Letter of Comment No: 6
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August 22, 2005

Financial Accounting Standards Board
401 Merritt 7
PO Box 5116
Norwalk, CT 06856-5116

Re: Proposed FASB Staff Position No. FAS 140-c, Clarification of the Application of Paragraphs 40(b) and 40(c) of FASB Statement No. 140

Ladies and Gentlemen:

The American Securitization Forum[1] thanks the Financial Accounting Standards Board for this opportunity to comment on proposed FASB Staff Position No. FAS 140-c (the "Proposed FSP"). Our comments relate to the treatment of market-making and trading positions in the Proposed FSP. We agree with the guidance in the Proposed FSP relating to imbalances resulting from prepayment speeds that vary from expectations, and the ASF has no specific comments on that guidance.

We understand that FASB staff has had prior discussions with constituents relating to the impact of market-making and trading positions under paragraph 40(b) of Statement 140, including an April 26, 2005 meeting. We are grateful for the efforts of FASB and its staff to provide supplemental guidance on these issues. However, one aspect of the proposed guidance exacerbates the problems that constituents face in this area. The treatment of market-making and trading in the Proposed FSP closely parallels the treatment of deviations from expected amortization and prepayment schedules, but the underlying issues are sufficiently different to require different solutions.

Paragraph 10 of the Proposed FSP requires that:

> "purchases of beneficial interests through market-making or trading activities must be evaluated as part of a comprehensive analysis of whether, at the time the beneficial interests of the qualifying SPE are issued, the notional amounts of the derivatives are *not expected to*

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[1] The American Securitization Forum (the "*ASF*") is a broadly-based professional forum of participants in the U.S. securitization market. Among other roles, the ASF members act as issuers, underwriters, dealers, investors, servicers and professional advisors working on securitization transactions. This comment letter was developed principally in consultation with the ASF's Accounting and Tax Subcommittee, with input from other ASF members and committees. More information about the ASF, the Accounting and Tax Subcommittee and their respective members and activities may be found at the ASF's internet website, located at www.americansecuritization.com.

exceed the amount of beneficial interests outside the control of the transferor, its affiliates, or agents subsequently."

This approach assumes that transferors could exclude the beneficial interests that the transferor expects to be purchased by its affiliates or agents in market-making or trading activities from the coverage of a derivative held by the qualifying SPE. For a number of reasons, that is not practical. We have listed the most important obstacles below.

In considering these points, it may be helpful to think in terms of a simple example, where fixed rate assets are transferred to a qualifying SPE, but the beneficial interests are to pay interest at a variable rate. To make this possible, the qualifying SPE would enter into a simple interest rate swap, under which the qualifying SPE would pay a fixed rate, the swap counterparty would pay a variable rate, and the notional amount at any time would equal the outstanding principal amount of the beneficial interests at that time.

The main obstacles for a transferor seeking to apply the proposed guidance would be as follows:

1. Beneficial interests that are purchased by the transferor's affiliates or agents in trading or market-making activities are often held initially by independent investors, who will want the protection of the derivative. In fact, coverage by the derivative will generally be a prerequisite to achieving the desired credit ratings on these beneficial interests. In our example, without an interest rate swap, the rating agencies generally would not be comfortable with the interest rate risk created by issuing variable rate beneficial interests, backed by fixed rate assets. Consequently, it is not feasible to exclude those beneficial interests that the transferor estimates its affiliates or agents might acquire in market-making and trading activities from the coverage of the derivative when the beneficial interests are issued.

2. Beneficial interests purchased in market-making or trading activities are held for resale and are generally then resold to independent investors, who again will want the protection of the derivative and the credit rating that depends upon the derivative. The derivative cannot be terminated without affecting the value and marketability of the related beneficial interests. Consequently, it would not be feasible to provide for partial terminations of the derivative from time to time as beneficial interests are acquired in market-making or trading activities, as the timing of repurchases due to market making is inherently unpredictable.

Besides the transferor, the qualifying status of an SPE can also be important to a third party investor (particularly in subordinated tranches), who may be the primary beneficiary in a FIN 46R analysis, if the SPE falls out of the scope exception for qualifying SPEs. Any such investor would be in a very difficult situation, particularly for pre-existing transactions. Investors generally do not receive any information that would enable them to monitor the impact of market-making and trading activities on the SPE's qualifying status, and would generally not be entitled to request such additional information.

As anticipated by paragraph 8 of the Proposed FSP, an Exposure Draft (Revised) issued by FASB on August 12, 2005 (the "FAS 140 Exposure Draft") proposes changes to paragraph 40 that would eliminate the market-making and trading issue for transfers of financial assets

occurring after the end of the first fiscal quarter beginning after the issuance of the final Statement.[2] In light of this development, we strongly believe that FASB should delete the portions of the Proposed FSP relating to market-making and trading activities.

We recognize that constituents asked for supplemental guidance on market-making and trading last Spring. However, the passage of time, the release of the FAS 140 Exposure Draft and the short transition period contemplated by the FAS 140 Exposure Draft have substantially reduced the need for additional guidance on this point. Among other things, the guidance proposed in paragraph 10 of the Proposed FSP differs from the related provisions of the FAS 140 Exposure Draft. As a result, if paragraph 10 were adopted as proposed, preparers would be required to implement serial inconsistent versions of GAAP in a short number of reporting periods. In fact, given the proposed transition provisions of the FAS 140 Exposure Draft and the possibility of grandfathering existing structures, it is possible that *three different sets of GAAP requirements* (existing guidance prior to the effectiveness of the Proposed FSP; the final version of the Proposed FSP; and the final version of the FAS 140 Exposure Draft) could apply going forward, depending upon the creation date and other characteristics of the SPE involved.

If FASB is not comfortable with deleting the sections of the Proposed FSP related to market-making and trading activities as suggested above, then we request that the Proposed FSP be modified to provide that paragraph 40(b) was not intended to address market-making and trading activities and therefore those activities can be disregarded for purposes of applying that paragraph.[3] We believe this is reasonable as we understand that the purpose of paragraph 40(b) was to make sure that transferors would not be able to avoid marking derivatives to market through earnings by transferring them to a qualifying SPE.[4] This concern does not apply to positions obtained through market-making or trading activities because those positions are held in the trading book and are marked to market through earnings under current practice.

To avoid any doubt on this point, the Board could make some version of the requirements in paragraph 10 of the Proposed FSP apply if, for any reason, positions purchased by a transferor's affiliates or agents in market-making or trading activities were not marked to market through earnings. To avoid any undue disadvantage for investors who might be primary beneficiaries (as described above), any such requirements should apply only to new transactions closed after the Proposed FSP is finalized, so that investors are aware of this issue and are in a position to negotiate appropriate monitoring arrangements.

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[2] FAS 140 Exposure Draft, pp. iv and 30.

[3] We note that Chairman Herz has opined that amendments to FASB statements may be made through the FSP process, since similar due process is followed with FSPs and amendments. Remarks of Robert H. Herz Chairman, Financial Accounting Standards Board Twenty-Fourth Annual SEC and Financial Reporting Institute Conference June 2, 2005, pp. 7-8.

[4] See Statement 140, Basis for Conclusions, par. 187-188.

The ASF appreciates the opportunity to provide the foregoing comments. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact Esther Mills, Chair of the Accounting and Tax Subcommittee (212. 449.2048), Lisa Filomia-Aktas, Deputy Chair of the Subcommittee (212.773.2833) or George Miller, Executive Director of the ASF, at 646.637.9216.

Sincerely,

/s/ Lisa Filomia-Aktas
Deputy Chair
Accounting and Tax Subcommittee
American Securitization Forum

/s/ Esther Mills
Chair
Accounting and Tax Subcommittee
American Securitization Forum