



Richard D. Levy
Executive Vice President & Controller

2011-220
Comment Letter No. 39
MAC A0163-039
343 Sansome Street, 3rd Floor
San Francisco, CA 94104
415 222-3119
415 975-6871 Fax
richard.d.levy@wellsfargo.com

February 15, 2012

Ms. Leslie F. Seidman
Chairman
File Reference No. 2011-220
Financial Accounting Standards Board
401 Merritt 7, P. O. Box 5116
Norwalk, CT 06856-5116

Re: File Reference No. 2011-220, Proposed Accounting Standards Update, *Consolidation (Topic 810) - Principal versus Agent Analysis*

Dear Ms. Seidman:

Wells Fargo & Company (Wells Fargo) is a diversified financial services company with over \$1.3 trillion in assets providing banking, insurance, trust and investments, mortgage banking, investment banking, retail banking, and consumer finance. We appreciate the opportunity to comment on the FASB's File Reference No. 2011-220, Proposed Accounting Standards Update, *Consolidation (Topic 810), Principal versus Agent Analysis* (the "Proposed ASU").

Executive Summary

We agree with the overarching consolidation principal in the Proposed ASU including, the alignment of the assessment of kick-out and participating rights for variable interest entities ("VIEs") and partnerships and similar entities, the assessment of whether a decision maker is using its power as a principal or agent and the continued qualitative approach to the primary beneficiary assessment. In general, we believe the approach is operational and should yield financial reporting results that both the preparers and users of financial statements will find representative and appropriate. However, we have the following overriding concerns with the proposed guidance:

- Contrary to the stated intent of the Board, it is likely that investment advisors will be required to consolidate money market and similar funds;
- The implications of regulatory reforms currently under contemplation for money market funds should be considered before the proposed guidance is finalized;
- The proposed guidance does not clarify the assessment of implicit interests;
- It is not clear how the principal/ agent assessment should be applied to a passive investor when the decision maker is acting as an agent;
- The principal/ agent assessment appears to include a new framework for the assessment of variability which lacks cohesion and clarity;
- The proposed model does not achieve convergence or resolve diversity in practice related to entities with limited or no on-going decision making activities; and
- The requirement to continually reassess the primary beneficiary does not adequately consider a change in the status of the decision maker as a principal or agent.

Ms. Leslie Seidman, Chairman
Financial Accounting Standards Board
February 15, 2012
Page 2

These concerns, in addition to other specific comments, are further described below.

Specific Comments on the Proposed ASU

A more comprehensive description of our concerns and our recommended improvements to the Proposed ASU are included below.

- A scope exception from the proposed guidance should be provided for money market and similar funds (“2a-7 Funds”): We acknowledge that the Board does not intend for application of the proposed guidance to result in the consolidation by investment advisors of certain funds that comply with or are managed in accordance with Rule 2a-7¹. However, we do not believe the proposed guidance is consistent with this intent.

2a-7 Funds are designed to maintain a daily \$1.00 per share net asset value which facilitates sufficient liquidity to meet investor redemption requests. Generally, this liquidity is maintained not by explicit or implicit support arrangements with the investment manager, but rather by the credit quality, liquidity, maturity, and investment diversification requirements of Rule 2a-7. The board of directors of a 2a-7 Fund has significant oversight to ensure the investment advisor is acting in the best interests of the investors and in accordance with the requirements of Rule 2a-7. As mandated by Investment Company Act of 1940 (the “1940 Act”) requirements for 2a-7 Fund advisory contracts, the oversight powers and responsibilities of the board of directors include the ability to unilaterally remove the investment advisor with or without cause. The board of directors is comprised of at least a majority of independent members who have a fiduciary duty to act in the best interests of investors.

Notwithstanding the structural characteristics of 2a-7 Funds, during times of financial market distress, investment advisors may have provided non-contractual financial support to maintain the \$1.00 per share net asset value or maintain credit ratings assigned by rating agencies for marketing purposes. This support may imply an ongoing implicit commitment to maintain the net asset value of the 2a-7 Funds. If it is necessary to weigh the magnitude of potential exposure along with the variability of the explicit and implicit variable interests of the investment advisor relative to other investors more heavily than the oversight responsibilities of the board of directors, including its kick-out or participating rights, in the principal/ agent assessment, the investment advisor would be considered the primary beneficiary.

To address these concerns, maintain the integrity of the principal/ agent framework and align the proposed guidance with the explicit intent of the FASB, we strongly encourage the FASB to exempt 2a-7 Funds from the proposed guidance.

¹ Rule 2a-7 of the Investment Company Act of 1940

Ms. Leslie Seidman, Chairman
Financial Accounting Standards Board
February 15, 2012
Page 3

- Consolidation of 2a-7 Funds does not improve financial reporting: The current VIE consolidation model provides transparency to financial statement users for certain structure types, such as securitizations and asset-based financing arrangements, which serve as a source of financing for the sponsor. Investment companies are distinctly different than these structure types, as they are established primarily to provide clients with access to professional investment management services for a fee and do not provide a source of funding or liquidity for the sponsor. Consolidation of a fund by the investment advisor results in elimination of fee revenue, which is replaced with investment income on the assets of the fund. This re-characterization distorts the revenue of the investment advisor by masking fee revenue and including investment income attributable to the investors in the income statement. Likewise, consolidating the assets of the fund, which the investment advisor cannot utilize in its operations, distorts the financial position of the investment advisor. Therefore, we do not believe consolidation by investment advisors provides meaningful financial reporting to financial statement users.
- The FASB should consider regulatory reforms currently under contemplation for money market funds before final issuance of the proposed guidance: The Securities and Exchange Commission is contemplating regulatory reforms² to money market funds. The reforms that are under consideration are intended to mitigate the risks of runs, provide sources of liquidity and foster shareholder awareness of the risk of loss in the event of a financial crisis, may include a capital buffer, floating net asset value and/ or investor redemption restrictions. The contemplated reforms, if enacted on such terms, could increase the likelihood that a money market fund would be consolidated by the sponsor. Given the difficulty in synchronizing the timing of finalizing the contemplated reforms and Proposed ASU, , we believe the best course of action to provide meaningful financial reporting for financial statement users is an explicit scope exception to the Proposed ASU.
- Additional guidance on the assessment of implicit interests of a sponsor is necessary: We believe further guidance is necessary related to the identification and evaluation of implicit interests held by a sponsor under the proposed model. Case C³ and Case F⁴ in the implementation guidance describe investment entities with investments in a portfolio of medium-term debt. In both cases, the sponsor is deemed the primary beneficiary because of its implicit obligation to ensure the entities operate as designed in order to manage the risk to the reputation of the sponsor in the marketplace. We are concerned that the implementation guidance related to the implicit interests of the sponsor may be analogous to the relationship of a sponsor of many other types of entities, such as the investment advisor of a 2a-7 Fund or servicer of a residential mortgage securitization with a large mortgage servicing platform.

² See Remarks at SIFMA's 2011 Annual Meeting (November 7, 2011) available at <http://www.sec.gov/news/speech/2011/spch110711mls.htm>

³ Case C: Structured Investment Vehicle (810-10-55-132D)

⁴ Case F: Commercial Paper Conduit (810-10-55-3BJ)

Ms. Leslie Seidman, Chairman
Financial Accounting Standards Board
February 15, 2012
Page 4

It is currently unclear which characteristics distinguish structure types that include an implicit interest and which do not and how they compare to the structure types in the examples for which the sponsor is deemed to have an implicit interest. We suggest limiting the consideration of this implicit obligation to entities that have a history of receiving material non-contractual financial support. While we have theoretical misgivings with introducing the concept of a “taint” based on historic actions, this type of an approach would at least establish a definitive bright line.

We encourage the FASB to provide additional guidance and examples addressing how implicit interests should be considered in the principal/ agent assessment for sponsors of structures that are common in the current market, in particular, 2a-7 Funds. The guidance should illustrate scenarios when implicit interests are deemed to exist and when they do not, and if so, how the sponsor should consider implicit interests in the principal/ agent analysis. We believe it would be most helpful if this guidance was provided in the context of the overall consolidation analysis, including consideration of the purpose and design of the entity.

- Substantive kick-out or participating rights held by an independent board of directors with substantive oversight responsibilities should be determinative: If a board of directors is independent of the decision maker and has substantive oversight over the operations of the entity, including kick-out or participating rights, the decision maker should be considered an agent. For example, the board of directors of a fund registered as an investment company under the 1940 Act has a fiduciary duty to act in the best interests of investors rather than the investment advisor. The board, which typically includes less than 10 members⁵, is comprised of at least a majority of members who are independent of the investment advisor, has de facto indefinite incumbency for its members and has broad oversight power and responsibility over operations of the fund, including the ability to remove the investment advisor with and without cause⁶. We believe the existence of a board of directors with these characteristics should be a determinative indicator that a decision maker is acting as an agent on behalf of the board and encourage the Board to amend the proposed guidance. As a separate and related matter, absent a scope exception for 2a-7 Funds, if the Board agrees to this amendment, it will be easier to determine whether the investment advisor is acting as an agent.

⁵ Investment Company Institute data shows that 1940 Act boards typically have 8-9 directors, 6-7 of which are independent. Study results are available at: http://www.ici.org/pressroom/news/11_news_fund_gov_pract

⁶ On multiple occasions, boards of directors of registered investment companies have actually exercised the power to terminate an advisory contract with an advisor or its affiliates. See *e.g.* the Japan Fund board (first replacing Zurich Scudder Investments with Fidelity Investments, and then replacing Fidelity Investments with Nomura Asset Management); the Clipper Fund board (selecting Davis Advisors over Barrow, Hanley, Mewhinney & Strauss, an affiliate of the then current advisor); and the South Africa Fund board (replacing Alliance Capital with Investec Asset Management).

Ms. Leslie Seidman, Chairman
Financial Accounting Standards Board
February 15, 2012
Page 5

- Power should not be ascribed to third party investors without decision-making authority:
The Proposed ASU describes an agent as a party that is acting on behalf of others, the principal(s)⁷. The Basis for Conclusions, paragraph BC8, indicates that a party should not avoid consolidating an entity by delegating its decision making authority over that entity to another party. When taken together, we are concerned the FASB intends to ascribe power to a third party investor without decision-making authority in situations where the decision maker is an agent. To illustrate our concern, consider the following example:
 - A VIE is established through the issuance of pari passu interests to multiple, unrelated third party investors;
 - A single investor owns more than 50% of the interests;
 - The servicer performs the most significant activities that affect the economic performance of the VIE;
 - The servicer is determined to be an agent because it does not have an economic interest in the VIE other than a fixed and customary fee arrangement;
 - None of the investors hold substantive kick-out or participating rights.

We do not believe any party should be required to consolidate the VIE in this example. However, absent clarification, the proposed guidance may be interpreted to ascribe the decision making authority of the servicer to the investor with the most significant interest, greater than 50% interest in this example. As such, the investor with the most significant interest would be required to consolidate the VIE. We do not believe it appropriate to ascribe the powers of the decision-maker to investors if they do not have the ability to influence the activities that significantly impact the economic performance of an entity.

We encourage the FASB to amend the proposed guidance to explicitly state that investors without the ability to significantly influence the economic performance of an entity through substantive kick-out or participating rights cannot be the primary beneficiary of an entity subject to the principal/ agent model. In addition, we recommend including examples in the implementation guidance from the perspective of an investor without substantive kick-out or participating rights in an entity with a decision maker acting as an agent. We recommend inclusion of both partnership (and similar entities) and non-partnership entity examples.

- Entities with limited or no on-going decision making may not have a primary beneficiary:
Currently, paragraph 810-10-25-38F requires an enterprise to consider its involvement in the design of an entity because such involvement may provide the opportunity or incentive to establish arrangements that give the enterprise power. Practice has developed to interpret this requirement to require an enterprise to consolidate an entity even when there are insignificant or no decision making activities that significantly impact the economic performance of the entity subsequent to formation. We believe it is inappropriate to ascribe power to an enterprise solely due to its involvement in the design of an entity. We believe there are entities for which no power exists. If an entity does not have significant on-going decision making and the decisions made in the formation of the entity are not significant to

⁷Paragraphs 810-10-25-39B and 810-10-25-86

Ms. Leslie Seidman, Chairman
Financial Accounting Standards Board
February 15, 2012
Page 6

the performance of the entity or multiple parties participated in the formation of the entity, no reporting entity may have power.

To further supplement our view, the IASB has included a fourth factor in its principal/ agent analysis, which requires the entity to have the ability to affect its returns through its power over the entity. We agree with this principle because decisions made at formation of the entity may not significantly impact the ongoing performance of the entity and may not constitute power. The IASB issued implementation guidance related to IFRS 10⁸ in September 2011 that concluded it may not be appropriate to consolidate entities with limited or no on-going decision making activities. We encourage the Board to include similar implementation guidance in the Proposed ASU.

- Continuous reassessment of the status of the decision maker as a principal or agent is necessary: The proposed guidance requires reassessment of the status of the decision maker as principal or agent only upon a change in the purpose and design of the entity⁹. It is unclear what types of reconsideration events would be considered a change in the design and purpose of the entity. It is also unclear whether the Board intended to change the threshold from the continuous assessment threshold required under current GAAP and whether the reassessment requirement for the primary beneficiary test differs from the proposed requirement in the principal versus agent analysis. If a reassessment is not allowed or required, we are concerned about the risk of perpetual consolidation or structuring opportunities that would allow reporting entities to inappropriately avoid consolidation. The principal/ agent analysis effectively serves as the primary beneficiary test for a decision maker and the level of economic interests held in an entity is inherent in that analysis. Accordingly, we believe it is necessary to reconsider the status of the decision maker as a principal or agent if the nature or level of the economic interests held by the decision maker changes. We recommend retaining the guidance in current GAAP that requires continuous reassessment of the primary beneficiary with a clarification that the guidance includes the continuous reassessment of the status of the decision maker as principal or agent.
- The second component of the primary beneficiary test is no longer necessary: While consolidation is still based on a power and benefits model, the concept of significance has been removed from the benefits component of the proposed model. The significance concept is now inherent in the principal/ agent analysis, but is not explicit. Because a decision maker must consider its variable interests in the principal agent analysis, we do not believe it is necessary to retain the benefits component of the primary beneficiary test. The Basis for Conclusions paragraph BC14 suggests the reason this component is necessary is to avoid completing the principal/ agent analysis if a decision maker does not have a variable interest. If this is the only purpose for inclusion of the second component of the test, we do not believe it provides a substantial benefit to preparers. Therefore, we suggest the Board either

⁸ September 2011 Effect Analysis, IFRS 10 *Consolidated Financial Statements* and IFRS 12 *Disclosure of Interests in Other Entities*

⁹ Paragraph 810-10-35-6

Ms. Leslie Seidman, Chairman
Financial Accounting Standards Board
February 15, 2012
Page 7

remove or clarify the purpose of this component, given the requirement to consider variable interests in the principal versus agent analysis.

- Analysis of exposure to variability in returns from other interests lacks cohesiveness: The analysis of other interests in 810-10-25-39K carries forward certain concepts from FAS 167; however, the Proposed ASU also introduces new concepts, including whether a decision maker's exposure to variability is more than that of other investors and whether the interest exposes the decision maker to positive and negative returns. As noted above, the 'could potentially be significant' language was removed from the second half of the power and benefits test, which may place additional emphasis on probability in the principal versus agent analysis. While we believe these modifications will generally provide more reasonable conclusions, an introductory principle tying the individual elements together would provide additional clarity to the analysis of this factor. In addition to the quantitative elements included in the analysis of this factor, we also believe a decision maker should include qualitative considerations when analyzing the interests it holds. Additional comments on certain of the elements are included below.
- The addition of the "more variability than that of other investors"¹⁰ concept does not improve the principal/ agent assessment: A decision maker must consider the magnitude and variability associated with its economic interests when assessing whether it is a principal or an agent. In connection with this assessment, a decision maker must also consider whether it is exposed to "more variability than that of other investors". However, the proposed guidance does not provide sufficient guidance to evaluate this criterion. Based upon the example provided, we believe the FASB intended to require a decision maker to consider the seniority of its interests. Variability inherently considers subordination because the more subordinate the interest, the greater the variability associated with that interest. In addition to being redundant, the concept of "more variability than that of other investors" could be interpreted to require a quantitative variability analysis, which we do not believe was intended. Therefore, we recommend the FASB remove this criterion as it is unnecessary and may be interpreted incorrectly.
- The assessment of other interests held should consider the purpose of the investment: Decision makers may hold economic interests for a variety of reasons including capital appreciation, temporary market-making and regulatory or investor requirements. For example, a general partner in a limited partnership has unlimited legal liability inherent in its ownership interest, which arises solely due to the legal form of the entity. When considering maximum exposure to loss in this context, the interest of the general partner would always cause the other interests held factor to point toward the general partner being a principal. This is inconsistent with the removal of the presumption that a general partner consolidates a limited partnership. The reason a decision maker holds an interest should be included in the principal versus agent analysis because it is relevant to understanding the nature of its role

¹⁰ Paragraph 810-10-25-39Lb

Ms. Leslie Seidman, Chairman
Financial Accounting Standards Board
February 15, 2012
Page 8

relative to the transaction, is consistent with the requirement to consider the design and purpose of the entity and will result in more logical conclusions.

- Analysis of whether fees are variable interests is redundant and unnecessary: The implementation guidance in paragraph 810-10-55-37¹¹ addresses whether a fee paid to a decision maker is a variable interest. This guidance is almost entirely replicated in the principal/ agent analysis in paragraphs 810-10-25-39I through 39L. The nature and variability of the fees and other economic interest of the decision maker is inherent in the proposed principal/ agent assessment. Accordingly, we encourage the FASB to eliminate the redundant implementation guidance. If the Board believes it is necessary to artificially differentiate a subset of economic interests as variable interests, we suggest that the FASB explain its rationale in the final standard.
- The implementation guidance should provide a comprehensive demonstration of the model: The implementation guidance for the principal versus agent analysis is separated from the primary beneficiary determination. We do not understand why these two elements of the analysis are separated and do not believe a decision maker acting as an agent can also be the primary beneficiary. We believe the FASB should make this explicit in the introduction to the model in paragraph 810-10-05-10. We also believe it would be beneficial to illustrate a scenario with a decision maker acting as a principal that is not the primary beneficiary. We suggest providing a single set of comprehensive examples including an analysis of the scope, principal/ agent analysis and primary beneficiary determination.
- Benefit plan interests should not be included in principal versus agent analysis: Paragraphs 810-10-55-37Aa through 37Ab, which excluded benefit plan interests from the primary beneficiary assessment, have been deleted in the Proposed ASU. Interests held by defined benefit plans¹² should continue to be excluded because altering the specialized accounting under Topic 960 would misrepresent the net position of the plan in the financial statements and would not provide financial statement users with more useful information. Moreover, consistent with our earlier comment, we believe consideration should be given to the purpose for holding a variable interest in the principal/ agent analysis. Absent an attempt to circumvent the requirements of the Proposed ASU, these interests should be excluded from the analysis.
- The organizational structure of the Proposed ASU is difficult to understand and navigate: The organization of the guidance within the Proposed ASU is difficult to follow due to the duplication of guidance. If the Board intended to align the principal versus agent analysis for VIE and Partnerships and Similar Entities models, we do not understand why the application guidance is included twice and nearly repeated in both sections. It is also unclear whether

¹¹ Formerly paragraph B22 of FASB Statement No. 167, *Amendments to FASB Interpretation No. 46(R)*

¹² We do not expect the removal of these paragraphs to affect interests held by defined contribution plans as such interests are held for the benefit employees who have decision making authority related to the composition of investments in their accounts.

Ms. Leslie Seidman, Chairman
Financial Accounting Standards Board
February 15, 2012
Page 9

the minor differences are intended and if those differences will ultimately result in a lack of alignment between the VIE and Partnership and Similar Entities models. To further complicate the matter, the examples in the implementation guidance do not distinguish the entity type. We recommend the Board modify the final guidance to eliminate this redundancy¹³ and consider including a scope analysis in the examples.

Conclusion

We support with the overarching consolidation principal underlying the principal/ agent assessment. We encourage the FASB to consider our recommendations described in this letter and in particular, urge the FASB to provide a scope exception for 2a-7 Funds. We believe addressing our concerns will result in more rational conclusions, consistent and useful financial reporting and will more closely converge the consolidation guidance with IFRS.

* * * * *

We appreciate the opportunity to comment on the issues contained in the Board's invitation. If you have any questions, please contact me at (415) 222-3119.

Sincerely,

/s/ Richard D. Levy

Richard D. Levy
Executive Vice President & Controller

cc: Hans Hoogervorst – IASB
Kathy Murphy – Office of the Comptroller of the Currency
Stephen Merriett – Federal Reserve Board
Robert Storch – Federal Deposit Insurance Corporation
Donna Fisher – American Bankers Association
David Wagner – The Clearing House

¹³ Rights of others: paragraphs 810-10-25-39D and 810-10-25-88, Compensation: paragraphs 810-10-25-39I and 810-10-25-92, Other interests held: paragraphs 810-10-25-39K and 810-10-25-94