

## Federal Deposit Insurance Corporation

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### § 360.4 Administrative expenses.

The priority for *administrative expenses of the receiver*, as that term is used in section 11(d)(11) of the Act (12 U.S.C. 1821(d)(11)), shall include those necessary expenses incurred by the receiver in liquidating or otherwise resolving the affairs of a failed insured depository institution. Such expenses shall include pre-failure and post-failure obligations that the receiver determines are necessary and appropriate to facilitate the smooth and orderly liquidation or other resolution of the institution.

[60 FR 35488, July 10, 1995]

### § 360.5 Definition of qualified financial contracts.

(a) *Authority and purpose.* Sections 11(e) (8) through (10) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(e) (8) through (10), provide special rules for the treatment of qualified financial contracts of an insured depository institution for which the FDIC is appointed conservator or receiver, including rules describing the manner in which qualified financial contracts may be transferred or closed out. Section 11(e)(8)(D)(i) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(e)(8)(D)(i), grants the Corporation authority to determine by regulation whether any agreement, other than those identified within section 11(e)(8)(D), should be recognized as qualified financial contracts under the statute. The purpose of this section is to identify additional agreements which the Corporation has determined to be qualified financial contracts.

(b) *Repurchase agreements.* The following agreements shall be deemed “repurchase agreements” under section 11(e)(8)(D)(v) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1821(e)(8)(D)(v)): A repurchase agreement on qualified foreign government securities is an agreement or combination of agreements (including master agreements) which provides for the transfer of securities that are direct obligations of, or that are fully guaranteed by, the central governments (as set forth at 12 CFR 324.2 (definition of sovereign exposure), as may be amended from time to time) of the OECD-

based group of countries (as generally discussed in 12 CFR 324.32) against the transfer of funds by the transferee of such securities with a simultaneous agreement by such transferee to transfer to the transferor thereof securities as described above, at a date certain not later than one year after such transfers or on demand, against the transfer of funds.

(c) *Swap agreements.* The following agreements shall be deemed “swap agreements” under section 11(e)(8)(D)(vi) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1821(e)(8)(D)(vi)): A spot foreign exchange agreement is any agreement providing for or effecting the purchase or sale of one currency in exchange for another currency (or a unit of account established by an intergovernmental organization such as the European Currency Unit) with a maturity date of two days or less after the agreement has been entered into, and includes short-dated transactions such as tomorrow/next day and same day/tomorrow transactions.

(d) Nothing in this section shall be construed as limiting or changing a party’s obligation to comply with all reasonable trading practices and requirements, non-insolvency law requirements and any other requirements imposed by other provisions of the FDI Act. This section in no way limits the authority of the Corporation to take supervisory or enforcement actions, or to otherwise manage the affairs of a financial institution for which the Corporation has been appointed conservator or receiver.

[60 FR 66865, Dec. 27, 1995, as amended at 78 FR 55595, Sept. 10, 2013; 83 FR 17741, Apr. 24, 2018]

### § 360.6 Treatment of financial assets transferred in connection with a securitization or participation.

(a) *Definitions—*

(1) *Applicable compliance date* means, with respect to a securitization, the date on which compliance with Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act is required with respect to that securitization.

(2) *Financial asset* means cash or a contract or instrument that conveys to one entity a contractual right to receive cash or another financial instrument from another entity.

(3) *Investor* means a person or entity that owns an obligation issued by an issuing entity.

(4) *Issuing entity* means an entity that owns a financial asset or financial assets transferred by the sponsor and issues obligations supported by such asset or assets. Issuing entities may include, but are not limited to, corporations, partnerships, trusts, and limited liability companies and are commonly referred to as special purpose vehicles or special purpose entities. To the extent a securitization is structured as a multi-step transfer, the term issuing entity would include both the issuer of the obligations and any intermediate entities that may be a transferee. Notwithstanding the foregoing, a Specified GSE or an entity established or guaranteed by a Specified GSE shall not constitute an issuing entity.

(5) *Monetary default* means a default in the payment of principal or interest when due following the expiration of any cure period.

(6) *Obligation* means a debt or equity (or mixed) beneficial interest or security that is primarily serviced by the cash flows of one or more financial assets or financial asset pools, either fixed or revolving, that by their terms convert into cash within a finite time period, or upon the disposition of the underlying financial assets, and by any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders issued by an issuing entity. The term may include beneficial interests in a grantor trust, common law trust or similar issuing entity to the extent that such interests satisfy the criteria set forth in the preceding sentence, but does not include LLC interests, partnership interests, common or preferred equity, or similar instruments evidencing ownership of the issuing entity.

(7) *Participation* means the transfer or assignment of an undivided interest in all or part of a financial asset, that has all of the characteristics of a “participating interest,” from a seller, known as the “lead,” to a buyer, known as the

“participant,” without recourse to the lead, pursuant to an agreement between the lead and the participant. “Without recourse” means that the participation is not subject to any agreement that requires the lead to repurchase the participant’s interest or to otherwise compensate the participant upon the borrower’s default on the underlying obligation.

(8) *Securitization* means the issuance by an issuing entity of obligations for which the investors are relying on the cash flow or market value characteristics and the credit quality of transferred financial assets (together with any external credit support permitted by this section) to repay the obligations.

(9) *Servicer* means any entity responsible for the management or collection of some or all of the financial assets on behalf of the issuing entity or making allocations or distributions to holders of the obligations, including reporting on the overall cash flow and credit characteristics of the financial assets supporting the securitization to enable the issuing entity to make payments to investors on the obligations. The term “servicer” does not include a trustee for the issuing entity or the holders of obligations that makes allocations or distributions to holders of the obligations if the trustee receives such allocations or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer.

(10) *Specified GSE* means each of the following:

- (i) The Federal National Mortgage Association and any affiliate thereof;
- (ii) Federal Home Loan Mortgage Corporation and any affiliate thereof;
- (iii) The Government National Mortgage Association; and
- (iv) Any federal or state sponsored mortgage finance agency.

(11) *Sponsor* means a person or entity that organizes and initiates a securitization by transferring financial assets, either directly or indirectly, including through an affiliate, to an issuing entity, whether or not such person owns an interest in the issuing entity or owns any of the obligations issued by the issuing entity.

(12) *Transfer* means:

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(i) The conveyance of a financial asset or financial assets to an issuing entity or

(ii) The creation of a security interest in such asset or assets for the benefit of the issuing entity.

(b) *Coverage.* This section shall apply to securitizations that meet the following criteria:

(1) *Capital Structure and Financial Assets.* The documents creating the securitization must define the payment structure and capital structure of the transaction.

(i) *Requirements applicable to all securitizations:*

(A) The securitization shall not consist of re-securitizations of obligations or collateralized debt obligations unless the documents creating the securitization require that disclosures required in paragraph (b)(2) of this section are made available to investors for the underlying assets supporting the securitization at initiation and while obligations are outstanding; and

(B) The documents creating the securitization shall require that payment of principal and interest on the securitization obligation must be primarily based on the performance of financial assets that are transferred to the issuing entity and, except for interest rate or currency mismatches between the financial assets and the obligations, shall not be contingent on market or credit events that are independent of such financial assets. The securitization may not be an unfunded securitization or a synthetic transaction.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) The capital structure of the securitization shall be limited to no more than six credit tranches and cannot include "sub-tranches," grantor trusts or other structures. Notwithstanding the foregoing, the most senior credit tranche may include time-based sequential pay or planned amortization and companion sub-tranches; and

(B) The credit quality of the obligations cannot be enhanced at the issuing entity or pool level through external credit support or guarantees. However, the credit quality of the obligations

may be enhanced by credit support or guarantees provided by Specified GSEs and the temporary payment of principal and/or interest may be supported by liquidity facilities, including facilities designed to permit the temporary payment of interest following appointment of the FDIC as conservator or receiver. Individual financial assets transferred into a securitization may be guaranteed, insured or otherwise benefit from credit support at the loan level through mortgage and similar insurance or guarantees, including by private companies, agencies or other governmental entities, or government-sponsored enterprises, and/or through co-signers or other guarantees.

(2) *Disclosures.* The documents shall require that the sponsor, issuing entity, and/or servicer, as appropriate, shall make available to investors, information describing the financial assets, obligations, capital structure, compensation of relevant parties, and relevant historical performance data set forth in paragraph (b)(2) of this section.

(i) *Requirements applicable to all securitizations:*

(A) In the case of an issuance of obligations that is subject to 17 CFR part 229, subpart 229.1100 (Regulation AB of the Securities and Exchange Commission (Regulation AB)), the documents shall require that, on or prior to issuance of obligations and at the time of delivery of any periodic distribution report and, in any event, at least once per calendar quarter, while obligations are outstanding, information about the obligations and the securitized financial assets shall be disclosed to all potential investors at the financial asset or pool level, as appropriate for the financial assets, and security-level to enable evaluation and analysis of the credit risk and performance of the obligations and financial assets. The documents shall require that such information and its disclosure, at a minimum, shall comply with the requirements of Regulation AB. Information that is unknown or not available to the sponsor or the issuer after reasonable investigation may be omitted if the issuer includes a statement in the offering documents disclosing that the specific information is otherwise unavailable;

(B) The documents shall require that, on or prior to issuance of obligations, the structure of the securitization and the credit and payment performance of the obligations shall be disclosed, including the capital or tranche structure, the priority of payments and specific subordination features; representations and warranties made with respect to the financial assets, the remedies for and the time permitted for cure of any breach of representations and warranties, including the repurchase of financial assets, if applicable; liquidity facilities and any credit enhancements permitted by this rule, any waterfall triggers or priority of payment reversal features; and policies governing delinquencies, servicer advances, loss mitigation, and write-offs of financial assets;

(C) The documents shall require that while obligations are outstanding, the issuing entity shall provide to investors information with respect to the credit performance of the obligations and the financial assets, including periodic and cumulative financial asset performance data, delinquency and modification data for the financial assets, substitutions and removal of financial assets, servicer advances, as well as losses that were allocated to such tranche and remaining balance of financial assets supporting such tranche, if applicable, and the percentage of each tranche in relation to the securitization as a whole; and

(D) In connection with the issuance of obligations, the documents shall require that the nature and amount of compensation paid to the originator, sponsor, rating agency or third-party advisor, any mortgage or other broker, and the servicer(s), and the extent to which any risk of loss on the underlying assets is retained by any of them for such securitization be disclosed. The securitization documents shall require the issuer to provide to investors while obligations are outstanding any changes to such information and the amount and nature of payments of any deferred compensation or similar arrangements to any of the parties.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) Prior to issuance of obligations, sponsors shall disclose loan level information about the financial assets including, but not limited to, loan type, loan structure (for example, fixed or adjustable, resets, interest rate caps, balloon payments, etc.), maturity, interest rate and/or Annual Percentage Rate, and location of property; and

(B) Prior to issuance of obligations, sponsors shall affirm compliance in all material respects with applicable statutory and regulatory standards for origination of mortgage loans, including that the mortgages are underwritten at the fully indexed rate relying on documented income, and comply with 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 other or additional guidance applicable at the time of loan origination. Sponsors shall disclose a third party due diligence report on compliance with such standards and the representations and warranties made with respect to the financial assets; and

(C) The documents shall require that prior to issuance of obligations and while obligations are outstanding, servicers shall disclose any ownership interest by the servicer or an affiliate of the servicer in other whole loans secured by the same real property that secures a loan included in the financial asset pool. The ownership of an obligation, as defined in this regulation, shall not constitute an ownership interest requiring disclosure.

(3) *Documentation and recordkeeping.* The documents creating the securitization must specify the respective contractual rights and responsibilities of all parties and include the requirements described in paragraph (b)(3) of this section and use as appropriate any available standardized documentation for each different asset class.

(i) *Requirements applicable to all securitizations.* The documents shall define the contractual rights and responsibilities of the parties, including but

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not limited to representations and warranties and ongoing disclosure requirements, and any measures to avoid conflicts of interest; and provide authority for the parties, including but not limited to the originator, sponsor, servicer, and investors, to fulfill their respective duties and exercise their rights under the contracts and clearly distinguish between any multiple roles performed by any party.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) Servicing and other agreements must provide servicers with authority, subject to contractual oversight by any master servicer or oversight advisor, if any, to mitigate losses on financial assets consistent with maximizing the net present value of the financial asset. Servicers shall have the authority to modify assets to address reasonably foreseeable default, and to take other action to maximize the value and minimize losses on the securitized financial assets. The documents shall require that the servicers apply industry best practices for asset management and servicing. The documents shall require the servicer to act for the benefit of all investors, and not for the benefit of any particular class of investors, that the servicer maintain records of its actions to permit full review by the trustee or other representative of the investors and that the servicer must commence action to mitigate losses no later than ninety (90) days after an asset first becomes delinquent unless all delinquencies have been cured, *provided* that this requirement shall not be deemed to require that the documents include any provision concerning loss mitigation that requires any action that may conflict with the requirements of Regulation X (12 CFR part 1024), as Regulation X may be amended or modified from time to time.

(B) The servicing agreement shall not require a primary servicer to advance delinquent payments of principal and interest for more than three payment periods, unless financing or reimbursement facilities are available, which may include, but are not limited to, the obligations of the master servicer

or issuing entity to fund or reimburse the primary servicer, or alternative reimbursement facilities. Such “financing or reimbursement facilities” under this paragraph shall not be dependent for repayment on foreclosure proceeds.

(4) *Compensation.* The following requirements apply only to securitizations in which the financial assets include any residential mortgage loans. Compensation to parties involved in the securitization of such financial assets must be structured to provide incentives for sustainable credit and the long-term performance of the financial assets and securitization as follows:

(i) The documents shall require that any fees or other compensation for services payable to credit rating agencies or similar third-party evaluation companies shall be payable, in part, over the five (5) year period after the first issuance of the obligations based on the performance of surveillance services and the performance of the financial assets, with no more than sixty (60) percent of the total estimated compensation due at closing; and

(ii) The documents shall provide that compensation to servicers shall include incentives for servicing, including payment for loan restructuring or other loss mitigation activities, which maximizes the net present value of the financial assets. Such incentives may include payments for specific services, and actual expenses, to maximize the net present value or a structure of incentive fees to maximize the net present value, or any combination of the foregoing that provides such incentives.

(5) *Origination and retention requirements—(i) Requirements applicable to all securitizations.* (A) Prior to the applicable compliance date for regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the documents creating the securitization shall require that the sponsor retain an economic interest in a material portion, defined as not less than five (5) percent, of the credit risk of the financial assets. This retained interest may be either in the form of an interest of not

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less than five (5) percent in each of the credit tranches sold or transferred to the investors or in a representative sample of the securitized financial assets equal to not less than five (5) percent of the principal amount of the financial assets at transfer. This retained interest may not be sold, pledged or hedged, except for the hedging of interest rate or currency risk, during the term of the securitization.

(B) For any securitization that closes upon or following the applicable compliance date for regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the documents creating the securitization shall instead require retention of an economic interest in the credit risk of the financial assets in accordance with such regulations, including the restrictions on sale, pledging and hedging set forth therein.

(C) Notwithstanding paragraph (b)(5)(i)(A) of this section, for any securitization that closes following November 24, 2015 and prior to the applicable compliance date for regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, at the option of the sponsor, the requirements of paragraph (b)(5)(i)(B) of this section may be satisfied if (in lieu of the requirement set forth in paragraph (b)(5)(i)(A) of this section) the documents creating the securitization require retention of an economic interest in the credit risk of the financial assets in accordance with the requirements of the Section 15G regulations as though such regulations were then in effect.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) The documents shall require the establishment of a reserve fund equal to at least five (5) percent of the cash proceeds of the securitization payable to the sponsor to cover the repurchase of any financial assets required for breach of representations and warranties. The balance of such fund, if any,

shall be released to the sponsor one year after the date of issuance.

(B) The documents shall include a representation that the assets shall have been originated in all material respects in compliance with statutory, regulatory, and originator underwriting standards in effect at the time of origination. The documents shall include a representation that the mortgages included in the securitization were underwritten at the fully indexed rate, based upon the borrowers' ability to repay the mortgage according to its terms, and rely on documented income and comply with all 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 other or additional regulations or guidance applicable to insured depository institutions at the time of loan origination. Residential mortgages originated prior to the issuance of such guidance shall meet all supervisory guidance governing the underwriting of residential mortgages then in effect at the time of loan origination.

(c) *Other requirements.* (1) The transaction should be an arms length, bona fide securitization transaction. The documents shall require that the obligations issued in a securitization shall not be predominantly sold to an affiliate (other than a wholly-owned subsidiary consolidated for accounting and capital purposes with the sponsor) or insider of the sponsor;

(2) The securitization agreements are in writing, approved by the board of directors of the bank or its loan committee (as reflected in the minutes of a meeting of the board of directors or committee), and have been, continuously, from the time of execution in the official record of the bank;

(3) The securitization was entered into in the ordinary course of business, not in contemplation of insolvency and with no intent to hinder, delay or defraud the bank or its creditors;

(4) The transfer was made for adequate consideration;

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(5) The transfer and/or security interest was properly perfected under the UCC or applicable state law;

(6) The transfer and duties of the sponsor as transferor must be evidenced in a separate agreement from its duties, if any, as servicer, custodian, paying agent, credit support provider or in any capacity other than the transferor; and

(7) The documents shall require that the sponsor separately identify in its financial asset data bases the financial assets transferred into any securitization and maintain an electronic or paper copy of the closing documents for each securitization in a readily accessible form, a current list of all of its outstanding securitizations and issuing entities, and the most recent Form 10-K, if applicable, or other periodic financial report for each securitization and issuing entity. The documents shall provide that to the extent serving as servicer, custodian or paying agent for the securitization, the sponsor shall not comingle amounts received with respect to the financial assets with its own assets except for the time, not to exceed two business days, necessary to clear any payments received. The documents shall require that the sponsor shall make these records readily available for review by the FDIC promptly upon written request.

(d) *Safe harbor*—(1) *Participations*. With respect to transfers of financial assets made in connection with participations, the FDIC as conservator or receiver shall not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership any such transferred financial assets, provided that such transfer satisfies the conditions for sale accounting treatment under generally accepted accounting principles, except for the “legal isolation” condition that is addressed by this section. The foregoing paragraph shall apply to a last-in, first-out participation, provided that the transfer of a portion of the financial asset satisfies the conditions for sale accounting treatment under generally accepted accounting principles that would have applied to such portion if it had met

the definition of a “participating interest,” except for the “legal isolation” condition that is addressed by this section.

(2) *Transition period safe harbor*. With respect to:

(i) Any participation or securitization for which transfers of financial assets were made on or before December 31, 2010 or

(ii) Any obligations of revolving trusts or master trusts, for which one or more obligations were issued as of the date of adoption of this rule, or

(iii) Any obligations issued under open commitments up to the maximum amount of such commitments as of the date of adoption of this rule if one or more obligations were issued under such commitments on or before December 31, 2010, the FDIC as conservator or receiver shall not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership the transferred financial assets notwithstanding that the transfer of such financial assets does not satisfy all conditions for sale accounting treatment under generally accepted accounting principles as effective for reporting periods after November 15, 2009, provided that such transfer satisfied the conditions for sale accounting treatment under generally accepted accounting principles in effect for reporting periods before November 15, 2009, except for the “legal isolation” condition that is addressed by this paragraph and the transaction otherwise satisfied the provisions of §360.6 in effect prior to the effective date of this regulation.

(3) *For securitizations meeting sale accounting requirements*. With respect to any securitization for which transfers of financial assets were made after December 31, 2010, or from a master trust or revolving trust established after adoption of this rule or from any open commitments that do not meet the requirements of paragraph (d)(2) of this section, and which complies with the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section, the FDIC as conservator or receiver shall

not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership such transferred financial assets, provided that such transfer satisfies the conditions for sale accounting treatment under generally accepted accounting principles in effect for reporting periods after November 15, 2009, except for the “legal isolation” condition that is addressed by this paragraph (d)(3).

(4) *For securitization not meeting sale accounting requirements.* With respect to any securitization for which transfers of financial assets were made after December 31, 2010, or from a master trust or revolving trust established after adoption of this rule or from any open commitments that do not meet the requirements of paragraph (d)(2) or (d)(3) of this section, and which complies with the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section, but where the transfer does not satisfy the conditions for sale accounting treatment set forth by generally accepted accounting principles in effect for reporting periods after November 15, 2009:

(i) *Monetary default.* If at any time after appointment, the FDIC as conservator or receiver is in a monetary default under a securitization due to its failure to pay or apply collections from the financial assets received by it in accordance with the securitization documents, whether as servicer or otherwise, and remains in monetary default for ten (10) business days after actual delivery of a written notice to the FDIC pursuant to paragraph (f) of this section requesting the exercise of contractual rights because of such monetary default, the FDIC hereby consents pursuant to 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2) to the exercise of any contractual rights in accordance with the documents governing such securitization, including but not limited to taking possession of the financial assets and exercising self-help remedies as a secured creditor under the transfer agreements, provided no involvement of the receiver or conservator is required other than such consents, waivers, or execution of transfer documents as may be reasonably re-

quested in the ordinary course of business in order to facilitate the exercise of such contractual rights. Such consent shall not waive or otherwise deprive the FDIC or its assignees of any seller’s interest or other obligation or interest issued by the issuing entity and held by the FDIC or its assignees, but shall serve as full satisfaction of the obligations of the insured depository institution in conservatorship or receivership and the FDIC as conservator or receiver for all amounts due.

(ii) *Repudiation.* If the FDIC as conservator or receiver provides a written notice of repudiation of the securitization agreement pursuant to which the financial assets were transferred, and the FDIC does not pay damages, defined in this paragraph, within ten (10) business days following the effective date of the notice, the FDIC hereby consents pursuant to 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2) to the exercise of any contractual rights in accordance with the documents governing such securitization, including but not limited to taking possession of the financial assets and exercising self-help remedies as a secured creditor under the transfer agreements, provided no involvement of the receiver or conservator is required other than such consents, waivers, or execution of transfer documents as may be reasonably requested in the ordinary course of business in order to facilitate the exercise of such contractual rights. For purposes of this paragraph, the damages due shall be in an amount equal to the par value of the obligations outstanding on the date of appointment of the conservator or receiver, less any payments of principal received by the investors through the date of repudiation, plus unpaid, accrued interest through the date of repudiation in accordance with the contract documents to the extent actually received through payments on the financial assets received through the date of repudiation. Upon payment of such repudiation damages, all liens or claims on the financial assets created pursuant to the securitization documents shall be released. Such consent shall not waive or otherwise deprive the FDIC or its assignees of any seller’s interest or other obligation or interest issued by the



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issuing entity and held by the FDIC or its assignees, but shall serve as full satisfaction of the obligations of the insured depository institution in conservatorship or receivership and the FDIC as conservator or receiver for all amounts due.

(iii) *Effect of repudiation.* If the FDIC repudiates or disaffirms a securitization agreement, it shall not assert that any interest payments made to investors in accordance with the securitization documents before any such repudiation or disaffirmance remain the property of the conservatorship or receivership.

(e) *Consent to certain actions.* Prior to repudiation or, in the case of a monetary default referred to in paragraph (d)(4)(i) of this section, prior to the effectiveness of the consent referred to therein, the FDIC as conservator or receiver consents pursuant to 12 U.S.C. 1821(e)(13)(C) to the making of, or if serving as servicer, shall make, the payments to the investors to the extent actually received through payments on the financial assets (but in the case of repudiation, only to the extent supported by payments on the financial assets received through the date of the giving of notice of repudiation) in accordance with the securitization documents, and, subject to the FDIC's rights to repudiate such agreements, consents to any servicing activity required in furtherance of the securitization or, if acting as servicer the FDIC as receiver or conservator shall perform such servicing activities in accordance with the terms of the applicable servicing agreements, with respect to the financial assets included in securitizations that meet the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section.

(f) *Notice for consent.* Any party requesting the FDIC's consent as conservator or receiver under 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2) pursuant to paragraph (d)(4)(i) of this section shall provide notice to the Deputy Director, Division of Resolutions and Receiverships, Federal Deposit Insurance Corporation, 550 17th Street, NW., F-7076, Washington, DC 20429-0002, and a statement of the basis upon which such request is made, and copies

of all documentation supporting such request, including without limitation a copy of the applicable agreements and of any applicable notices under the contract.

(g) *Contemporaneous requirement.* The FDIC will not seek to avoid an otherwise legally enforceable agreement that is executed by an insured depository institution in connection with a securitization or in the form of a participation solely because the agreement does not meet the "contemporaneous" requirement of 12 U.S.C. 1821(d)(9), 1821(n)(4)(I), or 1823(e).

(h) *Limitations.* The consents set forth in this section do not act to waive or relinquish any rights granted to the FDIC in any capacity, pursuant to any other applicable law or any agreement or contract except as specifically set forth herein. Nothing contained in this section alters the claims priority of the securitized obligations.

(i) *No waiver.* Except as specifically set forth herein, this section does not authorize, and shall not be construed as authorizing the waiver of the prohibitions in 12 U.S.C. 1825(b)(2) against levy, attachment, garnishment, foreclosure, or sale of property of the FDIC, nor does it authorize nor shall it be construed as authorizing the attachment of any involuntary lien upon the property of the FDIC. Nor shall this section be construed as waiving, limiting or otherwise affecting the rights or powers of the FDIC to take any action or to exercise any power not specifically mentioned, including but not limited to any rights, powers or remedies of the FDIC regarding transfers or other conveyances taken in contemplation of the institution's insolvency or with the intent to hinder, delay or defraud the institution or the creditors of such institution, or that is a fraudulent transfer under applicable law.

(j) *No assignment.* The right to consent under 12 U.S.C. 1821(e)(13)(C) or 12 U.S.C. 1825(b)(2), may not be assigned or transferred to any purchaser of property from the FDIC, other than to a conservator or bridge bank.

(k) *Repeal.* This section may be repealed by the FDIC upon 30 days notice provided in the FEDERAL REGISTER, but any repeal shall not apply to any

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issuance made in accordance with this section before such repeal.

[75 FR 60297, Sept. 30, 2010, as amended at 80 FR 73089, Nov. 24, 2015; 81 FR 41423, June 27, 2016; 85 FR 12731, Mar. 4, 2020]

### § 360.7 Post-insolvency interest.

(a) *Purpose and scope.* This section establishes rules governing the calculation and distribution of post-insolvency interest to creditors with proven claims in all FDIC-administered receiverships established after June 13, 2002.

(b) *Definitions*—(1) *Equityholder.* The owner of an equity interest in a failed depository institution, whether such ownership is represented by stock, membership in a mutual association, or otherwise.

(2) *Post-insolvency interest.* Interest calculated from the date the receivership is established on proven creditor claims in receiverships with surplus funds.

(3) *Post-insolvency interest rate.* For any calendar quarter, the coupon equivalent yield of the average discount rate set on the three-month Treasury bill at the last auction held by the United States Treasury Department during the preceding calendar quarter, and adjusted each quarter thereafter.

(4) *Principal amount.* The proven claim amount and any interest accrued thereon as of the date the receivership is established.

(5) *Proven claim.* A claim that is allowed by a receiver or upon which a final non-appealable judgment has been entered in favor of a claimant against a receivership by a court with jurisdiction to adjudicate the claim.

(c) *Post-insolvency interest distributions.* (1) Post-insolvency interest shall only be distributed following satisfaction by the receiver of the principal amount of all creditor claims.

(2) The receiver shall distribute post-insolvency interest at the post-insolvency interest rate prior to making any distribution to equityholders. Post-insolvency interest distributions shall be made in the order of priority set forth in section 11(d)(11)(A) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(d)(11)(A).

(3) Post-insolvency interest distributions shall be made at such time as the

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receiver determines that such distributions are appropriate and only to the extent of funds available in the receivership estate. Post-insolvency interest shall be calculated on the outstanding balance of a proven claim, as reduced from time to time by any interim dividend distributions, from the date the receivership is established until the principal amount of a proven claim has been fully distributed but not thereafter. Post-insolvency interest shall be calculated on a contingent claim from the date such claim becomes proven.

(4) Post-insolvency interest shall be determined using a simple interest method of calculation.

[67 FR 34386, May 14, 2002]

### § 360.8 Method for determining deposit and other liability account balances at a failed insured depository institution.

(a) *Purpose.* The purpose of this section is to describe the process the FDIC will use to determine deposit and other liability account balances for insurance coverage and receivership purposes at a failed insured depository institution.

(b) *Definitions.* (1) The *FDIC Cutoff Point* means the point in time the FDIC establishes after it has been appointed receiver of a failed insured depository institution and takes control of the failed institution.

(2) The *Applicable Cutoff Time* for a specific type of deposit account transaction means the *earlier* of either the failed institution's normal cutoff time for that specific type of transaction or the *FDIC Cutoff Point*.

(3) *Close-of-Business Account Balance* means the closing end-of-day ledger balance of a deposit or other liability account on the day of failure of an insured depository institution determined by using the *Applicable Cutoff Times*. This balance may be adjusted to reflect steps taken by the receiver to ensure that funds are not received by or removed from the institution after the *FDIC Cutoff Point*.

(4) A *sweep account* is an account held pursuant to a contract between an insured depository institution and its customer involving the pre-arranged,