

November 17, 2008

Mr. Russell G. Golden
Technical Director
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5116

RE: Exposure Draft – Amendments to FASB Statement No. 140

Dear Mr. Golden:

The Accounting Standards Executive Committee of the American Institute of Certified Public Accountants (AcSEC) has reviewed the Exposure Draft of the proposed FASB Statement, *Accounting for Transfers of Financial Assets, an amendment of FASB Statement No. 140* (the proposed Standard or the Exposure Draft), and is pleased to provide our comments.

One of the objectives of the project is to improve the relevance, representational faithfulness and comparability of the information that a reporting entity provides in its financial statements. We believe that the proposal makes improvements in that regard, but in view of the fact that the International Accounting Standards Board (IASB) also has a project on its agenda to develop a new standard on derecognition, AcSEC recommends that the Board instead focus its efforts on developing a converged derecognition standard with the IASB. We understand that the IASB project is also on a “fast track” and the IASB will bypass the Discussion Paper step and proceed directly to issue an exposure draft in the near term.

AcSEC believes that it would be better to require companies to make a single change to a converged accounting standard, rather than implementing this proposal and then undertaking a second implementation effort when a converged derecognition standard is issued shortly thereafter. Substantial costs will be incurred to implement these standards. Preparers will incur costs to learn the new standard, train employees, collect significant amounts of data not collected today, change reporting and consolidation systems and make changes to systems and control structures to reflect the new requirements. Auditors will need to update practice aids, policies, tools and train employees on the new standard. Users will experience a similar learning curve. Therefore, we think it is unreasonable to ask entities to apply two sets of accounting changes within what we expect to be a short time frame.

In the event that the Board does not accept this recommendation, AcSEC believes it is extremely important that FASB issue the standards on amendments to FASB Statement No. 140, *Transfers of Financial Assets and Extinguishments of Liabilities*, and the amendments to FASB Interpretation No. 46(R), *Consolidation of Variable Interest Entities* (FIN 46(R)), concurrently. We believe that the two standards complement each other, since they both address what should be recognized on the balance sheet.

Although AcSEC supports delaying the issuance of this proposed standard until a joint solution with the IASB can be achieved, we support the finalization of the enhanced disclosure guidance in the proposed FSP FAS 140-e and FIN 46(R)-e, *Disclosures about Transfers of Financial Assets and Interests in Variable Interest Entities*. The proposed FSP would provide greater transparency to financial statement users about a transferor's continuing involvement with transferred financial assets and an enterprise's involvement with variable interest entities before a final joint standard can be finalized. AcSEC has already provided its comments on the enhanced disclosures in its comment letter on the proposed FSP, which are applicable to this proposed standard as well. We also believe that the recognition, measurement and disclosure requirements in this proposed standard should apply equally to both public and private companies.

The FASB did not limit the changes in FASB Statement No. 140 only to removing QSPEs, but made several other significant changes to the FASB Statement No. 140 model, increasing the difficulty of initially applying the proposed standard. As an indication of the impact of these changes on financial reporting and the complexity in their application, the Task Force cites Appendix C to the Exposure Draft, which shows the extent to which the proposed Exposure Draft would impact financial reporting. We think the complexity of adopting the numerous changes to the proposed amendments of both FASB Statement No. 140 and FIN 46 (R) provides an additional reason why preparers should not be required to implement two successive changes in close proximity.

AcSEC recognizes that the Board may decide to continue with the project despite our views and, therefore, we recommend certain revisions to improve the proposed Standard, which are described below.

Coordination with the Proposal to Amend FIN 46(R)

As we noted above, this proposal is presumably being issued simultaneously with the proposal to amend FIN 46(R), *Consolidation of Variable Interest Entities*. It is unclear to us whether to apply this Standard first and then the proposed FIN 46(R) or vice versa. For example, if the proposed amendment to FIN 46(R) were applied first, then a former QSPE for which the transferor is deemed to be the primary beneficiary would be consolidated and, thus, become a consolidated affiliate. Then, in applying the proposed amendment to FASB Statement No.140 to the transfer of assets to the former QSPE, proposed paragraph 9 sales criteria would not be met, because the assets were transferred to a

“consolidated affiliate.” However, if the proposed standard amending FASB Statement No. 140 were applied first, sales treatment could potentially be achieved before the FIN 46(R) consolidation analysis was performed.

AcSEC believes that the amendments to FASB Statement no. 140 should be applied first, as it is usually the transfer of assets that leads to the transferor’s attaining a controlling financial interest in the variable interest entity. We request that the Board clarify whether it intends that a “consolidated affiliate,” as that term is used in paragraph 9(a) of the proposed amendments to FIN 46(R), would include a variable interest entity consolidated under FIN 46(R). We also recommend that the final Standard clarify the intent of the Board with respect to the priority of application of both proposed Standards, because the order of applying the two standards could result in a significant difference in the standalone financial statements of the parent company and the special purpose entity.

Criteria for Sale Treatment

AcSEC generally agrees with the amendments that the FASB has made to paragraphs 9(b) and 9(c) criteria for sale accounting. Particularly, we support the deletion of the “more than a trivial benefit” language, which has been difficult to apply and audit. However, we believe that the requirement in paragraph 9(c)(3) should be changed to read, “... unless such constraint is designed to significantly benefit the transferee (or investors in a transferee that is an SPE).” The FASB should clarify that, where the transferee is an SPE, the investor may also be the beneficiary of a restriction on assets transferred and such restriction would not necessarily preclude sale accounting, if such a constraint was not designed primarily to benefit the SPE transferee, but rather to benefit the ultimate investors. Such restrictions are often designed to assure investors that there will not be significant changes to the risk characteristics of the pool of assets in which they invested through the SPE.

Additionally, determining whether a transferor, transferee or investor significantly benefits from the constraint would be very challenging, because of the fact that the securitization transaction is a bargained exchange. All parties to the exchange presumably benefit from it, and each party presumably gives up consideration commensurate with the benefit that it receives. Therefore, this provision is difficult to operationalize in practice.

We also would suggest that the FASB clarify the accounting for a transfer from a parent to a subsidiary. Presumably, the parent would not account for the transfer as a sale; since the parent has control over the subsidiary, it would be deemed to have effective control over the transferred financial assets. Therefore, it appears that such transfers would never be eligible for sale accounting. If symmetrical accounting for both the parent and subsidiary is achieved, the subsidiary could never account for the assets it received in the transfer in its standalone financial statements.

Participating Interests

AcSEC questions the necessity of creating the guidance included in the proposed Standard for a “participating interest.” We are not aware of any abuses in practice related to transfers of a portion of an asset and this new guidance makes the standard much more difficult to apply, would significantly change practice and would result in accounting that doesn’t make sense. We believe the criteria specified to meet the definition of a participating interest are too restrictive and would cause many participations that are widely used in practice to fail to qualify for sales treatment under the proposal. We note that some participations may not receive sale treatment, whereas if the financial assets were transferred in their entirety to an SPE with similar economic terms and economic outcome with an equivalent interest retained, the transfer would be able to meet the criteria for sale accounting. We believe that it is not an improvement in financial reporting if the form of the transaction dictates the accounting, rather than the economic substance. However, if the Board keeps the concept of participating interests in the proposed Standard, we would not object to the Board’s precluding gain recognition on a transfer of a portion of an asset that does not qualify as a sale as outlined in the Exposure Draft., paragraph 12.

In the event the FASB rejects our suggestion to eliminate paragraph 8B to the Exposure Draft, we believe that several implementation issues need to be addressed. We would ask that the FASB consider eliminating or revising the requirement in paragraph 8B(b) that the transferor’s ownership shares must remain pro rata over the life of the original financial asset. In standard loan participation agreements, it is not uncommon for the transferor’s proportionate interest to vary over the life of the original financial asset. Consider the following examples:

- Under construction loan agreements, the lead bank may advance its own funds first to avoid the necessity of contacting the participants before each draw. A “true up” occurs shortly after the lead bank advances the funds.
- A participant may negotiate to sell its share back to the lead bank, which would change the lead bank’s proportionate interest.
- If a participation commences after the inception of the asset, collections from the borrower prior to the participation would not be pro rata with the ultimate allocation of interests among the participants.
- If an entity initially transfers 50% of a loan to another lender and later transfers another 20% to that lender or another party, the transferor’s ownership shares do not remain pro rata over the life of the original financial asset.

Our reading of paragraph 8B(b) is that the transfers listed above would not qualify as a participating interest under the guidance in the proposed Standard. This conclusion would likely cause many common participation agreements to fail to qualify for sales treatment. At the very least, if the Board does not decide to eliminate the concept of a participating interest as we recommended, we suggest the

guidance be modified to require any pro rata requirements relate to the life of the participation, not the life of the original financial asset.

We also fail to understand why participating interest holders can have no recourse to the transferor or to each other. FASB Statement No. 140 is based on a financial components approach under which every participant in the transaction records the assets they retain or acquire and the liabilities they assume. Just as recourse is a factor in determining whether isolation of an entire transferred asset has been achieved, but does not preclude sale accounting, AcSEC believes that having some recourse should not prevent sale accounting for a participation as long as paragraph 9(a) is met.

The FASB should also clarify if it is relevant whether the interest held by the transferor is in security or non-security form. Consider the following example: An entity transfers an entire group of assets to a securitization trust and takes an interest issued by such trust. If the form of the interest in the trust is a security, we believe this transfer would not be considered a participating interest in the pool of assets because the retained interests would be deemed to be a new interest, different from the transferred assets. Alternatively, if the form of the interest is not in security form, it is not clear to us whether this causes the transfer to be subject to the requirements for participating interests, since the retained interest has not changed its characteristics (e.g., a transferred loan would still be subject to loan accounting).

Elimination of the Mortgage Banking Exception

AcSEC supports the elimination of the special provisions in FASB Statement No. 140 and FASB Statement No. 65, *Accounting for Mortgage Banking Activities*, for guaranteed mortgage securitizations (GMS) to require them to be treated the same as any other transfer of financial assets. However, the interaction of this change with the FIN 46(R) Exposure Draft should be clarified. Specifically, if the transferor retains 100 percent of the beneficial interests, but the transferee consolidates the GMS trust holding the loans, would both the transferor and transferee reflect the loans in their financial statements? We believe the Board needs to clarify which asset it intends that the third-party guarantor to recognize - the loans or a receivable from the transferor in its consolidated financial statements. Our sense is that structuring around the revised rules would be simple, if the transferor were to simply sell off a minor interest in the GMS (i.e., 1 percent) and thus qualify for sales accounting, resulting in a significant change in accounting including 100% gain recognition.

Increased Use of Fair Value Accounting

AcSEC does not object to the elimination of the current fair value practicability exceptions currently in FASB Statement No. 140. We do not agree, however, with the proposal that would require a transferor's beneficial interest to be initially measured at fair value when the transfer is accounted or as a sale. We are concerned that this requirement could lead to abuse in practice and would not meet

the objective of improved financial reporting and transparency. For example, under the proposed standard, a transferor could choose to transfer assets to an SPE shortly before a reporting period ends in order to get sale accounting for the assets and to recognize a gain in the financial statements while retaining a very large portion of the interests issued by the SPE. Since the project is aimed in part at preventing such abuses, we would recommend that the beneficial interests continue to be measured at their allocated carrying amounts.

Basis for Conclusions

While the Task Force supports the Board's decision to eliminate Qualifying Special Purpose Entities (QSPEs), we object to the language in the Basis for Conclusions (paragraphs A17, A18 and A26) that criticizes preparers and auditors for so-called abuse in the application of FASB Statement No. 140 to QSPEs and argues that the Board was not aware of these issues. We would also reference Robert Herz's September 18, 2008 speech, where he criticized preparers for aggressively using QSPEs to get off-balance sheet treatment, stating "unfortunately, it seems that some folks used Qs like a punch bowl to get off-balance sheet treatment while spiking the punch."

During the Board's deliberations on FASB Statement No. 140 and its predecessor FASB Statement No. 125, as well as during subsequent consideration of various amendments to FASB Statement No. 140, representatives of industry held numerous educational sessions with the Board and its staff explaining various common securitization structures, how the Standard would be applied in practice to these structures, and on other implementation issues. Although there has been turnover on the Board and the staff, the record will show that the Board had every opportunity to obtain an in-depth knowledge of structures widely considered to be QSPEs. We recommend that such language be deleted from the Basis for Conclusions, because it is incorrect, inappropriate, and misstates what actually occurred.

We thank the Board for its consideration and would welcome the opportunity to further discuss our comments with Board members and their staff.

Very truly yours,

Jay D. Hanson
Chair, AcSEC

Linda B. Bergen
Co-chairs, FASB Statement No. 140 and FIN 46(R) Task Force

James W. Bean