

February 15, 2012

Ms. Susan M. Cosper Technical Director Financial Accounting Standards Board 401 Merrit 7 P.O. Box 5116 Norwalk, CT 06856-5116

Re: File Reference No. 2011-220; Consolidation (Topic 810), Principal versus Agent Analysis

Dear Ms Cosper,

The Bank of New York Mellon Corporation (BNY Mellon) appreciates the opportunity to comment on the FASB's Proposed Accounting Standard Update, Consolidation (Topic 810), Principal versus Agent Analysis (Proposed Update). BNY Mellon is a global financial institution operating in 36 countries with \$325 billion of assets and \$1.2 trillion in assets under management as of December 31, 2011. BNY Mellon is supportive of a single set of high quality global accounting standards, and welcomes each opportunity to participate in the standards setting process with the FASB and IASB.

Thank you for listening to the asset management industry's concerns related to the consolidation of its asset management funds. We support the FASB's development of a principles based approach to assess whether a decision maker acts in the capacity of a principal or an agent. We do not believe it is useful to investors for an investment manager to consolidate the funds they manage.

We believe that a qualitative assessment of a decision maker's overall relationship with the entity and other parties involved with the entity must be included as part of the assessment. The factors listed in paragraph ASC 810-10-25-39C must be expanded to include the "overall purpose and design of the entity." We are concerned that if this is not included as a main factor required to be assessed, the overall purpose and design of the entity, which is currently only referenced in paragraph ACS 810-10-25-39C, will be inappropriately excluded from the overall assessment of the decision maker's capacity.

We do not agree with the FASB's belief in paragraph BC 18 "that kick-out and participating rights should affect only the consolidation analysis when there is a realistic possibility that the other interest holders may exercise those rights." The probability of actual exercise of substantive kick-out or participating rights should not be a factor in determining whether the decision maker acts as a principal or an agent. Furthermore, we believe when substantive kick-

out or participating rights exist they should not be weighted differently primarily due to a larger number of fund investors holding those substantive rights.

We are further concerned that the examples provided in the Proposed Update will establish, and in fact, may have already begun to establish bright lines in regard to a decision maker's interests in an entity. Asset managers, in accordance with securities or other banking regulations, are required to act as a fiduciary and to act and make decisions in the best interests of the other interest holders, regardless of the size of a decision maker's investment in an entity.

Our specific responses and comments to the questions in the Proposed Update are included in the **Appendix** to this letter.

If you have any questions or are in need of further information, please contact Robert Hitchings at (212) 635-7083 or me at (212) 635-7080.

Sincerely,

John Park

Corporate Controller

cc: Leslie F. Seidman, Chairman, Financial Accounting Standards Board

Hans Hoogervorst, Chairman, International Accounting Standards Board

Dr. Alan Teixeira, Director of Technical Activities, International Accounting Standards Board

Appendix

Question 1: When determining whether a decision maker is a principal or an agent, the proposed amendments require the analysis to consider the decision maker's overall relationship with the entity and the other parties involved with the entity. This analysis would be based on a qualitative assessment. Do you agree with this approach? If not, why?

Response: We agree that a qualitative assessment is an appropriate approach to determine whether a decision maker acts as a principal or an agent, when the consolidation model is based on control of an entity. This analysis should consider the decision maker's overall relationship with the entity and any other parties involved with the entity. This assessment should also address any explicit terms, whether contractual or non-contractual (e.g., fiduciary responsibilities) between the decision maker and other parties involved with the entity.

The asset management business is highly competitive. Investment strategies and the related complexity and effort vary widely. Also, an investor's perception of and market practice on an asset manager's compensation and any requisite investment for alignment with the investor's interests change as market conditions change.

For example, the amount and structure of the fees paid to an asset manager managing a fund tied to a published index is likely to be much different than a fund based on infrastructure investments in a less developed economy. Also, based on the purpose and design of the fund, the market may not require an asset manager to have "skin in the game". In other funds or in different market conditions, the market may require the asset manager to invest alongside the other investors so the investors are assured of an alignment of their interests with those of the asset manager. Finally, fee structures can vary depending on investor's preferences. An asset manager may offer the same investment strategy to two different clients; one of whom may demand a fixed fee structure while the second demands a performance fee structure. In all of these fund structures, the purpose and design of the fund is to provide investors with the investment strategy along with the intended risks and rewards for a market rate fee and an assurance that an asset manager's interests are aligned with those of the investors.

Question 2: The evaluation of a decision maker's capacity would consider the following factors:

- a. The rights held by other parties
- b. The compensation to which the decision maker is entitled in accordance with its compensation agreement(s)
- c. The decision maker's exposure to variability of returns from other interests that it holds in the entity.

Are the proposed factors for assessing whether a decision maker is a principal or an agent appropriate and operational? If not, why? Are there any other factors that the Board should consider including in this analysis?

Response: We believe that the proposed factors can be operational when assessing whether the decision maker is a principal or an agent. However, the manner in which paragraph 810-10-25-39C is written could lead someone to infer that an assessment of only these three factors will be

determinative in concluding whether the decision maker acts as a principal or an agent. On the other hand we believe the FASB intended the overall relationships should be evaluated. A narrow focus on just these factors may exclude consideration of investment strategies, their complexity and the market factors affecting the establishment of fees and any asset manager investment.

We are especially concerned that factor c. will be emphasized in any analysis, effectively reducing the significance of factors a. and b.

Additionally, we are concerned that the duties and responsibilities of an asset manager, which has a fiduciary responsibility to its investors, will be overlooked in the principal versus agent analysis.

We suggest the following changes, which are highlighted in *bold italics*, should be made to paragraph 810-10-25-39C:

810-10-25-39C A decision maker shall consider the overall relationship between itself, the entity being managed, and other parties involved with the entity when evaluating whether it is exercising its decision-making authority as a principal or an agent. This assessment also shall consider the entity's purpose and design, including the risks that the entity was designed to create and pass through to its interest holders and other explicit terms, whether contractual or non-contractual, between the decision maker and the other interest holders. Some but not all of the factors to be considered in determining whether the decision maker is using its decision-making authority in a principal or an agent capacity are:

- a. The purpose and design of the entity.
- b. The rights held by other parties (see paragraphs 810-10-25-39D through 25-39H).
- c. The compensation to which the decision maker is entitled in accordance with its compensation agreement(s) (see paragraphs 810-10-25-39I through 25-39J).
- d. The decision maker's exposure to variability of returns from other interests that it holds in the entity (see paragraphs 810-10-25-39K through 25-39L).

Different weightings shall be applied to each of the factors on the basis of particular facts and circumstances considering the purpose and design of the entity, including the risks that the entity was designed to create and pass through to its interest holders *and other explicit terms, whether contractual or non-contractual, between the decision maker and the other interest holders* (See the Examples in paragraphs 810-10-55-3A through 55-3BK).

Question 3: The proposed Update would require judgment in determining how to weigh each factor in the overall principal versus agent analysis. Do you agree that the proposed amendments, including the related implementation guidance and illustrative examples, will result in consistent conclusions? If not, what changes do you recommend?

Response: An asset manager's business model is to establish investment vehicles for the benefit of its clients in order to provide them with a cost effective method of diversifying investment risks. Our role is to act in the best interests of the investors, as their agent. In our role as an asset manager and within the asset manager business model, we believe asset managers would come to consistent consolidation conclusions for similar asset management entities.

Additionally, an asset manager is required to act in a fiduciary capacity and to make decisions in the best interests of fund investors. Securities and other regulatory laws, which an asset manager is required to adhere, ensure that an asset manager performs these fiduciary duties. These fiduciary responsibilities do not change when an asset manager also invests in the fund, regardless of the size of its investment.

We also believe that the illustrative examples represent a reasonable basis of the proposed assessment process and should not be expanded. However, these examples should be presented in a manner as to not establish "bright lines", specifically as it relates to the levels of an asset manager's investment in an entity, which are invested for specific reasons. The examples provided for Investment Funds, specifically Case C and Case D, in paragraphs 810-10-55-3U through 810-10-55-3AM appear to establish an asset manager's investment of 20% as a bright line. We recommend that the references to the percentage of the decision maker's investment in the examples be removed as to not establish perceived "bright-lines".

Question 4: Should substantive kick-out and participating rights held by multiple unrelated parties be considered when evaluating whether a reporting entity should consolidate another entity? If so, do you agree that when those rights are held by multiple unrelated parties, they should not in and of themselves be determinative? If not, why? Are the guidance and implementation examples illustrating how a reporting entity should consider rights held by multiple unrelated parties in its analysis sufficiently clear and operational?

Response: The Proposed Update requires the consideration of substantive rights held by multiple parties as opposed to only considering those rights held by a single party. This amendment is a significant improvement over the current accounting model.

We believe substantive kick-out and participating rights held by multiple parties should be considered in the decision maker's qualitative assessment when determining whether a reporting entity should consolidate another entity. While the number of investors is an indicator that should be considered, it cannot be assessed in isolation of other facts and circumstances. Many asset management fund structures provide mechanisms allowing a relatively small number of the fund's investors to initiate the exercise of substantive kick-out or participating rights. The initiation of a substantive kick-out right is likely to affect the actions or inactions of an asset manager. Once the kick-out or participating rights are considered substantive, the rights should be determinative in concluding that a decision maker is acting in an agency capacity.

Whether or not substantive voting rights or substantive participating rights that exist in an asset management fund structure are utilized, the fact they do exist does have an impact on the actions or inactions of an asset manager. Knowing it can be removed from its role as the asset manager

of a fund by the other investment holders, the asset manager obligates itself to act within the investment parameters established by the fund's governing documents. The asset manager also will act in the best interests of the investment holders, knowing investors can withdraw their investments from a fund, negatively impacting the asset manager's fees. Acting inappropriately in one of its funds would also have a negative impact on the asset manager's reputation, which would likely result in the loss of clients in its other managed funds.

Therefore, we do not agree with the FASB's beliefs in paragraph BC 18 "that kick-out and participating rights should affect only the consolidation analysis when there is a realistic possibility that the other interest holders may exercise those rights." The probability of actual exercise of substantive kick-out or participating rights should not be a factor in determining whether the decision maker acts as a principal or an agent. Paragraph BC 18 should be amended to be aligned with paragraph 810-10-25-41D which states "the likelihood that the participating rights will be exercised by the interest holder shall not be considered when assessing whether a participating right is substantive."

Mutual funds registered under the Investment Company Act of 1940 are overseen by small independent boards of directors. An independent board of directors has monitoring and oversight responsibilities of the fund. It also has the ability to remove the decision maker by terminating the asset management contract without cause. Additionally, fund shareholders have the ability to remove a board member or the decision maker directly. Therefore, we believe the existence of substantive kick-out and participating rights in certain fund structures, such as 1940 Act registered mutual funds, should be a determinative factor when assessing whether an asset manager is acting as a principal or an agent.

Question 5: The proposed Update would not include a criterion focusing on the level of seniority of a decision maker's fees when evaluating the decision maker's capacity. Do you agree that the seniority of the fee relative to the entity's other operating liabilities that arise in the normal course of the entity's activities should not be solely determinative of a decision maker's capacity? If not, why?

Response: We agree the level of seniority of a decision maker's fee should not be solely a determinative factor of a decision maker's capacity and we believe the level of seniority should not be considered at all when determining the decision maker's capacity.

Question 6: The evaluation of a decision maker's capacity places more emphasis on the decision maker's exposure to negative returns (for example, an equity interest or a guarantee) than interests that only expose the decision maker to positive returns. When performing the principal versus agent analysis, should the assessment differentiate between interests that expose a decision maker to negative returns (or both negative and positive returns) from interests that expose the decision maker only to positive returns? If not, why?

Response: We agree the exposure created when the decision maker absorbs losses of other interest holders or when the decision maker absorbs losses of other interest holders disproportionately to their own interests should be weighted more heavily. However, no special weighting should be given to exposure when the decision maker absorbs losses or receives gains

pari passu with other interest holders (i.e., a decision maker's equity interests where unrelated third parties hold a majority of the total equity interests).

Question 7: A reporting entity would be required to evaluate whether there has been a change in the decision maker's capacity by considering whether there has been a change in the purpose and design of the entity. For example, the purpose and design of the entity may change if the entity issues additional equity investment that is at risk to the decision maker. Do you agree with this proposed requirement? If not, please specify when this relationship should be reassessed and why.

Response: As indicated in our response to Question 2 above, the purpose and design of an entity should be one of the factors assessed when determining the capacity of a decision maker. Therefore, we agree that a reporting entity would be required to evaluate whether there has been a change in the decision maker's capacity by considering whether there has been a change in the purpose and design of the entity.

Question 8: The Board decided to include the principal versus agent assessment as a separate analysis within the overall consolidation assessment, rather than replacing the current guidance for evaluating whether a decision-making arrangement is a variable interest (and accordingly, a principal) with the revised principal versus agent analysis. The Board believes that if an entity's fee arrangement does not meet the definition of a variable interest (for example, a nominal performance-based fee), the decision maker should not be required to continue the consolidation assessment. Do you agree? If not, why?

Response: We agree that a consolidation assessment in accordance with the Proposed Update should not be performed if the decision maker's fees are not variable interests, as defined in paragraph 810-10-55-37.

Question 10: Update 2010-10 was issued to address concerns that some believe that the consolidation requirements resulting from Statement 167 would have required certain funds (for example, money market funds that are required to comply with or operate in accordance with requirements that are similar to those included in Rule 2a-7 of the Investment Company Act of 1940) to be consolidated by their investment managers. The amendments in this proposed Update would rescind the indefinite deferral in Update 2010-10 and would require money market funds to be evaluated for consolidation under the revised guidance. The Board does not intend the application of the proposed Update to result in money market funds being consolidated. Do you agree that the application of the proposed Update will meet this objective? If not, why and what amendments would you recommend to address this issue?

Response: We agree money market funds that are required to comply with or operate in accordance with requirements that are similar to those included in Rule 2a-7 of the Investment Company Act of 1940 should not be consolidated. We do not believe the Proposed Update to be operational for these money market funds. Due to the economic conditions in recent years, fund sponsors provided financial support to certain money market funds, although they were not required to do so, and recorded the related expense in their financial statements. These actions could lead one to believe that the sponsor provides implicit financial support to all of its money

market funds. By analogizing the facts and circumstances of an entity's money market funds with the Case F Commercial Paper Conduit example in the ASU, we believe there is a potential for an inconsistent application of the ASU with respect to money market funds.

We believe a specific scope exception for money market funds that are required to comply with or operate in accordance with requirements that are similar to those included in Rule 2a-7 of the Investment Company Act of 1940 should be included in paragraph 810-10-15-12. A scope exception would reduce the cost of implementing the Proposed Update for funds which the FASB has acknowledged should not be consolidated. Additionally, providing a specific exemption in the final ASU would avoid accounting uncertainty as the government and industry considers steps to deal with the public policy issues related to these important investment vehicles.

Question 11: For purposes of applying the proposed principal versus agent guidance, the proposed amendments would require a reporting entity to include the decision maker's direct and indirect interests held in an entity through its related parties. Do you agree with the requirement that a decision maker should include its proportionate indirect interest held through its related parties for purposes of applying the principal versus agent analysis? Why or why not?

Response: We agree that a decision maker's direct and indirect interests held in an asset management entity through its related parties should be included in the principal versus agent analysis. However, there are acceptable reasons for employees and employee benefit plans to invest in asset management funds of the decision maker. Employees of asset managers will often invest at their own discretion, at their own risk and for their own account in asset management funds offered by their firm. In these instances, the asset manager has no economic exposure to the employees' investments and therefore should not be included in the indirect interests of the decision maker. We suggest that the FASB retain the proposed deleted exclusions from related parties in ASC 810-10-55-37A subparagraphs a. and b., which specifically excluded interests of employees and employee benefit plans of the decision maker except if they are used in an effort to circumvent the provisions of the proposed principal versus agent guidance.

Question 12: The amendments in this proposed Update would require a general partner to evaluate its relationship with a limited partnership (or similar entity) by applying the same principal versus agent analysis required for evaluating variable interest entities to determine whether it controls the limited partnership. Do you agree that the evaluation of whether a general partner should consolidate a partnership should be based on whether the general partner is using its decision-making authority as a principal or an agent?

Response: Yes, requiring the same principal versus agent analysis for limited partnership structures, whether or not they are determined to be variable interest entities, ensures that similar entities are assessed for consolidation in a consistent manner.

Question 13: Do you agree with the proposed transition requirements in paragraph 810-10-65-4? If not, how would you propose to amend those requirements, and why? Please provide an estimate of how long it would reasonably take to implement the proposed requirements.

Response: We agree with the proposed transition provisions in paragraph 810-10-65-4. Implementation of the 3 related proposed ASUs (i.e., Consolidations, Investment Companies and Investment Property Entities) will require a significant amount of time and resources. We believe that it would take a minimum of 12 months to implement the final ASUs, after they are issued. We would propose that the effective date of the final ASUs be no earlier than January 1, 2014.

We believe this Proposed Update can be implemented independent of the proposed ASUs on Investment Companies and Investment Property Entities.

Question 14: Should early adoption be permitted? If not, why?

Response: We support an option for early adoption for those entities that wish to do so.

Question 15: Should the amendments in this proposed Update be different for nonpublic entities (private companies or not-for-profit organizations)? If the amendments in this proposed Update should be applied differently to nonpublic entities, please provide a rationale for why.

Response: We see no basis for a difference in adoption of the final ASU for public and non-public entities.

Other Administrative Points

The Introduction in paragraph 2 of the Proposed Accounting Standard states:

"The Accounting Standards Codification is amended as described in paragraphs 3–23. In some cases, to put the change in context, not only are the amended paragraphs shown but also the preceding and following paragraphs. Terms from the Master Glossary are in **bold** type. Added text is underlined and deleted text is struck out."

We suggest the final Accounting Standards Update include revisions and all text associated with ASU 2009-17, Consolidation [Topic 810]: Improvements to Financial Reporting by Enterprises Involved with Variable Interest Entities, and ASC 810-20, Control of partnerships and Similar Entities. Including only changed text and some preceding and following paragraphs in the final Accounting Standard Update, will make it difficult to follow and apply the revised consolidation update.