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

October 28, 2009

BY ELECTRONIC MAIL

Mr. Robert E. Feldman, Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429
Attn: RIN 3064-AD49
comments@fdic.gov

Re: FDIC Proposal for Prepaid Deposit Insurance Assessments

Dear Madams and Sirs:

Bank of America Corporation appreciates the opportunity to comment on the proposed regulations of the Federal Deposit Insurance Corporation (the "FDIC") authorizing the FDIC to require prepayments of deposit insurance assessments. Bank of America, with over $2.5 trillion in total assets and over $1 trillion 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 6,200 retail branch locations and over 18,700 ATMs.

Bank of America supports the FDIC's overall proposal to use prepaid assessments as a means to provide liquidity to the Deposit Insurance Fund (the "DIF"). Bank of America agrees that continued special assessments in the current economic environment are bad for the banking system and would be detrimental to bank earnings, liquidity and the prospects of economic recovery.

While supportive of the concept of prepaid assessments, there are costs associated with the proposal and assumptions used by the FDIC that warrant further consideration. Bank of America has a number of suggestions for the proposed rule that would mitigate some of these costs and burdens yet continue to meet the FDIC's goal of liquidity and growth of the DIF.

A. Implicit Costs for the Time Value of Money.

The FDIC's proposal would require that banks prepay assessments for the years 2010, 2011 and 2012. This would generate a credit that would be applied to quarterly assessments billed over that period. The amount of the prepayment would be based on September 30, 2009 deposit balances, with assumptions for growth over time. Any unused credits at the end of 2012 would

be carried forward and applied to assessments in 2013 and 2014. Any unused credits at the end of 2014 would be refunded to the bank.

The FDIC has correctly noted in its proposal that the accounting treatment for the prepayment is more favorable than a special assessment. The prepayment would represent an asset for the banks and the expense would be incurred only during the period in which the ordinary quarterly deposit insurance assessments will be invoiced. This approach is beneficial because it will spread out the impact of the prepayment on bank earnings over time. We also agree and support that the impact to bank capital should be neutral because the prepaid asset would receive a zero risk weighting.

The proposed prepayments have two potentially negative consequences for banks, however, that the FDIC should consider and seek to mitigate in the final rule.

First, the prepayment will result in a reduction in liquidity for the banks and the banking industry as a whole. The FDIC has stated that the overall banking industry is in a strong liquidity position presently and that the FDIC prepayments will not result in a reduction in lending to customers. It is true that most banks, including Bank of America, are maintaining greater liquidity in the current economic environment to protect against further market disruptions. This is being done because banks have determined it is prudent, but also because banking regulators have strongly encouraged it as a matter of safety and soundness. The size of the prepayments being funded at one time will undeniably reduce the existing liquidity positions of banks. For some banks, that will either necessitate a reduction in business activities (such as lending) or it will require banks to take measures to replace that liquidity. Replacing that liquidity will result in costs to the bank that would otherwise not have been incurred but for the prepayment.

Second, as proposed by the FDIC, the banks will earn nothing on the amount of prepayment. In the absence of the prepayment, the banks could invest those funds and earn some rate of return that could have offset some of the costs of future assessments. The longer the period between the prepayment and the actual time that the expense accrues, the greater this opportunity cost becomes. The prepayment is the equivalent of a zero interest loan for up to 5 years (reflecting the maximum period of time before a bank may receive a refund from the FDIC for overpayment). The opportunity cost of lost revenue is significant and the FDIC should factor in this cost when evaluating alternatives so to reduce to the extent possible this impact.

To mitigate the impacts to liquidity and lost earnings, Bank of America offers the following suggestions and alternatives:

1. Multiple Prepayments. The prepayments could be broken up into multiple payments. According to the FDIC, the primary driver behind the prepayments is liquidity for the FDIC and the DIF. The amount of the prepayment was calculated with the assumption that three years worth of assessments paid up front would provide sufficient liquidity for the FDIC and the DIF to manage expected bank failures and losses during that entire period. While acknowledging the

FDIC's need for liquidity and the desire for it to be bank funded, this does not necessitate that all prepayments for three years are made on December 30, 2009. Expected bank failures and DIF liquidity needs will not be incurred all at once at the end of 2009. Those losses will be incurred over time (potentially over three years) as additional banks fail. The FDIC can accomplish the same liquidity goal by having prepayments only for 2010 paid in December 2009. Prepayments for 2011 and 2012 could be made at different dates in the future, either based on a set schedule (e.g., 2011 amounts could be paid in 2010 and 2012 payments could be made in 2011) or timing of prepayments could be made following determinations by the FDIC of the liquidity needs of the DIF at the time.

2. Adjust Assumptions for Determining Assessments. The assumptions used by the FDIC will likely result in banks being charged more in prepayments than will actually be incurred on a quarterly basis. The quarterly charges will be based on actual deposit amounts, rates and risk factors relevant at the time; therefore, the actual size of the DIF balance is not impacted by adjustments of these assumptions. The assumptions only factor into the liquidity of the DIF during this period. It is therefore not necessary that the FDIC forecast of prepayments match precisely the rates that will be charged in the future. Rather, the FDIC's goal should be to raise only enough money in prepayments to resolve the liquidity needs of the fund in the short term. The FDIC should therefore use assumptions that err on the side of having banks pay less than expected actual assessments, not more. This would mitigate the time value of money issues outlined above. The FDIC's assumptions should be adjusted to be a more realistic reflection of what actual charges will be.

a. Deposit Growth. The FDIC has modeled prepayments with the assumption of 5% deposit growth annually through 2012. Bank of America believes that this assumption is too high. Bank of America recommends that no growth assumption should be used. If a growth assumption is used, a gradual growth curve that is flat in 2010 and goes no higher than 3% in 2012 would be more appropriate. The market environment has changed so dramatically as a result of the economic disruptions of the last two years that historic growth rates prior to that time may not be reliable indicators and the growth during the economic turmoil may be aberrations that are not sustainable. The flight to quality to stronger banks as well as the movement of customers' funds from other investments into safer deposits may have exaggerated recent deposit growth.

b. September 30, 2009 Data as the Baseline. The FDIC bases three years worth of prepayments on September 30, 2009 data. This measurement will likely result in overpayments relative to actual assessments for two reasons. First, the September 30, 2009 deposit numbers may represent a spike relative to normalized deposit levels due to the factors described above. Second, the FDIC will calculate prepayments based on risk-based assessment factors that exist at arguably the weakest point in the economic cycle for banks. As the overall economy improves, and the banking system demonstrates sustained stability, risk-based assessment factors may improve for many banks which would result in lower actual assessments in subsequent periods. Banks that do in fact

show improved stability would in fact be penalized because it would exacerbate the time value of money impacts discussed above.

3. Reconcile Prepayments with Actual Charges. One alternative to mitigate the impacts of overpayments is to reconcile the forecasted prepayment amount to the actual quarterly assessment. While the FDIC's proposal contemplates a refund of overpayments, such refunds would not occur until the end of 2014. Bank of America would propose a quarterly rebate for the excess of the amount of the forecasted quarterly prepayment relative to the actual quarterly assessment. An alternative would be to provide a mechanism for an earlier rebate if the bank can demonstrate changes in factors since September 30, 2009 (for example, a reduction in risk-based assessment rates or a material reduction in deposits). A final alternative, which is beneficial but not helpful as the other options, would be to refund any excess credits at the end of 2012 rather than 2014. The FDIC has not provided information to support that the additional two years is necessary for liquidity of the DIF and such a delay in the refund only extends the costs described above.

4. Deemed Interest on Prepayments. The FDIC's proposal effectively gives a zero interest rate loan from the banks to the FDIC. The FDIC will have liquidity from these prepayments, but it will also have the ability to invest those cash reserves. We recognize that interest income on DIF funds ultimately is good for the DIF balance and banks benefit in the long term if the DIF grows because it may reduce needed assessments to reach the required DIF ratio. In the shorter term, however, the banks that prepay now based on current market conditions should be given consideration relative to parties that may form new charters or rapidly grow deposits over the next several years. Banks should receive an increase in their credit that can be applied to future assessments at a deemed rate of interest (for example, the yield on Treasury securities of a comparable maturity). Such a deemed interest payment would reduce the opportunity cost of the lost use of funds. It would also address the potential for unfair treatment between banks that ultimately are assessed more than their projected prepayment and banks that are chartered after this prepayment is effective or have higher than anticipated deposit growth. The FDIC has precedent for using such a credit system, as was done several years ago when the FDIC began charging assessments after a long hiatus.

5. No Risk-Based Assessment Increases for Prepayments. The FDIC has proposed to require banks to prepay based on the assumption that the FDIC will increase deposit insurance assessments by 3 basis points across the board in 2011 and 2012. This assumption should be removed for purposes of the prepayment calculation. Since the prepayment benefits the DIF and FDIC by providing liquidity but does not impact the amount and rate for actual assessments, the FDIC's proposal unnecessarily accelerates that premium increase and increases the liquidity and business opportunity costs to the banks. The FDIC has not demonstrated that there is link between the liquidity needs of the FDIC and the DIF in the short term and the rate increase in the subsequent years such that the additional three basis point assumption is necessary to solve the liquidity issue. If the FDIC does not increase the prepayment amount by this assumption, it does not impact the ultimate assessment rates or assessments collected to replenish the DIF, or the

timing of when the DIF balances raise. If the FDIC ultimately does in fact raise rates in 2011 and 2012, it would accelerate the utilization of the prepayment credits and would more quickly replenish the FDIC's liquidity for those higher premiums in the years when they are actually assessed.

6. Credit Trading. The FDIC has proposed to permit banks to trade the prepayment credits as a means to address the concerns raised about bank liquidity and opportunity costs. Bank of America supports having the flexibility to purchase and sell credits. Nevertheless, this is not a realistic solution to the costs and concerns of the prepayment discussed above. There is no evidence that a secondary market exists or has any probability of forming over the next several years. The market would be limited to banks, most of which likely will have excess credits themselves. While it is conceivable that a small bank with nominal credits could find a willing buyer at a discount, a large bank would have a very difficult time in finding purchasers that would have capacity material enough to use a substantial amount of the credits. The FDIC should therefore discount the value of this option as being a solution to the costs and concerns outlined above.

B. Tax Considerations.

Simple changes to the FDIC proposal could help address potential complexities in determining the tax treatment of the assessments. Specifically, the FDIC should treat prepaid assessments allocable to 2010, 2011, and 2012 as separate and distinct amounts, and require three separate payments or invoices. If prepaid assessments for these years are not separately documented, banks may face considerable uncertainty in determining annual allowable tax deductions with respect to the assessments.

Consistent with the suggestions discussed above that would mitigate the liquidity and opportunity costs of the prepayments, the FDIC could require the banks to prepay the 2010 assessments on December 30, 2009, the 2011 assessments in 2010 and the 2012 assessments in 2011. Having the proximity of the prepayment closer to the timing of the actual quarterly assessments may enable banks to accelerate the tax deductions for those later periods. This acceleration could partially compensate banks for the loss of funds that would result under the proposed prepayments.

C. Assessments Should Continue to be Based on Deposits.

Bank of America notes that several small- and medium-sized institutions have submitted comments on the proposal and have advocated that the FDIC should base the calculation of any prepaid assessments on an institution's total assets as opposed to total deposits. While we believe that the underlying argument is wholly inconsistent with the notion of risk-based assessments as a matter of both law and economics, we are not commenting on this suggestion because it was not part of the proposal or the issues presented by the FDIC for public notice comment.

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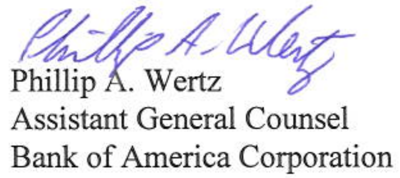
Bank of America appreciates the opportunity to comment on the FDIC's proposed prepaid assessments, and we thank you for your consideration of our comments.

Sincerely,



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