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FDIC Board Approves NPR Regarding Safe Harbor Protection for Securitizations

The Board of Directors of the Federal Deposit Insurance Corporation (FDIC) today approved a Notice of Proposed Rulemaking (NPR) to clarify the safe harbor protection in a conservatorship or receivership for financial assets transferred by an insured depository institution (IDI) in connection with a securitization or participation. This action was necessitated by the changes adopted by the Financial Accounting Standards Board in June 2009 to the accounting standards on which the FDIC's prior rule, 12 C.F.R. Part 360.6, was based.

In March, the FDIC Board extended a transitional safe harbor that permanently grandfathered securitization or participations in process through September 30, 2010. Earlier this year, the FDIC Board approved for public comment an ANPR regarding what standards should be applied to securitizations seeking safe harbor treatment for transactions created after September 30th. Conditions for safe harbor treatment focused on greater clarity in the securitization capital structure, enhanced disclosure requirements, and risk retention and origination requirements.

The FDIC received comments on the ANPR from a wide variety of interested parties. In response, the FDIC has proposed some changes to the standards in the NPR, but has retained a clear focus on improved transparency and a better alignment of incentives for strong underwriting in the securitization process. Among the key proposed changes from the sample regulatory text included with the ANPR, the FDIC is proposing 1) a 5% reserve fund for RMBS in order to cover potential put backs during the first year of the securitization, rather than the prior 12 month seasoning requirement; 2) required disclosure of any competing ownership interests held by the servicer, or its affiliates, in other loans secured by the same property; and 3) requiring deferred compensation only for rating agencies, rather than all service providers. The NPR also includes clarifications of the prior text to simplify compliance. Significantly, the FDIC's proposed disclosure and risk retention requirements are aligned with those proposed in April by the Securities and Exchange Commission. Upon final adoption by the SEC of the disclosure requirements in the new Regulation AB, the FDIC anticipates that compliance with those requirements will satisfy the disclosure requirements in the FDIC's proposed rule. The FDIC will continue to work closely with the SEC on these issues.

FDIC Chairman Bair said, "The market is clearly trying to find a new securitization model, with investors placing a premium on transparency throughout the process. With the system awash in cash, investor appetite is coming back. Now is the time to act to put prudent controls in place before the significant issues we saw during the crisis return."

"We must acknowledge the role that the "originate to distribute" model played during the crisis. Insured institutions and our economy have lost many billions because our mortgage finance system broke down."

"The proposed rule compliments other regulatory and legislative efforts to correct the weaknesses in securitization that contributed to the crisis. The proposed NPR will help support stronger, sustainable securitizations – that are consistent with securitization's role as a source of funding and risk management tool for insured banks."

The NPR will be open to public comment for 45 days following publication in the *Federal Register*.

Attachments:

Notice of Proposed Rulemaking (PDF Help)