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

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Mr. Robert E. Feldman, Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429
Attn: RIN 3064-AD66
comments@fdic.gov

Re: Proposed Regulations regarding Asset-Based Assessments and Risk-Based Assessments

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 changes to deposit insurance assessments methodology. Bank of America, with over $1.8 trillion in total assets and over $900 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 5,900 retail branch locations and over 18,700 ATMs.

Bank of America agrees that deposit insurance assessments should be risk-based and that well-capitalized, as is mandated by the Federal Deposit Insurance Act, and well-run institutions should pay premiums at lower rates than institutions that pose greater risks upon a failure. Bank of America, however, has serious concerns about the FDIC's proposed methodology for measuring risk for large institutions. Coupled with the change in the assessment base from deposits to total assets required by Section 331 of the Dodd-Frank Act, the FDIC's proposals will result in significantly higher assessment rates for larger institutions that do not reflect the actual risk to the Deposit Insurance Fund (the "DIF") posed by such institutions. We discuss these concerns and potential modifications to the proposal that could mitigate these concerns in more detail below.

The Impact of Asset-Based Assessments

The Dodd-Frank Act requires a change in the deposit insurance assessment base from the current methodology using insurable deposits to one based on total assets minus tangible capital. This fundamentally changes the deposit insurance assessment system and illogically divorces the costs of assessments from the actual risks of potential losses to the DIF (i.e., potential losses on insured deposits). This change has no reasonable foundation in public policy and in fact likely

will have unintended consequences in the pricing and availability of various products for customers both domestically and internationally. This change only serves the short-sighted political goal of shifting a greater proportion of assessment burdens from smaller banks to larger banks. Given that it is small bank failures over the last several years that have depleted the DIF, and there have been few large bank failures and no systemically important bank failures that have resulted in losses to the DIF, this new policy only exacerbates the subsidy that large banks provide to support small bank failures.

The asset-based assessment represents a de facto assessment rate increase that is NOT risk-based. While the magnitude of this increase will vary based on the size and composition of a particular bank's balance sheet, it could represent an increase of 6 to 5,000 basis points relative to the existing system, before application of the FDIC's proposed risk-based assessment formula. While the FDIC has proposed to decrease rates across the board to compensate for the legislative change to the base, it has not addressed the fundamental disconnect between the rate (based on risk of deposit losses) and assessments (to be based on total assets). The across the board rate decrease does not fix this problem, it exacerbates it. Smaller institutions (even ones in the highest risk categories) will receive a rate discount, while larger institutions that pose little risk to the DIF will suffer a rate increase, in some cases to unconscionable levels.

We acknowledge that the FDIC has a statutory mandate to implement regulations giving effect to Section 331 of the Dodd-Frank Act and the FDIC is unable to override the new assessment base requirements. Nevertheless, the FDIC also has a statutory obligation to implement a deposit insurance assessment program that is risk-based. Section 331 does not override this mandate nor does it authorize the FDIC to ignore the likely distortions that may result. The FDIC must balance these two competing principles. The FDIC has the power and the obligation to take all possible steps to mitigate the impacts of this dramatic change by factoring in the effects of asset-based assessments more directly in the proposed risk-based assessment regulations. The assessment rates should be scaled based not only on the risk of an institution, but discounted based on the non-risk based feature of the asset base calculation. The FDIC's goal should be to ensure that the actual amount of assessments paid, and the de facto rate charged based on the combination of all of the FDIC's rules and regulations, is reasonable and proportionate to risk.

We further believe that the FDIC's proposal to modify only large bank assessment methodology, but ignore small banks, is problematic. Given the significant amount of small bank failures over the last several years, and the continuing rate of failures, the FDIC should evaluate and propose changes to the small bank assessment methodology as well to ensure that their assessments are consistent with a risk-based system. This should explicitly factor in the impacts of the Dodd-Frank Act changes to the assessment base. An institution should be assessed based on its risk to the DIF. An arbitrary across the board rate decrease for smaller institutions solely based on an increase in subsidy payments from larger institutions means that small bank assessments are no longer truly risk-based and the entire system (not just the large bank methodology) should be revisited. As proposed, the riskiest small banks would get a rate reduction while safest large

institution will get a rate increase. This result is unjustifiable and is inconsistent with the statutory requirements of a risk-based system.

The FDIC Should Apply a Cap on Effective Rates to Mitigate Unreasonable Asset-Based Impacts.

As discussed above, the change in the assessment base to assets is an implicit rate increase. While the FDIC has attempted to compensate for this on an industry-wide basis by adjusting base assessment rates downward, this proposal has two fundamental flaws.

First, the FDIC's proposed rules will not be revenue neutral for the industry. We appreciate the fact that the FDIC has proposed to reduce the base rate across the board with the intention to maintain a neutral amount of overall DIF assessments for the industry. While that proposed base rate may have been based on reasonable assumptions prior to the new large bank risk-based assessment proposal, it no longer holds true. We estimate that the risk-based assessment proposal will result in significantly higher rates for most large institutions on top of the impact for a larger base. We estimate that overall assessments for the industry will be substantially higher than the FDIC predicts and will not be revenue neutral. This should be fixed by reducing the punitive proposals on large institutions and/or reducing the base rate further.

Second, the FDIC has failed to account for potential unreasonable anomalies that will result from the combination of the new assessment base and the new risk-based rate proposal. For example, Bank of America has two bankers bank depository institution subsidiaries, each with $500,000 in total deposits. These banks are funding vehicles that facilitate raising liquidity for its affiliated banks. These banks have billions worth of assets, primarily mortgage loans. Based on the change to asset-based assessments, and using the proposed FDIC risk-based assessment rate, these entities would pay *50 times* more *per year* in FDIC assessments than their actual insured deposits that could be at risk to the DIF upon a failure (assuming a complete loss on all deposits, which is unimaginable given the levels of assets and capital available to cover such deposits upon default). This leads to an effective assessment rate based on the actual deposits of these banks of approximate *5,000 basis points*. Similar outrageous results will occur for credit card banks or any bank that has a substantial disparity between the size of its deposit base relative to the size of its total assets.

These examples demonstrate fundamental flaws in the risk-based assessment proposal. The FDIC has proposed a wide-variety of risk metrics that it believes are indicative of risk. The FDIC fails, however, to step back and look at the big picture and ask whether or not the combination of the new rules leads to a reasonable result. The FDIC's regulations cannot be truly risk-based unless the amount of assessments paid actually correlates to the risk of loss to the DIF. The FDIC's proposal looks at the rate in a vacuum, and ignores the implicit rate increase due to the asset-based methodology. The FDIC's proposed rate schedule is a fiction, because it does not represent the de facto rate charged by banks resulting from the asset-based

methodology. The example above demonstrates that this is a key component missing from the FDIC's analysis.

When the FDIC imposed a special assessment on banks in 2009, it recognized the potential for such irrational results. In that assessment, while the FDIC based the assessment on total assets, it imposed a maximum rate cap based on what a reasonable rate would have been if the deposit-based assessment methodology had been used. The FDIC should adopt a similar process for the new assessment system. The FDIC should calculate its assessment rate based on the amount of insurable deposits at risk (which represents the true risk to the DIF) to determine a reasonable risk-based rate. Then the FDIC should cap a bank's assessment rate or adjust the assessment rate downward to offset the non-risk based component of the overall assessment represented by the incremental charges caused solely by the asset base. The FDIC must ensure that the actual assessments paid are reasonable, not merely the rate that represents only one part of the equation.

Unintended Impacts on Non-Deposit Products

The new assessment base required by the Dodd-Frank Act discourages a bank from growing assets. For example, a bank that makes a mortgage loan and holds it on its balance sheet will incur an FDIC assessment. Traditionally, costs of deposit insurance would be priced into deposit rates, as there is a logical connection between the cost and the benefit for the deposit customer. There is no benefit to the mortgage customer of FDIC insurance, however. The new assessment base could result in mortgage customers bearing additional costs that have no understandable benefit. Similarly, it would be very difficult to pass all of the incremental increased assessments through to deposit customers and reasonably justify that its interest rate will be worse because other customers have obtained a mortgage. The net result of this new policy is to impose a tax on a bank for growing assets, such as making loans, and creates a deterrent to offering such products. This is fundamentally at odds with public policy initiatives to encourage lending and economic growth.

The FDIC should make downward adjustments to risk-based assessment rates for beneficial non-deposit assets on a bank's balance sheet, such as high quality loans or marketable securities or otherwise take actions to mitigate this impact my mitigating the cost of unencumbered assets that that serve to absorb losses to the DIF in the event of a bank failure.

Unintended Impacts on Non-U.S. Deposits

Non-U.S. deposits (whether at a foreign branch of an insured depository institution or at a foreign subsidiary bank that is consolidated into the insured depository institution) are not FDIC insured deposits. In fact, foreign deposits are not deemed "deposits" at all under the Federal Deposit Insurance Act. They are general unsecured credit claims that are subordinate to U.S. depositors in the event of a bank failure. The FDIC should therefore encourage non-US deposits because they provide a cushion to potential losses of the DIF. The new assessment base will result in assessments charged on these non-US deposits as they add to total assets of a bank. Since they

are not FDIC insured, there is no incremental benefit to the customers who place these deposits. In some cases, the non-U.S. deposit will be subject to a similar deposit insurance regime in the local jurisdiction where it is booked (with associated costs). Assessing these non-US deposits will make it difficult for U.S. banks to compete with local banks for these foreign deposits because of the incremental FDIC tax. This policy may result in a reduction of non-U.S. deposits for U.S. banks. This is harmful because it discourages an important source of liquidity for banks, it harms the ability of U.S. banks to serve global customers, and it may increase risks to the DIF by reducing the loss absorbency benefits of non-U.S. deposits. For non-U.S. customers that remain, there will be an incentive to make such deposits payable in the U.S. so they can get the benefit of FDIC insurance that they are paying for, thereby increasing the insured deposits susceptible to a loss upon a bank failure.

The FDIC should mitigate this impact by either excluding assets relating to non-US operations and deposits from the assessment base or adjust the assessment rate downward to lessen the impact caused by assessing non-US deposits. In calculating potential loss severity upon failure, the FDIC should give full credit to non-U.S. deposits in offsetting potential losses to the DIF.

FAS 167 Consolidation Impacts

The FDIC's proposal to implement the asset-based assessment provisions overstates the actual assets of a depository institution. Under FAS 167, certain previously off-balance sheet transactions (such as asset-backed securitizations) may now be consolidated onto the bank's balance sheet for accounting purposes. The FDIC's proposal to use average total assets in the assessment calculations will include such assets. The FDIC should exclude FAS 167 consolidated assets from the assessment base. Such assets, while consolidated for accounting purposes, are not legally assets of the bank that would be available to the FDIC for liquidation upon a failure. The FDIC has recently updated safe harbor rules whereby it will continue to respect true sale treatment of conforming securitizations, regardless of accounting treatment. Counting the FAS 167 consolidated assets will dramatically over-inflate the assessment base for institutions that rely upon asset-backed securitizations for funding, particularly credit card banks. The FAS 167 assets also result in a skewing of the assessment rate because it over-states the concentration of risk of an institution and mischaracterizes these transactions as an asset, rather than a beneficial funding and liquidity tool.

This could be remedied by the FDIC defining the term "asset" in the assessment base proposal to exclude FAS 167 assets and/or by adjusting assessment rate methodology to eliminate the impact of such assets from the rate calculations.

The Bankers Bank Methodology is Too Limited

The Dodd-Frank Act expressly permits the FDIC to modify the asset-based assessment requirements in respect of bankers banks. The FDIC's proposal defines a bankers bank too narrowly and will result in overcharging assessments on bankers banks and double counting of

assessments. The FDIC's proposal would exclude from the definition of a bankers bank any bank that conducts business primarily with affiliated banks. There is no reasonable policy basis to limit the bankers bank definition in this way and it is inconsistent with the regulatory definition of a bankers bank used elsewhere in federal banking laws and regulations. There is no discernable difference in risk profile for a bankers bank that does business with affiliates that would justify measuring them under the typical large bank methodology. The Dodd-Frank Act would authorize, and the FDIC should adopt, a regulation that states that bankers banks will be assessed based on actual insurable deposits, not total assets. As discussed above, failure to base assessments on deposits will lead to absurd results that have no correlation to risk.

Additionally, the FDIC's proposed treatment of bankers banks that primarily deal with affiliates will double tax those institutions. For example, our lead bank sells mortgage loan assets to a sister bankers bank to be used in funding and liquidity programs. The bankers bank holds assets, the lead bank receives fed funds payable from the bankers banks as payment. This transaction results in the FDIC assessing both the lead bank and the bankers bank for assets relating to the same transaction. Aside from the fact that there is no risk-based rationale for assessing the same transaction twice, the cross-bank guarantee provisions of the Federal Deposit Insurance Act make such a result illogical because each bank would be required to make payments to the FDIC upon a default in order to reduce potential losses to the DIF. Therefore, not only should the FDIC expand the definition of a bankers bank to include any bank that deals exclusively with other banks (regardless of affiliation), but the FDIC should further decrease the potential assessments for such bankers banks that do business with affiliates because they pose a lower risk to the DIF than a traditional bankers bank that faces unaffiliated banks.

The FDIC's Risk-Based Proposal Does Not Factor in Other Risk Mitigating Regulation

The explicit premise of the FDIC's proposed risk-based assessment regime is that larger institutions are inherently more risky and therefore warrant a more complicated methodology for measuring risk that undoubtedly will lead to higher assessments, relative to smaller and simpler institutions. Given that the actual losses and depletion of the DIF reserves over the last several years are due to small bank failures, it is difficult to understand why the FDIC is focused exclusively on larger and complex institutions rather than holistically revamping the risk-based system for all banks, including small institutions.

Most of the data upon which the FDIC has based its assumptions and analysis have come from experience relating to small bank failures or hypothetical models of what could have happened if a large bank failed, but have not been tested with actual experience. The formulas for risk assessment are so complicated that it is almost impossible to calculate without the FDIC's automated scorecard tool. The benefit of using so many complicated metrics for risk measurement is unclear. Because of the complexity of the data, the model and assumptions, it is extremely difficult for the industry to validate the FDIC's assumptions as fair and reasonable. There should be greater transparency in the FDIC's models and assumptions which should be subject to a more robust study and public debate and comment. There appears to be a high

potential that these complex risk measurements overlap and may double count risk. At the very least, especially given the limited time available for public comment, the proposal should be simplified or delayed and subjected to a more rigorous review by industry analysts and statisticians.

The FDIC's proposal also ignores other very important regulations and policies that also serve to mitigate risks of failure for larger institutions and, in fact, should result in larger institutions posing significantly less risk to the DIF than smaller institutions. Among the risk mitigating requirements applicable only to larger institutions are:

a. Title I of the Dodd-Frank Act and the heightened prudential regulation, capital and liquidity requirements for systemically important financial institutions;
b. BASEL III requirements for higher capital and stricter components of capital;
c. Requirements for ongoing enterprise stress testing and maintenance of capital and liquidity plans to survive adverse economic scenarios;
d. Requirements for large institutions to adopt recovery and resolution plans that will help prevent a failure and make any failure more orderly; and
e. The ongoing, active, on-site supervisory activities of the U.S. and non-U.S. banking regulators that provide meaningful oversight of large banks and real time monitoring of risk (which is far more robust than the level of supervision applied to smaller institutions).

This unprecedented amount of enhanced regulation and supervision over large and systemically significant institutions must be recognized as a rationale to reduce the inherent risk to large institutions relative to small institutions. If an institution is able to successfully satisfy all of these heightened requirements and capital buffers, the FDIC should recognize this and reduce an institution's rate accordingly. As currently drafted, the FDIC has created its own risk metrics and has largely disregarded all of these other factors that otherwise serve as the core of the global system for regulation and supervision of depository institutions.

The FDIC's Loss Severity Measurements are Overly Conservative

The FDIC's proposed risk-based assessment methodology has two flaws in calculating potential loss severity. First, the FDIC has made very dire assumptions about the likely run-off of assets and discount of the value of assets upon a default. We firmly believe that a true risk-based assessment should factor in the potential loss given default. The greater the unencumbered assets of an institution, the more likely they will mitigate the potential losses to the DIF. While the FDIC acknowledges this principle to an extent, the FDIC's methodology discounts the value of assets upon a default based on extreme and unsupported assumptions. The FDIC has presented no reasonable data or analysis to support the anticipated run-off rates of assets or the anticipated discounted value of assets following a failure. The assumptions appear arbitrary and without a transparent and reviewable model. For example, the FDIC has assumed that automatically upon a failure, most assets would have an immediate drop in market value, without even considering the potential liquidity of the markets for those assets or the quality of those assets. The FDIC

should not discount assets in its rate calculations. It should base them on the value of such assets on the banks balance sheet, which is the best data available and reflects the risk of an institution as of now, not based on unknowable and hypothetical events. The FDIC has also failed to give proper weight to subordinate liabilities that would absorb potential losses to the DIF.

A few examples demonstrate that the FDIC's models are overly conservative. The FDIC presumes that most foreign deposits will be withdrawn quickly in a crisis and therefore offer little loss absorbing benefit. This scenario did not happen during the most recent financial crisis. Foreign deposits have proven to be at least as stable as core U.S. deposits. The FDIC has also assumed that assets in foreign branches and subsidiaries may be ring-fenced by local regulators upon a failure and would not be made available to buffer losses of the DIF. There is no experience of this having occurred, nor any stated policy of particular regulators giving rise to this concern. Additionally, the FDIC wrongly assumes that assets in foreign branches correlate to the deposits located there. In many cases, while deposits are booked in a non-US branch, there are minimal assets booked in that branch, so the negative impact to the DIF of ring fencing would be minimal. For valuation of other assets, the FDIC assumes a worst case scenario of liquidating asset pools during a crisis at the trough of a cycle with little liquidity and depressed values and doesn't contemplate that some assets are held in subsidiaries that may not have failed, that are high quality and liquid and that the FDIC is not required to sell liquidate the assets immediately and has flexibility to manage a resolution to minimize short term market impacts.

Second, the FDIC's proposal limits the weight given in the loss severity metric to a range such that even an institution with zero risk cannot have a factor lower than .80 or higher than 1.20 of the overall risk score. The FDIC should remove the proposed downward limit. By capping it at .80, it becomes impossible for a large bank to take any risk-mitigating action that can reduce its rate to the lowest rate. The FDIC provides no support as to why this is an appropriate loss severity factor and has any bearing on overall risk of loss to the DIF for an institution. Applying this range adds to the anomalous results that the all-in assessments paid do not correlate to risk of the DIF. As with the bankers bank example above, if there is zero risk of loss to the DIF, there is no risk-based rationale to impute that the assessment rate will assume there is an 80% risk factor. This range should be removed from the FDIC's proposal and the overall loss severity measurement should be modified to more closely measure the potential losses on insured deposits given default.

Brokered Deposits Should Exclude Affiliated Sweeps

Bank of America agrees that adjusting assessment rates for institutions that rely upon substantial amounts of brokered deposits is appropriate. We believe that the FDIC's definition of brokered deposits is potentially too broad. The FDIC should not consider deposits that are swept from affiliates (including affiliated broker dealers) to be brokered deposits for purposes of risk adjustments. The FDIC has considered a large concentration of brokered deposits to demonstrate risk because brokered deposits generally are "hot money", meaning they are not relationship based and may not be a stable source of deposits for the bank. Many banks have affiliated broker

dealers that manage investments for clients. These are well established and stable relationships with customers. A common investment option for these customers (whether for idle funds or as a safe investment) is to sweep cash from brokerage accounts into FDIC insured bank deposits. This type of deposit is not hot money as it represents a product choice of an established relationship from the affiliate and balances are relatively stable. Unlike a common brokered deposit where the depositor may only be chasing the highest rate, deposits swept by a broker dealer customer are part of the suite of financial management services that the bank and its affiliates offer.[1]

Aside from the current NPRs, we encourage the FDIC to consider re-visiting the definition of "brokered deposits" more generally and issue proposed rules for comment on the subject. The current definitions and interpretations are now decades old and have not been updated to reflect the current market, technology and products available to deposit customers. The current definitions often result in classifying a deposit as "brokered", when it bears little to no resemblance and does not carry the same risks as the classic examples presumed by the FDIC in its policymaking.

There Should be No Discretionary Risk Adjustment

The proposal permits the FDIC to increase an institution's assessments on a discretionary basis by making adjustments to an institution's scorecard. This provision allows the FDIC to override objective risk measurements of risk and the views and experience of the primary regulator. This discretion gives rise to unpredictability in planning for assessment costs and disparate treatment among similarly situated institutions. We believe that the final regulation should retain the ability of the FDIC to make downward adjustments to the assessment rates of a particular institution when it becomes apparent that the FDIC's complex models result in aberrations that do not fairly correlate to actual risk. The FDIC's discretion to arbitrarily make upward rate adjustments should be eliminated.

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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
Associate General Counsel
Bank of America Corporation

[1] Bank of America's affiliated broker-dealer (consistent with a number of other large institutions) has obtained a letter from the FDIC confirming that its sweeps do not constitute brokered deposits so long as they operate within certain parameters and restrictions defined in that letter. Nevertheless, we wish to reinforce the importance of such products and the need to avoid mischaracterizing them as akin to classic brokered deposits.