THE FINANCIAL SERVICES ROUNDTABLE

1001 PENNSYLVANIA AVENUE, NW
SUITE 500 SOUTH
WASHINGTON, DC 20004
TEL 202-289-4322
FAX 202-289-1903

E-Mail rich@fsround.org
www.fsround.org

RICHARD M. WHITING
EXECUTIVE DIRECTOR AND
GENERAL COUNSEL

July 19, 2004

Communications Division
Public Information Rm., Mailstop 1-5
Office of the Comptroller
of the Currency
250 E Street, S.W.
Washington, DC 20219
Attn: Docket number 04-12

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, DC 20552
Attention No. 2004-27

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Ave., N.W.
Washington, DC 20551
Docket No. OP-1189

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429
Attn: Comments/Exec. Secretary Section

Jonathan G. Katz
Securities and Exchange Commission
450 5th Street, N.W.
Washington, DC 20549
File Number S7-22-04

Re: Proposed Interagency Statement on Sound Practices Regarding Complex Structured Finance Activities (69 Fed. Reg. 28980 (May 19, 2004))

Dear Sir or Madam:

The Financial Services Roundtable[1] (the "Roundtable") appreciates the opportunity to comment to the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission (collectively, the "Agencies") on the Interagency

[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine accounting directly for $18.3 trillion in managed assets, $678 billion in revenue, and 2.1 million jobs.

Statement on Sound Practices Concerning Complex Structured Finance Activities, 69 Fed. Reg. 28980 (the "Guidance").

I. Background

The Roundtable supports the efforts of the Agencies to provide guidance in relation to those policies, procedures and practices that can assist financial institutions in mitigating the risks arising from "complex structured finance transactions" ("CSFTs"), while at the same time recognizing that innovative and sophisticated financing techniques, including CSFTs, have an important role to play in international capital markets.

We recognize that, because of the nature of CSFTs, there is potential for deception and abusive practices. We agree with the Agencies that rigorous controls, risk management and corporate governance executed by professionals in multiple disciplines and involving senior management are critical.

Despite our support for the objectives of the Agencies, Roundtable member companies have significant concerns with the Guidance in its current form. We believe the broad nature of the Guidance, and the lack of clarity, may have unintended negative consequences. Roundtable member companies have the following specific concerns with the proposed Guidance:

- The Guidance goes beyond the scope of the obligations and responsibilities that currently exist in law, regulation or practice. As a result, we believe the Guidance would increase, not minimize, the legal risk of U.S. financial institutions;

- The scope of the Guidance is overbroad, covering numerous transactions that should not be covered and failing to distinguish among the distinct roles financial institutions play in these transactions;

- The Guidance is unduly prescriptive and fails to calibrate its requirements to varying degrees of risk;

- The Guidance does not recognize or map the extensive body of current law, regulation and best practice that applies in the context of the roles and transactions covered by the Guidance; and

- Certain additional procedures should be undertaken before issuing any final version of the Guidance.

II. The Guidance Goes Beyond the Obligations and Responsibilities That Currently Exist in Law

We believe that, in a number of areas, the Guidance goes beyond obligations that exist in law and may expose financial institutions to increased risks.

The language of the proposed Guidance imposes on a financial institution obligations and responsibilities in connection with a counterparty's tax, regulatory and accounting treatment of a specific transaction without regard to the financial institution's role in the transaction or conduct in connection with it. As a general matter, financial institutions should not be responsible for the disclosure, tax and accounting obligations or risk assessments of their customers and counterparties. Nor are they responsible for appraising the suitability of a particular transaction for a customer or counterparty. These are the responsibility of the customers' management, boards of directors, accountants and lawyers and the government agencies that oversee them. The Guidance contains standards that could be read to require financial institutions to "ensure" (in other words, "guaranty") the compliance by their counterparties in the CSFT, rather than only "managing" or "addressing" for itself, the risks presented by a counterparty's non-compliance.

We do not believe the Agencies intended to create these strict standards. These standards ignore the realities of the transaction and the roles of the parties. When engaging in these transactions, the financial institution is often acting as counterparty to the customer, rather than as an independent advisor. As with a traditional term loan, the lender and borrower, although working toward a common goal and having an interest in common success, sit on opposite sides of the table – the lender places restrictions on the customer, receives representations and warranties from a customer and receives a contractual indemnity or other contractual remedy (e.g., acceleration, foreclosure, etc.) for breach of such restrictions and representations. In other words, the customer is ultimately responsible for the customer's compliance with the law and compliance with the agreements. If, as the Guidance suggests, the financial institution is responsible for the customer's liability, it would be harmful to the safety and soundness of financial institutions.

There are instances in which financial institutions take significant responsibilities subjecting them to obligations under the law. Certainly, when a customer formally and intentionally retains and compensates a financial institution for undertaking an advisory or other fiduciary role with respect to the customer,

---

[2] Supplementary Information, Section I, eighth paragraph and Section II, first paragraph.

the financial institution may assume significant responsibilities and affirmative duties with respect to the customer's understanding of a particular transaction or strategy.[3] When a financial institution structures a transaction or strategy for a particular tax, accounting or disclosure effect, the institution may also assume an elevated level of responsibility, and established bodies of law and regulatory regimes, ranging from the Investment Advisers Act of 1940[4] to governance of broker-dealers, and multiple theories of common law, address these duties and responsibilities. Without adding to existing law or the regulatory framework, it is clearly impermissible now to knowingly participate in a transaction the strategy or purpose of which is to deceive investors, regulators or tax authorities. Additionally, a financial institution could not prudently proceed with a transaction if it becomes aware of "red flags" indicating such intention unless the institution, through additional review and careful consideration, determines that the transaction does not entail inappropriate risk or violate applicable laws or regulations.[5]

The Roundtable believes the Guidance extends beyond these existing obligations and imposes upon financial institutions a duty to police customer accounting, disclosure and tax practices, and assure the suitability of a transaction for a customer, when the institution participates in or facilitates a CSFT.[6] The imposition of such broad and undifferentiated standards of care would have significant unintended consequences, including:

- greatly increased potential liability and exposure to loss;
- new costs and burdens as financial institutions take steps to minimize their liability and exposure;
- diminished responsibility and accountability on the part of the customer; and
- rendering some transactions uneconomical.

---

[3] Even in this context, final determination of tax, accounting and disclosure issues may fall beyond the specific scope or time span of the financial institution's engagement.

[4] 15 U.S.C. 80a-1 et seq.

[5] Advice by the Agencies as to specific "red flags" to be considered by financial institutions would be welcome; however, the list of factors in the Guidance suggesting "heightened scrutiny" should be reconsidered. While some of the enumerated "red flags" do indeed suggest the need for special scrutiny, others are commonly present in appropriate transactions.

[6] Indeed, quite ironically, the Guidance goes well beyond the dictates of the Citigroup, JP Morgan and Merrill Lynch orders – mandates which were established in a remedial context.

We recommend that the Agencies clearly and unequivocally state that they do not intend the Guidance to create new law or regulation or to impose standards of care and practice beyond the standards embodied by current law. Additionally, the Agencies should carefully scrutinize the specific language of the Guidance to assure that it is not susceptible to more expansive interpretation than the Agencies intended. In addition, we recommend including a positive statement by the Agencies that makes clear that the Guidance is not intended to make financial institutions liable for the actions of their clients or liable for ensuring the compliance of their clients vis-à-vis third parties.

III. The Scope of the Guidance is Too Broad

A. The definitions of covered transactions should be clarified

The key question for any financial institution's procedures, controls and systems will be to define those transactions that are CSFTs and that, consequently, must be subjected to the enhanced scrutiny suggested under the Guidance. The scope of the definition will affect the applicability of all other portions of a financial institution's new or modified policies, procedures and controls.

The key terms specifying the scope of the Guidance, "complex structured finance activities," "complex structured finance transactions" and "heightened risk," are not precisely defined. We believe the Guidance provides general and ambiguous criteria, specified in the Guidance as "not exclusive," and suggests that financial institutions should supplement and modify these criteria to identify transactions that fall within their scope.

The Guidance defines complex structured finance transactions as those that may expose financial institutions to heightened legal or regulatory risk. Section II of the Guidance also lists four criteria that complex structured finance transactions "usually share" and Section III lists additional characteristics that should be considered in determining whether or not a transaction must be subject to heightened scrutiny. The difficulty arises because the enumerated characteristics are exceedingly broad, covering myriad transactions.[7] Given the vague nature of the four characteristics in Section II and the overlap between the characteristics set forth in the two sections, the Guidance creates confusion and obscures the types of transactions that are meant to be covered. Some of these factors are common to routine transactions that are not particularly complex and do not raise heightened

[7] For example, almost any conventional leveraged lease or securitization transaction, for an international customer or even a domestic one, is likely to fall within the scope of the definition proposed by the Guidance. The potential impact on a large portion of the leveraged finance and leasing markets is likely to be severe. These markets provide funding to capital intensive industries (e.g. transportation) that are vital to a vibrant economy.

legal or reputational risks. Certain characteristics, such as the use of a structured special purpose entity ("SPE"), are not inherently problematic. The context of the transaction should determine whether there is reason for heightened concern.

We believe that the broad definition would have a negative effect on financial institutions. Each one of these transactions would be subject to review by a senior management committee and control personnel. This process, which would seem to include a review of numerous routine transactions, would be unmanageable and inefficient. This may also prevent senior personnel from focusing on those transactions that have the potential for greater risks.

In light of the impact of its requirements on financial institutions and the potential reliance on the Guidance by third parties – including courts – the Guidance should state clearly that the determination of which transactions or categories of transactions increase risk and, therefore, require special attention, is primarily within the province of the financial institutions in the exercise of their business judgment, subject to existing law.

B. The Guidance should focus on the various roles in which a financial institution may act with respect to a transaction

Financial institutions play numerous roles with respect to complex structured finance transactions, including:

- a formal advisory or fiduciary role;
- an ongoing and integral role in the finances or other aspects of the customer or its business;
- a role in which the financial institution has structured or marketed the transaction as providing a particular accounting or tax result;
- an arm's-length provider of credit;
- a participant but not lead institution in a financing transaction;
- a purchaser or seller of securities or other assets in the secondary market; or
- a custodian, trustee or escrow agent.

The Guidance does not differentiate among the substantive and procedural responsibilities that are associated with a particular institutional role. Under

existing law, the obligations associated with the respective roles are distinct. For example, the obligations of an institution which has undertaken an advisory role are surely different from one that is an arm's-length provider of financing. And, an institution that markets the desirable regulatory, tax or accounting results expected from a complex financial product may assume different responsibilities, especially in the case of a relatively unsophisticated counterparty.

The failure to properly discriminate among the multiple roles a financial institution can play in a complex financial transaction – even with a more narrow definition of CSFTs – will lead to confusion in the marketplace. We recommend that the Agencies appropriately reflect such distinctions in any final guidance.

C. The Guidance lacks materiality or reasonableness standards

The Guidance lacks any meaningful and useful standards for incorporating a materiality or reasonableness analysis into the definition of CSFTs or the various policies, procedures and controls recommended under the Guidance. The Agencies have not set forth their views with respect to "materiality," either from the perspective of the financial institution or the customer. Although the Agencies state in the Supplementary Information that "policies and procedures concerning complex structured finance activities should be tailored to, and appropriate in light of, the institution's size and the nature, scope and risk of its complex structured finance activities,"[8] and although the Agencies at times use the word "key" to limit the scope of certain policies and procedures, for the most part the language of the Guidance and the "laundry-list" nature of the recommended policies and procedures are not appropriately qualified in scope.

We believe that special scrutiny should be reserved for transactions whose potential impact, on either the financial institution or on the counterparty, is "material." The Roundtable recommends that the Agencies, (1) qualify the scope of the standards by using materiality statements throughout the Guidance, or (2) address the application of materiality through a single clear and encompassing statement in the Guidance.

IV. The Guidance is Unduly Prescriptive and its Requirements Are Not Calibrated to Varying Degrees of Risk

A. The Guidance is too prescriptive

The Roundtable believes policies and procedures outlined in the Guidance are prescriptive and impose significant costs and burdens on financial institutions,

[8] Supplementary Information, Section II, seventh paragraph.

which in some cases are inappropriate. For example, the Guidance seems unduly prescriptive when describing the use of a senior-level committee to review CSFTs. We believe that it may be costly and/or unnecessary to use senior-level committees for all CSFTs. It may be more effective for institutions to review these transactions by business line or utilize a different supervisory review process. Similarly, the Guidance is prescriptive in suggesting that firms specify when external legal counsel or other experts have been consulted. Because of the unique nature of these transactions, financial institutions may not be able to anticipate when outside legal counsel is needed. Therefore, creating policies and procedures that outline when the use of legal counsel is necessary may be unrealistic.

Roundtable member companies recommend that the Agencies adopt a principles-based approach to the development of internal controls and procedures. Financial institutions should be given the flexibility to develop policies and procedures as long as these controls appropriately manage risk. A more prescriptive approach would subject institutions to further legal and reputational risk.

B. Documentation standards

The Guidance recommends that institutions retain documents reporting minutes of committee meetings, minutes of "critical" meetings with customers, client correspondence, as well as documents relating to transactions that the institution did not pursue.[9] Roundtable members believe the document retention standards proposed are overly broad and would impose significant costs on financial institutions for activities that do not involve heightened legal or reputational risk. Moreover, these standards suggest affirmative substantive duties that are inappropriate and beyond the requirements of existing law, regulation or best practice.

We are most troubled with the documentation requirements relating to transactions that the institution did not pursue. The Guidance would require documentation of unapproved transactions if such transactions involve controversial elements. Roundtable member companies believe that this requirement is vague in terms of what are "controversial elements." We believe that creating documents for a transaction that was not consummated, simply because it had a "controversial" element, is unlikely to yield any meaningful benefit in terms of managing legal or reputational risk. Instead, the obligation would be burdensome in terms of cost and personnel and would create the need for generating documentation that did not otherwise exist.

---

[9] 69 Fed. Reg. at 28989.

If a transaction is abandoned in its early stages, the proposed documentation requirement would impose an obligation on a financial institution that is unnecessary for business purposes. This documentation requirement could also needlessly and inappropriately involve the financial institution in third-party litigation and create potential exposure to the customer.

The Guidance also proposes that financial institutions document and retain any formal or informal analysis or opinions, whether prepared internally or by others, that relate to legal considerations, tax and accounting matters, market viability and regulatory capital requirements. This obligation, particularly the requirement to retain records of informal communications, could have an unintended chilling effect on open discussions between financial institutions and their customers or counterparties, as well as a chilling effect on communications within the financial institution. If any final guidance does require retention of analysis or opinions, only significant and formal materials should be covered.

Similarly, the proposal in the Guidance that financial institutions maintain "minutes of critical meetings with clients" will hamper or prevent legitimate business negotiations and other discussions and could impede the completion of routine transactions. Creating minutes would be impractical or impossible in the context of a fast-paced and complex transaction involving multiple parties and advisers, and customers in many circumstances would oppose such intrusive documentation of meetings.

The Roundtable believes that financial institutions are in the best position to determine what documentation should be produced and retained in order to identify and minimize risk in the context of that institution's overall internal control procedures and business requirements. Financial institutions should be given the flexibility to develop policies and procedures that are either applicable to all transactions or broken down by business line. Although the Guidance uses words like "as appropriate" to qualify documentation standards and thus appears to provide some flexibility, the enumerated items will for all practical purposes become requirements – a "check list" for examiners, plaintiffs and courts. If the final guidance must include any prescriptions regarding documentation, those prescriptions should do no more than require a financial institution to develop or maintain its own documentation policies that mandate the retention of records regarding complex structured finance transactions that are both approved and completed.

C. Reporting

The Guidance discusses reports that are to be provided to senior management, including the board of directors (the "Board"), relating to pending and completed CSFTs.[10] We agree that effective oversight by a financial institution's Board is fundamental to preserving the integrity of capital markets. We also agree that the Board is ultimately responsible for ensuring that the risks associated with a firm's activities are effectively identified, evaluated and controlled by management. However, the Roundtable opposes reporting these specific pending or completed transactions to senior management or the Board unless the transactions are material to the financial institution.

V. The Guidance Does Not Recognize Existing Law and Regulation

To be effective, we believe the Guidance must recognize and reflect the complex body of law, regulation and practice that has evolved with respect to the transactions purportedly covered by the Guidance. We believe that certain aspects of the Guidance are inconsistent with well-settled bodies of law and practice. We are confident that this was not the Agencies' intent.

The Guidance should clearly incorporate a fair explication of pertinent bodies of law and regulation, including (but not limited to) securities laws, lender liability jurisprudence, existing accounting standards, rules of practice, regulatory oversight, the work of the IRS ("Internal Revenue Service") in connection with tax shelters and the extensive body of state and common law and regulation arising out of the very concerns addressed by the Guidance. To the degree that the Agencies identify gaps, or within their authority seek to resolve conflict or ambiguity in the existing regulatory framework, they should do so expressly seeking further comment as to the propriety and effect of such action.

The work of the U.S. Department of the Treasury (the "Treasury Department") in connection with tax shelters is illustrative. The Guidance suggests that the expected tax consequences to the financial institution's customer of a complex financial transaction be considered by the financial institution in determining its procedures for approving the transaction. Requiring financial institutions to take into account such tax consequences raises at least three issues. First, the financial institution may not know the customer's expected tax consequences, particularly if the financial institution is engaging in what is for it a relatively routine transaction but that is part of a larger transaction for the customer. Second, customers may well view their expected tax consequences as confidential, and may be unwilling, and should not be required, to share tax

[10] 69 Fed. Reg. at 28989.

analyses with financial institutions, particularly if such analyses are subject to attorney-client privilege or to the privilege for communications with federally authorized tax practitioners created by Section 7525 of the Internal Revenue Code. Sharing such privileged communications with a financial institution would waive any such privileges. Third, to the extent that the Guidance suggests that a financial institution does assume some responsibility for the expected tax consequences of a transaction for a customer or counterparty, this increased responsibility for the financial institution could diminish the care taken by the customer or counterparty.[11] The Agencies could not have intended this result.

In addition, and more importantly, the Treasury Department has over the last four years promulgated regulations that are intended to provide it with information regarding tax shelters in order to better enforce the tax laws. These regulations have been subject to substantial revision since they were initially proposed in 2000 to reflect the comments of taxpayers and other interested parties in order to tailor the regulations to meet the enforcement goals of the IRS. Further, tax shelters are the subject of proposed legislation that would expand and strengthen the current regulatory requirements.[12] The State of California has already imposed its own tax shelter disclosure rules which supplement the federal rules, and other states have such proposals pending.[13]

Current federal tax disclosure regulations require "promoters", which may include financial institutions, to maintain lists of persons participating in tax shelters, and require participants in tax shelters, to include relatively detailed disclosures relating to the transactions in their tax returns.[14] The transactions subject to these rules include so-called "listed transactions," which are specific transactions identified publicly by the IRS, and other transactions that meet certain prescribed criteria set forth in the regulations.[15] The IRS has maintained flexibility in the regulations, through an administrative procedure that allows it to identify

[11] For the same reason, the proposed requirement in the Guidance that a financial institution assume increased responsibility for a customer's accounting treatment of, and disclosure regarding, a particular transaction could reduce the degree of care taken by the customer in these areas.

[12] The House-passed "American Jobs Creation Act of 2004" (H.R. 4520) and the Senate-passed "Jumpstart Our Business Strength (JOBS) Act of 2004" (S. 1637).

[13] 2003 Cal. Legis. Serv. Chs. 654 & 656, filed with Secretary of State (Oct. 2, 2003).

[14] In addition, certain "promoters" of certain transactions that are offered to multiple participants where a principal purpose of the transaction is tax avoidance must register the transaction with the IRS prior to the first offer. Treas. Reg. Sec. 301.6111-2.

[15] The regime does not rely on promoters to second-guess their customers' tax planning, which would raise the confidentiality issues addressed above. Rather, the regime requires various forms of disclosure depending on whether the transaction meets certain specified criteria. The policy rationale reflects the view that parties are unlikely to engage in a questionable transaction if it must be disclosed, and the disclosure of transactions enables the IRS, rather than financial institutions, to pass judgment on the transactions.

new listed transactions, to expand the reach of the regulations to new transactions as the IRS becomes aware of them.[16]

In our view, compliance with the list maintenance and registration rules as established by the Congress and the Treasury Department should be both necessary and sufficient for a financial institution to have met its duty with respect to its customers' tax matters. It would be unduly burdensome for Agencies to impose duplicative, and possibly conflicting, duties in the tax area, especially in the face of pending Congressional action and possible additional state disclosure requirements. Further, in light of the substantial experience of the IRS in dealing with complex financial transactions, we urge the Agencies to consult with the IRS prior to promulgating standards intended to apply to other relevant areas.

More broadly, and with this illustration in mind:

- The Agencies should incorporate and articulate their views of the application of the securities laws to the multiple roles of financial institutions in complex structured finance transactions and their obligations with respect to customer and counterparty disclosure. The Guidance goes well beyond the advice of the Securities and Exchange Commission to the banking agencies,[17] and certainly existing case law.

- The Agencies should expressly consider the impact of a significant body of law (i.e., the Sarbanes-Oxley Act) and regulation (including the stock exchange rules) on corporate governance specifically arising out of the very abuses that give rise to the Guidance. This body of law, regulation and best practice should be recognized and clearly presented in the Guidance.[18] The Agencies should not create a new layer of requirements – even those not inconsistent with current law – without a clear demonstration of need.

- The Agencies should recognize and incorporate bodies of law, such as the jurisprudence involving lender liability, where courts have made plain the absence of a fiduciary obligation on the part of an arm's-length creditor. Although we are confident this was not the intent, the Guidance appears to reverse this well established legal rule, and risks creating new standards of

[16] The first listed transaction was identified on February 28, 2000. To date, the IRS has identified 31 listed transactions. Notice 2003-76, 2003-49 IRB 1181 contains 26 listed transactions and five more have been added since that notice.

[17] Letter from Annette L. Nazareth, Director, Division of Market Regulation, Securities & Exchange Commission, to Richard Spillenkothen, Director, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System, and Douglas W. Roeder, Senior Deputy Comptroller for Large Bank Supervision, Office of the Comptroller of the Currency (Dec. 4, 2003) (available at the Federal Reserve's website as SR Letter 04-7 May 14, 2004).

[18] Such a presentation might be extremely helpful for less sophisticated institutions and customers.

care, and indeed new substantive grounds for liability, that would greatly increase, rather than diminish, financial institution risk.

- The Agencies should recognize that the obligations and responsibilities with respect to transactions involving individuals and private companies are different from those associated with public companies, and even further removed from transactions with the public at large.

- Finally, the Agencies should recognize the competitive, practical and legal consequences of globalization in the marketplace. Any significant guidance issued by the Agencies must be coordinated with foreign authorities, as the Agencies have done with Basel II and the Conglomerates Directive. The failure to do so will competitively disadvantage U.S. institutions, and risks creating rules and expectations at odds with the law in other significant jurisdictions.

VI. Procedural Recommendations

The Roundtable believes the following recommendations, if followed, would enhance the proposed Guidance and assist the Agencies in achieving their goals while minimizing any potential unintended consequences. These steps include:

- Republish a significantly modified Guidance for further comment. The Agencies should treat the proposed Guidance as the equivalent of an advance notice of proposed rulemaking and republish it for further comment after consideration of this round of comment. Although we are cognizant of the perceived need to act quickly, we are certain that the sweep and sensitivity of issues posed by the Guidance require a more deliberate and measured process.

- Consult with other agencies and expert bodies. In developing any Guidance, the Agencies should consult other relevant regulatory bodies, including the Treasury Department and the IRS, as well as the various bodies responsible for promulgating accounting standards across all industries. In addition, because of the cross-border nature of the transactions in question and the competitive consequences of imposing new burdens on U.S. institutions, this effort should be coordinated with regulators in the European Union and other significant countries.

- Expressly provide for an implementation period. Any final Guidance should expressly provide for an implementation period of at least six to nine months to assure that affected institutions have appropriate time to modify internal

policies and procedures, if necessary.

- Survey and monitor institutional behavior and respond with a tailored supervisory approach. The Agencies should monitor, through the supervisory process, steps that financial institutions have already taken to address the concerns expressed in the Guidance and identify specific shortcomings on a case-by-case basis.

VII. Conclusion

Roundtable member companies are committed to working with the Agencies to address our concerns with the proposed Guidance. We believe that the proposed Guidance would have a significant impact on the financial markets, included several unintended negative consequences.

First, since the responsibilities and obligations in the Guidance go beyond those that currently exist in law, regulation and practice, we believe the Guidance would create inappropriate liability to third parties and increase risk for financial institutions. Second, the broad scope and prescriptive nature of the Guidance would impose significant new costs and burdens upon numerous transactions which are not currently inappropriate or controversial. Third, some of the recordkeeping and documentation requirements could have a chilling effect upon discussions with customers and counterparties. And, fourth, because the Guidance does not recognize existing law, regulation and best practice, its adoption would confuse rather than guide behavior in the marketplace.

We strongly urge the Agencies to exercise caution moving forward with this Guidance. If the Agencies believe that final guidance must be issued, we recommend that the Agencies republish the Guidance for further comment. If you have any further questions or comments on this matter, please do not hesitate to contact me or John Beccia at (202) 289-4322.

Sincerely,

Richard M. Whiting

Richard M. Whiting
Executive Director and General Counsel