October 12, 2005

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

Re: Revised Exposure Draft, Accounting for Transfers of Financial Assets, an amendment of FASB Statement No. 140 (File Reference No. 1225-001)

Dear Mr. Smith:

We appreciate the opportunity to comment on the Revised Exposure Draft, Accounting for Transfers of Financial Assets, an amendment of FASB Statement No. 140 (the Exposure Draft). 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 securitize assets for liquidity, alternative funding, and risk management purposes and we structure securitization vehicles for our customers.

We believe that the current Exposure Draft is a significant improvement over the Exposure Draft issued for comment in 2003. In particular, we agree with the elimination of the proposed prohibition of transferor support commitments to a qualifying special purpose entity (QSPE). In addition, we are generally supportive of the Board’s efforts to provide additional guidance on the legal isolation analysis, particularly the requirement that the legal isolation opinion should consider arrangements between the transferor and beneficial interest holders, and we agree that transfers of participating interests can achieve legal isolation without using a QSPE. However, we are concerned with a number of other provisions in the Exposure Draft:

- The Exposure Draft would permit sale accounting treatment for assets transferred to a QSPE only if the transferor and all other beneficial interest holders have the right to pledge or exchange any beneficial interests that they might hold. We disagree with this proposal as it applies to the transferor. The transferability of a beneficial interest held by the transferor may impact the fair value of the interest but should not be a factor in determining whether the transferor has given up control over the transferred assets.

Bank of America

Letter of Comment No: 45
File Reference: 1225-001
- We would appreciate clarification of the proposed requirement that each party involved in a multi-step transaction have the right to pledge or exchange any assets received. As written, it appears to be inconsistent with the nature and purpose of a multi-step transaction.

- We are concerned with the proposed approach to deal with rollovers of beneficial interests issued by a QSPE, which is based on an evaluation of whether a party can obtain a more-than-trivial benefit by virtue of having more than one type of involvement with the entity. The evaluation appears to be based on a risks and rewards model, and is therefore inconsistent with the fundamental principle of control upon which FAS 140 is based. We believe that this approach should be abandoned and that the Board should instead provide implementation guidance as to the nature of financing activities that may be undertaken by a QSPE.

- The distinction between the sale of financial assets in their entirety and participating interests may have unintended consequences for transfers of whole loan pools with servicing retained. We believe that the revised Standard should clarify that such transfers should be evaluated as the transfer of financial assets in their entirety.

These issues are described in more detail on the following pages, along with additional commentary on the legal isolation standard, restrictions on derivatives in a QSPE, and the effective date and transition provisions.

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**Beneficial Interests Held by the Transferor**

Assuming that other sale accounting criteria are met, a transfer of financial assets into a QSPE is currently accounted for as a sale only to the extent that consideration other than beneficial interests in the assets themselves is received by the transferor. This limitation would be deleted by the proposed changes to paragraph 9, in which the entire transfer would be recorded as a sale as long as at least 10% of beneficial interests are issued by the QSPE to third parties. Under this model, which assumes that all beneficial interests issued by a QSPE are “new” assets, all beneficial interests held by the transferor would initially be recorded at fair value.

A proposed change to paragraph 9(b) would also require that the transferor have the ability to pledge or exchange its beneficial interests, without significant constraints that also provide more than a trivial benefit to the transferor. We surmise that this requirement was viewed by the Board as being consistent with the notion that all beneficial interests are new assets and that the transferor, as one of many beneficial interest holders, should be subject to the same rights and obligations as any other beneficial interest holder. However, we believe that this approach is flawed in that the transferor may face unique circumstances which do not affect other beneficial interest holders. For example, many securitization vehicles impose restrictions on the transferor’s ability to pledge or exchange certain beneficial interests for tax, regulatory or commercial reasons. Specifically:
• A real estate investment trust that securitizes mortgage loans may be required to retain the equity interest in a securitization vehicle and may face significant restrictions on its ability to subsequently pledge or exchange that interest in order to avoid adverse tax consequences.

• A transferor that is also the servicer of securitized assets may be prohibited from pledging its rights to receive the future cash flows which represent the servicing asset. In the event that the servicer defaults and a replacement servicer must be hired, an unencumbered right to receive those cash flows may be needed to attract a replacement servicer.

• A third party credit enhancer may require that a transferor that is also the servicer retain a portion of the beneficial interests in a securitization vehicle to ensure that the transferor maintain the highest level of servicing standards.

• Prior to transferring a beneficial interest that represents a residual interest in a securitization vehicle, the transferor may be required to obtain a tax opinion that the transfer will not trigger a taxable event or a rating agency opinion that ratings on bonds issued by the QSPE will not be adversely affected. Depending on specific facts and circumstances, such a requirement could constrain the transferor from pledging or exchanging its interests.

We do not believe that constraints on the transferor’s ability to pledge or exchange its beneficial interests should be a factor in determining whether the transfer of assets into a QSPE is accounted for as a sale. However, we believe that such constraints should be included in the determination of the fair value of the beneficial interests.

**Transferee’s Right to Pledge or Exchange in a Multi-step Transaction**

Paragraph 9(b) currently requires that each transferee or each holder of beneficial interests issued by a QSPE (other than the transferor) have the right to pledge or exchange those interests and is not constrained from exercising that right by any condition that also provides more than a trivial benefit to the transferor. The proposed change to this paragraph states that “If a transaction involves a series of steps designed to isolate the transferred assets (as described in paragraph 83), each entity that receives the transferred assets is a transferee, and each transfer must meet this condition.” It would appear that this sentence applies to all multi-step transactions, including those that use QSPEs. We do not understand how this provision is consistent with so-called two-step securitizations and other structures that utilize more than one QSPE.

As described in paragraph 83, one common securitization structure involves a two-step transfer in which assets are transferred first from the transferor to a wholly-owned, bankruptcy-remote special purpose entity (BRE) and then from the BRE to a QSPE. This structure is designed to isolate the transferred assets from the transferor and its creditors and has been widely used by the financial services industry for many years. One might conclude that, because the BRE actually transfers assets to the QSPE, the requirements of paragraph 9(b) have been met. However, one might argue instead that the transfer from the BRE to the QSPE was preprogrammed for the
benefit of the initial transferor and the BRE does not have the right to pledge or exchange the assets following their transfer to the QSPE; therefore, the proposed requirements of paragraph 9(b) will not have been met.

Similarly, a series of transfers involving multiple QSPEs may be required or desirable for tax or regulatory purposes. For example, in some credit card securitization programs, one QSPE issues beneficial interests to a second QSPE, which then issues notes to third parties. Constituents have reasoned that the current language in paragraph 9(b) permits them to “look through” both of the QSPEs to the beneficial interest holders to determine whether the requirements of that paragraph have been met. As noted above, the proposed change to paragraph 9(b) would require that each transferee in a multi-step transaction have the right to pledge or exchange its interests. One possible interpretation of paragraph 9(b) is a conclusion that, because the second transferee is a QSPE that cannot freely pledge or exchange its assets, the requirements of that paragraph will not have been met. We do not believe that is an appropriate conclusion.

We believe that such an analysis of the activities of the BRE or an intermediate QSPE in a multiple-step securitization is unnecessary. Instead, we believe that a series of inextricably linked transactions should be evaluated in their entirety. As noted in paragraph 6 of FAS 140, “recognition of financial assets and liabilities should not be affected by the sequence of transactions that result in their acquisition or incurrence unless the effect of those transactions is to maintain effective control over a transferred financial asset.” Therefore, we believe that the analysis should not focus on intermediate transferees but should instead evaluate the rights of the ultimate transferees to determine whether the requirements of paragraph 9(b) have been met. Alternatively, we believe that the Board should clarify that the proposed changes do not apply to multi-step transactions that use one or more QSPEs.

Rollovers of Beneficial Interests

We disagree with the fundamental approach taken by the FASB to deal with rollovers, which are defined in the Exposure Draft as reissuances of beneficial interests to obtain cash or other assets to retire or otherwise settle existing beneficial interests held by parties other than the transferor. Certain QSPEs manage the issuance and re-issuance of short-term beneficial interests in a manner that some believe is inconsistent with the notion of a passive entity. However, as noted in paragraph A7, FAS 140 does not provide any guidance as to the ability of a QSPE to retire and reissue beneficial interests, and the EITF was unable to reach a consensus in EITF Issue No. 02-12, *Permitted Activities of a Qualifying Special Purpose Entity in Issuing Beneficial Interests under FASB Statement No. 140* (EITF 02-12). As the activities of a QSPE must be entirely specified and significantly limited by the legal documents that established the SPE or created the beneficial interests, we believe that implementation guidance is needed as to the nature of financing activities that may be undertaken by a QSPE.

The Exposure Draft does not provide such implementation guidance. Instead, it takes an indirect approach to determining whether special purpose entities that roll over beneficial interests are qualifying. Paragraph 45A states that, if the governing documents permit rollovers of beneficial interests, no party associated with a QSPE can have the opportunity to obtain more than a trivial incremental benefit by virtue of having more than one type of involvement with the entity. The
types of involvement mentioned include an obligation to provide liquidity; an obligation to provide credit enhancement, which includes the right to receive subordinated cash flows; and the right to specify the terms of the beneficial interests that are rolled over. We have several concerns with this approach:

- We do not believe that an evaluation of potential benefits should be a determining factor in concluding whether an entity is a QSPE, particularly given that a transferor can retain all of the subordinated beneficial interests in a QSPE and up to 90% of all beneficial interests issued without jeopardizing the qualifying status of the SPE. The activities of the QSPE should be the sole basis for such a determination.

We fail to understand why the ability of a party other than the transferor to obtain a more-than-trivial incremental benefit by virtue of having more than one type of involvement with the SPE should impact the determination of whether the SPE is qualifying. This approach seems to be inconsistent with the FAS 140 model, which is based on the notion that sale accounting and derecognition are appropriate if the transferor has relinquished control over the transferred assets. If the individual types of involvement are permissible activities of a QSPE, the analysis should be indifferent as to level of involvement of any party unless the involvement results in the transferor retaining control over the transferred assets. That having been said, we do not believe that the transferor’s ability to obtain a more-than-trivial incremental benefit is adequate evidence upon which to conclude that the transferor has retained control over the assets.

- We are not convinced that a transferor could ever successfully demonstrate that it does not have the opportunity to obtain a more-than-trivial incremental benefit by virtue of having more than one type of involvement with the SPE. Such an analysis would require the entity to consider every possible combination of facts and circumstances, regardless of their likelihood of occurrence. An analysis would be required if the governing documents permit rollovers, regardless of whether any rollovers actually take place. This provision will unfairly penalize master trusts and other vehicles that may have the ability to rollover beneficial interests but do not actually do so.

Based on these concerns, we recommend that the FASB eliminate the guidance in proposed paragraph 45A and instead provide implementation guidance as to the nature of financing activities that may be undertaken by a QSPE. The financial services industry submitted a proposal to assist in this effort through the response of the American Bankers’ Association to EITF 02-12. Consistent with that letter, we recommend the establishment of certain parameters, including the type and tenor of beneficial interests that may be issued, within which a QSPE can exercise a limited amount of discretion without calling into question whether the transferor has given up control over the transferred assets.

**Participating Interests**

The proposed scope of FAS 140 includes transfers of financial assets “in their entirety” and “participating interests”. Participating interests are defined in proposed paragraph 8A as an ownership share of a financial instrument that, among other things, represents a proportionate
interest in cash flows of the asset and provides for no recourse to the transferor. A transfer of an ownership share of a financial instrument that does not meet the definition of a participating interest would be accounted for as a secured borrowing.

This approach may have negative unintended consequences for certain sales of whole loans. We understand that the intent of the FASB in drafting paragraph 8A was to describe a traditional bank loan participation, in which the originator sells less than 100% of the notional amount of the loan to third parties. In a whole loan sale with servicing retained, the originator sells 100% of the notional amount of the loans, retaining only a servicing fee which generally reflects a market rate. This type of transaction has not traditionally been considered a loan participation. However, because the originator retains a servicing fee, we believe it would not meet the definition of the sale of a financial asset in the entirety. As the loans are not being transferred to a QSPE, the transfer would have to be evaluated to determine whether it meets the definition of a participating interest.

Proposed paragraph 8A(c) states that participating interest holders may have no recourse to the transferor or to each other. While this concept may be appropriate for traditional bank loan participations, it would be unduly restrictive in the context of whole loan sales with servicing retained, particularly those involving pools of loans which typically provide for adjustments to the purchase price due to defects in documentation or failure to comply with eligibility criteria. Sales of whole loan pools may also include a limited amount of recourse for credit losses or prepayments. FAS 140 defines recourse as “The right of a transferee of receivables to receive payment from the transferor of those receivables for (a) failure of debtors to pay when due, (b) the effects of prepayments, or (c) adjustments resulting from defects in the eligibility of the transferred receivables”. Given this broad definition, sales of whole loan pools with servicing retained would not generally meet the definition of a participating interest.

Based on this analysis, we believe that the transferor would have to transfer the loans into a QSPE in order to achieve sale accounting treatment. This would have negative consequences for both the transferor, due to the costs involved, and to the ultimate transferee, who would not hold title to the loans but would instead hold a beneficial interest in the QSPE.

We recommend that the Board clarify that the sale of whole loans with servicing retained should be accounted for as the sale of financial assets in the entirety.

**Legal Isolation Analysis**

We are generally supportive of the Board’s efforts to provide additional guidance on the legal isolation requirement. However, we request that the Board reconsider some of the language to avoid any misinterpretation. For example:

- Paragraph 27A (a) states that a transfer is considered to have isolated the transferred assets only if, among other things, a legal analysis would support the conclusion that the transfer is “legally a sale”. We believe that this is inconsistent with current practice in certain jurisdictions. The legal analysis for an FDIC-insured financial institution will include an opinion as to whether the FDIC would disaffirm or repudiate a contract, or
otherwise reclaim or recharacterize the transferred assets as property of the transferor, but it will not include an opinion as to whether the transfer is “legally a sale”. Similarly, assets may be conveyed to a wholly-owned, bankruptcy remote special purpose entity via an equity contribution rather than a sale for tax, structural or other reasons. The legal analysis may conclude that the assets are legally isolated from the original owner, even though the transfer is not legally structured as a sale. We believe that the Board should acknowledge that, depending upon facts and circumstances, legal isolation may be achieved even though a transfer is not characterized as a sale.

- Paragraph 27B(a) states that “Under U.S. law, a true sale is an attorney’s conclusion that the transferred financial assets have been sold and are beyond the reach of the transferor’s creditors and that a court would conclude that the transferred assets would not be included in the transferor’s bankruptcy estate.” This may be true under U.S. bankruptcy law but, as noted above, perhaps not in other jurisdictions. We therefore suggest that the opening sentence of paragraph 27B(a) be modified to refer to “U.S. bankruptcy law”.

- Proposed paragraphs 9(e) and A17 require that the legal isolation analysis for assets transferred to a QSPE include an evaluation of arrangements between the transferor and the beneficial interest holders as if the same arrangements had been made between the transferor and the QSPE itself. We agree that arrangements between the transferor and beneficial interest holders should be considered in the legal isolation analysis and, if legal isolation is compromised as the result of these arrangements, sale accounting should be precluded. However, we do not agree that the legal opinion should be based upon the theoretical assumption that the QSPE rather than the beneficial interest holders had entered into an arrangement with the transferor, as this provision goes beyond what is necessary to demonstrate that the assets have been legally isolated from the transferor. We therefore suggest that the language in paragraph 9(e) be clarified to require only that actual arrangements between the transferor and the beneficial interest holders be explicitly considered in the legal isolation analysis.

**Derivatives**

We appreciate and support the changes that FASB has proposed to paragraph 40(a), which would eliminate the prohibition against a QSPE holding derivative instruments that pertain to beneficial interests held by the transferor. However, given the recently-issued Exposure Draft, *Accounting for Certain Hybrid Financial Instruments, an amendment of FASB Statements No. 133 and 140*, we question whether the restrictions in paragraphs 40(b) and 40(c) that limit the amount and type of derivatives that can be held by a QSPE are still necessary.

When drafting FAS 140, the Board was concerned about potential abuses that might arise if transferors could benefit from derivatives held in QSPEs because they were not required to reflect the variability associated with changes in market value of those retained interests in the income statements. As noted in paragraph 187 of FAS 140, respondents to the FAS 140 Exposure Draft “were concerned whether allowing a qualifying SPE to enter into a derivative instrument avoids accounting requirements under FASB Statement No. 133, *Accounting for Derivative Instruments and Hedging Activities*” (FAS 133). This concern has been addressed in
the proposed amendment to FAS 133, which will require that beneficial interests issued by a QSPE be subject to FAS 133. If a beneficial interest contains an embedded derivative that is not clearly and closely related to the host, the holder will have the option of bifurcating the derivative and accounting for it at fair value or accounting for the entire beneficial interest at fair value, in either case with changes in fair value recorded in income. As a result, a transferor will not be able to avoid recognition of the volatility associated with holding derivatives by transferring them into a QSPE and holding a beneficial interest.

We agree that derivatives held in a QSPE should be passive and that a QSPE should not be permitted to actively manage a portfolio of derivatives. However, we see no conceptual basis for continuing to require that the notional amount of derivatives in a QSPE be limited to the amount of beneficial interests issued or that they be designed to counteract “but not excessively counteract” some risk associated with those beneficial interests or other assets held by the QSPE. Accordingly, we recommend that the Board modify the current restrictions in paragraphs 40(b) and 40(c) to eliminate the reference to the notional amount of beneficial interests issued and require only that the derivatives be designed to counteract some risk associated with the assets held or beneficial interests issued by the QSPE.

Effective Date and Transition

We have a number of concerns with regard to the proposed effective date and transition provisions.

- We believe that the use of multiple effective dates will complicate application of the final Statement. If a final Statement is issued in the first quarter of 2006, public entities with calendar year ends will apply the measurement provisions of amended paragraphs 10 and 11 as of January 1, 2006 but will apply most of the derecognition provisions as of July 1, 2006. Restrictions on rollovers of beneficial interests will not be effective until at least January 1, 2007. We acknowledge that the January 1, 2006 date was selected to coincide with the effective date of two other exposure drafts, including one that is discussed earlier in this letter, that would amend FAS 133 and FAS 140 by permitting preparers to adopt fair value accounting for servicing rights and certain hybrid financial instruments. In addition, we appreciate the FASB’s willingness to provide an extended transition period for entities that roll over beneficial interests. However, we believe that the use of multiple effective dates will complicate the application of new standards proposed in this Exposure Draft. We also believe that mid-year adoption would lead to a lack of comparability between quarters that would confuse readers of the financial statements. We therefore recommend that all of the provisions of this Exposure Draft be effective as of January 1, 2007, with early adoption permitted as of January 1, 2006.

- If the above suggestion is not adopted, we note that the revised provisions of paragraph 9(a) would be effective immediately upon issuance of the revised Statement, but other paragraphs impacting the legal isolation analysis, notably 9(d), 9(e), 27, 27A and 27B, would not be effective until July 1, 2006 for public entities with a calendar year end. As noted in paragraph 27B, the true sale opinion should consider the provisions of paragraphs 9(d) and 9(e), and it is unclear how a transferor would be able to apply
paragraph 9(a) without also applying these other paragraphs. We see no compelling reason for paragraph 9(a) to have an effective date that is significantly earlier than the effective date for other derecognition provisions.

- Regardless of the effective date, we find it problematic that the revised provisions of paragraph 9(a) would be applicable to transfers that had occurred prior to the effective date of the Statement if the transferor has "any remaining commitments related to the transferred financial assets to deliver additional cash or other assets." This would appear to apply to an extremely broad range of transactions, including any credit card master trust, regardless of whether the trust issues new beneficial interests; any securitization vehicle in which the transferor provides an interest rate swap or any form of liquidity; and any transaction in which the transferor provides any level of recourse, including remedies for breaches of representations and warranties or defects in documentation with respect to the transferred financial assets. We believe that a broad, retroactive application would place an undue burden on preparers, particularly given that each such transaction was previously evaluated under the current accounting literature and there is no basis to conclude that such evaluations were somehow lacking.

We believe guidance should be included as to how the transition provisions would apply to QSPEs that roll over some, but not all, of their beneficial interests. For example, suppose an existing QSPE obtains 90% of its funding from term notes and 10% from commercial paper. If the QSPE otherwise maintains its qualifying status and does not issue any additional term notes, one might conclude that the QSPE is not subject to the new restrictions on rollovers because more than a majority of its beneficial interests will not roll over.

- As proposed, existing QSPEs that do not receive additional assets or issue additional beneficial interests other than those it was committed to receive or issue would be grandfathered from some, but not all, of the provisions of the amendment. We believe that such an approach provides no clear benefit and may have negative unintended consequences. In particular, it is unclear how certain credit card master trusts would comply with the proposed changes to paragraph 9(b) that are discussed above. We believe that such QSPEs should be grandfathered from all of the provisions of the revised Statement or, at a minimum, from the proposed changes to paragraph 9(b). We acknowledge that rollovers of beneficial interests result in the creation of new beneficial interests, and existing QSPEs would therefore be subject to the revised guidance on rollovers of beneficial interests.

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

Sincerely,

[Signature]

John M. James
Senior Vice President
Corporate Controller

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