UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	**09 Civ. 6829 (JSR)**
	:	**10 Civ. 0215 (JSR)**
-against-	:	**ECF Cases**
BANK OF AMERICA CORPORATION,	:	
Defendant.	:	

MEMORANDUM OF PLAINTIFF
SECURITIES AND EXCHANGE COMMISSION
IN SUPPORT OF ENTRY OF PROPOSED CONSENT JUDGMENT

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INTRODUCTION

The Securities and Exchange Commission ("Commission") respectfully submits this memorandum in support of the entry of a proposed consent order imposing final judgments in the actions SEC v. Bank of America Corp., 09-cv-6829 (JSR) ("Bonuses Action") and SEC v. Bank of America Corp., 10-cv-0215 (JSR) ("Q4 Losses Action") (collectively, "Actions"). The proposed consent judgment orders defendant Bank of America Corporation ("Bank of America") to pay a civil penalty of $150 million to be distributed solely to harmed Bank of America shareholders pursuant to the fair fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002.[1] In addition, the order requires Bank of America, for three years from entry of judgment, to comply with agreed-upon remedial undertakings designed to improve the Bank's disclosure and corporate governance processes and to provide its shareholders with a voice on compensation-related matters. Finally, under the order, Bank of America acknowledges as the evidentiary basis for the settlement a detailed Statement of Facts that is attached to the order and made part of the public record, and which contains citations to deposition testimony, exhibits and other evidence developed in the course of discovery in the Bonuses Action.[2]

As detailed below, the relief contemplated by the proposed order is fair, reasonable, adequate and in the public interest. Accordingly, the Commission respectfully submits that the Court should enter the proposed order.

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[1] A copy of the proposed consent order is attached as Exhibit A to the Commission's Notice of Motion.

[2] For the Court's convenience, the Commission is submitting an appendix containing the relevant portions of the discovery record that are cited in the Statement of Facts. Upon the Court's request, the Commission will make the entire discovery record, which consists of nearly 5000 pages of testimony, 288 deposition exhibits, interrogatory responses, and responses to requests for admission, available to the Court.

BACKGROUND

A. The Actions

The Actions charge Bank of America with failing to adequately disclose material information to its shareholders before the December 5, 2008 shareholder meeting to approve the merger with Merrill Lynch & Co., Inc. ("Merrill"). The Bonuses Action, filed on August 3, 2009, charges Bank of America with violating Section 14(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 14a-3 and 14a-9 thereunder based on the Bank's failure to disclose, in proxy materials soliciting shareholder votes for approval of the merger, its authorization to Merrill to pay year-end bonuses of up to $5.8 billion to its employees prior to the closing of the merger. The Q4 Losses Action, filed on January 12, 2010, charges Bank of America with violating Section 14(a) and Rule 14a-9 based on the Bank's failure to disclose, prior to the December 5 shareholder meeting to approve the merger, extraordinary losses that Merrill sustained in October and November 2008.

B. Discovery and the Evidentiary Record

Between late September 2009 and early January 2010, the Commission took extensive discovery in the Bonuses Action which included discovery concerning the claims subsequently asserted in the Q4 Losses Action. Among other things, the Commission's counsel deposed twenty-five senior executives and in-house lawyers of Bank of America and Merrill, as well as attorneys from Wachtell, Lipton, Rosen & Katz and Shearman & Sterling LLP, the law firms that represented Bank of America and Merrill, respectively, in the merger. In addition, the Commission's counsel has reviewed extensive document productions from Bank of America and third parties, served and responded to multiple discovery requests (including more than 400 requests for admissions) and exchanged several expert reports. Following Bank of America's waiver of the attorney-client privilege and work product doctrine in October 2008, the

Commission's counsel obtained documents from, and deposed, the lawyers who played a central role in drafting the merger agreement and proxy materials and in making relevant disclosure decisions. As a result, the Commission has developed a detailed evidentiary record of the role of all key participants and decision-makers in Bank of America's nondisclosure of Merrill's authority to pay year-end bonuses and Merrill's fourth quarter losses.

C. The Proposed Order

The proposed order, if entered, will fully resolve both Actions.[3] Under the order, Bank of America is required to pay $1 in disgorgement and a $150 million penalty pursuant to Section 21(d)(3) of the Exchange Act, and the funds will be distributed to harmed Bank of America shareholders. The Bank is also required, under the order, to implement a series of remedial undertakings designed to reform its disclosure and corporate governance processes for the benefit of shareholders. In addition, as part of the proposed order, Bank of America acknowledges the evidentiary basis of the statements set forth in a Statement of Facts that is attached to the order and is based on the discovery record.

1. The $150 Million Penalty

The proposed order directs Bank of America to pay the $150 million penalty into an interest-bearing account with the Court Registry Investment System (CRIS), and provides that the funds will be distributed pursuant to a fair fund. Although the details of the proposed distribution plan will be determined at a future date, the settlement contemplates that the funds will be distributed solely to shareholders of Bank of America who were harmed by the Bank's

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[3] Bank of America has represented to the Commission's counsel that the settlement proposal has been approved without dissent by the members of the Bank's Board of Directors, all of whom except for one are independent and disinterested.

nondisclosures, and will exclude Merrill shareholders who arguably benefited from the failure to make negative disclosures about Merrill that could have thwarted the approval of the merger and resulted in renegotiation of the price in favor of Bank of America shareholders. The distribution will also exclude officers and directors of Bank of America who knew, or had access to, the undisclosed information concerning Merrill.[4]

2. The Undertakings

The order also provides that Bank of America will implement and maintain, for a period of three years from the entry of judgment, seven remedial undertakings that are designed to reform the Bank's disclosure and corporate governance processes and provide its shareholders with a voice on compensation-related matters. Each of the undertakings is described below.

a. Audit of Internal Disclosure Controls

Under Section 404 of the Sarbanes-Oxley Act, 15 U.S.C. § 7262, Bank of America must establish internal controls and procedures for financial reporting and have its outside auditor attest to, and report, on management's assessment of their effectiveness. Although Bank of America is also required to establish controls and procedures for disclosure-related matters and evaluate their effectiveness each quarter, see 17 C.F.R. § 240.13a-15, such disclosure controls and procedures are not required to be audited by an external auditor. This undertaking requires

[4] To facilitate the efficient distribution of the penalty funds to shareholders, the parties request that the distribution be deferred pending the entry of judgment or settlement in pending civil litigations against Bank of America relating to the same allegations as those asserted in the Actions. See, e.g., In re Bank of America Corp. Securities, Derivative, and Employment Retirement Income Security Act (ERISA) Litigation, 09-md-2058 (DC) (S.D.N.Y.). On the Commission's motion, and subject to Court approval, if there were a monetary judgment or settlement in those actions, the funds Bank of America pays pursuant to the proposed order could be distributed in accordance with the distribution mechanism adopted in those actions. The proposed settlement specifically provides, however, that none of the penalty funds may be distributed as payments for attorneys' fees or expenses incurred by any parties seeking distribution.

Bank of America to retain an independent auditor to perform an annual assessment and attestation of the Bank's internal disclosure controls, similar to a Section 404 audit, and to include the attestation report in its annual report to shareholders and filings on Form 10-K.

b. Certifications of Annual and Merger Proxy Statements

Pursuant to the Sarbanes-Oxley Act, Bank of America's Chief Executive Officer and Chief Financial Officer are required to certify the accuracy of the Bank's quarterly and annual reports under the Exchange Act. See 17 C.F.R. §§ 240.13a-14(a), 240.15d-14(a). No certification is required, however, with respect to proxy statements. This undertaking requires Bank of America's CEO and CFO to provide certifications of all annual and merger proxy statements similar in form to the certifications required for quarterly and annual reports under the Sarbanes-Oxley Act.

c. Special Counsel to Audit Committee

This undertaking requires the Audit Committee of the Bank's Board of Directors to retain special counsel with expertise in disclosure issues who will report to the Committee and review the Bank's public disclosures. The disclosure counsel is required to confer with members of the Bank's Audit Committee in executive session at all regularly scheduled meetings, separate and apart from the non-independent Board members, to discuss the adequacy of Bank of America's public disclosures.

d. "Super-Independence" of Compensation Committee

The members of Bank of America's Audit Committee are prohibited, under the Sarbanes-Oxley Act, from accepting consulting, advisory or other compensatory fees from the Bank or its affiliates other than routine compensation for serving as a Board member. See 15 U.S.C. §78j-1(m)(3)(B). This standard of independence, commonly referred to as "super-independence," is not required for compensation committee members. This undertaking requires Bank of America

to adopt a super-independence requirement for members of the Compensation Committee of its Board.

e. "Super-Independent" Compensation Consultant

Pursuant to this undertaking, Bank of America will maintain a consultant to advise the members of its Compensation Committee, who will also be subject to "super-independence" standards.

f. "Say on Pay"

As a former recipient of funds under the Troubled Asset Relief Program (TARP), Bank of America until recently was required to hold a non-binding shareholder vote to approve executive compensation. See 17 C.F.R. § 240.14a-20. Because the Bank has recently repaid the government the TARP funds it had received, it is no longer subject to this requirement. This undertaking requires the Bank to continue holding a non-binding shareholder vote on executive compensation for three years from the entry of judgment.

g. Disclosure of Compensation Principles and Advisory Shareholder Vote on Any Changes

Pursuant to this undertaking, Bank of America will implement and maintain incentive compensation principles and procedures and post a description of them in a prominent place on its website at www.bankofamerica.com. Unless a change in the principles is required by law, Bank of America can change them only after first informing its shareholders and placing any proposed change to the shareholders for an advisory vote.

3. The Statement of Facts

As part of the proposed settlement, Bank of America acknowledges the evidentiary basis for the statements in a detailed Statement of Facts, based upon the discovery record developed in the Bonuses Action, that is attached to the order and made part of the public record.

ARGUMENT

The Commission respectfully submits that the proposed consent order is fair, reasonable and adequate and should accordingly be entered.[5] The settlement was negotiated based upon a detailed discovery record, including a record of the actions and communications of Bank of America's counsel secured as a result of the Bank's waiver of the attorney-client privilege. The settlement has been carefully considered and approved by both the Commission and disinterested members of Bank of America's Board of Directors. The proposed order contemplates a substantial penalty that will be distributed to aggrieved shareholders, and a series of remedial undertakings that improve upon the Bank's existing disclosure and corporate governance processes. In addition, the proposed order encloses a detailed Statement of Facts, which details the relevant evidence concerning Bank of America's alleged proxy violations. This relief will benefit Bank of America's shareholders, present relevant evidence to the public, and address the concerns raised by the Court in its September 14, 2009 order ("Sept. 14 Order"), which rejected the initial proposed settlement in the Bonuses Action.

I.

The Proposed $150 Million Civil Penalty Will Be Distributed Solely to Harmed Shareholders

The $150 million penalty contemplated by the current settlement proposal reflects the widespread impact of Bank of America's nondisclosures concerning the merger with Merrill and will provide substantial relief to harmed shareholders. The disclosure lapses alleged in the Actions deprived Bank of America shareholders from casting a fully informed vote. Given

[5] The standard governing approval of Commission settlements is set forth in detail on pages 28 to 32 of the Commission's Memorandum of Law, dated August 24, 2009, that was filed in the Bonuses Action. See SEC v. Bank of America Corp., 09-cv-6829 (JSR) (Docket Entry #12).

access to the withheld information — including the extraordinary losses that Merrill experienced in October and November of 2008 — the shareholders could have voted against the merger and effectively demanded a lower price for the acquisition of Merrill. The distribution of the proposed penalty to harmed Bank of America shareholders is designed to compensate these shareholders and to deter future corporate proxy disclosure violations. By targeting harmed shareholders, the proposed distribution of the penalty funds addresses the Court's concern, raised in the Sept. 14 Order, that a civil penalty would further penalize the victims of disclosure violations.

II.

The Remedial Undertakings Contained In The Proposed Order Will Enhance And Improve Bank of America's Disclosure and Governance Processes

The Commission believes that the undertakings contemplated by the proposed settlement provide an effective means of corporate reform that would help to avoid future violations by Bank of America. The agreed-upon undertakings have been crafted to collectively enhance the Bank's disclosure processes, provide its shareholders with a voice on compensation-related matters, and strengthen the ability of the Bank's Compensation Committee to access independent information and advice and bring an independent perspective to bear on compensation matters. Such reforms should inure to the long-term benefit of Bank of America's shareholders.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court enter the proposed order entering final judgments on consent.

Dated: February 4, 2010
New York, New York

Respectfully submitted,

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