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Via Electronic Mail

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Ms. Suzanne Bielstein
Director of Major Projects and Technical Activities
Financial Accounting Standards Board
401 Merritt 7
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Norwalk, CT 06856-5116

File Reference No. 1082-200

Dear Ms. Bielstein:

Bank of America appreciates the opportunity to comment on the Exposure Draft of the Proposed Interpretation, *Consolidation of Certain Special Purpose Entities an Interpretation of ARB No. 51* (the Proposal). We support the Board's attempt to improve the accounting guidance for special purpose entities (SPEs). SPEs have become an integral part of today's capital markets and provide liquidity to parties seeking and providing financing. Additionally, SPEs provide (a) extra capacity for financing mortgages and other loans through securitizations, (b) businesses with access to lower cost funding compared to "traditional" bank funding, (c) investors exposure to differing combinations of asset risk and (d) short-term investors with access to commercial paper which pays a higher return than "traditional" bank deposits.

We commend the Board for attempting to strengthen and clarify the guidance on accounting for SPEs. The Board's efforts have the potential to improve existing practice. The Proposal contains some innovative concepts dealing with accounting for SPEs that we believe lead in the right direction. The Board's recognition that certain SPEs that hold financial assets may serve to diversify risks and not have a primary beneficiary is welcomed. Additionally, the proposed expanded disclosure for SPEs will benefit financial statement users tremendously through increased transparency.

After spending a considerable amount of time monitoring the Board's deliberations and progress on this issue as well as studying the Proposal, we find certain aspects of the Proposal to be confusing and potentially troubling. We do not believe the final interpretation will be a workable document that meets the Board's objective without addressing or clarifying these issues.

We have written this letter in order to provide feedback to the Board on issues we have identified during our evaluation process and have incorporated examples for the purposes of illustrating our concerns. A more detailed discussion of these issues is included in the attached appendix. We have the following significant concerns:

- We are concerned that the Proposal's basic premise that the majority variable interest holder should consolidate the SPE is not applied consistently throughout the Proposal. Specifically, we question whether the proposed guidance properly considers the variable interests of all parties involved with multi-seller SPEs. If the guidance for multi-seller SPEs is not rectified in the final interpretation, we are concerned that parties that do not hold the significant variable interest will consolidate the SPE and that this will result in an unintended disruption in the capital markets. Ultimately, the impact will be increased borrowing costs to companies that have historically used these types of conduits to finance a portion of their operations.

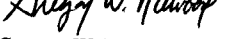
- The Proposal's requirement for on-going primary beneficiary evaluations is ill conceived. Consolidation reporting subsequent to the SPE being established may be impacted by factors outside the reporting party's control or knowledge. Given the multitude of factors outside the control of an investor, even an exhaustive search may not detect the appropriate information necessary to provide an accurate filing.

- The guidance for identifying the primary beneficiary is difficult to apply on a consistent basis. It requires a determination of what constitutes a "significant" variable interest that is "significantly more" than any other variable interest. This terminology will be open to broad and varied interpretation. Further, we are concerned that the Proposal requires parties to consolidate an SPE despite not having sufficient ownership/control to impact the SPE's operations or activities. Our response includes a proposal based on APB 18 that we believe is a good starting point for developing the final guidance.

- The transition guidance is not sufficient to allow for orderly progression in the capital markets. Many SPEs that will be impacted by this Proposal fund themselves through the capital markets. Making necessary changes to these structures requires input from parties other than the reporting party, for instance rating agencies. We are concerned that many entities will not be in a position to effectively adopt this new guidance in the second quarter of 2003 and suggest adoption at a later point.

In conclusion, we appreciate the opportunity to express our thoughts and concerns regarding the Proposal. Consolidation based solely on economics sets a new standard in accounting that we believe will have a significant impact on reporting parties and users of financial statements. Therefore, the final guidance must result in consistent application by differing parties to avoid confusion on the part of financial statement users. We are available to assist the Board in any way it may require and are available to answer any questions the Board may have.

Sincerely,



Gregory W. Norwood

Attachment

cc: Mr. James H. Hance, Jr.,
Vice Chairman and Chief Financial Officer

Mr. Marc D. Oken
Principal Financial Executive

Consolidation Based on Voting Interests

Issue:

Do all classes of equity in a structure have to have identical voting rights in order to comply with paragraph 9(a)?

Discussion:

Paragraph 9(a) requires the owners have voting rights that provide control over the structure. We are uncertain how a structure with two classes of equity having identical economic risks and rewards but the voting control is concentrated in one class of super voting stock would be treated. We have observed situations where one party is willing to consolidate an entity by virtue of having voting control even though they do not have a majority of the economic risks and rewards (i.e, Party A owns 5% of the equity with 95% voting rights while Party B owns 95% of the equity with 5% voting rights). The Proposal is not clear whether the determining factor for paragraph 9(a) is equivalent voting, equivalent risks and rewards or both.

Recommendation:

We request the Board address situations similar to this in the Proposal. We believe that if the equity is entitled to exactly the same risks and rewards, that voting power does not have to be equivalent to meet the Board's objective.

Issue:

Paragraph 12's presumption is unworkable and the Proposal is not clear whether it applies only to SPEs with less than 10% equity.

Discussion:

We are not clear how the Board intends paragraph 12 impact paragraph 9(b). Paragraph 4 states that the Board identified four conditions for determining whether an equity investment is sufficient to allow the SPE to finance its operations. Paragraph 9(b) specifically requires that equity "...be sufficient to allow the SPE to finance its activities without relying on financial support from variable interest holders...". The last sentence of paragraph 9(b) provides guidance for determining whether the equity is sufficient and states, "...the equity investment should be greater than or equal to the expected future losses of the SPE..."

Paragraph 12 introduces an additional requirement not included in paragraph 9 by requiring a comparison to businesses that engage in similar transactions with similar risks due to a presumption that the equity of the SPE is insufficient to finance its activities. SPEs are often unique in nature and have pre-specified operating parameters; therefore, finding a comparable business may not be practical. We contend that the inability to find a business that is an exact match to the SPE should not be the determinant factor in consolidation.

We are not sure whether paragraph 12 applies to all SPEs or if it is intended to be applied only where the equity of the SPE is less than 10% of its capitalization. Specifically, if expected losses of an SPE are 5% and the SPE has 7% equity, we do not understand why the Board would then conclude that the SPE may not have sufficient capital by virtue of paragraph 12. Our concern is exacerbated when considering the fact that many of these structures are rated by one or more of the national rating agencies. Our observation is that the ability of an SPE to have investment grade rated debt is an indication that the non-investment grade equity tranches are sufficient to cover expected losses.

Recommendation:

We request the Board clarify the guidance of the Proposal. We are concerned that a comparison to the equity of similar businesses will be difficult to perform because the business operations of SPEs are often unique. We believe that the Proposal should only require an evaluation of the equity based on expected losses because this test is a more accurate indicator of whether other interests, such as debt, are at risk.

Consolidation Based on Variable Interests

Issue:

ARB 51 and FAS 94 require consolidation where one company has a "controlling financial interest." FAS 94 paragraph 2 states that, "The usual condition for a controlling financial interest is ownership of a majority voting interest, and, therefore, as a general rule ownership by one company, directly or indirectly, of over fifty percent of the outstanding voting shares..." We are concerned that paragraphs 7 and 13 may be inconsistent with existing literature and may create illogical conclusions.

Discussion:

The terms "significant" and "significantly more" should be better defined in paragraph 7 or 13 of the Proposal for situations where the requirements of paragraph 9 are not met. These terms are very subjective and will be difficult to incorporate into practice.

For example, if one party owns 10% of the variable interests and eighteen other parties each own 5%, the following conclusions might be reached regarding which party is the primary beneficiary:

- The 10% holder's variable interest is twice as large as any other variable interest holder; therefore, it may be deemed to be significant. Additionally, because the party's interest is twice as large as any other party's, it would be considered significantly more than other variable interests. The result is consolidation by a 10% variable interest holder.

- The 10% holder despite having a variable interest that is twice as large as any other party is not the primary beneficiary because the holder does not have a "controlling financial interest" by virtue of its 10% ownership position.

While this example is simplistic, when considering it in relation to an SPE that has $100 million of variable interests, we hope the Board better understands our concern. In such an example, the 10% holder's interest would be worth $10 million, which could be considered significant by some parties.

Recommendation:

We believe there should be a floor used in the significant financial support test. We suggest that the Proposal analogize APB 18 in determining thresholds for interpreting what is "significant". Analogizing from APB 18 with regards to parties with variable interests in an SPE, we make the following recommendations.

- At a minimum, we suggest the Proposal state that ownership of 20% or less of the variable interests in an SPE by a party does not constitute "significant" ownership and consolidation would not be required (regardless of whether that variable interest is "significantly more" than others).

- In situations where ownership percentages are between 20% and 50% we believe that determining "significance" becomes more complicated, which is why we have requested the Board expand its thoughts around "significantly more". Without this additional guidance, we believe that application will be equally subjective, not an improvement in application compared to existing literature.

On-Going Evaluation of Consolidation

Issue:

The requirements of paragraph 14 for evaluating consolidation of an SPE at each reporting date are unworkable. The effort to determine the input necessary for a consolidation decision will be unduly time consuming, burdensome, expensive, and difficult to measure for nearly all holders of variable interests.

Discussion:

Paragraph 18 contains ten possible factors that indicate a variable interest. These factors along with others specific to an SPE would have to be evaluated at each reporting date for each SPE with whom the reporting party is "involved". Quarterly evaluations will be time consuming and costly because it will likely be difficult for a reporting party to determine activities by others associated with the SPE. We do not believe the benefit justifies the cost. Unlike equity and debt securities that are registered on an exchange, SPE equity and debt securities are not typically publicly recorded; therefore, performing a consolidation analysis subsequent to

creation of the SPE will likely be impossible. The result of an on-going quarterly evaluation will most likely confuse users of financial statements because the result might be that an SPE could be consolidated in one reporting period and then un-consolidated in a subsequent period; this pattern could be repeated several times over the SPEs life. It is difficult to understand how an on again/off again consolidation benefits users of the financial statements. This is the primary example where the benefit of required actions does not support the additional costs of compliance.

Finally, in regards to the proposed on-going evaluation requirement, we are concerned that reporting parties that make a decision regarding consolidation based on the facts known at the time will be at risk because of facts outside the reporting party's control. It is unclear to us how the Board intends to address a situation where a party with incomplete information does not consolidate an SPE because it does not believe itself to be the primary beneficiary; however, the facts used to make that decision were incomplete because an unrelated party sold a portion of its variable interest. Our concern is amplified when considering how to treat a situation where after financial statements are issued facts are discovered that would have resulted in the reporting party being the primary beneficiary. The reporting party is at risk of inaccurate reporting because of facts outside of its control.

For example, an SPE's equity is sold to three parties. Company A purchases 45%, Company B purchases 45% and Company C purchases 10%. The equity represents 6% of the total capitalization and the debt is provided by a national bank. The 6% equity is determined to be insufficient compared to other companies with similar operations. Because two parties have identical variable interests on Day 1, there is no deemed primary beneficiary; therefore, no party consolidates the SPE. One year later, Company B sells 70% of its original equity investment to a party not previously affiliated with the SPE. Typically the after-market for SPE investments is not readily observable and Company A may not be aware of the sale. Therefore, under the Proposal, Company A would now be the primary beneficiary and have to consolidate the SPE even though Company A took no action with regards to its relationship with the SPE. The Proposal's threshold for Company A's evaluation at the reporting date regarding whether it is the primary beneficiary is "all factors influencing consolidation decisions shall be considered at each reporting date using evidence that the enterprise possesses or would be reasonably expected to possess". We are concerned that this is problematic in so much as fact discovered subsequently will indicate that the search was inadequate. Parties in situations similar to Company A may misstate their financial statements because of a lack of public information.

We are also concerned that the Proposal could require a lender to consolidate an SPE even though the loan did not originally have a variable component when the SPE was funded. This result is not consistent with the substance foreclosure accounting rules. Our experience indicates that a lender may be unwilling to provide financing in these situations because of the potential for expanded legal liability. Following our example above, assume that Company B's sale did not occur and three years after funding the SPE, the SPE's equity is worthless due to losses exceeding expectations. The lender to the SPE would now be required to consolidate the SPE despite the loan not originally having a variable component nor having control over the SPE whatsoever.

Recommendation:

We recommend the Board reconsider this portion of the Proposal and only require a variable interest holder to perform the primary beneficiary evaluation after the initial assessment if it takes actions to change its relationship with or its economic exposure to an SPE. If the on-going test is retained, we believe the "search" requirement of footnote 5 should be eliminated and replaced with the requirement that the variable interest holder is required to assess all information that would be available to it based on the totality of its relationship to the SPE either directly or through related parties.

SPEs That Hold Certain Financial Assets

Paragraph B19 references certain SPEs that diversify risks and potential benefits related to certain assets or activities. Paragraph B20 states that, "The Board believes that appropriate application of the provision of this Interpretation would not result in consolidation of SPEs that effectively disperse risks..." We agree with the Board's introduction of this type of distinction; however, we are concerned that the Proposal will inappropriately result in consolidation in many situations where SPEs do effectively disperse risk and are not the primary beneficiary.

Multi-seller asset backed commercial paper vehicles ("multi-seller SPEs") provide low cost financing and serve to substantially diversify risk. This is accomplished by purchasing receivables or other financial assets originated by multiple entities that are typically unrelated to the multi-seller SPE. Multi-seller SPEs fund themselves, for the most part, in the asset backed commercial paper or term note markets and effectively divide the risks of their assets between the seller, the letter of credit provider, the liquidity provider and the CP holders. Sellers typically retain an over-collateralization component designed to cover expected losses.

Based on our analysis, we believe administrators will be required to consolidate multi-seller SPEs based on the guidance of paragraph 23. Based on the language in paragraphs 19 and 23, we believe multi-seller SPEs as commonly structured today would fail provisions 23(b) and 23(c) (as defined by paragraph 19) and potentially fail paragraph 23(a).

The Proposal, under paragraph 23, requires analysis of the possibility of providing significant financial support to an SPE. With respect to paragraph 23, we have the following comments and questions:

Issue:

Paragraph 23(a) deals with the ability to buy and sell assets of the SPE and contains the phrases "sufficient discretion" and "authority to significantly affect the revenues, expenses, gains and losses". The language is too vague and requires clarification.

Discussion:

Authority to buy and sell assets exists primarily to protect the commercial paper (CP) or term note holders in the event of market disruption or asset deterioration. We agree that an entity that has unrestricted purchase and selling ability and a significant residual interest meets paragraph 23(a). However, we propose that in situations where those abilities are governed by program documents that limit the ability to buy and sell assets be scoped out of paragraph 23(a) because the limitations effectively prevent trading inside the SPE.

Paragraph 23(a) contains two phrases dealing with the ability to purchase and sell assets that are critical in evaluating paragraph 23(a). We interpret this guidance to mean the ability to actively trade the assets and that there are no limits on what types of assets can be purchased by the SPE or that the limits are very broad. One interpretation of sufficient discretion would be any decision making ability because purchasing an asset involves decisions regarding price, tenor and asset quality even if the characteristics are restricted. It is not clear to us how anyone can buy an asset without making these types of decisions; therefore, we do not believe that the ability to purchase assets always qualifies as "sufficient discretion".

It is not clear how the Board intends "authority to significantly affect" be interpreted. In most cases, managers and administrators can affect the volume of transactions in a multi-seller SPE; however, we are concerned that this phrase is vague and will result in divergent application.

Recommendation:

We request that the Board provide more specific guidance related to the words "sufficient discretion" and "significantly". With respect to the authority to purchase and sell assets, we request that the Board consider changing paragraph 23(a) to exempt parties that are prohibited from trading for gains by the program documents that can only be changed by parties outside of their control. Additionally, the program documents should be required to address (1) purchasing powers that limit the nature and quality of assets that can be purchased by the SPE, and (2) limited power to sell assets based on identifiable events specified in the program documents (specifically prevents gains trading). The Board should include examples of how they intend this guidance to be applied. Providing examples would not be moving away from a "concept based" approach but instead are necessary to apply the guidance correctly. We also suggest the examples include a discussion of quantitative thresholds that will aid in determining "significant."

Issue:

How does paragraph 23(b) address the over-collateralization retained by a seller when evaluating support provided by parties that issue liquidity facilities and/or letters of credit to a multi-seller SPE?

Discussion:

We believe that over collateralization represents an interest that is "subordinate to the interests of other parties" which should be considered when assessing liquidity lines and letters of credit that are exposed to loss only after losses exceed the over collateralization. Paragraph 23(b) contains guidance that we believe is inconsistent with provisions of paragraph B19. In paragraph B19, the Board states that it recognizes that certain SPEs are risk diversification vehicles, and concludes that no party controls the assets of these types of SPEs. We interpret that statement to include multi-seller SPEs based on the discussion in the Background Information and Basis for Conclusions section of the Proposal. However, we are concerned that paragraph 23(b) is unclear and could result in conclusions inconsistent with paragraph B19, as it relates to entities that provide liquidity and/or letter of credit. Liquidity facilities or credit enhancements do not recombine risks for the benefit of one party; instead they serve to protect investors against catastrophic risk or significant liquidity disruptions. As mentioned earlier, in certain multi-seller SPEs the liquidity and/or credit enhancement does not serve as first loss protection; the seller over collateralizes the assets sold and retains a subordinated interest in the assets sold. The over collateralization is based on expected losses of the assets sold to the multi-seller SPE. The seller is legally obligated to deliver the collateral to the SPE in order to fulfill all expected shortfalls in asset value.

Recommendation:

We request the Board modify the last part of paragraph 23(b) as follows, "...liquidity, credit or asset support that meets the definition of paragraph 13(c)." Our suggestion is that only the party with the most subordinate interest, if that interest equals expected losses based on an analysis similar to paragraph 9 of the Proposal, should be determined to meet paragraph 23(b).

Issue:

Does the Proposal result in any party providing services to a paragraph 22 SPE meeting the requirements of paragraph 23(c)? The presumption that all fees are non-market based is an unreasonable standard because information required to overcome it is not directly available in the marketplace.

Discussion:

Paragraph 23(c) references paragraph 19 for a determination of non-market based fees. The guidance in paragraph 19 is a totally new concept and is unclear and difficult to apply. It results in any party that gets paid a fee for its services having to evaluate consolidation regardless of whether that fee has a residual component. Multi-seller SPEs present bids to potential sellers in what should be construed as a competitive bidding process. By virtue of the bidding process, we contend that this demonstrates market-based fees. Bids by competitors are not public information and we are concerned that an evaluating party will not have access to competitor's bids in order to demonstrate that its fees are market based.

Recommendation:

The presumption that all fees are non-market based should be removed. We are not aware of a presumption similar to this anywhere else in the accounting literature. These types of transactions are typically negotiated between unrelated parties and we believe a comparison to similar transactions with unrelated parties serves as a sufficient indicator whether the fees is market based. The proposal should be expanded to include factors that indicate that a fee may not be market based.

Issue:

Whether a party evaluating its variable interests in a multi-seller SPE for consolidation should consider all parties with a variable interest even if those other parties do not meet at least two of the three requirements of paragraph 23.

Discussion:

Parties that meet at least two of the provisions of paragraph 23 have to evaluate whether they are the primary beneficiary. The Proposal is not clear whether the test requires the evaluating party to compare its variable interest to all other parties or whether it compares its interest only to parties that meet two of the three tests in paragraph 23. Paragraph 23 states, "...is considered to provide significant financial support through a variable interest only if meets at least two of the following three conditions". One interpretation of this sentence is that any party that does not meet two of the three conditions of paragraph 23 should be excluded from a paragraph 13 analysis; however, this interpretation seems counter to the Proposal's intent of the party with the significant variable interest that is significantly more being the party to consolidate. By excluding all parties that do not meet two of the three conditions of paragraph 23, any paragraph 13 analysis will be flawed. The significance of this distinction is that in most cases the administrator may comply with provisions (a) and (b) of paragraph 23 (subject to our comments on paragraph 23 (b) above) but does not have a significant variable interest that is significantly more compared to a seller that retains the over-collateralization component.

Recommendation:

The guidance of paragraph 23 should be changed to require that a party that meets two of the three conditions of paragraph 23 evaluate its variable interest against all other variable interest holders of the SPE regardless of whether or not the other party(s) meet two of the three conditions of paragraph 23. In other words, consolidation is appropriate only by a party that meets paragraph 13 and meets two of the three conditions of paragraph 23.

Issue:

We are concerned that the Proposal reaches different conclusions when evaluating two different structures that have identical risks and rewards.

Discussion:

Another common structure used in the capital markets to diversify risks is a collateralized debt obligation (CDO). CDOs generally provide investors exposure to either specific assets or baskets of assets in a cost effective manner. In some cases, CDOs actually invest in the underlying assets (i.e. cash CDO) or may gain the exposure synthetically through derivatives. Synthetic structures are often used to provide exposure to many different assets in a more cost effective manner than a cash CDO. In both cases the risk profile is the same; however, under the Proposal the accounting result is different. Cash CDOs will likely qualify for treatment under paragraph 22 but synthetic CDOs will not because of the changes that may result if the proposed amendment to SFAS 133 is adopted.

Recommendation:

Because the risk profile is no different between a cash CDO and a synthetic CDO, we request that the Board change the Proposal to allow synthetic CDOs to qualify under paragraph 22. This will result in consistent accounting for CDOs having the same economic risks and rewards and be in accordance with the Board's beliefs cited in paragraph B20.

Disclosure Requirements

Issue:

We are concerned that the scope of paragraph 25 is too broad because parties with no management responsibility or residual or variable interest would now be required to disclose SPEs in their financial statements.

Discussion:

This requirement will impact servicers, administrators, trustees, commercial paper dealers and other parties that are compensated for administrative functions and have no impact over the assets of the SPE. In many cases, these parties may not have access to complete financial information for disclosure purposes as required by the Proposal and it is not beneficial to a user of the financial statements for a service provider with no variable interest to disclose financial information of an SPE.

Recommendation:

Parties that are acting solely in an administrative function for an SPE and do not have impact on the assets for a set fee nor a variable interest should be scoped out of this paragraph. Additionally, for parties that do have a residual interest, the requirement should be expanded to discuss any commitments or contingent obligations associated with the SPE.

Effective Date and Transition Provisions

Issue:

We are concerned that the proposed adoption timeline is too short because once the final Interpretation is issued it will take time to make necessary changes to existing structures.

Discussion:

The Board has considered many alternatives during its deliberative process and we think it is appropriate to make any necessary revisions to existing SPEs only once the final guidance has been issued. With regards to revising existing SPEs to comply with the new Interpretation, the process will be lengthy due to factors outside of a company's control. Once the internal decisions are made with regards to revisions and external lawyers are involved in drafting the documents, the process of obtaining rating agency approval begins. We believe that it could take up to six months once submitted to the rating agencies to get their approval of changes. This timeline could be extended if the rating agencies take issue with a change to an existing structure or do not have adequate resources to evaluate all of the SPEs requesting approval.

Recommendation:

The effective date of the new Interpretation should be periods beginning after December 31, 2003 for existing SPEs and periods beginning after March 15, 2003 for all new SPEs. Our suggestion that the timeline be extended for existing SPEs is not an attempt to delay implementing the Proposal; it is simply the realization that significant and time consuming changes will be required to existing SPEs if the Proposal is adopted as currently written.

Examples

Paragraph A3 contains different examples of SPEs and Primary Beneficiaries. We request that the Board consider expanding paragraph A3 by providing background on how conclusions with regards to the different scenarios were reached. This expanded background will help reduce application errors due to misunderstandings of the guidance.

Specifically, we request the Board elaborate on the last example in paragraph A3. It is not clear to us whether the purchaser or the seller is considered the primary beneficiary. Based on paragraph 9(b) footnote 3, we conclude that the purchaser of protection is not the primary beneficiary because their possible loss is less than the seller's and gains are not to be considered. For example, an SPE holds only one credit derivative on a referenced asset. The SPE is funded through the issuance of notes to investors. The purchaser of the derivative pays a fixed fee to the SPE for the protection. In this situation, it is not clear whether the Board intends that investors who have the risk of the referenced asset are the primary beneficiary or the party purchasing the derivative.

SPEs often have derivatives that are used to transfer risk from one party to another. We request the Board include an example whereby a derivative provider assumes the risk of an SPE and

transfers that risk to another party through a different derivative. We believe that the party that ultimately has the risks and rewards of the SPE is the primary beneficiary but we are not clear if only the relationship with the SPE is to be evaluated. The decision should be made based on the substance of the transaction. We think this is significant for the Board to address and request it do so. Additionally, we request the Board provide an example where the facts are the same except that the derivative laid off is leveraged to the party that ultimately has the risk. For example, an SPE has assets of $100 and one party assumes the total return of the SPE through a derivative and lays that risk off to a different party that only posts collateral against the derivative of $20. If the assets decline in value, the counterparty would be required to post more collateral. Does the Board consider the counterparty to be the primary beneficiary?