MAYER • BROWN

Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606-4637

Main Tel (312) 782-0600
Main Fax (312) 701-7711
www.mayerbrown.com

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BY ELECTRONIC MAIL

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

Re: RIN # 3064–AD55

Dear Mr. Feldman:

Mayer Brown LLP appreciates this opportunity to comment on the FDIC's Advance Notice of Proposed Rulemaking (the "ANPR") relating to *Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation After March 31, 2010*.[1] We have reviewed the comment letter on the ANPR submitted by the American Securitization Forum (the "ASF"), and we support the comments made in that letter. We are submitting our own comments in order to highlight what we consider to be the most important points relating to the ANPR, without being as comprehensive as the ASF letter.

Mayer Brown has a large asset-backed securities ("ABS") practice, representing sponsors, underwriters and other market participants. We have represented various parties in numerous transactions that have relied on the FDIC's safe harbor for securitizations[2] (the "Safe Harbor"), both under its original terms and under the interim change made by the FDIC in November 2009. We have also represented issuers and underwriters in several bank-sponsored securitizations that achieved legal isolation without the benefit of the Safe Harbor. We also participated in the market group that requested the original Safe Harbor from the FDIC.

We applaud the FDIC for its initial adoption of the Safe Harbor, its timely interim amendment last November and the thoughtful approach to further amendments exhibited in the ANPR. Throughout the history of the Safe Harbor, the FDIC has wisely balanced the liquidity and other benefits provided to insured depository institutions ("IDIs") by the ABS market with other considerations arising from the FDIC's unique responsibilities and interests. We trust that the FDIC will continue this excellent track record as it moves toward finalizing the amendments to the Safe Harbor, though we believe doing so will require some significant changes from the sample regulatory text attached to the ANPR.

[1] Federal Register, Vol. 75, p. 934 (January 7, 2010).
[2] 12 CFR 360.6.

Separating Market Reform from the Safe Harbor

The ANPR touches on two vital areas:

- the need for ongoing safe harbors to provide market certainty about the treatment of IDI-sponsored ABS in the event of receivership or conservatorship of the sponsor; and

- reforms to market practices to minimize a repeat of the recent market crisis.

While both of these areas must be dealt with expeditiously, they must ultimately be dealt with separately. The market reform questions in the ANPR have advanced the public debate substantially by providing a forum for comment from interested constituents on a comprehensive menu of reform measures. However, it is essential that the conditions applicable to the amended Safe Harbor be objective, verifiable at the time ABS are issued and not affected by the sponsor's (or servicer's) conduct after the ABS have been issued. Otherwise, investors and rating agencies will have no reasonable basis to rely on the availability of the Safe Harbor in making investment and rating decisions. To have a Safe Harbor that facilitates continued access by IDIs to funding through the ABS market, all or most of the market reform-related conditions appearing in paragraph (b) of the sample regulatory text must be excluded from the final Safe Harbor.

This does not mean that market reform will stall, only that it must move forward on a separate track (or tracks) from the amendment to the Safe Harbor. Financial reform legislation and separate rulemakings by the FDIC and its sister regulatory agencies (including the other Federal banking agencies and the SEC) provide adequate means to reform the market.

Providing Clear Safe Harbors that Address Crucial ABS Market Expectations

The legal details of the Safe Harbor have become much more complicated now that the FDIC has to deal with both on-balance sheet and off-balance sheet transactions and layer in relief from the consent requirements of section 11(e)(13)(C) of the Federal Deposit Insurance Act ("FDIA").[3] To cut through some of the complexity, we believe it will be helpful to start with a general principles-based statement of investor and rating agency expectations relating to ABS.

As stated by Moody's Investors Service in a published comment on the ANPR: "Our ABS ratings typically address credit losses on the underlying assets in a scenario where the assets are held to maturity".[4] While Moody's spoke only of its own ratings, we understand the statement to be true of all of the major ABS credit rating agencies. The phrase "held to maturity" is a crucial part of this statement. Most ABS depend on contractual cash flows from an identified pool of

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[3] 12 U.S.C. 1821(e)(13)(C), which was enacted after the FDIC adopted the initial Safe Harbor.
[4] Moody's Investors Service, *FDIC's Advance Notice on Proposed Safe Harbor Unclear on Protection against Repudiation Risk* (January 2010), available at http://v3.moodys.com/researchdocumentcontentpage.aspx?docid=PBS_SF190147.

financial assets[5] over time. Most of the market concern about the terms of paragraph (d)(4) in the sample regulatory text arise from ambiguities about whether transactions relying on that paragraph could reasonably rely on the underlying assets remaining in the issuing entity to their maturity and being collected in an orderly manner.

The ANPR correctly points out that the FDIC does not ordinarily have the power to repudiate a valid security interest. However, where an IDI has granted a valid security interest to secure indebtedness of the IDI, the FDIC would generally have the power to repudiate the agreement relating to the indebtedness. The secured creditors would then have the benefit of their collateral to secure the payment of the statutory damages arising from that repudiation, but their claims would be limited to actual direct compensatory damages, which might be less than the par amount of outstanding secured debt, plus interest accrued through the date of payment. Paragraph (d)(4) appears to recognize the potential for repudiation of the secured claim (as opposed to the security interest), by providing expedited consent for actions by the secured creditors to realize on the collateral after repudiation.

Access to the collateral by means of foreclosure or similar actions around the time of repudiation does not appear to protect the hold to maturity cash flow assumptions that guide ABS investment and rating decisions. The question then becomes what the FDIC is willing to do, consistent with other policy objectives and statutory constraints, in order to provide assurance to ABS investors on the hold to maturity point. In considering this question, it is important not to let the "security interest" paradigm unnecessarily broaden or complicate the issue.

As reflected by the terms of the current Safe Harbor and the sample regulatory text, the important obligations secured or supported by the assets underlying ABS are not obligations of the sponsoring IDI. They are obligations of special purpose issuing entities, which are legally distinct from the sponsor. This provides an important basis for the FDIC to provide the assurances that the market needs, while remaining true to the FDIC's overall policy objectives and legal constraints.

The original Safe Harbor and the interim amendment state that, under specified conditions, the FDIC will not use its repudiation power to reclaim, recover or recharacterize assets transferred in a securitization. The ANPR uses similar language to describe the treatment of securitizations that satisfy the requirements discussed in the ANPR,[6] but paragraph (d)(4) does not expressly provide any "reclaim, recover or recharacterize" assurance. It appears that the FDIC did not think any Safe Harbor language was necessary, given the statutory limits on its power to repudiate valid security interests. However, the statutory limits themselves are not sufficient to protect the hold to maturity assumption underlying ABS, for the reasons discussed above.

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[5] Lease transactions, especially relating to autos, complicate this statement somewhat, in that those transactions may also rely on the expected residual values of the leased property as the leases expire. However, those transactions are still very similar to other forms of ABS, in that they rely on cash expected to be realized in an orderly manner over time from an identified pool of assets.
[6] Federal Register, Vol. 75, p. 935.

We request that the FDIC revise paragraph (d)(4) to provide assurance about reclaiming, recovering or recharacterizing securitized assets on terms similar to those appearing in the ANPR preamble text and paragraph (d)(3) of the sample regulatory text.[7] That should give the market reasonable assurance that a sponsor IDI's insolvency will not disrupt the issuing entity's continued access to collections on the securitized assets to make payments on the related ABS (which should not be subject to repudiation, since they are not obligations of the sponsor IDI). It also would not appear to impinge on any of the FDIC's other policy objectives or legal constraints since the FDIC would retain the ability to repudiate ongoing obligations of the sponsoring IDI and to exercise other powers not addressed by the Safe Harbor.

Legal vs. Accounting Sales and the FDIC's Statutory Powers

In prior releases relating to the Safe Harbor, the FDIC has provided helpful confirmation as to the relationship between legal true sales[8] and the repudiation power, even where the Safe Harbor does not apply. As a law firm that has consistently advised its IDI clients to structure their ABS transactions using legal true sales since around the time that the original Safe Harbor was adopted, we have very much appreciated these statements. We request that the FDIC reiterate that guidance as it finalizes the amendment to the Safe Harbor, as well as providing some related guidance on the consent requirements (the "Consent Requirements") of section 11(e)(13)(C) of the FDIA and clearing up some related confusion that has arisen in the course of the public discussion of the Safe Harbor over the past several months.

We do not make these requests out of any desire to assist clients in avoiding any requirements of the final Safe Harbor. We trust that the FDIC will ultimately amend the Safe Harbor in a manner that provides appropriate assurances to the market. We expect that the market will strongly prefer transactions that fall within the scope of the amended Safe Harbor. However, it is inevitable that some important transfers of financial assets (*e.g.*, whole loan sales and probably GSE transactions) will not qualify for the Safe Harbor. This rulemaking process provides the FDIC with an opportunity to clarify important legal points for such transactions.

Past Statements on Repudiation. In the adopting release for the original Safe Harbor, the FDIC made the following statement, which we believe accurately reflects the law:

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[7] The preamble language, appearing at p. 935 of the ANPR, reads: "the conservator or receiver will not, in the exercise of its statutory repudiation power, attempt to reclaim or recover financial assets transferred by an IDI in connection with a securitization if the financial assets are subject to a legally enforceable and perfected security interest under applicable law." While the ANPR text does not refer to recharacterization (possibly because under a security interest theory the underlying assets might actually be property of the IDI), we believe the final text of paragraph (d)(4) should include language dealing with recharacterization, like the language in the existing Safe Harbor and paragraph (d)(3). Securitized assets are generally sold (in form) to the issuing entity, though that transfer may or may not be a legal true sale. As a result of the form of the transaction, the "recharacterization" concept is relevant, even if there may not be a legal true sale.

[8] We use the term "legal true sale" to refer to what the FDIC called (in the text quoted below in the body of this letter) "a transaction . . . which would be characterized as a sale under the general legal view".

> a transaction that purports to be a sale . . . of all of a financial asset . . . which would be characterized as a sale under the general legal view, should not need to be encompassed by the rule; the FDIC would not be able to recover transferred assets as a result of repudiation. In the case of a completed sale, the FDIC would have nothing to repudiate if no further performance is required. Even in the case of a sale transaction that imposes some continuing obligation, a repudiation by the FDIC would relieve the FDIC from future performance, but generally should not result in a recovery of any property that was transferred by the institution before the appointment of the conservator or receiver.[9]

In the November 2009 adopting release, the FDIC reiterated the point above in somewhat different terms, explaining that the section of the original Safe Harbor dealing with the repudiation power

> was a clarification, rather than a limitation, of the repudiation power because such power authorizes the conservator or receiver to breach a contract or lease entered into by an IDI and be legally excused from further performance but it is not an avoiding power enabling the conservator or receiver to recover assets that were previously transferred by the IDI in connection with the contract.[10]

The ANPR repeats the language quoted above from the November release, except that it changes the final phrase from "transferred by the IDI in connection with the contract" to "sold off balance sheet by the IDI".[11] As discussed below, this change has created some uncertainty among market participants.

Consent Requirements. Section 11(e)(13)(C) of the FDIA provides that, subject to specified exceptions:

> no person may exercise any right or power to terminate, accelerate, or declare a default under any contract to which the depository institution is a party, or *to obtain possession of or exercise control over any property of the institution* or affect any contractual rights of the institution, without the consent of the conservator or receiver, as appropriate, during the 45-day period beginning on the date of the appointment of the conservator, or during the 90-day period beginning on the date of the appointment of the receiver, as applicable. (emphasis added)

The actions subject to the Consent Requirements can be divided into two categories: those relating to property of the IDI (the italicized portion above), and the balance relating to contracts and contractual rights. We refer to the first portion below as the "IDI Property Consent Requirement" and the balance as the "IDI Contract Consent Requirement."

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[9] Federal Register, Vol. 65, p. 49189 at 49191 (August 11, 2000).
[10] Federal Register, Vol. 74, p. 59066 at 59067 (November 17, 2009).
[11] Federal Register, Vol. 75, p. 934 (January 7, 2010).

Under the natural reading of section 11(e)(13)(C), the IDI Property Consent Requirement would not apply to financial assets that the IDI had transferred prior to receivership or conservatorship in a legal true sale. Financial assets that had been so transferred would not be "property of the institution." Consequently, it should not be necessary for a transaction to qualify for the existing or amended Safe Harbor in order for transferred assets to be free of the IDI Property Consent Requirement, so long as those assets were transferred by the IDI in a legal true sale.

Requested Confirmations. We request that the FDIC:

- reiterate its confirmation that a legal true sale is ordinarily not subject to repudiation, and confirm that this result is not contingent on the accounting treatment of the transfer; and

- confirm that assets transferred in a legal true sale are not subject to the IDI Property Consent Requirement, again regardless of the accounting treatment of the transfer).

Some of the FDIC's statements relating to the Safe Harbor have created market concern about the relationship between accounting sales and legal true sale and how that relationship affects the FDIC's repudiation power and the Consent Requirements. As noted above, in the ANPR, while reiterating its prior guidance that the repudiation section of the Safe Harbor was a clarification, rather than a limitation, of the repudiation power, the FDIC referred to assets previously "sold off balance sheet by the IDI" instead of repeating the reference in the November release to assets "transferred by the IDI in connection with the contract". This and various other statements by FDIC staff have given some market participants the impression that the FDIC may believe that it can use its repudiation power to reclaim assets transferred in a legal true sale if the transfer was not treated as a sale for accounting purposes.

We believe that position would be incorrect as a matter of law and inconsistent with the FDIC's prior statements discussed above. We hope that it is not what the FDIC was trying to say. Clearly the transfers in some on-balance sheet transactions could be subject to repudiation, as the transactions might not involve legal true sales. It is our hope that the FDIC had transactions of that type in mind when making the referenced statement in the ANPR, and we request that the FDIC clarify the point.

Similarly, the ANPR states:

> If a securitization is not given sale accounting treatment under the changes to GAAP, but is treated as a secured financing, section 11(e)(13)(C) could prevent the security holders from recovering monies due to them by up to 90 days in a receivership.[12]

This statement is clearly correct as to a securitization where the securitized assets have not been transferred in a legal true sale. However, where there has been a legal true sale, the situation is a

[12] Federal Register, Vol. 75, p. 934 at 935.

little more complicated. As discussed above, we believe that assets transferred by an IDI in a legal true sale should not be subject to the IDI Property Consent Requirement. That would not necessarily make the sentence quoted above wrong, since the IDI Contract Consent Requirement could have the specified result. Also it is not clear that the sentence was meant to apply to all on-balance sheet securitizations, as opposed to just some of them (since the word "could" implies some contingency about the stated result). However, the sentence can be read broadly and has created some market uncertainty.

In requesting the FDIC to confirm that GAAP sale treatment is not essential for assets to be isolated from the repudiation power and IDI Property Consent Requirement, we are mindful of the FDIC's need to be able to rapidly identify assets of an IDI and to rely on the IDI's call report when acting as receiver or conservator. We believe that these needs are adequately addressed by (a) the written agreement requirements of 12 U.S.C. 1821(d)(9), 1821(n)(4)(I) and 1823(e), which enable the FDIC to avoid transfers that have not been adequately documented, and (b) the disclosures required by GAAP concerning variable interest entities, which supplement balance sheet presentation with additional information about asset transfers. We note that the FDIC and the other banking agencies could require additional information in call reports and other record-keeping measures to address any residual concerns on this point.

Summary

To summarize, we request that the FDIC:

- separate market reform from the amendments to the Safe Harbor, so as to provide an ongoing Safe Harbor that investors and rating agencies can reasonably rely upon in making investment and rating decisions;

- provide a safe harbor for on-balance sheet securitizations that fully shields the related transfers from repudiation, by using the "reclaim, recover or recharacterize" language appearing in the paragraph (d)(3) and the existing Safe Harbor;

- reiterate its confirmation that a legal true sale is ordinarily not subject to repudiation, and confirm that this result is not contingent on the accounting treatment of the transfer; and

- confirm that assets transferred in a legal true sale are not subject to the IDI Property Consent Requirement, again regardless of the accounting treatment of the transfer.

All of these points are crucial to providing the legal certainty required for a robust ABS market and secondary market in financial assets. We do not believe that any of them compromise other FDIC policy objectives.

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Thank you for this opportunity to comment on the ANPR. Should you have any questions relating to our comments, please feel free to contact Rob Hugi (312/701-7121; rhugi@mayerbrown.com), Jason Kravitt (212/506-2622; jkravitt@mayerbrown.com) or Stu Litwin (312/701-7373; slitwin@mayerbrown.com).

Yours truly,

Mayer Brown LLP