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Bank of America

July 1, 2010

VIA E-MAIL: comments@fdic.gov (RIN 3064-AD53)

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

Re: FDIC Notice of Proposed Rulemaking Regarding Amendments to 12 C.F.R. Section 360.6; Treatment by the FDIC as Conservator or Receiver of Financial Assets Transferred by an Insured Depositary Institution in Connection with a Securitization or Participation After September 30, 2010; RIN 3064-AD53

Dear Mr. Feldman:

Bank of America appreciates the opportunity to submit this letter in response to the request of the Federal Deposit Insurance Corporation for comments to its Notice of Proposed Rulemaking regarding its treatment of assets transferred to securitization vehicles if a bank enters FDIC receivership or conservatorship.

Bank of America is one of the world's largest financial institutions, and is actively engaged in facilitating the provision of credit to individual consumers, small and middle market businesses, and large corporations, as well as helping to transfer the risks associated with this credit to end investors. Bank of America is a leader in the securitization market, including serving as issuer of the first publicly registered offering of non-agency residential mortgage pass-through certificates in 1977. Securitization helps communities by supporting lending and allowing for an efficient redeployment of capital and new

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credit creation. We welcome and support certain aspects of the NPR, the FDIC's responsiveness to comments made in the advance NPR process, and the FDIC's stated goal of increasing market confidence, preventing abuses, providing incentives to carefully underwrite loans, and restarting the securitization markets in a manner that is mindful of both credit availability concerns and safety and soundness considerations. However, we believe that some aspects of the NPR, if enacted, would hinder the ability of banks to utilize safe and sound securitization structures and thereby access the private capital that will be needed to fuel economic recovery and expansion. In general, we are supportive of the comment letters concerning the NPR submitted by the American Securitization Forum, the American Bar Association, and the Securities Industry and Financial Markets Association.

Securitization markets have experienced challenges in the recent past, and continue to do so today. However, securitization served the economy well for many years prior to the current crisis, and continues to be a useful, legitimate tool. Approaches should focus on helping market infrastructure, without making the process impractical. Many actions have been taken already in attempts to address these concerns (for example, FAS 166 and 167, and the related Risk-Based Capital Guidelines), and many more actions in addition to the NPR are being considered. If the NPR is not appropriately designed, and unreasonable requirements are codified, the resulting overregulation may make it more difficult for banks to rationalize participation in the securitization markets. This, in turn, may create greater risks to the economy than the risk that inappropriate transactions will resurface in scale. FDIC policy prescriptions should recognize these broader issues.

It is foreseeable that if the NPR were adopted without adjustment it could discourage appropriate risk transfer transactions and reduce credit availability. The alternative to securitization is a banking market funded, to a larger degree, by deposits and wholesale funding – an outcome that may not be practical or feasible. Ultimately, removing securitization as a source of funding will reduce consumer and commercial credit availability and contravene a key public policy goal of diversifying bank funding sources. The FDIC should provide workable, clear and transparent guidance on legal isolation for securitization transactions because banks need securitization techniques to enable them to transfer risks off balance sheet, as well as to release capital and allowance for loan and lease losses for new credit creation.

We provide detailed responses to some of the questions presented by the FDIC in the NPR as well as proposed textual changes in *Schedule A* annexed to this letter, and we incorporate by reference into this letter our comments concerning the advance NPR contained in our February 22, 2010 comment letter to the FDIC to the extent that such comments did not result in changes to the NPR. Nevertheless, our four principal concerns with the NPR may be outlined in summary.

- **Competing and Conflicting Regulatory Regimes Frustrate Efficient Markets, and Are Inconsistent with A Sound Supervisory Framework**

  We applaud the FDIC's efforts to modernize the securitization safe harbor in response to FAS 166 and 167. Transfers of bank assets associated with securitization activity that benefit from safe harbor protections should be subject to prudent standards requiring the highest level of governance rigor, legitimacy and credibility. [1] In addition to this, we also agree with the FDIC that market regulation of securitization transactions should address the FDIC's stated goal of promoting a sustainable securitization market. Market regulation, however, needs to be done in a collaborative and coordinated way.

  We cannot support competing legal and regulatory regimes governing the same subject matter. Prudential regulation of the banking industry, which facilitates its core credit intermediation functions, must be harmonized and rationalized across many supervisory constituencies. A single, national standard arising out of Federal legislation and implemented by joint interagency regulatory rulemaking could achieve the FDIC's goals of promoting responsible underwriting and market transparency, while addressing the need of industry participants to have a clear, practical and efficient approach.

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[1] FDIC precedent in both existing 12 C.F.R. §360.6 and in other analogous circumstances refrained from independently imposing market regulatory standards concerning detailed substantive transaction terms, but rather generally limited themselves to issues of transaction legitimacy, authority and governance rigor. *See* FDIC Advisory Opinion 93-10 (Feb. 2, 1993); FDIC Advisory Opinion 86-8 (April 9, 1986). This circumscribed approach is consistent with 12 U.S.C. § 1823(e), codifying the *D'Oench Duhme* doctrine. *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

At the time of writing of this letter Congress is on the verge of passing legislation that addresses many of the market regulation issues contemplated by the NPR, and in a somewhat different and more coordinated, comprehensive way. For example, it is highly likely that Federal legislation expected to be enacted within days or weeks will provide for exemptions from risk retention for securitizations of certain high quality consumer mortgage loans, as well as traditionally structured commercial mortgage-backed securities transactions. Rulemaking arising out of this legislation not only is mandated to be performed on an interagency basis, but further is to be centrally coordinated by the Chairperson of the Financial Stability Oversight Council. Additionally, this legislation wisely mandates two separate studies in order to determine how best to approach risk retention, as well as a review of its potential macroeconomic effects. Likewise, the SEC has recently proposed changes to Regulation AB, governing disclosure requirements for securitized transactions, as well as other related rules. These SEC proposals, too, address a suite of issues similar to the NPR, but in a different manner. Additionally, other ongoing regulatory initiatives will influence bank securitization, including proposals put forth by the Basel Committee, which also should be considered and harmonized. In light of the ongoing evolution of the regulatory environment, we believe rushing into this NPR without ensuring that the various requirements are consistent and not duplicative will be more hazardous than helpful. There is no need for immediate, final action, and the interim safe harbor should be extended for an additional period until final rules can be harmonized.

For example, the NPR's risk retention requirement is similar to, but not the same as, the risk retention thresholds now under consideration by Congress, the SEC, the European Union Capital Requirements Directive amendments, and others. The NPR's risk retention proposals are, in fact, in many cases more onerous (including the hedging prohibition). It is also unclear what the cumulative, aggregate effects of FDIC risk retention, SEC risk retention, legislative risk retention, other forms of risk retention, an RMBS 5% repurchase reserve, and other requirements will have on GAAP sale and consolidation conclusions. Additionally, the FDIC notes that the NPR's proposed disclosure requirements are consistent with proposed SEC standards under Regulation AB proposals. While this is true in some cases, it is not true in many other cases.[2] The NPR also proposes limitations on capital structures, mandatory substantive transaction terms, repurchase reserve funds, and other requirements that are both unique and completely unrelated to the existence of a legal true sale. The policy rationale behind the NPR's suggestions concerning compensation deferral for structured finance credit rating agencies appears to be addressed, although in a somewhat different manner, by the Federal financial reform legislation. This discrepancy results in securitization disclosure standards, and markets, less friendly to regulated banks than to unregulated financial firms.

[2] There is important precedent for bank regulatory agencies to import SEC standards and concepts when addressing the same subject matter, in cases where jurisdictional lines require distinct rules. *See* 12 C.F.R. Part 16 ("[t]he OCC regulations generally require the offering documents…to conform to the SEC form that would have applied if the 1933 Act registration were required" Charles J. Johnson, Jr. & Joseph McLaughlin, *Corporate Finance and the Securities Laws* §1.05[f] at 1-66 (Fourth Edition, 2007 Supplement)).

We agree with the FDIC that better rules are needed. We hope that the FDIC can agree with us that just one set of better rules will be sufficient.

- **Grandfathering of Vintage Assets Will Be Required in Order to Preserve Bank Funding and Liquidity Options**

The unprecedented nature of the recent economic turmoil and its consequences for many financial institutions has illustrated the importance of liquidity risk management. Many recent regulatory initiatives have responded by placing a renewed focus on liquidity risk management practices. The importance of preserving reasonable liquidity and funding options for banking organizations requires that the NPR be modified to grandfather not only legacy securitization transactions (which have closed prior to the transition date), but also to grandfather vintage loans and other financial assets originated or acquired prior to the transition date from the market regulation requirements contained in the NPR. It may not be possible to satisfy many of the NPR's requirements for such legacy assets, including those associated with origination loan level data, affirmation of certain origination compliance standards, and satisfaction of certain underwriting criteria. This impracticability of performance (and in some cases impossibility of performance) is exacerbated by the fact that many banks own loans that were originated by third parties that may no longer be in business. Accordingly, absent appropriate adjustment, the NPR will cause otherwise reasonably liquid bank assets to become illiquid. This result does not benefit banks, the FDIC, the Deposit Insurance Fund, or any other constituency.

The banking sector's ability to absorb liquidity shocks arising from financial and economic stress is critical. It allows banking organizations to serve their consumer and commercial clients better, and to stand as a reliable source of strength performing core financial intermediation functions for the real economy during all points in the business cycle.

- **The Proposed Time Frame for Compliance Is Significantly Inadequate**

The NPR's proposed time frame is inadequate to put operational processes into place to comply with the preconditions to the safe harbor. A transition period and related interim safe harbor of at least 12 months may be needed to accommodate the changes proposed in the NPR. Solely by way of example, we believe few, if any, banks are currently capable to support consumer mortgage loan level disclosure for residential mortgage securitization transactions, or have systems in place to readily verify the absence of any affiliate owning an interest in second liens on the same real property. The time and expense required to build the infrastructure necessary to support these mandates will be significant. The risk that FDIC requirements may differ from similar SEC or other regulatory requirements will further complicate implementation of any final requirements and may become a significant obstacle to prompt compliance given the time needed to digest all of the various regulatory regimes. We note that the SEC's Regulation AB required, and was afforded, more than 12 months for implementation. We also note that, at the time of the writing of this letter, pending Federal legislation concerning credit risk retention calls for regulations to be jointly prescribed within 270 days after enactment, with an effectiveness one year after publication of final rules in the Federal Register for residential mortgage backed securities, and two years after publication for other asset types.

The FDIC should establish a more workable implementation time frame for compliance with the NPR that is mindful of like activity currently in process concerning Regulation AB modernization and Federal legislative developments, among other things.

- **The Safe Harbor Must Be Established Reliably And Irrevocably at Transaction Origination**

  The safe harbor must be firmly established at transaction origination, with an extremely high degree of certainty, rather than being dependent upon future events. While the NPR contains somewhat more workable provisions regarding certainty than the advance NPR did, including moving some standards to being documentary requirements rather than being dependent on future counterparty behavior, we believe that more refinement is needed.[3] Notwithstanding the NPR's improvements, the proposal still contains criteria that could change over the life of a transaction, and that require transaction parties to do certain things over a period of time. For example, it is foreseeable that uncertainty could arise connected with the adequacy of a retained "representative sample," hedging strategies, and other proposed standards. These risks need to be considered in concert with the FDIC's broad powers and discretion when resolving insolvent institutions, and FIREEA's corresponding constraints on judicial review of certain FDIC actions in this context. This approach is not consistent with providing certainty and fostering investor protection.

We fear that the NPR as proposed is not appropriately balanced, and that the risks it presents may be more significant than merely creating an unduly fragmented regulatory environment. If adopted in its present form, it is likely to *increase* the overall credit risks to the United States government, and to *reduce* credit availability to qualified borrowers. The NPR will make it more difficult for banks to rationalize participation in the non-agency securitization markets relative to other capital and funding options, and will create risks that insured institutions will continue to refrain from participating in these markets, thereby reducing consumer and commercial lending. If banks continue to refrain from non-

[3] "[T]he proposed safe harbor…places the risk of the loss of the safe harbor squarely on the shoulders of investors." Moody's Investors Service, Sector Comment *U.S. FDIC's Safe Harbor Remains Choppy* (May 2010) (extracted from *Moody's Weekly Credit Outlook*, dated May 17, 2010).

agency securitization activity, concentrations of mortgage credit risk appear likely to continue to reside within the Federal Housing Administration and the Government National Mortgage Association, institutions regulated by the Federal Housing Finance Agency (and, in some cases, supported by the United States Treasury), and on the balance sheet of the Federal Reserve. Responsible, user-friendly non-agency securitization markets should be viewed as a tool to help gradually reduce concentrations of these risks in governmental agencies, defined more broadly. For this reduction to be done in scale it should be, in part, intermediated by responsible, regulated banks whose deposits are insured by the Deposit Insurance Fund. Many regulatory perspectives need to be addressed in harmony, and one-off prescriptions should be resisted.

Securitization, when used prudently, can serve a very important function in providing liquidity to the economy. We urge the FDIC to act in partnership with Congress, the SEC, the FASB, and other banking agencies to strike the right balance among the FDIC's direct interests in setting appropriate standards to address the concerns of the FDIC as conservator or receiver of an insured bank; the general credit underwriting and safety and soundness and consumer protection concerns of all of the banking agencies (including the FDIC); and the need for stable funding sources to facilitate economic growth.

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We appreciate the opportunity to comment on the NPR. If the FDIC or its staff has questions regarding the comments contained herein, you may contact David B. Rich III, Associate General Counsel & Managing Director – Corporate Law at (980) 388-7449 or at david.rich@bankofamerica.com, or the undersigned and we would be happy to address them.

Respectfully submitted,

Gregory A. Baer / by [illegible]

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Schedule A

<u>*Credit Risk Retention*</u>

The NPR states that credit risk retention requirements may be satisfied by either the retention of a 5% vertical slice, or a representative sample of the securitized assets at this same 5% level. The NPR does not define what constitutes a "representative sample," and, therefore, it is unclear what type of retention would satisfy this requirement. We believe that most market observers interpret this option as allowing banks to hold financial assets similar in quality and other important characteristics (so that there is no "cherry picking") on their balance sheet in unsecuritized form at a level equal to 5% of what they securitize (at the time of issuance, and these financial assets would amortize as the securitizations amortize). Further clarification regarding this risk retention option will be necessary in order for bank sponsors to know how to comply.

As stated in the body of this comment letter, the combined effects of the credit risk retention requirements of the NPR, together with all other applicable credit risk retention standards, the NPR's RMBS 5% repurchase reserve, the NPR's requirements concerning RMBS servicer incentive fee income, and suggested increases in incidental recourse through representations and warranties need further clarification. The impact of these changes (as well as the FDIC's characterization of the 5% retained economic interest as a "material portion") on GAAP sale and consolidation conclusions are of paramount importance to the banking industry, especially in light of how these conclusions may impact regulatory capital requirements. While certain commentators appear to be confident that such requirements will not cause consolidation under GAAP accounting, we are not aware of any conclusive determinations made by FASB or the accounting community on this point.

In addition to harmonization, the FDIC should reconsider allowing for additional and more creative options for banks to align the interests of investors with bank sponsors in securitization transactions, including satisfaction of minimum loan underwriting standards, first-loss "B-piece" buyers, and other options. Many of these other options are already under consideration by the SEC, Congress, and like bodies.

The FDIC states in the NPR that asset-backed securities qualifying for the rule cannot be sold to an affiliate or other insider of the bank. However, this provision appears to have been included without reference to the core risk retention requirements of the NPR, the impending regulatory proposals, traditional intermediation transactions executed by affiliated broker-dealers, or the uncontroversial market practice of sponsors retaining some portion of the issued securities (including, without limitation, the seller's interest in traditional credit card structures). It is not clear how the FDIC rationalizes the simultaneous requirements that banks (i) retain risk, in some cases in the form of a portion of the securities tranches sold to investors, and (ii) refrain from having an affiliate or insider of the bank acquire those same securities. At a minimum, any risk retention requirement in a final rule should permit retention by a sponsoring bank or its affiliates (like the SEC proposal permits), rather than exclusively by the sponsoring bank (as is found in the current version of the NPR).

Finally, we request that the FDIC clarify that retained tranches or other interests in bank securitizations may be pledged as collateral in traditional secured funding transactions. Maintaining funding and liquidity options for banking organizations is an important public policy goal, and a clarification of this nature would support that goal without compromising any objectives of the FDIC articulated in the NPR. This should be permissible even in those secured funding transactions, such as securities repurchase financings, that are legally documented as a sale and attendant repurchase but have core economic terms (and GAAP accounting results) consistent with a secured lending transaction.

Consistent with these comments, we propose that at least the following changes be made to Paragraphs (b)(5) and (c)(1):

(5) Origination and Retention Requirements.

(i) The following requirements apply to all securitizations:

(A). The **documents shall require that the** sponsor ~~must~~**or an affiliate of the sponsor** retain an economic interest in ~~a material portion, defined as~~ not less than five (5) percent~~,~~ of the credit risk of the **securitized** 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~~**, in the form of an interest of not less than five (5) percent of the aggregate of all obligations and ownership interests issued in the securitization, or in the form of unsecuritized financial assets that are reasonably similar to** the securitized financial assets **and that are** equal to not less than five (5) percent of the principal amount of the **securitized** financial assets at transfer. This retained interest may not be transferred or hedged during the term of the securitization**, but the retained interest may be pledged in one or more secured funding transactions (including, without limitation, repurchase financing transactions) and the rate of collection or amortization of any retained interest is not required to match the rate of collection or amortization of any other interest or the securitized financial assets.**

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

(A) ~~The documents shall require the establishment of a reserve fund~~ **If the sponsor makes representations and warranties that if breached would give rise to an obligation of the sponsor to repurchase securitized financial assets, the sponsor shall affirm in the documents that it has available liquid assets** equal to at least five (5) percent of the cash proceeds of the securitization payable to the sponsor to cover ~~the repurchase of any financial assets required for breach of representations and warranties. The balance of such fund, if any, shall be released to the sponsor one year after the date of issuance~~**the repurchase obligation**.

(B) The ~~assets shall~~**sponsor shall affirm in the documents that any securitized financial assets originated by the sponsor after [EFFECTIVE DATE OF RULE] (1)** have been originated in **material** compliance with all **applicable** statutory~~,~~**, and** regulatory~~, and originator underwriting~~ standards **for the origination of mortgage loans** in effect at the time of origination~~. Residential mortgages included in the securitization shall be~~**, (2) have been** underwritten at the fully indexed rate~~,~~ based upon the borrowers' ability to repay the mortgage according to its terms~~,~~ and ~~rely~~**in reliance** on documented income**,** and ~~comply~~**(3) are in material compliance** with all ~~existing~~ supervisory guidance governing the underwriting of residential mortgages **at the time of origination**, including **if**

then applicable 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.**~~2007.

(c) *Other requirements.*

(1) The transaction should be an arms length, bona fide securitization transaction, and **more than ninety (90) percent of** the obligations shall not be sold to **the sponsor or** an affiliate or insider **of the sponsor**;

Requirements Specific to RMBS Transactions

We support the FDIC's removal from the NPR of any requirement that consumer mortgage loans be seasoned for one year in order for the associated transaction to qualify for safe harbor treatment. However, we do not agree with the inclusion of a required cash reserve, funded with 5% of issuance proceeds, to provide a dedicated funding source for repurchase obligations arising out of possible breaches of representations and warranties during the first year of the transaction. The repurchase remedies for representation and warranty breaches are intended to be, and must remain, merely incidental recourse to cover operational risks of the seller or securitizer, and are not intended to be direct credit support or otherwise serve as credit enhancing recourse. To implement rules that suggest otherwise would contravene not only market practice and historic risk allocation, but potentially also could call into question certain analytical underpinnings of the risk-based capital guidelines for securitization transactions. The 5% reserve fund also seems questionable in those securitization transactions where the sponsor makes no representations or warranties that would give rise to a repurchase obligation. We believe, however, that our proposed changes to Paragraph (b)(5)(ii)(A) at the end of the preceding section would address these concerns while meeting the FDIC's policy goals.

The FDIC has proposed in the NPR that consumer mortgage collateral must comply with all applicable laws, regulations and other origination standards in order for the associated RMBS transaction to qualify for safe harbor treatment. Notwithstanding the strict language in the NPR, the FDIC also noted that some degree and frequency of minor imperfections would not invalidate safe harbor protections. The market may find it difficult to assign too much confidence to that dictum, and the FDIC should provide more clarity and certainty on this point in any final rule. In particular, we recommend that our proposed changes to Paragraph (b)(5)(ii)(B) at the end of the preceding section be incorporated in that Paragraph and in Paragraph (b)(2)(ii)(B).

Additionally, the NPR requirements identified in the previous two paragraphs respectively appear to be inconsistent with one another. On the one hand, the failure to comply with the originator's underwriting criteria and origination legal requirements (above some minimal degree) will result in a loss of transaction safe harbor protections. On the other hand, the safe harbor requires that the transaction provide for a repurchase reserve fund that will accommodate repurchase activity during the first year of the transaction of 5% of proceeds. While repurchase claims can arise due to many purported issues, including data errors or allegations of fraud, in many cases they arise due to allegations concerning the failure to comply with the originator's underwriting criteria and origination legal requirements. It is difficult to contemplate any practical situation in which a transaction would have legitimate repurchase claims arising during the first year of a transaction at a 5% level, and also in which there was not a failure to comply with the originator's underwriting criteria and origination legal requirements in a degree sufficient to terminate safe harbor protections as currently proposed. We believe that our proposed changes to Paragraphs (b)(2) and (5) sufficiently address the concerns that have been raised by the FDIC, and for this reason, we also recommend that the obligation in Paragraph (b)(2)(ii)(B) to supply and disclose third-party due-diligence reports be removed.

It appears to be clear that the FDIC does not intend that the NPR should complicate in any way normal bank sponsored loan delivery or other transactions with the government sponsored enterprises. This conclusion appears to be the case due to, among other things, the definition of securitization, its ban on external credit support, SEC disclosure issues, and its focus on the details of the involvement of external credit rating agencies. Nevertheless, one of the open questions from the NPR is how the FDIC might choose to treat transfers that have never needed the safe harbor's protections because they are legal true sales. We request that the FDIC remove any potential de minimis doubt on these questions with a clear statement that bank sponsored loan delivery or other transactions with the government sponsored enterprises are not in scope.

The NPR requires disclosure of any interest that a servicer (or any of its affiliates) has in second or other liens on affected mortgaged properties. We disagree with the inclusion of this onerous requirement, and believe that the expense and burden of compliance implementation will greatly exceed any potential disclosure benefits. We also note that many other factors, applicable to many other asset classes, contain similar potential issues (such as credit card lines, auto loans, and other consumer credit exposures).

The NPR would require that loan servicers in safe harbor qualifying RMBS transactions have broad authority to maximize the net present value of assets. This power would include, among other things, the authority to reduce loan principal, exercise forbearance, "take such other action necessary to maximize…value", and otherwise modify residential mortgage loan terms. In connection with these proposed standards, we request that the FDIC liaise with appropriate policy decision makers at the Internal Revenue Service to determine if such standards require interpretive guidance through a Revenue Procedure or otherwise to confirm that the Service would not challenge the tax status of the implicated securitization vehicle holding such loans, whether due to real estate mortgage investment conduit standards, the "no-power-to-vary" doctrine applicable to certain non-REMIC investment trusts, or otherwise.

Finally, servicer advances of principal and interest for extended periods of time can, in some instances if not done properly, influence the risk borne by senior security holders. It might also exacerbate systemic risk due to the capital markets illiquidity that often accompanies periods in which delinquency and default rates are highest. Accordingly, limiting the period of time that an RMBS servicer is required to advance principal and interest may be a worthwhile objective. A 120 day *option* for principal and interest advances to cease may serve as a starting place. However, such a standard may have unintended downstream consequences, and dialogue and collaboration with other important constituencies would be optimal prior to codifying rules on these matters.

Safe Harbors

For revolving trusts, Paragraph (d)(2) addresses only obligations that are issued on or before September 30, 2010, and Paragraphs (d)(3) and (4) address only obligations that are issued after September 30, 2010. As a result, even if a revolving trust and its sponsor were to meet Paragraphs (b) and (c) as required by Paragraphs (d)(3) and (4), Paragraph (d)(2) could be construed as requiring the revolving trust to continue satisfying GAAP in effect for reporting periods before November 15, 2009 (including all QSPE requirements) in order to protect obligations that were issued under the transitional safe harbor. We do not believe, however, that this is the FDIC's intent and therefore request that the words "prior to September 30, 2010 [or a later transition date as we have requested]" be inserted between "provided that" and "such transfer" in Paragraph (d)(2). We also recommend that definitions in the final rule be excluded from applying to Paragraph (d)(2) to the extent that they conflict with the construction of those terms under the preexisting rule (as would be the case, for example, with the definitions of "securitization," "obligation," and "transfer").

For securitization transactions that do not achieve sale accounting treatment and are closed after the transition date, we have a number of concerns.

First, we do not believe that the last sentence of Paragraph (d)(4)(i) is appropriate or consistent with the Federal Deposit Insurance Act. Investors and other parties involved in a securitization may have claims against the institution (particularly as servicer or transferor) that are not properly resolved by access to the securitized financial assets alone. Preservation of these independent claims would be especially important, for instance, if the securitized financial assets were to decline in value and no longer suffice to make claimants whole. As a result, we suggest that this final sentence be deleted.

Second, even when adequate securitized assets exist, we are not confident that Paragraphs (d)(4)(ii) and (e) operate to ensure that investors will always receive accrued interest and other amounts through the date of repudiation. For example, if repudiation were to occur after interest and other amounts had begun to accrue but before the payment date had arrived, neither Paragraph appears to require that the accrued amounts be remitted to investors. If the FDIC is inclined to stay the course and afford relief that differs from that found in the preexisting rule, we believe it is important that the FDIC either include accrued interest and other amounts in this damage calculation or otherwise make it clear that investors will have access to collections on the underlying receivables to cover accrued interest and other amounts.

Third, we note that the second sentence of Paragraph (d)(4)(ii) refers only to "receivership" and that conservatorship must be referenced as well. In addition, the opening clauses of Paragraph (e) mention only "(d)(4)(i)" and instead need to reference "(d)(4)(i) and (ii)."

Prohibition on Commingling of Cash

The NPR contains a provision that restricts the ability of certain transaction parties from commingling transaction assets with their own assets except as necessary to clear payments received, and in no event for more than two days. Because of this, certain practices relatively common in the market that permit sponsors acting in the capacities of servicer, custodian or paying agent to commingle assets during a collection period as long as a ratings trigger is satisfied will no longer be permitted. We disagree with this conclusion, and believe that in many cases limited commingling presents no material risks where other mitigating factors are present. We also note that a limit of two days, rather than at least two business days, would pose highly difficult, if not impossible, systems and logistical issues.

To address these anomalies and other textual omissions, we propose the following changes to Paragraph (c)(7) at a minimum:

(7) The ~~sponsor~~**documents** shall **require that the sponsor** separately identify in its financial asset data bases the financial assets transferred **by the sponsor** into any ~~securitization~~**of its outstanding securitizations** and maintain an electronic or paper copy of the closing documents for each ~~securitization~~**of its outstanding securitizations** 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~~**of its outstanding securitizations** and issuing ~~entity~~**entities**. To the extent the sponsor serves as servicer, custodian or paying agent provider for the securitization~~, the sponsor shall not comingle~~ **and does not meet the standards required by the documents for commingling, the documents shall prohibit the sponsor from commingling** 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 **business** day period. The **documents shall require that the** sponsor ~~shall~~ make these records readily available for review by the FDIC promptly upon written request.

FDIC Imposed Disclosure Standards

The NPR requires transaction documents of qualifying securitizations to obligate sponsors, issuers and/or servicers, as appropriate, to provide disclosure that at a minimum complies with Regulation AB or any successor disclosure requirements for public issuances of asset-backed securities, both prior to sale and periodically thereafter, irrespective of whether the securitization is publicly registered or privately placed. The NPR provides that disclosure in safe harbor compliant transactions must satisfy Regulation AB's disclosure requirements "even if the obligations are issued in a private placement or are not otherwise required to be registered." We request that this standard not be adopted. This standard goes far beyond historical precedent, and also goes far beyond the proposals contained in the SEC's Regulation AB proposals, currently in a public comment period. The SEC has not required, and does not propose, that Regulation AB standards apply to offers or sales of asset-backed securities that qualify for either a transaction based or a securities based statutory exemption from registration, such as Section 4(2), Section 4(1½), Section 3(a)(2), and Section 3(a)(3). For example, as proposed, the SEC's Regulation AB changes are likely to require loan level disclosure for publicly registered securities across all asset classes (other than credit cards), and this NPR requirement effectively would require loan level disclosure even for transactions and securities qualifying for one or more statutory registration exemptions. In addition, the NPR is not clear on how the standards described in Paragraphs (b)(2)(i)(B) and (C) work together with the requirements in Paragraph (b)(2)(i)(A), especially if the relevant provisions of Regulation AB differ.

As a result, we recommend that the FDIC abstain from creating separate securities-law regulations here and instead include in Paragraph (b)(2) only a condition that the sponsor be required by the documents to comply with applicable securities laws.

Separate Agreements

The NPR's proposal that the agreement evidencing the transfer of assets must be distinct from agreements evidencing the transferors' other roles, including as servicer, is not expected to create material difficulties for new transactions initially arising after the effective date of the final rule. However, transactions that currently exist and have expected continued life following the effective date of the final rule, including credit card master trust transactions, should be made exempt from this requirement.

Safe Harbor Transition Period Uncertainties

Proposed adjustments to certain terms used in the NPR might inadvertently narrow the scope of the transition period safe harbor, and clarity on these points should be provided. For example, RMBS that relied upon pool-level external credit support are no longer "securitizations" under the proposed rule and accordingly their coverage under the transition period safe harbor appears to be unclear. Clarification should be provided regarding the integrity of the safe harbor protections for all qualifying transactions during the transition period, regardless of any subsequent evolution in standards or definitional boundaries.

Miscellaneous

In addition to our other proposed changes, we believe that the following textual corrections are necessary.

Paragraphs (a)(4) and (b)(1)(ii)(B): In our view, the definition of "monetary default" must cover not just a failure to pay principal or interest but also the failure to make any required payment or deposit under the documents (including, for example, payments due to interest-rate or currency swap counterparties that in turn have been making their required payments to the issuing entity). We therefore suggest that "default in the payment of principal or interest when due" be replaced by "default in making any payment or deposit when due." Similarly, in Paragraph (b)(1)(ii)(B), we believe that liquidity facilities should be permitted to temporarily support "any required payment or deposit" rather than just "the temporary payment of principal and/or interest."

Paragraph (a)(5): The definition of "obligation" includes "equity" beneficial interests and securities in the first sentence but excludes "ownership interests" in the last sentence, and the FDIC's intent here is not apparent. Coverage for trust certificates and other equity interests, however, is essential for the safe harbors to function properly. The reason for ambiguity here is not straightforward but appears to stem from the inclusion of intermediate transferees in the definition of "issuing entity," which is not consistent with the use of that term either in the market or other legal frameworks. We therefore recommend that the definition of "issuing entity" be reconsidered and that corresponding corrections be made to the definitions of "sponsor" and "transfer" and related provisions. We also note that the word "and" appears to have been omitted before "any rights or other assets" in the first sentence of this definition.

Paragraphs (a)(7) and (b)(1)(i)(B): These two provisions are not entirely consistent with one another or with the definition of "obligation" in describing the reliance of investors and the source of repayment. The differences range from the use of the word "primarily" (which is appropriate and which is found in the definition of "obligation" and Paragraph (b)(1)(i)(B) but not in the definition of "securitization") to the inclusion of other rights or assets (which is appropriate and which is found in the definition of "obligation" but not in Paragraph (b)(1)(i)(B) or the definition of "securitization"). As a result, we recommend that Paragraphs (a)(7) and (b)(1)(i)(B) be conformed to the definition of "obligation."

Paragraph (a)(8): Because the definition of "servicer" includes any entity that makes "allocations or distributions to holders of the obligations," we believe that trustees need to be explicitly excluded. As a result, we recommend using here the definition of "servicer" found in the SEC's Regulation AB.

Paragraph (a)(10): In addition to our related comment on the definition of "obligation," we are not certain whether the FDIC intends to distinguish between a conveyance "to" an issuing entity and a security interest "for the benefit of" an issuing entity. In our view, because the safe harbors are only relevant to transfers by an insured depository institution, the ambiguity can be easily resolved by focusing on the transferor rather than the transferee. Therefore, we recommend that the definition of "transfer" read: "The transfer of (including the grant of a security interest in) one or more financial assets by an insured depository institution in connection with a securitization or a participation."

Paragraph (b)(1)(i)(A): Similar to the need for "the documents shall require" elsewhere, we believe that the words "required to be made" should be inserted between the words "of this section are" and "available to investors."

Paragraph (b)(3)(ii)(A): We believe that the lead-in "The documents shall require" was unintentionally omitted in the last two sentences and that corrections should be made.