January 6, 2010

Financial Accounting Standards Board
401 Merritt 7
Norwalk, Connecticut 06856-5116

Re: File Reference No. 1750-100
Exposure Draft: Consolidation (Topic 820) Amendments to Statement 167 for Certain Investment Funds

We appreciate the opportunity to respond to the invitation to provide comments on the Exposure Draft Consolidation (Topic 820) Amendments to Statement 167 for Certain Investment Funds.

Summary

We recognize the action taken by the FASB to strengthen and improve the accounting and disclosure relating to off-balance sheet exposure and support the board’s intention to defer the requirements in Statement No. 167 for a reporting entity’s (investment manager’s) interest in an entity (1) that has the attributes of an investment company or (2) for which it is industry practice to apply measurement principles for financial reporting purposes that are consistent with those followed by investment companies.

As currently drafted the proposed deferral would not apply in situations in which a reporting entity has the explicit or implicit obligation to fund actual losses of an entity that could potentially be significant to the entity.

The proposed deferral also would not apply to interests in securitization entities, asset-backed financing entities, or entities formerly considered qualifying special-purpose entities.

By definition, the proposed deferral would apply to a reporting entity’s interest in an entity that is required to comply or operate in accordance with requirements similar to those in Rule 2a-7 of the Investment Company Act of 1940 for registered money market funds.

An entity that qualifies for the deferral would continue to be assessed under the overall guidance on the consolidation of variable interest entities in Subtopic 810-10 (before its amendment by Statement 167) or other applicable consolidation guidance, such as the guidance for the consolidation of partnerships in Subtopic 810-20.

We do not believe though that the proposed deferral is suitably comprehensive (especially from a principles-based point of view). Specifically, in consideration of circumstances in which a reporting entity has the explicit or implicit obligation to fund actual losses of an entity that could potentially be significant to the entity. In paragraph BC6 the Board “emphasized that determining whether a reporting entity has the obligation to fund losses that could potentially be significant to an entity requires judgment and consideration of all facts and circumstances about the terms and characteristics of a reporting entity’s interest or interests in the entity along with the design and characteristics of the entity.”
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However, the Board went on to decide not to provide specific guidance on how a reporting entity should conclude whether it has the obligation to fund losses that could potentially be significant to the entity. The Board concluded that providing this guidance would inevitably result in the establishment of "bright lines" that would be used in practice as the sole factor for determining whether these obligations could potentially be significant to the entity. We agree that a bright line test as the sole factor for determining significance is not the appropriate approach. We do believe that as currently drafted the proposed Update does not adequately address the differing circumstances and requirements under which an entity may have an obligation to fund losses. Accordingly, one reporting entity (asset management company) may be viewed as not having to consolidate an investment company because of its legal form (e.g., as a limited liability company) while another may be viewed as not having to consolidate because the reporting entity's de minimis capital balance is and will be insufficient to fund any significant losses.

Therefore, we recommend that the deferral for consolidating investments in entities that have the attributes of entities subject to ASC 946 should apply to all of a reporting entity's investments in entities that meet such criteria until there has been sufficient time to adequately address all facets of the topic.

In the circumstances, it appears to us that our recommendation may achieve better alignment with upcoming considerations of consolidation principles. A reporting entity (management investment company) that has been granted express powers, is acting within the scope of its authority (e.g., to generate returns primarily for the fund's principals) as an agent on behalf of an investment fund and that has fiduciary responsibilities (the reporting entity must exercise a duty of loyalty and must use reasonable care to serve and protect the interests of the principals) appears, in substance and in form, to be governed by agreement, law and fiduciary requirements. Business to be transacted, investing advice, research and administration are duties often relinquished to the management investment company-agent but control remains the province of the investment fund's directors/principals. The variety of remuneration arrangements for such asset management services is also governed by agreement and represents an integral part of the principal-agency arrangement. See our responses to the specific questions for an expanded discussion.

If you have any questions please contact Craig Goodman at 212.891.8783, cgoodman@eisnerllp.com.

Respectfully submitted

Eisner LLP
Eisner

Appendix

Responses to Specific Questions

Question 1: Do you agree that the Board should defer the effective date of Statement 167 for entities that meet the requirements in the proposed Update? Please elaborate as to why you believe this deferral is appropriate or not?

Response 1: We agree that the effective date Statement 167 should be deferred for entities that meet the requirements set forth in the proposed update. The relationship between asset managers and the investment entities they manage, and may also have very limited investments in, is not sufficiently addressed by current accounting models. The needs of those financial statement users would not be met simply by consolidating investments in entities which have the attributes of entities subject to ASC 946. We feel that the Board should defer requiring consolidation of all entities subject to ASC 946 until such time as the Board is able to take into account the consolidation of investments in entities that are subject to the guidance in ASC 946 within the context of their overall consolidation project.

Question 2: The Board expects that the deferral would only affect a limited number of types of entities, including but not limited to mutual funds, hedge funds, mortgage real estate investment trusts, private equity funds, and venture capital funds. The Board expects that this deferral would not apply to securitization entities, asset-backed financing entities, and entities formerly classified as qualifying special-purpose entities. For example, the Board does not expect this deferral to apply to (a) structured investment vehicles, (b) collateralized debt/loan obligations, (c) commercial paper conduits, (d) credit card securitization structures, (e) residential or commercial mortgage-backed entities, and (f) government-sponsored mortgage entities. That list is not meant to be all inclusive as to the entities that the Board expects would not meet the requirements in this proposed Update for deferral. Do you believe that the 4 amendments to paragraph 810-10-65-2 in this proposed Update clearly identify the population of entities that would qualify for the deferral? If not, please provide suggested language to assist the Board in achieving this goal.

Response 2: We believe that the 4 amendments to paragraph 810-10-65-2 in the proposed Update identify a population of entities that would qualify for the deferral. However, the Update does not clearly address the substance of the circumstances under which those entities would qualify. For example, a hedge fund incorporated in a non United States jurisdiction that has an LLC as a Managing Member would meet the criteria for deferral. Another hedge fund having exactly the same investments, management and financial results but was organized as a partnership in the United States would not meet the criteria for deferral because under US law the General Partner could be obligated to fund losses of the hedge fund. This obligation would legally exist even if the probability of the General Partner ever funding any losses is remote.

The understanding that a general partner may be legally liable for the obligations of a partnership would only be an issue if an investment fund is leveraged or if the general partner acts in malpractice does not cover all potential scenarios. A general partner would be liable under those situations. However, a general partner could also be liable if an investment fund had a funding commitment to an investee and the limited partners defaulted on making a capital commitment. This situation could arise with a private equity fund that an agreement to make a series of additional investments and the capital for those investments is based on capital calls to the funds' limited
partners. The same would happen if a funds' investment is in the form of a loan to an investee which provides for additional rounds of financing. If the limited partners fail to honor their capital commitment the general partner would need to step in and make good the partnership's commitment to the investee. Contingent leverage situations in which the GP may be liable such as with derivatives or short positions are also common. These are just several examples.

At the time the reporting entities and investment funds were created there was never any intent for an investor entity (the reporting entity) to fund any losses nor was there a requirement to consolidate. The business reasons for creating one particular structure instead of another are driven many times by income tax considerations and efficiencies, legal requirements or existing organizational structures

We recommend that the consolidation of an investment partnership by a reporting entity should be deferred if:

- The reporting entity's investments in entities that have the attributes of entities subject to ASC 946 are carried at fair value with changes in fair value of the investments reflected in the reporting entity's financial statements, and
- The General Partner's and/or Managing Member's and affiliates' business model is to earn fees (both fixed rate and performance based) from managing these investments.

Note, these fees are eliminated in consolidation and thus would not give the users of the reporting entity's financial statements a true picture of its economic results.

This approach would be similar in concept to the Board's decision to propose a deferral from applying FAS 167 to money market funds subject to Rule 2a-7 of the Investment Company Act of 1940.

Asset managers would continue to apply the applicable existing guidance to those entities which qualify for the deferral — i.e., either current ASC 810-10 (formerly FIN 46(R)) or ASC 810-20 (formerly EITF 04-5).

This recommended approach to deferral would allow the FASB and IASB to jointly develop an accounting model that considers the relationship between asset managers and the investment structures they manage as part of their broader consolidation project.

**Question 3:** Do you believe that the Board's proposed change to include language to clarify that related-party arrangements should be considered for all of the conditions in paragraph B22 of Statement 167 is operational and achieves the Board's objective?

**Response 3:** We believe that the Board's proposed change to include language to clarify that related-party arrangements should be considered in applying each of the criteria in paragraph B22, and not only paragraph B22(c) for determining whether a decision maker or service provider fee represents a variable interest would be operational and achieve the Board's objective. Prior to this change the application of the guidance in Statement 167 to related parties was not clear and led to variations in practical application. The proposed change should serve to eliminate the previous ambiguity.
Question 4: Do you believe that the Board's proposed changes to condition (c) in paragraph B22 of Statement 167 are operational and achieve the Board's original objective in Statement 167 that a quantitative test should not be the sole determinant of whether a fee arrangement is a variable interest?

Response 4: We agree that a quantitative test should not be the sole determinant of whether a fee arrangement is a variable interest. Fee structures and payments to related entities could differ significantly. Some may be structured for income tax, regulatory or operational business reasons. Having only a quantitative calculation when evaluating whether the other variable interest is more than insignificant in practice could result in a defacto arithmetic bright line analysis of significance. A quantitative only approach would not sufficiently consider the business and economic substance of a fee to a related party in which the decision maker or service party holds another interest.