July 19, 2004

Mr. Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

File Number S7-22-04

Dear Mr. Katz:

Morgan Stanley & Co. Incorporated and Goldman, Sachs & Co. are pleased to submit comments to the Securities and Exchange Commission (the "Commission") on the proposed policy statement on sound practices concerning complex structured finance activities (the "Policy Statement") proposed on May 14, 2004 by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision and the Commission (the "Agencies").

We fully support the view that issuers of securities in the public markets must provide full and accurate public disclosure of transactions affecting their financial condition and results of operations, including appropriate disclosure of complex structured finance transactions. As a result of abuses that have come to light in recent years, we agree that complex structured finance transactions deserve special attention from regulators.

We also believe that financial institutions must have proper risk management controls in place that are tailored to their business lines, and we further recognize that the effectiveness of such controls depends on having a board of directors and senior management that set the proper tone for compliance by the entire organization.

The Policy Statement highlights the unfortunate fact that certain issuers of securities may have used complex structured finance transactions to circumvent regulatory or financial reporting requirements, engage in improper tax reporting or mask questionable if not illegal behavior. We fully recognize that financial institutions may expose themselves to substantial

reputational and legal risk if they knowingly participate in structuring and executing transactions that are illegal or that mislead investors.

While we support the purposes and objectives of the Agencies in drafting the Policy Statement, we are concerned that the Policy Statement will have unintended negative consequences for entirely proper transactions. The overwhelming majority of structured finance transactions are productive, legitimate activities constituting a very significant means of capital formation for the business community. Securitization transactions involving approximately $1.1 trillion of securities were executed in 1993 and the notional amount of outstanding interest rate/currency swaps in that year was approximately $8.5 trillion. By 2003, the face amount of securitization transactions totaled approximately $3.7 trillion and the notional amount of outstanding swaps equaled approximately $145 trillion, including transactions in entirely new asset categories, such as credit default swaps and collateralized debt obligations.

Despite the vast size of these markets, only a small handful of transactions were subsequently identified as fraudulent during the investigations of the past few years. Yet, the Policy Statement subjects all complex structured finance transactions, broadly defined, to heightened scrutiny and record-keeping requirements that will substantially and immediately impair bona fide financing techniques by companies and their financial intermediaries. As one example, the Policy Statement's requirement to create and maintain "minutes of critical meetings" is highly cumbersome and virtually impossible to implement. Rather than promoting a regulatory benefit, this requirement will most likely undercut the free flow of ideas that is essential for the implementation of existing techniques and the creation of new financial products. U.S. leadership and competitiveness in developing and implementing these intellectually intensive products will suffer. We welcome the opportunity to address our concerns in the comments set forth below.

We note that, although our concerns may overlap with concerns of other types of financial institutions, our comments are intended to reflect the scope of our respective firm's business lines and activities.

We comment on the following seven subjects:

- Issuers of securities in the public markets should continue to bear the burden of public disclosure of material matters regarding their financial statements and results of operations. The Policy Statement should not result in a sharing of that burden by financial institutions engaging in complex structured finance transactions with such issuers. Financial institutions do not and should not have

the enforcement capability to require confirmation of involvement by an issuer/customer's senior management, to compel a customer to disclose its business objectives or to mandate a dialogue with a customer's outside advisors, including auditors. The focus on evaluating proposed customer disclosure and accounting treatment places an improper burden on financial institutions.

- The Policy Statement should oblige each financial institution to maintain a robust risk management program that is suitable to its own business. The Agencies should not, however, attempt to define elements of transactions that should always require special scrutiny; decisions on risk management should be left to the judgment of the individual institutions.

- Certain of the suggestions in the Policy Statement regarding minutes of customer meetings and retention of documents regarding rejected transactions are inconsistent with normal business practices and are impractical.

- The role of the Board of Directors in this area should be consistent with the general duties of directors in the oversight of internal controls. The Policy Statement should not expand the role of the Board beyond these well-established corporate governance principles.

- The Policy Statement should cover transactions involving U.S. reporting companies. Extending the scope of the Policy Statement to foreign companies that are not reporting companies under the U.S. Securities Exchange Act of 1934 (the "Exchange Act") will unfairly disadvantage U.S. financial institutions by driving such foreign companies to engage in transactions with unregulated or offshore financial intermediaries.

- The Policy Statement should not become a source of private rights of action against financial institutions.

- The Agencies' interpretations of the Policy Statement should be made on a consistent and coordinated basis and publicly available.

1. Relationship with the Customer

(A) Responsibility of the Customer

While we agree with the spirit of the Policy Statement and welcome the expression of concern on the part of the Agencies that financial institutions may assume reputational or legal risk if their customers act in improper or illegal ways, we believe that public company customers that enter into complex structured finance transactions, and not the financial institutions that assist in structuring or executing them, are in the best position to ensure their compliance with applicable laws and regulations.

Several recent initiatives have greatly enhanced both the quality of public company disclosure and the likelihood that disclosure of structured finance transactions entered into by public companies will be accurate and complete. These include (i) the Commission's recent modifications of the events that trigger the filing of current reports on Form 8-K, (ii) the new disclosure requirements concerning off-balance sheet arrangements, (iii) new accounting rules on consolidation of variable interest entities, (iv) the renewed focus generally on the adequacy of disclosure in the Management's Discussion and Analysis of Financial Condition and Results of Operations section of periodic reports and registration statements, (v) the requirements concerning disclosure controls and procedures, and (vi) the certification requirements applicable to principal executive and principal financial officers regarding periodic reports. The enhanced quality of reporting company disclosure resulting from these initiatives, we believe, will go a long way toward addressing several of the concerns that underlie the Policy Statement. We believe the Commission should give these various initiatives a chance to work.

We are not suggesting that financial institutions be permitted to turn a blind eye to wrongdoing. Quite to the contrary. We agree with the Agencies' observations that there will be circumstances in which a financial institution should step away from a transaction or ensure that any transaction executed by it is modified to comply with applicable laws and regulations. But we do not believe a financial institution should be required to substitute its judgment for that of its customer when it does not know, or does not recklessly disregard information, that the proposed transaction is unlawful and where the customer has a good faith basis to assert that the transaction complies with applicable laws and regulations. Moreover, financial institutions should be entitled to rely fully on experts in the absence of knowledge that the customer has misled the experts.

(B) Knowledge of the Customer

The Policy Statement calls for policies and procedures designed to ensure that the customer understands the risks of each complex structured finance transaction. The suggestions include, among other things, confirmation that a customer's senior management has reviewed and approved a transaction. The Policy Statement also suggests that financial institutions understand the customer's business objectives for entering into a transaction.

Financial institutions do not and should not have the enforcement capability to require confirmation of involvement by the customer's senior management or, in many cases, the ability to compel a customer to fully disclose its business objectives. Effective implementation of these concepts presumes a high level of cooperation from the customer, which, as a practical matter, may not always be present. We note that some of our customers are also our competitors, and they may wish to withhold from us proprietary information relating to the transactions that we execute for them for perfectly legitimate reasons. This lack of transparency should not act as a bar to executing a transaction, but often is an element in the financial institution's analysis of its legal and reputational risks.

We believe that it is reasonable for financial institutions to make sure that the individuals with whom they deal understand the nature and consequences of complex structured finance transactions prior to their completion, but it is incumbent upon the customer to know and understand its own objectives and to ensure that such objectives are appropriate. Each institution needs to "know its customer" in keeping with current requirements, but we do not believe that new rules in this area are necessary, appropriate or effective in preventing wrongdoing. Accordingly, the Policy Statement should delete the language under the section entitled "Reputational and Legal Risk" that states "Policies should also articulate when a proposed transaction requires acknowledgment by the customer that the transaction has been reviewed and approved by higher levels of the customer's management". The same concept should also be deleted where it appears under the last bullet point under "Reputational and Legal Risk" and in "Documentation Standards".

It is critical in our view that the roles and responsibilities of the participants in complex structured finance transactions remain arm's-length. Financial institutions should not be considered investment advisors with respect to these transactions and should not be deemed to have a fiduciary-type relationship with their customers. We believe that the Policy Statement should be clear not to impose these types of duties on financial institutions in these circumstances.

(C) Accounting and Disclosure

The Policy Statement would require financial institutions to obtain (and document) complete and accurate information about their customer's proposed accounting treatment and financial disclosures relating to proposed transactions. This information would be assessed in the approval process and considered in light of the financial, accounting and rating agency disclosure. The Policy Statement envisions circumstances in which the financial institution or third-party professionals communicate with the customer's independent auditors or advisors. We believe these requirements are overly broad and exceed what a financial institution should properly be required to do and what it can reasonably accomplish.

As suggested above, the Policy Statement does not adequately take account of the fact that the customer is primarily responsible for its own disclosure, as the party with unlimited access to its own information. Furthermore, it will often be the case that financial statement

and MD&A disclosure will take place after, and sometimes long after, a complex structured finance transaction is executed. Hence, there will be a meaningful gap in time between a financial institution's consummation of an individual transaction and the customer's preparation of its public disclosure documents under the Exchange Act (other than any required Form 8-K disclosure). Additionally, customers may properly aggregate the financial impact of various transactions in their public disclosure documents, and a financial institution may not have knowledge of all or even most of the transactions that a customer executes with other financial institutions in a given reporting period. As a result, information available to a financial institution will not be sufficient for the financial institution to make appropriate judgments about proper and complete disclosure. In addition, even if a financial institution were in possession of all relevant information, a financial institution and a customer could reasonably differ as to what information is material.

We believe that there should be no follow-on obligation of a financial institution after a transaction is executed to make sure that the customer properly discloses it. To impose obligations on a financial institution in this respect would convert the financial institution into a compliance authority, a role it would not have the legal basis or capability to perform. The markets and regulators should rely on the enhanced rules and regulations applicable to issuers to ensure that material matters are disclosed properly.

Finally, financial institutions cannot force a dialogue with a customer's outside advisors, including its independent auditors, or require information from them. Some customers may not permit a financial institution to be in contact with its independent auditor or other outside advisors for any number of reasons, including confidentiality. Additionally, some auditing and advisory firms will not enter into conversations with financial institutions at all or without insisting on indemnification and imposing other requirements as a precondition to discussion. A financial institution is not in a position to dictate a change in these practices.

In light of the foregoing, we believe that the section on "Accounting and Disclosure by Customers" should be recast in its entirety. In particular, we believe that a customer's proposed accounting treatment and public disclosure of a complex structured finance transaction, to the extent either or both are in fact communicated by the customer to the financial institution, should be included among other factors in a financial institution's determination of appropriate legal or reputational risk to it. We suggest that the Policy Statement be revised to eliminate references based on a determination "that a proposed transaction may result in the customer filing materially misleading financial statements", which we believe is too vague and inappropriately shifts the burden of due diligence and liability exposure to the financial institution. Instead, "appropriate action" should be triggered by a determination "that a proposed transaction would raise inappropriate legal or reputational risk to the financial institution, based on all of the factors then known to such financial institution, including for example, the accounting treatment or public disclosure to the extent communicated or proposed by the customer at the time."

2. Definition of Complex Structured Finance Transactions Subject to Scrutiny

We subscribe to the notion that each financial institution must have a robust risk control function. We agree with the Policy Statement that each financial institution should have the responsibility and the discretion to determine which complex structured finance transactions should be subject to heightened risk control procedures.

To be sure, there are common qualities of certain types of complex structured finance transactions that may merit special scrutiny by the risk control function. The Policy Statement should not, however, suggest that any particular transactional element or group of elements should require elevating a transaction to the level of special scrutiny. For example, most swap and securitization transactions possess some of the elements cited by the Policy Statement as necessitating heightened scrutiny. Yet, these transactions generally pose little or no inherent legal or reputational risk. Each financial institution must be permitted to make its own determination as to which transactions raise meaningful legal, regulatory or reputational risks and should be subjected to heightened scrutiny.

Moreover, we believe that the Policy Statement would impose unnecessary requirements relating to tax matters. The Department of the Treasury and the Internal Revenue Service (the "IRS") recently updated their rules requiring taxpayers to disclose transactions with "tax shelter" indicia to the IRS, and requiring material advisors to maintain information about such transactions. Under the IRS rules, advisors are required to provide that information to the IRS upon request. These new rules reflect a major effort by the IRS over the last several years to develop rules that identify all types of transactions that are of interest to them, in a manner that is not unduly burdensome to taxpayers. We (and other financial institutions) have made substantial investments to develop procedures and train personnel in order to comply with these rules. We are not aware of any need for the adoption by the Agencies of additional oversight requirements in this area.

3. Documentation

The Policy Statement sets standards for documenting the approval process for complex structured finance transactions. While we recognize the benefits of good documentation, certain aspects of the proposal raise concerns.

We believe it is impractical to create and maintain "minutes of critical meetings" with customers. It is not normal or customary in any industry or business to take minutes at meetings among business transaction participants. Generally, conversations may not have any predetermined outcome or may be premised on confidentiality among the parties. This is in contrast to government agency proceedings or corporate governance bodies or committees where all parties have an expectation that minutes are necessary to create a record of the proceedings for record keeping and historical purposes. Secondly, the requirement that a financial institution minute a meeting with a customer will chill the free flow of ideas that has proven to be essential for the creation of new financial products. As discussed above, the

immense creativity of the structured finance business has resulted in an array of new and valuable capital raising techniques in the last ten years. Finally, minuting meetings may not be particularly valuable because many meetings may not have any tangible impact on whether a transaction occurs or is terminated. Leaving aside the practicalities of minuting every "critical" meeting, there typically is no opportunity to determine, other than through studied hindsight, whether a meeting is "critical" or not. Accordingly, the section on "Documentation Standards" should delete references to the bullet point relating to minutes of critical meetings with the client.

The Policy Statement suggests retention of documents relating to "disapproved transactions with controversial elements (e.g., denied in the final stages of approval or due to customer requests for particular terms requiring additional scrutiny)." Transactions may be disapproved or terminated for a variety of reasons – commercial issues, timing issues and pricing issues, among others, even in the final stages. Transactions may be rejected at early stages before they are brought to the attention of a governance or policy oversight committee, which in hindsight might be deemed to have involved terms requiring additional scrutiny. Records should not have to be maintained for all transactions that are rejected (because the burdens of doing so would be unmanageable), and it will frequently be difficult to pinpoint what circumstances led to the rejection of a particular transaction of the type identified above. Frequently, transactions are rejected or terminated for more than one reason. The retention of disapproved transaction records should not become a significant administrative burden in its own right, entailing meetings and additional paperwork just to document the rejected transaction documentation. We believe that an appropriate balance between meeting the goals of the Policy Statement and not imposing excessive record-keeping or otherwise impractical requirements can be best achieved through an expectation that financial institutions would retain records of decisions by any governance or policy oversight committee disapproving a transaction because it presented the financial institution with an unacceptable level of legal or reputational risk.

4. The Role of the Board and Management

We agree with the Policy Statement that the proper role of the Board of Directors of financial institutions in this area is to (i) establish and maintain a proper ethical and risk management tone, and (ii) engage in oversight of activities regarding the adoption, maintenance and use of risk management policies and procedures. Additionally, we believe that management has principal responsibility for devising and implementing risk control procedures relating to complex structured finance transactions. Management is obligated to review individual transactions, where appropriate, monitor trends in this area to the extent possible and report to the Board as a matter of normal corporate governance. We further believe, however, that the Policy Statement should not be a vehicle for expanding or changing customary principles regarding corporate governance.

5. Scope of Coverage

The Policy Statement provides that financial institutions executing complex structured finance transactions should maintain a comprehensive set of formal, firm-wide policies and procedures for managing and regulating complex structured finance activities with all customers and in all jurisdictions around the world where the institution operates.

We believe that extending the obligations of financial institutions to encompass customer compliance on a global basis (and not just to companies having a reporting obligation with the Commission under the Exchange Act), would require financial institutions to address a myriad of potentially conflicting legal and regulatory regimes, different disclosure standards (not just the Commission's) and accounting treatment under other accounting principles (not just U.S. generally accepted accounting principles).

Extending the reach of the Policy Statement to non-reporting foreign companies could place our respective firms and other U.S. financial institutions at a competitive disadvantage with other market participants outside the United States. To the extent that customers find the level of risk control dictated by U.S. procedures too intrusive, they are likely to move offshore to institutions that are not subject to oversight by any of the Agencies. The net effect will be negative for U.S. financial institutions and global markets.

We believe that it would be sound policy and would maintain U.S. competitiveness to limit the reach of the Policy Statement to complex structured finance transactions executed by companies that are required to file reports with the Commission under the Exchange Act, including transactions in which the financial institution counterparty is a non-U.S. or unregulated entity. If the scope of the Policy Statement were defined differently, customers would be driven to engage in business with unregulated entities or offshore institutions.

6. No Private Right of Action

We believe the Policy Statement should not establish standards that could become the basis for legal action by private third parties, including shareholders of customers. We believe that it does not and we respectfully suggest that the Policy Statement expressly confirm that it is not intended to create a private right of action.

7. Interpretation of Policy Statement

We would respectfully request that the Agencies make an effort to provide consistent and coordinated responses and interpretations to comments on or issues raised by the Policy Statement. We would appreciate that all requests for interpretive guidance of the Policy Statement to each of the Agencies as well as each Agency's response be made public.

8. Conclusion

We welcome the spirit of the Policy Statement. We believe, however, that the Policy Statement is unduly burdensome in certain key respects and potentially creates unwanted legal exposure for financial institutions engaging in appropriate and good faith commercial activity.

We appreciate the opportunity to raise these comments with the Commission and we would be pleased to discuss the matters addressed in this letter with the Staff if you would find that to be helpful.

Very truly yours,

Goldman, Sachs & Co.

By: David J. Greenwald

David J. Greenwald
Managing Director and Deputy
General Counsel

Morgan Stanley & Co. Incorporated

By: _____

Robin Roger
Managing Director and General Counsel,
Securities

cc: Office of the Comptroller of the Currency
Chief Counsel's Office, Office of Thrift Supervision
Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System
Robert E. Feldman, Executive Secretary,
Attention: Comments/OES, Federal Deposit Insurance Corporation

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