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Docket No. OCC-2009-0012

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Docket No. R-1368

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Regulation Comments
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Attention: OTS-2009-0015

Subject: Joint Comments for "Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance; Impact of Modifications to Generally Accepted Accounting Principles; Consolidation of Asset-Backed Commercial Paper Programs; and Other Related Issues"

Ladies and Gentlemen:

The Mortgage Bankers Association[1] (MBA) and the Commercial Mortgage Securities Association (CMSA)[2] welcome the opportunity to comment on the proposed changes to regulatory capital requirements for financial institutions (referred to herein as "banks")

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[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 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, including 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.

[2] 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 more than 270 member companies globally, and with a presence in Europe, Japan and North America, 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.

set forth in the recent Notice of Rulemaking, *Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance; Impact of Modifications to Generally Accepted Accounting Principles; Consolidation of Asset-Backed Commercial Paper Programs; and Other Related Issues* (Proposed Rule).

Background

On June 12, 2009, the Financial Accounting Standards Board (FASB) issued Statement of Financial Accounting Standards No. 166, *Accounting for Transfers of Financial Assets, an Amendment of FASB Statement No. 140* (FAS 166) and Statement of Financial Accounting Standards No. 167, *Amendments to FASB Interpretation No. 46(R)* (FAS 167). FAS 166 and FAS 167 removed the concept of a qualifying special-purpose entity (QSPE) from generally accepted accounting principles (GAAP) and altered the criteria under which special purpose entities, like mortgage-backed securities trusts (MBS), must be included in the issuer's or servicer's consolidated financial statements. The net impact to the mortgage banking and commercial mortgage securities industries will be for hundreds of billions of dollars of securitized assets and liabilities to come onto the balance sheets of issuers, servicers or special servicers.

The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Fed), the Federal Deposit Insurance Corporation (FDIC), and Office of Thrift Supervision (OTS) (collectively "agencies") generally use GAAP as a starting point for assessing regulatory capital requirements for an exposure. The Proposed Rule states that the agencies have determined that the qualitative analysis under FAS 167 coupled with the enhanced requirements for recognizing the transfer of financial assets under FAS 166 "converge in many respects with the agencies' assessment of a banking organization's risk exposure to a structured finance transaction and other transactions affected by the 2009 GAAP modifications." Accordingly, the agencies in the Proposed Rule will not grant any regulatory capital relief for the assets and liabilities coming onto bank balance sheets as a result of the implementation of FAS 166 and FAS 167 on January 1, 2010 for calendar year reporting banks.

The following are our members' general comments on the Proposed Rule and response to specific questions asked in the exposure draft for the Proposed Rule.

General Comment

Request for Special Guidance for MBS: Pages 12 and 13 of the exposure draft stipulates that the underlying reason for the agencies' decision not to allow relief under the Proposed Rule, "In the case of some structures that banking organizations were not required to consolidate prior to the 2009 GAAP modifications, the recent turmoil in the financial markets has demonstrated the extent to which the credit risk exposure of the sponsoring banking organization to such structures (and their related assets) has in fact been greater than the agencies estimated, and more associated with non-contractual considerations than the agencies had expected. For example, recent performance data on structures involving revolving assets show that banking organizations have often provided non-contractual (implicit) support to prevent senior securities of the structure from being downgraded, thereby mitigating reputational risk and the associated alienation of investors, and preserving access to cost-efficient funding." The underlying premise here is that banks have taken on more credit risk than the risk inherent in the interests it retains in securitizations

Ballooning risk-based capital (RBC) and leverage ratios by the entirety of assets of sponsored variable interest entities (VIE's), newly consolidated under FAS 167, is an inappropriately blunt instrument to address the more narrowly focused abuses that occurred in applying the QSPE concept. MBA and CMSA members recognize that in some cases it is entirely appropriate to fully charge RBC and inflate leverage ratios of sponsoring entities where, in fact, there is evidence that the sponsor, explicitly or implicitly is likely to provide credit support to the VIE. However, not all VIE's carry such implicit or explicit credit backstop.

For most static pool structures, like residential mortgage-backed securities (RMBS) and commercial mortgage backed securities (CMBS and collectively MBS), the appropriate regulatory capital treatment is to continue to require RBC and leverage ratio treatment for only the variable interest retained and not for all of the consolidated VIE assets. There is no business case for the sponsors to provide credit support for these securitizations, hence no case for RBC and leverage ratio treatment to attach beyond the retained variable interests.

Accordingly, MBA and CMSA propose that the primary risk-weighting rules and leverage ratio rules should be revised for certain VIEs that meet the following criteria:

- If the primary beneficiary is the transferor, the transfer meets the three criteria for sale accounting in paragraph 9 of FAS 166.

- The beneficial interest holders of the VIE have no recourse to the general credit of the primary beneficiary other than standard representations and warranties;

- The VIE's assets can be used only to settle the obligations of the VIE; and

- There are no explicit arrangements or implicit variable interests that could require the primary beneficiary to provide financial support (for example, liquidity arrangements and obligations to purchase assets) to the VIE, other than servicing advances, which are only required if the servicer deems them to be collectible.

MBA and CMSA feel strongly that the agencies should address the RMBS and CMBS accounting model uniquely in the capital rules with a confined, rational, and straightforward framework because these structures, on a combined basis, represent the largest segment of the securitization market, and the structure's static pool nature makes it easiest to conceptualize and implement rules that are more in line with the underlying risks. Further, the second and third criteria proposed above are the two criteria in paragraph 22A of FAS 167 for one line treatment in the asset and liability sections in the statement of financial position. Thus, it will facilitate the agencies' ability to enforce the rule in a transparent manner consistent with the reporting in the GAAP financial statements.

In addition to the carve-out above for static pool VIE's like RMBS and CMBS, there may be other situations where a VIE's assets and liabilities should be afforded special treatment under the regulatory capital rules so that only retained interests are included in RBC and leverage ratio calculations. MBA and CMSA recommend that the agencies take the time to study the risks inherent in each of the major securitization structures so that the regulatory capital treatment is more precisely aligned with the risk retained by the reporting bank.

Responses to Specific Questions

Question 1: Which types of VIEs will banking organizations have to consolidate onto their balance sheets due to the 2009 GAAP modifications, which types are not expected to be subject to consolidation, and why? Which types are likely to be restructured to avoid consolidation?

MBA's and CMSA's Response: Many mortgage loans in private label securitizations where a bank owns a potentially significant variable interest and the bank is also servicer (where no single independent party can remove it as servicer without cause) may be required to be consolidated onto the bank's balance sheet. Some institutions may sell their potentially significant variable ownership interests or sell or terminate servicing to avoid the ill-effects of consolidation. Thus, FAS 166 and 167, in conjunction with the Proposed Rules, may cause some banks to make decisions that are not economically sound or justified. Further, if the agencies do not grant the relief suggested in general comments above for RMBS and CMBS, it will compound the adverse impact of FAS 167, further postponing the recovery of the private label RMBS and CMBS markets.

Question 2: Are there features and characteristics of securitization transactions or other transactions with VIEs, other SPEs, or other entities that are more or less likely to elicit banking organizations' provision of non-contractual (implicit) support under stressed or other circumstances due to reputational risk, business model, or other reasons? Commenters should describe such features and characteristics and the methods of support that may be provided. The agencies are particularly interested in comments regarding credit card securitizations, structured investment vehicles, money market funds, hedge funds, and other entities that are likely beneficiaries of non-contractual support.

MBA's and CMSA's Response: Static RMBS and CMBS transactions do not have features or characteristics that would prompt or incent the primary beneficiary to provide support that is not contractually required.

Question 3: What effect will the 2009 GAAP modifications have on banking organizations' financial positions, lending, and activities? How will the modifications impact lending typically financed by securitization and lending in general? How may the modifications affect the financial markets? What proportion of the impact is related to regulatory capital requirements? Commenters should provide specific responses and supporting data.

MBA's and CMSA's Response: The 2009 GAAP modifications will have the impact of artificially increasing assets and liabilities for assets not owned and liabilities not owed by banks. It will significantly and artificially increase GAAP leverage ratios and adversely impact regulatory capital ratios. FAS 166 and 167 and the resulting regulatory capital impacts will delay the re-start of the private-label RMBS and CMBS markets. Regulatory capital will continue to be scarce resulting in an adverse impact on consumers for all loan products as banks increase prices to ration scarce capital and to cover the additional accounting and administration costs of carrying additional assets and liabilities. Additionally, residential loans to moderate-to-medium income households will be adversely impacted unless FHA or other government agencies expand their underwriting criteria to provide mortgages to an emerging under-served market resulting from the collapse of private-label mortgage securitizations market that served individuals not eligible for loans qualifying for securities issued by Ginnie Mae, Fannie Mae or Freddie Mac.

Question 4: As is generally the case with respect to changes in accounting rules, the 2009 GAAP modifications would immediately affect banking organizations' capital requirements. The agencies specifically request comment on the impact of immediate application of the 2009 GAAP modifications on the regulatory capital requirements of banking organizations that were not included in the SCAP. In light of the potential impact at this point in the economic cycle of the 2009 GAAP modifications on regulatory capital requirements, the agencies solicit comment on whether there are significant costs and burdens (or benefits) associated with immediate application of the 2009 GAAP modifications to regulatory capital requirements. If there are significant costs and burdens, or other relevant considerations, should the agencies consider a phase-in of the capital requirements that would result from the 2009 GAAP modifications? Commenters should provide specific and detailed rationales and supporting evidence and data to support their positions.

Additionally, if a phase-in of the impact of the GAAP modifications is appropriate, what type of phase-in should be considered? For example, would a phase-in over the course of a four-quarter period, as described below, for transactions entered into on or prior to December 31, 2009, reduce costs or burdens without reducing benefits?

MBA's and CMSA's Response: The operational costs associated with implementing FAS 166 and FAS 167 will be material, but the incremental operational cost of the Proposed Rule will not be material. The real cost of the Proposed Rule will be the cost to consumers that results from the resulting scarcity of capital and the allocation of that scarce capital resource to products in the form of higher interest rates. In light of the impact of FAS 166 and FAS 167 and the Proposed Rules described in our response to question 3, any postponement for implementing under the regulatory capital rules will serve to postpone the pro-cyclical, anti-consumer, anti-affordable housing impacts described therein. MBA and CMSA are trade organizations and will not respond to the impact of the Proposed Rule on specific banking organizations not included in the SCAP analysis.

Question 5: The agencies request comment on all aspects of this proposed rule, including the proposal to remove the exclusion of consolidated ABCP program assets from risk-weighted assets under the risk-based capital rules, the proposed reservation of authority provisions, and the regulatory capital treatment that would result from the 2009 GAAP modifications absent changes to the agencies' regulatory capital requirements.

MBA's and CMSA's Response: In this commentary, we can only speak to the impact of the proposed rules on RMBS and CMBS and not to the proposed exclusion from consolidation of ABCP program assets and liabilities. See our response to question 3 with respect to the potential impacts of the 2009 GAAP changes absent changes to the regulatory capital requirements.

Question 6: Does this proposal raise competitive equity concerns with respect to accounting and regulatory capital treatments in other jurisdictions or with respect to international accounting standards?

MBA's and CMSA's Response: The International Accounting Standards Board (IASB) has not yet issued its reporting standards on de-recognition (FAS 166 equivalent) and consolidation (FAS 167 equivalent). However, there are significant differences in approach between FAS 166 and FAS 167 and the IASB's exposure drafts. So, the Proposed Rule could, in fact, raise competitive equity concerns when the international standards are issued later this fall or early next year. This should serve as a further reason to delay the regulatory capital impact of FAS 166 and 167. MBA, CMSA and many other trade organizations have been consistent in commenting to both FASB and IASB that all standards related to financial instruments should be worked on jointly and converged on an accelerated basis. This would prevent abuses that may arise from opportunities for accounting arbitrage for multi-national financial institutions. However, FASB and IASB continue to expose the individual pieces on a separate and piecemeal basis so that preparers and users have no opportunity to see what the impact of the entire "quilt" of pronouncements affecting financial instruments will be until the last piece is in place. Then, IASB and FASB will have to reconcile and negotiate the differences to come up with a converged standard. The result will be millions of dollars wasted by preparers of financial statements to implement the piecemeal changes, and additional millions of dollars subsequently wasted to implement the final converged standards. Even worse, users of financial statements will be confused by the constant flux related to multiple accounting and reporting standard changes.

Further, the proposed regulatory capital standards relate to the existing Basel I Accord regulatory capital structure. Larger banks are in the process of implementing the Advanced Approach under Basel II. Those banks believe that the Advanced Approach will require less risk-based capital than under the Proposed Rule. Thus, the Proposed Rule could lead to further divergence from international capital standards for banks.

Question 7: Among the structures that likely will be consolidated under the 2009 GAAP modifications, for which types, if any, should the agencies consider assessing a different risk-based capital requirement than the capital treatment that will result from the implementation of the modifications? How are commenters' views influenced by proposals for reforming the securitization markets that require securitizers to retain a percentage of the credit risk on any asset that is transferred, sold or conveyed through a securitization? Commenters should provide a detailed explanation and supporting empirical analysis of why the features and characteristics of these structure types merit an alternative treatment, how the risks of the structures should be measured, and what an appropriate alternative capital treatment would be. Responses should also discuss in detail with supporting evidence how such different capital treatment may or may not give rise to capital arbitrage opportunities.

MBA's and CMSA's Response: See our general comments above for our suggestions for structures that should be considered for special treatment under the regulatory capital rules.

Question 8: Servicers of securitized residential mortgages who participate in the Treasury's Making Home Affordable Program (MHAP) receive certain incentive payments in connection with loans modified under the program. If a structure must be consolidated solely due to loan modifications under MHAP, should these assets be included in the leverage and risk-based capital requirements? Commenters should specify the rationale for an alternative treatment and what an appropriate alternative capital requirement would be.

MBA's Response: MHAP is not applicable to CMSA's members. MBA does not believe that consolidation solely due to loan modifications under MHAP is a plausible outcome of applying the provisions of FAS 167. These fees are similar to other ancillary fees a servicer collects, and by design, are intended partially to offset the additional costs and burden of modification activity. Thus, any fees received under MHAP should not be considered variable interests. Further, MBA believes that these fees should be viewed as the same unit of account as the servicing asset. MBA also believes that the fees under MHAP are reasonable compensation for efforts expended by the servicer in the loan modification process and are commensurate with the level of effort to modify a loan. Finally, the fees net of the associated direct incremental costs will not be significant individually or in the aggregate.

Even in the implausible event of a bank having to consolidate a VIE's assets and liabilities when having no financial ownership other than servicing related fees, the final regulatory capital rule should exclude those consolidated assets from risk-based capital determinations since the related assets do not provide risk to the bank.

Question 9: Which features and characteristics of transactions that may not be subject to consolidation after the 2009 GAAP modifications become effective should be subject to risk-based capital requirements as if consolidated in order to more appropriately reflect risk?

MBA's and CMSA's Response: No transactions not subject to consolidation under FAS 167 should be included in RBC or leverage ratio requirements.

Question 10: Will securitized loans that remain on the balance sheet be subjected to the same ALLL provisioning process, including applicable loss rates, as similar loans that are not securitized? If the answer is no, please explain. If the answer is yes, how would banking organizations reflect the benefits of risk sharing if investors in securitized, on-balance sheet loans absorb realized credit losses? Commenters should provide quantification of such benefits, and any other effects of loss sharing, wherever possible. Additionally, are there policy alternatives to address any unique challenges the pending change in accounting standards present with regard to the ALLL provisioning process including, for example, the current constraint on the amount of provisions that are includible in tier 2 capital? Commenters should provide quantification of the effects of the current limits on the includibility of provisions in tier 2 capital and the extent to which the 2009 GAAP modifications and the changes in regulatory capital requirements proposed in this NPR effect those limits.

MBA's and CMSA's Response: Reporting entities will be required to provide an allowance for credit losses for assets consolidated under FAS 167 unless they elect the fair value option. For reporting entities not electing the fair value option, the allowance for credit losses provisioning process for the newly consolidated loans will be the same for similar loans that are not securitized. Generally accepted accounting principles do not support reducing the allowance for credit losses based upon the expectation that actual losses will be ultimately absorbed by the investors. If investors were to economically absorb credit losses in the trust, it would manifest itself as an extinguishment of a liability owed to the trust bondholders once the actual loss is incurred. The extinguishment of the debt may not occur in the same accounting period that the credit losses were recognized because the debt extinguishment may only be recorded when the entity is legally released from the obligation. This is a flaw in FAS 167 and its interaction with FASB Statement No. 5, *Accounting for Contingencies* (FAS 5). Under FAS 5, Banks will be required to provide for credit losses that, in this case, are not expected to be realized by the bank. This gets to the root of our general observations with respect to FAS 167. It requires reporting entities to recognize assets that they do not own and liabilities that they do not owe.

MBA and CMSA greatly appreciate the opportunity to share their comments with the agencies on the proposed capital rules associated with the implementation of FAS 166 and FAS 167 by banks commencing January 1, 2010. Any questions about MBA's and CMSA's comments should be directed to Jim Gross, Associate Vice President and Staff Representative to MBA's Financial Management Committee, at (202) 557-2860 or jgross@mortgagebankers.org or to Stacy Stathopoulos, Managing Director, Government Relations, Commercial Mortgage Securities Association, (212) 509-1950 or sstathopoulos@cmsaglobal.org.

Most sincerely,

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