

November 14, 2008



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

Via email to director@fasb.org

Re: File Reference Number 1620-100, Proposed Statement of Financial Accounting Standards, *Amendments to FASB Interpretation No. 46(R)*

Dear Mr. Golden:

LNR Property Holdings, Ltd. appreciates the opportunity to provide comments and observations on the Financial Accounting Standards Board's ("FASB") Exposure Draft of Proposed Statement of Financial Accounting Standards, Amendments to FASB Interpretation No. 46(R) (the "Exposure Draft"). We are a leading commercial real estate investment, finance, management and development company which, in part, engages in making real estate finance investments, including investments in unrated and non-investment grade commercial mortgage-backed securities ("CMBS"), high-yield real estate loans and other subordinate real estate interests. As an investor in CMBS, we often purchase the unrated and non-investment grade securities issued by CMBS trusts. In certain cases, an affiliate provides special servicing activities for the securitizations in which we invest. As special servicer, this affiliate specializes in maximizing returns for all certificate holders on defaulted loans through actions, such as foreclosure or work-out of the loan, that are permitted by contractual agreement.

While we support the FASB's desire to reduce the complexities of applying FASB Interpretation No. 46 (revised December 2003), Consolidation of Variable Interest Entities ("FIN 46(R)") by permitting a more principles-based approach, we believe that certain of the proposed changes will not accomplish these objectives. Rather, we believe these changes simply introduce a new level of complexity, increase the administrative burden and cost to implement, and most importantly, provide less meaningful and reliable information for financial statement users. As a further complication for constituents and users alike, these changes come at a time when the profession is moving towards international convergence. In reviewing the Exposure Draft, we have identified the following issues which we believe require further consideration by the FASB:

- The ambiguity of the concepts of "power" and "potentially significant" in determining the primary beneficiary
- The requirement to perform ongoing assessments even when the design of an entity has not changed

- The inconsistency between the Exposure Draft and existing authoritative guidance in determining the role of substantive kick-out rights
- The ambiguity of certain disclosure requirements
- The administrative burden associated with implementing the Exposure Draft and the resulting reduced benefit to financial statement users
- Consideration of the trend toward international convergence

Each of these matters is explained in further detail below.

The Concepts of "Power" and "Potentially Significant"

Inherent in any principles-based approach is the acknowledgement that individual judgment may differ, thereby resulting in inconsistent application. Particularly, the determination of (i) what entity, if any, has the power to "direct matters that most significantly impact the activities of the variable interest entity," as stipulated by paragraph 14A(a), and (ii) what entity, if any, has the "right to receive benefits [or obligation to absorb losses] that could potentially be significant to the variable interest entity," as stipulated by paragraph 14A(b), is subject to a high degree of interpretation. However, Examples 1 and 6 in the Exposure Draft eliminate this subjectivity by categorically stating that a transferor who acts as servicer and retains a residual financial interest in a variable interest entity ("VIE") has the power to direct matters that most significantly impact the activities of the VIE and the right to receive benefits and the obligation to absorb losses that could potentially be significant to the VIE. We believe these examples fail to consider certain critical factors often present in commercial mortgage securitizations:

- Generally, the decision making activities allowed within a structured vehicle are constrained by contract and/or law to be merely administrative or protective in nature, and such decision making is certainly not commensurate with consolidation as it has been traditionally conceived. For example, a CMBS special servicer is constrained by the terms of a detailed pooling and servicing agreement and applicable provisions of federal tax law, as well as an overriding servicing standard. The special servicer's actions performed on behalf of a CMBS trust are limited to protective actions which may only take place when certain pre-defined events beyond the special servicer's control occur. A special servicer's power is vastly inconsistent with the level of control which would customarily be associated with consolidation and to the type of control which would allow a special servicer to manage a VIE for its own financial benefit.
- The role of the special servicer is, by definition in the pooling and servicing agreement, that of an independent contractor. In exchange for these services, the special servicer receives a fee based on a fixed percentage of the underlying loan balance, similar to the type of fee a master servicer would receive. Neither fee is performance-based. Rather, these fees represent market compensation for services performed on behalf of the VIE. In Example 8 of the Exposure Draft, a variable interest holder who maintains an equity interest in a VIE (a hotel) and also manages the VIE pursuant to a service agreement is not considered to have the power to direct matters that significantly impact the activities of the VIE. That being the case, a special servicer performing services on behalf of the VIE

pursuant to a similar agreement should likewise not be considered to have this power.

- Examples 1 and 6 of the Exposure Draft discuss common mortgage-backed securitization trust structures. In doing so, the examples acknowledge that the economic performance of a structured finance VIE is impacted primarily by the performance of its underlying assets and that the activities of a special servicer are only performed upon delinquency or default of the underlying assets. Since January 2001, the industry delinquency rate for U.S. issued conduit CMBS has averaged approximately 1%. From a qualitative perspective, it is simply unreasonable to conclude that the performance of 1% of a VIE's assets has the most significant impact on its activities. Said another way, if the economic performance of the VIE is impacted primarily by the performance of its underlying assets, then how can a special servicer who only has prescribed managerial responsibility over 1% of those assets have the most significant impact? Further to this point, in certain instances, structured vehicles have no delinquencies. In these instances, the special servicer has absolutely no impact on the activities of the VIE. If we look simply to the design of the VIE, a concept which is at the core of what defines a VIE, then how can the mere level of delinquencies (i.e. zero vs. any amount above zero) result in a different conclusion as to which enterprise maintains the "power" over the VIE's activities?
- The purpose of FIN 46(R) is to determine the enterprise which has a controlling financial interest in an entity. However, due to the nature and structure of the financial special purpose entities which typically hold securitization structures. the interest in such an entity does not convey an actual controlling financial interest over the entity or its assets. Unlike voting stock, the securitization interests often do not convey any control rights in the ordinary course. Understanding that the FASB is currently proposing to remove the concept of a qualifying special purpose entity ("QSPE"), the very criteria that formed the basis for which vehicles qualified for QSPE status cannot be ignored. This criteria included a requirement that the structures be passive entities whose activities were "significantly limited" and "entirely specified in the legal documents that established [them]." That being the case, how can any one enterprise, including a servicer or residual interest holder, have "power" or discretion over this entity's activities if the entity was structured to be passive with predetermined parameters? Qualitatively, roles in such types of entities should not be equated with a controlling financial interest.

In addition to our concerns regarding the concept of "power" in paragraph 14A(a), we believe that the requirement in paragraph 14A(b) of the Exposure Draft to measure the right to receive benefits and the obligation to absorb losses that "could potentially be significant" to the VIE is too broad and subjective. Using this term could presumably encompass multiple variable interest holders, an infinite number of scenarios (whether likely or not) and unlimited periods of time into the future. In order to avoid inconsistent interpretation, we suggest that the FASB clarify its intent with respect to this requirement.

With regards to a variable interest holder's role as special servicer, the examples in Appendix A are unclear as to whether this role alone could provide the servicer with the right to receive benefits that could potentially be significant. To this end, it is important to note that these services are performed on behalf of the VIE pursuant to a pooling and servicing agreement, similar to any other third party contractor agreement. As noted above, Example 8 of the Exposure Draft does not conclude that the hotel manager who maintains an equity interest in a VIE receives benefits that are potentially significant to the VIE. Likewise, we suggest that the FASB include an explicit statement that market compensation received by CMBS special servicers, in and of itself, is not a significant benefit for the purposes of paragraph 14A(b).

As illustrated by the above, the concepts of "power" and "potentially significant" as currently drafted in the Exposure Draft lack clarity and, from a qualitative perspective, appear to be contradicted by the examples in Appendix A.

Ongoing Assessments

Paragraph 14 of the Exposure Draft requires a continuous reassessment as to whether a variable interest holder should consolidate a VIE. This requirement includes the reconsideration of losses incurred in excess of a VIE's expected losses, which could render equity insufficient and potentially result in consolidation. This outcome appears to contradict the premise that a VIE, as defined in paragraph 5, is based on the design of the entity. In other words, an entity's status as a VIE should only change when its design has changed. Therefore, we suggest that the FASB exclude from its continuous reassessment requirement those items which do not impact the design or structure of a VIE.

Substantive Kick-out Rights

Paragraph 14A(a) of the Exposure Draft requires that substantive kick-out rights be ignored in the determination of whether an enterprise has the power to direct matters that most significantly impact the activities of a VIE unless a single enterprise has the unilateral ability to exercise these rights. This requirement contradicts existing authoritative literature, namely EITF Issue No. 04-5, Determining Whether a General Partner, or the General Partners as a Group, Controls a Limited Partnership or Similar Entity When the Limited Partners Have Certain Rights, and EITF Issue No. 96-16, Investor's Accounting for an Investee When the Investor Has a Majority Interest but the Minority Shareholder or Shareholders Have Certain Approval or Veto Rights. This inconsistency could result in a different consolidation conclusion for a variable interest holder who does not have significant differences in the economics of an entity.

The FASB has indicated its belief that substantive kick-out rights are typically not exercised and thus should not be considered until exercised in determining the primary beneficiary pursuant to the Exposure Draft. Aside from the inconsistency with other consolidation literature created by this assumption, the rationale behind it is unclear. It is common in CMBS and other commercial real estate structured finance products for such substantive kick-out rights to be exercisable by a simple majority of the voting interests. In fact, such rights have been exercised in many transactions recently. By comparison, shareholders in a non-VIE maintain voting rights which are frequently not exercised (i.e. the addition or removal of Board members). Despite their frequency of use, the mere ability to exercise

these rights is certainly relevant to the evaluation of consolidation and control, as supported by the consideration of such rights in existing authoritative literature.

We believe that the consideration of substantive kick-out rights in Paragraph 14A(a) should be consistent with existing authoritative literature (i.e. EITF 04-5). In support of the Exposure Draft's objective to be principles-based, this determination should likewise be principles-based. Requiring anything otherwise will simply lead to different consolidation conclusions for entities structured in a nearly identical manner.

Disclosure Requirements

Paragraph 22C(d) of the Exposure Draft requires an enterprise to disclose its implicit arrangements with a VIE. Despite the examples included in Appendix A, this requirement is too broad and lacks sufficient clarity. As such, we urge the FASB to provide further guidance as to what types of implicit arrangements should be considered. As currently drafted, the requirement leaves too much uncertainty as to what arrangements constitute implicit arrangements. Without further clarification, we believe this will not accomplish the FASB's objective, but will instead lead to inconsistent interpretation and application.

In determining whether an enterprise is or is not the primary beneficiary of a VIE, paragraph 22C(a)(2) of the Exposure Draft requires the enterprise to disclose "whether a different assumption or judgment could have been reasonably made that would result in a different conclusion." We believe this requirement is entirely too broad and subjective and will only serve to create confusion among users of financial statements. Management would have to second guess its own assumptions, leaving users to question management's conclusions. This type of disclosure would appear to be of little use to those attempting to understand an enterprise's financial statements. As such, we propose that this requirement be eliminated.

Cost / Benefit Considerations

Implementation of the Exposure Draft prior to the proposed November 15, 2009 effective date will cause an excessive burden, both in terms of personnel resources and financial cost, for many investors that will likely be deemed the primary beneficiary. In some cases, particularly in those involving common securitization trust structures, investors will be unable to obtain the information necessary to determine whether the entity is a VIE, to determine whether the investor is the primary beneficiary of that entity, or to perform the required consolidation accounting. Specifically, they may not have access to certain information essential to account for an outstanding commercial mortgage loan or the underlying asset. Even when a special servicer or investor can obtain access to some of the underlying data of the entity, the information will be on a cash basis, may be incomplete and may not be received timely. While borrowers are required to report financial information to the trustee or master servicer within a certain time frame, these deadlines are often not enforced on performing loans, Further, the consolidation of information from multiple sources and bases of accounting will require added human capital and systems capabilities far beyond those currently employed or in use. The resulting cost of such enhancements is expected to be significant.

As noted above, securitization interests often do not convey any control rights in the ordinary course. As a result, it is not likely that an interest in a typical securitization trust structure

would ever be qualitatively viewed as a controlling financial interest. Further, in these types of structures, no individual party controls the entity or its assets, nor is any individual party responsible for its liabilities. That being the case, it would be misleading and confusing to investors for a servicer or a residual interest holder to consolidate the entity's assets and liabilities on its balance sheet when the mere holding of such an interest does not convey any actual controlling financial interest over the entity's assets or a responsibility for its liabilities. The consolidation of such structures on a servicer's or residual interest holder's financial statements will simply obscure its financial results and significantly decrease transparency to the users of its financial statements.

In addition to the myriad of implementation issues which would result from this Exposure Draft, there is also likely to be an adverse economic impact, particularly given the current turmoil in the marketplace. We believe this seemingly unintended consequence should be viewed in conjunction with the decreased transparency of an enterprise's financial statements, as illustrated by our observations above, when assessing whether the Exposure Draft in its current form achieves its intended purpose.

International Convergence

With the continued increasing emphasis on convergence towards International Financial Reporting Standards ("IFRS"), we do not believe that a significant change to the consolidation model, especially one that diverges from the current international model, is justified at this time. Making significant changes to our systems and processes pursuant to the proposed amendment would be costly, time consuming, and, considering the impending trend toward convergence to an entirely different model, largely inefficient. Thus, we strongly recommend the pursuit of a joint plan in coordination with the International Accounting Standards Board to develop a consolidation model that will eventually apply under both U.S. generally accepted accounting principles and IFRS.

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We thank the Board for its consideration of our recommendations and would be pleased to discuss these issues in more detail with the Board members or the FASB staff at your convenience.

Respectfully submitted,

/s/ Rina Paniry

Rina Paniry
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LNR Property Holdings, Ltd.