



October 21, 2010

The Honorable Sheila C. Bair  
Chairman, Board of Directors  
Federal Deposit Insurance Corporation  
550 17th Street NW  
Washington, DC 20429

**Re: Request for Clarification – Final Rule, 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, RIN 3064-AD55**

Dear Chairman Bair:

On behalf of the Commercial Real Estate (CRE) Finance Council, we wish to update you on recent market activity as well as to respectfully request clarification on the timing and scope of the risk retention provision of the FDIC's final "Safe Harbor" rule for securitizations and participations.<sup>1</sup> Our members fully support the urgent need to extend the core Safe Harbor provision, but we have questions about the added inclusion of a risk retention mandate in the final rule, particularly in light of Dodd-Frank.<sup>2</sup>

As you know, the CRE Finance Council is the collective voice of the entire \$3.5 trillion commercial real estate finance market, including issuers; investors such as insurance companies, pension funds, and money managers; portfolio and CMBS lenders, commercial and investment banks; rating agencies; accounting firms; servicers; and other service providers. Our principal missions include setting market standards, facilitating market information, and education at all levels, particularly related to securitization, which has been a crucial and necessary tool for growth and success in commercial real estate finance. To this end, we have been working, and we will continue, to work, closely with policymakers in an effort to ensure that legislative and regulatory actions do not negate or contradict

---

<sup>1</sup> Final Rule, 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, 75 Fed. Reg. 60287 (Sept. 30, 2010).

<sup>2</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act § 941(b) (adding Section 15G (b)(1) (which requires a joint rulemaking on risk retention) and (c)(2) (which requires development of retention standards by asset class) to the Securities Exchange Act).

economic recovery efforts in the CRE market, which has been greatly impacted by the recent downturn in the economy – including high unemployment, low consumer confidence and falling property values.

With more than \$1 trillion in commercial mortgages maturing in the next several years (many of which face an “equity gap” between property value and loan amount), we have a particular interest in facilitating a revival of the commercial mortgage-backed securities (CMBS) market, which presently represents approximately 25% of all outstanding debt and accounted for as much as 50% of all CRE lending in 2007. Today, uncertainty related to regulatory and accounting changes remains a major impediment to private lending and investing that is critical to a CRE recovery. There are serious questions about the viability of the CMBS market when considering the combined impact of reforms on the market and concerns about whether implementing regulators will coordinate reforms and customize retention requirements for inherently different asset classes, as directed by Dodd-Frank.

While it has been correctly asserted that some asset classes, such as residential mortgage-backed securities, remain dormant, we believe it is important to note that the CMBS market is showing signs of revitalized activity, which makes deliberate and coordinated policy and implementation by asset class even more crucial at this critical time. In fact, there have been seven CMBS deals completed this year with a total issuance of \$4.5 billion through the third quarter. Further, industry analysts predict that CMBS issuance for the fourth quarter 2010 alone will range from an additional \$4 billion to \$ 8 billion, with as much as \$35 billion of CMBS issuance in 2011, depending on a number of factors, including regulatory certainty. These figures are small compared to the \$238 billion in issuance in 2007, but the progress is timely given the number of CRE loan maturities in the next few years and encouraging considering that private issuance ceased for six quarters until the first non-TALF deal was issued in December 2009.

We believe it also is worth noting that the CMBS transactions that have recently taken place have been structured with low leveraged and well-underwritten loans, and feature even greater transparency that further amplify the differences between CMBS and other asset classes and highlights the need to carefully consider rules by asset class, as directed by Dodd-Frank.

We also, however, are acutely aware that even though the FDIC’s interim safe-harbor may have a significant impact on the commercial real estate securitization markets, those rules appear to be driven by the structure of securitized assets, market activity and performance in the subprime and prime residential markets.

In this regard, since the adoption of the final Safe Harbor rule on September 27, there has been considerable concern and enormous confusion about the rule among our members, including CMBS market participants actively considering deals and doing other planning related to lending and investment activity. This reaction is cause for grave concern because, as you recognize, regulatory uncertainty can quickly undermine the confidence of investors and other participants that is critical to the markets’ recovery, as highlighted by the Council’s most recent surveys. The confusion stems from differences between the text of the final rule and statements that have been made about it, which we hope you will now clarify.

More specifically, first, the text of the rule states that the 5 percent risk retention requirement is “applicable to all securitizations.”<sup>3</sup> In testimony before the U.S. Senate Banking, Housing, and Urban Affairs Committee on September 30, 2010, however, the following exchange occurred:

---

<sup>3</sup> See 75 Fed. Reg. at 60299 (to be promulgated as 12 C.F.R. § 360.6 (b)(5)(i)(A)).

Senator Corker: This whole issue of securitization was one that I think we were all trying to understand how this 5 percent retention would work. And I do look forward to talking to each of you. This is obviously – especially in the commercial side, I mean there’s just nothing happening right now. And...

Chairman Bair: We don’t – it doesn’t apply to commercial.<sup>4</sup>

The exchange has prompted numerous questions from our membership regarding the scope of the new final rule and whether the risk retention provisions do or do not apply to securitizations of commercial mortgages. We respectfully request clarification on this question.

Second, the Safe Harbor rule states that upon the “effective date” of the risk retention regulations required by Section 941(b) of Dodd-Frank, such final regulations shall exclusively govern with respect to the risk retention requirements in the Safe Harbor rule (the “auto-conform” provision).<sup>5</sup> The Dodd-Frank Act instructs that the regulations to be promulgated thereunder “become effective ... two years after the date” they are published in final form in the Federal Register,” for assets other than residential mortgages.<sup>6</sup> Thus, the implication of the auto-conform provision is that the risk retention rules adopted pursuant to Dodd-Frank will not supplant those in the Safe Harbor rule until April 2013.

During the September 30 Senate Banking hearing, however, Chairman Bair described the auto-conform provision as “an action-forcing event so that those interagency rules can be done on a very timely basis. It’s a 270-day timeframe that is provided by Dodd-Frank. We hope that is met.” This statement has been interpreted by market participants to suggest that the intention of the auto-conform provision is for the Dodd-Frank rules to supplant the Safe Harbor risk retention rule when the broader Dodd-Frank rules are *finalized* (in April 2011), rather than when the Dodd-Frank rules become *effective*, an interpretation that is at odds with the text of the Safe Harbor rule. Thus, there is significant confusion among market participants about when the Safe Harbor rule’s risk retention provision will conform to the rules adopted under Dodd-Frank. We respectfully request clarification on this question as well.

Ultimately, the CRE Finance Council's membership is united in the view that the alignment of the interests of lenders, issuers and investors in the securitization process is essential. The Council has long been an advocate within the industry for enhanced transparency and sound practices, and the association will continue to work with market participants and policymakers to build on the unparalleled level of disclosure and other safeguards that exist in the CMBS market. Therefore, we continue to urge regulators to adopt “joint” risk retention rules, by asset-class, which set forth a menu of options for commercial real estate loans and alignment of interests and allow for various methods (vertical slice, horizontal slice, 3<sup>rd</sup> party investor, enhanced underwriting and controls, etc.) to be available to the transaction parties.

---

<sup>4</sup> Hearing transcript provided by CQ Congressional Transcripts.

<sup>5</sup> 75 Fed. Reg. at 60299 (to be promulgated as 12 C.F.R. § 360.6 (b)(5)(i)(B)).

<sup>6</sup> Dodd-Frank Act § 941(b) (adding Section 15G (i)(2) to the Securities Exchange Act). Since the Dodd-Frank risk retention rules must be finalized within 270 days of enactment (that is, by April 17, 2011), two years from that date would be April 2013. *See id.* (Adding Section 15G (b)(1) to the Securities Exchange Act).

Further, the CRE Finance Council is working on industry “best practices” for underwriting, representations and warranties, and issuance and ongoing disclosures that reflect (and go beyond) the statutory mandate for commercial mortgages in Dodd-Frank, and we plan to share these final projects with policymakers during the joint rulemaking process.

We appreciate your consideration of our request that the FDIC clarify the applicability of the new Safe Harbor risk retention requirements to commercial mortgages and the timing of the rule’s auto-conform feature, and we stand ready to provide any additional assistance that may be helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "John D'Amico". The signature is fluid and cursive, with a large initial "J" and "D".

John D’Amico  
Chief Executive Officer  
CRE Finance Council

cc: Michael H. Krimminger, Deputy to the Chairman for Policy