February 22, 2012

Ms. Susan M. Cosper
Technical Director
File Reference No. 2011-220
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5166

Re: Proposed Accounting Standards Update, Consolidation (Topic 810): Principal versus Agent Analysis (File Reference No. 2011-220)

Dear Ms. Cosper:

We appreciate the opportunity to comment on the Proposed Accounting Standards Update, Consolidation (Topic 810): Principal versus Agent Analysis (the proposed Update). Bank of America Corporation provides a diverse range of financial services and products domestically and internationally. We are one of the largest banks in the U.S. in terms of total assets. We routinely structure variable interest entities (VIEs) and partnerships for our customers and for our own use.

We would like to thank the FASB for undertaking this project. We fully support the use of a consistent principal versus agent analysis for both VIEs and non-VIEs such as partnerships, and we believe that the proposed Update represents an improvement to GAAP. We do, however, have several recommendations for improvement:

- We do not support removal of the requirement for the primary beneficiary of a VIE to be exposed to “potentially significant” economics. We are concerned that this change could lead to the identification of a primary beneficiary that does not have a meaningful economic involvement with the VIE. Although exposure to variability of returns is a key element of the principal versus agent analysis, the requirement for some minimum level of exposure is not explicit and is no longer determinative. See our response to Question 1.

- The scope of the decision maker’s authority should be added as a fourth factor to consider in the principal versus agent analysis. See our response to Question 2.

- The magnitude and variability of compensation should be considered in the principal versus agent analysis only if the fee arrangement is a variable interest on a stand-alone basis (that is, without considering other economic interests held by the decision maker). See our response to Question 2.
• Substantive kick-out rights and participating rights held by a limited number of parties that are independent of the decision maker should be determinative in the principal versus agent analysis. See our response to Question 4.

• Although the Board does not intend the application of the proposed Update to result in money market funds being consolidated, we do not believe that the proposed Update will meet that objective on a consistent basis. We therefore recommend that such funds be explicitly exempt from consolidation. See our response to Question 10.

These comments, along with a number of additional observations, are included in the attached Appendix A of our responses to questions posed by the Board.

* * * * *

We appreciate the opportunity to express our views in this letter. Should 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: Neil A. Cotty, Chief Accounting Officer  
Randall J. Shearer, Accounting Policy Executive
Appendix A

The following are our responses to certain questions presented by the Board on the Proposed Accounting Standards Update, Consolidation (Topic 810): Principal versus Agent Analysis

**Question 1:** When determining whether a decision maker is a principal or an agent, the proposed amendments require the analysis to consider the decision maker’s overall relationship with the entity and the other parties involved with the entity. This analysis would be based on a qualitative assessment. Do you agree with this approach? If not, why?

**Response:** Although we generally agree with this approach, we do not support removal of the current requirement that the primary beneficiary have an obligation to absorb losses or the right to receive benefits “that could potentially be significant to the VIE”. This change appears to eliminate the requirement for the primary beneficiary to have any minimum level of interest in the VIE. Although exposure to variability of returns is a key element of the principal versus agent analysis, the requirement for some minimum level of exposure is not explicit and is no longer determinative. We are concerned that this may lead to situations in which the primary beneficiary does not have a meaningful economic involvement with the VIE, and we believe it would be inappropriate to conclude the decision maker is acting as principal if the decision maker holds a variable interest that is not potentially significant. Accordingly, we would recommend that the reference to potentially significant economics be retained.

We also have some recommendations to improve clarity of the Update.

a. The result of the principal versus agent analysis appears to be determinative. We believe that, in the absence of shared power, if the decision maker is acting as principal, the decision maker is also the primary beneficiary. If the decision maker is acting as agent, the decision maker is not the primary beneficiary. This should be clearly articulated in paragraph 810-10-25-38A.

b. We believe that Topic 810 would be enhanced by a reorganization. As seen in the ASU, most subsections discuss general consolidation standards, then VIEs, then non-VIE partnerships. We would prefer to see the guidance for VIEs and non-VIE partnerships segregated into separate Subtopics as we believe this would enhance the readability of the guidance.

**Question 2:** The evaluation of a decision maker’s capacity would consider the following factors:

a. The rights held by other parties

b. The compensation to which the decision maker is entitled in accordance with its compensation agreements(s)

c. The decision maker’s exposure to variability of returns from other interests that it holds in the entity.
Are the proposed factors for assessing whether a decision maker is a principal or an agent appropriate and operational? If not, why? Are there any other factors that the Board should consider including in this analysis?

Response: We agree that the three proposed factors are appropriate and operational. However, we recommend that an additional factor be added: scope of the decision maker’s authority. As noted in paragraph B62 of IFRS 10, the scope of a decision maker’s authority can be evaluated by considering “(a) the activities that are permitted according to the decision-making agreement(s) and specified by law, and (b) the discretion that the decision maker has when making decisions about those activities.” As noted in paragraph BC 131 of IFRS 10, “To have control, an investor must have power and be able to use that power for its own benefit.” We believe that the scope of a decision maker’s authority is a critical element of the principal versus agent analysis.

This issue is most likely to affect certain financing vehicles in which there are virtually no ongoing activities that could affect the VIE’s economic performance. For example, in a static resecuritization vehicle that holds a pool of securities, the issuer’s duties are limited to collecting cash flows and distributing them to investors. Typically, there are no provisions for liquidating the pool or making other decisions that might affect the economics of the vehicle. We acknowledge that the issuer may have had sole power over deciding which securities would be held as collateral and how the beneficial interests issued by the vehicle would be structured. However, absent any explicit or implicit responsibility to shield other investors from loss, we do not believe that the issuer’s role in creating the vehicle should carry weight in the principal versus agent analysis.

This view would likely result in the conclusion that many static resecuritization vehicles would not have a primary beneficiary. Assuming that the transfer of collateral had met all of the applicable sale accounting criteria, all investors, including the transferor, would report the securities that they own on their balance sheet, resulting in consistency between legal, economic, and accounting presentations. We believe this is an appropriate outcome.

We also have some additional recommendations for improvement in the principal versus agent analysis as follows:

a. Substantive rights held by a small number of independent parties should be determinative, resulting in the conclusion that the decision maker is acting as an agent. See our response to Question 4.

b. The analysis of compensation should be revised to reflect the difference between a fee arrangement that is nothing more than adequate compensation for services provided and a fee arrangement that incorporate other terms and conditions and is, in substance, a variable interest in the VIE. The factors found in subparagraphs (a), (d), (e) and (f) of paragraph 810-10-55-37 should be incorporated into 860-10-25-39 as a basis for making this determination. If the decision maker’s fee arrangement is commensurate with the services provided, includes only
customary terms and conditions, is not significant in amount and is expected to absorb no more than an insignificant amount of the variability from the VIE’s economic performance, the fee arrangement is simply adequate compensation for services provided. By definition, it does not absorb more than an insignificant amount of variability and, absent other economic interests held by the decision maker, it is not a variable interest in the VIE. We think it would be contradictory to include the magnitude and variability of such a fee as a factor to be considered in the principal versus agent analysis. Instead, we believe that the magnitude and variability of compensation should be considered in the principal versus agent analysis only if the fee arrangement is a variable interest on a stand-alone basis (that is, without considering other economic interests held by the decision maker).

**Question 3:** The proposed Update would require judgment in determining how to weigh each factor in the overall principal versus agent analysis. Do you agree that the proposed amendments, including the related implementation guidance and illustrative examples, will result in consistent conclusions? If not, what changes do you recommend?

**Response:** We believe that the proposed amendments will improve consistency. However, we believe that consistency would be improved by incorporating additional elements into the illustrative examples. Case D, beginning at paragraph 810-10-55-3AD, is more helpful than other cases because it considers a few key changes in facts and how those changes affect the conclusion. We recommend adopting this approach in the other examples.

**Question 4:** Should substantive kick-out and participating rights held by multiple unrelated parties be considered when evaluating whether a reporting entity should consolidate another entity? If so, do you agree that when those rights are held by multiple unrelated parties, they should not in and of themselves be determinative? If not, why? Are the guidance and implementation examples illustrating how a reporting entity should consider rights held by multiple unrelated parties in its analysis sufficiently clear and operational?

**Response:** We believe that substantive kick-out and participating rights held by multiple unrelated parties should be considered in the consolidation analysis. Further, we believe that such rights, if held by a limited number of parties that are independent of the decision maker, should be determinative, resulting in the conclusion that the decision maker is acting as an agent. In such a situation, the decision maker does not have power and should not consolidate the entity.

Kick-out rights are substantive only if they meet all of the criteria set forth in paragraph 810-10-25-40A. Specifically, the parties holding the rights must have the ability to exercise those rights and there can be no significant barriers to the exercise of those rights. For example, there must be a reasonable mechanism to conduct a vote, and the parties holding the rights must have the ability to obtain the
information necessary to exercise them. If a small number of independent parties holds substantive kick-out rights, it is reasonable to conclude that they will use those rights to further their own interests or those of the investors they represent, regardless of whether those interests are aligned with those of the decision maker. The decision maker will have power only as long as holders of the kick-out rights are satisfied with the performance of the entity. Similarly, substantive participating rights, if held by a small number of independent parties, give the holders the ability to block the actions of the decision maker if those actions are not in the best interests of the parties. In such situations, we believe that power lies with the holders of the rights, not the decision maker.

While we generally agree with the conclusions reached in the illustrative examples, we disagree with the conclusion in Case D, paragraph 810-10-55-3AM, that the role of an independent board of directors that holds substantive participating rights is more or less meaningful depending on the significance of variable interests held by the fund manager. In that example, the board of directors is comprised of a small number (seven) of individuals, all of whom are independent of the fund manager. The board has the ability to remove the fund manager without cause based on a simple majority vote. As long as the fund manager cannot control board membership and the investors, excluding the fund manager, have an economic interest in the fund that is more than insignificant, we believe the composition of the board and the substantive rights held by the board in this fact pattern should be determinative. The board has power, not the fund manager, and therefore the fund manager should not consolidate the fund.

If the Board is concerned about potential abuse, we recommend that the definition of substantive kick-out rights and participating rights be more rigorous. For example, the guidance could explicitly state that holders of the rights or the investors that they represent must have economic interests in the VIE that are more than insignificant.

Question 5: The proposed Update would not include a criterion focusing on the level of seniority of a decision maker’s fees when evaluating the decision maker’s capacity. Do you agree that the seniority of the fee relative to the entity’s other operating liabilities that arise in the normal course of the entity’s activities should not be solely determinative of a decision maker’s capacity? If not, why?

Response: We agree that the seniority of the fee relative to the entity’s other operating liabilities that arise in the normal course of the entity’s activities should not be solely determinative of a decision maker’s capacity.

Question 6: The evaluation of a decision maker’s capacity places more emphasis on the decision maker’s exposure to negative returns (for example, an equity interest or a guarantee) than interests that only expose the decision maker to positive returns. When performing the principal versus agent analysis, should the assessment differentiate between interests that expose a decision maker to negative returns (or both negative and positive returns) from interests that expose the decision maker only to positive returns? If not, why?
Response: We agree that the assessment should differentiate between interests that expose a decision maker to negative returns (or both negative and positive returns) from interests that expose the decision maker only to positive returns.

Question 7: A reporting entity would be required to evaluate whether there has been a change in the decision maker’s capacity by considering whether there has been a change in the purpose and design of the entity. For example, the purpose and design of the entity may change if the entity issues additional equity investment that is at risk to the decision maker. Do you agree with this proposed requirement? If not, please specify when this relationship should be reassessed and why.

Response: We agree with the proposed requirement but, given the importance of the decision maker’s economic interests in an entity, we believe that a re-evaluation should also be required when such economic interests change significantly. For example, if a decision maker acting as a principal disposes of its subordinate investment in a VIE and its only remaining economic interest consists of a fee that is not a variable interest, the decision maker would likely conclude that it is now acting as an agent. Similarly, if a decision maker acting as an agent acquires economic interests in a VIE from an existing investor, the decision maker might conclude that it is now acting as a principal.

Question 8: The Board decided to include the principal versus agent assessment as a separate analysis within the overall consolidation assessment, rather than replacing the current guidance for evaluating whether a decision-making arrangement is a variable interest (and accordingly, a principal) with the revised principal versus agent analysis. The Board believes that if an entity’s fee arrangement does not meet the definition of a variable interest (for example, a nominal performance-based fee), the decision maker should not be required to continue the consolidation assessment. Do you agree? If not, why?

Response: We agree with the Board’s conclusion but we are not certain that it is clearly articulated within subsection 860-10-25. In lieu of providing the implementation guidance that is currently found in ASC 810-10-55-37, we believe that ASC 810-10-25 should clearly state that, if the fee arrangement is not a variable interest on a standalone basis (as discussed in our response to Question 2) and the decision maker does not otherwise hold a variable interest that is more than insignificant, the decision maker is not required to continue the consolidation assessment.

Question 9: The Board expects the proposed principal versus agent guidance may affect the consolidation conclusions for entities that are consolidated as a result of the decision maker having a subordinated fee arrangement (for example, collateralized debt obligations). However, the Board does not otherwise expect the proposed amendments to significantly affect the consolidation conclusions for securitization entities, asset-backed financing entities, and entities formerly classified as qualifying special-purpose entities. Do you agree? If not, why?

Response: We do not expect the proposed amendments to significantly affect the consolidation conclusions. However, as noted in our response to Question 1, we are concerned that the removal of the
requirement that the primary beneficiary have an obligation to absorb losses or the right to receive benefits “that could potentially be significant to the VIE” could lead to situations in which the primary beneficiary that does not have a meaningful economic involvement with the VIE.

**Question 10:** Update 2010-10 was issued to address concerns that some believe that the consolidation requirements resulting from Statement 167 would have required certain funds (for example, money market funds that are required to comply with or operate in accordance with requirements that are similar to those included in Rule 2a-7 of the Investment Company Act of 1940) to be consolidated by their investment managers. The amendments in this proposed Update would rescind the indefinite deferral in Update 2010-10 and would require money market funds to be evaluated for consolidation under the revised guidance. The Board does not intend the application of the proposed Update to result in money market funds being consolidated. Do you agree that the application of the proposed Update will meet this objective? If not, why and what amendments would you recommend to address this issue?

**Response:** We do not believe that the proposed Update will meet this objective. In recent years, some fund managers have felt an obligation to provide support to certain money market funds to ensure that a fund’s net asset value does not fall below $1.00. In addition, some fund managers have temporarily waived or suspended fees to maintain a positive yield in a very low interest rate environment. When such support is provided, it would be difficult to argue that it is not significant to the fund. Also, some might argue that such actions create a barrier for a fund’s board of directors, making it unlikely that the board could exercise its kick-out rights. Accordingly, the fund manager could be at risk of consolidating the fund.

We believe that the design of money market funds, including governance requirements and investment restrictions mandated by Rule 2a-7, support a conclusion that fund managers do not have a controlling financial interest in the funds. However, we are concerned that a strict application of the guidance could lead to a different conclusion. To eliminate this issue and to ensure consistency, we recommend that funds subject to Rule 2a-7 or similar legal requirements be explicitly exempt from consolidation.

**Interests Held by Related Parties**

**Question 11:** For purposes of applying the proposed principal versus agent guidance, the proposed amendments would require a reporting entity to include the decision maker’s direct and indirect interests held in an entity through its related parties. Do you agree with the requirement that a decision maker should include its proportionate indirect interest held through its related parties for purposes of applying the principal versus agent analysis? Why or why not?

**Response:** We agree with the premise that indirect interests should be considered in the principal versus agent analysis. However, we believe that the proposed approach is overly simplistic and may be difficult to apply in practice. In addition, because the proposal requires a quantitative approach to measurement, it could lead to a bright line application of the guidance. Since the guidance does not distinguish between types of affiliates, we believe that it establishes a rule rather than a principle. We
recommend that the guidance provide for a certain level of judgment so that different types of relationships can be weighted differently. For example, an equity method affiliate in which the reporting entity holds a low level investment and has very little influence over investment decisions should not be given the same weight as a senior manager of the reporting entity who is given the investment or receives financing. We believe that the guidance should be written to allow for these types of distinctions.

We note that the definition of Related Parties in Topic 850 includes “trusts for the benefit of employees, including pension and profit-sharing trusts that are managed by or under the trusteeship of management.” We do not believe that investments held in employee trusts should be included in the analysis of indirect interests.

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<td><strong>Question 12:</strong> The amendments in this proposed Update would require a general partner to evaluate its relationship with a limited partnership (or similar entity) by applying the same principal versus agent analysis required for evaluating variable interest entities to determine whether it controls the limited partnership. Do you agree that the evaluation of whether a general partner should consolidate a partnership should be based on whether the general partner is using its decision-making authority as a principal or an agent?</td>
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**Response:** We agree.

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<td><strong>Question 13:</strong> Do you agree with the proposed transition requirements in paragraph 810-10-65-4? If not, how would you propose to amend those requirements, and why? Please provide an estimate of how long it would reasonably take to implement the proposed requirements.</td>
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**Response:** We agree with the proposed transition requirements. Although we do not expect the proposed Update to significantly change the consolidation conclusions for decision makers, we believe that implementation will be time-consuming because the changes affect both the identification of a VIE and the consolidation analysis. Many entities that are now considered to be VIEs will have to re-evaluated to determine whether they continue to be VIEs under the revised guidance, and the consolidation analyses for VIEs and non-VIE partnerships will have to be revised to incorporate the new principal versus agent assessment. We therefore recommend an effective date no sooner than one year after publication of the final standard.

| **Question 14:** Should early adoption be permitted? If not, why? |

**Response:** Yes, early adoption should be permitted. We believe that the proposed Update represents an improvement in GAAP but will not result in significant changes to consolidation conclusions. As a result, early adoption by some but not all reporting entities will not cause a lack of comparability.
Nonpublic Companies

**Question 15:** Should the amendments in this proposed Update be different for nonpublic entities (private companies or not-for-profit organizations)? If the amendments in this proposed Update should be applied differently to nonpublic entities, please provide a rationale for why.

**Response:** We do not believe the amendments should be different for nonpublic entities.