MEMORANDUM

To: Section 106 Guide Public File

From: Mr. Van Der Weide

Date: September 9, 2004

Subject: Meeting with representatives of Simpson Thatcher & Bartlett.

On September 9, 2004, representatives of the Federal Reserve System (Messrs. Fallon, Van Der Weide, Baer, Hurwitz, Borzekowski, and Brevoort) met with representatives of the law firm of Simpson Thacher (led by John Walker, Esq.) to discuss an exception from section 106 of the Bank Holding Company Act Amendments of 1970 for tying arrangements with large corporate customers or in large syndicated loan transactions. Mr. Walker provided some preliminary research and analysis that he and his clients (Citigroup, JP Morgan Chase, Deutsche Bank, Bank of America, and UBS) had conducted that would support such a large customer or large syndicated loan exception from section 106. The public version of a written submission in this regard by Bank of America is attached. Mr. Walker also indicated that he expected to present additional research and analysis in writing to the Federal Reserve within the next month.

BEST IMAGE AVAILABLE

Bank of America

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REDACTED VERSION
September 9, 2004

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Docket No. OP-1158

Dear Ms. Johnson:

This letter is submitted to the Board of Governors of the Federal Reserve System (the "Board") by Bank of America Corporation and its subsidiaries ("Bank of America") in connection with section 106 of the Bank Holding Company Act Amendments of 1970 ("section 106") and the Board's proposed interpretation and supervisory guidance regarding section 106.[1] Bank of America supports the frameworks that are set out in Exhibit A hereto for (i) a "large customer" safe-harbor exemption from the coverage of section 106 and (ii) a coercion interpretation. This letter and Confidential Exhibits B, C and D hereto, which set forth data and information regarding "Top Fee Payers" tracked by Bank of America in 2003, provide support for such safe-harbor exemption and interpretation. Bank of America intends to provide

1 68 Fed. Reg. 52024 (Aug. 29, 2003).

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additional supporting data and information for such safe-harbor exemption and interpretation in the near future.

Bank of America's strong position in the syndicated loan market is well recognized. In the first quarter of 2004, Bank of America ranked first as lead arranger by number of deals (with 155) and second as lead arranger by volume (with $31.3 billion); Bank of America has consistently ranked first by number of deals and second by volume over the last five years.[2] Bank of America's leading presence in the syndicated loan market, however, does not translate into coercive power over customers. This is clearly evidenced by the data and information set forth in Confidential Exhibits B, C and D.

<u>Top Fee Payers in 2003</u>. Confidential Exhibit B sets forth data and information for the year 2003 regarding customers and potential customers -- "Top Fee Payers" -- that Bank of America closely tracks, including the fees paid by such customers for various capital market financing services. Over _____ corporate customers and potential customers were tracked by Bank of America in 2003. Bank of America provides financing services to approximately ___ of these customers. This represents approximately __% of the total customers that Bank of America tracks; Bank of America currently does not provide financing services to approximately __% (or over _____) of the customers that it tracks. The customers that Bank of America tracks spent over $___________ in loan syndication fees in 2003; Bank of America's share of these fees was approximately $_________, or ____%. The estimated total spending in 2003 by these

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2 Source: Loan Pricing Corporation.

customers for all capital market financing services was over $__________; Bank of America's share of this "wallet" was approximately $___________, or ___%.

The amount of fees paid by these customers for capital market financing services and Bank of America's share of that amount support the following conclusions: (1) a very large number of these customers have access to alternative sources of capital beyond the syndicated loan market; and (2) Bank of America faces stiff competition from other financial institutions for all capital market financing services, including syndicated loans. In such an intensely competitive environment, no bank or other financial institution can possibly coerce customers in the syndicated loan market.

(i) Customers' access to alternative sources of capital

Bank of America tracks customers' and potential customers' spending on fees for the following capital market financing services: asset-backed securities ("ABS"); convertible bonds; common equity; high grade debt; high yield debt; debt private placements; and loan syndications. To evidence these customers' access to alternative sources of capital beyond the syndicated loan market, each case in which these customers utilized these various other financing services is highlighted in yellow on Confidential Exhibit B. These customers' access to alternative financing sources is visually evident by the numerous yellow highlights on each page of Confidential Exhibit B.

This is also evidenced by the breakdown of these customers' spending on fees for each capital market financing service, which follows:

Capital Market Financing Service	**Estimated Total Fees Paid by Customers**	**Bank of America's Share of Total Fees**	**Bank of America's % of Total Fees**
ABS	$________________	$________________	___%
Convertible bonds	$________________	$________________	___%
Common equity	$________________	$________________	___%
High grade debt	$________________	$________________	___%
High yield debt	$________________	$________________	___%
Debt private placements	$________________	$________________	___%
Loan syndications	$________________	$________________	___%
TOTAL:	$________________	$________________	___%

This breakdown is shown visually as follows:

At approximately $__________, loan syndication fees represent less than 19% of the total fees spent on capital market financing services by these customers. The fees attributable to such alternative sources of capital made up over __% of the total fees spent for all financing services by these customers and demonstrate that a very large number of customers have access to capital markets for financing other than the syndicated loan market.

This is confirmed in the most recent issue of *FDIC Outlook*, which reports that "[l]arge public corporations . . . took advantage of low-cost alternative funding sources during the past few years, thereby diminishing their need for C&I loans. . . . As a result, according to *Thomson Financial*, corporate bond and convertible securities sales rose to a record $899 billion in 2003 from $668 billion in 2002, a 35 percent increase. Had this debt not been so affordable to corporate issuers, some of those funding needs may have been met through commercial lenders." *FDIC Outlook* (Fall 2004), at 4 (footnote omitted).

(ii) Bank of America Faces Stiff Competition

Bank of America faces stiff competition from numerous other financial institutions in each of the capital markets for financing, which is also evidenced by Confidential Exhibit B. Bank of America's market share of the fees spent in these capital markets was less than __% in each of the ABS, convertible bond, common equity, high grade debt and high yield debt markets. Other competing financial institutions earned over __% of the fees in the ABS market, over __% in the convertible bond market, over __% in the common equity market, over __% in the high grade debt market, and over __% in the high yield debt market. Bank of America's share of loan syndication fees was _____%, and other competing financial institutions earned over __% of the fees in this market.

The "BAS Share of Wallet %" column on Confidential Exhibit B evidences that customers spread their business widely among various financial institutions. Our bankers are keenly aware of the competition for all capital market financing services from other financial institutions. This competition, coupled with the customers' abundant financing options, make it impossible for Bank of America or any other financial institution to coerce customers in the syndicated loan market or any other capital market for financing.

(iii) The $100 million total debt and $500 million total revenue thresholds

Under the framework for the "large customer" safe-harbor exemption that is set out in Exhibit A, a customer would be a "large customer" if, on a consolidated basis in aggregate, it (a) is the obligor or guarantor on outstanding debt obligations, including commitments to lend, of $100 million or more or (b) had in its financial statements for the immediately preceding four quarters gross revenues of $500 million or more. The data and information in Confidential Exhibit B supports such $100 million total debt and $500 million total revenue thresholds.

By sorting the data in Confidential Exhibit B in ascending order of "Total Debt" (see Confidential Exhibit C), a pattern emerges from the yellow highlights. Those customers with small amounts of total debt raise financing principally through the common equity market, as evidenced by the nearly exclusive concentration of yellow highlights in the common equity column. With a few exceptions, this trend holds true until about the $_________ total debt level, at which point customers begin to access alternative financing markets. At around the $100 million total debt level, the yellow highlights reach across all forms of financing, and the concentration of yellow highlights shifts from common equity to the high grade debt and high yield debt markets. Approximately __% of the customers tracked in Confidential Exhibit C, representing _____ customers, have total debt of $100 million or more.

By sorting the data in Confidential Exhibit B in ascending order of "Total Sales" (or total revenues) (see Confidential Exhibit D), a pattern also emerges from the yellow highlights. Those customers with lower total revenues raise financing principally through common equity, as evidenced by the concentration of yellow highlights in the common equity column. As the customers' total revenues begin to increase, the financing options also begin to broaden into other forms of financing, *e.g.*, convertible bonds and high yield debt. As the total revenues approach the $500 million level, the voluminous instances of yellow highlights evidence that the customers at this level and above have the entire range of financing alternatives available to them. Approximately __% of the customers tracked in Confidential Exhibit D, representing ______ customers, have total revenues of $500 million or more.

Conclusions. The data and information contained in Confidential Exhibits B, C and D provide strong supporting evidence that customers, and not financial institutions, hold the power in the syndicated loan market. While Bank of America and numerous other financial institutions compete to meet their customers' financing needs, customers hold the power by utilizing the different capital market financing options and by spreading their business among various financial institutions. Confidential Exhibits C and D, respectively, show that customers with at least $100 million in total debt and customers with at least $500 million in total revenues are very powerful players with access to the full range of alternative forms of financing, which is evidenced by the yellow highlighted patterns in these Confidential Exhibits. Such customers simply cannot be coerced in the syndicated loan market as well as in the other capital markets.

Confidentiality request. Pursuant to the Freedom of Information Act, Bank of America requests that the Board treat confidentially all the information included in Confidential

Exhibits B, C and D as well as the information that has been redacted in the copy of this letter that is included herewith. Such information is highly confidential and is not otherwise available to the public. The disclosure of such information would cause significant competitive harm to Bank of America.

* * *

Bank of America strongly encourages the Board to adopt a final interpretation and supervisory guidance regarding section 106 that includes a "large customer" safe-harbor exemption and a coercion interpretation that are based on the frameworks set out in Exhibit A.

Any question regarding this letter, Exhibit A, and Confidential Exhibits B, C and D may be addressed to the undersigned (704-388-6724; john.h.huffstutler@bankofamerica.com).

Very truly yours,

John H. Huffstutler

Exhibit A
Confidential Exhibits B, C and D

cc: Scott Alvarez
Kieran J. Fallon
Mark E. Van Der Weide
Andrew S. Baer
Joyce Hansen
Ivan Hurwitz

Safe-Harbor Exemption

Safe harbor for large customers. The prohibitions of section 106 shall not apply to any proposed or executed transaction between a bank and a customer if at the time negotiations between the bank (or any affiliate thereof) and the customer with respect to such transaction are commenced or at the time such transaction is entered into, after giving effect to such proposed or executed transaction, the customer either is a large customer that is not the obligor on any distressed debt obligation or is an affiliate of such a large customer. "Large customer" means any person other than an individual that:

(a) on a consolidated basis is the obligor or guarantor on outstanding debt obligations, including commitments to lend, of $100 million or more in aggregate;

(b) on a consolidated basis had in its financial statements for the immediately preceding four quarters, in aggregate, gross revenues of $500 million or more;

(c) is managed or controlled, directly or indirectly, by one or more financial sponsors any of which has $1 billion or more under management; or

(d) within the five years immediately preceding the time negotiations with respect to a transaction commenced or the time such transaction is entered into, has issued outstanding debt obligations that are rated investment grade by a nationally recognized statistical rating organization.

"Distressed debt obligation" means any outstanding debt obligation, including loans and public or private debt securities, of an obligor (i) that, in the case of a debt security, has traded on average for five consecutive business days during the immediately preceding 60 days at a 35% or greater discount from its face amount (or accreted amount in the case of a debt security issued at a deep discount), (ii) for which, in the case of a loan trading in the secondary market, the bid or offer rate at any time during the immediately preceding 14 days is at a 20% or greater discount from its principal amount, or (iii) that, to the bank's knowledge, has been classified as substandard, doubtful or loss by a federal banking agency or a State bank supervisor.

Final Interpretation

The final interpretation and supervisory guidance regarding section 106 (the "Final Interpretation") should include two separate and independent tests: (i) a meaningful option analysis for mixed-product arrangements performed with respect to various classes of customers, and (ii) a coercion analysis to the following effect:

Coercion analysis. The Board concludes that a violation of section 106 may occur only if a bank coerces or forces a customer to obtain (or provide) the tied product as a condition to the customer obtaining the desired product from the bank. *See, e.g., Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1415 (11th Cir. 1987) ("[T]he plaintiff must establish that seller forced or coerced the buyer into purchasing the tied product."). Such coercive tie-ins forced or imposed on a customer by a bank will violate section 106, unless an exemption is available for such tie-ins. Section 106 does not apply where a customer voluntarily seeks and obtains from a bank or its affiliates multiple products that the customer desires. Further, section 106 does not apply where a customer uses its business leverage to seek to obtain from a bank or its affiliates a package of products that the customer desires, in which case the bank or its affiliate is free to negotiate with and propose to the customer a counteroffer with regard to one or more products.

Under section 106, a bank may present a tying arrangement to a customer so long as the bank reasonably believes that the customer is not being coerced or forced to accept the arrangement. Coercion does not occur simply because a bank offers an economic incentive for a customer to agree to its proposal; for coercion to occur, the customer must be unable to freely choose among the choices that are made available to it. Proof that no coercion or force is involved may be shown by the competitive landscape as well as by the nature of the customer relationship. For example, a bank may present a tying arrangement to a customer that has a sophisticated Chief Financial Officer and other well-trained staff (*e.g.*, a customer that has a sizable treasury operation) who are fully capable of negotiating favorable terms for a desired product on a stand-alone basis or tied to other products or services, just as such customers currently do when they negotiate with financial institutions that are not subject to section 106. Further, if a bank can show that a customer has one or more *bona fide* alternative sources of the desired product or that one or more other financial institutions are bidding on a *bona fide* basis to provide the desired product to such customer on similar terms, then no coercion or force would be involved unless there is some demonstrable reason why the customer is being prevented from choosing among the alternative sources or bids.

While this coercion analysis may be applied on a case-by-case basis, the Board believes that a class of "large customers" can be described that, subject to certain conditions, are not susceptible to the coercion that section 106 seeks to prevent, and accordingly the Board has adopted a safe-harbor exemption for these "large customers." Such an exemption provides greater certainty as to the general permissibility of tying arrangements with such customers. Even though a practice may not be prohibited under section 106, the Board has recognized that granting an exemption for the practice provides certainty as to the permissibility of the practice. *See, e.g.*, *Huntington Bancshares*, 82 Fed. Res. Bull. 688, 690 (1996). However, a transaction with a customer that falls outside the safe harbor will violate section 106 only if the customer is in fact coerced or forced; a transaction that falls outside the safe harbor should not be presumed to involve coercion or force. Rather, the safe-harbor exemption is being adopted because large customers as defined in the exemption presumptively cannot be coerced or forced.