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NC1-007-20-01
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July 12, 2004

By E-Mail to: rule-comments@sec.gov

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609
Attn: Jonathan G. Katz, Secretary

Re: Asset-Backed Securities
Release Nos. 33-8419, 34-49644 (File No. S7-21-04)

Dear Mr. Katz:

Bank of America Corporation (the "Corporation") is pleased to submit this comment letter to the United States Securities and Exchange Commission (the "Commission") regarding its proposed rules for asset-backed securities ("ABS") and related commentary contained in Release Nos. 33-8419, 34-49644.

The Corporation is a Delaware corporation, a bank holding company and a financial holding company under the Gramm-Leach-Bliley Act. Through its banking subsidiaries and various nonbanking subsidiaries, the Corporation provides a diversified range of banking and nonbanking financial services and products. The Corporation has several broker/dealer subsidiaries, including Banc of America Securities LLC ("BAS"). BAS is a full-service investment banking and brokerage firm that is registered as a broker/dealer with the Commission. BAS also is a member of the New York Stock Exchange, Inc. and NASD, Inc.

The Corporation, its affiliates, and their predecessors have been leaders in the ABS public offering process since this market's inception. The first publicly registered offering of ABS was an offering of mortgage pass-through certificates sponsored by Bank of America in 1977[1]. In the consumer finance asset market, VISA credit cards trace their history back to 1958 when Bank of America launched its BankAmericard product in California[2]. Today, BAS is a top-tier underwriter of ABS transactions, with a business that spans the auto loan, student loan, credit card, home equity loan, residential mortgage loan and commercial mortgage loan asset classes, as well as the development of less traditional collateral classes. Finally, the Corporation's affiliates serve as sponsors, issuers and servicers in a similarly wide array of ABS transactions.

We commend the Commission on its effort to create transparency in the rules governing practice by promulgating a comprehensive set of regulations tailored to the ABS market. As a sponsor of many securitizations, we have shared the frustration experienced by other market participants with a regulatory scheme based as much on an assumed knowledge of unpublished Commission interpretations as on the text of the Federal securities laws themselves.

We believe that the proposed rules go a long way towards meeting the common goals of the Commission and of market participants. There are, however, a number of instances in which we believe that the proposed rules would benefit from some modification. For example, in certain instances the proposed rules impose a higher burden on securitizers than under existing practice, without a clear investor protection rationale. In other instances, the

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[1] Charles J. Johnson, Jr. & Joseph McLaughlin, Corporate Finance and the Securities Laws, 869 (2nd ed. 1977).

[2] See http://usa.visa.com/personal/about_visa/who/who_we_are_history.html.

Commission has not addressed whether certain requirements resulting from the application to ABS of the regulatory scheme designed for corporate equity and debt securities should be modified.

In this regard, we generally endorse and concur in the recommendations and proposals made to the Commission in the comment letters with respect to the proposed rules submitted by the American Bar Association, the American Securitization Forum, The Bond Market Association and the Commercial Mortgage Securities Association. In addition, and without limiting the degree of our concurrence in those proposals, we wish to emphasize several matters that are of particular importance to our business. In summary we propose that:

(i) eligibility to use Form S-3 should not be limited as the result of untimely filing of Exchange Act reports occasioned by the inability to include unaffiliated third party information;

(ii) any disqualification from using Form S-3 as a consequence of untimely filing should be limited to successive registration statements by the offending depositor or any successor entity;

(iii) the market-making prospectus delivery requirement should be eliminated with respect to ABS; and

(iv) the final rules should apply only with respect to transactions issued after their effective date and that the effective date be extended.

I. Exchange Act Filing History and S-3 Eligibility

We are deeply concerned by the breadth of the proposed disqualification from eligibility to use a Form S-3 shelf registration statement, as a result of defects in Exchange Act reporting compliance. Under existing rules and practice, a depositor, as Securities Act registrant, is barred from using Form S-3 unless it has timely filed all Exchange Act reports required during the 12 months preceding the filing of the registration statement. Under the proposed rules, the depositor would be barred from the use of Form S-3 if the depositor or any issuing entity established directly or indirectly by the sponsor or the depositor did not timely file all required Exchange Act reports during the 12 months and any portion of a month preceding the filing of the registration statement. Although, as under current practice, this bar is implemented through the instructions to Form S-3, which speak as of the date of filing the registration statement, the Commission's comments appear to indicate a belief that an untimely Exchange Act filing renders a Form S-3 registration statement ineffective for subsequent transactions under that registration statement, rather than merely acting as a bar to effectiveness of a new Form S-3 registration statement[3].

Participation in the capital markets for ABS is an essential part of modern banking. As a large, diverse financial institution, we are involved in the financing and securitization of a broad range of assets. Our widespread ABS activities include not only our own issuances of securities through affiliated depositors, but also may include our participation as a seller of assets or otherwise in numerous transactions with unaffiliated depositors. Ready access to the capital markets for ABS is therefore very important to us and our clients, and to

[3] See text accompanying Release footnote 90.

many of the markets in which we are significant participants. As such, we are concerned that a sponsor that has multiple ABS businesses could be barred from using Form S-3 for all of those businesses by reason of a reporting failure with respect to any of those businesses.

In taking the approach contained in the proposed rules, we believe the Commission failed to take into account several important considerations. First, the expanded Exchange Act reporting contemplated under proposed Item 1119 of Regulation AB requires that the reporting entity, depending on the facts and circumstances of the transaction, provide updated information about various unaffiliated third parties, such as servicers, significant obligors and significant credit enhancers. Even when incorporation by reference is permitted, the cooperation of a third party's accounting firm may be required if the Commission does not modify the requirement to file accountants' consents to incorporation by reference. In addition, in order to comply with the assessment and attestation requirements of Item 1120 and the compliance statement requirements of Item 1121, the "responsible party" or the depositor, as the case may be, will require the additional cooperation of the various parties performing servicing functions. Although we believe that these reporting, assessment and attestation requirements should be modified in accordance with the recommendations of the comment letters referenced above, under any circumstances full and timely Exchange Act reporting will, under the final rules, often depend upon the cooperation of unaffiliated third parties, regardless of which transaction party is contractually responsible for preparing, executing and filing Exchange Act reports under the transaction documents. If such cooperation is not received, the depositor, and under the current proposal all other depositors of the same sponsor, are penalized through the loss of access to shelf registration. We believe that is a fundamentally unfair result, and can be remedied by qualifying General Instruction I.A. to Form S-3 to provide that the failure to file Exchange Act

reports on a timely basis will not affect the depositor's eligibility to use Form S-3, if the failure resulted from the action or inaction of a unaffiliated third party and if the depositor otherwise acted in good faith and without intent to avoid the reporting requirements of the Exchange Act. We do not mean to suggest that a depositor should not be responsible for full and timely Exchange Act reporting or that it can delegate the ultimate responsibility for the effectiveness of such reporting to a third party. However, to the extent that effective compliance requires the receipt of information or the cooperation of unaffiliated third parties, to penalize the depositor and all other depositors of the related sponsor for the recalcitrance of third parties is the wrong result.

In addition, in expanding the class of persons that become ineligible to use Form S-3 to other depositors of this sponsor, and by suggesting that such disqualification occurs immediately and not at the time of filing of the subsequent registration statement, the proposed rules create the potential for consequences that would unfairly penalize sponsors like the Corporation's affiliates, which have multiple ABS businesses, by rendering them ineligible to use Form S-3 for all types of assets due to a reporting problem that related only to one particular asset class. This result ignores the independent significance of the market for each asset class, and the related fact that each is typically conducted as a separate line of business. The Corporation and its affiliates, for example maintain a number of different affiliated depositors having their own shelf registration statements for the purpose of securitizing different asset classes. Many of these businesses are separately managed by business units having the appropriate experience with the particular asset class. An institution-wide loss of Form S-3 eligibility for ABS would be inconsistent with the continued eligibility to use Form S-3 that independent subsidiaries of the same parent entity enjoy in the corporate market. We understand

that a broader disqualification is intended to close a perceived loophole existing under current Form S-3 which is unique to the ABS market, whereby a sponsor whose depositor becomes ineligible to use Form S-3 could establish a new depositor for same asset class. However, we believe that a remedy to that problem can be addressed by other, more tailored measures that do not run the risk of adversely impacting the ABS market. For example, the instructions to Form S-3 could provide that Form S-3 may not be used by any depositor who did not timely file required Exchange Act reports during the preceding twelve month period (subject to the proposed exception for failure due to third party action described above) or any other depositor subsequently established by the controlling entity of the ineligible depositor for the purpose of securitizing assets of the same asset class.

We also request that the Commission clarify, notwithstanding its suggestion to the contrary, that when Form S-3 eligibility is lost, it is lost with respect to the ability to file a future Form S-3 (including a renewal via Rule 429), but that a reporting failure does not impair the ability to use an already effective Form S-3 registration statement. Immediate transactional disqualification would have severe consequences for sponsors like Bank of America, which utilize the ABS market to finance the origination of consumer assets such as residential mortgage loans. The efficient operation of the residential mortgage market depends, in large part, on the ability of financial institution mortgage originators to sell those assets in the secondary market. The ability to do so through timely securitization on a shelf basis, without the need for preparation, filing and review of an S-1 registration statement, is critical to the smooth functioning of the residential mortgage market and ultimately the stability of residential mortgage interest rates. In addition, immediate disqualification would create many practical difficulties for issuers who are “in the market” on a monthly basis, as it is likely they will have

begun the marketing process, including the use of ABS informational and computational materials, and entered into hedging transactions, in anticipation of closing the current issuance of securities within days after the date on which Exchange Act reports with respect to prior issuances are due. In the event of a delinquent report with respect to a prior issuance, not only would the depositor's securitization program be seriously disrupted, it may have inadvertently committed a Section 5 violation with respect to its current transaction. Again, this seems to us to be a far greater penalty than is required to enforce the depositor's obligation to comply with its Exchange Act reporting requirements. Loss of the ability to file subsequent registration statements for same asset class is leverage enough, without throwing the depositor's securitization program into complete turmoil.

We also request that the final rules expressly provide that eligibility to use Form S-3 will not be impaired by immaterial or inadvertent instances of noncompliance with Exchange Act reporting requirements and that the final rules provide a procedure whereby a noncompliant issuer can request that the filing history eligibility requirement be waived by the Commission.

II. Market-Making Prospectuses

The proposed rules, to the extent that they attempt to provide a comprehensive framework for asset-backed securities under the Securities Act and the Exchange Act, provide a unique opportunity for the Commission to address the rationale for and continued necessity of market-making prospectuses in ABS transactions. We urge the Commission to take this opportunity to eliminate any market-making prospectus requirement for ABS, recognizing the differences between ABS and corporate securities, and not to defer the issue to some broader Securities Act initiative.

In the universe of ABS transactions, a market-making prospectus delivery requirement is understood to arise when a broker-dealer effects secondary market sales of ABS as to which both the depositor and servicer are its affiliates because, in the Commission's view, the broker-dealer exemption in Section 4(3) of the Securities Act is technically inapplicable. Dual affiliation with the depositor and the servicer analogizes their collective role to that of a corporate issuer, whose affiliated broker-dealer is presumed to be in a position to provide current financial information about the issuer. In the context of shelf registrations of corporate securities, this obligation is easily satisfied through incorporation by reference of the issuer's Exchange Act reports. Because corporate securities are generally much more widely held than ABS, and are accordingly less likely to be subject to cessation of Exchange Act reporting under Section 15(d) of the Securities Act, the procedure for producing a market-making prospectus creates little incremental expense or effort for either the issuer or its broker-dealer affiliate. In addition, a broker-dealer is unlikely to be affiliated with more than a small number of reporting issuers of corporate equity or debt securities.

The realities of the ABS market are quite different from those of the corporate market. Most issuances of ABS are held by a relatively small number of investors, and issuers routinely avail themselves of the ability to cease filing Exchange Act reports once the initial annual report on Form 10-K is filed. Investors in ABS are indifferent to such cessation, because the distribution and servicing information which would be contained in current Exchange Act reports continues to be available to them through monthly reports that are either mailed to investors or made available on the issuer or the trustee's website. Because of the market-making prospectus requirement however, depositors whose broker-dealer affiliates are subject to that requirement typically continue to file Exchange Act reports voluntarily in order to permit the

distribution and servicing reports in those filings to update the prospectus. Given that each issuing entity is a separate Exchange Act reporting person, and that periodic reports in ABS transactions are filed monthly, rather than quarterly, the result is an enormous additional compliance burden for ABS issuers whose affiliated broker-dealers have a market-making prospectus delivery obligation. By way of illustration, in order to enable BAS to satisfy its market-making delivery obligation, in 2003 various affiliated depositors effected hundreds of Exchange Act filings with respect to scores of ABS transactions at significant cost. That is a far greater number of filings than those ordinarily required to be made by corporate issuers, and the net effect is merely to make available through the EDGAR system information which is readily available and more easily accessible elsewhere.

The burden on issuers affiliated with ABS, and similarly situated issuers, will only be exacerbated by the proposed rules, which greatly expand the required content of periodic Exchange Act filings and which, as described in Part I above, materially increase the penalty to depositors and their affiliates as a result of incomplete or untimely filings, notwithstanding that they may arise from the inability of the depositor to obtain information solely within the control of unaffiliated third parties. Further, the Commission has, in footnote 86 of the Release, suggested an additional requirement for Exchange Act reports of issuers affiliated with broker-dealers that, notwithstanding the Commission's assertion that it reflects current Commission policy, directly contravenes existing ABS market practice. Given the number of transactions to which BAS' market-making prospectus delivery obligation applies, it has no effective alternative to requiring its affiliated issuers to continue to file Exchange Act reports for the life of the transaction. There is simply insufficient time to prepare a new prospectus in connection with each trade. The only effective means for BAS's affiliated issuers to avoid the risks and costs of

perennial Exchange Act filings would be for BAS to discontinue making a market in their securities, which in turn would serve to only disadvantage the very BAS investors who the market-making prospectus delivery obligation is alleged to protect.

We see no reason in policy or logic why affiliated broker-dealers should continue to be required to deliver market-making prospectuses in ABS transactions. Secondary market investors in investment grade public ABS routinely request and desire to receive only a copy of the original prospectus and the most recent distribution date statements for the transaction, irrespective of whether the trade is effected through an affiliated or unaffiliated dealer. A broker-dealer, by virtue of affiliation with the issuer and servicer of an ABS transaction, is highly unlikely to have any material information which is not disclosed in those statements or in information published and readily available to investors on the issuer or trustee's website. To the extent that the broker-dealer has any material non-public information about the ABS, it would be forced by Exchange Act Rule 10b-5 principles, to disclose or abstain from trading.

As discussed above, the market-making prospectus requirement imposes on broker-dealers who are affiliated with both the issuer and the servicer of a transaction, an ongoing compliance burden, and creates a substantial risk of Form S-3 disqualification for the issuer, that is not shared by other dealers and issuers, with no compelling investor protection benefit. Accordingly, we respectfully request that the Commission provide in the final rules that broker-dealers who are affiliated with ABS issuers and servicers need not deliver a market-making prospectus in connection with secondary market transactions in ABS of those issuers.

III. Transition Period.

The Commission has indicated that it is considering a three month transition period for compliance with the proposed rules for new registration statements or takedowns off of existing shelf registration statements, and that it is considering compliance with the Exchange Act proposals for outstanding asset-backed securities beginning with fiscal years ending six months after the effective date of the final rules.

Each of these proposed transition periods presents certain difficulties, due primarily to the need to enlist the cooperation of third parties, such as originators, servicers, significant obligors and credit enhancers, and sponsors (in the case of rent-a-shelf transactions), about whom more extensive prospectus disclosure is required under the proposed rules and about whom additional information is required to be provided on an ongoing basis in Exchange Act reports. Our experience with prior, and much more limited, actions taken by the Commission in connection with the asset-backed securities market, such as the no-action letters which permitted the use of ABS term sheets and computational materials and the certification requirements imposed under Section 302 of the Sarbanes Oxley Act, is that it takes a considerable period of time for ABS market participants to analyze, negotiate and adjust the allocation of responsibility and liability among them with respect to the additional regulatory compliance requirements. This is due, in part, to the need for service providers, such as servicers and trustees, to move with caution while they gauge what develops as the market norms for their respective industries. Accordingly, we suggest a longer transition period for compliance with the proposals for new registration statements and new takedowns, such as twelve months following the publication date of the final rules.

With respect to outstanding ABS transactions, we respectfully request that the Commission consider the practical limitations on an issuer's ability to comply with the proposed rules. Regardless of the length of the transition period, the issuer cannot compel a third party, which is not contractually obligated to do so, to provide information which may be necessary in connection with Exchange Act reports. Some outstanding ABS transactions involve program issuances with repetitive transaction parties who will need to adjust their obligations on a going forward basis and might agree to incur similar obligations with respect outstanding transactions, notwithstanding that they are not contractually bound to do so. However, many other transactions involve participants who do not have a regular relationship to the program, such as derivative providers who may have been enlisted for a one-off transaction and have no incentive to cooperate in providing information to the issuer in connection with future Exchange Act reports. In addition, there is no provision made in outstanding transactions for the payment of any expenses which may be incurred in obtaining such third party cooperation or otherwise in complying with the greater reporting burden under the proposed rules. Accordingly, we strongly recommend that the Commission apply both the disclosure and the Exchange Act reporting provisions of the proposed rules entirely prospectively. With respect to master trust transactions, which may involve series of securities issued both before and after the effective date of the proposed rules and which relate to the same trust, we propose that Exchange Act reporting in accordance with the proposed rules commence at the time that each series of securities issued prior to the end of the transition period for new transactions is paid in full.

We also request that the Commission clarify expressly that the disclosure provisions of the proposed rules do not apply with respect ABS transactions that were outstanding prior to the effective date of the rules, irrespective of whether a prospectus delivery

requirement exists after the effective date with respect to such transactions. Although an underwriter with an unsold allotment or a market-maker with a market making prospectus delivery obligation may have the ability to contractually require the issuer to update the prospectus, the related issuer will face the practical challenges described above in securing the cooperation of third parties about whom disclosure may be required under the proposed rules that was not required previously.

If the Commission or the staff has any questions regarding the comments contained herein, we would be happy to address them.

Respectfully submitted,

William C. Caccamise Jr.
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Deputy General Counsel