

Clients&FriendsMemo

Securitization Reforms: What is the Current State of Play?

May 26, 2010

On May 20, 2010, the United States Senate passed a financial reform bill entitled The Restoring American Financial Stability Act of 2010 (the “**Senate Bill**”), which includes provisions designed to improve the offering process for asset-backed securities (“**ABS**”).¹ The Senate Bill was passed in response to a bill passed by the United States House of Representatives on December 11, 2009, entitled The Wall Street Reform and Consumer Protection Act of 2009 (the “**House Bill**”).² A portion of the House Bill contains similar securitization reforms.³ The United States Senate and the United States House of Representatives will now hold a conference to reconcile the provisions of the House Bill and the Senate Bill.⁴

Separately, the Federal Deposit Insurance Corporation (the “**FDIC**”) released an Advanced Notice of Proposed Rulemaking (the “**FDIC ANPR**”) on December 15, 2009, which contains proposed amendments to the FDIC’s securitization “safe harbor” rule that would regulate the issuance of ABS.⁵ The FDIC ANPR would require banking institutions that issue ABS to satisfy various conditions to obtain “safe harbor” from the FDIC’s ability to repudiate contracts of insolvent banks and recover securitized assets.⁷ On May 17, 2010, the FDIC released a Notice of Proposed

¹ See The Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. (2010), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s3217pcs.txt.pdf.

² See The Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. (2009), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173eh.txt.pdf.

³ See *Id.* at Title I, Subtitle F, The Credit Risk Retention Act of 2009.

⁴ In passing the Senate Bill, the United States Senate renamed it H.R. 4173, The Wall Street Reform and Consumer Protection Act of 2009.

⁵ See Advance Notice of Proposed Rulemaking Regarding Treatment by the FDIC as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation After March 31, 2010, available at <http://www.fdic.gov/news/board/DEC152009no5.pdf>.

⁶ See 12 C.F.R. § 360.6.

⁷ Currently, the FDIC provides a safe harbor where assets transferred in a securitization constitute a “sale” under generally accepted accounting principles (“**GAAP**”). However, FAS 166 and 167, which are effective for reporting periods beginning after November 15, 2009, may require some securitizations to be consolidated on the balance sheet of the sponsor if the sponsor retains (i) the power to direct activities that significantly impact the securitization entity’s performance or (ii) the obligation to absorb losses or right to receive benefits that could potentially be significant.

Rulemaking⁸ revising the proposed regulations in the FDIC ANPR, and extending the comment period until July 1, 2010.

Finally, on April 7, 2010, the Securities and Exchange Commission announced proposed regulations that would significantly revise Regulation AB and other laws governing offerings, sales and reporting for ABS.⁹

These legislative and regulatory initiatives address many of the same issues, such as (i) risk retention, (ii) continued periodic reporting and (iii) increased disclosure to investors. We thought it would be helpful to provide a chart that compares and contrasts some of the key overlapping points in these initiatives.

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We hope you find this helpful. Please feel free to contact any of the following Cadwalader attorneys if you have any questions about this memorandum.

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⁸ See Notice of Proposed Rulemaking Regarding Treatment by the FDIC as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation After September 30, 2010, available at <http://www.fdic.gov/regulations/laws/federal/2010/10proposeAD53.pdf>.

⁹ See Asset-Backed Securities Proposed Rule, SEC Release Nos. 33-9117; 34-61858, File No. S7-08-10, 75 Fed. Reg. 23,328, 23,514 (May 3, 2010), available at <http://www.sec.gov/rules/proposed/2010/33-9117fr.pdf>.