COVINGTON & BURLING

1330 AVENUE OF THE AMERICAS
NEW YORK, NY 10019
TEL 212.841.1000
FAX 212.841.1010
WWW.COV.COM

NEW YORK
WASHINGTON
SAN FRANCISCO
LONDON
BRUSSELS

BRUCE C. BENNETT
TEL 212.841.1060
BBENNETT@COV.COM

July 19, 2004

Office of the Comptroller of the Currency
250 E Street, S.W.
Public Reference Room
Mail Stop 1-5
Washington, D.C. 20219
regs.comments@occ.treas.gov

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
regs.comments@ots.treas.gov

Board of Governors
of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
Attention: Jennifer J. Johnson, Secretary
regs.comments@federalreserve.gov

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

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609
Attention: Jonathan G. Katz, Secretary
rule-comments@sec.gov

Re: OCC Docket No. 04-12
OTS No. 2004-27
Federal Reserve Docket No. OP-1189
FDIC Reference Comments/OES
SEC File No. S7-22-04
Proposed Policy Statement: Interagency Statement on Sound Practices Concerning Complex Structured Finance Activities (69 Fed. Reg. 28980 (May 19, 2004))

Ladies and Gentlemen:

Covington & Burling is pleased to respond to the request of the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Securities and Exchange Commission (collectively, the "Agencies") for comments on the Agencies' joint Proposed Policy

Statement concerning complex structured finance activities cited above (including the supplemental information included therewith, the "Statement").[1]

We support the Agencies' objective of ensuring that financial institutions subject to supervision by one or more of the Agencies develop and maintain adequate internal control and risk management procedures related to complex structured finance activities. We also agree with the Agencies that in the vast majority of cases, structured finance transactions, even those of great complexity, serve the legitimate business needs of customers and achieve beneficial results for the capital markets.[2] We further believe that the vast majority of corporations that engage in complex structured finance transactions do so for valid business purposes, and account for, and disclose the financial impacts of, such transactions appropriately, despite recent and troubling examples to the contrary.

The purpose of this comment letter is to respectfully suggest that certain recommendations contained in the Statement as proposed may prove to be unworkable in practice, at least to the extent that complex structured finance transactions involve companies that are required to file periodic and other reports with the Securities and Exchange Commission pursuant to Sections 13(a) and 15(d) of the Securities Exchange Act of 1934. If the Agencies adopt these recommendations as best practices for financial institutions subject to their supervision, we believe that this could lead these financial institutions to adopt practices that unnecessarily impair the ability of their customers to execute such a transaction, either by delaying execution or by unnecessarily raising the cost of doing so such that the transaction is no longer economically attractive. In the worst case, the Statement, if adopted as proposed, could prevent otherwise valid structured finance transactions from occurring, or could unnecessarily impose additional legal risks on financial institutions subject to supervision by one or more of the Agencies. These risks could impair the vibrancy of our capital markets by forcing participants to execute transactions offshore or by artificially reducing the range of options available to companies seeking to select the optimal financing alternative. We believe that these risks can be addressed without impairing the ability of the Statement to provide meaningful guidance to financial institutions as they evaluate their internal control and risk management procedures related to complex structured finance activities.[3]

---

[1] The Agencies extended the deadline for comments on the Proposed Statement from June 18, 2004 to July 19, 2004. 69 Fed. Reg. 34354 (June 21, 2004).

[2] See Annette L. Nazareth, Director, Division of Market Regulation of the Securities and Exchange Commission, Testimony Concerning Transparent Financial Reporting for Structured Finance Transactions, December 11, 2002 (http://www.sec.gov/news/testimony/121102tsan.htm) ("Nazareth Testimony") ("When used properly, [structured finance] can provide needed liquidity and funding sources, investment opportunities, and can facilitate risk dispersion.").

[3] While we are not submitting this comment letter on behalf of specific clients, we have discussed the issues addressed herein with senior management of several publicly-held clients.

Accounting and Disclosure by Customers

The Statement suggests that a financial institution should inquire as to a customer's (i) business purpose in entering into a complex structured finance transaction, (ii) accounting for the transaction, and (iii) disclosure of the transaction. This recommendation is expressed repeatedly throughout the Statement, in many instances inconsistently, and this inconsistency makes it difficult to understand precisely what the Agencies believe to be the best practice in this area. This uncertainty could lead to the creation of overly broad internal policies by financial institutions that seek in good faith to follow the letter and the spirit of the Statement. However, even if these inconsistencies are remedied, we believe that there are substantive issues with the second and third components of this recommendation that could render it unworkable, and could even create additional legal risk for the financial institutions as they seek to rely on the Statement as a means of limiting that risk. We discuss each of these concerns below.

Review of a Customer's Accounting Treatment of a Complex Structured Finance Transaction.

The Statement recommends in several instances that a financial institution should understand how a customer intends to account for a complex structured finance transaction upon completion of the transaction. Some references clearly limit this to the customer's proposed accounting treatment, but in other instances the Statement refers to review of a customer's accounting treatment unmodified by the word "proposed." Some of these references arise in the context of the identification by the financial institution of a situation involving an unusually high degree of risk, suggesting that in these higher risk transactions, the financial institution would be expected to review final rather than proposed accounting treatment. One such reference even suggests that the customer be required to provide a written representation and warranty to the financial institution as to its accounting treatment.[4]

We believe that the Statement should only recommend that a financial institution inquire as to a client's proposed accounting treatment for the transaction in question. It is entirely appropriate to expect that the customer have a basic understanding of how it would expect to account for the transaction in its audited financial statements for the fiscal year in which the transaction is consummated. Implicit in this expectation is that the customer will have discussed the accounting treatment for the transaction with its independent public accounting firm prior to entering into the transaction, and we agree that the financial institution that is the primary counterparty to the customer in the transaction should, as a matter of basic diligence, be aware of this proposed accounting treatment and satisfy itself that there are no material differences between the customer, its Audit Committee and its independent auditors. The Statement also contemplates that a financial institution could retain a public accounting firm to evaluate the accounting treatment of a complex structured finance transaction.[5] However, we do not believe

---

[4] See the third paragraph under the caption "Accounting and Disclosure by Customers" in the Statement.

[5] We note that AICPA Statement on Auditing Standards No. 50 imposes specific obligations on an accounting firm when rendering an oral or written report on the application of accounting principles to a particular transaction. In addition, SAS 50 was amended by Statement on Auditing Standards No. 97 to preclude the issuance of such a report (continued…)

that it is plausible to expect the customer to be in a position to commit to definitive accounting treatment at any time prior to the completion of the preparation of the customer's financial statements for the fiscal year in question and of their independent public accounting firm's audit of those financial statements.

There are several reasons for this concern. First, any transaction will be executed prior to the preparation of the audited financial statements for the fiscal year in question, or of the unaudited financial statements for the fiscal quarter in question. We expect that any attempt by the customer to "lock in" such treatment in advance of the completion of the audit would almost certainly be resisted by its auditors. In turn, since the financial statements are prepared by the company, not by its auditors, the auditors cannot definitively recommend any presentation until they have had an opportunity to perform their audit on the financial statements as prepared by the company.

We also believe efforts by any third party to compel a publicly-held company to adopt a particular accounting treatment or presentation would usurp the Audit Committee's authority and responsibility to oversee the work of the company's auditors for the purpose of preparing an audit report, and to resolve disagreements, if any, between management and the auditors regarding financial reporting. This statutorily-imposed duty[6] cannot be delegated to any other individual or institution.

In addition, the growing complexity of United States generally accepted accounting principles has created uncertainty as to the appropriate treatment of certain transactions and structures. Companies and auditors, struggling in good faith with these shifting sands, are increasingly finding themselves revising previous views as to accounting treatment as they prepare the financial statements and complete the audit. Such a change could occur for any number of reasons, including a change in analysis on the part of the company's auditors, publication of a new interpretation by the entities that promulgate the literature that constitutes GAAP in the United States, or issuance of a statement by an accounting regulator that calls into question standards that were accepted at the time the transaction in question was consummated. Finally, regardless of what one may think of the long-term merits of the potential shift to principles-based accounting, it is reasonable to expect that if this shift occurs, uncertainty as to accounting treatments and presentations will increase in the short term, perhaps dramatically. None of these events would in any way challenge the good faith expectation of the company and its auditors at the time the complex structured finance transaction was being executed, but could cause the proposed accounting treatment or presentation to shift, perhaps materially. The result would still be consistent with U.S. GAAP, but it may not be consistent with undertakings made by the customer to the financial institution at the time the complex structured finance transaction was entered into.

---

regarding "hypothetical transactions." See Nazareth Testimony for a discussion of SAS 50 and SAS 97; see also Comment Letter, dated June 18, 2004, of Deloitte & Touche LLP regarding the Statement.

[6] See Section 10A(m)(2) of the Exchange Act.

Finally, a publicly-held company could receive SEC comments as a result of a review of its periodic and other reports filed under the Exchange Act, or of a review of a registration statement filed under the Securities Act of 1933, that could result in a change in accounting treatment or presentation of a previously consummated complex structured finance transaction.

These factors would render any undertaking by a customer as to definitive accounting treatment of a complex structured finance transaction at best illusory. It is also unclear what benefit to the process would be achieved by requiring the customer to enter into some undertaking or to provide some form of certification, both with implicit remedies if the undertaking or certification proves to be incorrect, if the change results from any of the events described above. Rather than try to negotiate ever-more complex contractual provisions or certifications attempting to anticipate each such potential situation, we believe that the financial institution should be encouraged to undertake a reasonable inquiry regarding the customer's proposed accounting treatment of the complex structured finance transaction, but to do so with the understanding that it is not possible for the customer (or its auditors) to provide any binding assurances as to the ultimate accounting treatment to be adopted.

Because of these concerns, we would consider it inadvisable for any SEC registrant to enter into a contractual undertaking, or provide a written certification, as to what it believes the definitive accounting treatment of a complex structured finance transaction would be at any time prior to completion of the relevant financial statements and audit (or, in the case of quarterly financial statements, auditor review), because of the unacceptably high potential that subsequent events out of the company's control could require it to adopt a different approach. We fear that if the Statement as adopted could be read to require customers to commit or certify in a legally binding manner to a particular accounting treatment or presentation, this could lead financial institutions to insist on such a commitment as a condition to their participation in the transaction, which could lead well-advised companies to refrain from entering into otherwise beneficial complex structured finance transactions.

<u>Review of a Customer's Disclosures Regarding a Complex Structured Finance Transaction</u>

The Release as proposed also recommends in several instances that the financial institution review a customer's disclosures regarding the complex structured finance transaction. While we are in no way suggesting that improper or misleading disclosures regarding such a transaction are acceptable, we believe that any mandated involvement by financial institutions in the preparation of a registrant's financial statements or related disclosures is inadvisable and unworkable for the reasons discussed below.[7]

---

[7] While the Statement as proposed is not entirely clear on this point, we interpret the disclosure review contemplated by the Statement as proposed to encompass both the customer's presentation of the complex structured finance transaction in its financial statements (including the notes thereto) as well as the customer's disclosures regarding the impact of the complex structured finance transaction on its results of operations, financial condition and liquidity in the accompanying Management's Discussion and Analysis or elsewhere in the disclosure document or (continued…)

*Drafting Disclosure Relating to a Complex Structured Finance During the Transaction Would Be Premature***.** In many instances involving complex structured finance transactions, the client will be many months away from preparing its annual financial statements and drafting its related disclosure documents. For example, assume that a public company that is an accelerated filer and has a fiscal year ending on December 31 entered into a complex structured finance transaction in February of 2004. It will not have to file its Form 10-K for that fiscal year until March 1, 2005. Thus, at the time the company enters into the transaction, it will be 13 months away from filing disclosure containing audited financial statements and related disclosures regarding the transaction.[8] Of course, the company was required to file its quarterly report on Form 10-Q much sooner (by May 10, 2004 in the above hypothetical). However, any disclosure of the transaction in this quarterly report will be included in unaudited financial statements that will be reviewed, but not audited, by the company's independent auditors. Also, MD&A disclosure in the Form 10-Q of a complex structured finance transaction may well be different from disclosure in the Form 10-K. Disclosure in the quarterly report is likely to focus on the specific transaction that occurred in that quarter and as such will be a more deal-specific description of that particular transaction.[9] By contrast, a company that may have entered into various complex structured finance transactions during its fiscal year should aggregate MD&A disclosure of these transactions in its Form 10-K to the extent that aggregation makes the disclosure more meaningful and provide information in an efficient and understandable manner.[10]

The Statement as proposed implies that these timing issues ought not to be relevant in that the parties can review proposed disclosure during the execution of the complex structured finance transaction. We do not believe that this is a workable approach. Financial and related disclosures can only be effectively drafted in the context of the company's overall results. Any attempt to draft disclosure (whether in the notes to the financial statements or in MD&A or related disclosures) creates disclosure in the absence of context, which may prove to be inappropriate when the time comes to insert it into the company's overall disclosures for the period in question. The staff of the SEC has consistently stressed that MD&A disclosure should emphasize the major themes underlying the company's results of operations, financial condition and liquidity. Simply dropping in an isolated and independently created disclosure relating to a

---

registration statement. As has been repeatedly noted by the SEC, MD&A disclosure must interpret the information conveyed by the financial statements, so any review by the financial institution of a client's financial statement disclosure will of necessity affect disclosures in the MD&A and perhaps other portions of the document in question.

[8] This assumes that the transaction would not otherwise require disclosure on Form 8-K under the SEC's new rules for that form, which take effect on August 23, 2004.

[9] According to SEC guidance, material changes to items disclosed in annual reports should be discussed in the quarter in which they occur. See Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-8350 (December 19, 2003) at Section III.B.2.

[10] See Final Rule: Disclosure in Management's Discussion and Analysis about Off-Balance Sheet Arrangements and Aggregate Contractual Obligations, Release No. 33-8182 (January 28, 2003) at Section III.C.

complex structured finance transaction (or stringing together independently created disclosures of multiple such transactions) will fail to provide the interrelated analysis that underlies effective disclosure.

Permitting Financial Institutions to Participate in the Preparation of Disclosure Documents would be Inadvisable. Alternatively, the Statement as proposed could be read to suggest that the financial institution should negotiate the right to review and comment upon a customer's disclosures regarding a complex structured finance transaction at the time the relevant disclosure or other document is being prepared. As described below, we believe it would be inadvisable for the customer to agree to this sort of third-party review of its non-public disclosures, and also for the financial institution to accept an invitation of this nature if one were offered.

Registrants and their Management and Directors Bear Significant Liability for their Disclosures and will be Unwilling to Cede Control to Third Parties. Companies required to file periodic and other reports with the SEC, and their officers and directors, bear significant liability for the accuracy of their disclosures, whether in periodic reports filed pursuant to the Exchange Act or in Registration Statements filed pursuant to the Securities Act.[11] In addition, the Sarbanes-Oxley Act has introduced rigorous certification requirements that must be complied with by CEOs and CFOs of reporting companies.[12] These certifications carry potential civil and criminal liability.

Similarly, it is the company that bears the ultimate responsibility for its financial statements. This remains true even if the company's auditors make suggestions as to the form or content of the financial statements, or even if they draft them in whole or in part. While these are audited (or, in the case of quarterly reports, reviewed) by the company's independent public accountants, the accounting literature (as well as the audit opinion delivered in respect of audited financial statements) makes clear that the financial statements are the responsibility of management. Under the Securities Act, the issuer is strictly liable for all of the information contained in the registration statement, including the financial statements.[13]

The Statement as proposed suggests that publicly-held companies agree to review disclosures with financial institutions. As noted above, in one instance the Statement proposes

---

[11] For example, see Sections 11, 12 and 17 of the Securities Act and Sections 10 and 18 of the Exchange Act and Rule 10b-5 thereunder. Controlling persons (as defined in both Acts) may also bear liability on a joint and several basis for inadequate disclosure and other violations of these Acts. See Section 15 of the Securities Act and Section 20 of the Exchange Act.

[12] See Rules 13a-14 and 15d-14 under the Exchange Act.

[13] The Securities Act provides that directors and officers are subject to a lesser standard of liability in respect of information, such as audited financial statements, that is "expertised." A company's public accountants take on this expert liability in respect of audited financial statements when they have expressly consented to the assumption of such liability. See Section 11(a)(3)(C) of the Securities Act. See also Paul Munter & Thomas A. Ratcliffe, Applying GAAP and GAAS § 24.02 (37th Release 2003).

that companies deemed to pose higher than normal risks should be required to commit contractually to such an arrangement. We believe it would be inadvisable for a publicly held company to enter into any arrangement whereby an unaffiliated third party has rights to participate in, or review, disclosures made by the company to its security holders. The interests of the parties may very well diverge in this situation for any number of reasons.

We also believe that this approach implies that the liability provisions of the federal securities laws provide inadequate incentive to publicly held companies to provide clear and accurate disclosure to their security holders. While there have doubtless been examples of disclosure that has failed to meet the standards set by the securities laws in recent years, we believe that the vast majority of public companies that have engaged in complex structured finance transactions, with the assistance of their independent public accountants and other advisors, prepare disclosure documents that meet the standards imposed by the federal securities laws.[14] Any suggestion that financial institutions must provide an additional level of scrutiny to ensure that adequate disclosures are made is, we believe, inconsistent with the policy underlying the securities laws, unless the financial institution is prepared to undertake liability for the disclosure in question. We discuss this question below.

Financial Institutions That Actively Participate In the Preparation of a Registrant's Disclosures Could be Deemed to Have Assumed Liability For Those Disclosures. As noted above, the federal securities laws impose significant liabilities on public companies, and their officers and directors, for the accuracy of disclosure documents. The securities laws can also impose liability on third parties that actively participate in the preparation or review of a registrant's disclosures.[15] While the precise parameters of this form of liability vary across the

---

[14] We note that generally accepted accounting principles and generally accepted auditing standards also require auditors to perform reviews that in many ways overlap with steps that the Standard proposes to impose on financial institutions. For example, AICPA Statement on Auditing Standards No. 1 states:

> The auditor has a responsibility to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud.

The AICPA subsequently adopted Statement on Auditing Standards No. 99 to establish standards and provide guidance to auditors in fulfilling their responsibilities under SAS No. 1 as it relates to fraudulent misstatements. In particular, paragraph 66 of SAS No. 99 states:

> During the course of the audit, the auditor may become aware of significant transactions that are outside the normal course of business for the entity . . . . The auditor should gain an understanding of the business rationale for such transaction and whether that rationale (or the lack thereof) suggests that the transactions may have been entered into to engage in fraudulent financial reporting or conceal misappropriation of assets.

Finally, the AICPA adopted Statement on Auditing Standards No. 54 to establish standards and provide guidance to auditors relating to detecting misstatements resulting from illegal acts.

[15] The SEC, in a letter from Annette L. Nazareth, Director, Division of Market Regulation, Securities and Exchange Commission, to Richard Spillenkothen, Director, Division of Banking Supervision and Regulation of the Board of Governors of the Federal Reserve System, and Douglas W. Roeder, Senior Deputy Comptroller, Large Bank (continued…)

various federal judicial districts, it is clear that plaintiff's lawyers, in search of the deepest possible pockets, will leap at any opportunity to include a large financial institution as defendant in any action alleging improper disclosure. Therefore, while the Statement is intended to suggest best practices designed to reduce the liabilities faced by financial institutions that participate in complex structured finance transactions, any suggestion that these institutions participate in the preparation of disclosure documents of public companies relating to these transactions may in fact expose the financial institutions to increased liabilities.

Supervisor of the Office of the Comptroller of the Currency, dated December 4, 2003, gave the following guidance regarding a financial institution's potential liability for securities law violations arising from deceptive structured finance products and transactions:

> Depending on the facts and circumstances, a financial institution could be liable for securities law violations when it offers deceptive structured finance products to, or participates in deceptive structured finance transactions with, a U.S. publicly traded company. A financial institution could have primary liability for antifraud violations. More commonly, it could be liable for aiding and abetting antifraud, reporting, recordkeeping, and internal controls violations. It could also be liable for causing such violations.

In *Central Bank of Denver N.A. v. First* Interstate *Bank of Denver, N.A., 511 U.S. 164, 191, (1994)*, the Supreme Court held that a private plaintiff may not maintain an aiding and abetting suit under Section 10(b) of the Exchange Act. However, the Supreme Court went on to state:

> [t]he absence of § 10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the securities Acts. Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming all of the requirements for primary liability under Rule 10b-5 are met.

Following the Supreme Court's ruling in *Central Bank*, the lower courts have formulated various standards to determine when the conduct of a secondary actor makes it a primary violator under the Exchange Act. Two divergent standards, the "bright line" test and the "substantial participation" test, have emerged. (*Enron Corp. Sec. Derivative & ERISA Litig.,* 235 F. Supp. 2d 549, 583 (S.D. Tex. 2002)). The federal court in the Enron case went on to quote, and adopt, the rule that the SEC had proposed for primary liability of a secondary party under Section 10(b) of the Exchange Act in its *amicus curiae* brief:

> when a person, acting alone or with others, creates a misrepresentation [on which the investor-plaintiffs relied], the person can be liable as a primary violator . . . if . . . he acts with the requisite scienter.

SEC *amicus curiae* brief at 18. The court went on to state:

> Moreover it would not be necessary for a person to be the initiator of a misrepresentation in order to be a primary violator. Provided that a plaintiff can plead and prove scienter, a person can be a primary violator if he or she writes misrepresentations for inclusion in a document to be given to investors, even if the idea for those misrepresentations came from someone else.

Enron, 235 F. Supp. 2d 546 at 587-590.

Other Miscellaneous Comments

Reputational and Legal Risk

The Statement recommends that financial institutions adopt policies and procedures designed to ensure that reputational and legal risks associated with a complex structured finance transaction are understood by both the financial institution and by the client. In particular, the Statement as proposed, in the second paragraph under this heading, suggests that financial institutions should ensure that the customer understands the risk and return profile of the transaction, and that disclosures made by the financial institution include an adequate description of the risks and other factors that the customer should be aware of. We believe this is an appropriate recommendation, but are concerned that practice may be inconsistent with this goal.

Our experience in complex structured finance transactions is it is becoming increasingly common for financial institutions to require customers to agree by way of contract, or attempt to deem customers to have agreed, that the customer has not relied upon any communication (written or oral) it has received from the financial institution related to the transaction. In some cases, these non-reliance representations provide that the customer has not relied upon such communications as investment advice or as a recommendation to enter into the transaction.[16] In other cases, the scope of the non-reliance is broader. It is also possible that foreign regulators could also recommend or require similar provisions in transactions implicating their jurisdiction. Non-reliance representation may usefully allocate risks between parties and are not necessarily inconsistent with the disclosure goal as enunciated in the Statement. However, the Agencies may want to consider whether such disclosure achieves that goal if the customer is expressly prohibited from relying upon it.

Documentation Standards

We note the suggestion under this caption in the Standard that financial institutions should include in their documentation of a complex structured finance transaction minutes of critical meetings with the client. Our experience is that it would be highly unusual for minutes to be taken in any meeting relating to a complex structured finance transaction. We also believe that the formal taking of minutes should be discouraged, for the reasons described below.

If the minutes are to have any relevance, they would have to be reviewed and agreed by all parties to the meeting. Otherwise, they are merely the uncorroborated views of the minute

---

[16] This formulation has become standard in derivatives documentation, particularly those transactions executed on International Swaps and Derivatives Association forms. This dates back to the promulgation by ISDA and the Federal Reserve Bank of New York of the Principles and Practices for Wholesale Financial Market Transactions. This document, which was issued in 1996, included non-reliance representations as a means to reduce the risk to derivatives dealers of being deemed to be a guarantor of the outcome of complex structured derivatives transactions that did not perform as a customer might have hoped. While the Principles never attained widespread adherence, non-reliance representations have become a standard, and in our experience virtually non-negotiable, part of derivatives documentation.

taker, but not necessarily consistent with the views of the other parties in the meeting. To the extent that the meeting in question is an early-stage meeting with senior management to discuss the proposal, we doubt that senior management will be willing to expend the time necessary to review the minutes. To the extent that the meeting is at a later stage of the transaction, there are likely to be many participants, so achieving an agreed-upon set of minutes is likely to be a very time consuming task. We believe that this aspect of the Statement as proposed would be unworkable solely on this basis.

Of greater import, if all parties know that minutes are being taken and will be retained, this could very well chill, rather than encourage, discussion. Anything that impairs the free flow of ideas and discussion will increase the risk of mistake or misunderstanding, which is exactly what the Standard's proposed documentation standards are designed to prevent.

Finally, we believe that a well-advised company would refuse to permit the taking of formal minutes in any transactional meeting. Litigation counsel typically recommends that handwritten notes, as well as drafts and other non-final documents, be discarded as a matter of course at the conclusion of any transaction. This is based on experience in defending against frivolous lawsuits that may be subsequently brought, when preliminary documents, notes and similar remnants of the evolution of the transaction may be taken out of context by opposing counsel and used in inappropriate ways. We believe that minutes of meetings, preserved post-closing, would be discoverable in any subsequent litigation and would pose precisely this risk for all parties to the transaction.

* * *

We appreciate the opportunity to comment on the Statement. If you have any questions with respect to this letter or require any further information, please to not hesitate to contact the undersigned (212.841.1060; bbennett@cov.com).

COVINGTON & BURLING

____

Bruce C. Bennett