Gregory A. Baer
Deputy General Counsel
Corporate Law

Bank of America

February 22, 2010

VIA E-MAIL: comments@fdic.gov (RIN 3064-AD55)

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

Re: FDIC Advanced Notice of Proposed Rulemaking Regarding Safe Harbor Protection for Treatment by the FDIC as Conservator or Receiver of Financial Assets Transferred by an Insured Depositary Institution in Connection with a Securitization or Participation – 12 CFR Part 360; RIN 3064-AD55

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 Advanced 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. Securitization helps communities by supporting lending and allowing for an efficient redeployment of capital and new credit creation. We welcome and support certain aspects of the ANPR, 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 ANPR, 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 restore credit to pre-crisis levels. Regulation concerning many matters raised in the ANPR, including disclosure and risk-retention standards, would be best approached in a consistent, standardized manner for banks and non-banks alike. Many of the securitization practices that are the target of reform were extensively used by organizations not regulated by the FDIC. If certain existing legislative proposals in financial regulatory reform concerning resolution authority become law, then these standards could be relevant not only to insured depository institutions, but also to securitizations sponsored by all "systemically significant" financial companies as well.

It is undeniable that securitization markets have experienced significant disruptions and other challenges during the last two years. However, securitization did provide substantial benefits for many years prior to the current crisis, and continues to be a useful, legitimate tool. The question now is what standards will best help the 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 are currently being considered (for example, financial regulatory reform legislative proposals). In the case of FAS 166 and 167, beginning in 2010 banking organizations are required to consolidate many, if not most, securitized assets that previously were excluded from their balance sheets, and because of this are now subject to higher regulatory capital requirements applicable to securitized loans. Accordingly, due to ongoing increased oversight of securitization practices, if the ANPR is not appropriately designed, it may be difficult for banks to rationalize participation in the securitization markets relative to other capital and funding options. If this occurs, it may create greater risks to the economy than the risk that inappropriate transactions will resurface in scale. FDIC actions should be approached in this larger context, and FDIC policy prescriptions associated with this ANPR should recognize these broader issues and new reality.

The ANPR states that securitizations that are not accounted for as sales could be considered an alternative form of secured borrowing, and applies a safe harbor to the FDIC's consent requirements for secured lenders if the securitization meets certain criteria not related to the question of whether the securitization was a legal sale. As discussed in more detail below, any final rule should make clear that while the accounting characterization of a transfer of financial assets is an element in determining its legal character, the relevant applicable law must determine the appropriate legal characterization of the transfer for safe harbor purposes.

It is foreseeable that if the ANPR 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.

While we provide detailed responses to many of the questions presented by the FDIC in the ANPR in *Schedule A* annexed to this letter, our principal concerns may be outlined in summary.

- **Proposed Time Frame Is Inadequate**
  First, the proposed time frame is inadequate to put operational processes into place to comply with the preconditions to the new safe harbor. We support the sentiments

outlined in the letter of the American Securitization Forum to the FDIC dated January 4th, 2010 on this matter. A transition period and related safe harbor of at least 12 months may be needed to accommodate the changes proposed in the ANPR. We note that the SEC's Regulation AB required, and was afforded, more than 12 months for implementation.

- **Conflicting Legal and Regulatory Regimes Should be Avoided**
  Second, conflicting legal and regulatory regimes should be avoided. Special FDIC-imposed requirements on insured depositary institutions are not necessary for a workable safe harbor rule. Requiring additional disclosure for transactions sponsored by banks would create disclosure practices inconsistent with those applicable to other organizations that may complicate efforts by investors to compare transactions sponsored by banks with those sponsored by other institutions, and may cause unnecessary confusion. Federal legislation addressing many of the ANPR's proposals is foreseeable, indeed likely, and would apply to all securitization transactions. We believe that the best public policy outcome would be to have regulation addressing many of these matters, including disclosure and risk-retention standards, in a consistent, standardized manner for banks and non-banks alike. The creation of duplicative and potentially contradictory sets of regulatory requirements on banks would unnecessarily frustrate the restoration of a functioning secondary market, would place banks at a competitive equity disadvantage relative to non-banks (and foreign banks), and would create unnecessary potential for conflict with other regulators and rules where overlap, or even conflict, arises.

- **Safe Harbor Must Be Established At Transaction Origination**
  Third, the safe harbor must be established reliably at transaction origination, rather than being dependent upon future events. We believe that the market will require certainty on the critical protections provided by the safe harbor. These protections lose much, if not all, of their benefit if they are dependent upon subjective standards or the ongoing actions or inactions of one or more transaction counterparties. For example, if the safe harbor is dependent upon ongoing periodic disclosure, then a sponsor – even an insolvent or almost insolvent sponsor – might effectively have the ability to void the protections of the safe harbor by ending or delaying periodic reporting, perhaps opportunistically. We understand that the FDIC may desire to retain a high degree of flexibility in resolving insolvent institutions; however in this case we believe that a much higher degree of assurance will be needed.

- **Proposed 12 Month Holding Period for Mortgages Should Not Be Adopted**
  Fourth, the proposed 12 month holding period for consumer mortgages should not be adopted. This rule would arbitrarily restrict liquidity for mortgage assets, would attract capital unduly, and may prevent extensions of credit to borrowers during the holding period.

- **Coordinated Study and Analysis Needed**
  Finally, more carefully coordinated study and analysis is needed. The proposed ANPR will have unintended consequences, and the uncertainty associated with these

> consequences grows when viewed in concert with other financial regulatory initiatives currently under consideration. For example, the ANPR's 5% risk retention threshold be interpreted by the accounting community as a *de facto* level, sanctioned by an objective regulatory body, that satisfies one of the conditions for a controlling financial interest and that further frustrates the ability to transfer financial assets to third-party investors through securitization. Additionally, if the safe harbor is dependent upon adequate disclosure in the primary offering materials, application in cases where the arguably inadequate disclosure applies only to certain tranches will be uncertain. If safe harbor treatment is dependent upon adequate disclosure, investors may decline to pursue appropriate securities laws claims to avoid jeopardizing their safe harbor treatment. We note that at least one legislative proposal currently exists concerning a study of the combined impact of credit risk retention requirements together with FAS 166 and 167. After the study, an assessment could be made concerning eliminating adverse impacts on the continued viability of the securitization markets and on the availability of credit for new lending. We support careful study, and urge that the consequences of the ANPR be added to such study, as well as the interconnectedness and combined effect of other policy proposals (including, for example, proposals concerning banking organizations that may limit the claims of their secured creditors, that may limit the size of their wholesale funding liabilities, and that may assess a tax or other fee on their non-deposit liabilities). [1]

We support the policy of safe, sound, and solvent deposit-taking institutions, supported by a well funded Deposit Insurance Fund. However, we fear that the ANPR as proposed may go too far, and in fact actually may *increase* overall credit risks to the United States government and reduce credit availability to borrowers. The ANPR as proposed, working in concert with FAS 166 and 167 and other interconnected regulatory developments, will make it more difficult for banks to rationalize participation in the securitization markets relative to other capital and funding options, and may create risks that insured institutions will continue to refrain from participating in these markets, thereby reducing consumer and commercial lending, which would likely frustrate economic recovery. If banks continue to refrain from non-agency securitization activity, concentrations of mortgage credit risk will continue to

[1] We are likewise mindful of the increasing importance of liquidity risk management to banking regulators. *See, e.g.*, Basel Committee on Banking Supervision, Consultative Document "*International Framework for Liquidity Risk Measurement, Standards and Monitoring*", December 2009. Regulatory proposals that meaningfully restrict the practical ability of banking organizations to participate in securitization transactions have the potential to influence negatively liquidity options and contingency funding plans.

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 key 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. For this reason, among others, we support the participation of a wide variety of regulatory voices in this process.

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 Securities and Exchange Commission, and other banking agencies to strike the right balance among the FDIC's direct interests in setting appropriate standards to address the prudential 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.

We appreciate the opportunity to comment on the ANPR. If the FDIC or its staff has questions regarding the comments contained herein, we would be happy to address them.

Respectfully submitted,

Gregory A. Baer /by David B. Rich III

Gregory A. Baer
Deputy General Counsel – Corporate Law

Schedule A

Enclosed are our answers to many of the questions posed by the FDIC in its request for comments.

QUESTION 2. ***Is the transition period to March 31, 2010 sufficient to implement the changes required by the conditions identified by Paragraph (b) and (c)? How does this transition period impact existing shelf registrations?***

ANSWER TO QUESTION 2. Bank of America supports the January 4, 2010 comment letter submitted by the American Securitization Forum. Bank of America believes that the conditions being proposed in the sample regulatory text are significant and that the proposed expiration date of the Interim Rule (March 31, 2010) will not be nearly sufficient time to ensure that securitizations can meet the proposed criteria. Today, Bank of America is engaged in many aspects of this market, serving as issuer, sponsor, servicer, trustee, investor, underwriter, and financial intermediary in a wide variety of securitization related activities. We will need time to put operational processes into place to ensure accurate data is disclosed for securitized assets and to comply with the preconditions to the new safe harbor. After review of the ANPR and its Sample Regulatory Text, we do not believe we can respond to questions regarding implementation of a rule that has not yet been officially recommended. It is unclear whether the Sample Regulatory Text has even been proposed and whether the questions posed in the ANPR reflect all the conditions contained in the Sample Regulatory Text. A realistic implementation period to comply with the new preconditions to the new safe harbor cannot be proposed by us at this time.

QUESTION 3. ***Should certain capital structures be ineligible for the future safe harbor? For example, should securitizations that include leveraged tranches that introduce market risks (such as leveraged super senior tranches) be ineligible?***

QUESTION 4. ***For RMBS specifically, in order to limit both the complexity and the leverage of RMBS, and therefore the systemic risk introduced by them in the market, should the capital structure of the securitization be limited to a specified number of tranches? If so, how many, and why? If no more than six tranches were permitted, what would be the potential consequence?***

QUESTION 5. ***Should there be similar limits to the number of tranches that can be used for other asset classes? What are the benefits and costs of taking this approach?***

ANSWERS TO QUESTION 3, 4, AND 5. While we agree that simplicity generally equates to less risk that investors may not understand the structural features of MBS and ABS transactions and might buy securities poorly suited to their needs as a result, it is unclear how limiting the number of tranches or the structuring features of those tranches would ensure investor suitability or reduce leverage or systemic risk in the capital markets. Even in the simplest of MBS and ABS capital structures, there are tranches that are not suitable for particular investors and preventing the issuance of such securities, which are entirely suitable for other types of investors, would be an inefficient and ineffective means of addressing concerns regarding investor suitability and disclosure. Nor would limiting the number or complexity of tranches appear to reduce the systemic risk posed by excessive leverage in the capital markets because such a restriction would not limit the ability of investors to engage in leveraged investment strategies involving ABS and MBS.

There are many legitimate and useful purposes for unique and tailored structuring solutions. For example, the ability to structurally create bonds that match the risk appetite and duration of an investor's liabilities (such as life insurance payouts) are one of the primary benefits of these transactions, and eliminating this flexibility under all circumstances would needlessly reduce the liquidity for these instruments, and, in turn, the underlying consumer and commercial loans.

QUESTION 6. ***Should re-securitizations (securitizations supported by other securitization obligations) be required to include adequate disclosure of the obligations including the structure and asset quality supporting each of the underlying securitization obligations and not just the obligations that are transferred in the re-securitization?***

ANSWER TO QUESTION 6. Resecuritization transactions are currently subject to the disclosure requirements of Rule 10b-5 under the Securities Exchange Act, among other standards. Resecuritizations that are registered with the Securities and Exchange Commission are subject to additional disclosure standards under the Securities Act and Regulation AB and Rule 190. We believe that this robust disclosure regime is appropriate, and that overlaying an FDIC imposed additional disclosure regime would be duplicative and possibly conflicting in a field that is presently extensively addressed. We also disagree with the proposal that re-REMICs and other resecuritizations will only be eligible for safe harbor protections if all underlying securitizations themselves satisfy *all* conditions in the ANPR. This would effectively exclude legacy ABS, and perhaps future non-bank ABS, from the scope of qualifying collateral. These transactions allow banks to obtain important and legitimate benefits, including increased liquidity and ratings insulation for securities of this nature.

QUESTION 7. ***Should securitizations that are unfunded or synthetic securitizations that are not based on assets transferred to the issuing entity or owned by the sponsor be eligible for expedited consent?***

ANSWER TO QUESTION 7. Legal isolation complications should not arise for a synthetic securitization because no transfer of assets occurs. The same is true for unfunded synthetic transactions. We suspect that your term "unfunded…securitizations" is intended to refer to "unfunded synthetic securitizations", and not to "prefunded" securitizations. We do not believe there should be a prohibition of prefunded transactions. Issuers also issue variable funding notes that have a principal amount that can be increased or decreased over the life of a transaction. There should be no restriction on variable funding notes.

However, we would not object to the FDIC making an appropriately calibrated policy statement providing an additional level of assurance regarding synthetic transactions.

QUESTION 8. ***Should all securitizations be required to have payments of principal and interest on the obligations primarily dependent on the performance of the financial assets supporting the securitization? Should external credit support be prohibited in order to better realign incentives between underwriting and securitization performance? Are there types of external credit support that should be allowed? Which and why?***

ANSWER TO QUESTION 8. We disagree with the proposal to prohibit external credit enhancement. External credit enhancement should be an available tool to use when sponsoring securitization transactions. Guarantees and insurance have been, and will likely continue to be, an important component of mortgage finance in the United States, including the roles played by the government sponsored enterprises and the Government National Mortgage Association. These techniques should be available to the non-agency market, too. This proposal may limit the liquidity of certain types of loan products, including home equity lines of credit, and increase funding costs that inevitably will be passed along to consumers, businesses, and government borrowers.

External credit support techniques may also be helpful for asset-backed commercial paper, and other unique circumstances where reliable transaction exit mechanisms are needed. The proposed prohibition on external credit support in securitization transactions may not achieve its incentive alignment goals. The costs associated with perceived incentive misalignment, due to underwriting deficiencies or otherwise, are addressed by the market in different ways – through increased internal credit enhancement requirements, through less price-efficient execution, through higher costs of external credit enhancement, or otherwise. Arbitrarily restricting structuring options may shift the medium through which these costs manifest themselves, but restrictions do not, by themselves, align incentives. This proposal also appears to limit the ability of banks to provide seller's loss coverage and other seller-provided external credit support to transactions, which highly align the incentives referred to in your question.

QUESTION 9. ***What are the principal benefits of greater transparency for securitizations? What data is most useful to improve transparency? What data is most valuable to enable investors to analyze the credit quality for the specific assets securitized? Does this differ for different asset classes that are being securitized? If so, how?***

QUESTION 10. ***Should disclosures required for private placements or issuances that are not otherwise required to be registered include the types of information and level of specificity required***

under Securities and Exchange Commission Regulation AB, 17 C.F.R. §§ 229.1100-1123, or any successor disclosure requirements?

QUESTION 11. ***Should qualifying disclosures also include disclosure of the structure of the securitization and the credit and payment performance of the obligations, including the relevant capital or tranche structure? How much detail should be provided regarding the priority of payments, any specific subordination features, as well as any waterfall triggers or priority of payment reversal features?***

ANSWERS TO QUESTIONS 9, 10, AND 11. Transparency is critical in order to maintain investor confidence in the securitization markets. The core non-mortgage consumer securitization market has resumed without significant changes to collateral and other data disclosures. However, issuance has focused principally on the senior most tranches, and heightened data and transparency concerns may be more of a focus for investors in subordinated tranches, particularly subordinated tranches of RMBS, and new products. The SEC is currently developing new disclosure requirements for ABS and RMBS that will address investor demands for such additional information. We do not believe that the capital markets would benefit from additional and possibly inconsistent disclosure standards promulgated by the FDIC for ABS and RMBS.

While improved data quality and transparency outside of the SEC's disclosure requirements may help sustain liquidity, issuers and investors should be left to balance those demands and trade-offs. We note that significant progress has been made in ASF Project Restart, a disclosure package working group of issuers, investors and rating agencies, sponsored by the American Securitization Forum. For RMBS, provision of "loan level" or "financial asset level" information has been endorsed by ASF in connection with ASF Project Restart. Non-mortgage consumer asset securitization has generally not provided ongoing, updated loan-level information and it would be unduly costly to implement this, and in some cases limited by systems abilities. Moreover, for credit card securitization in particular, investors have articulated that loan level information is neither helpful nor desired.

We do not believe that securitization disclosure is a "one size fits all" affair. Disclosure allows the investor to obtain necessary information concerning the investment being purchased, and along with securities law remedies, provides the investor with a certain level of contingent recourse against the issuer if the disclosure contains material mistakes or omissions. The ability of an issuer to provide disclosure, however, is not unlimited and the existing securities laws strike this balance very carefully. The existing securities laws, and the SEC's expertise in this area, are the product of decades of experience, focus, and practice.

Additionally, Regulation AB's public disclosure standards are not appropriate, in all cases, for securitization structures that qualify for a transaction exemption under the SEC's Rule 144A, which permits resales to qualified institutional buyers who generally have the opportunity to negotiate for the delivery of any information they deem useful for making their investment decision. Neither are Regulation AB's public disclosure standards, including static pool disclosure and other technical details, appropriate for privately negotiated securitization structures that qualify for a transaction exemption under Section 4(2) of the Securities Act. Different standards still might apply for asset-backed commercial paper instruments. Moreover, Regulation AB standards may not be appropriate in securitization structures that may qualify for a securities exemption under Section 3(a)(2) of the Securities Act. In many such cases, other Federal banking regulators already address the field (including, for example, 12 C.F.R. Part 16).

Finally, as noted above the remedy associated with non-compliance of the proposed standard may present issues. The consequences of an issuer's non-compliance with disclosure standards would be a risk that the FDIC safe harbor would not attach, and this risk would principally be borne by the investors, not the insolvent sponsoring institution responsible for the disclosure. It could give rise to other unintended consequences, including a chilling effect on otherwise appropriate securities law claims, and extreme difficulty in application where the arguably inadequate disclosure applies only to certain tranches.

QUESTION 12. ***Should the disclosure at issuance also include the representations and warranties made with respect to the financial assets and the remedies for such breach of representations and warranties, including any relevant timeline for cure or repurchase of financial assets.***

ANSWER TO QUESTION 12. The disclosure of representations and warranties and related repurchase provisions is required by the SEC's Regulation AB, which usually includes a summary of the representations and warranties in the offering document and the full list of representations and warranties in the transaction documents, which are filed publicly. The American Securitization Forum is currently working on developing consensus market standards on these matters, and we believe that this is the proper medium through which to address these issues.

The Sample Regulatory Text states that "the documentation must define all necessary rights and responsibilities of the parties, including but not limited to representations and warranties consistent with industry best practices." The use of an "industry best practices" concept in this case is not practical. Transaction specifics on these points may vary widely, and even the American Securitization Forum's model representations and warranties for RMBS transactions were developed merely as a baseline, and to allow for a degree of variation.

QUESTION 13. ***What type of periodic reports should be provided to investors? Should the reports include detailed information at the asset level? At the pool level? At the tranche level? What asset level is most relevant to investors?***

QUESTION 14. ***Should reports included detailed information on the ongoing performance of each tranche, including losses that were allocated to such tranche and remaining balance of financial assets supporting such tranche as well as the percentage coverage for each tranche in relation to the securitization as a whole? How frequently should such reports be provided?***

ANSWERS TO QUESTIONS 13 AND 14. This topic is being considered by legislative policy makers at this time. We support a comprehensive approach to periodic disclosure standards that is consistent for all securitizations. Overlaying special FDIC imposed additional requirements on insured depositary institutions is not necessary for a workable safe harbor rule. From a more fundamental perspective, the safe harbor must be established reliably at transaction origination, rather than being dependent upon future events. The market will need certainty on the protections provided by the safe harbor. These protections lose much, if not all, of their benefit if they are dependent upon subjective standards or the ongoing actions or inactions of one or more transaction counterparties. If the safe harbor is dependent upon ongoing periodic disclosure, then the sponsor – even an insolvent or almost insolvent sponsor – effectively has the ability to void the protections of the safe harbor by ending or delaying periodic reporting, perhaps opportunistically. We understand that the FDIC may desire to retain a high degree of flexibility in resolving insolvent institutions; however in this case we believe that a much higher degree of assurance provided at the time of transaction origination will be needed.

QUESTION 15. ***Should disclosures include the nature and amount of broker, originator, rating agency or third-party advisory, and sponsor compensation? Should disclosures include any risk of loss on the underlying financial assets is retained by any of them?***

ANSWER TO QUESTION 15. This topic is being considered by legislative policy makers at this time. We support a comprehensive approach to disclosure standards that is consistent for all securitizations. Disclosure standards that include the nature and amount of broker, originator, rating agency or third party advisory, or sponsor compensation should reflect the limitations on the availability of the information required to be disclosed and the materiality, or lack thereof, of such disclosure to an investment decision. Also, mandated disclosures regarding the compensation paid to brokers, originators, rating agencies, third party advisors and sponsors does not appear to be relevant to an investment decision in fixed-income, often investment grade RMBS and may raise concerns regarding disclosure of proprietary information to competitors. Again, overlaying special FDIC imposed requirements on insured depositary institutions may not be necessary for a workable safe harbor rule.

QUESTION 16. ***Should additional detailed disclosures be required for RMBS? For example should property level data or data relevant to any real or personal property securing the mortgage loans (such as rents, occupancy, etc.) be disclosed?***

ANSWER TO QUESTION 16. We concur with the sentiment expressed in this question, namely that securitization is not a "one size fits all" marketplace. Solutions may work best that are tailored to the specific product, and that have a reasonable degree of flexibility. "One size fits all" mandates appear likely to be sub-optimal. RMBS is a relatively homogenous collateral type that may be less likely to benefit from disclosure concerning individual loans on the property level, as is often the case, for example, with CMBS. Property level detail for these consumer mortgage loan products would not strike the right balance, and the costs and other burdens associated with such detail would outweigh the corresponding benefit.

QUESTION 17. ***For RMBS, should disclosure of detailed information regarding underwriting standards be required? For example, should securitizers be required to confirm that the mortgages in the securitization pool are underwritten at the fully indexed rate relying on documented income,[3] 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?***

ANSWER TO QUESTION 17. We support a comprehensive approach to securities disclosure standards that is consistent for all securitizations. The safe harbor must be established reliably at transaction origination, rather than being dependent upon subjective factors, such as compliance with underwriting standards – which will may permit latitude for underwriter discretion, and exceptions where compensating factors exist – or supervisory guidance. Determining whether compensating factors such as duration of employment or substantial reserves are sufficient to support an exception to stated underwriting criteria is a matter of judgment and professional experience that can readily be second guessed if the borrower later experiences an adverse credit event such as illness, loss of employment or divorce. The safe harbor protections may not provide much, if any, benefit if they are dependent upon compliance with subjective standards. We also note that determining whether a particular loan complies with the Interagency Guidance on Non-Traditional Mortgage Products or Interagency Statement on Subprime Mortgage Lending in many instances requires qualitative judgments and is more akin to a legal conclusion than a verifiable fact. Requiring banks to make such disclosures in RMBS offering materials or prospectuses may expose them and other transaction participants unnecessarily to undue and excessive securities law liability risks because these disclosures would be extremely difficult, or impossible, to verify objectively.

QUESTION 19. ***With respect to RMBS, a significant issue that has been demonstrated in the mortgage crisis is the authority of servicers to mitigate losses on mortgage loans consistent with maximizing the net present value of the mortgages, as defined by a standardized net present value analysis. For RMBS, should contractual provisions in the servicing agreement provide for the authority to modify loans to address reasonably foreseeable defaults and to take such other action as necessary or required to maximize the value and minimize losses on the securitized financial assets?***

ANSWER TO QUESTION 19. Bank of America supports sensible foreclosure avoidance efforts to help keep consumer in their homes. In 2009, Bank of America completed over a quarter million modifications through HAMP and non-government programs. Through the HAMP program, more than 12,000 Bank of America customers have been approved for final modifications. Bank of America recently became the first mortgage servicer to start more than 200,000 HAMP trial modifications, initiating more than 34,000 new trial modifications in December 2009 alone.

The impact of RMBS servicing contracts on loan modification results is a complex issue. Previous efforts to address these concerns have been influenced by accounting standards, REMIC tax rules, as well as other legal and regulatory requirements, in addition to the plain language of the contracts themselves. While the proposal in the ANPR might not give rise to precisely the same interlocking considerations, this historic experience underscores the need for close, multidisciplinary collaboration and partnership among the FDIC and others bodies – including the FASB, the SEC, Treasury, the ASF, and others – when solving these complex, thorny, interrelated questions.

QUESTION 20. ***Loss mitigation has been a significant cause of friction between servicers, investors and other parties to securitizations. Should particular contractual provisions be required? Should the documents allow allocation of control of servicing discretion to a particular class of investors? Should the documents require that the servicer act for the benefit of all investors rather than maximizing the value of to any particular class of investors?***

QUESTION 21. ***In mitigating losses, should a servicer specifically be required to commence action to mitigate losses no later than a specified period, e.g., ninety (90) days after an asset first becomes delinquent unless all delinquencies on such asset have been cured?***

ANSWERS TO QUESTIONS 20 AND 21. The FDIC should refrain from requiring particular contractual provisions of this nature as necessary for safe harbor protection. These requirements are not necessary for a workable safe harbor rule, and would not permit the ongoing natural evolution of market practice and standards on these matters. For example, the proposal that servicers be required to commence loss mitigation activity within 90 days of delinquency may stifle the ongoing evolution of market standards and practices for consumer mortgage loan servicing. Servicers, investors and other parties can negotiate and structure provisions that effectively address their individual concerns regarding loss mitigation for distressed transactions. Provisions may be tailored to address the concerns of particular asset classes and individual class of investors. The FDIC should allow the investors and parties to the securitization transactions to retain the ability to make their own investment decisions, including the structuring and negotiation of the underlying contracts.

QUESTION 22. ***To what extent does a prolonged period of servicer advances in a market downturn misalign servicer incentives with those of the RMBS investors? To what extent to servicing advances also serve to aggravate liquidity concerns, exposing the market to greater systemic risk? Should the servicing agreement for RMBS restrict the primary servicer advances to cover delinquent payments by borrowers to a specified period, e.g., three (3) payment periods, unless financing facilities to fund or reimburse the primary servicers are available? Should limits be placed on the extent to which, foreclosure recoveries can serve as a 'financing facility' for repayment of advances?***

ANSWER TO QUESTION 22. 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.

QUESTION 24. ***Should requirements be imposed so that certain fees in RMBS may only be paid out over a period of years? For example, should any fees payable to the lender, sponsor, credit rating agencies and underwriters be payable in part over the five (5) year period after the initial issuance of the obligations based on the performance of those financial assets? Should a limit be set on the total estimated compensation due to any party at that may be paid at closing? What should that limit be?***

QUESTION 25. ***Should requirements be imposed in RMBS to better align incentives for proper servicing of the mortgage loans? For example, should compensation to servicers be required to take into account the services provided and actual expenses incurred and include incentives for servicing and loss mitigation actions that maximize the value of the financial assets in the RMBS?***

QUESTION 27. ***Should similar or different provisions be applied to compensation for securitizations of other asset classes?***

ANSWERS TO QUESTIONS 24, 25, AND 27. Transaction compensation issues are being considered by legislative policy makers at this time. Regulation concerning transaction compensation practices, if any, should be imposed in a consistent manner for all securitization transactions, rather than specifically applying to bank securitizations only. Compensation limitations do not appear to be necessary for a workable safe harbor rule. We note that compensation deferral strategies that cause compensation to be dependent on transaction performance place risks on the seller, its employees and agents associated with natural loan pool evolution (for example, housing trends, general economic conditions, and employment), not merely risks associated with the seller's carelessness or malfeasance. This may place incremental stress on the conclusion that a sale has occurred. It would be difficult to calibrate or correlate the performance of the financial assets with compensation of transaction parties.

A requirement that certain RMBS fees should be paid out over time based on the performance of the financial assets is neither practical nor efficient because the actual cost of the sale often cannot be known with reasonable certainty, so every such transaction would have an imbedded risk premium for the potential variability of these costs. Detailed rules and tracking methods would need to be established for each transaction, establishing measurements of performance and non-performance and rules for parties with varying levels of responsibility and control. The requirement to build the infrastructure and establish rules would significantly impede the return to normalcy for the securitization market. Added complexities would arise regarding how to determine these costs for an institution that might have multiple roles, such as servicer, originator, underwriter, or custodian.

This proposal would place securitizations at a competitive disadvantage relative to portfolio or whole loan exit strategies. Purchasers of these portfolios or whole loans that are not banks might, in turn, choose to securitize such bank originated loans free from the encumbrances of the ANPR. All of these disadvantages have the potential to drain capital as well as funding alternatives from the bank consumer mortgage secondary market.

QUESTION 28. ***For all securitizations, should the sponsor retain at least an economic interest in a material portion of credit risk of the financial assets? If so, what is the appropriate risk retention percentage? Is five percent appropriate? Should the number be higher or lower? Should this vary by asset class or the size of securitization? If so how?***

ANSWER TO QUESTION 28. Risk retention issues for securitization transactions are being considered by legislative policy makers at this time. Regulation concerning "skin in the game" options, if any, should be imposed in a consistent manner for all securitization transactions, rather than specifically applying to bank securitizations only. Moreover, if various standards apply to banks they should be free from conflict. It is also not clear how, and on what basis, the real costs of these risk retention proposals in bank capital and liquidity options have been rationalized against the perceived benefits of securitization risk retention. The new accounting standards have eliminated the use of qualifying special purpose vehicles, making it considerably more difficult to structure off balance sheet transactions. There is a great deal of market concern regarding the viability of securitization given the uncertainty of the impact of the "skin in the game" proposals on accounting treatment and regulatory capital treatment.

Given the variability of asset types, requiring a specified percentage of risk retention may not be the most appropriate way to align economic interests of originators or securitizers. The risk retention suggestions in the ANPR present many questions, and lack a degree of detail. This uncertainty includes the duration of required risk retention, exceptions to the hedging restrictions, and what constitutes retention (*i.e.* vertical slice, first loss, expected loss, assets bearing credit exposure that is similar or identical to that of securitized assets, or other methods). Risk retention standards, if any, should include a variety of options to satisfy these requirements. One such option should include retaining interests in the securitized transaction, or in whole loans of a similar nature on the sponsor's balance sheet, or through some combination of these two options. The ANPR does not appear to allow for adjustments, which in turn may create significant regulatory gaps between any FDIC standards and standards that may be imposed by other bodies. Also, the prohibition on hedging risk in the retained interest does not appear to be consistent with prudential principles associated with asset-liabilities management. This proposal might have the perverse effect of trapping credit risks within the banking system that could otherwise be spread efficiently outside of the banking system and, indeed, outside of the United States.

Many banks and other securitization sponsors during the prior credit cycle retained substantial "skin-in-the-game", with sub-optimal results concerning credit quality. Many large securitizers would retain the most subordinated tranches and residual interests in their securitizations (in addition to representation and warranty exposure) because these could not be sold efficiently. This resulted in retained risk, in many cases, in excess of *pari passu* risk, and has contributed to credit losses and write-down exposure at affected institutions.

QUESTION 29. ***Should additional requirements to incentivize quality origination practices be applied to RMBS? Is the requirement that the mortgage loans included in the RMBS be originated more than 12 months prior to any transfer for the securitization an effective way to align incentives to promote sound lending? What are the costs and benefits of this approach? What alternatives might provide a more effective approach? What are the implications of such a requirement on credit availability and institutions' liquidity?***

ANSWER TO QUESTION 29. We do not believe that requiring mortgage loans included in RMBS to be originated more than 12 months prior to any transfer for the securitization effectively aligns incentives to promote sound lending. However, if the FDIC decides to pursue this requirement, we believe that a requirement of this nature may diminish the capacity to make new loans to credit-worthy consumers and businesses. The 12-month seasoning proposal would likely add to bank capital costs, expand balance sheets, and would limit bank funding options. These challenges might be felt most acutely by smaller, community based banks. It would also trap credit losses and other risks inside of banks that investors are willing to assume. For example, borrowers experience adverse credit events such as illness, loss of employment or divorce and uninsured natural disasters occur regardless of the quality of the underwriting of a mortgage loan and RMBS investors understand that they bear these risks. Finally, including this requirement would skew the ability to compare performance across vintages, particularly with non-bank securitizations. Again, it is also not clear how, and on what basis, the real costs of this proposal in bank capital and liquidity options have been rationalized against the perceived benefits.

QUESTION 30. ***Would the alternative outlined above, which would require a review of specific representations and warranties after 180 days and the repurchase of any mortgages that violate those representations and warranties, better fulfill the goal of aligning the sponsor's interests toward sound underwriting? What would be the costs and benefits of this alternative?***

ANSWER TO QUESTION 30. We disagree with the proposal to institute an FDIC-required review of specific representations and warranties post-closing for the purpose of enforcing repurchase remedies. We also disagree with the suggestion that would require sponsors to hold back 5% of transaction proceeds for up to twelve months to fund required repurchases, particularly for liquid and well capitalized sponsors.

If regulatory agencies believe that more transactional due diligence is needed, then it should be conducted *before* transaction execution. The risk associated with the performance experience of the collateral during the proposed 180 day period resides with the purchasers, so accordingly there does not appear to be a reason to wait. We note that this deferral approach would cause an increased degree of transactional uncertainty to linger after transaction closing, which may place incremental stress on the conclusion that a legitimate and credible sale has occurred.

The principal purpose of representations and warranties, and associated repurchase remedies, is to protect buyers from undisclosed risks. They are not, in the ordinary course, intended to act as a direct credit substitute, credit enhancement, or guarantee.

QUESTION 31. ***Should all residential mortgage loans in an RMBS be required to comply with all statutory and regulatory standards and guidance in effect at the time of origination? Where such standards and guidance involve subjective standards, how will compliance with the standards and guidance be determined? How should the FDIC treat a situation where a very small portion of the mortgages backing an RMBS do not meet the applicable standards and guidance?***

ANSWER TO QUESTION 31. Please refer to our answer to your Question 17 above. The safe harbor must be established reliably at transaction origination, rather than being dependent upon subjective factors, such as compliance with supervisory guidance. The safe harbor protections may not provide much, if any, benefit if they are dependent upon compliance with such subjective standards. This proposed standard may work to make such compliance effectively mandatory in order to ensure mortgage liquidity, which in turn may limit new product development and banks' ability to solve for currently unforeseen consumer needs in the future.

We also disagree with the suggestion that bank sponsors affirm compliance with certifications similar to those required under Sarbanes-Oxley. Certifications of this nature are not appropriate or needed where compliance with law is already addressed through representations and warranties in negotiated transaction documentation, and compliance with regulatory guidance must be assessed on highly subjective standards. Accordingly, the likely benefits are remote, while the costs (in compliance process and increased liability) are significant.

QUESTION 34. ***Is the scope of the safe harbor provisions in paragraph (d) of the sample regulatory text adequate? If not, what changes would you suggest?***

QUESTION 35. ***Do the provisions of paragraph (e) of the sample regulatory text provide adequate clarification of the receiver's agreement to pay monies due under the securitization until monetary default or repudiation? If not, why not and what alternatives would you suggest?***

ANSWERS TO QUESTIONS 34 AND 35. The safe harbor's application to particular financing transactions, at the time they are executed, needs to be clarified. Compliance with the requirements of the sample regulation will likely be very difficult, if not impossible, to establish with the high degree of certainty that the rating agencies and investors are likely to demand. Legal opinions concerning the application of the safe harbor rule may not provide sufficient comfort because they must assume many matters that are purely factual, some of which will not occur until future dates. Without further clarification and certainty, we are concerned that certain transactional constituencies, including possibly rating agencies and investors, may not be comfortable.

We note the publication by Moody's Investors Service, dated January 6, 2010, entitled "*Sector Comment—FDIC's Advance Notice on Proposed Safe Harbor Unclear on Protection against Repudiation Risk.*" Although the preamble to the ANPR correctly notes that the FDIC ordinarily cannot repudiate a valid security interest, significant investor and rating agency issues arise from the fact that the FDIC may have the power to repudiate the related secured debt (and limit damages as provided in the Federal Deposit Insurance Act). Appropriate clarification on this point will be important in any final rule. Otherwise, the credit rating of affected securitization structures would be more highly linked to the credit quality of the sponsoring bank than is the case today, which will frustrate the purpose and utility of the rule. We also note the Moody's observations regarding opportunities for clarification regarding intra-payment period interest shortfalls, and ambiguity regarding the term "regularly scheduled payments."

The ANPR also states that securitizations that are not accounted for as sales could be considered an alternative form of secured borrowing, and applies a safe harbor to the FDIC's consent requirements for secured lenders if the securitization meets certain criteria not related to the question of whether the securitization was a sale. The final rule should make clear that even if a transaction falls outside the safe harbor: *first*, the fact that a transaction is accounted for as a secured borrowing should not control the legal conclusion that the transaction is a secured borrowing in insolvency; *second*, the fact that entities are consolidated for accounting purposes should not control whether those entities are consolidated for insolvency purposes; and *third*, while the accounting treatment sometimes may be a relevant factor in these questions the relevant applicable law will control.[2]

ADDITIONAL OBSERVATIONS. ***In addition to providing answers to many of the specific questions presented by the FDIC, we also have suggestions regarding the following additional aspects of the ANPR and sample regulatory text.***

Standard Documentation, as Appropriate, Must Be Used. The ANPR would attempt to force the market towards more highly standardized documentation, although the meaning of this term and "as appropriate" are unclear. The purported rational for this appears to be a desire to make it easier to obtain relative comparisons across transactions. In practice, however, this would be extremely difficult to achieve because legal documentation often reflects an individual company's loan products, computer systems, servicing practices, risk management comfort level, legal entity structure, and other organizational details, which are not simple to adjust. Additionally, depending on the scope of amendments to the existing documentation and investor consent requirements, mandatory standardized documentation would be difficult to implement for certain asset classes such as credit card ABS.

Disclosures. The ANPR proposes for all securitizations that information be disclosed to all potential investors at the "financial asset" level. As noted previously, disclosure for all securitizations cannot be a "one size fits all" approach. Unlike MBS, non-mortgage consumer asset securitization has generally not provided ongoing, updated loan-level information and it be unduly costly to implement this, and in some cases limited by systems abilities. Moreover, for credit card securitization in particular, where "financial assets" number in the millions in a master revolving trust, investors have articulated that loan level information is neither helpful nor desired.

[2] In *BASF Corp. v. POSM II Properties Partnership, L.P.*, 2009 WL 522721, *8 (Del. Ch. 2009), the Delaware court rejected a party's argument that the inclusion of a subsidiary in its parent's consolidated financial statements meant that a petrochemical facility being run by the subsidiary was in fact being run by the parent.

Limits on Affiliates and Insiders. The ANPR would prohibit sponsoring banks from placing ABS predominantly with affiliates or other insiders. However, "swap-and-hold" securitization transactions, through which banks convert relatively illiquid loans into more liquid investment grade securities, have been a useful tool in bank asset—liability management practices. The resulting ABS securities, while not sold, may be and often are pledged to secured creditors in exchange for efficient bank funding. We do not believe that the benefits of and policy rationale for limiting these techniques are strong. Another uncertainty associated with this suggestion is how the "predominantly" standard would be applied: by trust, by tranche, by asset class, or by some other yet to be defined calibration. It is also unclear if this standard would apply solely at transaction origination, or throughout the life of the transaction. If the latter, ending the ability of banks to repurchase these securities, but not other types of securities, and having the remedy for such actions be a risk that the safe harbor will not apply (a consequence that will be experienced principally by remaining securityholders, creating possible opportunities for moral hazard) should be reconsidered.

Extension of the Status Quo – Perhaps Indefinitely? The FDIC's safe harbor concerning these matters worked well for a meaningful period of time. It appears highly likely that the FDIC may extend the Interim Rule's plan expiry (March 31, 2010) in order to consider comments to the ANPR, and then pivot towards a more formal rule making process that will result in a long term comprehensive solution. We suggest the FDIC consider that one possible acceptable outcome would be to extend the Interim Rule indefinitely. Such an approach would appear to allow the FDIC to accommodate its direct interests in setting appropriate standards as conservator or receiver of an insured bank, while at the same time working collaboratively with other policy making bodies, such as Congress, the Securities and Exchange Commission, and other banking agencies, to build a sound, uniform infrastructure to govern securitization more broadly going forward.