



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

February 11, 2009

DIVISION OF
CORPORATION FINANCE

Kevin P. McEnery
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006

Re: In the Matter of Merrill Lynch Pension Consulting (File No. HO-10195)
**Regarding Merrill Lynch & Co., Inc. and Bank of America Corporation-
Waiver Requests of Ineligible Issuer Status under Rule 405 of the Securities
Act**

Dear Mr. McEnery:

This is in response to your letter dated February 3, 2009, written on behalf of Merrill Lynch & Co., Inc. ("Company") and its parent Bank of America Corporation ("BAC") constituting an application for relief from the Company and BAC being considered "ineligible issuers" under Rule 405(1)(vi) of the Securities Act of 1933 ("Securities Act"). The Company and BAC both request relief from each being considered an "ineligible issuer" under Rule 405, due to the entry on January 30, 2009, of a Commission Order ("Order") pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), naming Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPFS") as the respondent. The Order finds, among other things, that MLPFS violated Section 206(2) of the Advisers Act.

Based on the facts and representations in your letter, and assuming the Company, BAC and MLPFS comply with the Order, the Commission, pursuant to delegated authority has determined that the Company and BAC have made a showing of good cause under Rule 405(2) and that the Company and BAC will not be considered ineligible issuers by reason of the entry of the Order. Accordingly, the relief described above from the Company and BAC being ineligible issuers under Rule 405 of the Securities Act is hereby granted and the effectiveness of such relief is as of the date of the entry of the Order. Any different facts from those represented or non-compliance with the Order might require us to reach a different conclusion.

Sincerely,

A handwritten signature in cursive script that reads "Mary Kosterlitz".

Mary Kosterlitz
Chief, Office of Enforcement Liaison
Division of Corporation Finance

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February 3, 2009

BY E-MAIL AND U.S. MAIL

Mary J. Kosterlitz, Esq.
Chief, Office of Enforcement Liaison
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: In the Matter of Merrill Lynch Pension Consulting, File No. HO-10195

Dear Ms. Kosterlitz:

We submit this application on behalf of our client Merrill Lynch & Co., Inc. ("Merrill") in connection with a contemplated settlement arising out of the above-entitled investigation by the Securities and Exchange Commission (the "Commission"). The contemplated settlement will result in the issuance by the Commission of an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order as to Merrill Lynch, Pierce, Fenner & Smith Inc. (the "Proposed Order"), in which Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch"), a direct wholly-owned subsidiary of Merrill, is the only respondent.

Merrill hereby requests, pursuant to Rule 405 promulgated under the Securities Act of 1933 (the "Securities Act"), 17 C.F.R. § 230.405, that the Commission determine that, for good cause shown, it is not necessary under the circumstances that Merrill and its parent Bank of America Corporation ("Bank of America") be considered an "ineligible issuer" under Rule 405. Merrill requests that this determination be effective upon the issuance of the Proposed Order. It is our understanding that the Staff of the Commission's Division of Enforcement does not object to the Division of Corporation Finance providing the requested determination under Rule 405.

BACKGROUND

The Staff of the Commission's Division of Enforcement and Merrill Lynch have reached agreement on the terms of a settlement. Merrill Lynch has submitted an executed Offer of Settlement (the "Offer") in which it neither admits nor denies the findings of the Commission's Proposed Order but in which it consents to the entry of the Proposed Order. The Commission's

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Proposed Order will address Merrill Lynch's conduct in connection with its pension consulting services advisory program.

In summary, the Commission will find that Merrill Lynch breached its fiduciary duty to certain of its pension fund clients and prospective clients by misrepresenting and omitting to disclose material information. More specifically, the Proposed Order will find that: (1) Merrill Lynch failed to disclose the facts creating the material conflict of interest in recommending clients use directed brokerage to pay hard dollar fees and in recommending the use of Merrill Lynch's transition management service; and (2) it made misleading statements to the clients of one of its offices in Florida regarding its manager identification process. In addition, the Proposed Order will find that Merrill: (1) as a result of such conduct, violated Section 206(2) of the Investment Advisers Act of 1940 ("Advisers Act"); (2) failed reasonably to supervise its investment adviser representatives in the Florida office with respect to the provision of advisory services to its consulting services clients; and (3) violated Advisers Act Section 204 and Rule 204-2(a)(14) thereunder by failing to maintain records of the offer or delivery of disclosure statements. The Proposed Order also will: (a) censure Merrill Lynch; (b) require Merrill Lynch to cease-and-desist from committing or causing any violations and any future violations of Advisers Act Sections 204 and 206(2), and Rule 204-2(a)(14) thereunder; and (c) require Merrill Lynch to pay a civil penalty of \$1 million within 90 days of the issuance of the Proposed Order.

Merrill has been a publicly traded company listed on the New York Stock Exchange and has been a reporting company under the Exchange Act. Merrill has identified itself in filings with the Commission as a well-known seasoned issuer. On January 1, 2009, a wholly-owned subsidiary of Bank of America merged with and into Merrill, with Merrill continuing as the surviving corporation and a subsidiary of Bank of America. Bank of America is a publicly traded company listed on the New York Stock Exchange and is a reporting company under the Exchange Act. Bank of America has identified itself in filings with the Commission as a well-known issuer. Merrill Lynch is registered as an investment adviser under the Investment Advisers Act of 1940 and as a broker-dealer under the Exchange Act. Merrill and Bank of America are at this time the only issuers that are parents of Merrill Lynch.

DISCUSSION

In 2005, the Commission revised the registration, communications, and offering processes under the Securities Act.¹ As part of its reform, the Commission added a new category of issuer, *i.e.*, a well-known seasoned issuer, that will be permitted to benefit to the greatest degree from the changes to the rules governing the offering process. The Commission defined a well-known

¹ Securities Offering Reform, Securities Act Release No. 8591, Exchange Act Release No. 52,056, Investment Company Act Release No. 26,993, 70 Fed. Reg. 44,722, 44,790 (Aug. 3, 2005).

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seasoned issuer as an issuer that is required to file reports pursuant to Section 13(a) or Section 15(d) of the Exchange Act and that satisfies other requirements, including the requirement that the issuer not be an ineligible issuer. The Commission also adopted rules permitting the use of free-writing prospectuses in registered offerings by issuers, including, but not limited to, well-known seasoned issuers and other offering participants. Pursuant to Securities Act Rules 164 and 433, an issuer may use a free-writing prospectus only if it is not an ineligible issuer.²

Securities Act Rule 405 makes an issuer ineligible when, among other things:

(vi) Within the past three years (but in the case of a decree or order agreed to in a settlement, not before December 1, 2005), the issuer or any entity that at the time was a subsidiary of the issuer was made the subject of any judicial or administrative decree or order arising out of a governmental action that:

(A) Prohibits certain conduct or activities regarding, including future violations of, the anti-fraud provisions of the federal securities laws;

(B) Requires that the person cease and desist from violating the anti-fraud provisions of the federal securities laws; or

(C) Determines that the person violated the anti-fraud provisions of the federal securities laws.

Securities Act Rule 405 also authorizes the Commission to determine, "upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer." The Commission delegated the function of granting or denying such applications to the Director of the Division of Corporation Finance.³

² This request for relief is being made not only for the purpose of continuing to qualify as a well-known seasoned issuer, but for all purposes of the definition of "ineligible issuer" in Rule 405, *i.e.*, for whatever purpose the definition may now or hereafter be used under the federal securities laws, including SEC rules.

³ Rule 30-1 provides in relevant part that "[p]ursuant to the provisions of Public Law No. 87-592 . . ., the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the Director of the Division of Corporation Finance to be performed by him or under his direction by such person . . . as may be designated from time to time by the Chairman of the Commission: [Securities Act Functions] (a) With respect to registration of securities pursuant to the Securities Act . . . (10) To authorize the granting or denial of applications, upon a showing of good cause,

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Merrill therefore requests that the Commission or its delegate determine that it is not necessary for Merrill to be considered an ineligible issuer, now or in the future, on the following grounds:

1. **The conduct to be addressed by the Proposed Order does not relate to disclosures and offerings of securities by Merrill or Bank of America.** The Proposed Order will concern Merrill Lynch's conduct in connection with its pension consulting services advisory program.

2. **A determination that Merrill or Bank of America will be an "ineligible issuer" would be disproportionately and unduly severe.** A determination that Merrill or Bank of America will be an ineligible issuer as a result of the anticipated entry of the Proposed Order would be unduly and disproportionately severe, given the lack of any relationship between the findings in the Proposed Order involving Merrill Lynch and any disclosure or offering activity conducted by Merrill or Bank of America. Moreover, the anticipated settlement will be the result of intensive negotiations between Merrill Lynch and the Division of Enforcement. Its terms will have been carefully crafted to meet and balance the competing concerns of all involved. In connection with the anticipated settlement, Merrill Lynch will pay a \$1 million civil money penalty, will be censured, and will be ordered to cease and desist from violating the provisions of the Advisers Act listed above. Applying the designation of ineligible issuer to Merrill Lynch's parent issuers, with the consequences thereof, would, in effect, unfairly impose an additional punishment in excess of the agreed-upon settlement terms negotiated by Merrill Lynch in good faith.

3. **Merrill Lynch has taken significant steps to ensure that the violative conduct found in the Proposed Order does not recur.** The Commission will state in the Proposed Order that, in determining to accept Merrill Lynch's Offer, the Commission considered voluntary and significant remedial acts promptly undertaken by Merrill Lynch.

* * * *

In light of the foregoing, Merrill believes that any determination that the contemplated Proposed Order will render it or Bank of America an ineligible issuer would be unwarranted, contrary to the public interest, and unnecessary for the protection of investors, and that Merrill has shown good cause for a determination by the Commission, or its delegate, that Merrill and Bank of America will not be deemed to be ineligible issuers upon entry of the Proposed Order.

that it is not necessary under the circumstances that the issuer be considered an ineligible issuer as defined in Rule 405." 17 C.F.R. § 200.30-1(a)(10).

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Accordingly, Merrill respectfully urges the Commission, or its delegate, pursuant to Securities Act Rule 405 or Rule 30-1(a)(10), to determine, effective upon the issuance of the Proposed Order, that it is not necessary that Merrill or Bank of America be considered an ineligible issuer for any purpose under the Commission rules. Merrill previously has not sought or obtained such relief, but Bank of America has.⁴

If you have any questions regarding this request, please contact me at the above-listed number.

Very truly yours,


Kevin McEnery

Cc: Jennifer S. Leete, Esq.
Branch Chief
Division of Enforcement

⁴ *Bank of America Corporation* (May 1, 2008), <http://www.sec.gov/divisions/corpfin/cf-noaction/2008/boac050108-405.pdf>.