

October 2, 2003

Mr. Lawrence Smith Director, TA&I—FSP Financial Accounting Standards Board 401 Merritt 7 P.O. Box 5116 Norwalk, CT 06856-5116

## **Comments on Proposed FSP FIN 46-c**

Impact of Kick-Out Rights Associated with the Decision Maker on the Computation of Expected Residual Returns under Paragraph 8(c) of FASB Interpretation No. 46, Consolidation of Variable Interest Entities

Dear Mr. Smith:

FleetBoston Financial Corporation (Fleet) is a diversified financial services company with over \$190 billion in assets. We appreciate the opportunity to comment on the above-referenced FASB Staff Position (FSP).

## Summary

We strongly disagree with the conclusion that rights to terminate the decision maker (also known as kick-out rights) do not affect the status of a decision maker in the application of paragraph 8(c) of FIN 46. We believe that the identification of a "decision maker", as that term is used in FIN 46, should be based on an analysis of facts and circumstances, and that the existence of kick-out rights should be a factor in that analysis. In fact, we believe that it is a key factor and fundamental to the basics of principal and agency relationships. If, however, the FASB intends for the FSP to override the well-established litany of accounting guidance related to principal and agency relationships, then we urge the FASB to reconsider if an FSP is the proper vehicle for such a sweeping change, and we request that any new guidance only be applied to prospective structures.

## Principal and Agency Relationships Must be Acknowledged

The objective of identifying a decision maker is to assist in the determination of which party has a controlling financial interest in the VIE. Inherent in the label of "decision maker" within FIN 46 is the notion that the decision maker is acting as a principal, not as an agent of another party. However, in seeking to make that determination, we believe that the underlying agency relationship must be taken into account whenever investors or other interested parties have the right to terminate a contract that otherwise temporarily conveys decision-making rights to the holder of the contract.

There are many situations being assessed for FIN 46 implications where the proposed FSP would create a fundamental logic flaw in trying to apply the interpretation. As a financial institution, we often earn fees for administering money on behalf of investors in situations where those investors are the driving force for what the investment activities should be and actively monitor actions taken and subsequent results. We implement investment strategies under their guidance as evidenced in contractual agreements and seek to perform to the best of our abilities, and even earn performance incentives if possible. However, our activities are constrained by the overall directions given us. The investors' ability to terminate the asset management contract, particularly if the termination is without cause or financial penalty, provides additional, indisputable evidence that the investors retain ultimate control over their funds.

Agency relationships are a key foundation of the consolidation and financial instruments models. That is, the rights of owners and investors relative to the control of an entity or a financial instrument factor into the analysis for determining consolidation of the entity or recognition of the financial instrument.

Indeed, FIN 46 acknowledges the concept of evaluating agency relationships in the context of related parties in paragraphs 16, 17 and C38-41. In addition, interpretations under FAS 140, FAS 133 and other EITF consensuses (e.g., EITF 96-16) highlight the importance of understanding the distinction between an agent and principal when accounting for financial instrument transactions. Further, EITF 97-2 suggests that a controlling financial interest is present only when a manager acts with exclusive controlling rights and can only be terminated for cause. Similarly, EITF 98-6 sets forth the concept that a sole general partner does not control a limited partnership if the limited partnerships can remove the general partner by a reasonable vote, without cause or financial penalty.

Therefore, an asset manager acting as an agent does not hold a controlling financial interest in a VIE, and is a "decision maker" within FIN 46 only as a secondary outcome of those investors and other interested parties acting as principals that decided to hire and can decide to fire the manager. The proper accounting should embrace the fundamentals of the primary service relationships and not a secondary outcome tripped into because of a selective interpretation of FIN 46's wording.

Accordingly, based on prior analogous interpretations, if a single investor or other variable interest holder, or a group of investors holding similar variables interests, may remove the asset manager by a reasonable vote without cause and without financial penalty at any time, and there are no conditions that unduly constrain them from exercising that right, it is reasonable to conclude that the manager is constructively acting as an agent for the investors and is not the decision maker.

## **Effective Date and Transition**

If the FASB intends for the FSP to override the well-established litany of accounting guidance related to principal and agency relationships, then we urge the FASB to reconsider if an FSP is the proper vehicle for such a sweeping change. We further request that any new guidance only be applied to prospective structures.

If the FASB intends the guidance in the FSP to be applied to existing structures during the interim period in which it is finalized, we request that the effective date be clarified, as the existing language is not clear and could be misinterpreted. We recommend that the following language be adopted:

The guidance in this FSP is effective for all arrangements to which Interpretation 46 applies beginning in the quarter in which the final FSP is posted to the FASB website. If the application of the guidance in this FSP results in changes to the accounting for VIEs as included in financial statements applicable to prior interim periods, the cumulative effect of the accounting change shall be reported as of the beginning of the quarter in which the FSP is finalized.

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Thank you very much for your consideration. If you would like to discuss these comments in more detail, please call Barbara Riddell at 401-278-5091 or me at 617-434-2341. Sincerely,

Ernest L. Puschaver Director of Finance Chief Accounting Officer