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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 360

RIN 3064–AC28

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

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (the FDIC) has adopted a rule regarding the treatment by the FDIC, as receiver or conservator of an insured depository institution, of financial assets transferred by the institution in connection with a securitization or in the form of a participation. The rule resolves issues raised by Financial Accounting Standards Board (FASB) Statement No. 125, Accounting for Transfers and Servicing of Financial Assets and Extinguishment of Liabilities (SFAS 125). The rule provides that with respect to financial assets transferred by an institution in connection with a securitization or in the form of a participation, and subject to certain conditions described in the rule, the FDIC will not seek to recover or reclaim such financial assets in exercising its statutory authority to repudiate contracts pursuant to section 11(e) of the Federal Deposit Insurance Act. The rule also provides that the FDIC will not seek to enforce the ''contemporaneous'' requirement of sections 11(d)(9), 11(n)(4)(I), and 13(e). The final rule applies to securitizations and participations that are engaged in while the rule is in effect, even if the rule is later repealed or amended.

EFFECTIVE DATE: September 11, 2000.

FOR FURTHER INFORMATION CONTACT: Michael Krimminger, Division of Resolutions and Receiverships, (202) 898–8950; Robert Storch, Division of Supervision, (202) 898–8906; or Thomas Bolt, Legal Division, (202) 736–0168, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to 12 U.S.C. 1821(e)(1), the FDIC, when acting as conservator or receiver of any insured depository institution, has the power to disaffirm or repudiate any contract or lease (i) to which the institution is a party; (ii) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and (iii) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs. Repudiation of a contract relieves the FDIC from performing any unperformed obligations remaining under the contract. Repudiation also entitles the other party to the contract to a claim for damages, which are limited by statute to actual direct compensatory damages determined as of the date of the appointment of the receiver or conservator. See 12 U.S.C. 1821(e)(3).

In addition, pursuant to 12 U.S.C. 1821(d)(9), 1821(n)(4)(I), and 1823(e), no agreement that tends to diminish or defeat the FDIC's interest in an asset acquired from an insured depository institution is enforceable against the FDIC unless such agreement meets certain requirements. One of those requirements is that the agreement be executed by the depository institution and by any person claiming an adverse interest thereunder contemporaneously with the acquisition of the asset by the institution. This is referred to as the ''contemporaneous'' requirement.

Under generally accepted accounting principles, a transfer of financial assets is accounted for as a sale if the transferor surrenders control over the assets. One of the conditions for determining whether the transferor has surrendered control is that the assets have been isolated from the transferor, *i.e.,* put presumptively beyond the reach of the transferor and its creditors, even in bankruptcy or receivership. This is known as the ''legal isolation'' condition.

Whether the legal isolation condition has been met is determined primarily from a legal perspective. This determination involves considerations of the kind of receivership into which the transferor may be placed and the powers of the receiver to reach assets that were transferred prior to its appointment. If the available evidence provides reasonable assurance that the transferred assets would be beyond the reach of the powers of a bankruptcy trustee or receiver for the transferor, then a determination that the transferred assets have been legally isolated is appropriate.

Where the transferor is an insured depository institution for which the FDIC may be appointed as conservator or receiver, the issue arises whether financial assets transferred by the institution in connection with a securitization or in the form of a participation would be put beyond the reach of the FDIC as conservator or receiver for the institution in light of (i) the statutory authority of the FDIC to repudiate contracts to which such institution is a party and (ii) the provisions of sections 11(d)(9), 11(n)(4)(I), and 13(e) of the Federal Deposit Insurance Act regarding the enforceability of agreements against the FDIC. The specific issues are whether the FDIC might, in the exercise of its authority to repudiate contracts, avoid a transfer of financial assets in connection with a securitization or in the form of a participation, and recover such assets; and whether the FDIC might challenge the enforceability of an agreement executed in relation to a transfer of financial assets in connection with a securitization or a participation by asserting the ''contemporaneous'' requirement with respect to such an agreement.

The final rule resolves these issues by clarifying the powers of the FDIC as conservator or receiver with respect to financial assets transferred by an insured depository institution in connection with a securitization or in the form of a participation. The FDIC believes that this clarification should provide sufficient assurance to determine that the legal isolation condition is met.

II. Proposed Rule

In September 1999, the FDIC requested comments on a proposed rule [1] that provided that the FDIC shall not, by exercise of its authority to disaffirm or repudiate contracts under 12 U.S.C. 1821(e), reclaim, recover, or recharacterize as property of the institution or the receivership any financial assets transferred by an insured depository institution in connection with a securitization or in the form of a participation. The proposed rule would apply only to those securitizations or participations in which the transfer of financial assets meets all conditions for sale accounting treatment under generally accepted accounting principles, other than the ''legal isolation'' condition as it applies to institutions for which the FDIC may be appointed as conservator or receiver, which would be addressed by the proposed rule. The proposed rule defined both ''securitization'' and ''participation'', with ''participation'' specifically limited to participations that are ''without recourse'' to the selling or ''lead'' institution. ''Without recourse'' would mean that the participation must not be 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.

The proposed rule would not apply unless the insured depository institution received adequate consideration for the transfer of financial assets at the time of the transfer, and the documentation effecting the transfer of financial assets reflects the intent of the parties to treat the transaction as a sale, and not as a secured borrowing, for accounting purposes.

The proposed rule further provided that it shall not 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 limited by this section, including, but not limited to, any rights, powers or remedies of the FDIC regarding transfers 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.

The proposed rule clarified that although the repudiation of a securitization or participation will not affect transferred financial assets, repudiation will excuse the FDIC from performing any continuing obligations imposed by the securitization or participation. If the FDIC, in order to terminate such continuing obligations or duties, seeks to disaffirm or repudiate an agreement or contract under which an insured depository institution has transferred financial assets in connection with a securitization or in the form of a participation, the FDIC will not seek to reclaim, recover, or recharacterize as property of the institution or the receivership such financial assets.

The proposed rule further provided that the FDIC shall not seek to avoid an otherwise legally enforceable securitization agreement or participation agreement executed by an insured depository institution solely because such agreement does not meet the ''contemporaneous'' requirement of sections 11(d)(9), 11(n)(4)(I), and 13(e) of the Federal Deposit Insurance Act.

The proposed rule was intended to apply to securitizations and participations that are engaged in by insured depository institutions while the rule is in effect, even if the rule is later repealed. Consequently, the last paragraph of the proposed rule provided that the rule would be effective unless repealed by the FDIC upon 30 days notice and opportunity for comment provided in the **Federal Register**, but in the event of such repeal, the rule would continue to be effective with respect to any transfers made before the date of the repeal.

III. Summary of Comments

The FDIC received 14 comment letters concerning the proposed rule. The vast majority of the commenters expressed support for the rule.

One commenter specifically requested that FDIC counsel issue, concurrently with the adoption of the rule, a legal opinion confirming that paragraph (g) of the rule will bind receivers or conservators appointed after the repeal or amendment of the rule. In this commenter's view, such an opinion would be necessary for legal specialists ''* * * to render opinions that provide reasonable assurance that the legal isolation condition of SFAS 125 is met.'' Other commenters disagreed with this view, but endorsed the issuance of an FDIC legal opinion if this would resolve the issue. Two commenters expressed the view that such an opinion was unnecessary.

The FDIC believes that the final rule more than adequately provides reasonable assurance as to how the FDIC as conservator or receiver of a depository institution would treat financial assets transferred by the institution in connection with a securitization or in the form of a participation. Paragraph (g) of the rule, the safe harbor provision for transfers made in connection with a securitization or in the form of a participation that was in effect before any repeal or amendment of the rule, is clear and unambiguous. The FDIC believes that an opinion by FDIC counsel that paragraph (g) will bind receivers or conservators appointed after any repeal or amendment of the rule would not add anything that is not already contained in the rule itself or in this preamble.

Other commenters sought clarification regarding the term ''without recourse'' used in the definition of participation. While the presence of recourse does not necessarily require that a transaction be characterized as a security interest instead of as a sale, *see Major's Furniture Mart, Inc.* v. *Castle Credit Corporation, Inc.,* 602 F.2d 538 (3rd Cir. 1979), courts generally view a transaction as a participation only if the buyer does not have recourse against the seller when a default occurs on the underlying obligation. *See, e.g., In re Sackman Mortgage Corp.,* 158 B.R. 926, 931–34 (Bankr. S.D.N.Y. 1993). The final rule maintains this distinction.

The final rule's definition of a participation as a transfer of an interest in a loan or a lease without recourse by the buyer against the lead should not exclude participations in which (a) the lead retains a subordinated interest in the obligation, against which losses are initially allocated; (b) the lead participated a loan in order to avoid a statutory lending limit violation, with the option of reacquiring some or all of the transferred interest when reacquisition would not result in a lending limit violation; or (c) the participation agreement provided for repurchase or compensation in connection with customary representations and warranties regarding the underlying asset. Thus, the meaning of the term ''recourse'', as used in the final rule, differs from its meaning for purposes of the FDIC's risk-based capital standards, 12 CFR Part 325, Appendix A.

One commenter expressed concern regarding the effect of the proposed rule on (a) a transaction that purports to be a participation, but includes recourse against the lead, and (b) a transaction that purports to be a sale (not a participation) of all of a financial asset, but includes recourse against the seller. A transaction that purports to be a participation, but includes recourse against the lead, is not encompassed by the rule; the FDIC, under certain

[1] 64 FR 48968, Sept. 9, 1999.

circumstances, may recover previously transferred assets as a result of repudiation. As discussed, under the general legal view, a transaction that purports to be a participation but includes recourse against the lead would be characterized as a secured borrowing rather than as a participation. If the FDIC repudiated such a transaction, it would be entitled to recover any collateral to the extent that the value of the collateral exceeds the claim for repudiation damages, which is determined as of the date of the appointment of the conservator or receiver.

On the other hand, a transaction that purports to be a sale (not a participation) of all of a financial asset, even if it includes recourse against the seller, 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.

IV. Final Rule

The final rule is identical to the proposed rule except for the following. First, the proposed rule's definition of the term ''participation'' included language that referred to ''the borrower's default'' in describing the meaning of the term ''without recourse''. Since a participation may involve a lease as well as a loan, the final rule refers to ''a default on the underlying obligation'' instead of ''the borrower's default''.

Second, paragraph (g) of the final rule refers to any amendment of the rule, in addition to any repeal. Paragraph (g) of the final rule provides that any repeal or amendment of the rule by the FDIC shall not apply to any transfers of financial assets made in connection with a securitization or participation that was in effect before such repeal or amendment. The revision is intended to make paragraph (g) more effective as a safe harbor provision if the rule is ever repealed or amended in such a way as to preclude subsequent transfers of financial assets by depository institutions from satisfying the legal isolation requirement of SFAS 125. As a result of paragraph (g), if the FDIC is appointed as conservator or receiver of a depository institution after any repeal or amendment of the rule, the rule will continue to be effective with respect to a transfer that was made in connection with a securitization or participation in effect before the repeal or amendment. Thus, where a transfer of financial assets in connection with a securitization or in the form of a participation is made by a depository institution and the securitization or participation was in effect before any repeal or amendment of the rule by the FDIC, such transfer will continue to satisfy the legal isolation requirement notwithstanding the repeal or amendment.

The rule is not intended to describe the exclusive circumstances in which legal isolation may occur. For purposes of the rule, the term ''special purpose entity'' encompasses a trust (including a grantor or owner trust), a corporation, and a limited liability company or partnership organized in compliance with applicable state law.

V. Matters of Regulatory Procedure

Paperwork Reduction Act

No collection of information pursuant to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is contained in the final rule. Consequently, no information was submitted to the Office of Management and Budget for review.

Regulatory Flexibility Act

The final rule is consistent with the FDIC's current practice and does not represent a change in the law with respect to securitizations and participations. Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the final rule will not have a significant economic impact on a substantial number of small business entities.

Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the rule is not a ''major rule'' within the meaning of the relevant sections of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (5 U.S.C. 801 *et seq.*). As required by SBREFA, the FDIC will file the appropriate reports with Congress and the General Accounting Office so that the final rule may be reviewed.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105–277, 112 Stat. 2681 (1998).

List of Subjects in 12 CFR Part 360

Banks, banking, Savings associations.

For the reasons set out in the preamble, the FDIC Board of Directors amends 12 CFR part 360 as follows:

PART 360—RESOLUTION AND RECEIVERSHIP RULES

1. The authority citation for part 360 is revised to read as follows:

Authority: 12 U.S.C. 1821(d)(1), 1821(d)(11), 1821(e)(1), 1821(e)(8)(D)(i), 1823(c)(4), 1823(e)(2); Sec. 401(h), Pub. L. 101–73, 103 Stat. 357.

2. Section 360.6 is added to part 360 to read as follows:

§ 360.6 Treatment by the Federal Deposit Insurance Corporation as conservator or receiver of financial assets transferred in connection with a securitization or participation.

(a) *Definitions.* (1) *Beneficial interest* means debt or equity (or mixed) interests or obligations of any type issued by a special purpose entity that entitle their holders to receive payments that depend primarily on the cash flow from financial assets owned by the special purpose entity.

(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) *Participation* means the transfer or assignment of an undivided interest in all or part of a loan or a lease 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 due to a default on the underlying obligation.

(4) *Securitization* means the issuance by a special purpose entity of beneficial interests:

(i) The most senior class of which at time of issuance is rated in one of the four highest categories assigned to long-term debt or in an equivalent short-term category (within either of which there may be sub-categories or gradations indicating relative standing) by one or more nationally recognized statistical rating organizations, or

(ii) Which are sold in transactions by an issuer not involving any public offering for purposes of section 4 of the

Securities Act of 1933 (15 U.S.C. 77d), as amended, or in transactions exempt from registration under such Act pursuant to Regulation S thereunder (or any successor regulation).

(5) *Special purpose entity* means a trust, corporation, or other entity demonstrably distinct from the insured depository institution that is primarily engaged in acquiring and holding (or transferring to another special purpose entity) financial assets, and in activities related or incidental thereto, in connection with the issuance by such special purpose entity (or by another special purpose entity that acquires financial assets directly or indirectly from such special purpose entity) of beneficial interests.

(b) The FDIC shall not, by exercise of its authority to disaffirm or repudiate contracts under 12 U.S.C. 1821(e), reclaim, recover, or recharacterize as property of the institution or the receivership any financial assets transferred by an insured depository institution in connection with a securitization or participation, provided that such transfer meets all conditions for sale accounting treatment under generally accepted accounting principles, other than the ''legal isolation'' condition as it applies to institutions for which the FDIC may be appointed as conservator or receiver, which is addressed by this section.

(c) Paragraph (b) of this section shall not apply unless the insured depository institution received adequate consideration for the transfer of financial assets at the time of the transfer, and the documentation effecting the transfer of financial assets reflects the intent of the parties to treat the transaction as a sale, and not as a secured borrowing, for accounting purposes.

(d) Paragraph (b) of this section shall not be construed as waiving, limiting, or otherwise affecting the power of the FDIC, as conservator or receiver, to disaffirm or repudiate any agreement imposing continuing obligations or duties upon the insured depository institution in conservatorship or receivership.

(e) Paragraph (b) of this section shall not 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 limited by this section, including, but not limited to, any rights, powers or remedies of the FDIC regarding transfers 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.

(f) The FDIC shall not seek to avoid an otherwise legally enforceable securitization agreement or participation agreement executed by an insured depository institution solely because such agreement does not meet the ''contemporaneous'' requirement of sections 11(d)(9), 11(n)(4)(I), and 13(e) of the Federal Deposit Insurance Act (12 U.S.C. 1821(d)(9), (n)(4)(I), 1823(e).

(g) This section may be repealed or amended by the FDIC upon 30 days notice and opportunity for comment provided in the Federal Register, but any such repeal or amendment shall not apply to any transfers of financial assets made in connection with a securitization or participation that was in effect before such repeal or modification.

By order of the Board of Directors.

Dated at Washington, D.C. this 27th day of July, 2000.

Federal Deposit Insurance Corporation.

James D. LaPierre,

Deputy Executive Secretary.

[FR Doc. 00–20193 Filed 8–10–00; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 00–ACE–24]

Amendment to Class E Airspace; Washington, MO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This action amends the Class E airspace area at Washington Memorial Airport, Washington, MO. The FAA has developed Area Navigation (RNAV) Runway (RWY) 16 and RNAV RWY 34 Standard Instrument Approach Procedures (SIAPs) to serve Washington Memorial Airport, Washington, MO. Additional controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to accommodate these SIAPs and for Instrument Flight Rules (IFR) operations at this airport. The enlarged area will contain the RNAV RWY 16 and RNAV RWY 34 SIAPs in controlled airspace. A review of the VHF Omnidirectional Range (VOR) or Global Positioning System (GPS) RWY 16 indicates the approach will be contained within the Class E airspace established in this rule. Therefore, the extension to the north is eliminated.

In addition a minor revision to the Airport Reference Point (ARP) is included in this document.

The intended effect of this rule is to provide controlled Class E airspace for aircraft executing RNAV RWY 16 and RNAV RWY 34 SIAPs, eliminate the extension to the north, revise the ARP and to segregate aircraft using instrument approach procedures in instrument conditions from aircraft operating in visual conditions.

DATES: This direct final rule is effective on 0901 UTC, November 30, 2000.

Comments for inclusion in the Rules Docket must be received on or before October 4, 2000.

ADDRESSES: Send comments regarding the rule in triplicate to: Manager, Airspace Branch, Air Traffic Division, ACE–520, DOT Regional Headquarters Building, Federal Aviation Administration, Docket Number 00–ACE–24, 901 Locust, Kansas City, MO 64106.

The official docket may be examined in the Office of the Regional Counsel for the Central Region at the same address between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours in the Air Traffic Division at the same address listed above.

FOR FURTHER INFORMATION CONTACT: Brenda Mumper, Air Traffic Division, Airspace Branch, ACE–520A, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329–2524.

SUPPLEMENTARY INFORMATION: The FAA has developed RNAV RWY 16 and RNAV RWY 34 SIAPs to serve the Washington Memorial Airport, Washington, MO. The amendment to Class E airspace at Washington, MO, will provide additional controlled airspace at and above 700 feet AGL in order to contain the SIAPs within controlled airspace, and thereby facilitate separation of aircraft operating under Instrument Flight Rules (IFR). The amendment at Washington Memorial Airport, MO, will provide additional controlled airspace for aircraft operating under IFR, eliminate the extension to the north and revise the ARP. The area will be depicted on appropriate aeronautical charts.

Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9G, dated September 10, 1999, and effective September 16, 1999, which is