Bank of America

August 8, 2008

Technical Director Financial Accounting Standards Board (FASB) 401 Merritt 7 PO Box 5116 Norwalk, CT 06856-5116

File Reference: No. 1600-100

Dear Sir:



LETTER OF COMMENT NO. 214

We appreciate the opportunity to comment on the proposed Statement of Financial Accounting Standards, "Disclosure of Certain Loss Contingencies - an amendment of FASB Statements No. 5 and 141 (R)," (the Exposure Draft or proposed Statement). Bank of America Corporation (Bank of America), one of the world's largest financial institutions, provides a diverse range of financial services and products throughout the United States and in selected international markets.

It is our opinion that Statement of Financial Accounting Standards No. 5, "Accounting for Contingencies" (FAS 5), in its current form, is an appropriate standard for addressing the recognition and disclosure of loss contingencies and uncertainties that are inherent in operating a large publicly-traded company. It is well understood by all constituents and lends itself to a practical and high-quality application and audit. Although we support the FASB's objective to improve disclosures, we are concerned that the proposed Statement does not acknowledge that the outcomes of many loss contingencies (e.g., litigation) cannot be reliably predicted even within a range of potential outcomes. In addition, we believe that the preliminary research done by Professors Joseph Grundfest and Laura Simmons, which is discussed in detail in a separate letter provided by Bank of America's senior litigator, Deputy General Counsel David Onorato, along with senior litigators from other companies, supports our view that investors already have sufficient information about litigation contingencies such that changes to FAS 5 do not appear warranted at this time.

We believe that disclosure as required by paragraph 7(a) of the Exposure Draft of either the claim against the entity or a best estimate of the maximum exposure to loss (or the best estimate of the possible loss or range of loss) becomes meaningless due to the significant level of uncertainty related to such estimates. This may be further compounded by the large number of pending lawsuits that a large multinational company may be involved with given the current litigious environment that we operate within today. For example, Bank of America and its affiliates (not including the recently acquired Countrywide Financial Corporation) currently have over 2,500 cases pending against them. While a large majority of these cases are immaterial, under the Exposure Draft, Bank of America (and other large companies) would be forced to expend a significant amount of time and resources in attempting to accumulate the required information to satisfy a disclosure requirement that will not provide meaningful information to the user of the overall financial statements.

We have similar concerns about whether the qualitative disclosures required in paragraph 7(b) of the Exposure Draft will provide meaningful information to the user of the financial statements, particularly in those

¹ Bank of America's senior litigator, Deputy General Counsel David Onorato, along with senior litigators from other companies are submitting a separate response that addresses in more detail the litigation concerns raised by the Exposure Draft. We concur with Mr. Onorato's comments. Mr. Onorato likewise concurs with our comments.

Technical Director
Financial Accounting Standards Board (FASB)
August 8, 2008
Page Two

situations where the company, like Bank of America, may be involved in a large number of pending lawsuits and those disclosures are aggregated by type of loss exposure as permitted by the Exposure Draft. While we are not advocating the removal of the aggregation wording in the Exposure Draft, we believe that it will be extremely difficult for companies that are involved in a large number of pending lawsuits to provide disclosure that the user of the financial statements would find meaningful. Accordingly, in the event the FASB intends to press forward with changes to FAS 5, we respectfully recommend that the FASB reconsider the breadth of the proposed disclosures and that the FASB also consider providing an example disclosure in the final standard that would demonstrate how the disclosures would work in a situation where a company was involved in a large number of lawsuits (e.g., more than 50) that are within the scope of the Exposure Draft and which would be aggregated into four or five subgroups for disclosure purposes.

Paragraph 6 of the Exposure Draft requires that an entity disclose a loss contingency, or a combination of loss contingencies, regardless of the likelihood of loss (i.e., remote loss contingencies) if the contingency or contingencies are expected to be resolved in the near term and the outcome could have a severe impact on the financial results of the company. While some may believe that satisfying this disclosure requirement would be easily accomplished, we believe that significant time and resources would be needed to determine the required disclosures, albeit for contingencies that are deemed to be remote as to likelihood of loss. As stated above, large multinational companies may be involved in hundreds or thousands of threatened or pending lawsuits at any one time. In order to satisfy the disclosure requirements, a company will need to review all threatened or pending lawsuits, forecast when it believes the lawsuit(s) will be resolved based on currently available information and then determine whether the potential impact of such resolution on its financial results could be severe. In order to make an informed assessment, companies will likely expend a significant amount of time and resources in completing this task. We question the cost/benefit of this disclosure requirement given that the loss contingency is considered to be remote as to likelihood of loss. Accordingly, we believe that paragraph 6 of the Exposure Draft should be deleted.

We believe that the extensive new disclosures included in the Exposure Draft about contingent assets (e.g., insurance recoveries) and liabilities related to litigation may lead to increased losses (or reduced levels of insurance recoveries) recorded by companies due to the information that will be provided for a plaintiff's perusal (or an insurance provider in the case of a recovery). Although the proposed Statement provides exceptions for prejudicial information, we believe that even when the exception can be invoked in a "rare" situation, disclosure of the Company's best estimate of a maximum exposure to loss (if there is no claim amount) will negate any benefit provided by the exception. As such, the new disclosures may prejudice a company's case by providing detailed information about the case which will give the plaintiff an advantage as the case proceeds. It is also likely that there will be an increased level of "nuisance" lawsuits filed by plaintiffs since there may be a general belief that companies will be more willing to settle the case versus entering into a protracted lawsuit that will also require a significant level of related disclosure. We believe that those who will benefit most from the additional disclosures are not the shareholders of the company or other users of financial statements such as the analyst community, but rather the plaintiffs in litigation matters against the Company who will be advantaged by the additional detailed disclosures.

Technical Director Financial Accounting Standards Board (FASB) August 8, 2008 Page Three

The Appendix to this letter includes our detailed responses to certain of the questions raised in the Exposure Draft.

We appreciate the opportunity to express our views in this letter. Should you have 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: Neil A. Cotty, Chief Accounting Officer

David Onorato, Deputy General Counsel

Randall J. Shearer, Accounting Policy Executive

APPENDIX

Question #1

Will the proposed Statement meet the project's objective of providing enhanced disclosures about loss contingencies so that the benefits of those disclosures justify the incremental costs? Why or why not? What costs do you expect to incur if the Board were to issue this proposed Statement in its current form as a final Statement? How could the Board further reduce the costs of applying these requirements without significantly reducing the benefits?

Response

As described in our cover letter, we believe the costs of complying with the Exposure Draft outweigh any theoretical benefits to users of financial statements. Further to that point, the disclosure of an amount or range as required by paragraph 7(a) of the Exposure Draft may result in the unintended consequence of additional incremental costs in the form of additional litigation against a company in a situation where a company discloses its best estimate of an amount or range and thereafter resolves the litigation for a larger amount. In this situation, one must consider whether shareholders of a company would be willing to ignore prior disclosure of the best estimate of an amount or range, as opposed to suing the company for not appropriately estimating and disclosing that amount or range.

Additionally, if the Board were to issue the proposed Statement as final, we would incur incremental in-house time and costs, as well as external costs to evaluate outstanding litigation for the disclosures. When considering that these disclosures, as proposed, would be required on a quarterly basis, the incremental impact would be that much more pronounced.

Question #3

Should an entity be required to provide disclosures about loss contingencies, regardless of the likelihood of loss, if the resolution of the contingencies is expected to occur within one year of the date of the financial statements and the loss contingencies could have a severe impact upon the operations of the entity? Why or why not?

Response

We do not believe that the disclosure of remotely possible contingencies, irrespective of their magnitude and timing, is appropriate. Currently, the required "Risk Factors" in the MD&A of a public filing covers such remotely possible risks, and we believe that moving a similar disclosure to the footnotes of the financial statements would not be useful to readers. In fact, populating the footnotes with such extraneous information could be distracting to users who are accustomed to reading factual information as opposed to speculation.

As stated in our cover letter, we believe that significant additional time and resources will be needed to assess the appropriateness for inclusion in the disclosures for loss contingencies that the likelihood of loss are considered to be remote. Accordingly, we question the cost/benefit of such disclosure requirements and would propose that the requirements included in paragraph 6 of the Exposure Draft be deleted.

Question #4

Paragraph 10 of Statement 5 requires entities to "give an estimate of the possible loss or range of loss or state that such an estimate cannot be made." One of financial statement users' most significant concerns about disclosures under Statement 5's requirements is that the disclosures rarely include quantitative information. Rather, entities often state that the possible loss cannot be estimated. The Board decided to require entities to disclose the amount of the claim or assessment against the entity, or, if there is no claim or

assessment amount, the entity's best estimate of the maximum possible exposure to loss. Additionally, entities would be permitted, but not required, to disclose the possible loss or range of loss if they believe the amount of the claim or assessment is not representative of the entity's actual exposure.

a. Do you believe that this change would result in an improvement in the reporting of quantitative information about loss contingencies? Why or why not?

Response

We do not believe that this change would result in an improvement to the reporting of quantitative information about loss contingencies. Likewise, we believe that the current FAS 5, paragraph 10 requirements are sufficient to fulfill users' needs for quantitative information when that information is reliably available. We believe the reason that preparers often do not quantify the exposure is because it is often impossible to reliably determine. Disclosing information about loss contingencies when the information is not reliable can be misleading to the user of the financial statements.

For example, Exxon Mobil Corporation disclosed in their recent Form 10-Q filed on May 6, 2008 the litigation history of the punitive damages from the Exxon Valdez oil spill in 1989. They noted that, "While it is reasonably possible that a liability for punitive damages may have been incurred from the Exxon Valdez grounding, it is not possible to predict the ultimate outcome or to reasonably estimate such potential liability." In the same disclosure, they noted that the judgments during the history of this matter, which occurred over a 19 year period, ranged from \$2.5 billion to \$5.0 billion. Ultimately, on June 25, 2008, the Supreme Court awarded punitive damages of only \$507 million. Therefore, just six weeks prior to the resolution of this matter with the Supreme Court, Exxon Mobil was not able to reliably predict the ultimate outcome or to reasonably estimate the potential liability. In our opinion, the disclosure that was made under the current FAS 5 guidance provided the investor with an appropriate level of information to understand the risks and uncertainties related to the loss contingency. We believe that if the proposed guidance in the Exposure Draft were followed that it would have been likely that Exxon Mobil would have been required to disclose a range of possible loss in an amount substantially greater than the eventual judgment even though at the time of the filing of their Form 10-Q they believed that it was not possible to predict the ultimate outcome or to reasonably estimate the potential liability. It is not clear as to how the user of the financial statements would have benefited from such disclosure.

We believe that certain contingencies that are homogenous in nature and frequently encountered can be reliably estimated because a consistent, stable and predictable loss history exists to supplement and support management's estimates. These contingencies are recorded and/or disclosed currently using the existing FAS 5 model. Other contingent liabilities, such as litigation, by their nature are uncertain and unpredictable. We are deeply concerned that the proposed Statement's requirements for quantification may force management to derive amounts that meet an accounting purist's view of what is conceptually correct. This effect will be even more profound if "fair value" as defined in Statement of Financial Accounting Standards No. 157, "Fair Value Measurements", becomes the measurement attribute for all contingencies. Even mathematical models with contrived probability weightings of a wide range of possible outcomes do not make estimates any more reliable or relevant. We would assert that probability weighted guesses about the exposure of a loss contingency are no more meaningful than any guesses.

Additionally, often a maximum exposure to loss, such as a claim amount, is merely an attention grabbing number determined by a plaintiff, and this amount is often irrelevant. Additionally, it is common, especially in the pre-discovery phases of litigation, for the damages not to be specified. In this situation, it is virtually impossible for the defendant to quantify the maximum exposure and we would surmise that if an amount were quantified it may not be auditable by an audit firm for inclusion in the footnotes to the financial statements given the large uncertainties relating to litigation-related loss contingencies. Furthermore, if an amount were disclosed, we believe that the plaintiff's lawyer is likely to use this amount as the point from which to begin settlement negotiations. Clearly, the

company (and its shareholders) have been disadvantaged given that it is likely that the plaintiff's floor for settlement negotiations has now been established as a result of the disclosure.

Therefore, in situations where reliable estimates are unavailable, we do not believe that the enhanced disclosures about quantified loss contingencies are beneficial to users. We question whether investors really want disclosure of an estimate which is inherently unreliable that could lead to further losses.

b. Do you believe that disclosing the possible loss or range of loss should be required, rather than optional, if an entity believes the amount of the claim or assessment or its best estimate of the maximum possible exposure to loss is not representative of the entity's actual exposure? Why or why not?

Response

No. For the same reasons discussed in the response to a) above, we believe there are situations when a range of losses cannot be reliably determined any more than a specific point estimate, and the accounting principles should acknowledge this. Additionally, in contingencies involving litigation, this requirement would likely benefit plaintiffs and their lawyers more than any other users of the financial statements.

c. If you disagree with the proposed requirements, what quantitative disclosures do you believe would best fulfill users' needs for quantitative information and at the same time not reveal significant information that may be prejudicial to an entity's position in a dispute?

Response

As noted above, we believe that the current FAS 5 model is sufficient and users' needs for quantitative information should be fulfilled by good faith compliance with the existing rules.

Question #5

If a loss contingency does not have a specific claim amount, will an entity be able to provide a reliable estimate of the maximum exposure to loss (as required by paragraph 7(a)) that is meaningful to users? Why or why not?

Response

The answer to this question is entirely dependent on the nature of the contingency (see response to Question #4). As a hypothetical example, it may be possible to reliably estimate the maximum cost to a company of a defective product recall. On the other hand, if customers were injured or killed as a result of the defective product, it may be impossible to quantify the maximum liability, especially in the beginning stages of the claims. Therefore, this may be good disclosure in theory, however, when put into practice it may oblige management (as encouraged by the accountants and legal advisors) to estimate and disclose amounts which ultimately prove to be materially inaccurate. We believe it is more useful to investors to describe the nature of the contingency and the relevant facts associated with it, as is required under the existing FAS 5 guidance.

Question #6

Financial statement users suggested that the Board require disclosure of settlement offers made between counterparties in a dispute. The Board decided not to require that disclosure because often those offers

expire quickly and may not reflect the status of negotiations only a short time later. Should disclosure of the amount of settlement offers made by either party be required? Why or why not?

Response

We agree with the Board that settlement offers should not be disclosed because an unaccepted settlement offer can be completely irrelevant to the ultimate settlement. In fact, settlement offers can be equally as absurd as the original claims. Additionally, if parties knew that settlements offers must be publicly disclosed, it could be used as a manipulation tool that is not ultimately in the best interests of the company or its investors. Moreover, such disclosure might discourage companies from engaging in settlement negotiations, which could hurt investors through, among other things, the cost of protracted litigation.

Question #8

This proposed Statement includes a limited exemption from disclosing prejudicial information. Do you agree that such an exemption should be provided? Why or why not?

Response

In the event some form of the Exposure Draft is adopted (and, again, we believe the current FAS 5 model is appropriate for preparers and users), we support the exemption from providing prejudicial information; however, we believe that the exception should be broadened so that it may be used in any situation where the disclosure could be prejudicial to the company, such as increasing the loss exposure in the case at issue or in any other matter, such as negotiation of a pre-litigation resolution where the facts are similar to the case at issue. It is neither clear how to determine a "rare" circumstance nor whose judgment should prevail when making that determination. Attorneys, preparers and auditors will likely have very different perspectives regarding when the exemption from providing prejudicial information is appropriate. Furthermore, accounting firms may not have the professional expertise to audit this determination, and in order to shield themselves from liability would likely error on the side of more disclosure rather than less. Therefore, broadening the prejudicial information exception to encompass more than "rare" situations is recommended. Unfortunately, in the United States' litigious business environment, a well-known company is subject to claims and suits on a frequent, not rare, basis and it is unrealistic to believe that this exception should be invoked only in rare situations.

Question #9

If you agree with providing a prejudicial exemption, do you agree with the two-step approach in paragraph 11? Why or why not? If not, what approach would you recommend and why?

Response

In situations where the two-step approach is sufficient to conceal prejudicial information, we believe that it is a reasonable compromise between providing information to users while also protecting the entity. Nevertheless, we believe that frequently the two-step approach will not be sufficient to conceal prejudicial information. For example, for potentially large litigation settlements, the two-step approach may not be sufficient as the specific litigation may still be identifiable in the aggregated disclosures. Also, depending on how the interpretation of "rare" develops in practice the exception may not be available. Additionally, it appears the requirement in paragraph 11 of the Exposure Draft to disclose the amount of the claim (or, if there is none, an estimate of the maximum exposure to loss), its current status, the anticipated timing of resolution and factors that are likely to affect the ultimate outcome along with the potential impact of the outcome serve to nullify the benefit of the exemption. And, as noted previously, we believe the need to apply this exemption will be much more frequent than the FASB anticipates.

Question #10

The International Accounting Standards Board (IASB) continues to deliberate changes to IAS 37, *Provisions, Contingent Liabilities and Contingent Assets,* but has not yet reconsidered the disclosure requirements. The existing disclosure requirements of IAS 37 include a prejudicial exemption with language indicating that the circumstances under which that exemption may be exercised are expected to be *extremely rare*. This proposed Statement includes language indicating that the circumstances under which the prejudicial exemption may be exercised are expected to be *rare* (instead of *extremely rare*). Do you agree with the Board's decision and, if so, why? If not, what do you recommend as an alternative and why?

Response

While Bank of America generally supports the global use of one set of financial reporting standards, we do not believe that disclosures related to litigation contingencies are presently amenable to a single standard given the fundamentally different nature of litigation in the United States. Accordingly, our comments in this letter regarding the limitations of the exception for prejudicial information would be repeated to the IASB. We believe that the standard of "rare" will lead to companies being forced to disclose information that will ultimately be detrimental, and therefore using the exception only in "extremely rare" situations is unworkable.

Question #14

Do you believe it is operational for entities to implement the proposed Statement in fiscal years ending after December 15, 2008? Why or why not?

Response

No. We believe that the existing requirements included in FAS 5 should be retained. Notwithstanding this, we believe there should be sufficient time given to companies to implement the disclosure requirements in the event the Exposure Draft becomes final. As stated in our letter, there are certain aspects of the disclosure requirements that may result in a significant amount of work to appropriately assess whether disclosure would be required (e.g., paragraph 6 disclosures). Accordingly, if the Exposure Draft becomes final, we believe that the new standard should not be effective for at least a year after its issuance in order to provide companies with adequate time to complete their assessments.