

This memorandum is submitted by Bank of America Corporation (“Bank of America” or the “Bank”) in support of entry of the proposed Consent Judgment, dated February 1, 2010, agreed to by both the Securities and Exchange Commission (the “SEC”) and Bank of America (the “Settlement” or “Consent Judgment”). The Bank respectfully submits that the Settlement should be accepted, for the reasons set forth below.

On September 14, 2009, this Court entered an order declining to approve the original consent judgment submitted by the SEC and Bank of America (the “Original Settlement” or “Original Judgment”) to resolve the claims related to the alleged failure to disclose the cap on Merrill Lynch & Co., Inc.’s (“Merrill Lynch”) ability to pay bonuses (the “Bonus Action”). In declining to approve the Original Settlement of the Bonus Action, the Court expressed its concerns that: (1) Bank of America shareholders would be responsible for the payment of the proposed fine to the SEC; (2) members of management purportedly responsible for the conduct at issue in the case made the decision to settle the case with shareholder funds; (3) the SEC had not fully investigated possible violations by potentially culpable individual executives and lawyers; (4) the Bank’s invocation of attorney-client privilege limited the SEC’s ability to probe the Bank’s reliance on counsel defense and the conduct of the Bank’s executives and outside counsel; and (5) the terms of the prospective relief in the Original Judgment were vague and would be difficult for the Court to administer. See Sept. 14, 2009 Order; Aug. 10, 2009 Tr. at 7, 13-14, 24-26.

The Bank respectfully submits that the parties’ conduct of the litigation and the proposed Settlement squarely addresses the Court’s prior concerns. Specifically:

(1) On October 13, 2009, the parties submitted to the Court a Disclosure Stipulation Agreement and Proposed Protective Order, reflecting Bank of America’s intention to

make a limited waiver, under Federal Rule of Evidence 502, of the attorney-client privilege and/or attorney-work product protection with respect to five specified subject matters during a defined time period covering the relevant dates. In response to the Court’s stated concern, this waiver allowed the SEC to investigate fully the decision-making concerning the subject matter of the SEC’s investigations. The Court signed the Order, finding that it was in the public interest for documents relating to those specified subject matters to be made available to the SEC. See Order dated October 14, 2009 (the “502 Order”).

(2) Following entry of the 502 Order and pursuant to that Order, Bank of America produced to the SEC a large number of otherwise privileged documents relating to: (i) the disclosures in, or omitted from, the Proxy Statement with respect to Merrill Lynch’s payment of 2008 bonuses; (ii) the disclosure, or non-disclosure, of losses incurred or forecasted for Merrill Lynch’s financial results for the fourth quarter of 2008; (iii) the Bank’s consideration of whether to invoke the material adverse change clause in the Agreement and Plan of Merger by and between Merrill Lynch and Bank of America (the “Merger Agreement”); (iv) any potential impairment of goodwill of Merrill Lynch during the fourth quarter of 2008; and (v) the Bank’s communications with the Federal Reserve Board, the U.S. Department of the Treasury, or other Federal officials regarding any federal assistance in connection with the merger and the Bank’s consideration of disclosure of such assistance or possible assistance. See id.

(3) The parties have completed extensive discovery. In particular, the SEC has taken the depositions of 25 witnesses, including the former Chief Executive Officers of Bank of America and Merrill Lynch (Kenneth Lewis and John Thain), the Chairman of the Merrill Lynch Management Development and Compensation Committee, the principal lawyers – both internal and external – for both companies who reviewed and/or drafted the Merger Agreement and the

Proxy Statement, Bank of America's then-Chief Financial Officer, finance personnel from both companies (including the chief accounting officers of each company), members of Bank of America's Board of Directors, and relevant employees involved in the payment of discretionary incentive compensation at Merrill Lynch for 2008.

(4) The Bank has produced almost two million pages of documents to the SEC, including over 95,000 pages of documents in civil discovery and over 690,000 pages of documents produced pursuant to the 502 Order. The bulk of those documents came from the files of several dozen Bank of America and Merrill Lynch executives, employees, in-house counsel, and the companies' outside counsel.

(5) The parties served and responded to extensive interrogatory requests and requests for admission of facts, and have served expert reports.

(6) The SEC moved to amend the complaint in the Bonus Action and, when that motion was denied, filed a separate lawsuit, based on the "substantial discovery" taken by the SEC in the Bonus Action (SEC Letter Mot. to Amend the Compl. (dated Dec. 31, 2009)) alleging non-scienter-based claims that Bank of America violated Section 14(a) of the Exchange Act and Rule 14a-9 by failing to update the Proxy Statement to disclose Merrill Lynch's fourth-quarter losses prior to the December 5, 2008 shareholder vote. Compl. (dated Jan. 12, 2010) (the "Q4 Losses Action" and together with the Bonus Action, the "Actions").

(7) As the SEC acknowledged, "[Bank of America] executives are not alleged to have deliberately concealed information from counsel or otherwise acted with scienter or intent to mislead. Nor is any counsel alleged to have acted with scienter or intent to mislead. For these reasons, the SEC's . . . complaint[s] [did] not seek charges against any individual officers, directors or attorneys. SEC staff has advised the Commission that, after a careful assessment of

the evidence and all of the relevant circumstances, it has determined that charges against individuals for their roles in connection with proxy disclosure are not appropriate.” See SEC Lit. Release No. 21371, dated Jan. 11, 2010.

(8) The Settlement negotiated by the parties provides substantial benefits to Bank of America’s shareholders, including remedial relief concerning disclosure and compensation, as well as a Fair Fund payment that will benefit legacy Bank of America shareholders.

(9) Bank of America has repaid the Troubled Asset Relief Program (“TARP”) funds it received, with interest (thus removing that aspect of the Court’s concerns expressed in its September 14 Order); no TARP funds will be used to make the Fair Fund payment discussed below.

(10) There have also been changes to Bank of America’s executive management team, including the retirement of its Chief Executive Officer and the selection of a new CEO.

(11) Bank of America’s Board of Directors (including all independent directors) has approved the settlement.

While Bank of America acknowledges that there is an evidentiary basis in the record for the Statement of Facts prepared by the SEC staff and appended to the Proposed Consent Judgment, the Statement of Facts does not represent the complete record, nor does it represent an admission of liability. Other evidence developed during discovery in the Actions supports other facts not included in the Statement of Facts or in the operative complaints in the Bonus Action and/or Q4 Losses Action, and is consistent with the defenses asserted by Bank of America. In view of the risks of continued litigation, and other considerations, Bank of America seeks resolution of the Actions and will not seek adjudication of any claims or defenses.

Bank of America's Board of Directors has approved resolution of this litigation on the terms set forth in the Consent Judgment. Entering this Settlement will allow the Bank to resolve all issues raised by the complaints filed by the SEC, to implement promptly the governance changes provided for in the Settlement, and to continue to address the challenges of the current economic environment.

The Consent Judgment will substantially benefit Bank of America's shareholders. First, the Bank will pay a \$150 million penalty into a Fair Fund, as enacted by Congress in the Sarbanes-Oxley Act. In contrast to the proposed penalty in the Original Consent Judgment, these funds will be distributed to certain Bank of America shareholders. Second, under the terms of the Consent Judgment, the Bank will implement extensive governance and remedial measures including, inter alia: (1) the engagement of an independent auditor to perform an assessment and provide an attestation report of the effectiveness of the Bank's disclosure controls and procedures; (2) the retention of disclosure counsel by the Audit Committee of the Board of Directors, to review the Bank's disclosure statements and advise the Committee in executive session; (3) the adoption of independence requirements, beyond those already applicable, for all members of the Compensation Committee of the Bank's Board of Directors (the "Compensation Committee"); (4) the continued retention of a compensation consultant, who will be engaged by, and report solely to, the Compensation Committee; (5) the inclusion in each proxy statement filed, pursuant to Section 14(a) of the Exchange Act, of certifications by the Chief Executive Officer and Chief Financial Officer that, inter alia, they have reviewed the proxy statement and the statement does not contain any untrue statement, or omit a statement, of material fact, and that financial statements or other financial information contained therein fairly present all material aspects of the financial condition of the Bank; (6) the implementation and disclosure of

incentive compensation principles on Bank of America's website; and (7) the provision of a separate advisory "say on pay" shareholder vote regarding the compensation of executives. The Bank will comply and maintain each of these measures for three years following entry of the Consent Judgment.

For the reasons set forth above, Bank of America respectfully requests that the Court approve the proposed Settlement.

Respectfully submitted,

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