Bank of America Corporation
Legal Department
NC1-002-29-01
101 South Tryon Street
Charlotte, NC 28255

April 4, 2008

BY ELECTRONIC MAIL

Mr. Robert E. Feldman, Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429
Attn: RIN 3064-AD26
comments@fdic.gov

Re: Proposed Regulations regarding Processing of Deposit Accounts and Insurance Determination Modernization

Dear Madams and Sirs:

Bank of America Corporation ("Bank of America") appreciates the opportunity to comment on the proposed regulations of the Federal Deposit Insurance Corporation (the "FDIC") relating to the FDIC's processes to enable the resolution of a large bank failure.[1] Bank of America, with over $1.6 trillion in total assets and over $800 billion in worldwide deposits, operates the largest and most diverse banking network in the United States with full-service consumer and commercial operations in 33 states and the District of Columbia. Bank of America, through its subsidiary banks, operates over 6,100 retail branch locations and over 18,700 ATMs.

Bank of America acknowledges the efforts of the FDIC in improving this proposal relative to the earlier Advance Notices of Proposed Rulemaking ("ANPRs").[2] Bank of America supports many of the changes that have been made that would provide greater flexibility for banks to comply with the proposed regulations. Specifically, Bank of America supports the FDIC's decision to remove requirements for bank systems to have a unique identifier number for each depositor that would have solely been used to support FDIC resolutions. A unique identifier as previously proposed would have been unnecessary and extremely costly and burdensome on large banks to implement. Bank of America also strongly supports the broad concept that deposit determinations in the event of a failure should be based on end of day ledger balances and that all normal end of day processing performed by bank systems in the ordinary course of business would take place. Bank of America also is in favor of the general flexibility for hold mechanics provided by the proposed regulation and the proposed process for transmitting data files between

[1] Notice of Proposed Rulemaking, 73 Fed. Reg. 2364 (January 14, 2008) ("NPR").
[2] Advance Notice of Proposed Rulemaking, 71 Fed. Reg. 74857 (Dec. 13, 2006); Advanced Notice of Proposed Rulemaking, 70 Fed. Reg. 73652 (Dec. 13, 2005).

a bank and the FDIC. It is important that the FDIC continue to be flexible to accommodate the different systems and processes of the different banks covered by the proposal, but also build in room within the proposed regulations to allow innovation of new processes in the future.

Nevertheless, the proposed rule continues to raise a number of significant issues that cause serious concerns for large banks. These concerns are broadly captured in the following categories:

A. Cost and burden of the proposal
B. Cut-off times
C. Sweeps
D. Holds processes
E. Implementation timeline.

Each of these topics will be discussed in more detail below.

A. Cost and Burden

While the new proposed regulation is an improvement upon the previous ANPRs, the proposal will still be extremely costly and burdensome to implement. Many large, complex financial holding companies (Bank of America included) operate multiple computer platforms and have many different deposit systems, depending upon the products and the geographic regions involved. Bank of America has identified at least 59 different internal systems that would be impacted by the proposal and would require some level of reprogramming. Mergers and consolidations of banks only add to this complexity. It would therefore be an oversimplification to believe that this proposal merely will require updating one set of systems or processes at a bank. Even seemingly simple changes to computer systems and processes often involve large undertakings for programming, testing and implementation to ensure that the system functions and that any change does not adversely affect other ongoing operations of the bank. In some cases, a bank may be able to utilize existing processes to satisfy FDIC requirements, but in others, a bank may be forced to create new processes that would not otherwise be needed but for compliance with this proposal. In addition to initial development costs, banks would need to have teams to maintain such systems and processes indefinitely and to be able to test periodically.

Consequently, the FDIC should make every effort to streamline requirements, provide flexibility to rely upon existing systems and processes, minimize technology development requirements and minimize periodic testing. Bank of America recognizes the need of the FDIC to perform periodic testing, however, this testing should be done infrequently and should be required to be performed in a manner that will not disrupt or impact ongoing day-to-day business operations of the bank.

The FDIC has requested that banks put a precise dollar number on the potential technology development costs, including costs of employees and their number of hours that would need to be dedicated to the implementing the requirements of the proposed rule. Based on the current version of the proposed regulation, Bank of America's current estimates are that the technology development project alone could cost at least $8-10 million and would involve over 100,000 hours of work. Note that this estimate does not include necessary costs and work hours that are not related to technology, such as legal, compliance, audit, training and project management resources. While difficult to calculate, these additional costs and resources are in themselves substantial and will in some cases involve ongoing expense and effort going forward indefinitely. The ongoing project team in place at Bank of America that was established purely to assess the potential impact of the proposed regulations has been an extensive effort in and of itself involving thousands of hours of labor on the part of bank employees and consultants. It is safe to assume that this team, and the related resources and costs required, will continue to grow substantially through implementation if a final rule is adopted.

These cost and burden factors, as well as the fact that the FDIC has been able to carry out resolutions of banks without this proposed regulation, beg the question of whether the proposed rule is necessary and whether the perceived benefits to the rule are outweighed by the material cost and burden to the banks. Consistent with comments submitted by other banks on the previous ANPRs, Bank of America is not convinced that the FDIC has demonstrated that the incredibly low probability of a large bank failure coupled with other mitigating risk factors (such as required capital levels, ongoing intensive supervison by banking regulators and overall balance sheet strength of most large banks) necessitates so much effort around what appears to be a small and hypothetical risk. Failure to factor in these risk mitigants and probability of default will result in an enormous cost and effort to banks with little to no real world benefit.

If the FDIC is insistent upon proceeding with the rulemaking, Bank of America recommends that (similar to risk-based deposit insurance premium assessments) the FDIC should exempt from the rule (or at least portions of the rule that would require extensive cost and development) any large bank that satisfies certain objective and measurable criteria of safety and soundness, such as minimum long term debt ratings, risk-based capital ratios or composite CAMELS ratings.

Bank of America also suggests that the FDIC provide exclusions for banks engaged in specialized businesses whose primary business is not deposit taking. For example, large credit card banks within a bank holding company family may have deposits that are incidental to its credit card business (e.g., overpayments on credit cards or balances in secured card programs). These businesses and the systems that support them are not transactional deposit systems and are materially different than typical deposit functions. Development of systems and processes for holds relating to credit card balances could dramatically increase the cost and complexity of implementing the proposal and would achieve very little in advancing the goals of the FDIC. Deposit balances incidental to credit card products are typically quite small, but there can be an enormous number of cardholders, which may cause aggregate balances to exceed the FDIC's threshold and become subject to the proposed regulations. An alternative approach would be to exclude deposits incidental to credit card products when calculating total deposits of a bank in determining if it is subject to the proposed regulation.

B. Cut Off Times

Bank of America recommends that the definition of "Cut off Point" in the NPR be revised. The proposed regulations use the concept of a cut off time which would impact when to give effect to transactions that come in from a customer through a variety of channels and geographic locations. All bank systems already have an established cut off time, which may vary by product or region. As currently contemplated, the proposal appears to give the FDIC the discretion to determine a single arbitrary cut off time to be used by the FDIC in making its insurance determination on the date of failure. The FDIC would declare the applicable cut off time based on the facts and circumstances at the time that a bank failure will be declared.

A single arbitrary cut off time, as is set forth in the proposed rule, is problematic for several reasons. First, bank systems may not be easily manipulated on a moment's notice or have the current technical abilities to change cut off times when directed by the FDIC. Second, such a change in business as usual processes may have many repercussions on the bank's ongoing operations and its customers. In the case of a cut off time that is during normal business hours (for example, the FDIC's description of using 5 pm eastern/2 pm pacific), the change would disrupt customer facing banking center operations in the middle of a working day. That would be inconsistent with customer expectations that have been communicated to customers via existing disclosures on ATMs, in banking centers or customer agreements. Additionally, bank staff would not be prepared to explain or implement such changes. Third, for international deposit systems, a single cut off time in the U.S. applied globally would cause even greater disruption to operations and customers. While Bank of America acknowledges that the FDIC has used these sample cut off times merely for illustrative purposes, it highlights the risks to large banks of using times other than those already established on bank systems.

The proposed regulation should require that the FDIC use established cut off times used by banks in their ordinary course of business systems and operations. To the extent that the FDIC insists on maintaining the ability to set new cut off times as of the date of failure in extreme circumstances, the FDIC should maintain flexibility to potentially set multiple cut off times that will vary by system or region. The FDIC's discretion to set cut off times should be constrained to exceptional circumstances and require that that the FDIC must select cut off times that will make all reasonable efforts to minimize the impacts to the bank's business as usual operations and processes (and thereby minimize impacts to customers). Finally, regardless of what cut off times that the FDIC may in fact apply upon a failure, the FDIC should not require banks to enhance technology systems and processes to accommodate the hypothetical possibility that the FDIC will set a different cut off time upon failure, nor should the FDIC test bank systems on that basis.

C. Sweeps

The FDIC has included extensive new proposals relating to the treatment of sweep products that were not part of the previous ANPRs. Bank of America believes that the issues raised and the potential impact to financial institutions and financial markets that could result from these proposals are very substantial. All of the proposals relating to sweeps warrant further study and consideration by the FDIC and should be removed from this rulemaking and should not be part of any final rule. The FDIC should consult further with other banking and financial regulatory agencies and with financial institutions that are key players in this market before finalizing a rule on sweeps.

While the FDIC's intention may only be to articulate the treatment of sweep transactions in the context of a large bank insolvency (which as already discussed is a remote contingency at best), the proposed regulation could have major ripple effects on other laws and regulations that ultimately rely upon the same legal definitions of a deposit in the Federal Deposit Insurance Act[3], including Regulation D[4], Regulation Q[5], deposit insurance premium assessments and the nationwide 10% deposit cap[6]. Sweep transactions have been common business practices for decades and represent a very large volume of transactions and funds balances for customers of large financial institutions. Disrupting the existing treatment and expectations of banks and their customers could have disastrous consequences and could potentially impair the viability of sweeps as an ongoing product.

The FDIC's focus on sweeps appears to emanate from its interpretation of the Adagio case[7] which revealed that the FDIC did not have a formal policy of how they would treat sweeps in the event of a bank failure. The NPR would codify the FDIC's longstanding practice that all prearranged automated sweeps would be given effect in determining end of day ledger balances in the event of a bank failure. Bank of America supports that position and thinks this proposal alone is sufficient to address the issues raised in Adagio. The NPR should explicitly provide that outgoing prearranged automated sweeps will be recognized as part of the day's business and reflected in end of day ledger balances regardless of when the internal bank systems process such transaction in the ordinary course of business. In other words, it should not make a difference if automated bank systems process such transactions before or after a particular point in time (or cut off time) that the FDIC declares a bank failure if the customer's transaction was arranged prior to that time. Nor should it matter if a particular bank processes such transactions at 6 pm or 2 am, so long as it is done as part of the normal closing of end of day ledger balances for the bank.

The remaining sweep related proposals are overly complicated and unnecessary. There are a variety of different sweep products and each may be done by different mechanisms (which will vary by bank). The FDIC has focused too much attention on specific products and the mechanics

[3] 12 U.S.C. §1813(l).
[4] 12 C.F.R. part 204.
[5] 12 C.F.R. part 217.
[6] 12 U.S.C. §1842(d)(2).
[7] Adagio Investment Holding Ltd. V. FDIC, 338 F. Supp. 2d 71 (D.D.C. 2004).

of how they are processed, making broad assumptions about how these products work that may not be universally correct. The result could be disparate treatment among different banks with ostensibly the same product, but that process it differently. For example, the FDIC articulates a distinction between "internal" sweeps (being sweeps from a bank account to other types of accounts held within the same institution, albeit not in the form of a domestic deposit) versus "external" sweeps (being sweeps from a bank account to third party accounts not held at the bank). The FDIC has premised these categories on the idea that keeping the funds "within the bank" is the important driver of the regulatory treatment. Bank of America believes that is the more relevant distinction is whether the funds are "in the deposit account" because once money has been swept to a non-deposit investment, it no longer is a "deposit" subject to FDIC insurance regardless of what form the investment or sweep takes. The FDIC also makes yet another distinction in the holds procedures of "Class A" versus "Class B" sweeps. The FDIC should eliminate these distinctions, to the extent that the FDIC proceeds with rulemaking around sweeps at all, and treat all sweeps the same.

Each variation of a sweep that is relevant to this rulemaking would take funds from a U.S. deposit account and (based on a prearranged automated transaction at the instruction of the customer) transfer the funds to a non-FDIC insured account or investment prior to the bank's close of business. The product that these funds are swept into may take different forms (non-U.S. deposits, securities repos, fed funds, money market mutual funds and potentially others). All of these products have one thing in common. None of those products meet the definition of a "deposit" under the Federal Deposit Insurance Act and therefore would be subordinated obligations in the event of a bank insolvency. This characterization of sweeps is consistent with the longstanding practices of virtually all financial institutions and has been accepted practice by banking regulators for decades.

When customers negotiate for a sweep product, the bank is able to offer better rates of return and more flexibility of investments than if the customers funds were to remain in an insured domestic deposit accounts subject to various regulatory restrictions such as Regulation Q's prohibition on payment of interest on demand deposits, the imbedded cost of FDIC insurance premiums and Regulation D reserve requirements. Most of these products are designed for and used by corporate and institutional customers who are sophisticated enough to understand the business terms. All sweeps are evidenced by customer agreements that authorize the sweeps and disclose the applicable terms. The FDIC should take no actions that would potentially cause customers to be treated differently from one another (based on arbitrary or technical details about how back office systems of different banks operate). Inconsistent treatment could result in steering banks towards using one product over another solely to address FDIC regulatory concerns. Finally, the FDIC should not take any actions that are inconsistent with or would override the terms of the agreements between the banks and its customers. To do so not only creates operational problems, but it disrupts market and customer expectations.

The FDIC has asked a number of technical questions in its sweeps proposal that go far beyond the scope of addressing the ability of the FDIC to manage a large bank resolution. These issues should be removed from this rulemaking and should be addressed in a separate ANPR with greater input from industry and other regulators. Specifically, the FDIC has asked for comment about whether the structure of securities repos may still meet the definition of a deposit under the Federal Deposit Insurance Act ("FDIA"). The FDIC has also asked banks to consider whether sweeps should be effectively disregarded and subjected to FDIC insurance premiums based on the unswept deposit balances. Consistent with longstanding practice of large banks, which has long been known by banking regulators and has not otherwise been questioned, the FDIC should follow current norms and recognize that sweeps into non-deposit products remove such funds from domestic deposit balances for all regulatory purposes. Bank of America believes the current sweep structures commonly used in the industry (including the structures of securities repos) are appropriately characterized as not being deposits under the FDIA. Bank of America further believes that any proposal to charge FDIC insurance premiums on the amounts swept would dramatically increase costs to banks relating to that product and could result in the product no longer being economically viable or able to be offered on terms that are competitive with other products offered by non-bank market participants.

Finally, the FDIC has outlined special rules relating to holds that would be required in the event of a bank failure to make sure that the FDIC would have control over the funds to enable it to conduct its resolution. Assuming that the FDIC accepts the approach that the outgoing sweep will be recognized, the FDIC would require the bank to place holds on the swept funds so that upon such funds returning to the bank the following morning, the FDIC would have control over such funds until released. Bank of America does not disagree with this approach in theory. These funds are subordinated claims to deposits and subject to greater risk of loss than domestic deposits. The FDIC needs to give flexibility for banks to achieve the intended goal of this process without imposing additional costs and burdens on the bank and bank systems.

The NPR provides that banks be able to place holds on the system of record into which the non-deposit account funds are swept (at least in the case of internal sweeps). This is both burdensome and unnecessary. Many systems or processes for booking swept products (like securities repos, money market mutual funds or fed funds) are not like a deposit system that would have functionality for holds. In many cases, there are not "accounts" in a sense equivalent to a deposit account. Similarly, non-U.S. deposit systems may have limited existing capabilities for holds without costly system development. The FDIC's goal should be to control these funds so as to prevent a customer from accessing and taking funds held in these non-deposit products while the resolution is pending. Due to the structure, timing and automated processes of sweeps, there is no practical ability of a customer to access and remove such funds until the incoming side of that sweep transaction is processed and the funds are placed back into the U.S. deposit account. Bank deposit systems could utilize existing capabilities to either place holds on the domestic deposit account upon return of the funds or a bank could trap such funds prior to their being returned by routing such funds into an alternative suspense account. This method would allow the FDIC to control such funds until it releases them to the customer and would reduce the burden and cost of process and technology development. There is no incremental benefit to the

FDIC in requiring holds on other systems that house the swept product during the overnight hours.

D. Holds Processes

Bank of America generally does not object to the overall concept of requiring holds on domestic deposit accounts that exceed certain dollar levels. Bank of America appreciates the efforts of the FDIC to reduce the potential burden by setting reasonable thresholds and by providing flexibility for banks to meet the hold requirements in a variety of ways. Bank of America encourages the FDIC to continue to be flexible in allowing banks to determine the best process to achieve the goals of the proposal, yet mitigate the costs, and wherever possible, the FDIC should accommodate existing systems and processes without requirements of new development. Specifically, Bank of America requests that the FDIC maintain in the NPR the various provisional hold approaches as different approaches may be needed within different deposit systems.

Bank of America is concerned about certain specific aspects of the holds provisions. The FDIC's proposal relating to holds on foreign deposits of the bank may be problematic for a number of reasons. First, the proposal grants the FDIC the ability to determine a different hold percentage and threshold on a country-by-country basis. This may present operational problems based on existing systems functionality and may require material development and costs. If the FDIC is to require holds on foreign deposits at all, we recommend one threshold that is consistently applied globally. Second, the requirement of foreign holds raises potential conflicts with local laws that are not addressed or discussed in the proposed regulation. For example, if the FDIC requires a 100% hold on a bank's deposits in its London branch, and the U.K. regulators initiated their own resolution proceedings covering the bank's London branch (which would seem almost certain to happen), what happens if the U.K. regulators give conflicting instructions? It is unacceptable to put a bank employee (particularly one located in a foreign jurisdiction) in the position to choose between compliance with U.S. and local law. The FDIC has represented that they would intend to work out such situations as they occur with a local regulator, but that is insufficient and leaves banks and their employees with legal risk. The FDIC should either not apply the holds to foreign deposits held outside of the U.S. or it should expressly provide that such holds are required to be maintained only to the extent permitted by applicable local law.

The FDIC asked in the NPR whether banks should be required to disclose to customers information about holds that may be put in place in the event of a failure and FDIC resolution. Bank of America questions the benefits of such a requirement relative to the likely costs. In the event of a large bank failure, there will be major customer disruptions, and one would presume that the FDIC will be proactive in communicating to the public about the situation, the resolution process and who the customers should call for information or with concerns. That process should be sufficient to alert customers impacted by holds without the cost and burden of creating special separate processes for disclosure. Given that these disclosures would only be required in the event of a failure, it is largely a hypothetical process that will never in fact occur. Given this fact, the FDIC should not require development of a process by banks to automatically generate such disclosures merely for the purpose of the FDIC's ability to test such practices if a failure were to occur.

Finally, many large banks operate multiple deposit systems. Some systems have insignificant numbers of accounts relative to the bank as a whole, or may be targeted to be sunset when systems upgrades or integrations occur. Deposit systems change from time to time, particularly for large banks involved in mergers and acquisitions. The FDIC has accommodated the fact there may be systems with small accounts and has permitted manual holds processes in lieu of automation. The FDIC should go further and provide exemptions from these requirements altogether for systems that house deposits that represent an insignificant part of a bank's overall deposits or accounts (potentially a minimum threshold of 5%). The FDIC should also exempt special purpose bank charters that are not primarily in the business of deposit taking, but may have deposits incidental to their business (e.g., limited purchase credit card banks or bankers' banks). Whether it is manual workarounds or systems development, the benefit to the FDIC in covering these small systems would not match the burden and cost to maintain and test the processes associated with them. Additionally, systems that are targeted for sunset within a reasonable period of time (for example within 18 months) should be exempted from the requirements of the proposal, provided that a bank commits that it is transitioning to a target system that will satisfy the applicable requirements. Without such an exemption, banks may have to spend time and money upgrading systems that will only exist for a short period of time.

E. Implementation Timeline

Bank of America encourages the FDIC to provide more time after publication of a final rule before it becomes effective and applicable to large banks. The FDIC's proposal of 18 months will be insufficient for large, complex banks with multiple systems to make the necessary upgrades and to complete necessary testing. Bank of America recommends a minimum of 36 months for banks to complete required changes. Additional time should also be granted in the cases of mergers and acquisitions, whether or not the merging institutions are covered institutions already subject to the regulation. In the alternative, Bank of America recommends that the FDIC consider requiring only that a bank has completed evaluation and development of an action plan and has commenced work on the necessary systems and operational changes. The timetable for completion of implementation should be customized in each bank's action plan to meet its unique structure and challenges. Failure to give adequate time for implementation will pose risks and costs to the banks. Banks will be required to devote more resources, which brings greater cost, if required to meet a faster deadline. Completing the technology changes faster, and without giving adequate time for testing, increases the risk that the systems will not function properly if called upon by the FDIC and increases the chances of systemic disruption of day-to-day bank operations that could injure both the bank and its customers.

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Bank of America appreciates the opportunity to comment on the FDIC's proposed regulations, and we thank you for your consideration of our comments.

Sincerely,

Phillip A. Wertz

Phillip A. Wertz
Assistant General Counsel
Bank of America Corporation