VIA E-MAIL

Director@fasb.org

File Reference 1225-001

Technical Director – File Reference 1225-001
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06851-5116

Re: FASB Statement No. 140, Accounting for Transfers of Financial Assets (No. 1225-001, August 11, 2005)

Ladies and Gentlemen:


The LSTA represents all segments of the nearly $1 trillion\(^1\) corporate loan market, including banks, broker-dealers, other buyers and sellers of corporate loans (including mutual funds and merchant banks) and professional financial service firms.\(^2\) As such, our response

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\(^1\) New issue syndicated loan volume in 2003, as reported by Loan Pricing Corporation.

\(^2\) Thus, the LSTA’s membership represents new issuance and primary sales (including through participations), par/near par and distressed trading; and bank institutional portfolio management. Attached hereto as Annex A is a complete list of the LSTA’s members. The LSTA and its members are committed to advancing the public understanding of the corporate loan market and to serving the public interest by encouraging adherence to the
focuses almost exclusively on the provisions of the Exposure Draft that could affect the accounting treatment for direct (one-step) transfers of interests in corporate loans pursuant to participation agreements. We are aware that the American Securitization Forum is submitting a comment letter that addresses multiple-step transfers (whether by participation or otherwise) and transfers of other assets. We have been coordinating with the American Securitization Forum and we support their comment letter.

We have organized our comments into the following four topics: (i) recourse limitations, (ii) priority constraints, (iii) proportional cash flow requirement, and (iv) other issues. Based on our counsel’s participation in the roundtables addressing setoff and true sale issues and the Board’s decisions as a result thereof, we believe our comments comport with what we understand to be the Board’s intention—namely, to continue to allow sale accounting treatment for one-step, standard, non-recourse, loan participations without involving a transfer to a QSPE and notwithstanding the effect of setoff rights. Therefore, our comments highlight those provisions that might have the unintended consequence of being interpreted to preclude sale accounting treatment for such participations. For your convenience, we have revised Paragraph 8A in a manner that would address our concerns and have included our proposed revision in Attachment A.

I. Recourse Limitations

The Exposure Draft provides that in order for the transfer of portions of financial assets (such as loan participations) to qualify for sale accounting treatment, the transferred portion must qualify under the definition of "participating interest" in Paragraph 8A. With respect to recourse limitations, Paragraph 8A(c) provides:

c. Participating interest holders have no recourse to the transferor (or its consolidated affiliates or agents) or to each other, and no participating interest is subordinated to another. That is, no participating interest holder is entitled to receive cash before any other participating interest holder. The rights of each participating interest holder (including the transferor if it retains a participating interest) have the same priority, and that priority does not change in the event of bankruptcy or other receivership of the transferor, the original debtor, or any participating interest holder.

In addition, "Recourse" is defined in Appendix E as:

The right of a transferee of receivables to receive payment from the transferor of those receivables for (a) failure of debtors to pay when due, (b) the effects of prepayments, or (c) adjustments resulting from defects in the eligibility of the transferred receivables.

highest ethical standards by all market participants and promoting the highest degree of confidence for investors in corporate loans.
We are concerned that the recourse limitations in Paragraph 8A(c) – specifically the reference to “no recourse” (emphasis added) and the limitation on recourse between participating interest holders – could arguably be interpreted to preclude sale accounting treatment for many standard, non-recourse, loan participations.

The following points exemplify the breadth of the recourse limitation in the Exposure Draft. In some participations, a participant has recourse to the transferor for: (i) breaches of representations and warranties about the nature and status of the underlying asset (e.g., a loan has a certain unpaid balance; the borrower is of a certain type; the collateral for the loan is of a certain type) and (ii) breaches of servicing obligations and other similar on-going contractual obligations (such as obligations under a setoff sharing provision as discussed below). In the case of (i) above, this recourse may be in the form of an indemnification provision whereby the transferor is obligated to buy back from the participant participations as to which the transferor’s representations were inaccurate. Or, the recourse may be in the form of a claim for damages for breach of the representations. In the case of (ii) above, this recourse is in the form of general on-going contractual obligations of the transferor to the participant. Under the Exposure Draft, the Paragraph 8A(c) limitation on any recourse combined with the definition of recourse to include “[t]he right of a transferee of receivables to receive payment from the transferor of those receivables for .... adjustments resulting from defects in the eligibility of the transferred receivables” would seem to disqualify virtually all participations from meeting the definition of “participating interest”. We assume this was an unintended consequence of incorporating the existing definition of recourse in Appendix E and not considering on-going servicing and similar contractual obligations (such as setoff sharing provisions). Therefore, our recommended revisions to Paragraph 8A(c) in Attachment A specifically allow for recourse in respect of defects in the eligibility of the transferred receivables, breaches of representations, breaches of on-going servicing obligations and breaches of obligations to pass through the benefit of any setoff rights exercised by the transferor or the obligor.

The Paragraph 8A(c) limitations further require that “...[p]articipating interest holders have no recourse to the transferor (or its consolidated affiliates or agents) or to each other, and no participating interest is subordinated to another.” (Emphasis added.) In the context of revolving loans and other instances involving funding commitments, the transferor typically has recourse to the participant to fund the participant’s pro-rata share. In that case, the Paragraph 8A(c) recourse limitations could arguably be interpreted to disqualify such participations from meeting the definition of “participating interest”. Similarly, under a setoff sharing provision found in many standard participation agreements, the transferor and participants agree to share pro-rata any benefits obtained from the exercise of setoff. Therefore, the transferor and each participant have recourse to each other for their pro-rata share of any such setoff benefits. Again, the Paragraph 8A(c) recourse limitations could arguably be interpreted to disqualify such participations from meeting the definition of “participating interest”. Again, we assume the Board does not intend to preclude such participations from qualifying as participating interests and, therefore, our recommended revisions to Paragraph 8A(c) in Attachment A delete the limitations with respect to recourse between non-transferor participants and recourse of the transferor to the participant and provide an exception for participant recourse to the transferor in respect of a setoff sharing provision.
In each of these circumstances, we do not believe it is the Board's intent to preclude sale accounting treatment. Moreover, there is no "true sale" justification for limiting such arrangements. The true sale analysis asks the fundamental question of whether, in an insolvency proceeding of the transferor, the participant's share of the proceeds of the underlying loan would be considered property of the transferor and would therefore be available to other creditors of the transferor. The analysis for determining whether the proceeds of the underlying loan would be considered property of the transferor is largely a question of whether the transferor has parted with the benefits and burdens of owning the underlying loan. A participant's recourse to the transferor in respect of eligibility representations and on-going servicing obligations and a transferor's recourse to a participant in respect of a participant's pro-rata funding obligations in the context of revolvers or partially unfunded loans are each entirely consistent with a "true sale". Similarly, a participant's recourse to another participant (or to the transferor) under a setoff sharing provision — or any other arrangement solely between non-transferor participants — would have no bearing on the true sale analysis and, therefore, we believe, should not affect the transferor's accounting. We also note that "recourse" as defined in the Exposure Draft is sensibly limited to rights of the transferee against the transferor. Therefore, the reference to "recourse" in Paragraph 8A(c) in the context of recourse between non-transferor participating interest holders or recourse of the transferor to the transferee is not appropriate and, if included, would need to be redefined in the context of the much broader recourse limitations in Paragraph 8A(c).

Although our concerns could be addressed by including specific carve-outs for the circumstances we discuss above, another possible approach would be to delete Paragraph 8A(c) in its entirety, thereby consolidating all recourse limitations to the Paragraph 9(a) isolation requirement. Such consolidation would address many of the current inconsistencies in the Exposure Draft with respect to the discussions of recourse. Moreover, this would have the added benefit of aligning the FAS 140 recourse limitations with the recourse limitations necessary to achieve a true sale — thereby facilitating interpretation of FAS 140 by allowing market participants to be guided by the legal true sale analysis. (We discuss in the conclusion below our view that Paragraph 8A should be eliminated in its entirety.)

II. Priority Constraints

Related to the recourse limitations discussed above are the specific requirements in Paragraph 8A(c) as to relative priorities between the participating interest holders.

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3 "Recourse" as defined in Appendix E of the Exposure Draft is limited to "[t]he right of a transferee of receivables to receive payment from the transferor of those receivables for ...." (Emphasis added.) Other sections of the Exposure Draft similarly limit recourse to the context of recourse of the transferee to the transferor. For example, Paragraph 113 states that in a transfer of receivables with recourse "...the transferor provides the transferee with full or limited recourse."

4 In addition to the examples already noted, Paragraph 8A(c) requires that participating interest holders have no recourse. In contrast, Paragraph 113 specifically acknowledges that some recourse is not inconsistent with sale accounting treatment — stating "In some jurisdictions, transfers with full recourse may not place transferred assets beyond the reach of the transferor and its creditors, but transfers with limited recourse may."
Specifically, Paragraph 8A(c) requires that “...the rights of each participating interest holder (including the transferor if it retains a participating interest) have the same priority, and that priority does not change in the event of bankruptcy or other receivership of the transferor, the original debtor, or any participating interest holder.”

We are concerned that this provision could arguably be interpreted to preclude accounting treatment for one-step, standard, non-recourse, loan participations because of the existence of transferor setoff rights. As was discussed at length in the context of the first roundtable, in a bankruptcy of both the obligor on the underlying loan and the transferor, the transferor’s receiver may have rights senior to participating interest holders in any setoff benefit received by the transferor. Therefore, in that case, upon the transferor’s bankruptcy, the other participating interest holders are essentially subordinated to the rights of the transferor’s receiver to any setoff benefit it receives. Again, in this circumstance, we do not believe it is the Board’s intention to preclude sale accounting treatment for such participations because the Board decided that setoff rights would not be an impediment to meeting the recourse limitations embedded in the isolation requirement. By analogy, we do not believe it is the Board’s intention that setoff rights become an impediment to qualifying as a “participating interest” on account of the additional recourse limitations proposed in Paragraph 8A(c). Therefore, we have deleted this priority constraint in our recommended revisions to Paragraph 8A(c) in Attachment A.

III. Proportionate Cash Flow Requirement

Paragraph 8A(b) provides that in order to qualify under the definition of “participating interest”:

b. All cash flows received from the asset are divided among the participating interests (including any interest retained by the transferor, its consolidated affiliates, or its agents) in proportion to the share of ownership represented by each, except for servicing fees representing adequate compensation and, if applicable, a share of the contractual interest representing all or a portion of the transferor’s gain on sale received by the transferor as consideration related to the sale of the participating interest. The ownership shares remain constant over the life of the original financial asset.

In other words, Paragraph 8A(b) requires that to qualify as a participating interest, all cash flows received from the asset must be divided among the participating interests in proportion to the share of ownership represented by each. An exception carves out from this “proportionate” cash flow requirement certain servicing fees and interest pass-through adjustments caused by yield fluctuations for participations sold after origination.

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5 Paragraph A14 states: “The Board ultimately decided that setoff rights would not be an impediment to meeting the isolation requirement.”
Our primary concern is that various types of fees could potentially be viewed as having the effect of creating unequal rights to the cash flows and not strictly be viewed as relating to the servicing of the assets. The types of fees payable under loan agreements include lead arranger fees, agency fees, and other fees associated with generating, syndicating, underwriting and structuring activities. Some of these fees are collected upfront at the origination of the loan. Some of these fees are paid over the course of the loan. Some or all of these fees may be retained by the transferor and not passed through to a participant.

It is helpful to divide these fees into two categories – fees collected by the transferor for services to the participants (such as servicing fees) and fees collected by the transferor for services to the underlying obligor (such as syndicating, structuring, arranging, underwriting or agency services). We recommend that the carve-out for "servicing fees representing adequate compensation" specifically acknowledge these two categories. We propose in our recommended revisions to Paragraph 8A(b) the following language: “...except as may be reduced by reasonable fees relating to the provision of services by the transferor to the transferee and fees received by the transferor for services to the underlying obligor.” With respect to the former category – namely, fees collected by the transferor for services to the participants – our proposed language includes an objective “reasonable” standard to ensure the integrity of the proportionate cash flow requirement. With respect to the latter category – namely, fees collected by the transferor for services to the underlying obligor – our proposed language recognizes that fees paid by the underlying obligor to the transferor do not alter payments to the participants and thus do not threaten the integrity of the proportionate cash flow requirement. Therefore, for the sake of providing a clearer standard for market participants, our proposed language does not include the reasonableness requirement for such fees paid by the underlying obligor to the transferor.

Finally, we include in our recommended revisions to Paragraph 8A(b) the following clarification with respect to the carve-out for interest pass-through adjustments caused by yield fluctuations for participations sold after origination. We propose replacing the following language “...and, if applicable, a share of the contractual interest representing all or a portion of the transferor’s gain on sale received by the transferor as consideration related to the sale of the participating interest” with “...and, if applicable, a share of the contractual interest retained as the transferor’s gain on sale.” Our proposed language is meant solely to clarify the language but not alter the applicability of the carve-out.

IV. Other Issues

1. We recommend clarifying the isolation requirements under foreign law. On the one hand, Paragraph 27 states that “...differences due to the jurisdiction where bankruptcy or other receivership would take place...” may be relevant in determining whether transferred assets have been isolated. On the other hand, Paragraph 27A requires a legal analysis under the laws in the applicable jurisdiction that the transfer is legally a sale. In other words, Paragraph 27A seems to require that the transfer constitute a legal sale under the law of the applicable jurisdiction whether or not a sale characterization is necessary under such law to
achieve isolation of the assets. This clarification would be relevant, for example, in the context of some participations under English law that are structured as pledges but nonetheless are considered "isolated" because of certain attributes of English insolvency analysis that create especially robust rights for secured creditors (i.e. equivalent to ownership rights).

2. Paragraph 8A(b) requires that: "The ownership shares remain constant over the life of the original financial asset." We have included recommended revisions to Paragraph 8A(b) in Attachment A in order to clarify that this limitation is not meant to restrict: (i) a change in the amount of participations owned as a result of subsequent transfers of participating interests or (ii) a change in the percentage of the participated portion owned by a participant as a result of changes to the underlying loan amount. 6

3. Paragraph 8A(d) provides that: "Neither the transferor (or its consolidated affiliates, its agents, or a bankruptcy trustee or other receiver for the transferor, its consolidated affiliates, or its agents) nor any participating interest holder has the right to pledge or exchange the entire financial asset in which they own a participating interest." We have included recommended revisions to Paragraph 8A(d) in Attachment A in order to clarify that this limitation is not meant to: (i) prevent the right of a 100% participating interest holder from later converting the participating interest into an assignment by complying with applicable notice procedures, or (ii) prevent a transferor and participants from collectively agreeing to sell the underlying financial asset.

4. We recommend that the Exposure Draft clarify in explanatory language that Paragraph 8A(d) is not meant to encompass a trustee’s limited right, if any, under Section 363(h) of the Bankruptcy Code to sell the interest of a co-owner in property in which the transferor debtor has an undivided interest as a tenant in common, joint tenant, or tenant by the entirety. 7

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6 The concern in (ii) above is twofold – decreases in the underlying loan amount resulting from the transferor’s assignment of portions of the underlying loan or increases in the underlying loan amount resulting from increases in funding to the borrower under a revolving credit facility. These concerns are best explained by example. Example 1: Transferor sells to participant a 50% participation in $100 loan. Transferor later assigns to third party $25 of underlying loan. By virtue of the assignment, participant now has a 67% participation (i.e. a $50 interest in a $75 loan). Example 2: In a revolving credit facility participant purchases a 50% participation in all new loans to be made under the facility ($100 maximum under the facility so participant’s share is capped at $50). Maximum borrowing under the facility is later increased to $200 but participant chooses to remain capped at $50. By virtue of the facility increase, participant now has a 25% participation (i.e. a $50 interest in a $200 loan).

7 Under Bankruptcy Code Section 363(h), the trustee may – in the extremely limited circumstances noted below – sell both the estate’s interest and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety. Such a sale of non-debtor property is only authorized where partition is impracticable, the sale of the undivided interest would realize significantly less than the sale free of the interest of such co-owners (taking into account the proceeds due to the co-owners) and the benefits to the estate outweigh the detriment to the co-owners. The vast majority of cases under this section involve real estate owned jointly by a debtor and the nondebtor spouse. We believe it is extremely unlikely that Code 363(h) would apply in the context of loan participations for a number of reasons. First, a participation interest is unlikely to qualify as a tenancy in common, joint tenancy or tenancy by the entirety. See, e.g., Okura & Co. (America), Inc., 249 B.R. 596 at 613 (S.D.N.Y., 2000) ("The rights created by a tenancy in common are very different from those created by a participation agreement."). Second, even if a
In addition, the Exposure Draft should emphasize that Paragraph 8A(d)'s reference to "right" to transfer is distinct from the "power" to transfer. For example, a seller of a participation (just like any servicer of an asset) could fraudulently dispose of the entire asset to a third party holder in due course in a way that would extinguish the rights of the participant in the participation (except for a claim against the seller).

5. We recommend that all references to "servicing assets" in Paragraph 10 be deleted because such references would only encompass servicing fees in excess of those allowed under the definition of "participating interest" in Paragraph 8A.

V. Concluding Commentary

As stated in our introduction, the LSTA membership is primarily concerned with the accounting treatment for direct (one-step) transfers of interests in corporate loans pursuant to participation agreements. We believe it is the Board's intention to allow for sale accounting treatment for such participations and thus our comments highlight those instances where we believe application of the Exposure Draft provisions could have the unintended consequence of precluding sale accounting treatment for such participations contrary to market expectations and contrary to the expectations and interests of the LSTA membership.

However, in addition to representing the particularized concerns of our membership, we would also like to comment more broadly to the question of whether Paragraph 8A contributes to the stated goals of FASB – namely to improve the consistency and comparability of reported financial information by clarifying the requirement for isolation of transferred financial assets and portions of financial assets. We agree with the view in Paragraph A51 that "...it is inappropriate to amend Statement 140 to impose [the QSPE requirement] for simple disproportionate transfers of portions of financial assets when an entity and its legal advisors have concluded it is not necessary to achieve legal isolation under applicable law."

As discussed in this letter, there is no true sale justification for the extent of the recourse limitations imposed by Paragraph 8A(c). Similarly, the proportional cash flow requirement in Paragraph 8A(b) does not mirror any true sale requirement and is not in any way relevant to the question of whether an interest in the underlying loan has been sold or pledged.8

participation interest were to be so characterized, it would be especially unlikely that the limited circumstances identified above would apply in the context of loan participations.

In any event, Bankruptcy Code Section 363(h) does not implicate the true sale inquiry. For example, if Company X and Company Y purchased from a third party, as tenants in common, a $100 note (50% each), and Company X became bankrupt, Company X's bankruptcy trustee could theoretically sell the entire note (with 50% of the proceeds going to Company Y). Company X would not thereby own 100% of the note (nor would Company Y). If the possible application of Section 363(h) by Company X's trustee somehow implied that Company Y did not own 50% of the note, then under any tenancy in common arrangement each co-owner would have to show the entire note on their balance sheet (because one cannot predict which party may become a Code debtor). This seems to us to be an absurd result.

8 In addition, the proportional cash flow requirement could raise various interpretive issues. One such interpretive issue involves how "asset" is used in Paragraph 8A(b). This issue is best explained by example. Example: A credit agreement provides for three tranches as follows – two term loan tranches and one revolving
In other words, we cannot discern any theoretical basis for Paragraph 8A. Paragraph A24 states that Paragraph 8A was supported by Board members who "...do not believe that an asset has been isolated from the transferor unless the entire asset has first been placed in a qualifying SPE or otherwise segregated." We do not understand how a transfer of the entire asset to a qualifying SPE achieves greater "isolation" in the context of transfers of portions of financial assets. Because we do not believe that either the Paragraph 8A limitations or the use of a qualifying SPE contribute to answering the fundamental question of whether the portions of financial assets have in fact been sold, we do not believe there is a theoretical basis for including Paragraph 8A in FASB Statement No. 140 and therefore it should be eliminated.

We thank the Board for the opportunity to comment on the Exposure Draft. The issues discussed above are of great importance to the LSTA's membership and we would be happy to discuss any aspect of this letter with you. Please do not hesitate to contact the undersigned (at 212-808-1177 or by email at eganz@lsta.org) or our counsel, Seth Grosshandler of Cleary Gottlieb Steen & Hamilton LLP (at 212-225-2542 or by e-mail at sgrosshandler@cgsh.com) or Kate Sawyer of Cleary Gottlieb Steen & Hamilton LLP (at 212-225-2634 or by e-mail at ksawyer@cgsh.com), if you have any questions regarding this letter.

Very truly yours,

THE LOAN SYNDICATIONS AND TRADING ASSOCIATION

By Elliot Ganz
General Counsel and Executive Vice President
8A. The requirements of this Statement apply to transfers of individual financial assets in their entirety, transfers of groups of financial assets in their entirety, and transfers of participating interests in individual financial assets (which are referred to collectively in this Statement as transferred financial assets). A participating interest has the following characteristics:

a. It represents an ownership interest in an individual financial asset other than an equity instrument, a derivative financial instrument, or a hybrid financial instrument with an embedded derivative that is not clearly and closely related as described in Statement 133, where the entire financial asset (and/or bare legal title to the asset) has not been transferred.¹

b. All cash flows received from the asset are divided among the participating interests (including any interest retained by the transferor, its consolidated affiliates, or its agents) in proportion to the share of ownership represented by each, except for servicing fees representing adequate compensation may be reduced by reasonable fees relating to the provision of services by the transferor to the transferee and fees received by the transferor for services to the underlying obligor and, if applicable, a share of the contractual interest representing all or a portion of retained as the transferor’s gain on sale received by the transferor as consideration related to the sale of the participating interest. The ownership shares remain constant over the life of the original financial asset, except as may be adjusted as a result of subsequent transfers of participating interests or changes to the amount of the underlying asset.

c. Participating interest holders have no recourse to the transferor (or its consolidated affiliates or agents) or to each other, and no participating interest is subordinated to another. That is, no participating interest holder is entitled to receive cash before any other participating interest holder. The rights of each participating interest holder (including the transferor if it retains a participating interest) have the same priority, and that priority does not change in the event of bankruptcy or other receivership of the transferor, the original debtor, or any participating interest holder, except for adjustments resulting from defects in the eligibility of the transferred receivables, breaches of representations, breaches of on-going servicing obligations or breaches of obligations to pass through the benefit of any setoff rights exercised by the transferor or the obligor.

d. Neither the transferor (or its consolidated affiliates, its agents, or a bankruptcy trustee or other receiver for the transferor, its consolidated affiliates, or its agents) nor any participating interest holder has the right to pledge or exchange the entire financial asset in which they own a participating interest, except in the case of a participating interest holder who owns 100% of the participation interests or in the case of 100% of the participating interest holders collectively agreeing to pledge or exchange the underlying financial asset.

¹ We believe the added language clarifies the definition of a participating interest.
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Greengate LLC
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Securities Industry Association
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