

FSP FIN 46-d 1120 Connecticut Avenue, NW Washington, DC 20036

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Mr. Lawrence Smith Director Financial Accounting Standards Board 401 Merritt 7 P.O. Box 5116 Norwalk, CT 06856-5116

Re: Comments on the Proposed FSP FIN 46-d, Treatment of Fees Paid to Decision Makers and Guarantors as Described in Paragraph 8 in Determining Expected Losses and Expected Residual Returns of a Variable Interest Entity under FASB Interpretation No. 46, Consolidation of Variable Interest Entities

## Dear Larry:

The American Bankers Association (ABA) appreciates the opportunity to comment on the proposed Staff Position No. FIN 46-d, Treatment of Fees Paid to Decision Makers and Guarantors as Described in Paragraph 8 in Determining Expected Losses and Expected Residual Returns of a Variable Interest Entity under Financial Accounting Standards Board Interpretation No. 46, Consolidation of Variable Interest Entities (FIN 46). ABA brings together all categories of banking institutions to best represent the interests of the rapidly changing industry. Its membership — which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies and savings banks — makes ABA the largest banking trade association in the country.

We encourage the FASB to re-examine the process for issuing FASB Staff Positions (FSPs). Although we recognize that the goal of FSPs is to provide additional interpretive guidance, we are very concerned about the process under which this additional guidance is being issued. There are growing numbers of extremely important issues being addressed through FSPs, yet the process for issuing FSPs is inconsistent. For example, sometimes the process permits public comment, and other times there is no public comment period. Instead, the final FSP is simply announced. We are concerned that important constituent input is being skipped, resulting in surprising and significant new rules for preparers. Keeping track of the status of a given issue, particularly when it is near quarter-end, has become a challenge, and can result in confusion and concern on the part of preparers about whether they have the most recent guidance issued by the FASB. We encourage the FASB to permit public comment on these important issues and advance notice if possible.

We believe that the following changes need to be made to FSP 46-d:

- fixed fees (whether a fixed dollar amount or fixed percentage fee) should be excluded from the calculation of expected loss and expected residual returns, and
- (2) fees should not be double-counted in the expected residual return calculation.

## Fixed Fees Should Be Excluded

We believe that fixed fees — both fixed dollar fees and fees that are a fixed percentage of assets — should be excluded from the process for calculating expected losses and expected residual returns. The proposed guidance in FSP 46-d states that if a party has the ability to make decisions related to assets held in an entity, the decision-making ability is an indicator of which party might be considered the primary beneficiary. It is not clear, however, why fixed fees are included in determining the primary beneficiary.

It is customary in managed trust agreements that a decision maker is paid a fixed dollar amount or a fixed percentage of assets fee to provide a service. Fixed fees (either dollar or percentage) are established by market conditions and are a factor in pricing the portfolio of assets under management. There should be no distinction between a fixed dollar amount and a nominal fixed percentage fee for the purpose of this FSP.

Many asset portfolio management services are based upon a fixed fee. The fee is most often determined at the time the portfolio is established and is dependent on the size of the portfolio – not the portfolio's investment return. Fees are to be received over the specified time that the assets are under management. The objective of paying these fees is to provide a service to facilitate the management of assets and maximize investment returns for the owners of the assets or beneficiaries of the trust – not the decision maker. Under the agreement, restrictions are placed on certain of the decision maker's abilities to manage the assets. The decision maker is prohibited from managing the assets for personal benefit, and does not have any personal variable interest in the managed entity. Therefore, we believe that the fixed fees received by the decision maker should be excluded from the expected losses and expected residual return calculations used to determine the primary beneficiary of managed trust agreements.

## Fees Should Not Be Double-counted

It appears that the fees to the decision maker are being double counted in the expected residual return calculation. As mentioned, we believe that the fees should not be included in the calculation at all, but if the FASB decides that these fees are to be included in the calculation, the fees should only be included once.

The expected loss calculation outlined in FSP 46-d requires that the fees paid to the decision makers be added back to the estimate of the net income or loss that is estimated to be received by the variable interest holder. The calculation of the expected residual returns requires that the fair value of the fees paid to a decision maker be included as a variable component in the calculation, and once the fees are included in the calculation, the fees are allocated to the variable interest holder.

Because the FSP proposes that fees to the decision maker are to be added back to the estimate of net income or loss to measure variability, and then the fees are to also be included as a variable component in the expected residual return calculation, it seems that the fees are counted twice in the calculation. We believe that if fees are to be included in the expected residual return calculation at all, they should only be included once and encourage the FASB to make this necessary change the calculation.

In conclusion, we are concerned about the process for issuing FSPs and believe that full consideration of constituent input is necessary and a vital component of the standard setting process. We believe that fixed fees should not be included in the expected loss or expected residual return calculation, whether the fees are a fixed amount or a fixed percentage of assets. If fees are to be included as part of the calculation, we believe that FSP 46-d incorrectly double-counts the fees, and we encourage the FASB to correct the calculation to include such fees only once.

Thank you for your consideration. If you would like to discuss this letter in more detail, please contact Gwen Ritter at 202-663-4986.

Sincerely,

Donna Fisher