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Russell G. Golden
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Via Email to: director@fasb.org

LETTER OF COMMENT NO. 9

Re: File Reference No. 1610-100

Dear Mr. Golden:

Thank you for the opportunity to comment on the Proposed Statement of Financial Accounting Standards, *Accounting for Transfers of Financial Assets, an amendment of FASB Statement No. 140* (the "Exposure Draft"). We have reviewed the Exposure Draft and are supportive of the Board's overall efforts to improve the relevance, representational faithfulness, and comparability of the information that reporting entities provide in their financial statements regarding the effects of transfers of financial assets. However, we also have the following comments and suggestions for improving the revised guidance proposed in the Exposure Draft.

Executive Summary

The guidance provided by the Exposure Draft, specifically in paragraphs 9(c) and 54B, sets forth a presumption that the transferor maintains effective control over transferred assets when a restriction which is not designed primarily to benefit the transferee is placed on that transferee's ability to subsequently pledge or exchange the transferred assets. We do not believe that the principle set forth in paragraphs 9(c) and 54A-D of the Exposure Draft is operational for restrictions typically placed on assets transferred as a part of a securitization.¹ We have discussed this principle with specialists in the securitization industry and have not been able to reach a clear consensus as to how it should be applied to our securitization program.

¹ In a typical securitization transaction, once assets have been transferred into a trust, they may be removed only under limited circumstances as specified in the legal documents governing the securitization.

Although the FASB has provided examples in paragraph 54A-D as to the proper application of the principle set forth in paragraph 9(c), we believe that the basic principle could be interpreted differently for even the simplest securitization structures, such as a single-class guaranteed mortgage-backed security ("MBS") issued by Fannie Mae. If the application of this principle is not clarified, both Fannie Mae and the lenders that transfer loans to a Fannie Mae trust in a Fannie Mae securitization may recognize the same assets in their financial statements. Specifically:

- (a) The lenders who utilize our MBS structure may conclude that they fail the sale accounting criteria in paragraph 9 of SFAS 140 due to the restrictions placed on the assets transferred into a securitization trust, and the loans will remain on the lenders' financial statements due to accounting treatment as a secured borrowing; and
- (b) Based on the revised consolidation model proposed in the exposure draft for Proposed Statement of Financial Accounting Standards *Amendments to FASB Interpretation No. 46(R)*, Fannie Mae will likely be required to consolidate the MBS trusts created by our MBS program.² As a result, we will reflect either the underlying mortgage loans (or a receivable from the lender backed by the cash flows from the mortgage loans) on our financial statements.

This result does not seem reasonable given the fact that the restrictions placed on assets transferred to Fannie Mae MBS trusts do not provide the transferor with effective control over the transferred assets.

In addition to these concerns, we anticipate that this Exposure Draft, in combination with the related exposure draft for the Proposed Statement of Financial Accounting Standards *Amendments to FASB Interpretation No. 46(R)* ("FIN 46(R)"), will have a significant impact on our accounting systems and processes. As such, we do not believe that we will be able to complete implementation of the final guidance by the effective date of January 1, 2010. Please refer to our concurrent comment letter on the proposed amendments to FIN 46(R) for further detail regarding the timing and cost of our implementation efforts for both standards.

Background

Federal National Mortgage Association (Fannie Mae)

Fannie Mae is a federally chartered and stockholder-owned corporation organized and existing under the Federal National Mortgage Association Charter Act, as amended. Fannie Mae was established in 1938 as a United States government agency to provide supplemental liquidity to the mortgage market. Fannie Mae became a stockholder-owned and privately managed corporation by legislation enacted in 1968. Fannie Mae entered the mortgage pass-through market in 1981 with its mortgage-backed securities program, which was modeled somewhat on the Ginnie Mae and Freddie Mac MBS programs. At June 30, 2008, the total unpaid principal

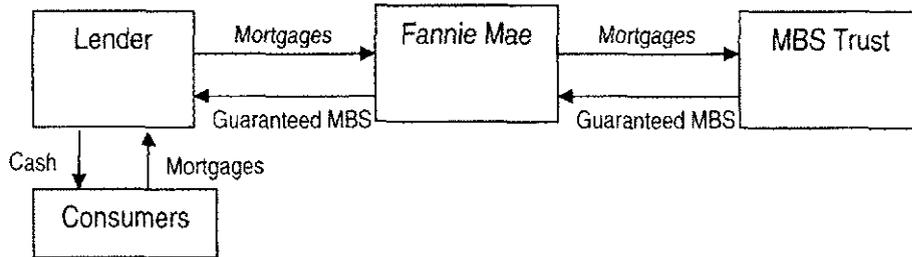
² This assessment is based on the guidance provided by paragraph 14 of the exposure draft for the Proposed Statement of Financial Accounting Standards *Amendments to FASB Interpretation No. 46(R)*. Fannie Mae will provide our comments in response to that exposure draft in a separate communication.

balance of Fannie Mae guaranteed MBS outstanding was \$2.7 trillion, and our estimated market share of new single-family mortgage-related securities issuances during the first half of 2008 was about 47%.

Fannie Mae’s MBS Program

Fannie Mae’s single-class guaranteed MBS represents one of the simplest securitization structures existing in the industry today. The most common Fannie Mae securitization model is the “lender swap” transaction, where a lender (the transferor) delivers a pool of single-family mortgage loans to Fannie Mae, which immediately delivers those loans into an MBS trust (the transferee) on behalf of the lender.³ Fannie Mae, in its corporate capacity, issues the MBS that include Fannie Mae’s guarantee of the timely payment of principal and interest to the MBS trust for the benefit of the MBS certificateholders (the investors or beneficial interest holders). Fannie Mae receives a guaranty fee as compensation for assuming the credit risk on the mortgage loans transferred to the MBS trust. The MBS provide the certificateholders with a contractual right to receive a pro rata share of the principal and interest payments from the specific pool of mortgage loans that was delivered to Fannie Mae by the lender. The lender may choose to hold, sell or pledge the MBS that they receive.

The following diagram illustrates a typical lender swap transaction:



Fannie Mae MBS trusts are subject to a set of uniform terms contained in the master trust documents that establish and govern each MBS trust. Fannie Mae’s MBS trusts are not senior-subordinate structures, do not employ any time-tranching, and do not hold any derivative instruments. Rather, the trusts are passive entities created by the participants in the transaction to hold a pool of mortgage loans and to issue certificates allocating cash flows from those loans equally among all certificateholders based on their percentage interests in the MBS.⁴ Once the assets have been transferred into the MBS trust, they may be removed only under limited circumstances specified in the trust documents.

³ Fannie Mae is not the transferor to the MBS trust as defined by SFAS 140. Rather, Fannie Mae is an agent for the lender, as we act for and on behalf of the lender in delivering the mortgage loans into the trust for securitization. Fannie Mae has no control or discretion in its facilitation of the transfer, as upon receiving the mortgage loans, Fannie Mae is only able to deliver them into the trust as directed by the lender.

⁴ Each MBS trust is treated as a “grantor trust” under the Internal Revenue Code, and thus for tax purposes, the beneficial owner of a security will be considered the beneficial owner of a pro rata, undivided interest in each of the mortgage loans in the underlying pool.

Beneficiaries of the Restrictions Placed on the Transferee's Ability to Subsequently Sell the Assets Transferred in a Securitization

The guidance in paragraph 9(c)(3) of the Exposure Draft sets forth a presumption that the transferor maintains effective control over transferred assets when a restriction which is not designed primarily to benefit the transferee is placed on that transferee's ability to subsequently pledge or exchange the transferred assets. Conversely, effective control is not maintained when the constraint on the transferee's right to pledge or exchange the transferred financial asset is designed primarily to provide the transferee with a benefit. This concept was illustrated in the following excerpt from paragraph 54A of the Exposure Draft:

In many securitization transactions, the transferee is restricted from pledging or exchanging the transferred financial asset. However, such restriction may exist primarily to benefit the transferee because it enhances the transferee's ability to market the issuance of securities backed by the transferred financial assets to prospective beneficial interest holders. Accordingly, the transferor does not maintain effective control over the transferred financial assets held solely due to that constraint.

Although this represents a good hypothetical example, we believe the actual facts that are associated with our MBS program could be interpreted differently. Specifically, we believe that one could make a compelling argument that the restriction that precludes the transferee (i.e. the MBS trust) from selling or pledging the assets was primarily established to benefit Fannie Mae (who is not the transferor or the transferee). Specifically, when evaluating the restriction that is established in Fannie Mae's securitization trusts, it is important to consider the fact that Fannie Mae is the issuer of the mortgage backed securities, the author of the legal documents that establish each trust and the party that is marketing the exchange of single family mortgage loans that are held by our customers for a guaranteed mortgage backed security. This arrangement allows Fannie Mae to deliver our primary product, a guarantee, to the mortgage market. Therefore, we believe that it would be reasonable to argue that any restriction that increases the marketability of the certificates is primarily for the benefit of Fannie Mae. As Fannie Mae is not the transferee, a customer's transfer to a Fannie Mae MBS trust would not qualify for sale accounting as it would be presumed under the paradigm in the Exposure Draft that the transferor retains effective control under the sale accounting requirements in paragraph 9(c)(3).

In the above example, Fannie Mae was not able to conclude that the restriction placed on the transferee was established primarily to provide the transferee with a benefit. That said, the restriction also did not allow the transferor to maintain effective control over the assets that had been transferred to the trust and securitized. Specifically:

- the transferred assets have been legally isolated from the transferor;
- the transferor does not have the unilateral ability to liquidate the trust or cause the holder to return specific assets of the trust;⁵

⁵ Note that the legal documents specify that Fannie Mae in its corporate capacity as trustee must propose and approve any amendment to significant terms of the trust. As a result, even when a lender owns 100% of the certificates issued by a Fannie Mae MBS trust, it does not have the unilateral ability to cause the trust to liquidate or to change the terms such that it can cause the holder to return specific assets of the trust.

- the transferor does not receive any benefit from knowing which party holds the financial asset; and
- there are no other terms of the arrangement that would challenge the assertion that the transferor has relinquished control over the assets transferred into the trust.

We have therefore concluded that the proposed guidance may result in diversity in practice as it relates to the restrictions typically placed on assets transferred as a part of a securitization, because it does not properly and consistently identify those circumstances in which such restrictions would allow the transferor to maintain effective control over the transferred assets.

Furthermore, Fannie Mae will likely be required to consolidate the MBS trusts created in our MBS Program based on the guidance proposed in the Board's concurrent project on consolidations of variable interest entities. Consequently, if the guidance in paragraph 9(c) of the Exposure Draft is issued as proposed, the results may be incongruous with the objectives of the consolidation project, as both Fannie Mae and the lenders that transfer loans to a Fannie Mae trust may recognize the same assets in their financial statements. That is, the lenders would account for transfers of loans into Fannie Mae MBS as secured borrowings rather than as sales, while Fannie Mae would reflect the underlying mortgage loans (or a receivable from the lender backed by the cash flows from those mortgage loans) on our financial statements as a result of the trust's consolidation.

Recommended Clarification

We recommend that the Board revise the principle as proposed to consider the evaluation of restrictions established in a securitization transaction. Under the current guidance, if the transferee is a qualifying special purpose entity (QSPE), then the assessment requires the reporting entity to "look through" the entity to determine whether the holders of the entity's beneficial interests have the right to pledge or exchange those beneficial interests. While the concept of a QSPE will be eliminated once the Exposure Draft is finalized, we believe that it is appropriate to include a modified principle that is consistent with the current paradigm, because it considers whether the transferor has relinquished control over the transferred assets from both a legal and a substantive perspective.

We recommend that the Board revise paragraph 9 of the Exposure Draft as follows:

9. A transfer of an individual financial asset in its entirety, a group of financial assets in their entirety, or a participating interest in an individual financial asset shall be accounted for as a sale if and only if *all of the following conditions* are met:
 - a. The transferred financial assets have been isolated from the transferor – put presumptively beyond the reach of the transferor and its creditors, even in bankruptcy or other receivership. Transferred financial assets are isolated in bankruptcy or other receivership only if the available evidence provides reasonable assurance that the transferred financial assets would be beyond the reach of the powers of a bankruptcy trustee or other receiver for the transferor or any of its consolidated affiliates included in the financial statements being presented. For multiple step transfers, a special purpose entity (SPE) that is designed to make remote the possibility that it would enter bankruptcy or other

receivership (bankruptcy-remote entity) is not considered a consolidated affiliate for purposes of performing the isolation analysis (paragraphs 27, 28, and 83).

- b. Each transferee (or, if the transferee is a statically managed pool of assets held by an entity created in a securitization transaction, each holder of its beneficial interests) has the right to pledge or exchange the assets (or beneficial interests) it received, and no condition constrains the transferee (or beneficial interest holder) from taking advantage of its right to pledge or exchange the transferred assets (or beneficial interests). A restriction placed on the right of a transferee (other than a statically managed pool of assets held by an entity created in a securitization transaction) to pledge or exchange the assets it received should be designed primarily to provide such a transferee with a benefit (paragraphs 54A–54D).
- c. The transferor, its consolidated affiliates included in the financial statements being presented, or its agents do not maintain effective control over the transferred financial assets. Judgment is required to assess whether a particular agreement provides the transferor with effective control of the transferred financial asset. For example, effective control over the transferred financial assets by the transferor exists through (1) an agreement that both entitles and obligates the transferor to repurchase or redeem them before their maturity (paragraphs 47–49), (2) the ability to unilaterally cause the holder to return specific financial assets, other than through a **cleanup call** (paragraphs 50–54), ~~(3) a restriction on the transferee’s right to pledge or exchange the transferred financial asset it receives unless such constraint is designed primarily to provide the transferee with a benefit (paragraphs 54A–54D), or (3)(4)~~ an agreement that permits the transferee to require the transferor to repurchase the transferred financial assets at a price that is so favorable to the transferee that it is probable that the transferee will require the transferor to repurchase the transferred financial assets (paragraph 54E).

The opinions expressed in this comment letter are solely those of Fannie Mae and do not purport to represent the views of the Federal Housing Finance Agency.

We would like to continue to participate in the public discussions of this issue and would be pleased to discuss any aspect of our letter with you to provide further assistance in your deliberations on the proposed guidance. Thank you for considering our views.

Sincerely,



Gregory N. Ramsey
Vice President, Accounting Policy