

November 30, 2005

Mr. Lawrence W. Smith
Director - Technical Application and Implementation Activities
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5166

Re: Proposed FASB Staff Position No. FIN 46(R)-c, *Determining the Variability to Be Considered In Applying FASB Interpretation No. 46(R)*

Dear Mr. Smith:

We welcome the opportunity to comment on the above-referenced FASB Staff Position (the FSP). Bank of America Corporation provides a diverse range of financial services and products throughout the United States and in selected international markets, and is the second largest U.S. bank in terms of total assets. We routinely use variable interest entities (VIEs) for risk management and other purposes, and we structure VIEs for our customers.

We would like to thank the FASB for undertaking this project and we fully support the conclusion that the analysis of variability to be considered when applying FASB Interpretation No. 46(R), *Consolidation of Variable Interest Entities*, should be based on the design of the entity. This approach is clearly superior to the cash flow and fair value methods that have evolved in practice. We do, however, request additional clarification as to the analysis of interest rate and foreign exchange derivatives, as discussed in more detail below.

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Interest Rate and Foreign Exchange Derivatives

Example 1(b) in paragraph A5 of the FSP describes a variable interest entity (VIE) that holds fixed and floating rate securities funded primarily by fixed rate debt. The entity enters into an interest rate swap to hedge the mismatch between floating rate assets and fixed rate debt throughout its three-year life. As noted in paragraph A7(c), the notional amount and contractual terms of the swap are designed, from the perspective of the debt and equity investors, to modify the assets so as to reduce or eliminate the interest rate mismatch between the assets and the liabilities.

We agree with the conclusion in paragraph A7 that the interest rate swap should be considered a "creator" of the entity's variability and is therefore not a variable interest in the entity. However, Footnote 8 states that "If the swap counterparty, directly, or through a related party, also held a debt or equity interest in the entity, an analysis of the design of the entity may lead to a conclusion that the swap counterparty was designed to absorb

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variability that otherwise would have been absorbed by the debt or equity investors, absent the swap transaction.”

One might infer from the footnote that, absent any other changes in the fact pattern of Example 1(b), the swap would be a variable interest if the swap counterparty also invested in debt or equity of the entity. We would disagree with this conclusion, as the analysis indicated that the swap was intended to eliminate a mismatch between the assets and liabilities of the entity, not to absorb variability created by the assets. In addition, we are concerned that this footnote may be interpreted by some practitioners to suggest that any time a debt or equity investor is also a swap counterparty, there will be a presumption that the interest rate swap is a variable interest.

We therefore recommend that Footnote 8 be replaced by a more robust discussion of interest rate derivatives. This discussion should also encompass foreign exchange derivatives which, like interest rate derivatives, are often used to manage exposure to broad market conditions that may affect the value of the assets held by a VIE. These derivatives can be both creators and absorbers of variability, depending on facts and circumstances. To improve consistency and reduce diversity in practice, we recommend that the FASB articulate certain indicators that support a conclusion that the derivative contracts are not intended to absorb variability. These indicators would include the following:

- The contracts are “plain vanilla” interest rate and foreign-exchange derivatives with no off-market terms or settlement provisions.
- Payment terms are driven by general market conditions, and are not based on changes in fair value or cash flows of the specific assets held by the VIE.
- The derivatives are intended to reduce or eliminate a mismatch between the assets and liabilities of a VIE (for example, by swapping fixed for floating rates of interest when fixed rate assets are funded by floating rate liabilities).
- The derivative counterparty routinely makes a market or trades in similar derivatives on similar terms.

The existence of these indicators should provide a basis for concluding that the interest rate or foreign exchange derivatives are not designed to absorb variability and are therefore not variable interests in the entity.

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We appreciate the opportunity to express our views in this letter. Should you have questions, please feel free to contact Randy Shearer at 704-388-8433 or me at 704-387-4997.

Sincerely,

/s/

John M. James
Senior Vice President
Corporate Controller

cc: Neil A. Cotty, Chief Accounting Officer
Randall J. Shearer, Accounting Policy Executive