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By UPS and Facsimile

Financial Accounting Standards Board
401 Merrit 7
P.O. Box 5116
Norwalk, CT 06856-5116

Attn: Ron Bossio

Re: Proposed Statement of Financial Accounting Standards Exposure Draft
• Consolidated Financial Statements: Policy and Procedures (No. 154-D, October 16, 1995)(the "Exposure Draft")

Gentlemen/Ladies:

The undersigned is submitting this comment letter on behalf of itself and the financial institutions listed at the end of this letter. Each is an active participant in the securitization markets. The purpose of submitting a common comment letter on behalf of a large number of market participants is to emphasize the importance to the huge and diverse securitization and structured finance marketplace of the Financial Accounting Standard Board's ("FASB") project on consolidated financial statements. We wish to insure that (i) the work on the FASB in the Proposed Statement of Financial Accounting Standards Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities (the "Transfer Exposure Draft") is not inadvertently thwarted by adoption of an overly broad consolidation accounting rule and (ii) a final consolidation rule does not require consolidation of special purpose entities ("SPEs") currently used in securitizations where it would be inappropriate to do so.

Our comment letter is organized as follows. First, we discuss the standard in Paragraphs 9 and 10 and its application to securitizations in general. In particular, we examine the fundamental nature of a securitization and why this

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fundamental nature will most often not justify consolidation of third party owned SPEs[1] with entities that may sponsor or administer them. Second, we examine several of the "presumptions" or "indicators" of control contained in the Exposure Draft in relation to securitization.

Before commencing, we wish to emphasize that we are not attempting in this letter to quarrel with the FASB's basic philosophical position in the Exposure Draft. Rather, we are attempting to insure that the ultimate standard adopted works in harmony with the securitization and structured finance markets and does not conflict with the FASB's ultimate Financial Accounting Standard on derecognition of financial assets through transfers.

1. The Basic Policy and Its Application to Securitization

Paragraph 9 adopts a consolidation standard based on "control" of the entities at issue and Paragraph 10 in turn defines "control" of an entity in terms of power over the entity's assets, the "power to use or direct the use of the individual assets of another entity in essentially the same ways as the controlling entity can use its own assets." (Emphasis added.)

It should be clear that such a standard will, in almost all cases, when applied to a well structured securitization, not require consolidation of the operative third party owned SPEs with the sponsor's or administrator's consolidated group. We would appreciate some formal comment in the final rule that this is the case. The following discussion contains the analysis for this conclusion.

Securitization at its heart is the use of superior information on the future financial performance of a pool of assets to finance those assets more efficiently than the business that generated such assets may be financed. In order to insure that the financial performance of that business will not taint the performance of the designated assets, the parties use structure to isolate the assets legally from the financial performance of their originator.

The normal fashion in which to isolate the assets is to transfer them by means of a legal true sale to a bankruptcy remote, special purpose subsidiary that is designed to have no assets or liabilities other than those obtained and incurred in connection with the securitization itself. The subsidiary in turn transfers the assets to a third party purchaser, which itself may be an SPE owned by third parties or a

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[1] *Please note that the above and following analysis is intended to apply both to SPEs that purchase assets from a single seller or group of related sellers and SPEs that purchase assets from many unrelated sellers. We perceive no difference in the analysis in either case.*

financial institution or other investor owned by third parties. The terms of each transfer are set out in exhaustive detail and clearly subject the assets to a set of restrictions designed to insure that each party to the transaction receives the rights and liabilities for which it has bargained. No document, including charters, by-laws, partnership agreements, trust agreements and the like, may be modified in a manner that may materially affect a party's rights or liabilities without the consent of that party.

Examples of the restrictions placed on the assets include the inability of the transferor to get them back, even through prepayment, the collection of proceeds in lock-boxes and accounts in the names of trustees, secured parties or other transferees, the marking of computer records, and the right of transferees to replace the servicer in well defined circumstances. Further, the vast bulk of proceeds from the liquidation of the assets ultimately must typically be paid to the third party investors.

Therefore, while a sponsor or administrator of a securitization is seeking to accomplish its own ends in choosing a particular structure, and may even bear the greatest proportional risk of loss or opportunity for gain, each party to the transaction will also achieve carefully defined investment or income goals and will have its rights and obligations carefully defined in an elaborate system that may not be materially modified by any party to the transaction - least of all by the sponsor - without the consent of the other applicable parties. In fact, because all parties achieve their goals and all parties control the aspects of the transaction about which they care the most, the SPEs that are not subsidiaries of the sponsor are clearly not "controlled" by the sponsor.

To say that one entity that helped to design a system that achieved such entity's goals controls the system is a mistake of logic. Many parties participate in the design. Many parties achieve their goals from the working of the system. Once the transaction commences, no one may change the treatment of the assets and their proceeds in ways that will materially affect others without the consent of the others. Otherwise the assets would not be isolated from the financial performance of other parties (including their creator) and the whole basis for the financing would fail.

It is clear, therefore, that in no meaningful sense may a sponsor or administrator, in a normal, well structured securitization, use the assets transferred to a third party SPE as if they were the sponsor's or administrator's own assets.

2. Presumptions and Indicators

We would appreciate confirmation that applying the above enumerated analysis to the presumptions contained in Paragraphs 14.d. and f. and the indicators in Paragraphs 158.d and e. would not require consolidation of third party owned SPEs.

For example, one could argue that some of the aspects of Paragraph 14.d. are found in securitizations. The creator helps to design the powers and activities of the third party SPE and after investors and debt holders are repaid, the sponsor may have a right through excess servicing or other mechanisms to left-over income. However, there clearly are voting rights held by the third party owners, changes to organic documents are not solely the province of the sponsor, and the vast majority of the cash flows go to third party investors (which was the idea behind the financing to begin with). Further, there are all of the protections referred to in Section 1 above.

Similarly, in a securitization, a sponsor may own an entity that serves as a sole general partner in a partnership, not in order to control the working of the partnership, but rather to insure that for tax purposes the SPE is in fact taxed as a partnership. The general partner will have the liabilities of a general partner but not the formal mechanisms of control that a general partner in an operating general partnership would have precisely because of the over-all structure and purposes of the structure enumerated above in Section 1. Accordingly, if the lack of actual control may be demonstrated, we assume that the presumption in Paragraph 14.e. may be successfully rebutted and we would appreciate formal confirmation of such analysis.

The analysis in Section 1 of this comment letter and the above portions of this Section 2 applies with equal force to the "indicators" of control found in Paragraphs 158. d. and e. The majority of cash flow from the liquidation of securitized assets go to third party investors, but a majority of income "left-over" after payment of third party investors may be paid to a sponsor, who, of course, may be argued to have been the "sole creator" of a third party owned SPE.[2] *But as all of the restrictions on servicing and use of the assets at issue described above will obtain, these superficial matches to the "indicators" described in Paragraphs 158 d. and e. again should not be determinative. Rather, we would appreciate confirmation that the actual analysis of the restrictions on the use of the transferred assets should be the deciding factor.*

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[2] *It should be noted that in any event almost always in securitizations third parties will formally organize the SPEs that they own, though the sponsor or administrator may have requested them to do so.*

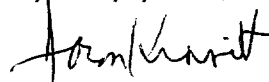
3. Misleading Financial Statements

It is worth pointing out that the FASB's adoption of an accounting standard consistent with the above analysis would also make it very much more likely that consolidated balance sheets of originators of securitized assets would fairly represent reality. As the originator will not in fact have control over the assets transferred to the third party owned SPE in anything approaching the nature of control over its own assets, and will not in fact be liable for the SPE's issued liabilities, it would be grossly misleading for the originator to consolidate the SPE into its consolidated group. To do so would surely mislead creditors of, and investors in, the originator as the originator would not have access to the transferred assets to satisfy its liabilities and would not need to utilize its resources to pay the third party owned SPE's issued liabilities.

4. Conclusion

We believe that the FASB did not intend to thwart its work in the Transfer Exposure Draft by means of the adoption of the Consolidation Exposure Draft. Further, we believe that the above analysis convincingly demonstrates that on the merits under the control standard enumerated in the Consolidation Exposure Draft a well structured third party owned SPE is structured to deny to the originator of the transferred assets continuing control over those assets; the transferor may no longer use such assets as if they were its own. Accordingly, we would appreciate a clearer statement of this conclusion in the final standard adopted.

Very truly yours,



Jason Kravitt on behalf of
Mayer, Brown & Platt

Financial Institutions On Behalf of Whom this Letter is also submitted:

ABN/AMRO
Bank of America NT&SA
Barclays
Canadian Imperial Bank of Commerce
Citibank, N.A.
Dean Witter, Discover & Co.
Deutsche Bank AG, New York
First National Bank of Chicago
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