October 15, 2009

*Via E-Mail and United States Mail*

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Mr. Robert E. Feldman, Executive Secretary
Attention: Comments/Legal ESS
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Email: comments@FDIC.gov

**Re:** Docket No. R-1368; Docket Number OCC-2009-0012; FDIC—RIN 3064-AD48

Ladies and Gentlemen:

Bank of America appreciates the opportunity to submit this comment letter on the Agencies' notice of proposed rulemaking on risk based capital guidelines related to the adoption of Statements 166 and 167 by the Financial Accounting Standards Board (FASB). We urge the Agencies to reassess the Proposed Rule taking into consideration actual transfers of risk, and the potential impact it could have on the availability of credit, liquidity and banks' capital. Further, because U.S. financial institutions begin implementation of the Basel II capital standards early next year, with full implementation in 2011, we urge the Agencies to consider the impact that Basel II treatment would have on the Proposed Rule.

Bank of America is one of the world's largest financial institutions, and is actively engaged in facilitating the provision of liquidity and credit to individual consumers, small and middle market businesses, and large corporations, as well as helping to transfer the risks associated with these credits to end investors who wish to purchase such risk. The Proposed Rule will have a significant impact on the operations of all participants in the secondary market and their ability to manage risk. Unfortunately, the Proposed Rule does not fully recognize the legitimate transfer of risk in existing securitizations and will require banks to hold regulatory capital that in many cases is excessive relative to the retained risk. As a result, the Proposed Rule will impede the ability of banks to cost-effectively maintain appropriate levels of capital with regard to securitized exposures, severely constrain bank balance sheets and eliminate important incentives that encourage proper risk transfer. The Proposed Rule negates large portions of Basel II before it is even implemented domestically, and places US financial institutions at a further significant disadvantage to their foreign competitors, who have already implemented Basel II and will see no changes. Furthermore, the Proposed Rule could have the significant unintended consequence of curtailing credit availability.

**<u>Background.</u>**

In the Agencies' December 3, 2008 letter to FASB regarding the exposure drafts for SFAS 166 and 167, the Agencies stated "we are concerned that making short-term changes to the U.S. accounting standards for financial asset transfers and consolidation could have an impact on credit markets in the U.S." Additionally, the Agencies stated "we believe that the needs of the U.S. financial statement users will be better served by improved disclosures than by the discontinuity in the primary financial statements that will result from multiple sets of changes to the accounting standards for financial asset transfers and consolidation beginning in 2010." We believe the Proposed Rule will crystallize those risks. First, if the capital requirements for consolidated securitizations do not reflect actual economic risks, and result in inappropriately high capital charges, credit markets in the U.S. will become distorted. Second, many affected financial institutions are required to move to Basel II capital calculations in 2011. Requiring the industry to calculate capital for these material exposures under Basel I in 2010 and then move to Basel II in 2011 will result in needless discontinuity in capital requirements.

The Proposed Rule is a significant departure from the efforts by the Agencies to require capital based upon the actual economic risks of an exposure. The Agencies have traditionally used U.S. generally accepted accounting principles (GAAP), as established by FASB, as the initial basis for determining whether an exposure is treated as on- or off-balance-sheet for regulatory capital purposes. However, the Agencies previously have departed from GAAP where appropriate to ensure that the capital charge for securitizations reflects actual risk exposure. For example, the Agencies have provided guidance on synthetic securitizations that recognizes risk transfer and provides capital relief for on-balance-sheet assets. The Agencies also require certain securitizations to attract capital as on-balance-sheet exposures if a firm provides certain support to the vehicle, even if the securitization remains off-balance-sheet under GAAP. Finally, the Agencies have implemented rules to ensure that capital requirements for any retained interests for off-balance-sheet securitizations appropriately reflect the risks of the retained interest. Departures of this type thus are not only precedented but appear particularly appropriate in the case of SFAS 166 and 167, which explicitly focus on control for determining consolidation, <u>not</u> risk transfer.

The Proposed Rule assumes that financial institutions are highly likely to provide non-contractually required support, and thus that the legal structure and prescribed risk transfer of the transaction should be disregarded. While recent market difficulties have included high-profile examples of support for off-balance-sheet structures – most notably, with respect to SIVs – in fact, only a very small percentage of securitization structures have received non-contractually required support from the issuer or sponsor. Such support generally has been limited to the credit card master trust market. In the case of credit card master trust structures, the institutions that provided non-contractually required support made business decisions they believed were the right decision for their firms at that point in time, and were primarily motivated by liquidity priorities, not credit risks.

The Proposed Rule deviates from the Agencies' commitment to risk-based regulatory capital requirements.[1] The overall level of capital required to be held is a separate question from how the capital requirements are allocated among various exposures. The rules should be sensitive to the relative risk of different types of exposures so as to provide appropriate incentives for risk management and to avoid favoring or discouraging, in a manner that is not risk-focused, extensions of credit within certain sectors or markets. The Proposed Rule will require material capital in excess of the actual economic risks for many consolidated securitizations. We believe this will damage financial institutions' capital positions and credit availability to the economy, and discourage appropriate risk transfer, with no meaningful corresponding benefit. Since securitization facilitates lending through many of the most significant consumer credit channels, the disproportionate capital levy imposed by the Proposed Rule on certain securitizations will likely have a particular and disproportionately adverse impact on consumer credit markets.[2] As a result, the Rule's application is too imprecise for any possible advantages to outweigh the expected disadvantages.

In addition, our foreign competitors will not be subject to the increase in regulatory capital that could result from this Proposed Rule as they have adopted the Basel II capital standards. As a result, foreign banks will have a competitive advantage over U.S. banks when it comes to making loans in the United States because they will have more favorable capital treatment.

## Recommendation

Given the expected material adverse impact on financial institutions' capital position and the economy, we recommend that the Agencies place a moratorium on any capital impacts from SFAS 166 and 167 until June 30, 2010. This will provide additional time for the Agencies to determine appropriate, well-calibrated risk-based capital requirements for securitizations that will be subject to consolidation. Thereafter, the capital impacts associated with any final rules could be phased-in from June 30, 2010 to June 30, 2011, or longer if necessary, to provide an appropriate bridge to the implementation of Basel II regulatory capital rules, thereby avoiding discontinuity in capital requirements.

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[1] *See, e.g.*, the U.S. Treasury's *Principles for Reforming the U.S. and International Regulatory Capital Framework for Banking Firms*, Core Principle #4, Page 5. "Risk-based capital requirements should be a function of the relative risk of a banking firm's exposures . . . . For a risk-based capital framework to protect the safety and soundness of banking firms and to provide appropriate incentives for firms to engage in prudent forms and amounts of risk-taking, it is crucial that relative risk-weights be appropriately calibrated."

[2] The importance of securitization to the consumer credit markets is widely accepted and serves as the justification for the Federal Reserve's highly successful Term Asset-Backed Securities Loan Facility (TALF) program. *See, generally, The Consumer and Business Lending Initiative,* http://www.ustreas.gov/press/releases/reports/talf_white_paper.pdf, including discussion of the importance of consumer credit markets to economic recovery and the adverse impacts to these markets resulting from the inability of lenders to securitize and concomitant balance sheet rationing and increases in consumer credit costs (p.2).

*Moratorium Period*

Even with only a one-month comment period, the Agencies' final rules are unlikely to be available until late November, leaving banks with just over one month to prepare before the initial capital changes take effect. Because implementation of SFAS 166 and 167 will have no impact on the actual economic risks to the affected financial institutions, we believe it is prudent for the Agencies to have a more deliberative process to ensure that: (1) examiners have time to understand the risk profiles of the vehicles being consolidated, (2) the final rules are consistent with risk-based capital principles, (3) the final rules are aligned to pending changes under Basel II, and (4) the final rules do not have unintended consequences for the banking industry or U.S. economy. It is also important to note that given the complexity of SFAS 166 and 167 and the very short implementation timeframe (final rules were issued on June 12), the industry has not fully completed the final assessment, in each instance, of precisely which securitization vehicles will need to be consolidated.

During the moratorium period, the regulatory capital position of financial institutions that have securitization vehicles consolidated under SFAS 166 and 167 should be fully unaffected by this change in accounting treatment. This would include, without limitation, no impact from associated newly consolidated assets, risk-weighted assets, credit reserves, associated deferred tax asset deductions, leverage ratios, and all other otherwise affected results.

The Agencies could develop guidelines or, with time permitting, specific capital rules for on-balance-sheet securitizations that are risk-based and provide an appropriate bridge to the Basel II requirements during the moratorium period. The Agencies could fully consider the legal, contractual, and practical requirements of the various vehicles, and refrain from broad assumptions that the accounting treatment implies financial institutions will provide non-contractually required support to any transactions. The current regulatory capital rules for securitizations, securitization retained interests, synthetic securitizations, and implicit recourse provides a good starting foundation. Additionally, European Union rules for on-balance-sheet rules offer an additional point of consideration.

As the Agencies develop guidelines that are risk based, we strongly urge you to reconsider the proposed change related to customer-centered multi-seller ABCP conduits. These conduits have a 26-year history of performing very well with minimal losses incurred by the sponsoring financial institutions. In response to prior accounting changes and in creating the Basel II rules, the Agencies have previously assessed these risks and determined the current capital treatment is appropriate. Changing these rules would create uncertainty about their future economic viability and reduce credit availability for the economy. We recommend that the agencies announce there will be no change in the capital treatment for customer-centered multi-seller ABCP conduits. To determine otherwise is inconsistent with risk-based capital principles and the pending requirements of Basel II.

We also encourage the Agencies to work with FASB during the moratorium period to assure GAAP does not require credit reserves on consolidated loans where the credit risk has been materially transferred.

*Phase-In Period*

With completion of the final rules during the moratorium period and an appropriate phase-in period that bridges to the implementation of Basel II, financial institutions would be able to make final determinations of the capital impacts, and develop appropriate capital management plans that can be prudently implemented over time. As recommended by the Agencies in the Proposed Rule, financial institutions would incrementally recognize the final aggregate capital impact over the phase-in period. The aggregate capital impact includes the impact from newly consolidated assets, risk-weighted assets, credit reserves, associated deferred tax deductions, leverage ratios, and all other otherwise affected results.

We recommend permanent capital relief for any deferred tax asset deduction resulting from assets consolidating as a result of the implementation of SFAS 166 and 167. Credit reserves required for consolidating assets will create a deferred tax asset because the establishment of the reserves will create a GAAP expense that is not deductible for tax purposes until losses are actually incurred. Depending upon a firm’s deferred tax position, this may result in a capital deduction under current capital rules. In this case the establishment of credit reserves will become a dollar-for-dollar deduction to Tier I Capital despite the risk exposure and capital resources of the firm not changing.

**Summary**

We believe that the Proposed Rule would have an adverse and significant impact on the viability of the securitization market and the availability of credit generally. We also believe that the Proposed Rule would put U.S. financial institutions and consumers at a competitive disadvantage relative to their foreign counterparts. Pending regulatory and legislative reforms that could require issuers to retain risk in securitizations add to the uncertain future economic viability of securitization, particularly when coupled with the accounting requirements of SFAS 166 and 167 and the capital standards outlined in the Proposed Rule.

We have attached answers to the questions in the Proposed Rule, but the above comments reflect our primary concerns and recommendations.

Finally, we request that the Agencies work quickly to update 12 CFR Section 360.6, concerning the treatment by the Federal Deposit Insurance Corporation of assets transferred by an insured bank in connection with a securitization or participation. We are supportive of the proposal on this matter outlined by the American Securitization Forum in a letter to the FDIC dated September 18, 2009, containing both a “Sale Approach” and a “Security Interest Approach.” Additionally, clarification should be provided that existing transactions that have relied upon the protections of this rule, and that qualified for GAAP sale accounting at the time of transaction execution, will continue to benefit from its protections.

We appreciate the opportunity to comment on the Proposed Rule. If any of the Agencies or their respective staff has questions regarding the comments contained herein, we would be happy to address them.

Respectfully submitted,

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Corporate Law