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December 11, 2009

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Defining Safe Harbor Protection for 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 74 Federal Register 59066 (November 17, 2009)

Dear Mr. Feldman:

The American Bankers Association (ABA)¹ and the ABA Securities Association (ABASA)² wish to take this opportunity to express serious reservations regarding a proposal scheduled to be addressed by the Federal Deposit Insurance Corporation (FDIC or Corporation) at its December 15th meeting. We understand that the FDIC will consider whether to impose additional conditions on the safe harbor for securitizations under Section 360.6. That Section provides protection for treatment by the Corporation as conservator or receiver of financial assets transferred in connection with a securitization or participation (Securitization Rule). In an attachment to this letter, we also provide comments on the FDIC's Interim Final Rule (Interim Rule)³ regarding securitizations.

It is widely believed that one of these additional conditions will require the securitizer to hold "skin in the game," *i.e.*, to retain a portion of the credit risk of the securitized assets as an incentive to ensure proper underwriting of the underlying

¹ The ABA brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthens America's economy and communities. Its members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry's \$13.6 trillion in assets and employ over 2 million men and women.

² ABASA is a separately chartered affiliate of the ABA that represents those holding company members of the ABA that are actively engaged in capital markets, investment banking, and broker-dealer activities.

³ 74 *Fed. Reg.* 59066 (Nov. 17, 2009).

assets. The risk retention requirement reportedly could be set somewhere between five and ten percent of the assets.

Congress is currently considering the appropriateness of a risk retention requirement for securitizations.⁴ Importantly, the proposals under consideration recognize the need to give the banking regulators and the Securities and Exchange Commission sufficient flexibility to determine whether “skin in the game” is warranted and, if so, at what level. It would seem entirely appropriate for the FDIC to wait until legislation addressing these important issues is enacted and, further, to consult with its fellow regulators before amending its securitization safe harbor rule to require “skin in the game.”

More importantly, ABA is extremely concerned that this early action by the FDIC could further harm a securitization market that is already struggling to recover from the loss of investor confidence. Our members are telling us that they cannot adequately assess the impact a credit risk retention requirement under the safe harbor could have on the continued viability of the securitization markets. Compounding their difficulties in making this assessment is the fact that many of these same participants are grappling with the potential impact of increased costs associated with legislative and regulatory proposals to reform deposit insurance and current capital adequacy requirements and to fund a consumer financial protection agency and systemic risk resolution authority.

Loan securitization and participations are important mechanisms that facilitate financial intermediation and the provision of credit. Market participants need to have certainty over the treatment of these transactions in a conservatorship or receivership of the issuer in order to continue to be willing investors or participants. The fact that the accounting treatment of these transactions will change under GAAP does not provide a compelling basis for changing long-standing FDIC policy about the treatment of these transactions in a conservatorship or receivership. To conclude otherwise would create significant obstacles to an issuer’s ability to enter into securitization or participation contracts and, thus, free up capital for future loans.

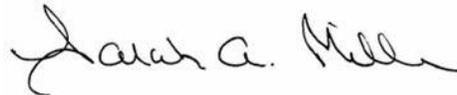
⁴ The Wall Street Reform and Consumer Protection Act of 2009 includes a requirement that securitizers retain five percent of the credit risk. However, the measure also provides broad authority for the banking agencies and the SEC jointly to provide for less than five percent risk retention (depending on underwriting standards). In addition, the Federal Reserve Board would be required to complete a 90-day study of the impact of various risk retention requirements and FAS 166 and 167 on the securitization market. On the Senate side, legislation before the Senate Banking Committee would require ten percent credit risk retention with similar broad exemptive authority for the regulators.

Any amendments to the FDIC's securitization rule would impact only insured depository institutions—not nonbank securitizers—thereby creating an unlevel playing field. The ABA believes that before issuing such a proposal, the FDIC should analyze the disparate impact the proposal could have on bank securitizers. A disparate impact would certainly limit the credit normally provided through securitizations and be counterproductive to efforts to restore the robust functioning of this key market.

Sincerely,



Wayne Abernathy



Sarah A. Miller

cc: Sheila C. Bair, Chairman, Federal Deposit Insurance Corporation
Martin J. Gruenberg, Vice Chairman of the FDIC Board of Directors
Thomas J. Curry, Director of the FDIC Board of Directors
John C. Dugan, Comptroller of the Currency
John E. Bowman, Director of the Office of Thrift Supervision (Acting)

Enclosure