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Ms. Suzanne Bielstein  
Director of Major Projects and Technical Activities  
Financial Accounting Standards Board  
401 Merritt 7  
Norwalk, Connecticut 06856

Dear Ms. Bielstein,

The American Bankers Association (ABA) appreciates the opportunity to comment on the Financial Accounting Standards Board's (FASB) Proposed Interpretation Exposure Draft (ED) on the Consolidation of Certain Special-Purpose Entities (SPEs). 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. The proposed guidance in the ED is extremely important to many of our members and we would like to meet with you to discuss our concerns. As noted in our previous letter, ABA requests to participate in the FASB's Roundtable Discussion on September 30, 2002.

ABA commends the FASB on its effort to improve financial reporting for SPEs; however, we recommend that the FASB not move too hastily in developing consolidation rules for SPEs. Our primary concerns regarding the ED are: 1) Not all SPEs have a primary beneficiary, and they should not be consolidated, 2) Many SPEs will not be considered Financial-SPEs under the ED, even though risks and benefits are effectively diversified, 3) For SPEs that are already in place and meet certain criteria, existing accounting rules should be followed, and 4) The effective date needs to be extended.

We believe the rush to conclude this project may be, in part, in response to criticisms in accounting subsequent to recent bankruptcies. Many of the facts and circumstances regarding the legal, regulatory, and accounting concerns, and management responsible for inappropriate governance have yet to be determined. We caution the FASB to not make hasty decisions that could inappropriately threaten the securitization markets.

The multi-trillion dollar securitization markets have played a significant role nationally and internationally in fueling the growth of economies, particularly in the United States. As such, a

broad range of companies, including financial institutions, now participate in the securitization markets on a regular basis. SPEs and multi-seller conduits have been used safely and extensively by the financial services industry, as well as other industries. SPEs and qualified-SPEs (QSPEs) have provided ways to reduce the cost of funds, obtain access to funding, and increase liquidity in the financial markets, which has contributed positively to economic growth, new opportunities for investors, and to the safety and soundness of the U.S. banking system. Market efficiencies are then passed on to businesses and consumers in the form of lower cost loan products (e.g., mortgages, student loans, credit cards, etc.). Disruption of existing SPEs may give rise to unintended consequences, creating new strains on the financial markets. SPEs have contributed positively to economic growth, new opportunities for investors, and to the safety and soundness of the U.S. banking system. We are concerned that the existing benefits from securitizations could be threatened by accounting changes that do not accurately reflect SPEs.

Establishment of principle-based accounting guidance for SPEs is an admirable objective, but we hope that the FASB recognizes that questions need to be addressed prior to issuing final rules. We are concerned that this proposal is laced with unclear requirements, and it lacks sufficient detail to ensure that the rules will be consistently applied. We believe that there are important questions that require additional research, discussion, and answers prior to moving forward with this ED.

The following sections of this letter discuss our concerns and recommendations in more detail.

#### Primary Beneficiary

We do not believe there is a primary beneficiary for every SPE. We believe that the determination of whether or not a primary beneficiary exists or an entity should consolidate the SPE should be based on the risks and circumstances of the transaction. The ED requires entities to determine the primary beneficiary by identifying the entity that is subject to the greatest risk of investment loss or variability in returns. The primary beneficiary is required to consolidate an SPE if it holds either a majority of the variable interests in the SPE, or if it holds a "significant" amount of the variable interests that is "significantly more" than the amount held by any other individual party. We do not agree that this would be the correct approach to reflect the complexities inherent in SPE structures that exist today. We do not believe that holding a significant amount of variable interests is a sufficiently rigorous test. Instead, we believe that an entity should be the primary beneficiary and be required to consolidate an SPE only if it holds a majority of the variable interest.

Also, although variability is discussed in the ED, we do not believe the guidance is clear on how variability should be measured and what information should be used to determine how one entity may have significantly more variability to risk exposure than another entity. We do not believe the ED provides adequate guidance on how to measure variability or the magnitude of economic risk. Additional guidance is needed to determine how expected outcomes should be defined and analyzed.

Further, we do not support continual reassessment of entities involved in the SPE to determine the primary beneficiary. Reassessment from quarter-to-quarter involving potential consolidation followed by de-consolidation could create confusion for users of financial statements and would be very burdensome for large banks with many SPEs. There should be

some triggering action on the bank's part, such as a change in investment level, before a consolidation decision is reviewed.

### Financial SPEs

We are concerned that the ED could require entities to inappropriately record assets that they do not have access to and/or liabilities for which they are not responsible for settling. Many financial-SPEs effectively diversify risks and benefits, yet may not meet the exclusion requirements in the ED. Although we appreciate the FASB's effort to provide exclusion for portfolios of financial assets and distribute the risks and benefits, we believe that the guidance will provide relief for only a limited number of financial-SPEs. We encourage the FASB to modify the proposed rules to ensure that no entity is required to consolidate assets and/or liabilities of a financial-SPE if that financial-SPE effectively diversifies risks and benefits.

Paragraph 23 in the ED relates to an entity's authority to buy or sell assets for the SPE. The authority of an entity to buy or sell assets may be significantly limited by investment guidelines or trading restrictions that cannot be changed unilaterally. That said, we do not believe that the ability to buy or sell assets should be construed as a controlling financial interest in the SPE for accounting purposes, nor should entities that have sufficiently limited authority to buy or sell assets be required to consolidate an SPE. We believe that the appropriate way to prevent incorrect recording of assets or liabilities would be to modify the guidance in paragraphs 22 and 23 in the ED to exclude all SPEs that hold financial assets, provided that the risks and benefits attributable to the assets in such SPEs have been effectively diversified.

### Definition and Scope

The ED does not clearly define what structures qualify as SPEs, and the scope of the ED is too far reaching. Mutual funds, certain investment funds, and hedge funds should not be included in the scope of the ED, and we believe they should not be consolidated as a result of this proposal. Mutual funds and certain other public investments are subject to the Investment Company Act. They are a form of registered equity where investors share the net asset value of the fund. Rules by the Securities and Exchange Commission (SEC) prohibit the consolidation of registered investment companies by the investment manager. Investment funds are generally for more sophisticated investors and are typically highly leveraged. Investors receive income in the form of notes that are similar to preferred stock. Generally, investors share in the residual value of the funds along with the investment manager. Although such investors' notes may not meet a legal definition of equity, the notes have many of the same characteristics as equity. Similarly, investors involved in hedge funds are usually highly-educated investors who have established net worth and can make a substantial personal investment. We encourage the FASB to define what structures qualify as SPEs and to make it clear that these described funds are not within the scope of this document.

### Equity Provision

It is unclear whether only common equity can be considered for the voting interest evaluation when an SPE qualifies for the voting interest model in paragraph 9 of the ED. We believe a requirement that only common equity be considered in the evaluation of equity at risk is arbitrary and illogical. Collateralized debt obligations (CDOs), for example, are structured to be economically independent of any third party, and the test of that independence is whether they can raise funds from third parties that are willing to absorb the first risk of loss absent

guarantees or other forms of support from the sponsor. It is irrelevant whether or not those funds are in the form of common equity or any other instrument that bears equity-like risks.

We believe that any investment, regardless of legal form, if subordinated to the primary beneficiary's investment, should be treated as equity for purposes of determining whether the primary beneficiary should consolidate the SPE. The definition of equity should be based on the instrument's economic characteristics and should allow for the consideration of equity that does not meet legal form of equity ownership, but is considered equity in substance (e.g., absorbs the first losses, absorbs residual gains and losses, etc.) as long as it is the most subordinated part of the capital structure.

#### Voting Interests

We do not believe that there should be a 10% threshold presumption with respect to third party equity ownership. The ED requires that an SPE's capital be comparable to that of a substantive operating enterprise to be considered sufficient to justify non-consolidation. However, we believe that capital of the SPE should not be compared to the capital of a substantive operating enterprise, because SPEs are generally designed to limit risks to investors. We do not believe that an arbitrary brightline should be imposed.

#### Market-based Fees

The ED does not address how to determine when a fee for services is considered to be market-based. For most transactions, particularly private placements, market comparative data will not be available. We believe an entity should be able to use its own transactions as a benchmark for a market-based fee on the premise that it has created a market. We recommend that the ED specifically state that comparability can be based on fees from similar observable arm's length transactions or arrangements, including those transactions in which the entity has participated.

#### Subsequent Accounting

The ED must address the issue of subsequent accounting for SPEs by the primary beneficiary that is required to consolidate the SPE. Subsequent accounting for an SPE's assets, derivatives, and liabilities could result in income statement and balance sheet distortion that would be misleading and confusing to users of the reporting entity's consolidated financial statements; most liabilities are carried at historical cost, while many securities are marked-to-market. The change in value of the securities does not benefit the consolidating company, except to the extent of its equity interest in the SPE. Liabilities of SPEs are typically non-recourse to the administrator's operations and can only be satisfied by the SPE's assets.

#### Existing Structures

As mentioned before, we do not believe that any parties to QSPEs should be within the scope of these new rules and believe existing structures should continue to follow existing accounting rules. Also, we believe existing structures that have not been previously consolidated, at a minimum, should be excluded for the scope of the ED. It would be complicated for companies to gather accounting records that were not previously maintained that may be required to consolidate entities. Also, fair value data may be difficult to gather or evaluate.

We ask the FASB to consider excluding from the scope existing SPEs that meet the following requirements: (1) the SPE has completed a reinvestment period and is now in a wind-down or liquidation phase; (2) a third party has an equity investment that is at risk for 3% of the total assets of the SPE; (3) the transferor and/or sponsor does not hold a controlling (majority) interest in the SPE; or (4) the transferor does not guarantee the equity of the SPE or have any exposure beyond the possible loss of any interests carried on its balance sheet, such that assets and liabilities of the vehicles are to be liquidated within one year of the proposed effective date of the new standards. Asset management vehicles, such as CDOs, should be excluded from the scope of the ED if the following two criteria are met: (1) no single investor owns more than 25% of the economic equity (preferred equity or subordinated debt) of the structure, and (2) the largest equity owner (that might otherwise be the primary beneficiary) does not guarantee the equity or otherwise provide direct credit enhancements to other investors in the SPE. We encourage the FASB to consider grandfathering these structures and believe that it would be more appropriate to require disclosures of the nature of the SPEs and the amounts at risk rather than consolidation.

#### Effective Date

The effective date proposed in the ED is unreasonable and should be extended, given the volume and complexity of SPEs. Regardless of the proposed effective date, we believe that this project has been rushed and that there are numerous questions that still need to be answered prior to issuance of the final Interpretation to facilitate efficient and cost-effective implementation changes.

We hope this information is useful. We would like to discuss these issues with you, and I will contact you to see if we can meet. In the meantime, please feel free to contact me if you have any questions.

Sincerely,

Donna Fisher