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February 22, 2010 Via E-Mail: comments@fdic.gov

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

Dear Mr. Feldman and FDIC Board:

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

I am writing on behalf of the California Public Employees' Retirement System (CalPERS), the largest public pension fund in the United States with approximately $200 billion in global assets and equity holdings in over 9,000 companies. CalPERS provides retirement benefits to over 1.5 million public workers, retirees, and their families and beneficiaries. Acting as fiduciaries to the members of the system, the CalPERS Board of Administration and its staff invest the pension funds of its members over the long term throughout the global capital markets.

CalPERS supports the Federal Deposit Insurance Corporation's (FDIC) mission in providing stability and public confidence in the nation's financial system. We believe the actions by the FDIC in dealing with the financial crisis have been instrumental in facilitating the liquidity and confidence necessary to assist financial recovery in markets world wide.

The FDIC's Advanced Notice of Proposed Rulemaking (ANPR) regarding the FDIC's role as conservator or receiver of securitized assets after March 31, 2010 raises many important issues. Securitizations undoubtedly played a role in the recent financial crisis. However, going 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. There are several areas of the ANPR which we feel call for better clarification and/or consideration.

As mentioned in the ANPR, the implementation of new accounting rules has created uncertainty for securitization participants. In 2009, the Financial Accounting Standards Board (FASB) finalized modification to Generally Accepted Accounting Principles (GAAP) through Statement of Financial Accounting Standards (FAS) No. 166, Accounting for Transfers of Financial Assets, FAS 167, and amendments to FASB Interpretation No. 46 ®.

These 2009 GAAP modifications effective for reporting periods beginning after January 1, 2010; in our opinion, have provided uncertainty as to the true sale nature of securitizations and how they may be handled in the case of a bankruptcy or failure. As a result of these changes by FASB, most securitizations will not be treated as sales for accounting purposes but rather an alternative form of secured borrowing. The ANPR addresses the issue and cites the statutory provision prohibiting a conservator or receiver from avoiding a legally enforceable or perfected security interest as clarification regarding the handling of transferred assets by an insured depository institution (IDI).[1]

CalPERS concern arises from recent remarks made by FDIC Chairwoman, Shelia Bair, and whether or not investors in the consolidated securitizations will be considered secured borrowers. In testimony before the House Financial Services Committee Chairwoman Bair stated, "Consideration also should be given to imposing some haircut on secured creditors to promote market discipline, limit costs to the receivership, and distribute markets losses more broadly."[2] The Chairwoman's remarks provide a position which seems to be counter to that of the statutory provision supporting the isolation of transferred financial assets by an IDI in the event of a bankruptcy or failure. In addition, should the investors in securitized assets be classified as secured borrowers, such a classification may cause a delay in recovering lost payments should failure of an IDI occur. Delayed ability to recover payments may also provide cause for lower ratings by the rating agencies. 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 linked to the rating of the IDI.

<u>Disclosures</u>

As investors we are always in favor of better transparency and more disclosure. Conformity among all of the different issuers and access to all of the information which the rating agencies are privy to may assist with the better transparency issue. More disclosure should always lead to better informed investment decisions, however many of the problems of the recent financial crisis were a result of poor application and forecasting of the data available. Better disclosure will fail to provide for a stronger market if the additional information is simply implemented in the poor models and forecasts which lead to the mispricing of risk in the first place.

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[1] 12 U.S.C. 1821(e)(12)

[2] Statement of Shelia Bair, Chairman, Federal Deposit Insurance Corporation on Systemic Regulation, Prudential Measures, Resolution Authority and Securitization before the Financial Services Committee; U.S. House of Representatives; 2128 Rayburn House Office Building, October 29, 2009

Underwriting

What seems most difficult is the task of implementing tougher standards throughout the securitization market, and still providing the needed liquidity needed to assist with financial recovery. The call for underwriting loans using fully indexed interest rates and fully income documented loans will undoubtedly produce better quality collateral. However, such steps would also lead to less credit origination in a struggling economy currently requiring more liquidity, not less.

Documentation and Recordkeeping

Servicers are always suppose to act in the best interest of the entire trusts, but in regards to servicers and potential conflict of interest, CalPERS feels that conflict may not only arise from servicer advances but also in the instance of the servicer owning certain tranches or more commonly, second liens held outside of the trust. Although, CalPERS, as an investors believes that aligning interest usually means retaining interests, servicers having "skin in the game" may ironically misalign servicer incentives just as if they were to not own any part of the issue.

Imposing loss mitigation requirements on servicers, such as taking action no later than ninety days after delinquency, does not appear relevant to us for several reasons. First, various governmental authorities have implemented foreclosure moratoriums that limit the ability to take timely action. Second, most servicers will take action sooner than this in most instances, but in today's environment they are accused of being predatory. Finally, currently there are serious capacity issues in the servicer industry that make compliance problematic.

Compensation:

In considering compensation incentives, we are in favor of all participants being paid over time (similar to a vesting period) out of the securitization waterfall. This payment method would require all parties to take more consideration in performing their role in the securitization process. The rating agencies would be inclined to rate the tranches more accurately, issuers would insist on better underwriting by the originator, and servicers would be inclined to act quickly to mitigate losses. Payment spread out over time would ultimately provide a stronger securitization market as a result of participants having more "skin in the game."

Origination and Retention Requirements:

CalPERS agrees that if a sponsor were required to retain an economic interest in the asset pool, without hedging the risk of such portion, the sponsor would be less likely to originate low quality financial assets. This may result in better quality loans over time, but also may create conflicts in the servicing of the loans as it relates to treatment of certain tranches as stated above. We are unclear if the ANPR is proposing that the issuer/originator own the first loss piece or a vertical slice of the entire deal. We would however agree that the documentation could require the sponsor to repurchase any financial assets that breach

such representation and warranties with thirty (30) days of notice from the Trustee and/or Custodian. We agree that it may require that a percent of the proceeds due to the sponsor would be held back to support the repurchase within 30 days if there is a breach in representation and warranties.

Other requirements:
We support the FDIC's sample regulatory text requiring that securitization agreements are in writing, should be approved by the board of directors and from the time of execution are in the official record of the bank.

Safe Harbor
CalPERS supports that the FDIC as conservator or receiver shall not, in the exercise of its statutory authority disaffirm or repudiate contracts, reclaim, recover or re-characterize as property of the institution or the receivership any such transferred financial assets provided that such transfer satisfies the conditions for sale accounting treatment as set by GAAP.

Thank you for considering our comments. If you would like to discuss any of these points, please do not hesitate to contact me at (916) 795-9672 or Mary Hartman Morris at (916) 795-4129.

Sincerely,

ANNE SIMPSON
Senior Portfolio Manager
Global Equity

Cc: Joseph A. Dear, Chief Investment Officer – CalPERS
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Mary Hartman Morris, Investment Officer – CalPERS