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November 25, 2014

Douglas J. Scheidt, Esq.
Associate Director and Chief Counsel
Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0506

Re: ***Securities and Exchange Commission v. Bank of America, N.A., Banc of America Mortgage Securities, Inc., and Merrill Lynch, Pierce, Fenner & Smith Inc. f/k/a Banc of America Securities LLC***

Dear Mr. Scheidt:

We are writing on behalf of Bank of America, N.A. ("BANA") and Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") (successor by merger to Banc of America Securities LLC ("BAS")) (collectively, the "Respondents"),[1] wholly owned subsidiaries of Bank of America Corporation ("BAC"), that entered into a settlement with the U.S. Securities and Exchange Commission ("SEC" or "Commission") in connection with the above-captioned proceeding ("BOAMS Action"). Pursuant to the terms of the settlement, a judgment was entered by the District Court on November 25, 2014.[2] The settlement follows an investigation by the Commission concerning the offer and sale of certain residential mortgage-backed securities ("RMBS") to investors.

Respondents seek the assurance of the staff of the Division of Investment Management ("Staff") that it would not recommend any enforcement action to the Commission under Section 206(4) of the Investment Advisers Act of 1940, as amended (the "Advisers Act"), or Rule 206(4)-3 thereunder (the "Rule"), if an investment adviser registered or required to be registered pursuant to Section 203 of the Advisers Act pays the Respondents or any other associated person of

[1] Banc of America Mortgage Securities, Inc. ("BOAMS") is also a party to the BOAMS Action (defined herein), however, it does not receive solicitor fees and we are not requesting relief on its behalf.

[2] *Securities and Exchange Commission v. Bank of America, N.A., et al.,* Civil Action No. 3:13-cv-447 (W.D.N.C. Nov. 25, 2014).

Respondents a cash payment for the solicitation of advisory clients, notwithstanding the existence of a judgment enjoining the Respondents ("Injunctions"), as described below. While the Injunctions do not operate to prohibit or suspend Respondents or any of their associated persons from being associated with or[3] acting as an investment adviser (except as provided in Section 9(a) of the Investment Company Act of 1940 (the "Company Act"), from which Section relief is separately being requested by Respondents) and does not relate to solicitation activities on behalf of any investment adviser, the Injunctions may affect the ability of Respondents and their associated persons to receive such payments. The Staff in many other instances has granted no-action relief under the Rule in similar circumstances.

BACKGROUND

The Staff of the Division of Enforcement ("Enforcement Staff") engaged in settlement discussions with Respondents in connection with allegations made in a complaint that the Commission filed on August 6, 2013, in federal district court (the "Complaint").[4] As a result of these discussions, on August 20, 2014, the Enforcement Staff and Respondents agreed to settle the BOAMS Action. As part of this settlement, the Respondents consented to the entry of Injunctions under Sections 17(a)(2) and (3) of the Securities Act, and Respondents Merrill Lynch and BOAMS, consented to the entry of an Injunction with regard to Section 5(b)(1)[5] of the Securities Act, in each case, without admitting or denying the allegations contained in the Complaint from which the Injunctions arise (except as to jurisdiction, which is admitted solely for purposes of the proceedings) (the "Consent").[6] Additionally, "[a]s part of the global

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[3] Under Section 9(a) of the Company Act, Respondents will, as a result of the Injunctions, be prohibited from serving or acting as, among other things, investment advisers or depositors of any registered investment company or as principal underwriter for any registered open-end investment company or registered unit investment trust. Respondents and certain affiliates, pursuant to Section 9(c) of the Company Act, are separately filing an application requesting (i) a temporary order exempting Respondents and certain affiliates from the provisions of Section 9(a) of the Company Act pending the determination of the Commission on an application for permanent exemption and (ii) a permanent order exempting Respondents and certain affiliates from the provisions of Section 9(a) of the Company Act. In no event will Respondents or any of their affiliated persons act in any capacity enumerated in Section 9(a) unless and until the Commission issues an order pursuant to Section 9(c) of the Company Act, exempting them from the prohibitions of Section 9(a) of the Company Act resulting from the Order. On November 25, 2014, the Commission issued a temporary order (SEC Release No. IC-31359) effective as of the date of the Injunctions, and the applicants expect the Commission will issue a permanent order in due course thereafter.

[4] *See Securities and Exchange Commission v. Bank of America, N.A., et al.,* Complaint for Injunctive and Other Relief, Civil Action No. 3:13-cv-447 (W.D.N.C. Aug. 6, 2013) ("Complaint").

[5] BANA was not named as a defendant in connection with the Commission's Section 5(b)(1) claim and therefore did not consent to entry of an injunction under that section.

[6] The settlement of the BOAMS Action was one of several settlements that were agreed to with various government entities, including the United States Department of Justice, the Securities and Exchange Commission, the Federal Housing Administration (the "FHA"), the Government National Mortgage Association ("Ginnie Mae"), Federal

settlement, Bank of America agreed to resolve the SEC's original case by paying disgorgement of $109.22 million, prejudgment interest of $6.62 million, and a penalty of $109.22 million."[7] BANA was not named as a defendant in connection with the Commission's Section 5(b)(1) claim and therefore did not consent to entry of an injunction under that section.

In the Complaint, the Commission described two alleged violations of Sections 17(a)(2) and (3) of the Securities Act. First, the Commission alleged that the Respondents underwrote a prime RMBS known as BOAMS 2008-A and failed to comply with its representation that each mortgage underlying the securitization complied with Respondents' underwriting guidelines. Second, the Commission alleged that Respondents did not disclose the percentage of loans collateralizing BOAMS 2008-A that were originated by third-party mortgage brokers ("wholesale channel loans") and the risks attendant with such loans. Specifically, the Complaint alleged that wholesale channel loans were more likely to have material underwriting errors, become delinquent, fail early in the life of the loan, or to prepay. Finally, the Commission alleged that the Respondents provided investors and the various rating agencies with documents that materially misrepresented material facts about debt to income and original combined loan-to-value ratios for the loans underlying BOAMS 2008-A.

With respect to the alleged violation of Section 5(b)(1) of the Securities Act, the Commission alleged in the Complaint that BAS and BOAMS disclosed preliminary data, including preliminary loan tapes, which reflected the percentage of wholesale channel loans collateralizing BOAMS 2008-A to certain, but not all, investors and that these Respondents did not file this preliminary data with the Commission, as required by Section 5(b)(1) of the Securities Act.[8]

EFFECT OF RULE 206(4)-3

Rule 206(4)-3 prohibits any investment adviser that is required to be registered under the Advisers Act from paying a cash fee, directly or indirectly, to any solicitor that (among other disqualifying events) has been permanently or temporarily enjoined by an order, judgment, or decree of a court of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security. The alleged conduct causes Respondents to be disqualified under the Rule, and accordingly, absent no-action or other relief, Respondents would be unable to receive cash payments for the solicitation of advisory clients.

Deposit Insurance Corporation ("FDIC") and several states on August 20, 2014 (the "Global Settlement"). Only the BOAMS Action, discussed in detail in the Background section of this letter, subjects Respondents to the Rule 506 disqualification. Neither the Global Settlement nor any of its other components subjects Respondents to the Rule 506 disqualification.

[7] *See* SEC Press Release 2014-172 (Aug. 21, 2014).

[8] We note that all securities in the BOAMS 2008-A offering were sold pursuant to an effective registration statement.

DISCUSSION

In the release adopting the Rule, the Commission stated that it "would entertain, and be prepared to grant in appropriate circumstances, requests for permission to engage as a solicitor a person subject to a statutory bar."[9] We respectfully submit that the circumstances present in this case are precisely the sort that warrant a grant of no-action relief.

The Rule's proposing and adopting releases explain the Commission's purpose in including the disqualification provisions in the Rule. The purpose was to prevent an investment adviser from hiring as a solicitor a person whom the adviser was not permitted to hire as an employee, thus doing indirectly what the adviser could not do directly. In the proposing release, the Commission stated that:

> [b]ecause it would be inappropriate for an investment adviser to be permitted to employ indirectly, as a solicitor, someone whom it might not be able to hire as an employee, the Rule prohibits payment of a referral fee to someone who . . . has engaged in any of the conduct set forth in Section 203(e) of the [Advisers] Act . . . and therefore could be the subject of a Commission order barring or suspending the right of such person to be associated with an investment adviser.[10]

The Injunctions do not bar, suspend, or limit Respondents or any person currently associated with them from acting in any capacity under the federal securities laws (except as provided in Section 9(a) of the Company Act).[11] Respondents have neither been sanctioned in the Injunctions for any activity relating to the solicitation of advisory clients, nor was any such activity at issue. Accordingly, consistent with the Commission's reasoning, there does not appear to be any reason to prohibit an adviser from paying Respondents or their associated persons for engaging in solicitation activities under the Rule.

In addition, the need for the no-action relief requested is neither theoretical nor speculative, but instead is concrete. Respondents are currently contractually entitled to receive cash compensation from certain investment advisers in connection with their solicitation of advisory clients for those advisers. Furthermore, Respondents would like to solicit clients for other investment advisers, both affiliated and unaffiliated with them. The Staff previously has granted numerous requests for no-action relief from the disqualification provisions of the Rule to

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[9] *See* Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Inv. Adv. Act Rel. No. 688 (July 12, 1979), 17 S.E.C. Docket (CCH) 1293, 1295, at note 10.

[10] *See* Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Inv. Adv. Act Release No. 615 (Feb. 2, 1978), 14 S.E.C. Docket (CCH) 89, 91.

[11] *See supra* note 3.

individuals and entities found by the Commission to have violated a wide range of federal securities laws and rules thereunder and SRO rules or permanently enjoined by courts of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security.[12]

UNDERTAKINGS

In connection with this request, each Respondent undertakes with regard to its respective solicitation activities that:

1. It will conduct any cash solicitation arrangement entered into with any investment adviser registered or required to be registered under Section 203 of the Advisers Act in compliance with the terms of Rule 206(4)-3 as if the Respondent were not disqualified for purposes of Rule 206(4)-3 by virtue of an Injunction;
2. It will comply with the terms of the Injunctions that apply to it, including, but not limited to, the payment of disgorgement and a civil monetary penalty; and
3. For ten years from the date of the entry of the Injunctions, the Respondent or any investment adviser with which it has a solicitation arrangement subject to Rule 206(4)-3 will disclose the Injunctions in a written document that is delivered to each person whom the Respondents or their associated persons solicit (a) not less than 48 hours before the person enters into a written or oral investment advisory contract with the investment adviser, or (b) at the time the person enters into such a contract, if the person has the right to terminate such contract without penalty within five business days after entering into the contract.

CONCLUSION

We respectfully request the Staff to advise us that it will not recommend enforcement action to the Commission if an investment adviser that is required to be registered with the Commission pays a Respondent or any associated person of a Respondent a cash payment for the solicitation of advisory clients, notwithstanding the Order.

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[12] *See, e.g., Citigroup Global Markets Inc.,* SEC No-Action Letter (Aug. 6, 2014); *Credit Suisse AG,* SEC No-Action Letter (May 20, 2014); *RBS Securities, Inc.,* SEC No-Action Letter (Nov. 26, 2013); *Wells Fargo Bank, N.A.,* SEC No-Action Letter (pub. avail. July 15, 2013); *J.P. Morgan Securities LLC,* SEC No-Action Letter (pub. avail. Jan. 9, 2013); *GE Funding Capital Market Services, Inc.,* SEC No-Action Letter (Jan. 25, 2012); *J.P. Morgan Securities LLC,* SEC No-Action Letter (pub. avail. July 11, 2011); *J.P. Morgan Securities LLC,* SEC No-Action Letter (pub. avail. June 29, 2011); *UBS Financial Services Inc.,* SEC No-Action Letter (May 9, 2011); *Citigroup Inc.,* SEC No-Action Letter (pub. avail. Oct. 22, 2010); *Banc of America Investment Services, Inc.,* SEC No-Action Letter (pub. avail. June 10, 2009).

Please do not hesitate to contact me at (202) 373-6118 if you have any questions regarding this request.

Sincerely,

Amy Natterson Kroll/EAM

Amy Natterson Kroll

cc: Anil Abraham, Esq.
Division of Investment Management

Marc Eric Harrison, Esq.
Division of Enforcement