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June 15, 2006 via email

Communications Division
Mailstop 1–5
Re: Docket No. 04–12
Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219
regs.comments@occ.treas.gov

Regulation Comments
Chief Counsel's Office
Attn: No. 2006–20
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
regs.comments@ots.treas.gov

Ms. Jennifer J. Johnson, Secretary,
Re: Docket No. OP–1254
Board of Governors of the
Federal Reserve System
20th Street & Constitution Avenue, NW
Washington, DC 20551
regs.comments@federalreserve.gov

Mr. Jonathan G. Katz, Secretary
Re: File No. S7–08–06
Securities and Exchange Commission
450 Fifth Street, NW.
Washington, DC 20549–0609
rulecomments@sec.gov

Robert E. Feldman, Executive Secretary
Attention: Comments/OES
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
comments@fdic.gov

Re: Proposed Interagency Statement on Sound Practices Concerning Complex Structured Finance Activities; **OCC** Docket No. 06-06; **OTS** No. 2006-20; **FRB** Docket No. OP-1254; **FDIC** (no docket number given); **SEC** File No. S7-08-06; 71 Federal Register 28326; May 16, 2006

Ladies and Gentlemen:

The Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency; the Office of Thrift Supervision, and the Securities and Exchange Commission (the Agencies) have requested comments on a re-proposed Interagency Statement on Sound Practices Concerning Complex Structured Finance Activities (Statement). The Agencies' initial proposal was issued in 2004. This re-proposed Statement makes significant changes to the original proposal, and the Statement potentially could be of importance to any commercial bank or savings association participating in complex structured finance transactions (CSFTs). The American Bankers Association (ABA) brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership - which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks - makes ABA the largest banking trade association in the country. The ABA Securities Association (ABASA) is a separately chartered affiliate of the ABA representing those holding company members of the ABA that are most actively engaged in securities underwriting and dealing activities, offering proprietary mutual funds, and derivative activities.

General Comments

The ABA and ABASA ("Associations") support adoption of the guidance as revised, with two additional changes as noted below. The Associations appreciate that the Agencies have carefully considered the comments of the industry to the original proposal and have made significant changes that preserve the core of the guidance on risky CSFTs while resolving the issues of concern raised in the industry by the original proposal. The Associations support the Agencies' efforts to provide guidance to financial institutions about the risks and the necessary internal controls that financial institutions need in order to avoid the legal, regulatory and reputational risks associated with complex structured finance activities that have elevated risks. We concur with the Agencies that such complex structured finance activities require rigorous and disciplined analysis, internal controls, risk management and corporate governance, executed by professionals in multiple disciplines and involving senior management throughout the process. Implementation of such best practices and fostering an unambiguous culture of professionalism, responsibility and integrity are essential. Accordingly, we support adoption of the guidance as revised, with two additional changes. These changes would (a) clarify that the guidance imposes no duty on banks to ensure the accuracy of a client's disclosures or accounting and (b) provide more guidance on the types of "plain vanilla" derivatives and collateralized loan transactions that are outside the scope of the guidance.

Specific Comments

Bankers had considerable concern that the initial proposed Statement actually would have imposed additional risks on financial institutions. That proposal appeared to create obligations and responsibilities that do not currently exist in law, regulation or practice. The re-proposed Statement addresses these concerns by reducing or eliminating the very specific practices that were to be required of any CSFT in favor of a more principals-based approach that incorporates the current law rather than making new law. The Associations are particularly appreciative of the clear statement by the Agencies that "[t]his Statement does not create any private rights of action, and does not alter or expand the legal duties and obligations that a financial institution may have to a customer, its shareholders or other third parties under applicable law."[1]

Our bankers were also concerned that the initial proposed Statement appeared to be overly broad in its application, potentially covering many transactions that the Agencies did not intend to cover. Further, it also did not appear to distinguish among the distinct roles financial institutions play in these transactions, roles that have differing responsibilities as well as risks. It also appeared to fail to adjust its requirements for varying degrees of participation and risk with complex structured finance transactions. Each of these concerns are addressed in the re-proposed Statement and, with the qualifications noted below, the Associations support the manner in which our concerns have been addressed.

First, the Agencies have addressed our concern that the initial Statement was overly broad by reducing the types of CSFTs subject to the Statement and thus reducing the number of institutions affected by the Statement. As the Agencies write: "Structured finance

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[1] 71 FR 28332

transactions encompass a broad array of products with varying levels of complexity. Most structured finance transactions, such as standard public mortgage-backed securities transactions, public securitizations of retail credit cards, asset-backed commercial paper conduit transactions, and hedging-type transactions involving "plain vanilla" derivatives and collateralized loan obligations, are familiar to participants in the financial markets, and these vehicles have a well-established track record. These transactions typically would not be considered CSFTs for the purpose of this Statement…. Because this Statement focuses on sound practices related to CSFTs that may create heightened legal or reputational risks… it will not affect or apply to the vast majority of financial institutions, including most small institutions."[2]

Second, the Agencies have addressed explicitly our concern that the differing roles that financial institutions may play in a CSFT may create different levels and degrees of responsibility by stating that "financial institutions that structure or market, act as an advisor to a customer regarding, or otherwise play a substantial role in a transaction may have more information concerning the customer's business purpose for the transaction and any special accounting, tax or financial disclosure issues raised by the transaction than institutions that play a more limited role. <u>Thus, the ability of a financial institution to identify the risks associated with an elevated risk CSFT may differ depending on its role.</u>"[3]

Third, the Agencies have addressed our concern that the Agencies were applying a "one-size-fits-all" guidance by clarifying that the financial institution's internal controls, policies and procedures must be appropriate to the perceived elevated risk. For example, the Statement now will provide that "In general, a financial institution should conduct the level and amount of due diligence for an elevated risk CSFT that is commensurate with the level of risks identified. …. Accordingly, a financial institution may need to exercise a higher degree of care in conducting its due diligence when the institution structures or markets an elevated risk CSFT or acts as an advisor concerning such a transaction than when the institution plays a more limited role in the transaction."[4]

While the Associations support the changes noted above and appreciates the Agencies' accommodations of our concerns, we offer two additional suggestions for the Agencies' consideration. First, we suggest the guidance be clarified to state explicitly that banks are not responsible for the accuracy of a client's disclosures or accounting. The Agencies include the following in the list of factors that may lead a bank to determine that a transaction warrants additional scrutiny:

> …those [transactions] that (either individually or collectively) appear to the institution during the ordinary course of its transaction approval or new product approval process to:
>
> - * * *
> - Raise concerns that the client will report or disclose the transaction in its public filings or financial statements in a manner that is materially misleading or inconsistent with the substance of the transaction or applicable regulatory or accounting requirements.[5]

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[2] Id. at 28331.

[3] Id. at 28332-33.

[4] Id. at 28333.

[5] Id. at 28332.

In light of the earlier-quoted statement that the guidance “does not alter or expand the legal duties and obligations that a financial institution may have to a customer, its shareholders or other third parties under applicable law,” we assume that this factor does not directly or indirectly impose an obligation to ensure the accuracy of the disclosures or accounting. To avoid any confusion on this part, we suggest the Agencies state explicitly that this factor does not impose a duty on a financial institution to ensure the accuracy of a customer’s public filings or financial statements.

Second, we suggest that the Agencies clarify what is intended by the reference to “’plain vanilla’ derivatives and collateralized loan obligations.”[6] We agree that “plain vanilla” transactions of the type noted should not be within the scope of the guidance, and ask that the Agencies provide an illustrative list of such transactions to minimize the potential for disagreements during examinations.

Conclusion

As restructured, the re-proposed Statement now effectively addresses supervisory concerns about financial institutions’ internal controls and responsibilities with respect to elevated risk CSFTs while avoiding most of the issues raised by the initial Statement. By focusing more pointedly on the CSFTs that are of concern to the Agencies, the Agencies have prepared a more reasonable approach to providing supervisory guidance to banks that engage in structured finance activities. While we believe there remain two opportunities for further improvement, the Associations appreciate very much the changes already made and supports those changes. If the Agencies have any questions about these comments, please call the undersigned.

Sincerely,

Paul Alan Smith

Paul Smith
Senior Counsel

Sarah A. Miller
General Counsel

[6] Id. at 28331.