the end of the second calendar quarter for which it meets the criteria for a *CIDI.*

(3) Upon the merger of two or more *Non-CIDIs,* if the resulting institution meets the criteria for a *CIDI,* that *CIDI* must comply with the requirements of this section no later than 6 months after the effective date of the merger.

(4) Upon the merger of two or more *CIDIs,* the merged institution must comply with the requirements of this section within 6 months following the effective date of the merger. This provision, however, does not supplant any preexisting implementation date requirement, in place prior to the date of the merger, for the individual *CIDI(s)* involved in the merger.

(5) Upon the merger of one or more *CIDIs* with one or more *Non-CIDIs,* the merged institution must comply with the requirements of this section within 6 months following the effective date of the merger. This provision, however, does not supplant any preexisting implementation date requirement for the individual *CIDI(s)* involved in the merger.

(6) Notwithstanding the general requirements of this paragraph (d), on a case-by-case basis, the FDIC may accelerate, upon notice, the implementation and updating time frames for all or part of the requirements of this section.

(7) FDIC may, upon application of a CIDI and for good cause shown, modify or waive the minimum requirements set forth in this section for that institution. "Good cause" shall mean that, because of the CIDI's asset size, level of complexity, risk profile, scope of operations or other relevant characteristics, the FDIC is able to determine that the particular IDI does not, at the time of the application, appear to present material resolution challenges or other unusual risk to the Deposit Insurance Fund. Any such waiver or modification shall be effective for one year.

(e) *Confidentiality of Information Submitted Pursuant to this Section.* Proprietary information and information which, if disclosed, could endanger the institution's safety and soundness, should be identified and segregated to the extent possible, and be accompanied by a request for confidential treatment. Confidential information will not be disclosed except as required by law.

Dated at Washington, DC, this 11th day of May 2010.

By order of the Board of Directors.

Robert E. Feldman,

Executive Secretary, Federal Deposit Insurance Corporation.

[FR Doc. 2010–11646 Filed 5–14–10; 8:45 am]

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 360

RIN 3064–AD53

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 September 30, 2010

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking with request for comments.

SUMMARY: The Federal Deposit Insurance Corporation ("FDIC") proposes to adopt amendments to the 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 a participation after September 30, 2010 (the "Proposed Rule"). The Proposed Rule would continue the safe harbor for transferred financial assets in connection with securitizations in which the financial assets were transferred under the existing regulations. The Proposed Rule would clarify the conditions for a safe harbor for securitizations or participations issued after September 30, 2010. The Proposed Rule also sets forth safe harbor protections for securitizations that do not comply with the new accounting standards for off balance sheet treatment by providing for expedited access to the financial assets that are securitized if they meet the conditions defined in the Proposed Rule. The conditions contained in the Proposed Rule would serve to protect the Deposit Insurance Fund ("DIF") and the FDIC's interests as deposit insurer and receiver by aligning the conditions for the safe harbor with better and more sustainable securitization practices by insured depository institutions ("IDIs"). The FDIC seeks comment on the regulations, the scope of the safe harbors provided, and the terms and scope of the conditions included in the Proposed Rule.

DATES: Comments on this Notice of Proposed Rulemaking must be received by July 1, 2010.

ADDRESSES: You may submit comments on the Proposed Rule, by any of the following methods:

- *Agency Web Site: http://www.FDIC.gov/regulations/laws/federal/notices.html.* Follow instructions for submitting comments on the Agency Web Site.
- *E-mail: Comments@FDIC.gov.* Include RIN 3064–AD53 on the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, *Attention:* Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Instructions: All comments received will be posted generally without change to *http://www.fdic.gov/regulations/laws/federal/propose.html,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Michael Krimminger, Office of the Chairman, 202–898–8950; George Alexander, Division of Resolutions and Receiverships, (202) 898–3718; Robert Storch, Division of Supervision and Consumer Protection, (202) 898–8906; or R. Penfield Starke, Legal Division, (703) 562–2422, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Background

In 2000, the FDIC clarified the scope of its statutory authority as conservator or receiver to disaffirm or repudiate contracts of an insured depository institution with respect to transfers of financial assets by an IDI in connection with a securitization or participation when it adopted a regulation codified at 12 CFR 360.6 (the "Securitization Rule"). This rule provided that the FDIC as conservator or receiver would not use its statutory authority to disaffirm or repudiate contracts to reclaim, recover, or recharacterize as property of the institution or the receivership any financial assets transferred by an IDI in connection with a securitization or in the form of a participation, provided that such transfer meets all conditions for sale accounting treatment under generally accepted accounting principles ("GAAP"). The rule was a clarification, rather than a limitation, of the repudiation power. 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 sold and no longer reflected on the books and records on an IDI.

The Securitization Rule provided a "safe harbor" by confirming "legal isolation" if all other standards for off balance sheet accounting treatment, along with some additional conditions focusing on the enforceability of the transaction, were met by the transfer in connection with a securitization or a participation. Satisfaction of "legal isolation" was vital to securitization transactions because of the risk that the pool of financial assets transferred into the securitization trust could be recovered in bankruptcy or in a bank receivership. Generally, to satisfy the legal isolation condition, the transferred financial assets must have been presumptively placed beyond the reach of the transferor, its creditors, a bankruptcy trustee, or in the case of an IDI, the FDIC as conservator or receiver. The Securitization Rule, thus, addressed only purported sales which met the conditions for off balance sheet accounting treatment under GAAP.

Since its adoption, the Securitization Rule has been relied on by securitization participants, including rating agencies, as assurance that investors could look to securitized financial assets for payment without concern that the financial assets would be interfered with by the FDIC as conservator or receiver. Recently, the implementation of new accounting rules has created uncertainty for securitization participants.

Modifications to GAAP Accounting Standards

On June 12, 2009, the Financial Accounting Standards Board ("FASB") finalized modifications to GAAP through Statement of Financial Accounting Standards No. 166, *Accounting for Transfers of Financial Assets, an Amendment of FASB Statement No. 140* ("FAS 166") and Statement of Financial Accounting Standards No. 167, *Amendments to FASB Interpretation No. 46(R)* ("FAS 167") (the "2009 GAAP Modifications"). The 2009 GAAP Modifications are effective for annual financial statement reporting periods that begin after November 15, 2009. The 2009 GAAP Modifications made changes that affect whether a special purpose entity ("SPE") must be consolidated for financial reporting purposes, thereby subjecting many SPEs to GAAP consolidation requirements. These accounting changes may require an IDI to consolidate an issuing entity to which financial assets have been transferred for securitization on to its balance sheet for financial reporting purposes primarily because an affiliate of the IDI retains control over the financial assets.[1] Given the 2009 GAAP Modifications, legal and accounting treatment of a transaction may no longer be aligned. As a result, the safe harbor provision of the Securitization Rule may not apply to a transfer in connection with a securitization that does not qualify for off balance sheet treatment.

FAS 166 also affects the treatment of participations issued by an IDI, in that it defines participating interests as pari-passu pro-rata interests in financial assets, and subjects the sale of a participation interest to the same conditions as the sale of financial assets. Statement FAS 166 provides that transfers of participation interests that do not qualify for sale treatment will be viewed as secured borrowings. While the GAAP modifications have some effect on participations, most participations are likely to continue to meet the conditions for sale accounting treatment under GAAP.

FDI Act Changes

In 2005, Congress enacted 11(e)(13)(C)[2] of the Federal Deposit Insurance Act (the "FDI Act")[3]. In relevant part, this paragraph provides that generally no person may exercise any right or power to terminate, accelerate, or declare a default under a contract to which the IDI is a party, or obtain possession of or exercise control over any property of the IDI, or affect any contractual rights of the IDI, 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 the 90-day period beginning on the date of the appointment of the receiver. If a securitization is treated as a secured borrowing, section 11(e)(13)(C) could prevent the investors from recovering monies due to them for up to 90 days. Consequently, securitized assets that remain property of the IDI (but subject to a security interest) would be subject to the stay, raising concerns that any attempt by securitization noteholders to exercise remedies with respect to the IDI's assets would be delayed. During the stay, interest and principal on the securitized debt could remain unpaid. The FDIC has been advised that this 90-day delay would cause substantial downgrades in the ratings provided on existing securitizations and could prevent planned securitizations for multiple asset classes, such as credit cards, automobile loans, and other credits, from being brought to market.

Analysis

The FDIC believes that several of the issues of concern for securitization participants regarding the impact of the 2009 GAAP Modifications on the eligibility of transfers of financial assets for safe harbor protection can be addressed by clarifying the position of the conservator or receiver under established law. Under Section 11(e)(12) of the FDI Act,[4] the conservator or receiver cannot use its statutory power to repudiate or disaffirm contracts to avoid a legally enforceable and perfected security interest in transferred financial assets. This provision applies whether or not the securitization meets the conditions for sale accounting. The Proposed Rule would clarify that prior to any monetary default or repudiation, the FDIC as conservator or receiver would consent to the making of required payments of principal and interest and other amounts due on the securitized obligations during the statutory stay period. In addition, if the FDIC decides to repudiate the securitization transaction, the payment of repudiation damages in an amount equal to the par value of the outstanding obligations on the date of receivership will discharge the lien on the securitization assets. This clarification in paragraphs (d)(4) and (e) of the Proposed Rule addresses certain questions that have been raised about the scope of the stay codified in Section 11(e)(13)(C).

An FDIC receiver generally makes a determination of what constitutes property of an IDI based on the books and records of the failed IDI. If a securitization is reflected on the books and records of an IDI for accounting purposes, the FDIC would evaluate all facts and circumstances existing at the time of receivership to determine whether a transaction is a sale under applicable state law or a secured loan. Given the 2009 GAAP Modifications, there may be circumstances in which a sale transaction will continue to be reflected on the books and records of the IDI because the IDI or one of its affiliates

[1] Of particular note, Paragraph 26A of FAS 166 introduces a new concept that was not in FAS 140, as follows: "* * * the transferor must first consider whether the transferee would be consolidated by the transferor. Therefore, if all other provisions of this Statement are met with respect to a particular transfer, and the transferee would be consolidated by the transferor, then the transferred financial assets would not be treated as having been sold in the financial statements being presented."

[2] 12 U.S.C. 1821(e)(13)(C).

[3] 12 U.S.C. 1811 *et. seq.*

[4] 12 U.S.C. 1821(e)(12).

continues to exercise control over the assets either directly or indirectly. The Proposed Rule would provide comfort that conforming securitizations which do not qualify for off balance sheet treatment would have access to the assets in a timely manner irrespective of whether a transaction is viewed as a legal sale.

If a transfer of financial assets by an IDI to an issuing entity in connection with a securitization is not characterized as a sale, the securitized assets would be viewed as subject to a perfected security interest. This is significant because the FDIC as conservator or receiver is prohibited by statute from avoiding a legally enforceable or perfected security interest, except where such an interest is taken in contemplation of insolvency or with the intent to hinder, delay, or defraud the institution or the creditors of such institution.[5] Consequently, the ability of the FDIC as conservator or receiver to reach financial assets transferred by an IDI to an issuing entity in connection with a securitization, if such transfer is characterized as a transfer for security, is limited by the combination of the status of the entity as a secured party with a perfected security interest in the transferred assets and the statutory provision that prohibits the conservator or receiver from avoiding a legally enforceable or perfected security interest.

Thus, for securitizations that are consolidated on the books of an IDI, the Proposed Rule would provide a meaningful safe harbor irrespective of the legal characterization of the transfer. There are two situations in which consent to expedited access to transferred assets would be given—(i) monetary default under a securitization by the FDIC as conservator or receiver or (ii) repudiation of the securitization agreements by the FDIC. The Proposed Rule provides that in the event the FDIC is in monetary default under the securitization documents and the default continues for a period of ten (10) business days after written notice to the FDIC, the FDIC will be deemed to consent pursuant to Section (11)(e)(13)(C) to the exercise of contractual rights under the documents on account of such monetary default, and such consent shall constitute satisfaction in full of obligations of the IDI and the FDIC as conservator or receiver to the holders of the securitization obligations.

The Proposed Rule also provides that in the event the FDIC repudiates the securitization asset transfer agreement, the FDIC shall have the right to discharge the lien on the financial assets included in the securitization by paying damages in an amount equal to the par value of the obligations in the securitization on the date of the appointment of the FDIC as conservator or receiver, less any principal payments made to the date of repudiation. If such damages are not paid within ten (10) business days of repudiation, the FDIC will be deemed to consent pursuant to Section (11)(e)(13)(C) to the exercise of contractual rights under the securitization agreements.

The Proposed Rule would also confirm that, if the transfer of the assets is viewed as a sale for accounting purposes (and thus the assets are not reflected on the books of an IDI), the FDIC as receiver would not reclaim, recover, or recharacterize as property of the institution or the receivership assets of a securitization through repudiation or otherwise, but only if the transactions comply with the requirements set forth in paragraphs (b) and (c) of the Proposed Rule. The treatment of off balance sheet transfers of the Proposed Rule is consistent with the prior safe harbor under the Securitization Rule.

Pursuant to 12 U.S.C. 1821(e)(13)(C), no person may exercise any right or power to terminate, accelerate, or declare a default under a contract to which the IDI is a party, or to obtain possession of or exercise control over any property of the IDI, or affect any contractual rights of the IDI, 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 the 90-day period beginning on the date of the appointment of the receiver. In order to address concerns that the statutory stay could delay repayment of investors in a securitization or delay a secured party from exercising its rights with respect to securitized financial assets, the Proposed Rule provides for the consent by the conservator or receiver, subject to certain conditions, to the continued making of required payments under the securitization documents and continued servicing of the assets, as well as the ability to exercise self-help remedies after a payment default by the FDIC or the repudiation of a securitization asset transfer agreement during the stay period of 12 U.S.C. 1821(e)(13)(C).

The FDIC recognizes that, as a practical matter, the scope of the comfort that would be provided by the Proposed Rule is more limited than that provided in the Securitization Rule. However, the FDIC believes that the proposed requirements are necessary to support sustainable securitization. The safe harbor is not exclusive, and it does not address any transactions that fall outside the scope of the safe harbor or that fail to comply with one or more safe harbor conditions. The FDIC believes that its safe harbor should promote responsible financial asset underwriting and increase transparency in the market.

Previous Rulemakings

On November 12, 2009, the FDIC issued an Interim Final Rule amending 12 CFR 360.6, 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, to provide for safe harbor treatment for participations and securitizations until March 31, 2010, which was further amended on March 11, 2010, by a Final Rule extending the safe harbor until September 30, 2010 (as so amended, the "Transition Rule"). Under the Transition Rule, all existing securitizations as well as those for which transfers were made or, for revolving trusts, for which obligations were issued prior to September 30, 2010, were permanently "grandfathered" so long as they complied with the pre-existing § 360.6.

At its December 15, 2009 meeting, the Board adopted an Advance Notice of Proposed Rulemaking ("ANPR") that sought public comment on the scope of amendments to Section 360.6, as well as the requirements for the application of the safe harbor. The ANPR and the public comments received are discussed below in Sections III and IV.

The 2009 GAAP Modifications affect the way securitizations are viewed by the rating agencies and whether they can achieve ratings that are based solely on the credit quality of the financial assets, independent from the rating of the IDI. Rating agencies are concerned with several issues, including the ability of a securitization transaction to pay timely principal and interest in the event the FDIC is appointed receiver or conservator of the IDI. Rating agencies are also concerned with the ability of the FDIC to repudiate the securitization obligations and pay damages that may be less than the full principal amount of such obligations and interest accrued thereon. Moody's, Standard & Poor's, and Fitch have expressed the view that because of the 2009 GAAP Modifications and the extent of the FDIC's rights and powers as conservator or receiver, bank securitization transactions would have to be linked to the rating of the IDI and are unlikely to receive "AAA" ratings if the bank is rated below "A". This view is based in

[5] 12 U.S.C. 1821(e)(12).

part on the ratings agencies' assessment of the delay involved in receipt of amounts due with respect to securitization obligations and the amount of repudiation damages payable under the FDI Act. Securitization practitioners have asked the FDIC to provide assurances regarding the position of the conservator or receiver as to the treatment of both existing and future securitization transactions to enable securitizations to be structured in a manner that enables them to achieve de-linked ratings.

Purpose of the Proposed Rule

The FDIC, as deposit insurer and receiver for failed IDIs, has a unique responsibility and interest in ensuring that residential mortgage loans and other financial assets originated by IDIs are originated for long-term sustainability. The supervisory interest in origination of quality loans and other financial assets is shared with other bank and thrift supervisors. Nevertheless, the FDIC's responsibilities to protect insured depositors and resolve failed insured banks and thrifts and its responsibility to the DIF require that when the FDIC provides a safe harbor consenting to special relief from the application of its receivership powers, it must do so in a manner that fulfills these responsibilities.

The evident defects in many subprime and other mortgages originated and sold into securitizations requires attention by the FDIC to fulfill its responsibilities as deposit insurer and receiver in addition to its role as a supervisor. The defects and misalignment of incentives in the securitization process for residential mortgages were a significant contributor to the erosion of underwriting standards throughout the mortgage finance system. While many of the troubled mortgages were originated by non-bank lenders, insured banks and thrifts also made many troubled loans as underwriting standards declined under the competitive pressures created by the returns achieved by lenders and service providers through the "originate to distribute" model.

Defects in the incentives provided by securitization through immediate gains on sale for transfers into securitization vehicles and fee income directly led to material adverse consequences for insured banks and thrifts. Among these consequences were increased repurchase demands under representations and warranties contained in securitization agreements, losses on purchased mortgage and asset-backed securities, severe declines in financial asset values and in mortgage- and asset-backed security values due to spreading market uncertainty about the value of structured finance investments, and impairments in overall financial prospects due to the accelerated decline in housing values and overall economic activity. These consequences, and the overall economic conditions, directly led to the failures of many IDIs and to significant losses to the DIF. In this context, it would be imprudent for the FDIC to provide consent or other clarification of its application of its receivership powers without imposing requirements designed to realign the incentives in the securitization process to avoid these devastating effects.

The FDIC's adoption of 12 CFR 360.6 in 2000 provided clarification of "legal isolation" and facilitated legal and accounting analyses that supported securitization. In view of the accounting changes and the effects they have upon the application of the Securitization Rule, it is crucial that the FDIC provide clarification of the application of its receivership powers in a way that reduces the risks to the DIF by better aligning the incentives in securitization to support sustainable lending and structured finance transactions.

The Proposed Rule is fully consistent with the position of the FDIC in the Final Covered Bond Policy Statement of July 15, 2008. In that Policy Statement, the FDIC Board of Directors acted to clarify how the FDIC would treat covered bonds in the case of a conservatorship or receivership with the express goal of thereby facilitating the development of the U.S. covered bond market. As noted in that Policy Statement, it served to "define the circumstances and the specific covered bond transactions for which the FDIC will grant consent to expedited access to pledged covered bond collateral." The Policy Statement further specifically referenced the FDIC's goal of promoting development of the covered bond market, while protecting the DIF and prudently applying its powers as conservator or receiver.[6]

The Proposed Rule is also consistent with the amendments to Regulation AB proposed by the Securities and Exchange Commission ("SEC") on April 7, 2010 (as so proposed to be amended, "New Regulation AB"). The proposed amendments represent a significant overhaul of Regulation AB and related rules governing the offering process, disclosure requirements and ongoing reporting requirements for securitizations. New Regulation AB would establish extensive new requirements for both SEC registered publicly offered securitization and many private placements, including disclosure of standardized financial asset level information, enhanced investor cash flow modeling tools and on-going information reporting requirements. In addition New Regulation AB requires certain certifications to the quality of the financial asset pool, retention by the sponsor or an affiliate of a portion of the securitization securities and third party reports on compliance with the sponsor's obligation to repurchase assets for breach of representations and warranties as a precondition to an issuer's ability to use a shelf registration. The disclosure and retention requirements of New Regulation AB are consistent with and support the approach of the Proposed Rule.

To ensure that IDIs are sponsoring securitizations in a responsible and sustainable manner, the Proposed Rule would impose certain conditions on all securitizations and additional conditions on securitizations that include residential mortgages ("RMBS"), including those that qualify as true sales, as a prerequisite for the FDIC to grant consent to the exercise of the rights and powers listed in 12 U.S.C. 1821(e)(13)(C) with respect to such financial assets. To qualify for the safe harbor provision of the Proposed Rule, the conditions must be satisfied for any securitization (i) for which transfers of financial assets were made on or after September 30, 2010 or (ii) for revolving trusts, for which obligations were issued on or after September 30, 2010.

The FDIC believes that the transitional period until September 30, 2010, that is currently provided for in the Transitional Rule is sufficient to allow sponsors and other participants in securitizations to restructure transactions to comply with the new accounting requirements, and to properly structure transactions which meet the conditions of the Proposed Rules, when final. However, the FDIC is requesting public comment on the adequacy of the transitional period under the Transitional Rule for potential changes to securitizations to comply with the Proposed Rule.

II. The ANPR

On January 7, 2010, the FDIC published its Advance Notice of Proposed Rulemaking Regarding Treatment by the FDIC as Conservator or Receiver of Financial Assets Transferred by an IDI in Connection with a Securitization or Participation After March 31, 2010 in the **Federal Register**. 75 FR 935 (Jan. 7, 2010). The ANPR

[6] FDIC Covered Bond Policy Statement, 73 FR 43754 *et seq.* (July 28, 2008)

solicited public comment for 45 days relating to proposed amendments to the Securitization Rule regarding the treatment by the FDIC, as receiver or conservator of an IDI, of financial assets transferred by an IDI in connection with a securitization or participation transaction.

The ANPR set forth specific questions as to which comments were sought and, in addition, in order to provide a basis for consideration of the questions, the ANPR included a draft of sample regulatory text (the "Sample Text"). The questions posed by the ANPR were grouped under the following general categories:

A. *Capital Structure and Financial Assets.* These questions included whether there should be limitations on the capital structures of securitizations that are eligible for safe harbor treatment, including whether the number of tranches should be limited and whether external credit support should be prohibited or limited.

B. *Disclosure.* These questions included whether disclosures for private placements should be required to include the types of information and level of specificity applicable to public securitizations and inquiries as to the degree of disclosure and periodic reports that should be required, as well as whether broker, rating agency and other fees should be disclosed.

C. *Documentation and Record Keeping.* These questions included whether securitization documentation should be required to include certain provisions relating to actions by servicers, such as requiring servicers to act for the benefit of all investors and commence loss mitigation within a specified time period, and whether there should be limits on the ability of servicers to make advances.

D. *Compensation.* These questions included whether a portion of RMBS fees should be deferred and paid out over a number of years based on the performance of the financial assets and whether compensation to servicers should be required to take into account services provided and include incentives for servicing and loss mitigation actions that maximize the value of financial assets.

E. *Origination and Risk Retention.* These questions included whether sponsors should be required to retain an economic interest in the credit risk of the financial assets, and whether a requirement that mortgage loans included in RMBS be originated more than twelve (12) months before being transferred for a securitization would be an effective way to align incentives to promote sound lending or, alternatively, whether a one (1) year hold back of proceeds due to the sponsor to fund repurchase requirements after a review of representations and warranties would better fulfill the goal of such alignment.

In addition, the ANPR included questions relating to the adequacy of the scope of the safe harbor provisions, the effect of the change in accounting rules on participation transactions and certain other general questions.

III. Summary of Comments

The FDIC received 36 comment letters on the questions posed by the ANPR and on provisions of the Sample Text, and held one teleconference with interested parties at which details of the ANPR were discussed. The letters included comments from trade associations, banks, law firms, rating agencies, consumer advocates and investors, among others.

Institutional investors and consumer advocates supported many of the proposed changes as responsive to the issues demonstrated in the current crisis by the prior model of securitization. Certain institutional investors commented specifically on the need for greater disclosures of loan level data and emphasized the value of disclosures and strong representations and warranties as important in allowing investors to understand and limit the ongoing risks in a securitization. Consumer advocate and investor comments also included support for risk retention and greater clarity in servicing responsibilities.

A number of banks, law firms and industry trade organizations opposed the new conditions set forth in paragraph (b) of the Proposed Rule for a variety of reasons. Their comments in opposition to the conditions included disagreement that such requirements would serve to promote more long-term sustainability for loans and other financial assets originated by IDIs, and objections that the conditions would impose additional costs on IDIs and competitively disadvantage IDIs in relation to non-regulated securitization sponsors. Several commenters stated that the FDIC should not unilaterally adopt new conditions, and some urged the FDIC to act only on an interagency basis or following final Congressional action.

These comments reflect a misunderstanding of the purpose of the conditions. The conditions are designed to provide greater clarity and transparency to allow a better ongoing evaluation of the quality of lending by banks and reduce the risks to the DIF from the opaque securitization structures and the poorly underwritten loans that led to the onset of the financial crisis. In addition, these comments fail to recognize that securitization as a viable liquidity tool in mortgage finance will not return without greater transparency and clarity because investors have experienced the difficulties provided by the existing model of securitization. However, greater transparency is not solely for investors but will serve to more closely tie the origination of loans to their long-term performance by requiring disclosure of that performance. Moreover, many of the conditions are supported by New Regulation AB and are reflected in proposed financial services legislation.

Several commenters also objected to inclusion of certain conditions, especially ongoing requirements or subjective criteria, because they would make it more difficult for persons analyzing a securitization to conclude at the outset of the securitization whether the conditions to the safe harbor have been satisfied. Some commenters asserted that, as a result, it would be difficult for the rating agencies to de-link the rating of a securitization from the rating of the sponsor. While the FDIC is not persuaded that rating agencies, which normally evaluate qualitative information, would not evaluate compliance with certain subjective criteria, the Proposed Rule has been drafted to tie disclosure and various other requirements to the contractual terms of the securitization. This should enable both rating agencies and investors to assess whether a transaction meets the conditions in the Proposed Rule.

Comment letters also requested that the FDIC confirm that the safe harbor is not exclusive and, thus, that the failure of a securitization transaction to satisfy one or more safe harbor conditions would not make the financial assets transferred to a special purpose issuing entity subject to reclamation by a receiver. Commenters also requested that the FDIC confirm its agreement with the legal principle that the power to repudiate a contract is not a power to avoid asset transfers. As indicated above, the FDIC does not view the safe harbor as exclusive, but cannot provide comfort as to transactions that are not eligible for the safe harbor. The FDIC also recognizes that the power to repudiate a contract is not a power to recover assets that were previously sold and are no longer reflected on the books and records of an IDI.

Several commenters stated that the new accounting treatment of assets transferred as part of a securitization should not be determinative of the

FDIC's treatment of such assets in an insolvency of a bank sponsor and that the Proposed Rule should focus instead on a legal analysis in determining whether a transfer of assets should be treated as a sale. Several commenters also objected to the proposal in the ANPR to treat as secured borrowings transfers that did not satisfy the requirements for sale accounting treatment. This position is not consistent with precedent. The Securitization Rule as adopted in 2000, as well as the FDIC's longstanding evaluation of assets potentially subject to receivership powers, has addressed only the treatment of those assets by looking to their treatment under applicable accounting rules. This was explicitly stated in the Securitization Rule. In formulating the revised safe harbor, it is appropriate for the FDIC to consider whether assets are treated under GAAP as part of the IDI's balance sheet when making the determination of how to treat assets in a conservatorship or receivership.

The objections to a safe harbor based on a secured borrowing analysis are misplaced. Such safe harbor provides a high degree of certainty for securitization transfers that do not meet the requirements for off balance sheet treatment under the 2009 GAAP Modifications. Prior to the Securitization Rule, securitization transactions were typically viewed as either secured transactions or sales, and the analysis would rely on a perfected security interest in the financial assets that are subject to securitization. As a result, under the Proposed Rule, if the securitization does not meet the standards for off balance sheet treatment, irrespective of whether the transfer qualifies as a sale, the transaction would qualify for treatment as a secured transaction if it meets the requirements imposed on such transactions under the Proposed Rule. In this way, investors in securitization transactions that do not qualify for off balance sheet treatment may still receive benefits of expedited access to the securitized loans if they meet the conditions specified in the Proposed Rule.

Comments relating to specific questions posed by the ANPR are discussed below in the description of the Proposed Rule.

IV. The Proposed Rule

The Proposed Rule would replace the Securitization Rule as amended by the Transition Rule. Paragraph (a) of the Proposed Rule sets forth definitions of terms used in the Proposed Rule. It retains many of the definitions previously used in the Securitization Rule but modifies or adds definitions to the extent necessary to accurately reflect current industry practice in securitizations.

Paragraph (b) of the Proposed Rule imposes conditions to the availability of the safe harbor for transfers of financial assets to an issuing entity in connection with a securitization. These conditions make a clear distinction between the conditions imposed on RMBS from those imposed on securitizations for other asset classes. In the context of a conservatorship or receivership, the conditions applicable to all securitizations would improve overall transparency and clarity through disclosure and documentation requirements along with ensuring effective incentives for prudent lending by requiring that the payment of principal and interest be based primarily on the performance of the financial assets and by requiring retention of a share of the credit risk in the securitized loans.

The conditions applicable to RMBS are more detailed and explicit and require additional capital structure changes, disclosures, and documentation, the establishment of a reserve and deferral of compensation. These standards are intended to address the factors that caused significant losses in current RMBS securitization structures as demonstrated in the recent crisis. Confidence can be restored in RMBS markets only through greater transparency and other structures that support sustainable mortgage origination practices and require increased disclosures. These standards respond to investor demands for greater transparency and alignment of the interests of parties to the securitization. In addition, they are generally consistent with industry efforts while taking into account proposed legislative and regulatory initiatives.

Capital Structure and Financial Assets

For all securitizations, the benefits of the Proposed Rule should be available only to securitizations that are readily understood by the market, increase liquidity of the financial assets and reduce consumer costs. Any re-securitizations (securitizations supported by other securitization obligations) would need to include adequate disclosure of the obligations, including the structure and the assets supporting each of the underlying securitization obligations and not just the obligations that are transferred in the re-securitization. This requirement would apply to all re-securitizations, including static re-securitizations as well as managed collateralized debt obligations. Securitizations that are unfunded or synthetic transactions would not be eligible for expedited consent under the Proposed Rule. To support sound lending, all securitizations would be required to have payments of principal and interest on the obligations primarily dependent on the performance of the financial assets supporting the securitization. Payments of principal or interest to investors could not be contingent on market or credit events that are independent of the assets supporting the securitization, except for interest rate or currency mismatches between the financial assets and the obligations to investors.

For RMBS only, the capital structure of the securitization would be limited to six tranches or less to discourage complex and opaque structures. The most senior tranche could include time-based sequential pay or planned amortization sub-tranches, which are not viewed as separate tranches for the purpose of the six tranche requirement. This condition would not prevent an issuer from creating the economic equivalent of multiple tranches by re-securitizing one or more tranches, so long as they meet the conditions set forth in the rule, including adequate disclosure in connection with the re-securitization. In addition, RMBS could not include leveraged tranches that introduce market risks (such as leveraged super senior tranches). Although the financial assets transferred into an RMBS would be permitted to benefit from asset level credit support, such as guarantees (including guarantees provided by governmental agencies, private companies, or government-sponsored enterprises), co-signers, or insurance, the RMBS could not benefit from external credit support. The temporary payment of principal and interest, however, could be supported by liquidity facilities. These conditions are designed to limit both the complexity and the leverage of an RMBS and therefore the systemic risks introduced by them in the market.

Comments in response to the ANPR expressed concern that a limitation on the number of tranches of an RMBS would stifle innovation and would negatively affect the ability of securitizations to meet investor objectives and maximize offering proceeds. In addition, commenters argued that there should be no restriction on external third party pool level credit support, while one commenter stated that guarantees in RMBS transactions should be permitted at the loan level only if issued by regulated third parties with proven capacity to ensure prudent loan origination and satisfy their obligations. Commenters also requested that the Proposed Rule not include the provision that a securitization may not be an unfunded securitization or synthetic transaction.

In formulating the Proposed Rule, the FDIC was mindful of the need to permit innovation and accommodate financing needs, and thus attempted to strike a balance between permitting multi-tranche structures for RMBS transactions, on the one hand, and promoting readily understandable securitization structures and limiting overleveraging of residential mortgage assets, on the other hand.

The FDIC is of the view that permitting pool level, external credit support in an RMBS can lead to overleveraging of assets, as investors might focus on the credit quality of the credit support provider as opposed to the sufficiency of the financial asset pool to service the securitization obligations.

Finally, although the Proposed Rule would exclude unfunded and synthetic securitizations from the safe harbor, the FDIC does not view the inclusion of existing credit lines that are not fully drawn in a securitization as causing such securitization to be an "unfunded securitization." In addition, to the extent an unfunded or synthetic transaction qualifies for treatment as a qualified financial contract under section (11)(e) of the FDI Act, it would not need the benefits of the safe harbor provided in the Proposed Rule in an FDIC receivership.[7]

Disclosure

For all securitizations, disclosure serves as an effective tool for increasing the demand for high quality financial assets and thereby establishing incentives for robust financial asset underwriting and origination practices. By increasing transparency in securitizations, the Proposed Rule would enable investors (which may include banks) to decide whether to invest in a securitization based on full information with respect to the quality of the asset pool and thereby provide additional liquidity only for sustainable origination practices.

The data must enable investors to analyze the credit quality for the specific asset classes that are being securitized. The FDIC would expect disclosure for all issuances to include the types of information required under current Regulation AB (17 CFR 229.1100 through 229.1123) or any successor disclosure requirements with the level of specificity that would apply to public issuances, even if the obligations are issued in a private placement or are not otherwise required to be registered.

Securitizations that would qualify under this rule must include disclosure of the structure of the securitization and the credit and payment performance of the obligations, including the relevant capital or tranche structure and any liquidity facilities and credit enhancements. The disclosure would be required to include the priority of payments and any specific subordination features, as well as any waterfall triggers or priority of payment reversal features. The disclosure at issuance would also be required to include the representations and warranties made with respect to the financial assets and the remedies for breach of such representations and warranties, including any relevant timeline for cure or repurchase of financial assets, and policies governing delinquencies, servicer advances, loss mitigation and write offs of financial assets. The periodic reports provided to investors would be required to include the credit performance of the obligations and financial assets, including periodic and cumulative financial asset performance data, modification data, substitution and removal of financial assets, servicer advances, losses that were allocated to each tranche and remaining balance of financial assets supporting each tranche as well as the percentage coverage for each tranche in relation to the securitization as a whole. The FDIC anticipates that, where appropriate for the type of financial assets included the pool, monthly reports would also include asset level information that may be relevant to investors (e.g. changes in occupancy, loan delinquencies, defaults, etc.).

Disclosure to investors would also be required to include the nature and amount of compensation paid to any mortgage or other broker, each servicer, rating agency or third-party advisor, and the originator or sponsor, and the extent to which any risk of loss on the underlying financial assets is retained by any of them for such securitization. Disclosure of changes to this information while obligations are outstanding would also be required. This disclosure should enable investors to assess potential conflicts of interests and how the compensation structure affects the quality of the assets securitized or the securitization as a whole.

For RMBS, loan level data as to the financial assets securing the mortgage loans, such as loan type, loan structure, maturity, interest rate and location of property, would also be required to be disclosed by the sponsor. Sponsors of securitizations of residential mortgages would be required to affirm compliance with applicable statutory and regulatory standards for origination of mortgage loans, including that the mortgages in the securitization pool are underwritten at the fully indexed rate relying on documented income[8] and comply with 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 additional guidance applicable at the time of loan origination.

The Proposed Rule would require sponsors to disclose a third party due diligence report on compliance with such standards and the representations and warranties made with respect to the financial assets. Finally, the Proposed Rule would require that the securitization documents require the disclosure by servicers of any ownership interest of the servicer or any affiliate of the servicer in other whole loans secured by the same real property that secures a loan included in the financial asset pool. This provision does not require disclosure of interests held by servicers or their affiliates in the securitization securities. This provision is intended to give investors information to evaluate potential servicer conflicts of interest that might impede the servicer's actions to maximize value for the benefit of investors.

Responses to questions in the ANPR concerning disclosure included requests that disclosure requirements be set forth in terms that are susceptible to verification of compliance at the time when the securitization securities are issued. Under the Proposed Rule, most of the disclosure provisions would require that the securitization documents require proper disclosure rather than making the disclosure itself a condition to eligibility for the safe

[7] 12 U.S.C. 1821(e)(10).

[8] Institutions should verify and document the borrower's income (both source and amount), assets and liabilities. For the majority of borrowers, institutions should be able to readily document income using recent W–2 statements, pay stubs, and/or tax returns. Stated income and reduced documentation loans should be accepted only if there are mitigating factors that clearly minimize the need for direct verification of repayment capacity. Reliance on such factors also should be documented. Mitigating factors might include situations where a borrower has substantial liquid reserves or assets that demonstrate repayment capacity and can be verified and documented by the lender. A higher interest rate is not considered an acceptable mitigating factor.

harbor. Under these provisions, if required disclosure is not made, there would be a default under the securitization documents, but a transaction that otherwise qualified for the safe harbor would not be ineligible for the safe harbor on the basis of inadequate disclosure.

Several letters requested that the FDIC refrain from adopting its own disclosure requirements and that private placements not be required to include the same degree of disclosure as is required for public securitizations. Concern was also expressed that loan level disclosure was inappropriate for certain asset classes, such as credit card receivables. Commenters also urged that the safe harbor should not require more information on re-securitizations than is required by the securities laws. Comments also opposed a requirement that sponsors affirm compliance with all statutory and regulatory standards for mortgage loan origination. Finally, the comments included a request that rating agency fees not be disclosed because of a concern that such disclosure would jeopardize the objectivity of the ratings process by making such information available to the rating agency analysts that rate securitizations.

The Proposed Rule recognizes that loan level disclosure may not be appropriate for each type of asset class securitization.

The FDIC believes that regardless of whether the securitization transaction is in the form of a private rather than public securities issuance, full disclosure to investors in such transaction is necessary. With respect to re-securitizations, the FDIC does not believe that there is a logical basis for requiring less disclosure than is required for original securitizations. For both securitizations and re-securitizations, the Proposed Rule would permit the omission of information that is not available to the sponsor or issuer after reasonable investigation so long as there is disclosure as to the types of information omitted and the reason for such omission. In particular, the FDIC is concerned that robust disclosure be provided in CDO transactions and that ongoing monthly reports are provided to investors in a securitization, whether or not there is an ongoing obligation for filing with respect to such securitization under the Securities Exchange Act of 1934.

Finally, the FDIC feels that disclosure of rating agency fees is very important to investors and that rating agencies can take appropriate internal measures to ensure that such disclosure does not impact the rating process.

Documentation and Recordkeeping

For all securitizations, the operative agreements are required to set forth all necessary rights and responsibilities of the parties, including but not limited to representations and warranties, ongoing disclosure requirements and any measures to avoid conflicts of interest. The contractual rights and responsibilities of each party to the transaction must provide each party with sufficient authority and discretion for such party to fulfill its respective duties under the securitization contracts.

Additional requirements apply to RMBS to address a significant issue that has been demonstrated in the mortgage crisis by improving the authority of servicers to mitigate losses on mortgage loans consistent with maximizing the net present value of the mortgages, as defined by a standardized net present value analysis. Therefore, for RMBS, contractual provisions in the servicing agreement must provide servicers with the authority to modify loans to address reasonably foreseeable defaults and to take such other action as necessary or required to maximize the value and minimize losses on the securitized financial assets. The servicers are required to apply industry best practices related to asset management and servicing.

The RMBS documents may not give control of servicing discretion to a particular class of investors. The documents must require that the servicer act for the benefit of all investors rather for the benefit of any particular class of investors. Consistent with the forgoing, the servicer must commence action to mitigate losses no later than ninety (90) days after an asset first becomes delinquent unless all delinquencies on such asset have been cured. A servicer must maintain sufficient records of its actions to permit appropriate review of its actions.

The FDIC believes that a prolonged period of servicer advances in a market downturn misaligns servicer incentives with those of the RMBS investors. Servicing advances also serve to aggravate liquidity concerns, exposing the market to greater systemic risk. Occasional advances for late payments, however, are beneficial to ensure that investors are paid in a timely manner. To that end, the servicing agreement for RMBS should not require the primary servicer to advance delinquent payments by borrowers for more than three (3) payment periods unless financing or reimbursement facilities to fund or reimburse the primary servicers are available. However, foreclosure recoveries cannot serve as the 'financing facility' for repayment of advances.

Comments on questions as to these provisions posed by the ANPR included statements that the safe harbor should not require the servicer to act for the benefit of all investors, and that the servicer should be permitted to act for a specified class of investors. In addition, concern was expressed that requiring servicer loss mitigation to maximize the net present value of the financial assets would unduly restrict the servicers.

Several comments were received relating to whether servicers should be required to commence action to mitigate losses in connection with residential mortgage securitizations within 90 days after an asset first becomes delinquent and whether servicer advances should be limited to three payment periods. The comments included suggestions that there should be no loss mitigation provisions in the safe harbor, that no set period should be established, that 90 days was too short, and that 90 days was too long. Responses relating to servicer advances included statements that the safe harbor should not include limits on servicer advances, and that a longer period for servicer advances should be permitted. One commenter suggested that servicers be given explicit authority to reduce principal and exercise forbearance as to principal payments, and that loan modification be required to be evaluated as a precondition to foreclosure.

While the FDIC agrees that servicers should be given flexibility on how best to maximize the value of financial assets, it believes that it is essential that there be certain governing principles in RMBS transactions. Maximization of net present value is a widely accepted standard for mortgage loan workouts, and the FDIC believes that use of this standard will result in the highest value being obtained. The FDIC also believes that the Proposed Rule would give the servicer authority to reduce principal or exercise forbearance if such action would maximize the value of an asset, and expects that servicers will consider loan modification in evaluating how best to maximize value.

The FDIC understands that it may not be possible to determine with absolute certainty the appropriate deadline for the commencement of servicer loss mitigation or the appropriate number of payment periods for which servicers can be required to make advances for which financing or reimbursement facilities are not available. However, the FDIC believes that a framework for sustainable securitizations must include certain deadlines and limits that address issues identified in the current financial crisis, and that the loss mitigation deadline and servicer advance limits set forth in the Proposed Rule are appropriate. In this connection, it is important to note that action to mitigate losses may include contact with the borrower or other steps designed to return the asset to regular payments, but does not require initiation of foreclosure or other formal enforcement proceedings.

Finally, the FDIC does not agree that sustainable securitizations would be promoted if sponsors are permitted to structure securitizations where the servicer does not act for all classes of investors.

Compensation

The compensation requirements of the Proposed Rule would apply only to RMBS. Due to the demonstrated issues in the compensation incentives in RMBS, in this asset class the Proposed Rule seeks to realign compensation to parties involved in the rating and servicing of residential mortgage securitizations.

The securitization documents are required to provide that any fees payable credit rating agencies or similar third-party evaluation companies must be payable in part over the five (5) year period after the initial 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. Thus payments to rating agencies must be based on the actual performance of the financial assets, not their ratings.

A second area of concern is aligning incentives for proper servicing of the mortgage loans. Therefore, compensation to servicers must include incentives for servicing, including payment for loan restructuring or other loss mitigation activities, which maximizes the net present value of the financial assets in the RMBS.

Commenters were divided on whether compensation to parties involved in a securitization should be deferred. Responses to the ANPR also stated that compensation to rating agencies should not be linked to performance of a securitization because such linkage would interfere with the neutral ratings process, and a rating agency expressed the concern that such linkage might give rating agencies an incentive to rate a transaction at a level that is lower than the level that the rating agency believes to be the appropriate level. Concern was also expressed that linkage of compensation to performance of the securitization could cause payment of full compensation to one category of securitization participants to be dependent in some measure on the performance of a different category of securitization participants. Comments also included an objection that if deferred performance based compensation was imposed on certain securitization participants, such as underwriters, these participants would be subject to risks that they had not expected to assume. Others commented that there should be incentives for servicers to modify loans rather than to foreclose. Concern was also expressed as to the complexity of reserving for deferred compensation and developing cash flow models relating to servicing incentives. Finally, concern was expressed that giving servicers incentives might lead to additional assets being consolidated on bank balance sheets.

Based on the comments provided, the Proposed Rule imposes the deferred compensation requirement only on fees and other compensation to rating agencies or similar third-party evaluation companies. The FDIC notes that rating agencies have procedures in place to protect analytic independence and ensure the integrity of their ratings. Compensation deferral may have certain ramifications on internal rating agency processes but should not affect the ratings or surveillance process. Finally, the FDIC is mindful of the proposal to encourage loan modification rather than foreclosure and has spearheaded efforts in this area. The Proposed Rule would include loan restructuring activities as one of the categories of loss mitigation activities for which incentive compensation could be payable to servicers.

Origination and Retention Requirements

To provide further incentives for quality origination practices, several conditions address origination and retention requirements for all securitizations. For all securitizations, the sponsor must retain an economic interest in a material portion, defined as not less than five (5) percent, of the credit risk of the financial assets. The retained interest may be either in the form of an interest of not less than five (5) percent in each credit tranche 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. By requiring that the sponsor retain an economic interest in the asset pool without hedging the risk of such portion, the sponsor would be less likely to originate low quality financial assets.

The Proposed Rule would require that RMBS securitization documents require that a reserve fund be established in an amount equal to at least five (5) percent of the cash proceeds due to the sponsor and that this reserve be held for twelve (12) months to cover any repurchases required for breaches of representations and warranties.

In addition, residential mortgage loans in an RMBS must comply with all statutory, regulatory and originator underwriting standards in effect at the time of origination. Residential mortgages must be underwritten at the fully indexed rate 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 additional regulations or guidance applicable at the time of loan origination.

Many commenters objected to the imposition of a 5 percent risk retention requirement, while other commenters suggested that a higher risk retention requirement might be acceptable. Objections included reference to the costs associated with this requirement, the fact that the requirement eliminates the ability of the originating bank to transfer all of the credit risk, and assertions that the requirement would constrict mortgage credit and would discourage banks from securitizing low risk assets and high quality jumbo prime loans. Commenters also objected that the retention requirements could cause securitizations that might otherwise qualify for sale accounting treatment under the 2009 GAAP Modifications to not qualify for that treatment. Many comment letters stated that the goals sought to be achieved by risk retention could be better achieved by the establishment of minimum financial asset underwriting standards. Other suggestions included establishing a reserve to support the repurchase obligations of a sponsor.

Commenters also suggested that the amount of risk to be retained should vary based on the asset type. Certain commenters suggested that certain types of assets, such as prudently underwritten loans or prime credit mortgage loans, be exempted from the retention requirement.

Concern was also expressed that attaching an anti-hedging requirement to the retained portion would interfere with proper credit risk management practices. Comments also included the concern that requiring that all assets have been originated in compliance with all applicable underwriting standards could make the safe harbor unachievable.

Finally, many comments were received that opposed a 12 month seasoning requirement for RMBS loans that was included in the options set forth in the ANPR.

The FDIC believes that the sponsor must be required to retain an economic interest in the credit risk relating to each credit tranche or in a representative sample of financial assets in order to help ensure quality origination practices. A risk retention requirement that did not cover all types of exposure would not be sufficient to create an incentive for quality underwriting at all levels of the securitization. The recent economic crisis made clear that, if quality underwriting is to be assured, it will require true risk retention by sponsors, and that the existence of representations and warranties or regulatory standards for underwriting will not alone be sufficient. The FDIC believes that the 5 percent across the board requirement for all types of assets is appropriate, and notes that it is consistent with the requirements set forth in New Regulation AB.

Based on the comments objecting to the seasoning requirement, the Proposed Rule includes the reserve requirement in lieu of a seasoning requirement.

With respect to the concern expressed that the safe harbor may be unachievable if all assets included in an RMBS must comply with all applicable underwriting standards, the FDIC understands that during the origination process it is difficult to assure compliance with all origination and regulatory standards. While the Proposed Rule would require that the financial assets be originated in compliance with all regulatory standards, the FDIC does not view technical non-compliance with some standards, or occasional limited non-compliance with origination standards, as affecting the availability of the safe harbor.

Finally, while the Proposed Rule provides that the retained interest cannot be hedged during the term of the securitization, the FDIC does not regard this prohibition as precluding hedging the interest rate or currency risks associated with the retained portion of the securitization tranches. Rather, the FDIC views this prohibition as being directed at the credit risk of the transaction, to ensure that the originator properly underwrites the financial assets.

Additional Conditions

Paragraph (c) of the Proposed Rule includes general conditions for all securitizations and the transfer of financial assets. These conditions also include requirements that are consistent with good banking practices and are necessary to make the transactions comply with established banking law.[9]

The transaction should be an arms-length, bona fide securitization transaction and the obligations cannot be sold to an affiliate or insider. The securitization agreements must be 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. The securitization also must have been 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.

The Proposed Rule would apply only to transfers made for adequate consideration. The transfer and/or security interest would need to be properly perfected under the UCC or applicable state law. The FDIC anticipates that it would be difficult to determine whether a transfer complying with the Proposed Rule is a sale or a security interest, and therefore expects that a security interest would be properly perfected under the UCC, either directly or as a backup.

The sponsor would be required to separately identify in its financial asset data bases the financial assets transferred into a securitization and maintain an electronic or paper copy of the closing documents in a readily accessible form. The sponsor would also be required to maintain a current list of all of its outstanding securitizations and issuing entities, and the most recent Form 10–K or other periodic financial report for each securitization and issuing entity. If acting as servicer, custodian or paying agent, the sponsor would not be permitted to commingle amounts received with respect to the financial assets with its own assets except for the time necessary to clear payments received, and in event for more than two days. The sponsor would be required to make these records available to the FDIC promptly upon request. This requirement would facilitate the timely fulfillment of the receiver's responsibilities upon appointment and will expedite the receiver's analysis of securitization assets. This would also facilitate the receiver's analysis of the bank's assets and determination of which assets have been securitized and are therefore potentially eligible for expedited access by investors.

In addition, the Proposed Rule would require that the transfer of financial assets and the duties of the sponsor as transferor be evidenced by an agreement separate from the agreement governing the sponsor's duties, if any, as servicer, custodian, paying agent, credit support provider or in any capacity other than transferor.

The Safe Harbor

Paragraph (d)(1) of the Proposed Rule would continue the safe harbor provision that was provided by the Securitization Rule with respect to participations so long as the participation satisfies the conditions for sale accounting treatment set forth by generally accepted accounting principles.

Paragraph (d)(2) of the Proposed Rule provides that for any participation or securitization (i) for which transfers of financial assets made or (ii) for revolving trusts, for which obligations were issued, on or before September 30, 2010, the FDIC as conservator or receiver will 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 notwithstanding that such transfer does not satisfy all conditions for sale accounting treatment under generally accepted accounting principles as effective subsequent to November 15, 2009, so long as such transfer satisfied the conditions for sale accounting treatment as set forth in generally accepted accounting principles in effect prior to November 15, 2009. This provision is intended to continue the safe harbor provided by the Transition Rule.

Paragraph (d)(3) addresses transfers of financial assets made in connection with a securitization for which transfers of financial assets were made after September 30, 2010 or revolving trusts for which obligations were issued after September 30, 2010, that satisfy the conditions for sale accounting treatment under GAAP in effect for reporting periods after November 15, 2009. For such securitizations, the FDIC as conservator or receiver will not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the

[9] See, 12 U.S.C. 1823(e).

receivership any such transferred financial assets, provided that such securitization complies with the conditions set forth in paragraphs (b) and (c) of the Proposed Rule.

Paragraph (d)(4) of the Proposed Rule addresses transfers of financial assets in connection with a securitization for which transfers of financial assets were made after September 30, 2010 or revolving trusts for which obligations were issued after September 30, 2010, that satisfy the conditions set forth in paragraphs (b) and (c), but where the transfer does not satisfy the conditions for sale accounting treatment under GAAP in effect for reporting periods after November 15, 2009. Clause (A) provides that if there is a monetary default which remains uncured for ten (10) business days after actual delivery of a written request to the FDIC to exercise contractual rights because of such default, the FDIC consents to the exercise of such contractual rights, including any rights to obtain possession of the financial assets or the exercise of self-help remedies as a secured creditor or liquidating properly pledged financial assets by the investors, provided that no involvement of the receiver or conservator is required. This clause also provides that the consent to the exercise of such contractual rights shall serve as full satisfaction for all amounts due.

Clause (B) provides that if the FDIC as conservator or receiver to an IDI provides a written notice of repudiation of the securitization agreement pursuant to which assets were transferred and the FDIC does not pay the damages due by reason of such repudiation within ten (10) business days following the effective date of the notice, the FDIC consents to the exercise of any contractual rights, including any rights to obtain possession of the financial assets or the exercise of self-help remedies as a secured creditor or liquidating properly pledged financial assets by the investors, provided that no involvement of the receiver or conservator is required. Clause (B) also provides that the damages due for these purposes shall be an amount equal to the par value of the obligations outstanding on the date of receivership less any payments of principal received by the investors to the date of repudiation, and that upon receipt of such payment the investors' liens on the financial assets shall be released.

Comments as to the scope of the safe harbor, including a comment from one of the rating agencies, expressed concern with the risk of repudiation by the FDIC, in particular, the risk that the FDIC would repudiate an issuer's securitization obligations and liquidate the financial assets at a time when the market value of such assets was less than the amount of the outstanding obligations owed to investors, thus exposing investors to market value risks relating to the securitization asset pool.

The Proposed Rule addresses this concern. It clarifies that repudiation damages would be equal to the par value of the obligations as of the date of receivership less payments of principal received by the investors to the date of repudiation. The Proposed Rule also provides that the FDIC consents to the exercise of remedies by investors, including self-help remedies as secured creditors, in the event that the FDIC repudiates a securitization transfer agreement and does not pay damages in such amount within ten business days following the effective date of notice of repudiation. Thus, if the FDIC repudiates and the investors are not paid the par value of the securitization obligations, they will be permitted to obtain the asset pool. Accordingly, exercise by the FDIC of its repudiation rights will not expose investors to market value risks relating to the asset pool.

The comments also included a request that the safe harbor not condition the FDIC's consent to the exercise of secured creditor remedies on there being no involvement of the receiver or conservator. The FDIC does not believe that the condition that no involvement of the receiver of conservator be required in connection with the exercise of secured creditor remedies should be of concern to investors, because the provision should not be understood to encompass ordinary course consents or transfers of financial asset related documentation needed to facilitate customary remedies as to the collateral.

Comments also included concern that non-proportionate participation arrangements, such as LIFO participations, entered into after September 30, 2010, that do not satisfy the criteria for "participating interests" under the 2009 GAAP Modifications would no longer qualify for sale treatment because the safe harbor is available only to participations which satisfy sale accounting treatment. Because the vast majority of participations are expected to satisfy the sale accounting requirement, the Proposed Rule includes only participations that satisfy the sale accounting requirements. However, the FDIC recognizes that this formulation may exclude certain types of participations from eligibility for the safe harbor and is requesting more detailed comments on how it could address these type of participations in a manner that does not expand the safe harbor inappropriately.

Consent to Certain Payments and Servicing

Paragraph (e) provides that, during the stay period imposed by 12 U.S.C. 1821(e)(13)(C) and during the period specified in subparagraph (d)(4)(A) prior to any payment of damages or consent under 12 U.S.C. 1821(e)(13)(C) to the exercise of any contractual rights, the FDIC as conservator or receiver of the sponsor consents to the making of required payments to the investors in accordance with the securitization documents, except for provisions that take effect upon the appointment of the receiver or conservator, and to any servicing activity required in furtherance of the securitization, (subject to the FDIC's rights to repudiate such agreements) with respect to the underlying financial assets in connection with securitizations that meet the conditions set forth in paragraphs (b) and (c) of the Proposed Rule.

Responses to the ANPR included a request that the safe harbor state specifically that the FDIC will make payments prior to repudiation, rather than merely consenting to payments to the investors in accordance with the securitization documents. The FDIC does not believe that addition of this provision is necessary. Unless the FDIC repudiates an agreement, as successor to the obligations of an IDI it would continue to perform the IDI's obligations under the securitization documents. Therefore the servicer, on behalf of the FDIC, in its capacity as receiver or conservator, would apply the payments received on financial assets to securitization obligations as required under the securitization documents.

Finally, the comments included a request that provisions addressing the making of payments during the stay period not be limited to originally scheduled payments of principal and interest. In response to these comments, the Proposed Rule was drafted to permit the making of required payments in accordance with the securitization documents, excluding any such payments arising on account of insolvency or the appointment of a receiver or conservator. Under the Federal Deposit Insurance Act, such ipso facto clauses are unenforceable.[10]

Miscellaneous

Paragraph (f) requires that any party requesting the FDIC's consent pursuant

[10] 12 U.S.C. 1821(e)(13)(A)).

to paragraph (d)(4), provide notice to the FDIC together with a statement of the basis upon the request is made, together with copies of all documentation supporting the request. This would include a copy of the applicable agreements (such as the transfer agreement and the security agreement) and of any applicable notices under the agreements.

Paragraph (g) of the Proposed Rule provides that the conservator or receiver will not seek to avoid an otherwise legally enforceable agreement that is executed by an insured depository institution in connection with a securitization 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).

Paragraph (h) of the Proposed Rule would provide that the consents set forth in the Proposed Rule would 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 the securitization transfer agreement or any relevant security agreements, and nothing contained in the section would alter the claims priority of the securitized obligations.

Paragraph (i) provides that the Proposed Rule 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. The Proposed Rule should 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 mentioned, 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 right to consent under 12 U.S.C. 1821(e)(13)(C) may not be assigned or transferred to any purchaser of property from the FDIC, other than to a conservator or bridge bank. The Proposed Rule could be repealed by the FDIC upon 30 days notice provided in the **Federal Register**, but any repeal would not apply to any issuance that complied with the Proposed Rule before such repeal.

V. Solicitation of Comments

The FDIC is soliciting comments on all aspects of the Proposed Rule. The FDIC specifically requests comments responding to the following:

1. Does the Proposed Rule treatment of participations provide a sufficient safe harbor to address most needs of participants? Are there changes to the Proposed Rule that would expand protection different types of participations issued by IDIs?

2. Is there a way to differentiate among participations that are treated as secured loans by the 2009 GAAP Modifications? Should the safe harbor consent apply to such participations? Is there a concern that such changes may deplete the assets of an IDI because they would apply to all participations?

3. Is the transition period to September 30, 2010, sufficient to implement the changes required by the conditions identified by Paragraph (b) and (c)? In light of New Regulation AB, how does this transition period impact existing shelf registrations?

4. Does the capital structure for RMBS identified by paragraph (b)(1)(ii)(A) provide for a structure that will allow for effective securitization of well-underwritten mortgage loan assets? Does it create any specific issues for specific mortgage assets?

5. Do the disclosure obligations for all securitizations identified by paragraph (b)(2) meet the needs of investors? Are the disclosure obligations for RMBS identified by paragraph (b)(2) sufficient? Are there additional disclosure requirements that should be imposed to create needed transparency? How can more standardization in disclosures and in the format of presentation of disclosures be best achieved?

6. Do the documentation requirements in paragraph (b)(3) adequately describe that rights and responsibilities of the parties to the securitization that are required? Are there other or different rights and responsibilities that should be required?

7. Do the documentation requirements applicable only to RMBS in paragraph (b)(3) adequately describe the authorities necessary for servicers? Should similar requirements be applied to other asset classes?

8. Are the servicer advance provisions applicable only to RMBS in paragraphs (b)(3)(ii)(A) effective to provide effective incentives for servicers to maximize the net present value of the serviced assets? Do these provisions create any difficulties in application? Are similar provisions appropriate for other asset classes?

9. Is the limitation on servicer interest applicable only to RMBS in paragraph (b)(3)(ii)(C) effective to minimize servicer conflicts of interest? Does this provision create any difficulties in application? Are similar provisions appropriate for other asset classes?

10. Are the compensation requirements applicable only to RMBS in paragraph (b)(4) effective to align incentives of all parties to the securitization for the long-term performance of the financial assets? Are these requirements specific enough for effective application? Are there alternatives that would be more effective? Should similar provisions be applied to other asset classes?

11. Are the origination or retention requirements of paragraph (b)(5) appropriate to support sustainable securitization practices? If not, what adjustments should be made?

12. Is the requirement that a reserve fund be established to provide for repurchases for breaches of representations and warranties an effective way to align incentives to promote sound lending? What are the costs and benefits of this approach? What alternatives might provide a more effective approach?

13. Is retention by the sponsor of a 5 percent "vertical strip" of the securitization adequate to protect investors? Should any hedging strategies or transfers be allowed?

14. Do you have any other comments on the conditions imposed by paragraphs (b) and (c)?

15. Is the scope of the safe harbor provisions in paragraph (d) adequate? If not, what changes would you suggest?

16. Do the provisions of paragraph (d)(4) adequately address concerns about the receiver's monetary default under the securitization document or repudiation of the transaction?

17. Could transactions be structured on a de-linked basis given the clarification provided in paragraph (d)(4)?

18. Do the provisions of paragraph (e) provide adequate clarification of the receiver's agreement to pay monies due under the securitization until monetary default or repudiation?

VI. Regulatory Procedure

A. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires an agency to provide an Initial Regulatory Flexibility Analysis with a proposed rule, unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603–605. The FDIC hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities, as that term applies to insured depository institutions.

B. Paperwork Reduction Act

This proposed rule contains new information collection requirements subject to the Paperwork Reduction Act (PRA). The FDIC will submit a request for review and approval of a collection of information to the Office of Management and Budget (OMB) regulation, 5 CFR 1320.13.

The proposed burden estimates for the applications are as follows:

1. 10K annual report

Non Reg AB Compliant:
Estimated Number of Respondents: 473.
Affected Public: FDIC-insured depository institutions.
Frequency of Response: 1 time per year.
Average time per response: 36 hours.
Estimated Annual Burden: 17,028 hours.

Reg AB Compliant:
Estimated Number of Respondents: 203.
Affected Public: FDIC-insured depository institutions.
Frequency of Response: 1 time per year.
Average time per response: 6 hours.
Estimated Annual Burden: 1,218 hours.

2. 8K—Disclosure Form

Non Reg AB Compliant:
Estimated Number of Respondents: 473.
Affected Public: FDIC-insured depository institutions.
Frequency of Response: 2 times per year.
Estimated Number of Annual Responses: 946.
Average time per response: 6 hours.
Estimated Annual Burden: 5,676 hours.

Reg AB Compliant:
Estimated Number of Respondents: 203.
Affected Public: FDIC-insured depository institutions.
Frequency of Response: 2 times per year.
Estimated Number of Annual Responses: 406.
Average time per response: 1 hour.
Estimated Annual Burden: 406 hours.

3. 10D Reports

Non Reg AB Compliant:
Estimated Number of Respondents: 473.
Affected Public: FDIC-insured depository institutions.
Frequency of Response: 5 times per year.
Estimated Number of Annual Responses: 2,365.
Average time per response: 36 hours.
Estimated Annual Burden: 85,140 hours.

Reg AB Compliant:
Estimated Number of Respondents: 203.
Affected Public: FDIC-insured depository institutions.
Frequency of Response: 5 times per year.
Estimated Number of Annual Responses: 1,015.
Average time per response: 36 hours.
Estimated Annual Burden: 36,540 hours.

The FDIC invites the general public to comment on: (1) Whether this collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (2) the accuracy of the estimates of the burden of the information collection, including the validity of the methodologies and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and (5) estimates of capital or start up costs, and costs of operation, maintenance and purchase of services to provide the information. In the interim, interested parties are invited to submit written comments by any of the following methods. All comments should refer to the name and number of the collection:

- *http://www.FDIC.gov/regulations/laws/federal/propose.html.*
- *E-mail: comments@fdic.gov.* Include the name and number of the collection in the subject line of the message.
- *Mail:* Gary A. Kuiper (202–898–3877), Counsel, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

A copy of the comments may also be submitted to the OMB Desk Officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

List of Subjects in 12 CFR 360.6

Banks, Banking, Bank deposit insurance, Holding companies, National banks, Participations, Reporting and recordkeeping requirements, Savings associations, Securitizations.

For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend 12 CFR part 360 as follows:

PART 360—RESOLUTION AND RECEIVERSHIP RULES

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

Authority: 12 U.S.C. 1821(d)(1), 1821(d)(10)(C), 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. Revise § 360.6 to read as follows:

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

(a) *Definitions.* (1) *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.

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

(3) *Issuing entity* means an entity created at the direction of a sponsor that owns a financial asset or financial assets or has a perfected security interest in a financial asset or financial assets 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 two-step transfer, the term issuing entity would include both the issuer of the obligations and any intermediate entities that may be a transferee.

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

(5) *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, 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 does not include any instrument that evidences ownership of

the issuing entity, such as LLC interests, common equity, or similar instruments.

(6) *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.

(7) *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.

(8) *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.

(9) *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.

(10) *Transfer* means:

(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 clearly define the payment structure and capital structure of the transaction.

(i) The following requirement applies to all securitizations:

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

(B) The 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) The following requirements apply 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 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 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 as follows:

(i) The following requirements apply to all securitizations:

(A) The documents shall require that, prior to issuance of obligations and monthly 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 Securities and Exchange Commission Regulation AB, 17 CFR 229.1100 through 229.1123, or any successor disclosure requirements for public issuances, even if the obligations are issued in a private placement or are not otherwise required to be registered. 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, 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 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 shall 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) The following requirements apply 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 with all 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 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 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 clearly define the respective contractual rights and responsibilities of all parties and include the requirements described below and use as appropriate any available standardized documentation for each different asset class.

(i) The following requirements apply to all securitizations:

(A) The documents shall set forth all necessary rights and responsibilities of the parties, including but not limited to representations and warranties and ongoing disclosure requirements, and any measures to avoid conflicts of interest. The contractual rights and responsibilities of each party to the transaction, including but not limited to the originator, sponsor, issuing entity, servicer, and investors, must provide sufficient authority for the parties to fulfill their respective duties and exercise their rights under the contracts and clearly distinguish between any multiple roles performed by any party.

(ii) The following requirements apply only to securitizations in which the financial assets include any residential mortgage loans:

(A) Servicing and other agreements must provide servicers with full 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 such other action necessary to maximize the value and minimize losses on the securitized financial assets applying 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. The servicer must commence action to mitigate losses no later than ninety (90) days after an asset first becomes delinquent unless all delinquencies on such asset have been cured. A servicer must maintain sufficient records of its actions to permit appropriate review; and

(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 depend 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) Compensation to servicers shall provide 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) The following requirements apply to all securitizations:

(A) The sponsor must 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 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 transferred or hedged during the term of the securitization.

(ii) The following requirements apply 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 assets shall have been originated in compliance with all statutory, regulatory, and originator underwriting standards in effect at the time of origination. Residential mortgages included in the securitization shall be 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 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, and the obligations shall not be sold to an affiliate or insider;

(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;

(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 sponsor shall 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. To the extent the sponsor serves as servicer, custodian or paying agent provider for the securitization, the sponsor shall not comingle amounts received with respect to the financial assets with its own assets except for the time necessary to clear any payments received and in no event greater than a two day period. 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 set forth by generally accepted accounting principles, except for the "legal isolation" condition that is addressed by this paragraph.

(2) *Transition period safe harbor.* With respect to any participation or securitization for which transfers of financial assets were made or, for revolving trusts, for which obligations were issued, on or before September 30, 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 any such transferred financial assets notwithstanding that such transfer 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 set forth by 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 (d)(2) and the transaction otherwise satisfied the provisions of this section (Rule 360.6) in effect prior to [EFFECTIVE DATE OF FINAL RULE].

(3) *For securitizations meeting sale accounting requirements.* With respect to any securitization for which transfers of financial assets were made, or for revolving trusts for which obligations were issued, after September 30, 2010, 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 set forth by 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 made, or for revolving trusts for which obligations were issued, after September 30, 2010, 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, as defined above, and remains in monetary default for ten (10) business days after actual delivery of a written request to the FDIC pursuant to paragraph (f) of this section hereof to exercise contractual rights because of such monetary default, the FDIC hereby consents pursuant to 12 U.S.C. 1821(e)(13)(C) to the exercise of any contractual rights, including obtaining possession of the financial assets, exercising self-help remedies as a secured creditor under the transfer agreements, or liquidating properly pledged financial assets by commercially reasonable and expeditious methods taking into account existing market conditions, provided no involvement of the receiver or conservator is required. The consent to the exercise of such contractual rights 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 of an insured depository institution 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 below, 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) to the exercise of any contractual rights, including obtaining possession of the financial assets, exercising self-help remedies as a secured creditor under the transfer agreements, or liquidating properly pledged financial assets by commercially reasonable and expeditious methods taking into account existing market conditions, provided no involvement of the receiver or conservator is required. 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 receivership less any payments of principal received by the investors to the date of repudiation. Upon receipt of such payment, the investor's lien on the financial assets shall be released.

(e) *Consent to certain actions.* During the stay period imposed by 12 U.S.C. 1821(e)(13)(C), and during the periods specified in paragraph (d)(4)(i) of this section prior to any payment of damages or consent pursuant to 12 U.S.C. 1821(e)(13)(C) to the exercise of any contractual rights, the FDIC as conservator or receiver of the sponsor consents to the making of required payments to the investors in accordance with the securitization documents, except for provisions that take effect upon the appointment of the receiver or conservator, and to any servicing activity required in furtherance of the securitization (subject to the FDIC's rights to repudiate such 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) 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 the securitization transfer agreement or any relevant security agreements. Nothing contained in this section alters the claims priority of the securitized obligations.

(i) *No waiver.* 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 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) 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 issuance made in accordance with this section before such repeal.

By order of the Board of Directors.

Dated at Washington, DC, this 11th day of May, 2010.

Robert E. Feldman,

Executive Secretary, Federal Deposit Insurance Corporation.

[FR Doc. 2010–11680 Filed 5–14–10; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0499; Directorate Identifier 2010–NE–06–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier-Rotax GmbH 912 F Series and 912 S Series Reciprocating Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

> Due to high fuel pressure, caused by exceeding pressure in front of the mechanical fuel pump (e.g. due to an electrical fuel pump), in limited cases a deviation in the fuel supply could occur. This can result in exceeding of the fuel pressure and might cause engine malfunction and/or massive fuel leakage.

We are proposing this AD to prevent the pump from exceeding the fuel pressure, which could result in engine malfunction or a massive fuel leak. These conditions could cause loss of control of the airplane or a fire.

DATES: We must receive comments on this proposed AD by July 1, 2010.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Contact BRP–Rotax GmbH & Co. KG, Welser Strasse 32, A–4623 Gunskirchen, Austria, or go to: *http://www.rotax-aircraft-engines.com/*, for the service information identified in this proposed AD.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tara Chaidez, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *e-mail: tara.chaidez@faa.gov*; telephone (781) 238–7773; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about