## Addendum

## Questions Presented in the Interim Rule.

On November 15, 2009, FDIC amended its "securitization rule" under Section 360.6 of its resolution rules to take into account the impact of bringing securitized assets back onto banks' balance sheets as may be required by FAS 166 and 167.

The securitization rule, first adopted in 2000, provides a safe harbor to assure securitizers, credit rating agencies and investors that, in the event a bank securitizer failed, FDIC as receiver or conservator would not use its repudiation authority to try to bring the securitized assets back into the estate of the failed institution. The safe harbor was conditioned on the requirement that the asset transfer met all the conditions for *sale accounting treatment under generally accepted accounting principles* (GAAP). Thus, since 2000, investors have known that in the event of a failure, they could look to securitized financial assets for payments without interference by the FDIC.

FAS 166 and 167 are effective for annual financial statement reporting periods beginning after November 15, 2009—typically after January 1, 2010. The changes will likely require many special purpose entities to be consolidated onto the securitizer's balance sheet and thus will *likely not satisfy sale accounting criteria.* The FDIC recently amended its securitization rule to provide that for transfers (or in the case of revolving securitizations, beneficial interests were issued) before March 31, 2010, the safe harbor will remain in effect despite the fact that the transfer did not satisfy sale accounting treatment (Interim Final Rule)

Thus, the Interim Final Rule effectively grandfathers all participations and securitizations for which financial assets were transferred or, for revolving securitization trusts, for which securities were issued prior to March 31, 2010, so long as those participations or securitizations complied with the preexisting provisions under GAAP in effect during reporting periods beginning prior to November 15, 2009, and irrespective of whether or not the participation or securitization satisfies all of the conditions for sale accounting treatment under GAAP as effective for reporting periods beginning after November 15, 2009. The FDIC is seeking comment on the following questions:

**Q.** Do the changes to the accounting rules affect the application of the Securitization Rule to participations? If so, are there changes to the Interim Rule that are needed to protect different types of participations issued by insured depository institutions more broadly?

**A.** Statement of Financial Accounting Standards No. 166, *Accounting for Transfers of Financial Assets, an Amendment of FASB Statement No. 140* (FAS 166), affects prospectively the application of the Securitization Rule to participations. While we are not aware of any changes to the Interim Rule that are needed to protect different types of participations, we wish to point out one factor that the FDIC should consider as it formulates a final rule.

As indicated in the Interim Rule, FAS 166 defines a participating interest essentially as a pari passu, pro rata interest in a financial asset. Generally, no priority of rights or subordination may be present. With this in mind, there may be participations that have priority or subordination (or other features that may prevent sale accounting) but are still legally isolated, beyond the reach of the entity, its creditors, or a bankruptcy trustee. The loan would remain on the bank's books, though it may, in fact, be legally isolated from the bank's creditors or trustees.

Legal isolation is the one aspect of a participation that is most relied upon by the lending community as assurance that interference (by the FDIC or other interested party) does not take place. Therefore, we believe that participations that are legally isolated and entered into in good faith should assume the same investor protections as contained in the Securitization Rule, whether or not sale treatment is attained for accounting purposes. We do not believe that the accounting treatment of a participation should control its treatment by the FDIC in a receivership or conservatorship of the originating lender. Rather, the FDIC should continue its policy of not repudiating loan participation contracts in order to preserve this mechanism as a viable part of the lending market.

**Q.** Does the Interim Rule adequately encompass all transactions that should be included within its transitional safe harbor?

**A.** With respect to the second question, it is possible that the changes to GAAP might impact other types of variable interest entities and other entities, such as pooled funds and joint ventures. Participations or securities held by these entities may be consolidated and recorded on bank balance sheets under certain circumstances. Again, we urge the FDIC to keep separate the issue of accounting treatment from the decision as to how to treat various transactions for purposes of the conservatorship and receivership rules.

**Q.** Is the transition period to March 31, 2010 sufficient to structure transactions to comply with the new GAAP?

A March 31, 2010 effective date is not likely to provide an adequate period of time to change the terms of transactions if significant changes are proposed. For certain classes of assets, there may be inventory in the pipeline that could be affected.