



**COMMERCIAL MORTGAGE
SECURITIES ASSOCIATION**



LETTER OF COMMENT NO. 296

April 1, 2009

VIA EMAIL

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LETTER OF COMMENT NO. 352

RE: Proposed FASB Staff Position No. FAS 157-e, *Determining Whether a Market Is Not Active and a Transaction Is Not Distressed* and FAS 115-a, FAS 124-a and EITF 99-20-b on Impairments

Ladies and Gentlemen:

The Commercial Mortgage Securities Association (“CMSA”)¹ appreciates the opportunity to express our views with respect to the proposed FASB Staff Position 157-e, *Determining Whether a Market Is Not Active and a Transaction Is Not Distressed* and FAS 115-a, FAS 124-a and EITF 99-20-b. The breadth and depth of our membership’s knowledge of and experience in the capital markets provides us with a unique platform to discuss the challenges caused by the confusion surrounding fair value accounting. We believe the proposed FSP FAS 157-e is of utmost importance to the restoration of the health of our economy. Without clarity that financial assets should not be valued at fire sale prices characteristic of distressed markets, the current, critical

¹ The CMSA is an international trade association promoting the ongoing strength, liquidity and viability of commercial real estate capital market finance worldwide. The CMSA plays a vital role in setting industry standards and educating real estate professionals. With close to 400 member companies, and with a presence in Canada, Europe, Japan and the United States, the CMSA’s diverse membership base represents the full range of the industry’s market participants, including senior executives at the largest money-center banks, investment banks, rating agencies, insurance companies, investors, lenders and service providers.

Treasury and Federal Reserve initiatives to restore liquidity will not work as sellers will remain unwilling to expose financial assets for sale under the valuation methodology of existing FAS 157.

With regard to FSP FAS 157-e, we respectfully suggest the following: (1) the second “prong” of the test set forth in the proposed FSP, that would determine whether a transaction is distressed should not function to override the presumption established by the first prong and, instead, be revised to incorporate a judgment-based, “facts and circumstances” analysis of whether a transaction in an inactive market is a distressed transaction; (2) the proposed FSP should be revised to make clear that any Level 3 measurement must be based on a risk-premium reflecting an orderly and not distressed market; and (3) the proposed FSP should provide clear and compelling guidance that the enhanced role of judgment in management’s determination of fair value under the standard also be extended to auditors when evaluating the reasonableness of such estimates. This final point is extremely important because the PCAOB’s current guidance that the auditor should gather substantial, corroborating evidence from third-party sources hinders FASB’s intention to provide a greater scope for reasoned discretion to all parties. A more detailed explanation of our comments and suggestions is set forth below.

1. The proposed FSP requires that a two-step test be satisfied before permitting reporting entities to use a valuation technique other than the quoted price. Pursuant to the proposed FSP, the reporting entity must first determine that the applicable market is inactive through consideration of a number of factors (the “Step 1 Test”). If the reporting entity, after consideration of these factors, determines that the market is not active, the proposed FSP requires that the reporting entity consider the “Step 2 Test”, which includes whether: (a) there was sufficient time before the measurement date to allow for usual and customary marketing activities for the asset; and (b) there were multiple bidders for the asset. If these factors are not present, the presumptive conclusion is that any sale was distressed; if both of these factors are present, the presumption of the Step 1 Test is reversed. The Step 2 test contains factors that are not correlated with the question of whether a market is inactive or a trade is distressed. Lengthy exposure to potential bids (which provides more than sufficient time to market the asset) is, in fact, a telling characteristic of an inactive market and correlated with a conclusion that a bid is distressed. Further, multiple bids in an environment where these bids originate from volatile market conditions and fluctuations driven by fire-sale bidders and all offers come from highly motivated potential sellers do not indicate that a transaction is not distressed in all cases. The ability of the Step 2 Test, as proposed, to reverse the presumption of the Step 1 Test creates a mechanistic impairment to the discretion afforded under the Step 1 Test. While the length of exposure to bids and the number of bidders party to a trade may be of some utility in determining whether a market is inactive, these factors are not useful or universally relevant in assessing whether a transaction is distressed in an inactive market. A more telling factor -- but that generally is unable to be determined by third parties -- would be what motivated the seller to engage in that transaction at that price.

As such, Step 2, can and should be revised to require a judgment-based decision, based on the Step 1 factors, as to whether the inactive market indicates a distressed transaction in a particular case. Similar to the Step 1 Test, the Step 2 Test should be a “facts and circumstances” analysis that is not tied to limited, specific factors that are not universally determinative or correlated, particularly in an inactive market.

2. If it is concluded that a transaction is distressed, the discount rate to be used in the calculation of fair value should be one on which willing buyers and sellers contract in an orderly, non-distressed, market. Indeed, Paragraph 15 of the proposed FSP properly provides that, in valuing assets for which a quoted price is insufficient, the inputs to the present value technique used should reflect an orderly transaction between market participants. The proposed FSP then states that such transaction must “... reflect all risks inherent in the asset at the measurement date, *including a reasonable risk premium for bearing the uncertainty that would be considered by willing buyers and willing sellers in pricing the asset in a non-distressed transaction at the measurement date.*” (emphasis added). In a disorderly, inactive market, the discount for liquidity and the scarcity of available leverage is not a useful data point. The results of using cash-flow models that incorporate a liquidity premium from a distressed, inactive market will result in prices that are similar to those implied by the discredited distressed sales themselves.

3. We are concerned that in paragraph A32E, the reporting entity is encouraged to look to credit spreads for current issuance of similarly-rated securities. In an inactive market, this will inappropriately overweight the liquidity premium inherent in the distressed transaction. The example should be revised to clearly illustrate that the discount rate used in developing the analysis should be that estimated to be characteristic of a non-distressed marketplace. Finally, we believe that the mechanistic use of a mid-point analysis in paragraph A32F is inappropriate - management’s discretion, which would be based on facts and circumstances, should inform the model inputs.

4. Lastly, the proposed FSP should provide clear and compelling guidance that the expanded reliance on management’s judgment in estimating fair value under the proposed FSP also be extended to, and exercised by, auditors in evaluating management’s estimates. Specifically, the PCAOB’s current auditing requirements for obtaining collaborating evidence from third-party sources impedes the achievement of FASB’s goal of providing greater room for discretion by all parties in distressed markets. The current PCAOB rules are overly mechanistic and regimented and will hinder the appropriate level of discretion essential where pricing data is suspect. The expectation that an auditor will gather substantial corroborating evidence from third-party sources must be abandoned since it is impossible to achieve in this environment.

With respect to proposed FASB Staff Positions on FAS 115-a, FAS 124-a and EITF 99-20-b, CMSA appreciates the work of the Board to address market participant concerns and is generally encouraged by these proposals to address the issue of impairments. We do think, however, that with regard to the fair value measurement and impairment proposals, it is imperative that FASB work with the PCAOB so that the new principles are appropriately implemented as you intended by the auditing community.

We thank the FASB for this opportunity to express our views on the proposed FSP and appreciate your consideration of the views of CMSA. If you have any questions or need additional information, please contact Stacy Stathopoulos at (212) 509-1950.

Sincerely,

A handwritten signature in black ink, appearing to read "Dottie Cunningham", with a long horizontal flourish extending to the right.

Dottie Cunningham
Chief Executive Officer
Commercial Mortgage Securities Association