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**MEMORANDUM**

November 12, 2009

To Our Clients and Friends

Re: FDIC Safe Harbor for Securitization Transactions

The Federal Deposit Insurance Corporation (“FDIC”) has adopted an interim amendment to its rule regarding safe harbor protection for treatment by the FDIC as receiver of assets transferred in connection with a securitization. The rule is effective immediately. The FDIC is also requesting public comment on its interim rule for 45 days.

**BACKGROUND**

In 2000, the FDIC adopted a rule that clarified the scope of its authority to disaffirm or repudiate contracts of a depository institution with respect to transfers of financial assets by the institution in connection with a securitization or participation. The rule provided that the FDIC will not use its statutory authority as receiver or conservator to disaffirm or repudiate contracts to reclaim, recover, or re-characterize as property of the institution any financial assets transferred by an institution in connection with a securitization or participation, provided that the transfer meets all conditions for sale accounting treatment under generally accepted accounting principles (“GAAP”).

In June, the Financial Accounting Standards Board (“FASB”) modified GAAP in a manner that affects whether a special purpose entity (“SPE”) must be consolidated for financial reporting purposes, thereby subjecting many SPEs to GAAP consolidation requirements.<sup>1</sup> These accounting changes will require some depository institutions to consolidate an issuing entity to which financial assets have been transferred for

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<sup>1</sup> See Statement of Financial Accounting Standards No. 166, *Accounting for Transfers of Financial Assets, an Amendment of FASB Statement No. 140* and Statement of Financial Accounting Standards No. 167, *Amendments to FASB Interpretation No. 46(R)*.

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securitization onto their balance sheets for financial reporting purposes. Because of the accounting treatment, securitizations could be considered to be an alternative form of secured borrowing. As a result, the safe harbor provision of the FDIC's rule may not apply to the transfer.

### **INTERIM RULE**

The FDIC's interim rule provides that, for participations or securitizations (i) for which transfers of financial assets were made or (ii) for revolving securitization trusts, for which beneficial interests were issued on or before March 31, 2010, the FDIC will not reclaim, recover, or re-characterize as property of the institution any such transferred financial assets, notwithstanding that such transfer does not satisfy all conditions for sale treatment under GAAP if the transfer satisfied the conditions for sale treatment in effect for periods before November 15, 2009.

A copy of the FDIC's draft *Federal Register* notice can be found on our website at [http://www.schwartzandballen.com/whats\\_new.html](http://www.schwartzandballen.com/whats_new.html).

If you have any questions, please call Gilbert Schwartz, Robert Ballen, Tom Fox or Heidi Wicker at (202) 776-0700.