover or reclaim the assets, or to recharacterize them as property of the IDI or the receivership. The conditions in the Securitization Rule are clear and unambiguous and allow transaction parties to conclude (and legal counsel to opine) with a high degree of confidence that those conditions are satisfied. If the replacement rule is not sufficiently clear, we are very concerned that, as counsel, we will be unable to deliver legal opinions whose scope and substance are sufficient to assure investors and rating agencies that investors may rely on the assets as a source of repayment even following the sponsoring IDI's conservatorship or receivership.

5. Many of the Proposed Rule's conditions still are not stated, we believe, with sufficient clarity to allow a determination of their satisfaction; a number of them contain future performance elements that would not be verifiable at the date of issuance; and the linkage between the safe harbor requirements, which need to be clear and concise to be effective, and securitization reforms that are evolving not only in the NPR but through Congressional and SEC action in parallel to the NPR, will create an unworkable and uncertain standard. Although in Part II below, we have articulated some of our concerns and suggested clarifications, we believe the problems with the proposed safe harbor are pervasive and cannot be fixed solely through editing changes. Consequently, we believe the FDIC should eliminate many of its proposed requirements from the final safe harbor and address these reforms in the coordinated rulemaking process mandated by Congress, as we discuss in Part I below.

6. In the NPR, the FDIC suggests that a sale of financial assets that does not achieve sale treatment under generally accepted accounting principles will not constitute a true sale for insolvency purposes. Such a position is, we believe, inconsistent with and not supported by applicable law. The accounting rule changes which have precipitated changes to the Securitization Rule have not affected any of the legal rights of the parties under state law applicable to asset transfers, do not alter the ability to achieve *legal* true sales and do not affect the FDIC's statutory powers with respect to such assets.

7. The remedy the FDIC is proposing if it breaches the securitization agreements is to allow investors to exercise contractual remedies and take possession of the assets. We are concerned that there may be ambiguity where the investors already *have* possession, because the assets are held by an independent trustee. In that circumstance, we believe the clearest way for the FDIC to acknowledge the rights of the investors is for the FDIC to agree that if it breaches the securitization agreements, it will not seek to recover, reclaim, or recharacterize as assets of the IDI the assets in the securitization.

I. Key differences between the safe harbor conditions and other applicable law and regulation

The statutory and regulatory landscape for securitizations is in a state of flux, with a number of different governmental entities, both here in the United States and overseas, working to impose new requirements with respect to the substance and disclosure of these transactions. At the time the FDIC initially discussed conditioning the safe harbor on the reforms to securitization practices, it was far from clear that the financial reform legislation then pending in Congress would be enacted. It now appears highly likely that the Conference Bill will be enacted, thus granting the FDIC new statutory powers requiring it to work with the SEC and other federal banking agencies to adopt regulations implementing certain of the securitization reforms embedded in the legislation. We believe that the Congress, the SEC and the FDIC, in particular, have a generally consistent goal, which is to bring about a more transparent securitization market with stronger alignments of interest. But the requirements of the Proposed Rule are, in certain key respects, materially different from the requirements proposed by Congress and the SEC to accomplish this goal. We consider it critically important that all governmental efforts to reform securitization—at least those that will be codified in United States laws and regulations— coalesce around a single set of requirements that are consistently applied across regulatory agencies. We therefore urge the FDIC to defer substantive regulation in these areas, and further extend the existing safe harbor, until the precise parameters of the final legislation are known and until any joint rulemaking processes among multiple agencies that are mandated by that legislation take place. In that regard, we know of no allegations of abuse of the FDIC's two prior extensions of the existing safe harbor.

An important example of the potential for inconsistent regulation may be found in the area of risk retention. Although the Conference Bill, the SEC's proposed rules and the Proposed Rule facially have in common a 5% baseline risk-retention requirement, there are significant differences in the application of the requirement, including, among others, which types of risk are to be retained and how risk retention should be structured, the party or parties responsible for such risk retention, the circumstances under which risk is to be retained, exemptions from the risk-retention requirements for high-quality assets and the extent, if any, to which retained risk is permitted to be hedged. Another key area at risk of inconsistent regulation is disclosure, where, again, the scope, circumstances and transition period differ among the various pending actions. Other areas of potential difference include due diligence review requirements and disclosures regarding representations and warranties. We discuss below some of the more significant variations in the risk-retention, disclosure and other regulatory proposals.

1. *What form must the retained risk take? Which asset transfers or securities are covered by the risk-retention requirement? Must every securitization transaction be done with risk retention? Who retains the risk? To what extent may the retained risk be hedged?* All of these questions, which as we write this letter are being scrutinized in detail by many industry participants, reveal the level of uncertainty surrounding how and under what circumstances risk retention will be required under the various proposals.

The Proposed Rule imposes a requirement that "an economic interest of a material portion of not less than five (5) percent of the credit risk of financial assets" be retained,

either in the form of an interest of not less than 5% of each tranche being sold or transferred to investors or in a representative sample of the securitized financial assets equal to not less than 5% of the principal amount of the financial assets transferred at closing, while the SEC proposes that a minimum of 5% of "the nominal amount of each of the tranches sold or transferred to investors" in certain registered offerings be retained. The Conference Bill contains no specified requirements for the form of its mandated "credit risk" retention, leaving it to the regulators, acting in concert, to adopt regulations as to the permissible forms and minimum duration of risk retention.

The Proposed Rule requires 5% risk retention for all securitizations, regardless of asset class or underwriting quality. In contrast, the risk-retention requirements described in the SEC Proposing Release apply *only* as a condition to shelf registration eligibility, with the SEC proposing to require all other offerings to address risk retention only through disclosure of the amount and type of any risk retained by specified transaction parties. Additionally, unlike the Proposed Rule, the Conference Bill specifically directs the regulators to develop separate rules for different asset classes, takes into consideration asset class distinctions and underwriting standards for the underlying assets, and provides for exceptions to, or reductions in, the required risk retention for a substantial variety of securitizations (including reductions over the life of the transaction).

Another difference between the Proposed Rule and the pending legislation is in the scope of covered transactions. The Proposed Rule pertains to "securitizations" of "financial assets," as those terms are defined in the Proposed Rule. The Conference Bill covers "asset-backed securities," using a definition that resembles the proposed definition of "structured finance product" under the SEC Proposing Release. We believe that these differences should be addressed in the joint rulemaking mandated by the legislation.

The Proposed Rule and the SEC Proposing Release each place the obligation to retain the requisite risk on the "sponsor" (as to which the FDIC and SEC propose substantially similar definitions), although the SEC would also allow the risk to be retained by an affiliate of the sponsor.[5] The Conference Bill provides for the risk to be retained by a "securitizer" (defined in a way that closely tracks the "sponsor" definitions proposed to be used by the FDIC and the SEC), but includes, as an alternative, retention by the "issuer" of the asset-backed securities and also allows for allocation of retained risk between the securitizer and the assets' originator. We believe that none of Congress, the FDIC or the SEC intends that risk be retained at the 5% level by *each* of the different entities potentially dictated by the proposed legislation and regulations. Nevertheless, we consider it imperative that the final requirements be contained in a single set of consistent regulations that leave no doubt that the risk-retention burden is not to be multiplied among different parties in order to ensure satisfaction of the rules.

The Proposed Rule also includes a prohibition on hedging. This proposed prohibition is inconsistent with the approach taken in the Conference Bill and the SEC Proposing Release. The Conference Bill prohibits only the hedging or transfer of "credit risk," instead of the entire retained interest, and authorizes the regulators to provide for

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[5] 75 Fed. Reg. 23328, 23331 n. 47. Allowing risk retention by an affiliate would enable a securitizing IDI to better manage its own risks and, under certain circumstances, could facilitate achievement of a legal true sale in connection with the asset transfers.

exceptions and adjustments relating to the hedging requirement (including possible phase-outs of the no-hedge limitation over the life of a transaction). The SEC Proposing Release likewise prohibits only hedging directly related to the retained securities or risk exposures, while allowing hedging of interest rate, currency exchange rate and certain broad market risks.[6]

Planning for risk retention—ensuring that the entity that will have to bear the retained risks can do so; understanding the capital, risk and liquidity implications; and structuring the securities themselves—will require significant effort by market participants. Unless clear, consistent rules are agreed upon by Congress and all relevant regulatory agencies, this effort will be greater and the planning will be more difficult and less reliable.

2. *Would disclosure requirements apply to private market transactions?* The Proposed Rule applies the disclosure requirements to every private placement, regardless of the exemption from securities law registration upon which the securitization relies. The disclosure provisions of the Conference Bill, however, apply only to publicly offered securities.[7] Even the SEC's controversial proposal to apply affirmative disclosure requirements to transactions that seek to utilize the safe harbors of Rule 144A and Rule 506 under the Securities Act, in circumstances where investors have always been presumed to be able to fend for themselves, does not extend those requirements to statutory private placements under Section 4(2) of the Securities Act or other offerings made in reliance on statutory, rather than regulatory, exemptions.

The primary roles of the FDIC are to regulate insured depository institutions and to protect the DIF, while the primary roles of the SEC are to protect investors and ensure properly functioning capital markets. The Conference Bill recognizes the SEC's role as the federal securities regulator and its particular expertise in this arena, and assigns to the SEC the sole responsibility for implementing changes to the disclosure regime. We agree with Congress that the SEC is uniquely suited—by experience, authority and mission—to evaluate the circumstances in which specific disclosure requirements should be mandated and their potential effects on investors, issuers and the securitization markets as a whole. Moreover, the SEC Proposing Release evidences a substantial and thoughtful undertaking by the SEC to address these disclosure issues in the securitization context. Although we understand the FDIC's desire to use the proposed safe harbor to achieve comprehensive reform of securitization, we do not believe the FDIC should expand disclosure requirements to transactions where neither Congress nor the SEC, in specifically addressing gaps in securitization disclosure identified in the economic crises of the last several years, has felt such expansion was appropriate. We therefore strongly recommend

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6 75 Fed. Reg. 23328, 23340 ("[W]e are primarily concerned with the risks that are under the direct or indirect control of the sponsor (such as the quality of the originator's underwriting standards and the extent of the review undertaken to verify the information regarding the assets). Therefore, hedge positions that are not directly related to the securities or exposures taken by the sponsor or affiliate would not be required to be netted under our proposal. Such positions would include hedges related to overall market movements, such as movements of market interest rates, currency exchange rates, or of the overall value of a particular broad category of asset-backed securities.").

7 Those provisions would modify Section 7 of the Securities Act of 1933 (the "Securities Act") – "Information Required in Registration Statement" – but would not extend the disclosure requirements to the private markets.

that the FDIC take no action to expand the scope or circumstances of, or the transition period for, changes to the disclosure regulatory regime beyond those adopted by the SEC at the conclusion of its regulatory process.

3. *When should the FDIC's new safe harbor rule take effect?* The FDIC has indicated that the Proposed Rule would become effective on September 30, 2010. The Conference Bill does not make the revised risk-retention rules effective until (i) for RMBS transactions, one year after publication of final rules in the Federal Register and (ii) for securitizations of other asset classes, two years after such publication.[8] The SEC has requested comment on an appropriate transition period for its proposed rules, indicating that any such transition period would be no more than one year after implementation of the final regulations. The SEC acknowledges, however, that "some of our proposed amendments, including asset-level and data tagging requirements, may initially impose significant burdens on sponsors and originators as they adjust to the new requirements."[9]

In our view, the extended time frame for effectiveness of the new rules reflects no less a sense of urgency by Congress and the SEC than that felt by the FDIC, but rather an understanding of the true scope of effort that will be required for the industry to adapt to the changes called for by the new rules. When Regulation AB was adopted, market participants were generally given a transition period of about 12 months to implement the changes that Regulation AB mandated.[10] Implementation of the regulatory requirements arising out of the proposed legislation, the SEC Proposing Release and the Proposed Rule as written, will be no less involved. If the FDIC retains the September 30th effective date, we believe IDIs will be unable to effect the necessary changes and, as a consequence, will be excluded from the securitization markets for an extended period of time. We therefore strongly encourage the FDIC to defer to Congress and the SEC in terms of transition periods and the effectiveness of these changes.

II. The safe harbor must be objectively verifiable and must not be subject to post-issuance reevaluation

For the last decade, the Securitization Rule has provided certainty to investors, issuers, rating agencies and their legal counsel that, when assets are transferred by an IDI in a securitization that meets the conditions of the safe harbor, the FDIC as conservator or receiver of a failed IDI will respect the transfer and not use its repudiation powers to attempt to recover or reclaim the assets, or to recharacterize them as property of the failed institution or the receivership. The conditions in the Securitization Rule have little ambiguity and have allowed transaction parties to conclude with a high degree of confidence that those conditions were satisfied. Traditionally, the safe harbor's

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8 The Conference Bill also directs the SEC to adopt regulations requiring the issuer to conduct a review of the assets underlying the asset-backed securities and disclose the details of that review. Those regulations must be issued not later than 180 days after the enactment of the legislation.

9 75 Fed. Reg. 23328, 23340.

10 Those changes required expensive and extensive systems modifications to support different reporting standards (the requirements for static pool data being an important example); contract modifications to ensure that the appropriate servicer statements of compliance and accountant attestations could be obtained; procedural changes to implement revised servicing standards; and, of course, the drafting of the new disclosure itself.

availability has been addressed in a legal opinion that the safe harbor requisites have been satisfied as of the closing of the transaction. As the FDIC has seen, the recent change in financial accounting rules that brought into question the satisfaction of just one of these conditions put literally hundreds of billions of dollars of asset-backed securities at risk of ratings downgrades. We are concerned that if the replacement rule is not sufficiently clear, counsel will be unable to deliver legal opinions whose scope and substance is sufficient to assure investors and rating agencies[11] that investors may rely on the assets as a source of repayment following the sponsoring IDI's conservatorship or receivership.[12]

We appreciate the FDIC's efforts to add clarity to the conditions of the Proposed Rule in response to comments received with respect to the ANPR. We continue to believe, however, that many of the Proposed Rule's conditions are still not stated with sufficient clarity to allow a determination of their satisfaction; that a number of them contain future performance elements that would not be verifiable at the date of issuance; and that the linkage between the safe harbor requirements, which need to be clear and concise to be effective, and the proposed securitization reforms which are evolving not only in the NPR but through Congressional and SEC action in parallel to the NPR, will create an unworkable and uncertain standard. We have tried to articulate many of our concerns by discussing issues presented by specific language in the Proposed Rule, including a number of smaller inconsistencies or ambiguities for which we are also suggesting clarifications in this letter. Although we are providing a specific textual analysis, and in some cases suggested revisions, we believe the problems with the proposed safe harbor are pervasive and cannot be fixed solely through editing changes.

For convenience of reference, we have set out, in bold, each section of the Proposed Rule on which we have specific comments, with the comments presented below.

(a) *Definitions*:

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[11] See, e.g., Moody's Investors Service, Inc., "FDIC Securitization Safe Harbor – Many Positives for RMBS; But Uncertainties Remain" (May 14, 2010) ("[T]he determination of whether or not the transaction meets the safe harbor would depend in some cases on requirements that are subjective, ambiguous and ongoing") and Standard & Poor's Ratings Services, "Implications Of FDIC Proposal For A Revised Securitization Safe Harbor On S&P's Rating Analysis Of U.S. Bank-Originated Transactions" (June 9, 2010) ("[W]e would expect the transactions to meet the conditions for such eligibility by means of representations, warranties, and covenants from the relevant parties; we would typically rely for our analysis on opinions from issuers' outside counsel concluding in substance that the conditions for the safe harbor are met").

[12] We note that the institutional investors that provided comment letters with respect to the FDIC's ANPR shared these concerns. See Comment Letter from MetLife, dated February 22, 2010 ("[A]s a threshold concern, MetLife believes it is important to confirm that any breach of the requirements imposed by the ANPR on an IDI would not jeopardize the securitization safe harbor for securitization investors of such IDI."); Comment Letter from CalPERS, dated February 22, 2010 ("[G]oing forward it is important that the actions taken to strengthen the market for asset backed securities do not impair the liquidity or functioning of the financial institutions which produce and service such securities. . ."; "We request that any future rules and regulations regarding consolidated securitizations provide clear and substantive language indicating the protection of a legally enforceable or perfected security interest in the event of a bankruptcy or failure. An additional concern is whether credit rating agencies are willing to rate bank securitization transactions as AAA ratings or whether these transactions would [be] linked to the rating of the IDI."); Comment Letter of GE Asset Management, Inc., dated February 22, 2010 (generally adopting the views expressed in the ASF comment letter).

(a)(1) – *Financial asset* means cash or a contract or instrument that conveys to one entity a contractual right to receive cash or another financial instrument from another entity.

Comment: We recognize that this definition is unchanged from the definition included in the Securitization Rule and that it originates in the accounting standards. We believe that two revisions to this definition are appropriate to clarify the applicability of the Proposed Rule to credit card receivables and leases.

In the context of credit card receivables, which we have always understood the definition to encompass, it has never been a precise fit, in that receivables – "the contractual right to receive cash or another financial instrument" – are transferred, but the contracts under which they arise are not. We think that now would be an appropriate time to revise the definition to create a better fit.

In the case of auto leases and other leases, a significant portion of the securitized value is realized by means of disposition of the vehicle or other equipment at the end of the lease term, rather than through periodic payments on the lease. As a result, such leases do not fit within the existing definition. Inasmuch as both the Conference Bill and Regulation AB expressly include leases in their respective definitions of "asset-backed security," we believe it would be appropriate for the Proposed Rule also to encompass these assets.

We would suggest the following as the appropriate definition that would address these two issues:

> *Financial asset* means cash or an instrument, contract, or contractual right that entitles one entity to receive cash or another financial instrument from another entity; provided, that in the case of financial assets that are leases, the right to receive cash may consist in part of the realization of cash proceeds upon disposition of the physical property underlying such leases.

(a)(3) *Issuing entity* means an entity created at the direction of a sponsor that owns a financial asset or financial assets or has a perfected security interest in a financial asset or financial assets and issues obligations supported by such asset or assets. Issuing entities may include, but are not limited to, corporations, partnerships, trusts, and limited liability companies and are commonly referred to as special purpose vehicles or special purpose entities. To the extent a securitization is structured as a two-step transfer, the term issuing entity would include both the issuer of the obligations and any intermediate entities that may be a transferee.

Comment: In the first sentence of paragraph (a)(3), we believe the words "created at the direction of a sponsor" should be deleted. We are concerned, for instance, with conduit securitizations, where the "issuing entity" would not have been established by the sponsor, given that "sponsor" is defined in paragraph (a)(8) to contemplate someone in the chain of title to the assets or otherwise affiliated with the transferor. We note, also, that both the definition of "sponsor" and the definition of "issuing entity"—which includes intermediate entities in the chain of title—appear to pick up the concept that is commonly referred to as the

"depositor," and we wonder whether breaking that definition out separately, as in Regulation AB, might be helpful.

(a)(5) – *Obligation* means a debt or equity (or mixed) beneficial interest or security that is primarily serviced by the cash flows of one or more financial assets or financial asset pools, either fixed or revolving, that by their terms convert into cash within a finite time period, or upon the disposition of the underlying financial assets, any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders issued by an issuing entity. The term does not include any instrument that evidences ownership of the issuing entity, such as LLC interests, common equity, or similar instruments.

Comment: The basic definition of "obligation" as articulated in the first sentence of paragraph (a)(5) is consistent with similar definitions in other regulations and, we believe, appropriately defines the types of securities that should receive the protection of the safe harbor. However, the breadth of the definition, and in particular its inclusion of equity securities, is undercut by the last sentence, which excludes "any instrument that evidences ownership of the issuing entity." Many common securitization structures—including most REMICs and master trusts—issue senior interests that are in the form of equity and evidence ownership of the issuing entity, which is the reason that equity beneficial interests are mentioned in the standard definitions of asset-backed securities. We agree that the vehicle's common equity, if held by the depositor, the sponsor, or their affiliates, in whatever form it is designated (which might include trust certificates), need not be covered by the safe harbor. We would suggest, however, that any exclusion intended to address this point focus on the identity of the holder and not solely on the equity characteristics of the security. One possible alternative form of this last sentence would be "The term does not include any security that represents the common equity in a securitization vehicle held by the transferor or an affiliate of the transferor, whether held in the form of common stock, LLC interests, general partnership interests or trust certificates."

(a)(8) – *Servicer* means any entity responsible for the management or collection of some or all of the financial assets on behalf of the issuing entity or making allocations or distributions to holders of the obligations, including reporting on the overall cash flow and credit characteristics of the financial assets supporting the securitization to enable the issuing entity to make payments to investors on the obligations.

Comment: We appreciate that the definition of "servicer" appears to be modeled on the SEC's definition in Regulation AB. The Regulation AB definition is intentionally broad and designed, for purposes of the SEC's compliance certification requirements and certain other disclosures, to include entities that do not have a role in the collection of the assets but do make allocations or distributions, prepare reports or even merely provide lockbox functions. For example, the securitization trustee typically is considered a servicer under this definition, even though the trustee does not interact with obligors on the transferred assets. In general, where the FDIC references a servicer (or sometimes "the servicer"), the FDIC appears to be focusing on the entity that would generally be deemed the "primary servicer" of the assets, i.e., the entity that performs the day-to-day invoicing, customer service and collection activity with respect to those assets. In several places, the Proposed Rule even uses the term "primary servicer"

although it is not separately defined. We believe many of the conditions in the Proposed Rule, such as the requirement that "[t]he servicer must commence action to mitigate losses no later than ninety (90) days after an asset first becomes delinquent,"[13] are intended only to obligate or apply to the primary servicer of that asset and not, for instance, the lockbox provider. We suggest that the term "primary servicer" be defined and that the term "servicer" be replaced with "primary servicer" in most places it appears, including paragraphs (b)(2)(ii)(C), (b)(3)(ii)(A) and (B), (b)(4)(ii) and (c)(6) and (7).

(b) *Coverage*:

(b)(1) – *Capital structure and financial assets.* The documents creating the securitization must clearly define the payment structure and capital structure of the transaction.

Comment: This introductory language does not indicate how it relates to the remainder of paragraph (b)(1), and the remaining provisions appear to dictate specific substantive requirements of the securitization but do not provide guidance on how to "clearly define" the aspects referenced in the introductory language. We acknowledge that the goal should always be to have clear language in the contract, but we are concerned that an inadvertent error could undermine the safe harbor. We suggest deleting this sentence, which would make it consistent with the format of paragraph (b)(5).

(i) The following requirement applies to all securitizations:

(A) The securitization shall not consist of re-securitizations of obligations or collateralized debt obligations unless the disclosures required in paragraph (b)(2) of this section are available to investors for the underlying assets supporting the securitization at initiation and while obligations are outstanding; and

Comment: Paragraph (b)(1)(i)(A) currently requires that for the safe harbor to apply to a resecuritization, "the disclosures required in paragraph (b)(2) . . . are available to investors." Paragraph (b)(2), however, is one of the paragraphs the FDIC revised to require, in most instances, not the disclosures themselves, but that the documentation for the transaction mandate those disclosures. We understand the goal of allowing investors to look through a resecuritization to the underlying assets, but we believe the requirement as drafted cannot be met. In addition, we are concerned that the requirement as it applies to "collateralized debt obligations," which is not defined, would encompass transactions such as balance sheet collateralized loan obligations that are supported by corporate loans rather than securitization obligations—in which case the requirements of paragraph (b)(2) would be inapplicable. We note, as well, that the SEC has included both of these categories of securitizations in the SEC Proposing Release. We therefore suggest that paragraph (b)(1)(i)(A) be deleted as a separate condition and instead be folded into the later disclosure conditions, in particular paragraph (b)(2)(i)(A), subject to our comments to that paragraph.

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[13] 75 Fed. Reg. 27471, 27485.

(B) The payment of principal and interest on the securitization obligation must be primarily based on the performance of financial assets that are transferred to the issuing entity and, except for interest rate or currency mismatches between the financial assets and the obligations, shall not be contingent on market or credit events that are independent of such financial assets. The securitization may not be an unfunded securitization or a synthetic transaction.

Comment: We are not sure what the first sentence of this provision is intended to add to the definition of "securitization" in paragraph (a)(6), and believe it creates ambiguity by providing an alternative version of that definition as a condition to the safe harbor. Therefore, we suggest deleting it. Also, it is unclear to us whether the last sentence of paragraph (b)(1)(i)(B) prevents the issuance of transactions with a prefunding account to allow assets to be acquired after closing (as provided in Regulation AB and preserved in the SEC Proposing Release). If limited prefunding would be permitted, we suggest that be clarified in the final sentence.

(b)(2)(i)(A) The documents shall require that, prior to issuance of obligations and monthly while obligations are outstanding, information about the obligations and the securitized financial assets shall be disclosed to all potential investors at the financial asset or pool level, as appropriate for the financial assets, and security-level to enable evaluation and analysis of the credit risk and performance of the obligations and financial assets. The documents shall require that such information and its disclosure, at a minimum, shall comply with the requirements of Securities and Exchange Commission Regulation AB, 17 CFR 229.1100 through 229.1123, or any successor disclosure requirements for public issuances, even if the obligations are issued in a private placement or are not otherwise required to be registered. Information that is unknown or not available to the sponsor or the issuer after reasonable investigation may be omitted if the issuer includes a statement in the offering documents disclosing that the specific information is otherwise unavailable;

Comment: We appreciate the effort the FDIC has made to shift the disclosure requirements to a more verifiable documentary approach. We believe, however, that there are a number of timing issues, ambiguities and inconsistencies in this language that continue to make the condition unverifiable as a safe harbor standard. For instance, the documents evidencing a transaction are signed *after* the initial disclosure documents have been prepared and delivered to investors, and cannot therefore be used to mandate the contents of such disclosure documents. (We also prefer "documentation" to "documents" to avoid the implication that the provision must be in each document evidencing the transaction.) The first sentence, requiring loan level data "as appropriate," appears to be inconsistent with the second sentence requiring compliance with Regulation AB, as the changes to Regulation AB that would implement loan level data requirements have not yet been finalized or implemented. As a result, there is no standard against which to evaluate whether data at the financial asset level, "as appropriate," has been required by the documentation or provided. With respect to the proposed extension of these requirements to the private market, we refer to our responses in paragraph 2 of Part I of this letter. In addition, the final sentence, although exempting information that "is unknown or not available to the sponsor or the issuer after reasonable investigation," does not address all the possibilities under which information might not be able to be provided, including (i) information that

can be obtained, but only at great expense, (ii) information that can be obtained but not verified or comforted, (iii) information that cannot be provided as a result of privacy laws and regulations, or (iv) information that cannot be provided due to confidentiality obligations. As discussed in Part I above, we ask that this condition be deleted.

If you nonetheless feel it important that disclosure be part of the conditions for the safe harbor, we would ask that you rely on the SEC to set appropriate standards for disclosure and define the circumstances in which those standards would apply, and revise this provision to say, "The documentation for the transaction includes a representation and warranty by the [sponsor][issuing entity] that (i) to the extent required under SEC rules, an offering document or prospectus was delivered to investors, and (ii) such offering document or prospectus complied in all material respects with all applicable U.S. federal securities law disclosure requirements, taking into account the relevant asset class and any private offering exemption from the securities laws on which such offering relied. In addition, the documentation for the transaction shall include a covenant that the [sponsor][issuing entity] will satisfy all ongoing disclosure requirements mandated by SEC rules, taking into account the relevant asset class and any private offering exemption from the securities laws on which such offering relied."

(b)(2)(i)(B) The documents shall require that, prior to issuance of obligations, the structure of the securitization and the credit and payment performance of the obligations shall be disclosed, including the capital or tranche structure, the priority of payments and specific subordination features; representations and warranties made with respect to the financial assets, the remedies for and the time permitted for cure of any breach of representations and warranties, including the repurchase of financial assets, if applicable; liquidity facilities and any credit enhancements permitted by this rule, any waterfall triggers or priority of payment reversal features; and policies governing delinquencies, servicer advances, loss mitigation, and write-offs of financial assets;

Comment: We believe this paragraph presents the same issues as those presented by the paragraph (A) above, and we recommend the same approach.

(b)(2)(i)(C) The documents shall require that while obligations are outstanding, the issuing entity shall provide to investors information with respect to the credit performance of the obligations and the financial assets, including periodic and cumulative financial asset performance data, delinquency and modification data for the financial assets, substitutions and removal of financial assets, servicer advances, as well as losses that were allocated to such tranche and remaining balance of financial assets supporting such tranche, if applicable; and the percentage of each tranche in relation to the securitization as a whole;

Comment: We believe this paragraph presents the same issues as those presented by the paragraph (A) above. In addition, the requirement, though phrased differently, seems to address the same disclosure matters as those addressed by paragraph (A). We recommend folding this requirement into paragraph (A), as revised as we suggest above.

(b)(2)(i)(D) In connection with the issuance of obligations, the nature and amount of compensation paid to the originator, sponsor, rating agency or third-

party advisor, any mortgage or other broker, and the servicer(s), and the extent to which any risk of loss on the underlying assets is retained by any of them for such securitization shall be disclosed. The securitization documents shall require the issuer to provide to investors while obligations are outstanding any changes to such information and the amount and nature of payments of any deferred compensation or similar arrangements to any of the parties.

Comment: We believe this paragraph presents the same issues as those presented by the paragraph (A) above, and we recommend the same approach.

(b)(ii) The following requirements apply only to securitizations in which the financial assets include any residential mortgage loans:

(A) Prior to issuance of obligations, sponsors shall disclose loan level information about the financial assets including, but not limited to, loan type, loan structure (for example, fixed or adjustable, resets, interest rate caps, balloon payments, etc.), maturity, interest rate and/or Annual Percentage Rate, and location of property; and

(B) Prior to issuance of obligations, sponsors shall affirm compliance with all applicable statutory and regulatory standards for origination of mortgage loans, including that the mortgages 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. Sponsors shall disclose a third party due diligence report on compliance with such standards and the representations and warranties made with respect to the financial assets; and

(C) The documents shall require that prior to issuance of obligations and while obligations are outstanding, servicers shall disclose any ownership interest by the servicer or an affiliate of the servicer in other whole loans secured by the same real property that secures a loan included in the financial asset pool. The ownership of an obligation, as defined in this regulation, shall not constitute an ownership interest requiring disclosure.

Comment: We believe paragraphs (b)(ii)(A), (B) and (C) present the same issues as those presented by the paragraph (b)(i)(A) above, and we recommend the same approach.

(b)(3) ***Documentation and recordkeeping.*** **The documents creating the securitization must clearly define the respective contractual rights and responsibilities of all parties and include the requirements described below and use as appropriate any available standardized documentation for each different asset class.**

Comment: The introductory language in paragraph (b)(3), reflected above, has three distinct elements:

- The documents creating the securitization must clearly define the respective contractual rights and responsibilities of all parties.
- The documents creating the securitization must include the requirements described below.

- The documents creating the securitization must use as appropriate any available standardized documentation for each different asset class.

As with the introductory language to paragraph (b)(1), we are concerned that the first requirement—that the documents "clearly define" the rights and responsibilities of all parties—does not provide an easily verifiable standard for legal opinions and places the risk of inadvertent documentation errors or ambiguities on investors. We discuss the second requirement in the context of the specific provisions included in paragraph (b)(3). The final requirement, requiring the use of available standardized documentation, we believe to be unascertainable. Who would decide what documentation was "standardized"? What degree of variation would be permitted? Would issuers with established programs have to abandon their customary documentation if a new "standardized" document became available for a particular asset class? We appreciate that having more consistent documentation might make it easier for investors to evaluate a particular transaction, and we would support industry efforts to create basic forms for mortgage loan securitization—but we do not believe this is an appropriate condition for the safe harbor.

(b)(3)(i)(A) – The documents shall set forth all necessary rights and responsibilities of the parties, including but not limited to representations and warranties and ongoing disclosure requirements, and any measures to avoid conflicts of interest. The contractual rights and responsibilities of each party to the transaction, including but not limited to the originator, sponsor, issuing entity, servicer, and investors, must provide sufficient authority for the parties to fulfill their respective duties and exercise their rights under the contracts and clearly distinguish between any multiple roles performed by any party.

Comment: Paragraph (b)(3)(i)(A) requires that the documents must set forth "all *necessary* rights and responsibilities of the parties, including but not limited to representations and warranties and ongoing disclosure requirements, and any measures to avoid conflicts of interest." (emphasis added) We believe this is much too vague a standard to be a condition for a safe harbor, because it can neither be addressed through a legal opinion nor independently verified by third parties. As transactional lawyers, we strive to ensure that the documentation reflects the business terms and allocation of risk determined by the parties in a clear and unambiguous way. Though often we would consider certain representations and warranties, for instance, to be sensible and prudent,[14] there is little by way of specific terms that we would consider to be "necessary" per se. In addition, where documentation issues have complicated workouts and recoveries for loan obligors and securitization investors, we do not believe the securitization participants generally knew they had faulty documentation when they issued the securities—rather, ambiguities or insufficiencies of procedures were recognized only as market conditions deteriorated and mechanisms in the documents that had never been tested became vitally important. A safe harbor should not have conditions that will fail because of lack of foresight or inadvertent drafting errors. Imagine how much worse the crisis would have been for investors if, upon

[14] For the avoidance of doubt, we also would consider a safe harbor condition that required the documentation to include all "sensible and prudent" provisions to be equally unascertainable.

discovering that certain contingencies had not been fully contemplated in the documentation for their investments, they also suddenly had to fear that the discovery voided their safe harbor! We have not been able to devise a workable revision of this standard, and we recommend that the condition be deleted.

(b)(3)(ii)(A) – Servicing and other agreements must provide servicers with full authority, subject to contractual oversight by any master servicer or oversight advisor, if any, to mitigate losses on financial assets consistent with maximizing the net present value of the financial asset. Servicers shall have the authority to modify assets to address reasonably foreseeable default, and to take such other action necessary to maximize the value and minimize losses on the securitized financial assets applying industry best practices for asset management and servicing. The documents shall require the servicer to act for the benefit of all investors, and not for the benefit of any particular class of investors. The servicer must commence action to mitigate losses no later than ninety (90) days after an asset first becomes delinquent unless all delinquencies on such asset have been cured. A servicer must maintain sufficient records of its actions to permit appropriate review.

Comment: There are a number of different concepts and requirements related to servicing embedded in this provision, and we have tried to separate them out to address them more clearly. These are the primary issues we have identified:

- As noted in our comments on paragraph (a)(8), we believe that this paragraph is intended to refer only to the primary servicer for a particular asset and should be revised accordingly.

- We believe the requirement that servicers be provided with "full authority" to mitigate losses should instead only require "authority" to take such actions. We are not sure what the word "full" was intended to add in this context or how it would be verified.

- The Proposed Rule does not define "net present value" in connection with the proposed requirement that servicers act to mitigate losses "consistent with maximizing the net present value of the financial asset," nor does it establish a relevant discount rate or calculation methodology, or provide guidance as to appropriate loss assumptions or the standard of care to apply to servicers in determining what actions would maximize the net present value. We appreciate that a concept of maximizing net present value has been used in other responses to the mortgage loan crisis, including HAMP. However, HAMP's use of net present value is within the context of a highly developed, multi-faceted approach that provides incentives not just to servicers, but also to borrowers and investors, to complete loan modifications. We are concerned that the proposed net present value determination, if made outside the robust statutory framework of HAMP, will not provide sufficient protections to investors.

- We are concerned that the requirement that servicers apply "industry best practices" creates both ambiguity and exposure for IDIs based on subjective and changing determinations as to what would constitute "industry best practices." We recommend that this provision be re-worded

to provide that the documentation shall require the primary servicer to act in accordance with industry best practices.

- Paragraph (b)(3)(ii)(A) requires servicers to act for all investors, not just a single class of investors. We believe this provision should be modified so that the servicer does not have to consider investors in classes that (1) have no principal outstanding (whether by repayment or allocation of losses), (2) have been structured specifically to take certain risk of losses on the underlying financial (including as a result of loan modifications) or (3) have no rights at all in the financial assets being modified. Additionally, some securitizations are structured to give a specified class of investors authority to direct one or more specific servicing actions. The reason for this is that such class is the class that generally takes the first loss on one more specified assets. We believe it would be prudent to permit this practice to continue and recommend that the language be clarified to specifically recognize this structure. Finally, in many securitizations, the servicer's duty runs to the issuing entity rather than to the investors, and we believe this approach should also be permitted.

- Paragraph (b)(3)(ii)(A) requires, in the last two sentences, that servicers act within a specified time and maintain certain records. We believe the condition should be revised to require only that these servicer duties be specified in the deal documentation. Such changes will prevent a defaulting servicer from making the safe harbor ineffective.

(b)(3)(ii)(B) – The servicing agreement shall not require a primary servicer to advance delinquent payments of principal and interest for more than three payment periods, unless financing or reimbursement facilities are available, which may include, but are not limited to, the obligations of the master servicer or issuing entity to fund or reimburse the primary servicer, or alternative reimbursement facilities. Such ''financing or reimbursement facilities'' under this paragraph shall not depend on foreclosure proceeds.

Comment: Paragraph (b)(3)(ii)(B) requires that acceptable "financing or reimbursement facilities" may not "depend on foreclosure proceeds." We are not sure what is intended by this requirement. It is increasingly common for servicers to have facilities that provide them with funding for advances they make, and those facilities rely on reimbursement from collections on the mortgage loans, including foreclosure and other liquidation proceeds. Perhaps this provision was intended to provide assurance that servicers would not be compelled to advance with no possibility of reimbursement except upon foreclosure? If that is the case, we suggest inserting the word "solely" before the phrase "depend on foreclosure proceeds." This revision would allow reimbursement to be made from foreclosure proceeds but require additional reimbursement methods.

(b)(4) – ***Compensation.*** **The following requirements apply only to securitizations in which the financial assets include any residential mortgage loans. Compensation to parties involved in the securitization of such financial assets must be structured to provide incentives for sustainable credit and the long-term performance of the financial assets and securitization as follows:**

Comment: We are unclear if the second sentence of this lead in paragraph is intended to create a separate, additional requirement to the requirements of subsections (b)(4)(i) and (b)(4)(ii). We believe the requirements of subsections (b)(4)(i) and (b)(4)(ii) provide specific requirements and that the second sentence of this lead in paragraph creates uncertainty. Therefore, we recommend this sentence be deleted.

(b)(4)(i) The documents shall require that any fees or other compensation for services payable to credit rating agencies or similar third-party evaluation companies shall be payable, in part, over the five (5) year period after the first issuance of the obligations based on the performance of surveillance services and the performance of the financial assets, with no more than sixty (60) percent of the total estimated compensation due at closing;

Comment: Although we appreciate the appeal of this provision in theory, we are not sure how it would be applied in practice. The credit rating agencies rate the risk of loss on the securities, and not directly the risk of loss on the assets. The key question is whether the securities performed consistently with their ratings, and that determination depends not only on the performance of the assets but also on the adequacy of credit enhancement. Would deferred compensation take into account the adequacy of credit enhancement? How would the increased risks associated with junior tranches be taken into account? If the deferred portion of rating agency fees were paid at the same level as the various tranches, would they receive the same associated yield? What effect would the performance of surveillance services have on whether the compensation should be paid? Would rating agencies be penalized for downgrading tranches, which might make them less likely to do so even when appropriate? Who would determine whether the compensation was sufficient? How would the payments be spread out over the deferral period? And if this only applied to securitizations involving IDIs, would rating agencies simply refuse to rate these transactions or increase their fees to a level that they believed effectively eliminated the risk to them? Would the proposal, rather than aligning interests, create new conflicts of interest as rating agencies seek to cause issuers to structure deals in ways that protect their fees over the interests of investors? Given the significant number of questions raised by this condition, we believe this condition should be deleted.

(b)(4)(ii) – Compensation to servicers shall provide incentives for servicing, including payment for loan restructuring or other loss mitigation activities, which maximizes the net present value of the financial assets. Such incentives may include payments for specific services, and actual expenses, to maximize the net present value or a structure of incentive fees to maximize the net present value, or any combination of the foregoing that provides such incentives.

Comment: Paragraph (b)(4)(ii) requires that servicers be compensated to provide incentives for maximizing net present value of the financial assets. It is not clear how this standard will be interpreted or satisfied. As we discuss in our comments to paragraph (b)(3)(ii)(A), it is unclear what would be involved in maximizing net present value in this context. In particular, maximizing the net present value of a financial asset can be at odds with the nature of a cash flow securitization structure which does not rely on the value of any one financial asset, but on the continued cash flow of the assets generally. We suggest that this requirement be modified to require that the documents contain provisions

obligating the servicer to maximize the returns on the financial assets on a current and overall basis and contain incentive compensation to the servicer based upon specified reductions in delinquencies over specified time periods.

(b)(5)(i)(A) –*Origination and Retention Requirements.* (i) The following requirements apply to all securitizations: (A) The sponsor must retain an economic interest in a material portion, defined as not less than five (5) percent, of the credit risk of the financial assets. This retained interest may be either in the form of an interest of not less than five (5) percent in each of the credit tranches sold or transferred to the investors or in a representative sample of the securitized financial assets equal to not less than five (5) percent of the principal amount of the financial assets at transfer. This retained interest may not be transferred or hedged during the term of the securitization.

Comment: We reiterate here our concerns expressed in Part I above, and ask that you delete this as a condition to the safe harbor. If you nonetheless believe that risk retention is an essential safe harbor condition, we ask that you consider the issues with risk retention we identify in Part I as well as the following comments.

We suggest that the risk-retention provisions of this paragraph be expanded to allow affiliates of the sponsor, in addition to the sponsor, to hold the retained risk.

The paragraph requires that retained interests may not be "transferred or hedged" during the term of the securitization. The term "transfer" is defined in paragraph (a)(10) only by reference to conveyance of financial assets. We think this use of "transfer" should be excluded from the defined term and should include permission to pledge the retained interests, which seems to be allowed under the SEC's proposed risk-retention provisions. In addition, if the risk-retention requirement and the prohibitions on transfer and hedging of the required retained interest are ultimately included as conditions in the FDIC's final rule, they should be modified with the words "the documentation shall require."

As recent events have demonstrated, market volatility and economic disruptions can affect security market values even where there is no apparent decline in the securities' intrinsic value. We believe that allowing IDIs to hedge their retained positions against market and index movements they cannot control, but not against the particular credit risk of the assets they originated or securitized, would strike an appropriate balance between mandating risk alignment and protecting IDIs and the DIF, on the one hand, and the Proposed Rule's anti-hedging prohibition, on the other hand. We ask that you consider this in connection with any final adoption of the Proposed Rule or any separate rulemaking in connection with the Congressional legislation.

(b)(5)(ii)(B) –The following requirements apply only to securitizations in which the financial assets include any residential mortgage loans: . . . (B) The assets shall have been originated in compliance with all statutory, regulatory, and originator underwriting standards in effect at the time of origination. Residential mortgages included in the securitization shall be underwritten at the fully indexed rate, based upon the borrowers' ability to repay the mortgage according to its terms, and rely on documented income and comply with all 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 regulations or guidance applicable to insured depository institutions at the time of loan origination. Residential mortgages originated prior to the issuance of such guidance shall meet all supervisory guidance governing the underwriting of residential mortgages then in effect at the time of loan origination.

Comment: Paragraph (b)(5)(ii)(B) requires that residential mortgage loans be originated in compliance with all statutory and other requirements of law. We believe that this is typically a requirement contained in securitization documents and is documented by a representation to that effect. As currently written, this requirement goes beyond a representation and requires, as a factual matter for the safe harbor to apply, that such loans be so originated. This introduces significant uncertainty to the safe harbor for such securitizations, because each such condition could be discovered, *after* the closing, not to have been satisfied *as of* the closing. We suggest that this provision be revised to provide that the documentation contain representations and warranties that such loans were so originated.

(c) *Other requirements*:

(c)(1) –The transaction should be an arms length, bona fide securitization transaction, and the obligations shall not be sold to an affiliate or insider;

Comment: We agree that the transaction should be an arm's length and bona fide securitization transaction to obtain the benefits of the safe harbor, and we believe this is consistent with existing law and policy. We are concerned, however, about the restriction on selling to an affiliate or insider (we assume the phrase "affiliate or insider" is intended to mean an affiliate or insider of the sponsor). We appreciate that there may be circumstances in which a securitization does not include a meaningful third party investment, and that the FDIC may not wish to extend the benefit of the safe harbor to such transactions. However, we believe it is important that the presence of insider or affiliate interests not taint an entire structure. For instance, the Proposed Rule and the pending legislation both contemplate mandatory risk retention in the securitization, and we do not see how this can be consistent with a flat prohibition on affiliate and insider interests.

It is common for affiliates of the sponsor to acquire some portion or all of the obligations of one or more classes of securitizations. Given the dislocation in the markets, there has been little ability in the past two years for issuers to sell the subordinated tranches necessary to support the senior tranches, and in many cases those subordinated tranches have been retained by the sponsor or its affiliates. Master trust structures depend on the ability to maintain with the sponsor or its affiliates the residual interest in the trust, known as the "seller's interest," which is required to be maintained at a specified level for ratings purposes but which has been increasing as a percentage of the trust for many issuers that have not replaced maturing securitized obligations with new issuances in the current market.

Also, affiliated underwriters or placement agents may buy some or all of a securitization in such capacity at issuance for resale to investors in the offering and may continue to make a market in those securities after issuance to improve liquidity for investors. FAS 140 looked to whether at least 10% of the interests in a transaction had been sold to unaffiliated third parties. We would suggest that the FDIC continue that approach.

(c)(6) The transfer and duties of the sponsor as transferor must be evidenced in a separate agreement from its duties, if any, as servicer, custodian, paying agent, credit support provider or in any capacity other than the transferor.

Comment: We believe the requirement, as drafted, can be accommodated for new issuances where a new trust agreement, indenture or pooling and servicing agreement would typically be entered into at the issuance. However, this requirement would present significant problems for existing master trust structures where the program documentation has been in place for many years and is supplemented with each new issuance. We are concerned that issuers will not be able to amend this documentation without investor consent to separate servicing and transfer obligations, and obtaining such consent, even if possible, would be an expensive and time consuming process. We suggest that any final rule that includes this provision also grandfather existing master trust structures, at least for so long as all currently outstanding beneficial interests continue to be outstanding. (The documentation for new issuances could include a deemed consent to amendment, which could be effected when all currently outstanding beneficial interests had matured.)

(c)(7) – The sponsor shall separately identify in its financial asset data bases the financial assets transferred into any securitization and maintain an electronic or paper copy of the closing documents for each securitization in a readily accessible form, a current list of all of its outstanding securitizations and issuing entities, and the most recent Form 10–K, if applicable, or other periodic financial report for each securitization and issuing entity. To the extent the sponsor serves as servicer, custodian or paying agent provider for the securitization, the sponsor shall not comingle amounts received with respect to the financial assets with its own assets except for the time necessary to clear any payments received and in no event greater than a two day period. The sponsor shall make these records readily available for review by the FDIC promptly upon written request.

Comment: We appreciate the importance of the elements of the first sentence in terms of ensuring that the FDIC can determine which assets have been transferred and the contracts governing such transfer. However, given the forward-looking aspect of this requirement and that failure to comply regarding any single securitization could void the safe harbor for unrelated securitizations, we believe it should not be a condition to the safe harbor, except to the extent the FDIC is unable to determine, after reasonable inquiry, which assets have been transferred or the definitive terms of the applicable agreements for the subject securitization. We believe recordkeeping requirements should be established by separate regulation.

We are also concerned about the forward-looking aspects of the second sentence of paragraph (c)(7), and believe that it should commence with words to the effect of "The applicable transaction document[s] shall require that . . . ." As noted above with respect to paragraph (b)(3)(ii)(A), the change will prevent a defaulting servicer from rendering the safe harbor ineffective. In addition, there are three other issues with respect to the two-day limit on commingling. First, we believe this should, at a minimum, be a two *business* day requirement. Second, we note that it is not uncommon for sponsors who are also servicers to be allowed to retain cash until the distribution date if they meet certain ratings requirements or post a letter of credit to cover the commingling risk. We note that this retention

right can be an important source of liquidity for IDIs with substantial securitization programs. Finally, it is typical for the servicer to be permitted to limit the amount of collections deposited so that it does not include collections that will be returned to it for servicing fees or payments on residual interests. Again, if this condition is intended to limit the ability to employ this netting even where permitted by the securitization contracts, it could cause significant liquidity issues for IDIs.

(k) *Repeal*. This section may be repealed by the FDIC upon 30 days notice provided in the Federal Register, but any repeal shall not apply to any issuance made in accordance with this section before such repeal.

Comment: The Securitization Rule provision regarding repeal also applies to amendments to the rule and it further provides that repeals and amendments will not affect transfers of financial assets or participations made in reliance upon the Securitization Rule. We believe the current language should be expanded to provide similar coverage as follows: "This section may be repealed or amended by the FDIC upon at least 30 days notice provided in the Federal Register, but any repeal or amendment shall not apply to any issuance, transfer of financial assets made in connection with a securitization or any participation, in any such case, that was in effect before such repeal or amendment.

III. The FDIC's repudiation powers and remedial and consent provisions in the Proposed Rule

When the FDIC established the Securitization Rule in 2000, it acknowledged that the repudiation power conferred on the FDIC under 12 U.S.C. §1821(e)(1) does not permit the FDIC to avoid a consummated sale of assets:

> [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. Even in the case of a sale transaction that imposes some continuing obligation, a repudiation by the FDIC would relieve the FDIC from future performance, but generally should not result in the recovery of any property that was transferred by the institution before the appointment of the conservator or receiver.[15]

This statement in the 2000 adopting release correctly reflected applicable law, which has not changed. Where the FDIC is appointed receiver for an IDI under the Federal Deposit Insurance Act, 12 U.S.C. § 1811 et seq. (the "FDIA"), it "succeed[s] to all rights, titles, powers, and privileges of the insured depository institution…."[16] The FDIA, however, does not expressly address the question of what assets make up the receivership

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[15] 65 Fed. Reg. 49189, 49191 (Aug. 11, 2000).

[16] 12 U.S.C. § 1821(d)(2)(A).

estate, or what constitutes the "rights, titles, powers, and privileges of the insured depository institution" with respect to a specific asset or claimed asset. The Supreme Court has held that, "except where some provision in the extensive framework of [the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA")] provides otherwise," the FDIC is placed in the shoes of the insolvent depository institution, "to work out its claims under state law."[17] Because there is no provision in the FDIA or FIRREA that addresses whether a transaction constitutes a true conveyance of assets to another entity or a secured loan to or from that entity, the issue will be determined by applicable state law. Subject to the FDIC's rights to repudiate ongoing performance obligations and reverse fraudulent conveyances, the FDIC will have no greater rights with respect to such conveyed assets than did the IDI.

In the NPR the FDIC has suggested that a sale of financial assets that does not achieve sale treatment under generally accepted accounting principles will not constitute a true sale for insolvency purposes[18] (we will use the term "legal sale" to refer to such a true sale). Such a position is not supported by applicable law; while the accounting treatment of a transfer is sometimes considered a relevant factor, it is by no means dispositive of whether the transfer is a legal sale.[19] The FDIC's suggestions that a transfer is not a legal sale unless it is an accounting sale are not, we believe, consistent with applicable law and are creating significant confusion in the securitization community about an area that we believe to be settled law.

One example of the foregoing is the assertion in the NPR that the FDIC's repudiation power "is not an avoiding power enabling the conservator or receiver to recover assets that were previously sold *and* are no longer reflected on the books and records on [sic] an IDI"[20] (emphasis supplied). This assertion, though technically correct, is too narrow, and it conveys the impression that the conservator or receiver would have the power to recover assets that were previously sold but that are still accounted for as owned by the consolidated entity. A more appropriate formulation would be that the repudiation power "is not an avoiding power enabling the conservator or receiver to recover assets that were previously sold under applicable law."

One consequence of the FDIC's conflation of accounting sale treatment with legal sale treatment is that the remedial provisions in paragraph (d)(4) of the Proposed Rule appear to give the FDIC powers that the FDIC does not have. When the securitization involves a legal sale by an IDI to a depositor, as is the case in a standard two-step securitization, then the IDI will have no remaining ownership rights in the transferred assets. In that situation, the FDIC as conservator or receiver of the failed IDI will not have the right to reacquire the transferred assets, nor to force the transferee to release any lien on the transferred assets upon satisfaction of the securitization obligations.

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17 See O'Melveny & Meyers v. FDIC, 512 U.S. 79, 87 (1994). See also Barnhill v. Johnson, 503 U.S. 393, 398 (1992) (stating, in the context of a bankruptcy case, "[i]n the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law").

18 75 Fed. Reg. 27471, 27472.

19 See, e.g., In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 67 B.R. 557 (D.N.J. 1986).

20 75 Fed. Reg. 27471, 27472.

We appreciate that there can be an inherent confusion between *sales for accounting* and *legal true sales*, but the recent accounting amendments, which change the presentation of information, have not affected any of the legal rights of the parties under state law applicable to asset transfers and similarly do not affect the FDIC's statutory powers with respect to such assets. Fundamentally, the accounting changes do not alter the ability to achieve a *legal* sale of assets, which is well beyond the power of the Financial Accounting Standards Board ("FASB") to alter. Rather, the amendments represent the most recent effort by FASB to establish the appropriate balance point between sale accounting treatment and consolidated reporting in situations where financial assets have been transferred to "orphan" entities but the transferor continues to have significant ties to those entities, even though they are not formally subsidiaries. But the balance is still not perfect. Where the prior standard may not have fully captured the continuing ties between transferors and their securitization entities, the current standard is arguably over-inclusive, preserving on the transferor's consolidated balance sheet pools of assets as to which the transferor does not have ownership rights.

This over-inclusiveness is not a new problem for financial reporting purposes, though it is new in the context of IDIs. Because of the complexity of FASB's prior standard to achieve sale accounting treatment, many entities that did not have regulatory capital requirements tied to on-balance sheet assets chose to forgo sale accounting treatment and recorded securitized assets in their consolidated financial statements. To avoid giving creditors of transferors the impression that such assets would be available to them in insolvency proceedings, and to emphasize the importance of the legal separateness of the entities included in consolidated financial statements, transferors typically include in their financial statements disclosure to the effect that the assets have been transferred in a securitization and are not expected to be available to those creditors. We believe that such a statement in an IDI's financial statements, together with customary indicia of a legal sale, should be considered *prima facie* evidence that the FDIC does *not* have the right to treat such assets as property of a receivership or conservatorship of the IDI.

We believe that drawing a clear line between assets that have been sold in a legal sale, even if included in an IDI's consolidated financial statements, and those that continue to be legally owned by the IDI is important not only for the protection of securitization investors but also for the protection of the DIF. The FDIC has long recognized that subsidiary organizations of an IDI must be kept legally separate from that IDI to avoid piercing the corporate veil and exposing the IDI, and through it the DIF, to the obligations of those subsidiary organizations. For example, in its 1998 adopting release detailing the powers that could be held by subsidiaries of insured state banks, the FDIC stated:

> The eligible subsidiary requirement is designed to assure that the subsidiary is in fact a separate and distinct entity from the bank. This requirement should prevent ''piercing of the corporate veil'' and insulate the bank, and the deposit insurance fund, from any liabilities of the subsidiary.[21]

[21] 63 Fed. Reg. 66275, 66306 (December 1, 1998). The "eligible subsidiary" criteria that the FDIC has adopted, as set forth in 12 CFR 362.4(c)(2), including requirements that the subsidiary have sufficient operating capital for its intended business, maintain separate accounting and business records from the IDI, and observe corporate formalities, strongly resemble the separateness

In our view, there is a core inconsistency between the implied position of the FDIC that assets consolidated for financial accounting purposes can be treated as belonging to the IDI, and the view articulated by the FDIC that corporate separateness should be respected, and IDI subsidiaries must be structured to preserve corporate separateness where their activities pose any risk to the IDI.

These issues of legal sale and corporate separateness have very real implications not only for transactions that would not meet the requirements of the safe harbor, but also for those that would satisfy, and must interpret their remedies in light of, the safe harbor provisions. For example, in clause (d)(4)(i), the FDIC provides that if it is in monetary default under the securitization documents, it will consent to the exercise of contractual remedies, "including obtaining possession of the financial assets." We are not sure what the quoted phrase means. One of the reasons special rules apply to transfers of financial assets is that there generally is no physical asset for which "possession" is meaningful. On the other hand, for a large portion of securitizations sponsored by IDIs, legal title to the assets is held in trust by an independent third party trustee, and there would be little value in moving that title to a different independent third party. In these circumstances, what would provide the greatest benefit to securitization investors would not be the ability to exercise contractual remedies, but rather to have the FDIC agree that it will not seek to recover, reclaim or recharacterize as property of the failed IDI those assets that were transferred in the securitization. In other words, for most securitizations, we believe the formulation of the prior safe harbor standard is the correct formulation for the context in which the FDIC agrees that the assets can remain with the securitization structure, and we request that the FDIC consider adding this language to clause (d)(4)(i).

Other Suggested Revisions to the Remedial and Consent Provisions

We believe that there are several technical aspects of paragraphs (d)(4) and (e) of the Proposed Rule that should be revised to clarify the rights of investors.

Application of Collections Prior to Payment of Repudiation Damages. One set of issues arises in the situation in which the FDIC pays the damages required by paragraph (d)(4)(ii). In general, the automatic consent in paragraph (e) permits collections on the financial assets to be used to continue to make payments to investors during the period following the date of the receivership or conservatorship. That provision is an important safeguard for investors.

However, the last sentence of paragraph (d)(4)(ii) specifies that the lien of the investors upon the financial assets is to be released "[u]pon receipt of" the FDIC's payment of the remaining principal when the FDIC elects to pay repudiation damages. If the collections are treated as part of the financial assets,[22] then this provision casts some doubt upon whether the collections received and not yet applied by the investors would be available to pay accrued interest, fees and the like that have accrued since the preceding payment date under the securitization documents.

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covenants that securitization participants use to protect securitization subsidiaries from the possibility of being substantively consolidated with a bankrupt parent entity.

[22] We do not concede that "financial assets" includes collections, but we are making that assumption for purposes of this discussion.

To allay the concern of investors regarding the application of collections on the financial assets during this period, we suggest that the following phrase be added to the last sentence of paragraph (d)(4)(ii), immediately following the word "payment":

> and application of collections received on the financial assets on the next regularly scheduled payment date under (and in accordance with) the securitization documents.
> Another way of dealing with this issue would be to include accrued and unpaid interest (to the extent supported by collections received on the underling financial assets) in the special definition of damages.

Measure of Damages. We also note that a small addition is needed to the penultimate sentence of paragraph (d)(4)(ii) (suggested additional text is italicized):

> For purposes of this paragraph, the damages due shall be in an amount equal to the par value of the obligations outstanding on the date of receivership *or conservatorship* less any payments of principal received by the investors to the date of repudiation.

IV. Transition issues

The FDIC has provided important assurances regarding the availability of the current safe harbor for securitizations issued in reliance on that safe harbor, notwithstanding the accounting changes. We appreciate your efforts in this regard, which we believe have been very successful in supporting the securitization markets. However, because the protections afforded by the safe harbor would change, concurrently with the change in the relevant conditions to satisfy it, if the Proposed Rule were adopted, further assurances may be necessary in connection with master trust structures to preserve their viability. This section discusses several transition issues related to the Proposed Rule as it would apply to master trust structures that we would like you to consider.[23]

The first issue, which we know has been raised previously, relates to the treatment of undrawn commitments to buy securitization interests in a revolving trust structure, where the commitment was made on or before September 30, 2010[24] but not fully drawn

[23] One additional technical issue arises in connection with paragraph (d)(2), which is intended to confirm the availability of the safe harbor for securitizations issued in reliance on the current rule. However, it uses the term "securitization," which is defined in the Proposed Rule to include only transactions supported by "external credit support permitted by this section." We do not believe the use of the word "securitization" in paragraph (d)(2) is intended to exclude RMBS transactions issued under the original rule that included, for instance, a monoline insurance wrap. For clarification, however, we suggest adding a sentence to paragraph (d)(2) that says, "Terms that are used in this paragraph (d)(2) and that were defined in Rule 360.6 at the time a securitization was closed shall have the meanings specified in Rule 360.6 at such time."

[24] We note that the NPR would create a one-day overlap with the interim rule as currently in effect, because the interim final rule addresses "any securitization for which transfers of financial assets were made, or for revolving trusts for which beneficial interests were issued, *on or before September 30, 2010*," 75 Fed. Reg. 12962, 12965 (March 18, 2010) (emphasis added), but the NPR states at 75 Fed. Reg. 27471, 27474 that "[t]o qualify for the safe harbor provision of the Proposed Rule, the conditions must be satisfied for any securitization (i) for which transfers of financial assets were made *on or after September 30, 2010* or (ii) for revolving trusts, for which obligations were issued

until after September 30, 2010. In our view, such commitments—which have a finite duration and require payment of a commitment fee—should be treated as beneficial interests that were issued on or prior to September 30, 2010 because the relevant investment decision will have been made prior to that date. We would ask that the FDIC clarify the safe harbor to confirm that such commitments may be drawn after September 30, 2010 and still receive the protection of the current securitization rule.

The second issue relates to the rights and remedies of securitization investors in revolving trust structures where some beneficial interests were issued prior to September 30, 2010, others were issued after that date, and both sets of beneficial interests met the conditions of the safe harbor as in effect on the issuance date. The safe harbor provision by which the FDIC agrees that it will not seek to reclaim, recover or recharacterize as property of a failed IDI or the receivership provides much stronger protection to investors than the approach of the Proposed Rule. Will investors in newly issued beneficial interests continue to receive the same protections as investors in the prior beneficial interests, which we believe should be the outcome; will the new issuances taint the overall structure in a way that effectively limits the rights of holders of beneficial interests issued before September 30, 2010; or will portions of the asset pool somehow be handled under each of the two provisions, so that some investors receive the protections of the earlier safe harbor and others receive the protections of the later safe harbor? We believe the cleanest and clearest approach would be to preserve the "reclaim, recover or recharacterize" version of the safe harbor for the entire securitization structure so long as the conditions for the interim safe harbor—that the transfers would have qualified for sale accounting treatment under standards in effect prior to November 15, 2009—continue to be met by the structure.

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The Section and the Committees appreciate the opportunity to comment on the NPR, and we respectfully request that the FDIC consider the recommendations set forth above. We are prepared to meet with the FDIC and its staff to discuss these matters and any specific drafting issues and to respond to any questions. Please also feel free to contact Ellen Marks at (312) 876-7700 or ellen.marks@lw.com or Vicki Tucker at (804) 788-8779 or vtucker@hunton.com.

Respectfully submitted,

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cc: Vicki O. Tucker, Chair, Committee on Securitization and Structured Finance
Sarah A. Miller, Chair, Committee on Banking Law

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on or after September 30, 2010" (emphasis added)). We suggest that the FDIC reconfirm that the Proposed Rule would apply only after September 30, 2010.

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