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September 15, 2003

BY ELECTRONIC & OVERNIGHT DELIVERY

Office of the Comptroller of the Currency
250 E Street, S.W.
Public Information Room, Mailstop 1-5
Washington, DC 20219
Attn: Docket No. 03-10

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551
Attn: Docket No. R-1151

Mr. Robert E. Feldman, Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429
Attn: Comments

Regulation Comments, Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attn: No. 2003-20

Re: Regulatory Publication and Review Under the Economic Growth & Regulatory Paperwork Reduction Act of 1996 ("EGRPRA")

Dear Madams and Sirs:

Bank of America Corporation ("Bank of America") appreciates the opportunity to comment to the Office of the Comptroller of the Currency (the "OCC"), the Board of Governors of the Federal Reserve System (the "Board"), the Federal Deposit Insurance Corporation (the "FDIC"), and the Office of Thrift Supervision (collectively, the "Agencies") in connection with the Agencies' first request for public comments pursuant to EGRPRA. Bank of America, with $769 billion in total assets, is the sole shareholder of Bank of America, N.A., the largest bank in the United States, with full-service consumer and commercial operations in 21 states and the District of Columbia. Bank of America provides financial products and services to two million businesses as well as one out of three households within its franchise, and provides international corporate financial services for clients around the world.

Under the EGRPRA mandate, the Agencies have solicited public comment on their regulations encompassing three categories: Applications and Reporting, Powers and Activities, and International Activities. In particular, the Agencies have requested public comment on which of their regulations contain "outdated, unnecessary, or unduly burdensome regulatory requirements." Bank of America supports the EGRPRA process and the Agencies' efforts to reduce regulatory burden wherever possible. Within two of the three categories identified by the Agencies, Bank of America has identified a number of opportunities for regulatory simplification:

Applications and Reporting

Change in Bank Control Act Regulations, 12 CFR § 5.51 & 12 CFR Part 225 Subpart E

OCC and Fed regulations create a rebuttable presumption of "control" whenever one or more persons "acting in concert" acquire 10% of more of bank or bank holding company voting shares and, in such circumstances, require the filing of a Change in Bank Control ("CIBC") notice. We understand that the Fed (and possibly the OCC) considers commonly advised mutual and other investment funds to be "acting in concert" and therefore a CIBC notice is required whenever a fund family collectively acquires 10% or more of the voting shares of a bank or bank holding company.

Bank of America believes that, insofar as registered investment advisers and registered investment companies are concerned, sufficient safeguards are in place to ensure that commonly advised funds cannot be used as vehicles to acquire control of a bank or bank holding company for the benefit of the fund advisor or parent of the fund advisor. Moreover, attributing the funds' ownership to the advisor (or the advisor's parent) for purposes of the CIBC regulations appears to be inconsistent with other positions (for example, whether to aggregate fund investments with those of the parent to determine whether the Section 4(c)(6) 5% threshold has been exceeded). Thus, Bank of America believes that the CIBC regulations are unreasonably burdensome insofar as the regulations would require aggregation of investments by commonly advised registered investment companies, and believes that an express exemption should be established in the regulation.

Rules, Policies and Procedures for Corporate Activities, 12 CFR Part 5

Business Combinations, 12 CFR § 5.34. Section 215a-3 permits the merger of nonbank entities (including national bank operating subsidiaries) into a national bank. Such transactions are subject to the Bank Merger Act (12 USC § 1828(c)) and FDIC regulations promulgated pursuant to that Act (12 CFR Part 303, Subpart D). FDIC regulations require the filing of an application

with the FDIC and permit, under certain circumstances, streamlined filings, but in all cases require publication of notice and opportunity for public comment with respect to such transactions.

Bank of America believes that the notice and comment requirement is unnecessary when the merging entity is a wholly owned bank operating subsidiary. National bank operating subsidiaries are subject to OCC supervision, are subject to national bank activity and branching limitations, are consolidated with the national bank, and are otherwise treated largely as a department or division of the national bank. Solicitation of public comment in connection with the merger of an operating subsidiary into its parent national bank only serves to increase transaction costs and to delay consummation. Accordingly, we believe that FDIC and/or OCC regulations should be revised to eliminate public comment with respect to such transactions or, at a minimum, to allow the FDIC to grant a waiver on a case-by-case basis.

Dividends Payable in Property other than Cash, 12 CFR § 5.66. OCC regulations currently require prior OCC approval for any noncash dividend or "dividend in kind," regardless of its size. In some situations, however, dividend transactions may be the optimal method for transferring certain property from the bank to its parent holding company. For national banks with a single shareholder, Bank of America believes that prior approval should not be required for such dividends in certain circumstances, for example, where the property is dividended at its fair market value, the dividend will not cause the bank to exceed the dividend limits set forth in 12 USC § 60, and the dividend comprises an insubstantial amount (*e.g.*, less than 1%) of the Bank's paid-in capital and retained surplus.

Deposit Insurance Filing Procedures, 12 CFR Part 303 Subpart B

Bank of America reiterates its comments concerning the requirement for obtaining public comment on operating subsidiary mergers with banks, set forth in the discussion of 12 CFR Part 5, above.

Powers and Activities

Investment Securities, 12 CFR Part 1

12 CFR § 1.3(h) permits a national bank to purchase and sell for its own account "investment company shares," provided the portfolio of the investment company consists exclusively of assets that the bank may purchase and sell for its own account under the OCC's investment securities regulations (12 CFR Part 1), and the bank's holdings of investment company shares do not exceed the quantitative limitations set forth in 12 CFR § 1.4(e).

Because the term "investment company" is narrowly defined at 12 CFR § 1.1(c) to include only investment companies registered under Section 8 of the Investment Company Act of 1940 (the "1940 Act"),[1] the OCC has concluded that, on a case-by-case basis, a national bank may make comparable investments in entities exempt from registration as an investment company under Section 3(c)(1) of the 1940 Act.[2] Section 3(c)(1) of the 1940 Act is limited to an issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities.

As long as the portfolio of an entity consists exclusively of assets that the national bank may purchase and sell for its own account under Part 1, and a national bank's holdings of shares in such entities comply with the limitations contained in Section 1.4(e) of the regulations, no purpose is served by requiring OCC approval for such investment or limiting such investments to entities which qualify for the registration exemption under Section 3(c)(1) of the 1940 Act. If the effect of an investment is merely to pass through the substance of an ownership interest in the assets of the entity invested in, the OCC's concerns of legal and quantitative permissibility would be satisfied regardless of whether the entity invested in is a registered investment company.

Accordingly, Bank of America recommends that 12 CFR § 1.3(h) be revised to read as follows:

> *(h) Pass-through shares* – A national bank may purchase and sell for its own account shares of an investment company or other entity provided that:
>
> > (i) The portfolio or assets of the investment company or other entity consist exclusively of assets that the national bank may purchase and sell for its own account under this part; and
> >
> > (ii) The bank's holdings of such shares do not exceed the limitations in section 1.4(e).

Public Welfare Investments, 12 CFR Part 24

Part 24 requires that a national bank self-certify its public welfare investments by providing certain information to the OCC within 10 working days after the initial investment. Although the OCC recently relaxed its self-certification requirements somewhat,[3] the revised regulation still

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[1] 15 USC § 80a-8.
[2] 15 USC § 80a-3(c)(1).
[3] *See* OCC Final Rule, *Community and Economic Development Entities, Community Development Projects, and Other Public Welfare Investments*, 68 FED. REG. 48,771 (Aug. 15, 2003)

requires the national bank to provide considerable information to the OCC concerning the public welfare investments. In some respects, the amount of information required under Part 24's self-certification process is more extensive than required under Part 5 in connection with the creation of an operating subsidiary. For example, Part 5 waives the operating subsidiary requirement when the Bank has previously filed a notice or obtained OCC approval to engage in the same activity; Part 24 contains no such exemption for public welfare investments similar to those previously made by the bank. Bank of America believes that the burden of the self-certification requirement should be substantially reduced, either by waiving the requirement for well-managed national banks with an "Outstanding" CRA rating, by creating a de minimis level below which no self-certification is required, or by establishing a like-kind investment exemption similar to that found within Part 5.

Bank Holding Companies and Financial Holding Companies, 12 CFR Part 225, Subpart I

Bank of America believes that the mutual fund seeding authority of Regulation Y (12 CFR § 225.86(b)(3)) is unduly burdensome because that provision imposes requirements not required by the Gramm-Leach-Bliley Act ("GLBA"). Specifically, Bank of America believes that the requirement that the financial holding company ("FHC") reduce its ownership in the fund to less than 25% within one year is unsupported by GLBA and is an unnecessary limitation on the powers of a FHC.

GLBA Section 103 authorized FHCs to engage in expanded activities, including certain enumerated powers such as "[u]nderwriting, dealing, or making a market in securities." In this respect, Congress intended GLBA Section 103 to authorize a wide range of activities including "securities underwriting, dealing, and market making without any revenue limitations *such as sponsoring and distributing all types of mutual funds and investment companies*" (emphasis added.)[4] Section 103 also expanded the scope of activities by specifically authorizing FHCs to engage in the same activities domestically as currently permitted abroad under the Board's Regulation K, without limitation.

In the Board's commentary accompanying the issuance of §225.86(b)(3), the Board expressly acknowledged Regulation K as the source of the new financial in nature determination for domestic mutual fund authority. Yet, in authorizing mutual fund authority domestically, the Board by regulation added the 25% requirement, in effect conferring much more limited authority domestically than currently authorized abroad under Regulation K.[5] The commentary

[4] H.R. Conf. Rep. No. 434, 106th Cong. 1st Sess. 153 (1999), *reprinted in* 1999 U.S.C.C.A.N. 245, 248 (emphasis added).

[5] Prior to the passage of GLBA, based on the U.S. Supreme Court's decision in *Investment Company Institute v. Camp,* 401 U.S. 617 (1971), the Board's position was that Section 20 of the Glass-Steagall Act effectively prohibited bank holding companies from organizing, sponsoring or controlling a mutual fund in the United States. 12 CFR § 225.125. During this time, however, the Board expressly permitted a bank holding company to engage in

contains no explanation surrounding the source or rationale for the 25% requirement or why domestic authority should be more constrained than foreign authority.[6]

Bank of America believes that while §225.86(b)(3) was primarily intended to merely codify the Board's determination under GLBA that mutual fund activities are financial in nature in accordance with Regulation K, the Board significantly restricted mutual fund authority domestically by adding the 25% requirement without any statutory basis. Accordingly, Bank of America believes that the 25% requirement should be removed from 12 CFR § 225.86(b)(3).

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If you have any questions, please do not hesitate to contact me at (704) 386-1613.

Sincerely,

Scott A. Cammarn

Scott A. Cammarn
Associate General Counsel

cc: Ms. Anne H. Predieri

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these mutual fund activities outside of the United States pursuant to Regulation K because Glass-Steagall's prohibitions did not apply extraterritorially. Regulation K, as in effect at the time of the passage of GLBA, permitted, "Organizing, sponsoring and managing a mutual fund if the fund's shares are not sold in the United States or to U.S. residents and the fund does not exercise managerial control over the firms in which it invests." 12 CFR § 211.5(d)(11) (now renumbered as 12 CFR § 211.10(a)(11)). Regulation K did not then, and does not now, impose a requirement that the ownership in the fund be reduced to less than 25% within one year.

[6] The 25% requirement may emanate from an interpretive letter issued by the Board prior to the passage of GLBA. Several months before GLBA was enacted, the Board authorized First Union Corporation to provide seed capital to mutual funds on the condition that First Union reduce its ownership interest in each fund to below 25% within six months after the fund was launched (the "First Union Letter"). While the First Union Letter imposed a limitation similar to the 25% requirement, it should not be controlling under these circumstances. First, the First Union Letter interprets the permissibility of seeding activities under the Bank Holding Company Act prior to the passage of GLBA. The First Union Letter, therefore, does not address activities that are "financial in nature" nor does it contemplate financial activities abroad. Second, the limitations imposed in the First Union Letter were described as necessary to comply with Section 20 of the Glass-Steagall Act. Thus, the 25% requirement discussed in the First Union Letter was not intended to define the permissibility of the activity under the Bank Holding Company Act, but rather was intended to ensure that First Union would not, as a result of its seeding activity, have "control" over a company engaged in securities activities in violation of Section 20 of Glass-Steagall. Inasmuch as Section 20 was repealed by GLBA, the 25% requirement should not have been carried forward into the GLBA implementing regulations, specifically, 12 CFR § 225.86(b)(3).