

November 14, 2008

Mr. Russell G. Golden  
Director of Technical Application and Implementation Activities  
Financial Accounting Standards Board  
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File Reference Nos. 1610-100 and 1620-100

LETTER OF COMMENT NO. 61

Dear Mr. Golden:

Bank of America Corporation appreciates the opportunity to comment on the proposed Statements of Financial Accounting Standards, *Accounting for Transfers of Financial Assets – an amendment of FASB Statement No. 140* (the proposed FAS 140 amendment) and *Amendments to FASB Interpretation No. 46(R)* (the proposed FIN 46(R) amendment). Bank of America Corporation, one of the three largest U.S. banks, provides a diverse range of financial services and products throughout the United States and in selected international markets. We routinely securitize assets and use special purpose entities for liquidity, alternative funding, and risk management purposes. We also structure securitization vehicles on behalf of and for the benefit of our customers.

We support the Board's efforts to improve financial reporting by requiring more timely and transparent reporting of risks related to transfers of financial assets and the use of special purpose entities. We believe that the new required disclosures will provide the improved transparency needed to better understand the transactions and related impacts on the financial statements.

We believe the Board should not make widespread accounting changes to the variable interest entity consolidation model at this time. It appears that the changes set forth in the proposed FIN 46(R) amendment are designed, in large part, to increase the number of variable interest entities (VIEs) that are consolidated. We believe that consolidation in many cases does not necessarily lead to improved financial reporting and better transparency. If an entity has very limited control over the assets of an SPE and is only partially exposed to the risks embodied in those assets, consolidation may obscure the true financial condition of the entity. Additionally, the costs of implementing the new standards will be significant but the benefits will be short-lived, as those standards will inevitably change with the adoption of international accounting standards in just a few years.

We strongly believe that there is a need for a comprehensive review of all consolidation guidance. We believe that all entities should be consolidated based on a single standard that embodies a principles-based construct that provides for one definition of control which would result in greater transparency to the user of the financial statements and would better represent the true financial condition of the company. Given that there appears to be a movement toward one set of globally accepted accounting standards within the next few years, we strongly urge the Board to focus its resources and efforts on the joint project with the International Accounting Standards Board (IASB) to develop convergent standards on derecognition and consolidation that would apply to all types of entities, not just VIEs, and which would be applied consistently on a global basis.

We do, however, support certain changes to the accounting model at this time. While the Board has struggled with conceptual issues surrounding the activities of qualifying special purpose entities (QSPEs), practitioners also struggle as they attempt to comply with the complex rules. We support the proposed changes to FAS 140 which will move the U.S. closer to international convergence while eliminating the existing practice issues including those related to QSPEs. As it

relates to the proposed amendments to FIN 46(R), we would support a limited number of changes that we believe would have a significant, positive impact on transparency of the financial statements. For example, we agree that the definition of a reconsideration event is too narrow because it does not include significant or unexpected changes in economic circumstances. We support a broader definition that would require an enterprise to reconsider its consolidation conclusion when it becomes aware of changes in economic circumstances or other events that could potentially change the identification of the primary beneficiary. We also support adoption of the linked presentation to improve transparency of the financial statements of the primary beneficiary of a VIE whose assets are restricted to the repayment of specific liabilities which the primary beneficiary is not obligated to repay.

If the Board ultimately adopts the broader changes that are included in the proposed FIN 46(R) amendment, we recommend a number of changes to the criteria for identification of the primary beneficiary, as set forth in more detail below. While we support the concept of a dual test to identify the primary beneficiary which combines elements of power with a significant exposure to risks and rewards, we are concerned that the proposed amendments to FIN 46(R) in their current form have not been thoroughly vetted and would lead to unintended consequences as discussed further below.

We also note that the proposed effective date of January 1, 2010 for calendar year preparers may not provide a sufficient amount of time to implement the new standards. Provisions of the new standards need to be fully vetted before accurate conclusions can be drawn. Also, to the extent that VIEs are newly consolidated, systems will need to be modified and controls must be established to ensure compliance with the requirements of the Sarbanes-Oxley Act. We are aware that some entities have publicly stated that the cost and time to comply with the new requirements would be significant and that their transition efforts would extend well into 2010. Additionally, given the turmoil in the current economic environment, we do not believe that now is the time to make the significant changes as proposed due to the potential impact that it may have on the securitization markets and availability of efficient funding for the many companies that rely upon the markets for such funding. Therefore, we recommend that implementation be delayed until January 1, 2011. This would also provide additional time to further eliminate practice differences with international standards.

We believe that the proposed changes to FAS 140, combined with a broader definition of reconsideration events and use of the linked presentation would result in a significant practice improvement in the short term. As mentioned above, we would then urge the Board to perform a comprehensive review in conjunction with the IASB of the derecognition and consolidation standards with the objective of creating principles-based standards that could be consistently applied to all types of entities, including variable interest entities and those that are currently consolidated based on voting rights.

Our specific comments and observations on these and other issues are set forth in more detail below.

### **Reconsideration Events**

We agree with the Board's conclusion that the current reconsideration requirements in FIN 46(R) are inadequate insofar as they do not permit an enterprise to reconsider its primary beneficiary status in response to significant economic changes. However, we believe that the proposed changes go beyond what is necessary and would create an undue burden for preparers.

- The proposed amendment would eliminate footnote 5 to paragraph 5(a) of FIN 46(R) which states that an enterprise that was not originally a VIE does not become a VIE simply because it incurs operating losses.
- The proposed amendment would require a continuous reassessment of both an entity's status as a VIE and an enterprise's status as primary beneficiary of a VIE.

*We do not believe that these changes represent an improvement in practice. Specifically, we do not believe that operating losses alone should cause a substantive operating entity to transform into a VIE. If the design of the entity has not changed and the equity owners have not given up control, this outcome would be illogical.*

In addition, the continuous reassessment requirement would be unduly burdensome to preparers. If facts and circumstances have not changed significantly, it is unlikely that the reassessment would yield different results, but preparers would be obligated to perform and document the reassessment nevertheless. Consider the combined impact of the above changes on a banking institution that holds thousands of commercial loans. The institution would be required to continuously reassess its portfolio of troubled loans to determine whether any borrower had become a VIE due to operating losses and whether the institution had become the primary beneficiary. Such an assessment, which includes a subjective assessment as to the sufficiency of equity, can be extremely time consuming, particularly for an institution such as a small regional bank that has not had extensive experience with VIEs. Many financial institutions would bear a similar burden in connection with their securities portfolios.

We therefore recommend the following:

- The guidance in footnote 5 on operating losses should be retained. Operating losses alone, absent any changes in contractual arrangements, should not cause an entity that is subject to consolidation based on voting rights to be accounted for as a VIE.
- Reassessment of both VIE status and primary beneficiary status should be required only when an enterprise becomes aware of a significant change in facts and circumstances, including contractual changes, implicit support arrangements and broad economic or market conditions, that are likely to impact the assessment.

#### **Criteria for Identification of the Primary Beneficiary**

As noted above, we do not support widespread changes to the consolidation model in FIN 46(R) at this time. However, if the Board ultimately adopts the broader changes that are included in the proposed FIN 46(R) amendment, we recommend a number of changes to the criteria for identification of the primary beneficiary.

Proposed paragraph 14A of FIN 46(R) requires an enterprise holding a variable interest in a VIE to qualitatively assess whether it holds a controlling financial interest in the VIE. An enterprise is deemed to hold a controlling financial interest and is therefore the primary beneficiary if it meets both of the following characteristics: (a) it has "the power to direct matters that most significantly impact the activities of a variable interest entity, including, but not limited to, activities that impact the entity's economic performance" and (b) it has "the right to receive benefits" or "the obligation to absorb losses" that "could potentially be significant". If an enterprise cannot determine conclusively whether it meets both of these criteria, paragraph 14B requires that a quantitative assessment be performed.

We have the following concerns with regard to these requirements:

- In assessing whether an enterprise meets the characteristic in paragraph 14A(a), substantive kick-out rights are considered only if a single party, including its related parties and de facto agents, has the unilateral ability to exercise such rights. This provision is inconsistent with existing guidance for non-VIEs as expressed in EITF Issue No. 04-5, *Determining Whether a General Partner, or the General Partners as a Group, Controls a Limited Partnership or Similar Entity When the Limited Partners Have Certain Rights*. The failure to acknowledge substantive kick-out rights that are held by multiple parties would lead to unintended consequences as illustrated by our first example below.
- The characteristic in paragraph 14A(b) requires an enterprise to analyze whether it has rights or obligations that could potentially be significant, but these rights or obligations do not have to meet the definition of a "variable interest". Accordingly, an enterprise could meet this characteristic based on an interest that creates but does not absorb variability. This seems contrary to the result that would be expected based on the design of the entity.
- Paragraph 14A(b) does not require that the primary beneficiary have rights or obligations that are significant, only those that could potentially be significant. We believe this threshold is too broad. It would require an enterprise to predict future facts and circumstances that may or may not be reasonably likely to occur.
- We question why a quantitative assessment would ever be required. A robust qualitative assessment performed in accordance with paragraph 14A should be sufficient.

Consider the following examples, all of which we believe represent unintended consequences:

- An asset manager with an interest in a 2a-7 money market fund that could potentially be significant would consolidate the fund, even though an independent Board of Trustees holds substantive kick-out rights and the asset manager does not expect to absorb a significant amount of the variability created by the assets of the funds. As noted in our recently filed Form 10-Q for the quarter ended September 30, 2008, we currently manage money market funds with \$175 billion of assets under management. Some or all of these funds could be at risk of consolidation if substantive kick-out rights held by their managing Boards are excluded from the analysis. To comingle the assets of these funds onto the Bank of America balance sheet when we are clearly not the owner of the assets would degrade transparency.
- An enterprise establishes a special purpose entity (SPE) to provide credit protection to the enterprise on a pool of mortgage loans. The SPE issues credit-linked notes, the proceeds of which are invested in high-grade collateral, and the enterprise guarantees a minimum return on the collateral. This guarantee is a variable interest in the SPE. If the enterprise services the mortgage loans, it would likely consolidate the SPE because it has an interest (the purchased credit protection) that could potentially be significant. This result is inconsistent with the design of the entity because the credit protection contract is the primary creator of variability for the investors in the credit-linked notes; it will not absorb variability.
- The trustee of an irrevocable trust manages the assets of the trust and receives a fee that is stated as a fixed percentage of assets in the trust. If the beneficiaries of the trust do not hold substantive kick-out rights, as defined in FIN 46(R), the fee paid to

the trustee is a variable interest in the trust. Depending on the relative profitability of the trust's assets the fee could potentially be significant, and the trustee may be identified as the primary beneficiary. This outcome is inappropriate, as the trustee is acting in a fiduciary capacity and is not expected to absorb a significant amount of variability created by the assets of the trust

Our recommendations:

- Substantive kick-out rights should always be considered in the paragraph 14A(a) analysis, even if no single party has the unilateral right to exercise them.
- The characteristic in paragraph 14A(b) should be revised to require that the primary beneficiary have an interest in the VIE that is expected to absorb a significant amount of variability created by the assets and other contracts of the VIE.
- The quantitative assessment is not necessary and should be eliminated.

#### **Linked Presentation**

As noted in paragraph A29 of the proposed FAS 140 amendment, the Board decided not to consider a linked presentation model at this time due the narrow scope of the FAS 140 project, which deals with financial assets only, and the limited time available. We recommend that the Board reconsider this view and explore the linked presentation, but as a component of the FIN 46(R) amendment.

Many securitization vehicles, in particular those that are currently structured as QSPEs, hold assets and liabilities whose cash flows are inextricably linked. That is, the cash flows of the assets are restricted and can only be used to repay those liabilities, and the liabilities are expected to be repaid only from those assets. If the primary beneficiary cannot use the cash flows of the assets for general purposes and is not obligated to repay the liabilities, a linked presentation, in which the liabilities are shown as a deduction from the assets on the face of the balance sheet, would be more transparent to readers of the financial statements.

Consider, for example, a non-guaranteed residential mortgage-backed security trust that is currently structured as a QSPE. In accordance with the proposed amendments of FAS 140 and FIN 46(R), the transferor is likely to consolidate the trust if the transferor services the assets and holds an interest that could potentially be significant. The trust has the following characteristics:

- The trust is a bankruptcy-remote SPE that exists solely to hold a static pool of financial assets and to issue securities that are repaid from the cash flows on those assets.
- The assets are legally isolated from the creditors of the transferor/primary beneficiary and the transferor/primary beneficiary does not maintain control over the assets, as evidenced by compliance with sale accounting criteria set forth in paragraph 9 of FAS 140.
- The transferor/primary beneficiary cannot remove loans from the trust at will, nor can it substitute one loan for another, except in response to a breach of representations and warranties.
- Should the assets of the trust be insufficient to repay its debt, the transferor/primary beneficiary has no responsibility to protect the investors from loss, nor has it ever done so in the past.

- The transferor/primary beneficiary does not have the unilateral ability to liquidate the trust and cannot choose to prepay the debt.

Given these facts, it would seem inappropriate and would degrade transparency to commingle the restricted assets of the trust with the other, unrestricted loans owned by the primary beneficiary. Also, without a linked presentation, the primary beneficiary's liabilities would be overstated and the primary beneficiary would appear to be more highly leveraged than it actually is. We believe that, at a minimum, the *linked presentation should be used by the primary beneficiary of a VIE with these characteristics*. Accordingly, we strongly urge the FASB to explore the linked presentation model.

#### **Definition of "Significant Variable Interest"**

Due to perceived diversity in practice, the Board clarified in paragraph 6 of the proposed FIN 46(R) amendment that a "significant variable interest" is one that is either (a) significant to the variable interest entity or (b) significant to the enterprise. This clarification does not address whether "significance" is viewed in terms of variability or sheer size.

*We recommend that a "significant variable interest" be defined as an interest that is expected to absorb a significant amount of variability created by the assets and other contracts of the VIE.*

#### **Transferee's Right to Pledge or Exchange Transferred Assets**

We support elimination of the current paragraph 9(b) in FAS 140 which focuses on whether the transferee has the right to sell or pledge the transferred assets. However, some of the concepts in paragraph 9(b) have been carried forward into new proposed paragraph 9(c)(3), and we believe that certain changes are necessary to make this paragraph operational. Proposed paragraph 9(c)(3) of FAS 140 would preclude sale accounting if the transferor maintains effective control through "a restriction on the transferee's right to pledge or exchange the transferred financial asset it receives unless such constraint is designed primarily to provide the transferee with a benefit." Proposed paragraph 54A explains that, in many securitization transactions, "such restriction may exist primarily to benefit the transferee because it enhances the transferee's ability to market the issuance of securities backed by the transferred financial assets to prospective beneficial interest holders."

We believe that the Board's intent was to acknowledge that such transactions should qualify for sale accounting. However, we find it difficult to accept the assertion in paragraph 54A because, in many securitization transactions, the transferee is essentially a conduit for the transferor to maximize its proceeds on its transferred assets. The transferor typically markets the securities and receives a benefit at inception in the form of higher proceeds. Subsequent to the transfer, *the beneficial interest holders benefit from the restrictions which ensure that they receive the returns generated by a static pool of specific assets.*

*Consequently, we believe that the condition described in 9c(3) should be removed in its entirety. In the current framework, it should not be relevant whether the transferee can sell or pledge, as long as it has been determined that the transferor cannot regain control.*

#### **Circular Reasoning**

Under proposed paragraph 9 of FAS 140, it appears to be impossible for an enterprise to account for a transfer of assets to a consolidated affiliate as a sale. A transfer to a consolidated affiliate

that is not a bankruptcy-remote SPE would fail the criteria in paragraph 9(a), and a sale to any consolidated affiliate would fail the criteria in paragraph 9(c).

In many circumstances, these results would have no impact, as a sale between consolidated affiliates is eliminated in consolidation. However, the interaction between the sale accounting analysis and the consolidation analysis for a VIE under FIN 46(R) creates a logical circularity because the consolidation analysis may be dependent upon the sale accounting analysis.

Consider, for example, the transfer of mortgage loans to a VIE that holds no other assets. If the transfer is accounted for as a sale and the transferor has a variable interest in the VIE, the transferor may be the primary beneficiary. However, if the transfer is accounted for as a secured borrowing, the VIE holds a receivable from the transferor. As this receivable is a creator of variability, the transferor no longer has a variable interest in the VIE and therefore cannot be the primary beneficiary.

Thus, if a tentative sale accounting conclusion leads the transferor to consolidate the VIE, the sale accounting conclusion cannot survive, since consolidation renders sale treatment impossible. Yet, in the absence of sale treatment, the VIE would not be consolidated, which would make sale accounting possible.

To prevent this outcome, we recommend that paragraph 9 be modified such that the transferee is not considered a consolidated affiliate for purposes of performing the sale accounting analysis. As previously noted, this will not affect the presentation in consolidated financial statements, as the impact of the transfer, including any gain on sale, will be eliminated in consolidation. It merely eliminates a logical circularity in applying these two interrelated standards.

### **Transition Provisions**

The transition provisions in both proposed amendments generally require an enterprise to record the assets and liabilities of newly consolidated VIEs, including former QSPEs, at fair value. While this approach may simplify implementation, it may also lead to financial results that are not comparable in future periods and are potentially confusing if the enterprise does not elect to carry the assets and liabilities of the VIE at fair value on an ongoing basis. Consider, for example, a credit card master trust that is newly consolidated and will be accounted for at historical cost after consolidation. The assets and liabilities of the trust at the transition date would be recorded at fair value, with the difference between fair value and par value accreted into earnings over the life of the assets and liabilities. After the transition date, newly generated receivables sold into the trust and newly issued liabilities would be recorded at historical cost. As a result, the receivables under a single credit card account would be bifurcated into a portion carried at fair value and a portion carried at historical cost. As a result of this mixed presentation, we would be obligated to reverse the impact of fair value adjustments and provide supplemental data to meet the needs of our investors, who want a clear picture of historical and ongoing credit trends.

We believe that the transition provisions as currently written in paragraph 37 of FIN 46(R) should be incorporated into the proposed amendments. Specifically, "the consolidating enterprise shall initially measure the assets, liabilities, and noncontrolling interests of the variable interest entity at their carrying amounts at the date the requirements of this Interpretation first apply. In this context, *carrying amounts* refers to the amounts at which the assets, liabilities, and noncontrolling interests would have been carried in the consolidated financial statements if this Interpretation had been effective when the enterprise first met the conditions to be the primary beneficiary."

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We also believe that the primary beneficiary should be allowed to elect the fair value option for the assets and liabilities of newly consolidated VIEs. Thus, VIEs that will be carried at fair value on an ongoing basis would initially be recorded at fair value, and VIEs that will be carried at historical cost on an ongoing basis would initially be recorded at their carrying amounts. In either case, the impact upon adoption would be the same as if the change in accounting had been *applied retrospectively and any gain or loss would be recognized as a cumulative effect adjustment to retained earnings.*

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We appreciate the opportunity to express our views in this letter. If you have any questions, please feel free to contact Randall Shearer (980.388.8433) or me (980.387.4997).

Sincerely,



John M. James  
Senior Vice President and  
Corporate Controller

Cc: Craig R. Rosato, Chief Accounting Officer  
Randall J. Shearer, Accounting Policy Executive