





October 30, 2008



VIA EMAIL

Mr. Russell G. Golden Technical Director Financial Accounting Standards Board 401 Merritt 7 Corporate Park P.O. Box 5116 Norwalk, CT 06856-5116

File Reference No.: 1620-100

Dear Mr. Golden:

Thank you for the opportunity to comment on the Proposed Statement of Financial Accounting Standards, Amendments to FASB Interpretation No. 46(R) (the "Exposure Draft"). This comment letter is being submitted jointly on behalf of the Commercial Mortgage Securities Association ("CMSA"), the Mortgage Bankers Association ("MBA")² and the Real Estate Roundtable ("RER"). We recognize and appreciate the amount of effort that has gone into producing the Exposure Draft.

CMSA is dedicated to promoting the ongoing strength, liquidity and viability of commercial real estate capital market finance worldwide. With commercial mortgage backed-securities ("CMBS") in the U.S. currently valued at almost \$1 trillion, CMSA acts as the voice of the marketplace encouraging the development of consensus positions among its diverse membership which encompasses the full range of market participants, including investment banks and commercial banks, rating agencies, insurance companies, service providers and investors at all levels of risk. For additional information, visit CMSA's Web site: www.cmbs.org.

MBA is the national association representing the real estate finance industry, an industry that employs more than 370,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,400 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

The Real Estate Roundtable brings together leaders of the nation's top publicly-held and privatelyowned real estate ownership, development, lending and management firms with the leaders of 16

We would like to express our support for FASB's effort "to improve financial reporting by enterprises involved with variable interest entities." However, we do not believe that the Exposure Draft meets this objective, because the revised standard may frequently result in overstatement of the assets and liabilities of reporting entities consolidating variable interest entities under the revised standard will likely confuse users of financial statements because the assets and liabilities being consolidated are not subject to the same level of control typically associated with consolidated assets and liabilities. Instead, reporting entities will be required to consolidate assets over which they do not have real control and liabilities for which they have no real economic risk (i.e., no obligation to repay the liabilities). We strongly urge FASB to reevaluate the Exposure Draft and explore other alternatives. Our comments and suggestions below are what we believe must be addressed, at a minimum, if FASB intends to proceed with the general framework of the revised standards outlined in the Exposure Draft.

Implementation and Convergence

We do not support the proposed implementation date of fiscal years beginning after November 15, 2009. We believe that users of financial statements would be better served by FASB taking additional time to deliberate on the consolidation standards for variable interest entities instead of enacting new standards and allowing what will likely be less than one year for implementation of the new standards retrospectively. Additional deliberation is especially warranted in light of the importance of international convergence on the matters at issue. It would be most beneficial for users of financial statements if FASB and IASB were to issue a single standard with a single date of implementation.

In addition to our paramount concern that these provisions are simply too important to be implemented after so short a period of reflection, comment and discussion, we have several specific comments on this proposal.

Controlling Financial Interest

As mentioned above, we believe that FASB should reevaluate the indicia of controlling financial interest as described in the Exposure Draft and explore other alternatives. We support a qualitative analysis for consolidation, however, we believe that the scope of the revised standard is too broad and will likely lead to confusion and overstatement of consolidated assets and liabilities. We urge FASB to create an operational standard that will require consolidation where the reporting entity has the level of control investors and users of financial statements typically associate with consolidated assets and liabilities. In addition to this overarching concern, we have the following two additional concerns.

First, Paragraph 14Aa of the Exposure Draft and the examples included in the implementation guidance appear to make clear that an enterprise that has an interest in a variable interest entity should not be considered to have the power to "direct matters that most significantly impact the activities of a variable interest entity" if another "single enterprise... has the unilateral ability to exercise... substantive kick-out rights." It is common in CMBS and other commercial real estate structured finance products for such substantive kick-out rights to be exercisable by a simple

national real estate trade associations to jointly address key national policy issues relating to real estate and the overall economy. Collectively, RER members' portfolios contain over 5 billion square feet of office, retail and industrial properties valued at more than \$1 trillion; over 1.5 million apartment units; and in excess of 1.3 million hotel rooms. Participating trade associations represent more than 1.5 million people involved in virtually every aspect of the real estate business. For additional information, visit RER's Web site: www.rer.org.

majority of the voting interests. In fact, such rights have been exercised in many transactions recently. We believe that a broader standard – being subject to removal by a simple majority of the voting interests – should apply to the Paragraph 14Aa "power to direct" evaluation because the existing guidance provides enough direction regarding whether or not kick-out rights are "substantive" and the sharing of such rights by more than one party should not automatically be deemed not to be substantive. This determination should be principles-based and the constituents should have the ability to determine when kick-out rights are substantive.

Second, we believe that FASB is substituting one type of problematic inquiry regarding the appropriate level of servicer discretion permissible in a QSPE for an equally problematic inquiry regarding what entity, if any, has the power to "direct matters that most significantly impact the activities of the variable interest entity." In many circumstances, the type of decision making allowed within a structured vehicle is constrained by contract and/or law to be merely administrative or protective in nature, and such decision making is most certainly not commensurate with consolidation as it has been traditionally conceived. For example, a CMBS servicer is constrained by the terms of a detailed pooling and servicing agreement and applicable provisions of federal tax law (the REMIC tax regime), as well as the overriding servicing standard. The servicer's actions are limited to protective actions to protect the value of the pool of loans, and a servicer's power is vastly inconsistent with a level of control customary to consolidation analysis and to the type of control which would allow a servicer to manage the pool for its own financial benefit.

Third, we believe that the requirement in paragraph 14Ab of the Exposure Draft that the reporting entity measure the right to receive benefits and the obligation to absorb losses, in each case, that "could potentially" be significant to the variable interest entity is too broad and subjective. For example, how far into the future will a reporting entity need to evaluate these rights and obligations? We urge FASB to revise this standard to require that the reporting entity only consider "actual and present" significance in measuring benefits and obligations as opposed to "potential" significance and instead rely on the enhanced disclosure and periodic reevaluation requirements to address benefits and obligations that could potentially be significant. Otherwise, the preparers of financial statements will be required to assess the probability of certain benefits and obligations being significant in the future. Moreover, we believe that the requirement that a reporting entity continuously reevaluate the status of a variable interest entity will identify any changes in the significance of such benefits or obligations. Furthermore, we suggest that FASB include an explicit statement that market compensation received by CMBS servicers and special servicers, standing alone, is not a significant benefit for the purposes of paragraph 14Ab.

Fourth, given FASB's more principles-based approach to determining the primary beneficiary of a variable interest entity by moving toward the qualitative analysis set forth in paragraphs 14A and 14B of the Exposure Draft, we do not believe that keeping the quantitative analysis set forth in paragraph 14C of the Exposure Draft is consistent with the movement toward the principles-based qualitative approach overall. Preparers of financial statements may be inclined to employ the back-up quantitative test in circumstances in which such test is not strictly necessary because of the comfort level that may be provided to them by a seemingly more objective quantitative test. We suggest that FASB remove the quantitative test entirely from the Exposure Draft.

Other Concerns

We are greatly concerned that the retrospective application of the amendments, with what will likely be less than one year transition, will cause insurmountable problems for many investors that will likely be deemed the "primary beneficiary" and that under the proposed changes such investors will be required to consolidate even though they may not have access to the information that would be necessary in order to do so. For example, the pooling and servicing agreements currently in place for CMBS may not, in many circumstances (e.g., circumstances where the servicer is not an affiliate of the "primary beneficiary"), permit the "primary beneficiary" to have access to the data they will need to properly undertake the required consolidation accounting. Specifically, they may not have access to payment histories, income and expense records, and other important information essential to account for an outstanding commercial mortgage loan (such as establishing fair value) and/or to account for income and expenses associated with an underlying pooled asset. Paragraph 4(g) of the Exposure Draft and the current interpretation exempts an enterprise with an interest in a variable interest entity from the consolidation requirement for variable interest entities created before December 31, 2003 if they are unable to obtain the information necessary to determine whether the entity is a variable interest entity; to determine whether it is the primary beneficiary of that entity; or to perform the required consolidation accounting. We believe that this date should be updated to be the date that the interpretation revisions are finalized to ensure that the revised interpretation will not be applied retrospectively in instances when it cannot be properly applied.

Additional Disclosure

As indicated in our October 15, 2008 letter regarding the Proposed FSP FAS 140-e and FIN 46(R)-e, we are concerned that the proposed changes to the disclosure requirements, together with the changes contemplated in the proposed Amendments to FASB Statement No. 140, are overly prescriptive and will require entities to provide such detailed and granular disclosure that its meaning is obscured. Specifically, we believe that these proposed disclosure requirements may actually result in less transparency because the ultimate user of financial statements will be presented with too much numeric and qualitative data and too little useful and meaningful information to assess risk. We believe that financial disclosure standards focused on principles-based guidance would better service the needs of the users of financial statements. For your convenience, we have restated our specific concerns mentioned in that letter below.

First, paragraphs 22C and 24 require detailed disclosure for a sponsor that holds a variable interest in a variable interest entity (irrespective of the significance of the variable interest). We propose that FASB clearly limit the detailed disclosure required in paragraphs 22C and 24 to those sponsors that have a significant variable interest. We believe that to require such detailed disclosure where the sponsor does not have a significant variable interest will not provide any true and meaningful benefit to users of financial statements and may ultimately overwhelm and confuse such users with excessive disclosure.

Second, the Exposure Draft will significantly increase the disclosure required for variable interest entities that are consolidated by another entity. While we agree that certain additional disclosure regarding variable interest entities that are consolidated could be helpful to users of financial statements, we believe that the additional disclosure about the special status of assets and liabilities of such variable interest entities that would be most helpful concerns the presence of asset restrictions, the nonrecourse nature of the variable interest entity's liabilities and the entity's maximum exposure to the variable interest entities.

Third, we believe that additional guidance and clarity is needed to assist the reporting entity in preparing the disclosure contemplated by paragraph 22Cd. Specifically, we urge FASB to provide guidance and clarity as to what types of "implicit arrangements" should be considered when

preparing the disclosure required by paragraph 22Cd. Our concern is that the proposed language leaves too much uncertainty as to what arrangements, which are not explicitly contractual, should be deemed "implicit arrangements" within the scope of the Exposure Draft. The lack of clarity may result in superfluous and inconsistent disclosures adding no real value to the ultimate user of financial statements.

Finally, we believe that the disclosure contemplated by paragraph 22Ca(2) is open-ended and should be narrowed and clarified. Pursuant to paragraph 22Ca(2), an enterprise is required to disclose its methodology for determining whether an enterprise is (or is not) the primary beneficiary of a variable interest entity, including "whether a different assumption or judgment could have been reasonably made that would result in a different conclusion." We believe that this requirement creates the possibility of overly broad disclosure that may ultimately confuse the user of financial statements. We propose that FASB narrow the scope of this requirement and provide clarity and guidance as to what it intends to accomplish by such disclosure.

We would again like to convey our appreciation to be given the opportunity to participate in this process and CMSA would be pleased to meet with FASB or the staff to discuss our concerns or to answer any questions you might have. We respectfully request that you continue the deliberations on changes to FASB Statement No. 140 and FASB Interpretation No. 46(R) to ensure that you carefully consider all critical issues and thereby produce the most robust and operational standard. We believe such a reasonable and appropriate course of action before any final decision is approved will lend itself to the creation of a more appropriate accounting standard in the least disruptive manner.

Sincerely,

Dottie Cunningham Chief Executive Officer

Commercial Mortgage Securities Association

John A. Courson

Chief Operating Officer

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Jeffrey D. DeBoer

President and Chief Executive Officer

The Real Estate Roundtable