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Summary of FDIC Safe Harbor Rule

On September 27, 2010, the Board of the Federal Deposit Insurance Corporation (the "FDIC") adopted a final rule amending the safe harbor for insured U.S. depository institutions (each, an "IDI") regarding the treatment by the FDIC, as receiver or conservator, of financial assets transferred by an IDI in connection with a securitization or in the form of a participation (the "Rule"). The final text of the Rule, together with the adopting release, is published in the Federal Register at 75 FR 60287 (Sept. 30, 2010). The Rule is codified at 12 CFR § 360.6, where it replaced the FDIC's original safe harbor rule that had been adopted in 2000 (the "Original Rule"), as modified by certain interim actions taken by the FDIC which established transitional periods for securitizations and participations completed or in process, first to March 31, 2010, then to September 30, 2010, and finally to December 31, 2010 pursuant to the Rule.

The Original Rule was intended to resolve issues raised by Financial Accounting Standards Board ("FASB") Statement No. 125 ("SFAS 125"), which was shortly replaced by Statement No. 140 ("SFAS 140") (a replacement of FASB Statement No. 125), each entitled "Accounting for Transfers and Servicing of Financial Assets and Extinguishment of Liabilities." Under SFAS 125, and then SFAS 140, a transfer of financial assets was accounted for as a sale if the transferor surrendered control over the assets. One of the conditions for determining whether the transferor had surrendered control was that the assets had been isolated from the transferor, i.e., put presumptively beyond the reach of the transferor and its creditors in bankruptcy or receivership, know as the "legal isolation" condition. The Original Rule provided that, subject to certain conditions, the FDIC would not, by exercise of its authority to disaffirm or repudiate contracts under 12 U.S.C. § 1821(e), reclaim, recover, or recharacterize as property of an IDI or the receivership any financial assets transferred by the IDI in connection with a securitization or participation, provided that such transfer met all conditions for sale accounting treatment under generally accepted accounting principles ("GAAP"), other than the legal isolation condition as it applies to institutions for which the FDIC may be appointed conservator or receiver, which was addressed by the Original Rule.

In 2009 FASB adopted Statement No. 166 ("SFAS 166") (an amendment of FASB Statement No. 140), "Accounting for Transfers of Financial Assets," and Statement No. 167 ("SFAS 167"), "Amendments to FASB Interpretation No. 46(R)," each of which is applicable to reporting periods that began on or after November 15, 2009. Under SFAS 166 and SFAS 167, many securitizations no longer qualified for sale treatment under GAAP and, as a result, no longer qualified under the safe harbor of the Original Rule.

In order to address the changes in GAAP, and to also subject the availability of new safe harbors to more stringent conditions based on the FDIC's belief that deficiencies in securitization practices led to many of the losses during the financial crisis which in turn led to claims upon the Deposit Insurance Fund administered by the FDIC, the Rule provides for four safe harbors for "legal isolation":

1. With respect to transfers of financial assets made in connection with participations, provided such transfer satisfies the conditions for sale treatment under current GAAP;

2. With respect to (i) any participation or securitization for which transfers of financial assets were made on or before December 31, 2010, or (ii) any obligations of revolving trusts or master trusts, for which one or more obligations were issued as of the date the FDIC adopted the Rule, or (iii) any obligations issued under open commitments up to the maximum amount of such commitments as of the date the FDIC adopted the Rule if one or more obligations were issued under such commitments on or before December 31, 2010, transfers of financial assets will remain subject to the Original Rule, provided such transfer satisfies the conditions for sale treatment under GAAP as in effect for reporting periods that began prior to November 15, 2009 (i.e., SFAS 140), notwithstanding the failure to satisfy the conditions for sale treatment under current GAAP;

3. With respect to any securitization not qualified for "grandfathering" under paragraph 2 above, the FDIC will not, through its authority to disaffirm or repudiate contracts, reclaim, recover or recharacterize as property of the IDI or receivership transfers of financial assets, provided such transfer satisfies the conditions for sale treatment under current GAAP; and

4. With respect to any securitization not qualified for "grandfathering" under paragraph 2 above and not qualified under paragraph 3 above because the transfers of financial assets do not satisfy the conditions for sale accounting treatment under current GAAP, if the FDIC is in monetary default due to its failure to pay or apply collections from the financial assets received by it in accordance with the securitization documents for ten business days after actual delivery of written notice, or if the FDIC repudiates the securitization agreement pursuant to which financial assets were transferred and does not pay damages within ten business days following notice of such repudiation, the FDIC consents to the exercise of rights and remedies in accordance with the securitization documents provided no involvement of the receiver or conservator is required other than executing documents in the ordinary course of business (this last safe harbor provides an exception to the stay of 45 days or 90 days that would otherwise apply to the exercise of such rights and remedies).

The availability of the safe harbors described in paragraphs 3 and 4 above is subject to a number of new conditions, including that (i) the securitization documents define the payment and capital structure of the transaction, and payments on the securitization obligations must be primarily based on the performance of the related financial assets; (ii) disclosure is made describing the financial assets, obligations, compensation of relevant parties and relevant historical performance data; (iii) the securitization documents must specify the respective contractual rights and responsibilities of all parties; (iv) compensation to parties involved in the securitization must be structured to provide incentives for sustainable credit and the long-term performance of the financial assets and securitization; and (v) the sponsor must retain at least five percent of the credit risk of the financial assets (this risk retention requirement will automatically be conformed to the final risk retention requirements adopted pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act). These conditions are more stringent if the securitization includes residential mortgage loans. There are also a number of other requirements specified in the Rule.