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February 22, 2010

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

Re: RIN 3064-AD55

Dear Sir:

We are writing to comment on the Advance Notice of Proposed Rulemaking ("ANPR") of the Federal Deposit Insurance Corporation ("FDIC") regarding Treatment by the FDIC as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection with a Securitization or Participation after March 31, 2010. We are a law firm that often advises insured depository institution clients and others with respect to securitizations and participations, as well as to provide legal opinions in connection with such transactions.

As explained below, we are concerned that the rule being considered, as reflected in the preliminary regulatory text, does not actually provide a safe harbor from repudiation in circumstances in which sale accounting treatment under generally accepted accounting principles ("GAAP") cannot be achieved. In addition, we suggest that any rule that is eventually proposed be revised substantially because the preliminary regulatory text, if it were to become a final rule, would make it impossible for legal opinions to be rendered in future securitization transactions that would provide adequate comfort that the FDIC's proposed safe harbor has been met. We believe these concerns could adversely impact securitizations by insured depository institutions, to the substantial detriment of the U. S. housing markets.

No Safe Harbor from Repudiation

We understood that the entire purpose of the safe harbor would be to protect an institution from the exercise of a conservator's or receiver's authority to repudiate a securitization agreement. However, section (d)(4)(ii) of the preliminary regulatory text expressly provides that, with respect to a securitization that complies with paragraphs (b) and (c) of the preliminary regulatory text (i.e., meets all of the substantive requirements), but where the transfer does not satisfy the conditions for sale accounting treatment set forth by GAAP (which

will be the case with many securitizations as a consequence of adoption of FAS 166 and 167), the FDIC as conservator or receiver may provide a written notice of repudiation of the securitization agreement and may not pay statutory damages. Under the preliminary regulatory text, the FDIC in such cases consents to exercise of contractual rights, such as the counter-party's foreclosing on collateral. Thus, however, despite compliance with the rule, a securitization would be subject to repudiation.

In the event of repudiation, the counterparty is entitled to actual direct compensatory damages determined as of the date of the appointment of the conservator or receiver.[1] The preliminary regulatory text by providing consent to the counterparty's exercise of contractual rights, such as foreclosure, would transfer the underlying assets to the counterparty. However, it also permits the FDIC, instead, to pay damages for repudiation. It is not clear how those actual direct compensatory damages might be calculated in that case. If such damages would be based on the then-market value of the loans transferred under the securitization agreement, it is quite conceivable that market values, as has recently been the case, will be quite uncertain especially in the absence of a market for the assets. Instead of the credit risk of continued indirect ownership of the underlying loans, the investors would be exposed to market risk not ordinarily or currently assumed by investors in securitizations.

The old safe harbor rule provided that the FDIC as conservator or receiver would not use its repudiation authority to reclaim property transferred in connection with a securitization provided the transfer met all of the conditions for sale accounting treatment. The FDIC has acknowledged in the ANPR that adoption of FAS 166 and 167 has made sale accounting treatment questionable. Thus, a new safe harbor that provides for repudiation where sale accounting is not met does not appear to solve the problem created by FAS 166 and 167.

No Meaningful Comfort that Safe Harbor is Met

Parties to securitizations normally condition their performance of their obligations in such transactions on receipt of legal opinions to the effect that such transactions are authorized and enforceable and not subject to disaffirmance or repudiation in case of bankruptcy, conservatorship or receivership. Under the FDIC's old safe harbor rule, the existence of sufficient facts giving rise to the operation of the rule was sufficiently certain and determinable as to enable a law firm to decide whether to provide the necessary requested legal opinion. The new safe harbor rule concepts being considered by the FDIC do not do so.

We realize that preliminary regulatory text included in the ANPR is only an example to provide context and is not a recommendation. However, it illustrates a problem that non-specific language without objective verifiable standards would present to any lawyer or law firm asked to provide a legal opinion in a securitization transaction.

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[1] 12 U.S.C. 1821(e)(3)(e)(3)(A).

For example, to qualify for the safe harbor provided by the regulation requires disclosures "to all potential investors" "sufficient to permit evaluation and analysis of the credit risk and performance of the obligations and financial assets" "presented in such detail and in such format so as to facilitate investor evaluation and analysis". "Information that is unknown or not available to the issuer without unreasonable effort or expense, may be omitted...."[2] A law firm being asked to provide a legal opinion will not be able to ascertain whether disclosures have been provided to all potential investors or whether such disclosures have been "sufficient" or in such detail and format as to facilitate evaluation and analysis. Such law firm certainly will not know whether information was unknown or not available to the issuer or whether the information might have become known or available with "reasonable" effort or expense. Indeed, the law firm will not know what the FDIC might later conclude is sufficient or reasonable effort or expense.

In addition, the disclosure requirements being considered would be ongoing requirements, and thus, the availability of the safe harbor could terminate after closing if adequate ongoing disclosures are not made. Again, the reliability of any legal opinion provided at closing as to the availability of the safe harbor would be lessened as a consequence of the risk that a subsequent disclosure would not be deemed adequate by the conservator or receiver.

Similarly, in the case of the proposed text's requirements regarding documentation, a law firm would not be able to opine as to the availability of the safe harbor unless it could conclude that documentation creating the securitization "clearly" defines contractual rights and responsibilities which means, in the case of all securitizations, defining "all necessary rights and responsibilities" of the parties including representations and warranties "consistent with industry best practices" and "appropriate measures" to avoid conflicts.[3] Every conclusion that a law firm giving an opinion on any of those matters might reach could be contradicted by the FDIC as conservator or receiver because each requires subjective judgment, e.g. whether a definition is "clear", whether rights and responsibilities are "necessary", what industry practices are "best", and what measures are "appropriate".

The proposed regulation continues on in the same subjective vein requiring judgments as to whether authority is "sufficient" and whether contractual rights and responsibilities "clearly" distinguish between multiple roles performed by a party[4] and whether records are "readily available" "promptly"[5] and whether servicers are provided with "full" authority to mitigate losses and whether that authority extends to "reasonably foreseeable" default and includes authority to take action to maximize value and minimize losses applying "industry best

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[2] Preliminary Regulatory Text 12 C.F.R. 360.6(b)(2)(i)(A).

[3] Preliminary Regulatory Text 12 C.F.R. 360.6(b)(3)(i)(A).

[4] Preliminary Regulatory Text 12 C.F.R. 360.6(b)(3)(i)(B).

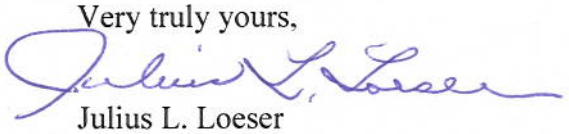
[5] Preliminary Regulatory Text 12 C.F.R. 360.6(b)(3)(i)(C).

practices", maintaining "sufficient" records to permit "appropriate" review[6]. Other provisions in the proposed rule also contain similarly subjective terms.

Those subjective standards make it impossible for any responsible law firm to issue a legal opinion without so many qualifications and assumptions as to compliance with the contemplated rule that they would deprive the recipient of any real comfort. The effect of that on the market is difficult to predict but is not likely to be positive. While the use of subjective standards provides the FDIC substantial regulatory flexibility, unfortunately it will deprive the market of reliability and certainty, both of which are necessary for the securitization markets to revive.

Thank you for the opportunity to express our views.

Very truly yours,



Julius L. Loeser

cc: Michael S. Gambro

[6] Preliminary Regulatory Text 12 C.F.R. 360.6(b)(3)(ii)(A).