



January 29, 2010

Mr. Wesley Bricker
Accounting Group - Interpretations
Securities and Exchange Commission (SEC)
100 F Street, NE
Washington, DC 20549-1090

Dear Mr. Bricker:

On December 23, 2009, the Mortgage Bankers Association¹ (MBA) submitted a letter to the SEC requesting pre-clearance on issues associated with the application of Statement of Accounting Standards No. 167, *Amendments to FASB Interpretation No. 46(R)* (FAS 167) to mortgage-backed securities (MBS) issued in conjunction with the Government National Mortgage Association's (Ginnie Mae) program. Per your follow-up request, the following is MBA's analysis of the application of Statement of Accounting Standards No. 166, *Accounting for Transfers of Financial Assets* (FAS 166) to Ginnie Mae MBS.

Question: The SEC staff has requested that MBA address in writing the application of FAS 166 by an Issuer of Ginnie Mae MBS securities at the time of the conveyance of the loans to the pool, assuming that the pool meets the definition of an "entity" for purposes of FAS 167.²

Response: The FASB Codification Master Glossary defines **transfer** as:

"The conveyance of a noncash financial asset by and to someone other than the issuer of that financial asset. A transfer includes the following:

- a. Selling a receivable
- b. Putting a receivable into a securitization trust
- c. Posting a receivable as collateral.

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 includes 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 See MBA letter to SEC dated December 23, 2009 for the basis for that conclusion. Also, in that letter, MBA concludes that the Issuer would not be the primary beneficiary of the entity. This is important to the FAS 166 analysis since Paragraph 26A of FAS 166 (FASB Codification paragraph 860-10-55-170) requires that "in determining whether the transferor has surrendered control over transferred financial assets, the transferor must first consider whether the transferee would be consolidated by the transferor".

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A transfer excludes the following:

- a. The origination of a receivable
- b. Settlement of a receivable
- c. The restructuring of a receivable into a security in a troubled debt restructuring.”³

Based on the assumption that the Ginnie Mae pool is an “entity,” the Issuer of a Ginnie Mae MBS security certainly puts the loans (a noncash financial asset) into a securitization entity.

Section 3.01 of the Ginnie Mae Guaranty Agreement states:

The Issuer does hereby transfer, assign, set over, and otherwise convey to Ginnie Mae all the right, title, and interest of the Issuer in and to the Mortgages identified and described in the Schedule of Pooled Mortgages for the subject pool. Such transfer and assignment shall be effective as of the date and time of delivery (release) of the Securities by Ginnie Mae or its agent, and shall include all interest, principal and other payments made on or with respect to, or related in any way to, such Mortgages. This includes, but is not limited to, payments due on the Mortgages after the Issue Date of the Securities and all unscheduled recoveries of principal received on the Mortgages after the close of business on the day on which the original principal balance of the pool was determined.

The Issuer conveys to Ginnie Mae all the rights, title, and interest to the mortgages in the pool. As MBA noted in its December 23, 2009, letter to the SEC, through Congressional authority, Ginnie Mae has the ability to legally isolate pools of mortgage loans without the use of a trust or other legal entity and allows the Issuer to issue pools of mortgage loans as securities through the U.S. Federal Reserve’s book-entry system. MBA believes this meets the definition of a transfer as defined above.

Sale Accounting Conditions:⁴

Legal Isolation:

In a sample legal letter provided to the SEC staff,⁵ outside counsel to a bank Issuer has opined on legal isolation primarily based on the following assumptions:

³ FASB Codification paragraph 860-10-20.

⁴ FAS 166, paragraph 9 (FASB Codification paragraph 860-10-40-5).

⁵ Note that the sample legal letter addressed an Issuer that was subject to receivership under the FDIC. Issuers subject to the United States Bankruptcy Code have also received legal isolation opinions supporting transfers to a Ginnie Mae pool.

- Prior to the appointment of the Federal Deposit Insurance Corporation (FDIC) as receiver for the bank, any attempt by the bank or its creditors to reclaim or recover the mortgage loans would give rise to an event of default under the Guaranty Agreement.
- Following the appointment of the FDIC as receiver for the bank, any action taken by the FDIC in either such capacity to reclaim or recover the mortgage loans as property subject to the receivership would give rise to an event of default under the Guaranty Agreement.
- Ginnie Mae would take the necessary action to exercise the “Extinguishment Power” (defined below) upon the occurrence of any of the preceding two bullet points.

The Extinguishment Power: Ginnie Mae has the power in connection with any guaranty of MBS to provide for the extinguishment, upon default by the Issuer, of any redemption, equitable, legal or other right, title or interest of the Issuer in any mortgage or mortgages constituting the trust or pool and in the event of that extinguishment, the mortgages that constitute such trust or pool shall become the absolute property of Ginnie Mae subject only to the unsatisfied rights of the holders of the securities based on and backed by such trust or pool.⁶

Events of default include, among other things, (a) any failure by the Issuer to remit to the security holders, funds sufficient to make any payment required to be made under the terms and conditions of the Ginnie Mae MBS Agreement, as of the due date for such payment and (b) any impending or actual insolvency by the Issuer.

Ability to Pledge or Exchange:

If the transferee is an entity whose sole purpose is to engage in securitization or asset-backed financing activities and the entity is constrained from pledging or exchanging the assets it receives, each third-party holder of its beneficial interests has to have the right to pledge or exchange the beneficial interests it received, and no condition both constrains the third-party holder from taking advantage of the right to pledge or exchange and provides more than a trivial benefit to the transferor.

As stated above, a Ginnie Mae MBS pool is assumed to be an entity and that entity's sole purpose is to engage in securitization activities and is constrained from pledging or exchanging the mortgage loans it receives. The holders of the

⁶ Section 306(g) of the National Housing Act.

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Ginnie Mae certificates have the right to pledge or exchange their certificates without constraint.⁷

Effective Control:

The transferor, its consolidated affiliates included in the financial statements being presented, or its agents do not maintain effective control over the transferred financial assets or third-party beneficial interests related to those transferred assets.

The Issuer of the Ginnie Mae MBS is the transferor of the mortgage loans. Except when the Issuer and its affiliates and agents own all of the certificates backed by a pool (as discussed further below), the Issuer, its affiliates and its agents do not have (1) any agreement that both entitles them and obligates them to repurchase or redeem the loans or the certificates before their maturity, (2) an agreement that provides the transferor with both the unilateral ability to cause the holder to return specific financial assets and a more-than-trivial benefit attributable to that ability, or (3) an agreement that permits the transferee to require the transferor to repurchase the transferred financial assets at a price that is so favorable to the transferee that it is probable that the transferee will require the transferor to repurchase them.

MBA analyzed the Default Call Option and determined that the option does not represent effective control under paragraph 9(c)(2) of FAS 166. This provision represents a “conditional” call and, therefore, not a sale accounting violation, because the transferor does not have the unilateral ability to cause the conditions to occur (i.e., default of the borrower). Although not relevant to the initial sale analysis, it should be noted that the assets subject to the Default Call Option are accounted for in accordance with paragraph 55 of FAS 166 (FASB Codification paragraph 860-10-40-41) once the condition is met.

When an Issuer and its affiliates and agents own all of the certificates backed by a pool, paragraph 9(c) would not be met, because the Issuer is allowed to collapse the pool and repurchase all the loans. In some instances, a pool may be terminated prior to the stated maturity date if the Issuer and all security holders of the outstanding securities relating to the pool have entered into an agreement for the termination and if Ginnie Mae has approved the termination. Prior to paying the security holders the remaining principal balance, the Issuer must submit to Ginnie Mae, prior to the 25th day of the month in which the Issuer wishes to terminate, a written notice that it will terminate the pool. Upon receipt of

⁷ See http://ginniemae.gov/guide/pdf/app_iv-04.pdf for the Ginnie Mae Prospectus, which does not note any restrictions on the holders of the Certificates.

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the documents required for pool termination, Ginnie Mae will give the Issuer written approval for pool termination.⁸

MBA concludes the transfer of a loan to Ginnie Mae MBS meets the requirements for sale accounting as specified in paragraph 9 of FAS 166 (FASB Codification paragraph 860-10-20).

Any questions about MBA's comments, assertions and questions in this letter 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.

Sincerely,

A handwritten signature in black ink that reads "John A. Courson". The signature is written in a cursive, slightly slanted style.

John A. Courson
President and Chief Executive Officer

Cc: Mr. Russell G. Golden, Technical Director, Financial Accounting Standards Board

Cc: Ms. Holly Barker, Project Manager, Financial Accounting Standards Board

Cc: Mr. Michael J. Najjum, Jr., Chief Financial Officer, Ginnie Mae

⁸ Chapter 20-3 of MBS Guide, Early Termination of Pool.