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Letter of Comment No: 28 a
File Reference: 1225-001

November 15, 2005

Financial Accounting Standards Board 401 Merritt 7 P.O. Box 5116 Norwalk, Connecticut 06856-5116

Re: File Reference 1225-001 - Proposed Statement of Financial Accounting Standards, "Accounting for Transfers of Financial Assets, an amendment of FASB Statement No. 140" (the "Proposed Amendment")

Ladies and Gentlemen:

This letter supplements the Commercial Mortgage Securities Association's ("CMSA")¹ letter of October 10, 2005 (the "October 10 Letter") to the Board on the Proposed Amendment. The purpose of this letter is to address the alternative structure for securitizing large commercial mortgage loans discussed at the October 17, 2005 Educational Forum.

The Structure Described in the October 10 Letter:

CMSA's October 10 Letter describes how:

- Senior and subordinated participations in large commercial mortgage loans are created after the large commercial mortgage loan has been originated,
- The senior participation is transferred to a CMBS issuing Trust that is a qualifying Special Purpose Entity, and

CMSA is an international trade organization dedicated to improving the liquidity of commercial mortgage backed securities ("CMBS") through access to the capital markets. Headquartered in New York City, CMSA has chapters in Canada, Europe, and Japan, and has expanded to more than 300 member firms since it was founded in 1994. CMSA's members include leading CMBS originators, issuers, investors and service providers, including the largest money-center banks, investment banks, insurance companies, money managers, specialty finance companies, loan servicers and rating agencies. Additional information on CMSA can be found at www.cmbs.org.

- 3. The junior (subordinated) participation is either-
 - Transferred to a corporate investor (i.e., an investor that is not a special purpose entity), or
 - Retained by the transferor, an affiliate, or agent of the transferor.

For the reasons indicated in CMSA's October 10 Letter, CMSA believes it should not be a requirement that a qualifying SPE be placed between the transferor of senior and subordinated participations in large commercial mortgage loans and the CMBS issuing Trust for the transferor to account for the transaction as a Statement 140 sale.

Alternative Structure:

The following structure (the "Alternative Structure") for securitizing large commercial mortgage loans was discussed at the Educational Forum:

- A junior participation in a large commercial mortgage loan is created and sold to a third party after the loan is originated, but before the large commercial mortgage loan, subject to a subordinated participation, is transferred in its entirety to the CMBS issuing Trust, and
- The entire large commercial mortgage loan (subject to the junior participation) is transferred, in a "true sale" to the CMBS issuing Trust which is a qualifying SPE that becomes the lender and mortgagee of record.

At the Educational Forum, a Board member expressed the view that:

- 1. The Alternative Structure does not meet the Proposed Amendment's sale criteria as it represents a "transfer of a portion of an asset" that is not a "Participating Interest," and
- 2. If the Alternative Structure were changed (the "Modified Alternative Structure:) such that:
 - The entire large commercial mortgage loan is transferred to the CMBS issuing Trust that is a qualifying SPE before the subordinate participation is created, and
 - The CMBS issuing Trust creates the subordinate Participation and issues it to either a third party buyer or an affiliate or agent of the transferor,

the Modified Alternative Structure transaction would meet the Proposed Amendment's sale criteria for the entire large commercial mortgage as there would be no transfer of a Participating Interest (as defined in the Proposed Amendment).

CMSA believes that when the subordinate participation is created (i.e., before, or after, the large commercial mortgage loan is transferred to the CMBS issuing Trust) is not, and should not be relevant to achieving a Statement 140 sale as, in both cases (creation of participation before, or after, the transfer of large commercial mortgage loan), the whole large commercial loan is transferred to CMBS issuing Trust in a legal "true sale."

If, despite CMSA's recommendation in it's October 10 Letter, the Board requires an additional QSPE be established to achieve Statement 140 sales treatment for the transfer of a junior participation in a large commercial mortgage loan before the whole large commercial loan is transferred (subject to the junior participation) to the CMBS issuing Trust, the transfer of the whole large commercial loan participation meets the criteria for both:

- The sale of the whole large commercial loan contained under both current Statement 140 and the Proposed Amendment, and
- Derecognition of the liability represented by the subordinated participation since the criteria for derecognition in paragraph 16² of Statement 140 (as interpreted by FASB Staff Interpretation No. 35) would be met.

Whether the subordinate participation is created before or after the transfer, the CMBS issuing Trust becomes the lender of record of the subordinate participation upon the transfer and the transferor has no obligation to the holder of the subordinate participation, with the possible exception of normal representations and warranties.

CMSA believes the issue is clearly a form over substance situation, and that there is absolutely no question that the Proposed Amendment's sale requirements are met once the whole large commercial mortgage loan is transferred to the CMBS issuing Trust as there is not sale of a portion of an asset. CMSA requests that the Board make this clear in the Final Amendment.

For the reasons indicated in CMSA's October 10 Letter, CMSA continues to believe the transferor should obtain sales treatment for the subordinate participation at the time it is created and sold, even if the large commercial mortgage loan has not yet been transferred to the CMBS issuing Trust.

CMSA would be pleased to discuss its comments and this letter with the Board or with the FASB Staff at their convenience. If CMSA can be of further assistance, please contact Stacy Stathopoulos at (212) 509-1950.

The interpretation indicates:

A debtor may derecognize a liability if and only if it has been extinguished. Paragraph 16 states that
a liability has been extinguished if either of the following two conditions is met:

² Staff Interpretation No. 35 provides that a debtor should derecognize a liability (without having to recognize another, similar liability) if it transfers noncash financial assets to a qualifying SPE that "assumes" the liability if:

The liability (in this case, the junior participation) is considered extinguished under paragraph 6 of Statement 140, and

The transfer of the noncash financial assets (in this case, the large commercial mortgage loans is accounted for as a sale under paragraph 9.

o The debtor pays the creditor and is relieved of its obligation for the liability.

The debtor is legally released from being the primary obligor under the liability, either judicially or by the creditor.

The transfer of assets to a qualifying SPE would not, in most cases, constitute a payment to the creditor and, therefore, would not meet the condition in paragraph 16(a) of Statement 140.

However, the debtor may extinguish its liability if, as a result of transferring the assets to the
qualifying SPE, the debtor is legally released from being the primary obligor under the liability
according to paragraph 16(b) of Statement 140.

^{4.} If the creditor's legal release is not obtained, the debtor should continue to recognize the obligation.

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Very truly yours,

Dottie Cunningham Chief Executive Officer

Commercial Mortgage Securities Association