



# Securitization Update

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Dechert has assembled a team to cover the latest legislative and regulatory developments affecting the CMBS, RMBS, and ABS markets. Each Dechert Securitization Update will provide you with timely information on these developments.

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## FDIC Board Approves Final Rule Regarding Safe Harbor Protection for Securitizations

The Federal Deposit Insurance Corporation's (the "FDIC") "safe harbor rule," adopted in 2000, shields an ABS (including CMBS and RMBS) sponsor that is an insured depository institution from the FDIC's power to recover securitized assets following a sponsor's insolvency. The existing safe harbor rule provides important protections for securitizations by confirming that in the event of a sponsor's insolvency, if an accounting sale occurred, the FDIC would not reclaim loans transferred into a securitization transaction. In June 2009, however, the Financial Accounting Standards Board revised generally accepted accounting principles for securitizations. As of the effective date of the accounting changes, many securitizations may no longer meet the off-balance sheet standards for sale accounting treatment and, as a result, may no longer comply with the preconditions for the application of the existing FDIC safe harbor rule. The FDIC had previously extended the protections twice, with the last extension set to expire on September 30, 2010.

On September 27, 2010, the FDIC approved a final rule (the "Rule") to extend through December 31, 2010 the existing safe harbor rule under which securitizations commenced on or before December 31, 2010 are permanently grandfathered under the existing terms of treatment by the FDIC as conservator or receiver of financial assets transferred in connection with such securitizations.

The Rule also imposes the conditions for safe harbor for securitizations issued after December 31, 2010 (the "New Safe Harbor"). By satisfying the New Safe Harbor, sponsors of ABS (including CMBS and RMBS) that are insured depository institutions are shielded from the FDIC's power to recover securitized assets following a sponsor insolvency.

In order to have the benefit of the New Safe Harbor, a sponsor needs to satisfy several key conditions, including provisions related to enhanced disclosure for private placements, required investor reporting and risk retention.

Among other provisions, the Rule includes an "auto-conform" provision. In order to ensure that the safe harbor regulation fully conforms with the risk retention requirements of the Dodd-Frank Wall Street Reform

and Consumer Protection Act (the “Dodd-Frank Act”), the Rule provides that, upon adoption of the interagency regulations, those final regulations shall exclusively govern the risk retention requirement in the New Safe Harbor. The Rule includes a similar provision with respect to the Securities and Exchange Commission’s forthcoming Regulation AB final rules.

Insured depository institutions may issue fewer ABS because of uncertainty created by the Rule. Securitization industry participants are also concerned that because unregulated non-bank entities are unaffected by the New Safe Harbor, the FDIC has created an uneven playing field that favors unregulated non-bank lenders.

The Rule can be found at: <http://www.fdic.gov/news/board/10Sept27no4.pdf>.

We will provide a detailed review and analysis of the Rule and the New Safe Harbor and their effect on the securitization industry in an upcoming publication.

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