

Letter of Comment No: 42
File Reference: 1200-001
Date Received: 07/30/03



July 30, 2003

Mr. Lawrence Smith
Director of Technical Application and Implementation Activities
Financial Accounting Standards Board
401 Merritt 7
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File Reference No. 1200-001

Dear Mr. Smith,

We are writing to express our views on the Exposure Draft of the Proposed Statement of Financial Accounting Standards, *Qualifying Special-Purpose Entities and Isolation of Transferred Assets*, an amendment of FASB Statement No. 140 (the Proposal). Bank of America Corporation provides a diverse range of financial services and products throughout the United States and in selected international markets. Bank of America Corporation is the third largest U.S. bank in terms of assets and utilizes securitizations for liquidity, alternative funding, and risk management purposes. We believe the Proposal's attempts to prevent certain entities from restructuring into qualifying special purpose entities (QSPEs) to avoid FASB Interpretation No. 46, *Consolidation of Variable Interest Entities*, an Interpretation of ARB No. 51 (FIN 46) threatens to damage a wide range of securitization transactions and will unfairly and retroactively penalize pre-FIN 46 structures that were fully consistent with the existing accounting guidance for QSPEs. We are concerned that the speed of the deliberations undermines the extensive process undertaken by previous Board members that gave full consideration to developing an accounting model which could be consistently applied and was theoretically sound. We strongly disagree with the Proposal's erosion of the control-based framework under which FASB Statement No. 140, *Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities*, a replacement of FASB Statement No. 125 (FAS 140) was constructed, particularly since the Proposal's provisions do not appear to be based on a consistent underlying theme. We are concerned with the interpretation risk caused by the Proposal's hybrid accounting model and inconsistent application, the broadness of the Proposal's restrictions on transferors (which would prevent almost all securitizations from establishing a QSPE), the apparent changes to transactions that do not involve QSPEs, and the unjust transition provisions that would not clearly grandfather all current QSPEs that do not have further asset transfers.

Fundamental Flaws in the Proposal

We believe the Proposal is fundamentally flawed as it creates a hybrid accounting model that contains inconsistencies and, through its transition guidance, unnecessarily penalizes constituents who appropriately applied the provisions of FAS 140 in good faith. The Proposal is also deficient as it has neglected to resolve the issues it was designed to address and which were enumerated in EITF Issue No. 02-12, *Permitted Activities of A Qualifying Special Purpose Entity in Issuing Beneficial Interests under FASB Statement No. 140, Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities* (EITF 02-12). Our comments on the theoretical soundness of the model, inconsistencies and deficiencies in the Proposal are detailed in Section I of the attached Appendix.

Clarifications Required

Should the Proposal's model be retained, there are clarifications required to the Proposal's provisions in order for constituents to evaluate whether structures are qualifying special purpose entities or are otherwise impacted. The Proposal also requires clarification because a literal read of certain restrictions would indicate that no securitization could ever be accomplished through a QSPE. These specific clarifications are required due to the rule based nature of the additional restrictions on QSPEs and the hybrid accounting model of the Proposal. Previously, constituents were able to evaluate new structures against the control based provisions of FAS 140. With a hybrid model that employs control concepts in certain instances and risk/ reward provisions in other selected instances, constituents will face uncertainty concerning which underlying concept should be used to evaluate components of structures that are not specifically addressed by the Proposal. As such, the Proposal must be as specific as possible in the definition of the restrictions in order for the hybrid model resulting from the amendment to be operational. Specifically, the provisions requiring clarification are:

1. Whether restrictions on derivatives held by the transferor are intended to apply to clean up calls, contingent calls or puts, or removal of accounts provisions
2. Whether restrictions on the transferor providing "other commitments" to the QSPE includes standard representation and warranties relating to transferred assets, obligations to repurchase defaulted assets or market-making activities
3. Whether the restrictions on derivatives and other commitments provided by agents of a transferor should be applied under the de facto agency provisions of FIN 46 or the agency provisions utilized prior to FIN 46
4. How to determine whether a structure that reissues beneficial interests has a party that makes decisions about the reissuance

In addition, clarification on the changes to paragraphs 80-84 is required as the Proposal confuses the criteria for derecognition in paragraph 9, which apply to all sale transactions regardless of whether a QSPE is involved, with the criteria for obtaining QSPE status. The Board's objective in changing this language is unclear and the new wording would result in severe changes to current practice with respect to two-step securitizations that are not attempting to achieve QSPE status. Literally read, the proposed addition to paragraph 83 would prevent every two-step sale where beneficial interests are issued from occurring unless a QSPE was involved. If this is the result, FIN 46 would generally be obsolete for these structures since a transferor could not achieve sale accounting unless a QSPE was involved, meaning there would not be any assets in a variable interest entity to review for consolidation under FIN 46. We recommend the Board modify the changes to paragraph 83 to indicate that a QSPE is not required in every two-step transaction which issues beneficial interests but those structures without QSPEs are subject to FIN 46.

The changes to paragraphs 80-84 also imply that loan participations could not occur unless a QSPE is involved. This implication is caused by the definition of an undivided interest as a beneficial interest and the language in paragraph 9b that requires the transferee to have the ability to pledge or exchange the assets if the structure is not a QSPE. Since an undivided interest would now be considered a beneficial interest, holders of loan participations would not meet this

requirement as they would have the right to pledge or exchange a beneficial interest but they would not have the right to pledge or exchange the underlying asset. Since QSPE structures provide the only exception for the transferee to meet 9b by having the ability to pledge or exchange a beneficial interest, loan participations would need to be accomplished through a QSPE. This could cause serious ramifications to the loan participation market as selling the loan into a QSPE may not be possible under certain corporate loan documents that restrict transfers and, at a minimum, significant operational changes would be required. We recommend the FASB clarify the language in these paragraphs to clearly allow loan participations without the existence of a QSPE.

The additional areas requiring clarification are explained in Section II of the attached Appendix.

Necessary Change to the Proposal: Transition

Over and above the aforementioned concerns, the single most important issue for the Board to address is the transition provisions in the Proposal. As currently structured, the provisions are unfair as they would not grandfather existing structures which fully met the requirements of a QSPE under the previous accounting guidance. For instance, the administrator of a pre-FIN 46 asset backed commercial paper program designed as a QSPE has a fiduciary duty to fulfill the terms of the program documents and roll over the existing commercial paper by issuing new commercial paper until the maturity of the existing assets of the QSPE. This structure may not be grandfathered if the restriction on issuing new beneficial interests is deemed to apply to the reissuance of new commercial paper when the existing commercial paper is rolled over. In the absence of grandfathering, this same program would be automatically subject to the consolidation provisions of FIN 46, and if consolidated by one party, that party would not be able to reflect any adjustment to its financial statements upon consolidation as a cumulative change in accounting principle, which is contradictory to the form and substance of the Proposal.

We believe revised grandfathering provisions are necessary because the Proposal captures pre-FIN 46 asset-backed commercial paper programs as a by-product of the Board's attempt to preclude the restructuring of multi-seller conduits to avoid FIN 46. The inability of the EITF and the Board to conclude these structures did not meet the requirements of a QSPE under the previous FAS 140 guidance provides further support for revised grandfathering provisions. In fact, FAS 140 clearly contemplated the issuance of short-term liabilities by a QSPE as it expressly included commercial paper as a permissible type of beneficial interest.

We strongly urge the Board to revise the transition guidance to grandfather structures which are committed to reissue beneficial interests to holders other than the transferor, in compliance with the governing program documents, until previously acquired assets mature. The Board has already concluded that future assets sales into a QSPE would not taint a structure from utilizing the grandfathering provisions if the asset sale was committed to prior to the effectiveness of the FAS 140 amendment. Specifically allowing the reissuance of commercial paper to fund assets acquired prior to the effectiveness of the FAS 140 amendment as required in the program documents would equalize the transition provisions in terms of continuing activities related to assets and liabilities. Alternatively, all QSPEs created prior to the issuance of FIN 46 could be grandfathered as the Board's driving concern surrounding the issuance of the Proposal was that multi-seller conduits would restructure into QSPEs to avoid the provisions of FIN 46.

We are compelled to note that the transferor does not have control over a QSPE and cannot unilaterally cause a restructuring of the QSPE to occur in order to comply with the new rules; therefore, the transition provisions must provide grandfathering such that those constituents who followed the provisions of FAS 140 and who are only fulfilling the original commitments of the program documents, whether in terms of assets or liabilities, are not unfairly penalized. If the Board takes no action on the transition provisions, it will be retroactively penalizing constituents who faithfully applied the provisions of FAS 140 because the Board now chooses to change its framework. The Board may inadvertently penalize its broader constituency in terms of investor confidence, financial position and regulatory measures as a result of the actions of only a few companies who did not apply the provisions of FAS 140.

We also recommend a delayed effective date such that constituents are provided an appropriate period of time to understand the impacts of the final statement. A delayed effective date is especially warranted due to constituents' recent experience with the apparently unintended consequences of FIN 46. We would be willing to further discuss our comments in this letter with the Board or the FASB Staff or to provide assistance in the resolution of the issues caused by the Proposal.

Sincerely,

/s/Randall J. Shearer
Senior Vice President
Accounting Policy

Appendix

Section I

Theoretical Soundness of a Hybrid Model

In paragraph A10 of the Proposal, the Board states that it did not subject QSPEs to the requirements of FIN 46 because of the different bases of FAS 140 and FIN 46. However, the Board has created a hybrid model that is composed of the original control concepts of FAS 140 and the risks/ rewards approach of FIN 46 as well as the decision making concepts of FIN 46. The risks/ rewards approach in the Proposal is evident in the general restrictions on the transferor and the restrictions on structures that reissue beneficial interests. The Board's introduction of the decision making concept in the restrictions on reissuances is theoretically inconsistent with the current guidance under FAS 140 as decision making within or related to a QSPE is not permitted. We urge the Board to consider the soundness of a hybrid model due to previous history where dual accounting models existed. The fundamental flaws in the hybrid model will lead to difficulties in practical implementation as constituents will not be able to evaluate evolving structures against a consistent conceptual framework. This will increase the risk of differing interpretations among constituents. We recommend modification of the Proposal to address structures or provisions where the Board considers the transferor to directly or indirectly retain control over the transferred assets through guidance that is consistent with the overall control framework and does not include evaluation based on risk and reward criteria.

Inconsistencies in the Proposal

The flaws associated with the hybrid model in the Proposal are exacerbated by the inconsistent manner in which the model is applied. The inconsistencies are most evident in the restrictions on the types of financial instruments or contractual commitments that a transferor can hold. For instance, a transferor cannot provide any type of liquidity commitment to a QSPE, regardless of the terms under which the liquidity is triggered, but the transferor can provide a servicing advance to a QSPE. Most liquidity arrangements and servicing advances provide economically similar functions as they are both timing and cash flow management devices and neither are credit enhancement tools. In fact, transferors with liquidity commitments may be able to design these commitments as servicing advances and still comply with the QSPE limitations due to this inconsistency. The Proposal has put form ahead of substance by treating similar securitization tools (servicing advances and liquidity) differently. Due to the similarities, we recommend liquidity commitments receive the same exemption as servicing advances from the restrictions in the Proposal.

Another example of the inconsistency with which the risk/ reward approach is applied exists in the restrictions on guarantees. A transferor cannot have any sort of limited guarantee or recourse even if the transferor holds no beneficial interests or has no control, yet a third party can provide a guarantee and own subordinated beneficial interests as long as the structure does not reissue beneficial interests. This appears to be in conflict with the Proposal's statement that it will improve financial reporting by preventing non-consolidation via a QSPE in situations where one party is in a position to enhance or protect the value of its own subordinated interest by providing financial support. The fact that one party can provide a guarantee on the beneficial interests if there is no reissuance but cannot do so if there is a reissuance also demonstrates inconsistency as the guarantor has the exact same risk in either scenario.

The Proposal is also inconsistent as a transferor can retain a 90% beneficial interest (per the 10% sale requirement in paragraph 36 of FAS 140) and the corresponding risks/ rewards of the

transferred assets but the transferor cannot hold a plain vanilla interest rate swap, even if the transferor does not hold any other beneficial interests. The risks and rewards of a plain vanilla interest rate swap are clearly less than those of a 90% beneficial interest. The Proposal results in a transferor being able to retain a significant amount of risks and rewards if these economics are held through cash instruments but the transferor may not hold any risks and rewards through a synthetic instrument even though the synthetic instrument does not result in the transferor retaining control. We do not believe there is a conceptual basis for different treatment of cash and synthetic instruments. The Proposal's inconsistent application of the risks and rewards component of the resulting hybrid accounting model will have severe impacts on the consistency and comparability of financial statements for similar entities that enter into securitization activities. We believe the inconsistencies in the Proposal can be eliminated by focusing on restrictions related to control.

Deficiencies in the Proposal

Paragraph A2 of the Proposal states that the Board's project on the permitted activities of a QSPE was undertaken in part due to the inability of the EITF to reach a consensus on this matter in its clarification effort under EITF 02-12. The Board has developed a framework which places restrictions on a QSPE when that QSPE reissues beneficial interests but the Proposal indicates that the restriction on decision-making does not apply if the entity taking action to reissue beneficial interests has no discretion. The Proposal has failed to provide additional guidance that would assist constituents in determining whether the party taking action has discretion in this scenario, which was the purpose of EITF 02-12. The reissuing vehicles that are currently structured as QSPEs are substantially different than the traditional multi-seller conduits that the Board is targeting. These QSPE conduits reissue beneficial interests in an administrative fashion based on requirements in the program documents. Because of the inability for administrators to force third parties to purchase beneficial interests or to determine a market clearing rate of return on beneficial interests, the administrator is simply performing a service similar to that of a broker filling a market purchase order. We do not believe the administrator has discretion in this situation, and neither did auditing firms, or these structures would not currently have QSPE status. Without further guidance, constituents would generally continue to believe these structures are exempt from the decision-making restriction. Our recommendations are discussed under Reissuance Restrictions below.

Misconceptions in the Basis for Conclusions

We also wish to comment on two misconceptions stated in the basis for conclusions. First, the Proposal states in paragraph A4 that enterprises may choose to incur costs to restructure existing entities to avoid recognizing assets or consolidating variable interest entities. We do not believe this is generally possible as a transferor would need control of the entity in order to restructure it. Alternatively, QSPE's program documents might be amended with the consent of beneficial interest holders and other interested third parties (e.g. rating agencies), but this may involve considerably more time than allowed by the transition provisions. It is unclear why third parties would be interested in amending a QSPE's program documents solely to alleviate a consolidation outcome required by the Proposal. Even if all the holders of beneficial interests were identified and available to amend the documents, one of the key areas where restructuring would be required is with respect to derivatives between the transferor and the entity; however, paragraph 40 of FAS 140 places restrictions on when a derivative can be entered into and still be considered as pertaining to the beneficial interests. Since an event or circumstance causing the replacement of a derivative must be specified in the legal documents upon establishment of the QSPE, a transferor could not restructure these entities to find another derivative provider and still maintain the QSPE status.

The second misconception is the Proposal's notion of "pledging and re-pledging" assets for structures that reissue beneficial interests. Paragraph A6 states "the ability to pledge and repledge assets raises questions about consolidation and effective control of transferred assets." In structures that reissue beneficial interests such as commercial paper, the assets of the entity are continually pledged to the class of commercial paper holder. Therefore, there is no "control" because nothing has been "pledged and repledged." The fact that the commercial paper holders change over time is no different in this respect than the secondary market sale of term beneficial interests from one investor to another. Instead, the Proposal should focus on differentiating structures where reissuance is an administrative function and structures where decision-making over the types and terms of beneficial interests clearly occurs. Our recommendations on differentiating these types of structures are below under Reissuance Restrictions.

Section II

Should the hybrid model in the Proposal be retained, despite the flaws and inconsistencies discussed above, the Board should clarify certain provisions of the Proposal to avoid differing interpretations of the provisions in practice. Without clarification, constituents and auditing firms may read these restrictions broadly and determine that nearly every securitization structure would not achieve QSPE status. The impact of non-QSPE status for a wide range of structures could be severe to investors due to the requirements of FIN 46 and lead to a downturn in the securitization market.

Derivatives Held by the Transferor, Affiliates or Agents

Paragraph 4 of the Proposal states that a QSPE may only hold passive derivative financial instruments entered into with counterparties other than the transferor, its affiliates and agents. Paragraph A12 states that "risk transfers from a qualifying SPE to a transferor through derivatives are prohibited." These statements do not imply the same restriction as a contingent call option or clean-up call would not be permitted under the wording in paragraph 4 (assuming the option met the definition of a derivative) but could be permitted under the language in A12. We ask the Board to clarify whether its restrictions on derivatives held by the transferor were intended to encompass only certain types of derivatives (i.e. total return swaps) or whether the Board intended to prohibit all derivatives such as clean-up calls, calls contingent on events out of the transferor's control or removal of accounts provisions that are present in the majority of securitization structures. Should a broad restriction on derivatives held by the transferor be retained, there will be significant implementation questions regarding whether these provisions meet the definition of a derivative and additional guidance from the Board may be required to prevent diversity in practice. The implementation questions will be compounded should transferors be required to examine beneficial interests retained for embedded derivatives under DIG Issue B12, *Embedded Derivatives: Beneficial Interests Issued by Qualifying Special Purpose Entities*. We recommend the restriction on derivatives with transferors be limited to derivatives which pass back substantially all the risks or rewards to the transferor as this would be consistent with the Board's concerns regarding risk concentration. We believe "substantially all" should be defined as more than 90% to remain consistent with the threshold set by the Board in determining the amount of risks and rewards which must be sold to third parties in order to achieve sale accounting.

Other Commitments

Paragraph 5 of the Proposal indicates that a transferor cannot enter into any agreement with a QSPE that would commit the transferor, conditionally or unconditionally, to deliver additional cash or assets to the QSPE or its beneficial interest holders. We request clarification on this

restriction as a literal reading would prevent all securitizations from obtaining QSPE status. One standard feature of securitizations is a requirement that the transferor repurchase assets or indemnify the trust if a breach of the standard representations and warranties made in the program document is found to occur. These merchantability warranties may include representations as to the absence of fraud in the origination of a receivable, incomplete documentation or delinquent receivables. Additionally, financial institutions with broker-dealer subsidiaries often act as market-makers in the securities issued by a QSPE to assist in the liquidity of the issue on behalf of the investor. It is unclear whether the restriction on other commitments would apply to this scenario. The elimination of these provisions would severely impact the securitization market. We recommend the Board address this issue by restricting only commitments that are unconditional or entirely within the transferor's control.

Agency Transactions

Due to the seemingly broad restrictions on a transferor in providing derivatives or other commitments, further guidance on how an agency relationship should be evaluated under the Proposal is warranted. Did the Board intend to apply the de facto agency rules of FIN 46 or the traditional, legal definition of agency? Although FIN 46 has been published for over six months, practice varies in this area. Certain audit firms have developed their own restrictions or working definitions of a de facto agency while others are reviewing each structure and concluding on facts and circumstances. We request guidance in particular as the banking industry will be impacted by the Proposal to a higher degree than other industries as other industries are not in the business of providing financial instruments and therefore do not typically enter into derivatives with their structures.

Reissuance Restrictions

As discussed in Section I, the Proposal did not provide guidance on the original issues in EITF 02-12. The Proposal did retain the idea that if a structure makes decisions in reissuing beneficial interests, there will be additional restrictions on that structure as indicated in paragraph 5. However, the Board has not provided guidance to determine whether any party associated with the structure is actually making decisions and the industry believes decision-making is not occurring with these structures. As the Board does not appear to believe this is the case with current structures, additional guidance is necessary. We remind the Board that the industry submitted a proposal to assist in determining when decision-making was occurring through the response of the American Bankers' Association to EITF 02-12. Consistent with that proposal, we recommend the establishment of certain parameters which would indicate the reissuance of beneficial interests is simply an administrative function and does not indicate the existence of control. These parameters include the type, tenor category (i.e. <1 year, 1-5 years, etc), priority and lien of beneficial interests issued and, if these parameters are specified in the documents, the party involved in executing the reissuance would not be viewed as retaining control. We believe the reissuance restrictions should only be applicable for structures where a party can truly exercise control by making significant decisions to change the type, form, priority and lien of the beneficial interest at the time of the issuance.