UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
THREE WORLD FINANCIAL CENTER
SUITE 400
NEW YORK, NEW YORK 10281-1022

February 16, 2010

By Hand Delivery

The Honorable Jed S. Rakoff
United States District Judge
Southern District of New York
United States Courthouse
500 Pearl Street, Room 1340
New York, NY 10007

Re: SEC v. Bank of America Corp., Nos. 09-cv-6829, 10-cv-0215 (JSR)

Dear Judge Rakoff:

On behalf of Plaintiff Securities and Exchange Commission ("Commission"), we write to respond to the questions and instructions contained in the Court's order dated February 11, 2010 ("Feb. 11 Order") and in further support of the Commission's Motion for Entry of the Proposed Consent Judgment.

I. Evidentiary Materials

a. Termination of Timothy Mayopoulos as General Counsel

In the Feb. 11 Order, the Court directed the parties to submit the evidentiary record relating to the termination in December 2008 of Bank of America's then-general counsel, Timothy Mayopoulos. The relevant evidence is compiled in Section I of the attached Supplemental Appendix and includes testimony of Mr. Mayopoulos, Kenneth Lewis (then-Chairman and Chief Executive Officer of Bank of America), Charles Gifford (member of Bank of America's Board of Directors), Thomas May (member of Bank of America's Board of Directors), Brian Moynihan (then-Head of Global Corporate and Investment Banking, later General Counsel, and currently Chairman and Chief Executive Officer of Bank of America), Joe Price (then-Chief Financial Officer of Bank of America), Gregory Curl (then-Vice Chairman of Corporate Development of Bank of America) as well as contemporaneous documents and communications. To assist the Court, the Commission had prepared and attached a Supplemental Statement of Facts that summarizes both the legal advice that Mr. Mayopoulos provided to Bank of America's management and the circumstances of his termination.

b. Participation of Wachtell Lipton Attorneys in Evaluating the Disclosure of Merrill's Losses After November 18, 2008

The Court directed the parties to submit evidence revealing the extent of participation of the law firm of Wachtell, Lipton, Rosen & Katz ("Wachtell Lipton") in evaluating the disclosure of Merrill's losses after November 18, 2008. The relevant evidence is compiled in Section II of the Supplemental Appendix, which includes testimony of Edward Herlihy (partner, Wachtell Lipton), Nicholas Demmo (partner, Wachtell Lipton), Teresa Brenner (Associate General Counsel of Bank of America), Timothy Mayopoulos, Kenneth Lewis, Joe Price, and Gregory Curl as well as emails, notes and other documents reflecting meetings between Bank of America's executives and in-house counsel and attorneys from Wachtell Lipton in November 2008 and a discussion about contacting Wachtell Lipton in early December 2008. This evidence is also summarized in the Supplemental Statement of Facts (see ¶¶ 3-8).

c. Recommendations of Disclosure of Merrill's Post-September Losses

The Court directed the parties to submit any information indicating that persons recommended disclosure of Merrill's post-September losses. The relevant evidence is compiled in Section III of the Supplemental Appendix, which includes testimony of Neil Cotty (then-Chief Accounting Officer and currently Acting Chief Financial Officer of Bank of America), John Thain (then-Chairman and Chief Executive Officer of Merrill), Timothy Mayopoulos, Joe Price, and Gregory Curl, as well as contemporaneous documents reflecting discussions about the possible disclosure of Merrill's losses. Information relating to this subject is summarized in the Statement of Facts attached to the Proposed Consent Judgment (see ¶¶ 17-23) and in the Supplemental Statement of Facts (see ¶¶ 3-8). The Statement of Facts includes two communications that were not the subject of deposition testimony but were described in detailed evidentiary proffers that Bank of America was required to provide to the SEC staff as a condition of settlement: (1) a conversation in which Jeffrey Brown, Bank of America's Treasurer, suggested to Joe Price that Bank of America should consider disclosing Merrill's fourth-quarter losses; and (2) a conversation in which an accountant at Deloitte & Touche, Merrill's outside accountants, suggested to David Moser, Merrill's head of accounting policy, that Merrill should consider disclosing the fourth-quarter losses. See Statement of Facts ¶¶ 17, 18 n. 5.[1]

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[1] Based on Bank of America's proffer, we understand that Price responded to Brown's suggestion by noting that Bank of America's attorneys were evaluating whether to make pre-vote disclosure of Merrill's fourth-quarter losses. See Statement of Facts ¶ 18 n. 5. Price provided essentially the same response when two other Bank of America executives – Neil Cotty and Gregory Curl, both of whom were deposed in discovery – raised the possibility of disclosure of Merrill's fourth-quarter losses. See id.; Suppl. Statement of Facts ¶ 4 n. 1. Following Deloitte & Touche's suggestion that Merrill consider disclosure of these losses, Moser raised the possibility of disclosure with Merrill's in-house counsel, who concluded that no disclosure should be made. See Statement of Facts ¶ 17; Transcript of deposition of Rosemary Berkery (Dec. 9, 2009) at 142-150.

d. Recommendations of Disclosure of the Agreement Concerning the Award of Merrill Bonuses

The Court directed the parties to submit any information indicating that persons recommended a pre-merger disclosure of "any agreements or decisions that had been reached by Bank of America to agree to Merrill's payment of billions of dollars of year-end bonuses." Feb. 11 Order at 2. There is no evidence that anyone associated with Bank of America or Merrill – including the companies' inside and outside counsel – recommended disclosure of the agreement between Bank of America and Merrill, as reflected in the Disclosure Schedule, under which Merrill could pay up to $5.8 billion in VICP awards for 2008. According to the evidence, the attorneys from Wachtell Lipton, Bank of America's outside counsel, who prepared the transactional and disclosure documents did not believe the agreement had to be disclosed because the VICP awards that Merrill was authorized to pay under the Disclosure Schedule were not special transactional bonuses and were regular year-end bonuses consistent with the prior year. The Wachtell Lipton attorneys did not actually discuss this question, however, with the Bank's executives and in-house counsel as no one expressly raised the question during the preparation of the Bank's proxy disclosures. See Statement of Facts ¶ 40. Attorneys at Shearman & Sterling LLP, the law firm representing Merrill in the merger, testified that they had considered disclosing the agreement on the bonuses but determined that no disclosure should be made. See Transcript of deposition of Jeffrey Crandall (Nov. 30, 2009) at 159-193. These attorneys never communicated to anyone outside of Shearman & Sterling that they had considered the disclosure issue concerning the bonus agreement. The relevant testimony of Shearman attorneys Jeffrey Crandall, John Marzulli, and Patricia Kuhn, as well as the testimony of Wachtell Lipton attorneys Nicholas Demmo and Jeannemarie O'Brien, is compiled in Section IV of the attached Supplemental Appendix.

II. Terms of Consent Judgment

The Commission has no objection to the Court's proposed modifications to the remedial provisions of the settlement. The Commission, however, does not seek to modify the remedial terms of the proposed consent judgment as it does not believe that the proposed modifications are necessary to achieve the remedial objectives of the settlement. In particular, the existing remedial provisions are tailored to the underlying violations alleged in the pending actions, which relate to the Bank's failure to disclose required financial and compensation-related information to its shareholders. As such, the proposed remedial provisions aim to enhance Bank of America's disclosure process and controls, to increase the input from shareholders concerning compensation and related matters, and to ensure that the Audit and Compensation Committees of the Bank's Board of Directors have access to advice and information that is wholly independent of management. The Commission does not seek a role in selecting either the Special Disclosure Counsel to the Audit Committee or the Compensation Consultant to the Compensation Committee so long as both of these committees and the professionals whom they select meet the strict independence requirements of the Proposed Consent Judgment.

The Commission does not object to the Court's proposal that the Consent Judgment expressly recite the parties' intent that the proposed Fair Fund distribution shall be distributed solely to Bank of America shareholders who were harmed by the Bank's nondisclosures and not to "legacy" Merrill shareholders or Bank of America officers or directors who had access to the undisclosed information.

III. Penalty Distribution

The proposed Fair Fund distribution will provide a meaningful distribution to harmed Bank of America shareholders and not a mere roundtrip to and from current shareholders. As of the closing date of the merger, January 1, 2009, Merrill shareholders received approximately 22 percent of the total Bank of America common shares outstanding and "legacy" Bank of America shareholders held approximately 78 percent of the outstanding shares of the merger entity. An analysis performed by the Commission's Division of Risk, Strategy, and Financial Innovation ("Risk Fin") suggests, however, that many shares held by legacy Bank of America shareholders – i.e., those who would be eligible for distribution under the proposed Fair Fund – have been sold since the closing of the merger. As a result, it is estimated that shares held by pre-merger Bank of America shareholders currently represent a significantly smaller percentage of the total outstanding shares than they did in January 2009. The statistics available for analysis by Risk Fin consist of the publicly-reported holdings of institutional shareholders, including mutual funds, 401K plans, and other institutional vehicles for investment by retail investors.[2] Risk Fin estimates that the percentage of shares acquired prior to the merger and still held by pre-merger Bank of America institutional shareholders has dropped to approximately 50 percent of the total common shares held by institutional shareholders.[3] Risk Fin further estimates that the average payment to an institutional shareholder will be approximately $63,240 after administration costs.[4] Based on the pattern of turnover of institutional shareholders, therefore, the estimated

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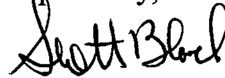
[2] Risk Fin's analysis is limited to institutional holdings because it does not have access from public sources to the data necessary to perform a similar analysis for non-institutional investors. Risk Fin estimates that institutional shareholders currently make up a total of approximately 60 percent of the total outstanding shares of Bank of America.

[3] Risk Fin obtained the quarterly institutional holdings data from Thomson Reuters Institutional (13F) Holdings. The most recent data available reflects institutional holdings as of September 30, 2009. Risk Fin estimates that approximately 38 percent of shares currently held by institutional shareholders would be ineligible because they were purchased after January 16, 2009 (the date that Merrill's fourth-quarter losses were publicly disclosed) and an additional 12 percent of such shares would be ineligible because they are held by "legacy" Merrill shareholders who received them in conversion for Merrill shares as a result of the merger. Risk Fin estimated institutional holdings on January 16, 2009, based on interpolating between the Bank of America holdings dated December 31, 2008 and March 31, 2009, based on daily trading volume. Risk Fin estimated the institutional holdings of Merrill shares based on the conversion ratio and prior Merrill holdings.

[4] Risk Fin estimates a fair fund administration cost of approximately $3.5 million based upon its analysis and information provided in interviews it conducted with two experienced fund administrators.

percentage of shares acquired prior to the merger and still held by pre-merger Bank of America shareholders has dropped from approximately 78 percent to approximately 50 percent of the total outstanding common shares. This estimate is further supported by additional information provided to the Commission by Bank of America indicating that there were approximately 5 billion Bank of America shares outstanding at the time of the proxy vote and approximately 8.66 billion shares outstanding as of February 2010. For that reason, even without accounting for any investor turnover, at most 58 percent of current Bank of America shares – retail and institutional – would be entitled to a fair fund distribution.

Respectfully,



Scott L. Black

Encl.

Cc: Lewis Liman (via e-mail without encl.)