#30

Bank of America Corporation
Anti-Money Laundering Compliance
NC1-002-21-21
101 South Tryon Street
Charlotte, NC 28255

Tel 704-387-1690
Fax 704-388-9691

November 26, 2002 BY ELECTRONIC MAIL

Judith R. Starr, Chief Counsel
Office of the Chief Counsel
Financial Crimes Enforcement Network
Department of the Treasury
P.O. Box 39
Vienna, Virginia 22183-1618
regcomments@fincen.treas.gov
Attention: NPRM – Section 352
Unregistered Investment Company Regulations

Dear Ms. Starr:

Bank of America Corporation ("Bank of America") appreciates the opportunity to comment on a narrow aspect of the recently proposed rule relating to anti-money laundering ("AML") programs for unregistered investment companies (the "Proposed Rule").[1] The Proposed Rule is designed to implement Section 352 of the USA Patriot Act (the "Act") by requiring the adoption and implementation of AML programs by certain unregistered investment companies.[2] With over $660 billion in total assets, Bank of America 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 30 million households and two million businesses and, through various business units and subsidiaries, offers a broad range of financial and investment products and operates or sponsors numerous types of investment companies.

Bank of America is a strong supporter of effective rules for the detection, reporting and prevention of potential money laundering activity. Bank of America's primary business units (its banks and broker-dealers) are already subject to the Act and have extensive AML compliance programs. However, we are concerned that the Proposed Rule would inadvertently encompass standard types of asset-backed securitization entities and structured finance vehicles ("Securitization Entities") that rely on exclusion from the Investment Company Act of 1940 (the "Company Act") pursuant to Section 3(c)(1) or Section 3(c)(7) of the Company Act. We understand that these same sections of the Company Act are relied upon by entities, such as hedge funds, that are intended and legitimate targets of the Proposed Rule and the AML program requirements of the Act. Nonetheless, we believe that, in capturing hedge funds and other actively managed pools of capital, care should be taken to avoid imposing the obligations of the Proposed Rule on Securitization Entities. Therefore, Bank of America recommends that the final rules exclude entities that are used in asset-backed securitizations or similar structured finance transactions from the

[1] *See* Financial Crimes Enforcement Network, "Anti-Money Laundering Programs for Unregistered Investment Companies," 67 Fed. Reg. 60617 (September 26, 2002).
[2] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. Law No. 107-56 (October 26, 2001).

definition of investment company for purposes of the Act. In the alternative, we believe that further guidance is needed to apply the Proposed Rule to Securitization Entities in a manner that is not unduly burdensome given the structure, limited purpose and narrowly defined function of such entities.

Exception for Securitization Entities

Securitization and structured finance transactions are an essential part of the capital markets. Banks and other financial institutions have issued hundreds of billions of dollars of securities through Securitization Entities. The typical Securitization Entity holds financial assets and issues rated securities backed by those assets that are sold to investors through regulated banks and broker-dealers (in their capacity as underwriters or placement agents).[3] Their primary purpose is to spread the risks of securitized assets to investors in the capital markets and to shift the funding of those assets away from banks, broker-dealers and other asset originators. We believe that securitization and structured finance transactions present a low risk for money laundering and terrorist financing that does not warrant coverage under the Act. The regulated banks and broker-dealers that place the issued securities are already required to have an AML program that should address any money laundering and terrorist financing concerns for these transactions. Requiring an AML program at the Securitization Entity level will not add additional benefit, but will impose unduly burdensome and disruptive standards to the operations of these transactions.

Securitization Entities are typically structured as common law or business trusts or special purpose companies. Due to the requirements of rating agencies (including criteria relating to bankruptcy remoteness) and investors and applicable accounting standards[4], these entities are designed to engage in only very limited activities consistent with their securization function and purpose. Securitization Entities do not have independent staff and operations, but rather act exclusively through agents. A Securitization Entity depends upon financial institutions in order to sell its securities, but it is not itself a financial institution. While these entities could, and often do, fall within the expansive definition of "investment company" set forth in the Company Act, these entities are not typically subject to registration under the Company Act due to available and long-standing exclusions and exemptions.[5] Specific examples of such entities include (i) credit card, auto, and mortgage securitization trusts, (ii) asset-backed commercial paper conduits, and (iii) collateralized debt obligations.

It appears that Treasury agrees with the spirit and rationale of an exemption for Securitization Entities. In particular, under the Proposed Rule, Securitization Entities that issue asset backed securities under Rule 3a-7 would appear to fall outside the scope of the Proposed Rule. While Rule 3a-7 is often available to credit card, auto and mortgage securitization entities, that is not always the case due to the technical provisions of that rule as interpreted by the SEC. More importantly, however, comparable Securitization Entities such as asset-backed commercial paper conduits and issuers of collateralized debt obligations are not able to rely on Rule 3a-7 and must achieve exemption from registration under the Company Act pursuant to Sections 3(c)(1) or 3(c)(7). The other exemptions contained within the Proposed Rule are not adequate to exclude these types of transactions.

We believe it appropriate that all Securitization Entities (not just those within the ambit of Rule 3a-7) be excluded from the scope of the Proposed Rule. There does not seem to be any principled reason to exclude Rule 3a-7 eligible Securitization Entities from the scope of the Proposed Rule while including functionally similar entities within the Proposed Rule. Moreover, this request is fully consistent with the

[3] The issuance of a least one class of investment grade rated debt securities distinguishes passive securitization entities from hedge funds and similar actively managed pools of investment capital targeted by the Proposed Rule.

[4] *See*, *e.g.*, Statement of Financial Accounting Standards No. 140 (defining the standards of a "qualifying special purpose entity" and generally requiring such entities passively hold financial assets and not engage in active asset management).

[5] *See*, *e.g.*, Sections 3(c)(1) and 3(c)(7) of the Company Act and Rule 3a-7 promulgated under the Company Act.

Treasury's intention not to unduly expand the scope of the Proposed Rule to entities that are highly unlikely to be involved in money laundering.[6]

Guidance on Application of Proposed Rule to Securitization Entities

To the extent that Treasury declines our recommendation to exclude all Securitization Entities from the scope of the Proposed Rule, we ask, in the alternative, that Securitization Entities within the scope of the Proposed Rule be permitted to meet their AML obligations if the sponsor, trustee, or administrator of such entity reasonably determines that the parties that hold the entity's assets, make the entity's payments, and sell the entity's securities, have in place AML programs compliant with the Act.

We thank you for your consideration of the foregoing.

Sincerely,

Daniel D. Soto
Anti-Money Laundering Compliance Executive

[6] *See* Proposed Rule at 60618 ("[a]n overly expansive definition of 'unregistered investment company' would unnecessarily burden businesses not likely to be used to launder money").