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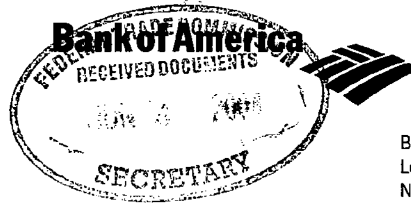

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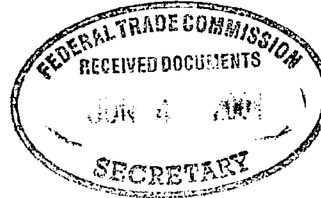

June 3, 2004

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex E)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: HSR Proposed Rulemaking, Project No. P989316

Bank of America Corporation ("Bank of America") appreciates the opportunity to comment on the Federal Trade Commission's (the "FTC's") proposed rulemaking that modifies the treatment of non-corporate interests under the regulations implementing the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). Bank of America is a financial holding company that operates the largest banking network in the United States, with full-service consumer and commercial operations in 29 states and the District of Columbia. Bank of America provides financial products and services to over 33 million households and 2.5 million businesses. Bank of America is also an active participant in securities and capital markets transactions, structured finance, community development, wealth and investment management and private equity investing.

Bank of America applauds the FTC's goal of clarifying the applicability of the HSR Act to transactions involving non-corporate entities. It is important to create a regime that is clear and predictable, logically and internally consistent, and meaningful in light of the business realities of the markets today. We urge the FTC to carefully consider the impact of the proposed rules in order to take steps to avoid substantially increasing the costs and filing burdens for transactions that do not raise competitive concerns.

We believe that the FTC could correct many internal inconsistencies of the current rules (such as treatment of non-corporate interests under the exemption for acquisition of voting securities that hold assets that are exempt under §802.4 and the intraperson exemption under §802.30) by adding the exemption provisions relating to non-corporate interests without also changing the rules relating to when filings are required based on the new control determination. While the

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existing rules are not perfect, it would be a mistake to change the rules in such a way as to create additional confusion or uncertainty or to unduly increase the filing burdens on companies in the absence of an associated material benefit of antitrust scrutiny for transactions that raise competitive concerns.

The following are some specific observations on the proposed rules.

Definition of "Control"

Under the current rules, non-corporate interests are neither assets nor voting securities and therefore acquisitions of non-corporate interests are not reportable unless 100% of the interests of an entity are acquired, in which case the transaction is treated as an acquisition of assets. The FTC proposes to make acquisitions of non-corporate interests reportable when an acquiring party acquires "control" of a non-corporate entity. The proposed rules define "control" as having the right to 50% or more of the profits of the entity or having the right in the event of dissolution to 50% or more of the assets of the entity.

The calculation of rights to receive profits or assets upon dissolution is not always clear and readily determinable. The rights of the investors may vary based on the levels of revenue generated by the entity, such as the case of a preferred investor having rights to a fixed return and a common investor holding all excess profits. Control could shift from one investor to another (and back again) based on the economic performance of the enterprise without any changes in the structure of the investments. The rights of the investors may also change over time, such that a preferred investor may have priority to assets upon dissolution initially, but that priority shifts as the preferred investor has recovered its initial investment. Again this could trigger a change in control without any change in the investment structure. A change in control could also occur solely by the actions of a third party. For example, the redemption of interests held by a third party may cause the allocation of rights to profits and assets of the remaining investors to rise above 50%. In any of these scenarios, a filing could be required some period of time after the initial investment and could cause inadvertent violations for failure to file because the requirement could be triggered automatically without any conscious action being taken by the acquiring party.

One suggestion to address the above concerns is to limit the filing obligation only to acquisitions of non-corporate interests that result in "control" of the entity at the time the non-corporate interests are acquired. Changes in the rights to profits or assets upon dissolution after the purchase of the non-corporate interest may change the ultimate parent of the entity, but would not trigger a new filing.

Non-Voting Non-Corporate Interests

The proposed rules still begin with the premise that non-corporate interests are neither voting securities nor assets. The fundamental change from the current rules is that all underlying assets are deemed acquired when an acquiring party purchases 50% rather than 100% of the non-

corporate interests. This approach seems to unnecessarily complicate the analysis and perpetuate a legal fiction that is not necessarily consistent with the legal structure. The result of this could be to cause the acquisition of some non-corporate interests to be treated more stringently than the acquisition of equivalent corporate interests, even though they should raise no greater competitive concerns.

Of particular concern is the proposal's treatment of non-voting non-corporate interests relative to non-voting corporate interests. Under the current and proposed rules, the acquisition of non-voting corporate securities (such as non-voting common or preferred stock) are exempt from filings, regardless of whether or not the holder was entitled to more than 50% of the profits or assets upon dissolution. Certain types of non-corporate interests similarly do not, and in fact by law are unable to, carry the right to vote or manage the company. Consider for example a limited partnership. The general partner has operational control over the entity. A limited partner by law is not permitted to engage in day-to-day operational or managerial control. A limited partner is by definition a passive investor and is the functional equivalent of a non-voting preferred stockholder or senior debt provider. To state that a limited partner somehow controls the partnership by owning 50% or more of the rights to profits or assets upon dissolution is at odds with the laws governing formation and operation of such entities.

The acquisition of less than 100% of non-voting non-corporate interests should not generally raise competitive concerns that warrant a filing any more than acquisition of non-voting corporate interests. The limited partner or non-voting investor in another type of non-corporate entity would not have any practical control that would permit the non-corporate entity to coordinate or consolidate its market power with the acquiring party because the non-corporate entity is in fact controlled by the general partner or manager. The proposed rules potentially cause the anomaly that the limited partner is deemed to control the non-corporate entity, but it has no legal ability or authority to file or cause to be filed the necessary HSR filings on behalf of the non-corporate entity. Ironically, the general partner or managing member who, based on applicable law and the organizational documents, actually controls and manages the entity would not be deemed to control the entity if it falls below the 50% threshold.

While the FTC has stated that it believes that basing "control" on the ability to elect directors or their equivalent is too complicated given the variations of non-corporate entities, at least that test is focused on the ability to truly control and manage the entity. The proposed test of control based on rights to assets and profits seems to be equally difficult to apply in practice, but is also both over-inclusive and under-inclusive in focusing antitrust scrutiny on the parties that may raise competitive concerns.

Exemption for Formation of Unincorporated Entities

To offset the potential increase in reportable transactions under the proposed rules, the FTC has proposed a new exemption (§802.65) that exempts the acquisition of non-corporate interests that confer control of a newly created non-corporate entity provided that four conditions are met: (a) the acquiring person is contributing only cash to the formation; (b) the formation transaction is in

the ordinary course of the acquiring person's business; (c) the terms of the formation agreement are such that the acquiring person will no longer control the entity after it realizes its preferred return; and (d) the acquiring person will not be a competitor to the new entity. The FTC's explanatory materials suggest that this exemption is designed to exempt transactions that are in essence financing transactions that are analogous to a secured credit transaction and therefore are unlikely to raise antitrust concerns. Bank of America supports the concept of this exemption, but has several recommendations to clarify and broaden the scope.

First, the exemption should not be limited to acquisitions of non-corporate interests. The acquisition of preferred stock in a corporation is fundamentally the same type of transaction. Preferred stock frequently is used as a financing vehicle and not as a means to acquire operating control of a company. As a financing vehicle, the acquisition of preferred stock should raise no greater antitrust concerns, provided that the other conditions to the exemption are satisfied.

Second, the proposed rules unnecessarily limit the exemption to acquisition of "newly-formed" unincorporated entities. Bank of America recommends that the exemption apply to any acquisition of corporate or non-corporate interests that are in essence financing transactions, whether for a newly-formed entity or a going concern. The nature of the transaction as being a financing transaction does not change based on this factor and therefore it does not alter the competitive analysis. Limiting the exemption to newly-formed entities also creates certain complex issues of interpretation. For example, what does "newly-formed" mean? Does the acquiring party have to participate in the formation of the entity (like a joint venture), or can it invest in an entity that was independently formed, only within a recent period of time? Can the entity have been engaged in any activity prior to funding of the acquisition of interests and if so, what is the maximum period of time or amount of activities permissible? If the initial acquisition was exempt at the time of formation, do follow-on investments and fundings into the same legal entity on substantially the same terms become reportable because it is not at the time of formation? Bank of America believes that this limitation makes the exemption too complicated and attempts to narrow the scope of the rule based on a factor that is arbitrary and does not create a meaningful distinction in the antitrust analysis.

Third, Bank of America believes that condition (c) of the proposed rules is vague and difficult to apply in practice. In keeping with the analysis of the transaction as being a financing transaction, a requirement that the acquired interest provide for a preferred return vis-à-vis holders of residual interests seems consistent. The requirement that the acquiring person no longer control the entity after receiving the preferred return, however, is confusing and not consistent with business structures. Many preferred investment interests are not perpetual in nature and provide that a preferred return continues for the life of the investment, and that the investment itself is redeemed at a date certain. Other interests may provide a conversion feature to an interest that is the equivalent of a common interest. Consistent with other rules (such as those relating to conversion of non-voting to voting securities), however, exercise of a conversion feature could be deemed a reportable transaction. Based on the definition of "control" discussed above, it may be difficult to calculate the terms and timing of when the acquiring party will no longer control the entity. It seems that the more meaningful factor is that the acquiring party does not have

operational control over the acquired party, other than certain investor protection provisions that are customary in financing transactions.

Fourth, condition (d) in the proposed rules also presents some ambiguity. "Competitor" is not a defined term in the HSR Act or the proposed rules. For a diverse financial holding company that engages in many lines of business, this term is difficult to apply and narrows the utility of this exemption. Being a competitor potentially depends upon many antitrust factors, such as market definition, geography and product availability, all of which are fact specific and will vary by transaction. Additionally, if the fundamental transaction is in the nature of a financing that does not confer operational control, potential antitrust concerns are lessened. We believe that this condition makes the rules unnecessarily complicated and potentially narrows the scope of the exemption without a meaningful benefit. As written, it would appear that an acquiring party could not offer financing in the form of equity to two different competitors in the same industry. For a bank or financial institution, that would significantly restrain the utility of the exception. Financing transactions that are established as debt are outside of the scope of the HSR Act, even when financings are between competitors. The other factors indicating elements of a financing transaction should be sufficient to justify an exemption, regardless of whether or not the counterparty is a competitor in some respect.

Passive Investment Vehicles

Bank of America is also concerned about the potential impact of the proposed rules on certain types of transactions involving passive investment vehicles. Many types of investment vehicles in the market today customary are structured as unincorporated entities (typically LLCs, LPs or business trusts). These investment vehicles typically are managed by an asset manager or fund manager that has operational and managerial control over the entity and investment discretion with respect to the underlying fund portfolio. Among the types of entities that potentially fall into this category include, mutual funds, investment companies (both that are registered under the Investment Company Act of 1940 and those that are unregistered), hedge funds, and structured finance and securitization vehicles.

Acquisition of these non-corporate interests are not reportable under the current rules unless 100% of the interests are acquired, which is very uncommon. Based on the proposed rules, any investment made into a fund that exceeds the size of transaction test is potentially reportable. An investor who intends to make a large investment into a mutual fund or investment company would be compelled to inquire of the fund manager what percentage of the total investment pool the acquiring party would hold and possibly require a filing prior to investment. Additionally, the proposed rules would impose a new obligation on investment fund managers that they must monitor percentage ownership thresholds of sales of investment securities and build a compliance process for the HSR Act that otherwise would not be necessary today in order to determine who its ultimate parent may be on any given day and what if any filings are required prior to consummation of sales.[1]

[1] Note that the new financing transaction exemption would not be applicable to these transactions because the

The FTC should review the potential impact of the proposed rules on capital and investment markets further prior to implementation of the new rules. The size of person test and the size of transaction test, and the 50% threshold for control, will help to reduce the potential number of filings. Many investors, however, specifically large institutional investors such as pension funds, may frequently exceed the size of transaction and size of person test. If the particular investment fund is a start up fund, has a relatively small current asset base or does not have a widely diversified investor base, the potential investor may exceed the 50% threshold. For example, a fund manager offers a new mutual fund (structured as an LLC) that invests in a diverse portfolio of debt or equity investments. Because the new fund has only recently begun soliciting investors, it has a relatively small asset base and investor base. A large pension fund elects to make an investment in excess of $50 million in the fund that at the time of purchase represents more than 50% of the total assets of the fund. The transaction would be reportable, even though the fund may ultimately sell additional interests to new investors and dilute the pension fund's percentage subsequently. Even more curious would be if a subsequent investor into that same fund made a large investment that caused it to hold more than 50% of the total fund value. In that case, the transaction could be reportable, with the parties required to file as the acquiring and acquired parties being two passive investors.

Given the nature of these types of investment vehicles, Bank of America believes that such investments do not raise competitive concerns that warrant making such transactions reportable. The investors are passive and do not operationally control the investment funds nor the underlying portfolio companies. The investment funds themselves rarely have controlling interests in the underlying portfolio companies or investments. Passive investment vehicles do not appear to be a conduit for consolidation of market power that would raise competitive concerns. These funds represent an enormous and competitive market, both for consumer and institutional investors, and provide positive avenues for investment and wealth management. The potential compliance burden (both in monitoring for compliance and the cost and burden of reporting transactions) could skew the economics of a transaction in such a way as to have unintended consequences on the structures of deals in the market. Many of these investment vehicles are themselves regulated by the securities authorities or operate under limited exemptions in accordance with the securities laws.

If the FTC elects to adopt the proposed rules, then Bank of America encourages the FTC to exempt transactions that are investments in passive investment vehicles representing unincorporated entities that are managed by unaffiliated third parties where the investor has no operational control over either the fund or the underlying portfolio investments.

Community Development Investments

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investments typically do not confer a preferred return, the funds are generally not newly formed and investment funds often make investments in other investment funds.

Bank of America is concerned about the impact of the proposed rules on community development investments made by banks and other regulated financial institutions. Pursuant to the Community Reinvestment Act[2], regulated financial institutions are required to serve the convenience and needs of the communities in which they do business. In addition to making available deposit and credit services, this law encourages regulated financial institutions to make investments for the public welfare into communities. In the case of national banks, applicable laws and regulations[3] authorize and encourage national banks to make investments designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families (such as providing housing, services or jobs). Financial institutions such as Bank of America actively invest in the community in many ways, including projects relating to affordable housing developments, community revitalization, historic preservation, small business development and minority business development just to name a few. Many of these projects are structured as investments in non-corporate entities (typically LLCs or LPs) in coordination with partners in the community. The nature of these investments is that a financial institution typically is the primary source of capital for the venture and therefore would exceed the "control" definition of the proposed rules.

Bank of America encourages the FTC to adopt a new exemption from reportability under the HSR Act for investments made by regulated financial institutions pursuant to the Community Reinvestment Act and in accordance with the laws and regulations applicable to that financial institution (e.g., in the case of a national bank, 12 U.S.C. §24, *Eleventh*, and its implementing regulations). These transactions do not raise antitrust concerns that warrant scrutiny under the HSR Act. To the contrary, the U.S. Congress and the banking regulatory agencies encourage financial institutions to make these investments because they benefit our communities and help to grow and develop underserved markets. A requirement to make an HSR filing for community development transactions would be counterproductive. The filing fees would reduce the ultimate amount of money invested in communities. The burden of filing and compliance with the waiting period would raise impediments and discourage large investments that benefit the public welfare.

If the FTC proceeds with the current rulemaking, many community development investments may become reportable. Existing and proposed exemptions may apply to some community development transactions, but are not broad enough. Bank of America therefore believes that a separate exemption for investments made by banks pursuant to the Community Reinvestment Act is warranted.

Increase in Reportable Transactions

Bank of America fears that the FTC has substantially underestimated the potential impact of the proposed rules on the number of reportable transactions. If the FTC does proceed with the

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[2] 12 U.S.C. §2901 et seq.
[3] See 12 U.S.C. §24, *Eleventh*, and the Office of the Comptroller of the Currency's implementing regulations at 12 C.F.R. Part 24.

proposed rulemaking, Bank of America encourages the FTC to continue to review and analyze the burden and volume of reportable transactions and revisit these rules if the FTC's assumptions prove incorrect.

The FTC states that in 2003, there were 495 reportable acquisitions of control of corporate interests. The FTC also estimates that unincorporated entities represent 47% of all entities formed in Delaware (using Delaware as a representative measure for the whole country). The FTC therefore suggests that 47% of 495 (or 233) represents the potential number of transactions involving control of an unincorporated entity. Using these assumptions, the FTC underestimates the number of transactions by half. Unincorporated reportable transactions would represent 47% of all transactions, not just those of corporate entities, and therefore the potential new transactions involving non-corporate entities would be 439. Assuming the FTC's estimate is correct that 50% of the transactions are currently reportable because they involve 100% acquisitions, the new reportable transactions would be 220.

The FTC's assumptions about the effect of the expanded exemptions seem overly optimistic. The 495 filings in 2003 for corporate entities already factored in existing exemptions, including the intraperson exemption. Assuming that the expanded exemptions will apply consistent treatment for unincorporated entities, no further reduction in potential reportable filings seems appropriate in the estimate. Furthermore, given the complexity and the current limitations imbedded in proposed §802.65, we believe the estimates of the impact of this new exemption are uncertain at best and possibly overstated.

Ultimately, we believe that the FTC's estimate of only 9 new filings being the ultimate impact of the proposed rules is too low. Furthermore, given the burdens and costs associated with filing requirements for reportable transactions, the FTC should carefully re-evaluate the potential impact versus the benefits of the new rules to make sure this new burden is justified. As discussed above, many transactions that may become reportable based on the new rules seem to pose little antitrust concerns. The FTC should analyze what particular transactions (if any) are not reported today that should be, then narrowly tailor the new rules to capture them.

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We thank you for your consideration of the foregoing.

Sincerely,

Phillip A. Wertz
Assistant General Counsel
Bank of America Corporation