09 CIV 5170

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RECEIVED
JUN 03 2009
U.S.D.C. S.D. N.Y.
CASHIERS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BANC OF AMERICA SECURITIES LLC AND BANC OF AMERICA INVESTMENT SERVICES, INC.

Defendants.

Civil Action No.

COMPLAINT

Plaintiff Securities and Exchange Commission ("Commission") alleges the following against Defendants Banc of America Securities LLC ("BAS") and Banc of America Investment Services, Inc. ("BAI") (collectively, "BOA"):

NATURE OF THE ACTION

1. This is a case in which Defendants misled thousands of customers regarding the fundamental nature and risks associated with auction rate securities ("ARS") that BOA underwrote, marketed, and sold. Through its sales personnel and marketing materials, BOA told customers that ARS were highly liquid investments comparable to money market instruments or cash. However, BOA knowingly or recklessly kept its customers in the dark as to the risks associated with their investments. BOA allowed its sales representatives to disseminate misinformation and out-of-date sales materials to BOA customers, giving the customers the misimpression that ARS were highly liquid. As a

result, numerous BOA customers invested funds that they needed to have available on a short-term basis in ARS that are now illiquid.

2. Historically, BAS had committed its own capital to support ARS auctions for which it served as sole or lead broker-dealer so that those auctions would not fail. During the fall of 2007, turmoil in the U.S. credit markets threatened the historical stability of the ARS markets and caused BAS to support its auctions to a greater extent then it had previously done. The risk of failed auctions was dramatically increasing as BAS's ARS inventory was at an all-time high and sales were faltering. BAS knew other ARS broker-dealers were struggling to support auctions as well. BOA knew these and other material facts but did not disclose to its customers timely, complete, and accurate information about them. Instead, BOA allowed its sales representatives to repeat statements about ARS, including statements about ARS liquidity, which it knew, or was reckless in not knowing, were false. BOA failed to protect and continued to mislead its customers even after one of its private bank affiliates issued two explicit warnings in mid-January 2008 recommending that its customers be taken out of ARS investments entirely because of the significant and increasing risk of auction failures and loss of liquidity.

3. BAS knew by February 2008, that other broker-dealers had failed auctions. Beginning on February 11, 2008, BAS began to let select auctions fail by declining to make bids. On February 13, 2008, BAS decided to support (*i.e.*, make bids in) only auctions for ARS with high maximum interest rates—the rate paid in the event of auction failure. Widespread auction failures ensued. In fact, most ARS previously sold by BOA to its customers—including 100% of student loan ARS underwritten by BAS—ceased to be the short-term, high-liquidity, high-interest assets BOA had represented them to be.

As a result, more than 6,000 BOA customers holding approximately $10 billion of ARS found their funds frozen in long-term, illiquid, low-interest bonds.

4. By engaging in the conduct described in the Complaint, the Defendants violated Section 15(c) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §78o(c)]. Accordingly, the Commission seeks: (a) entry of a permanent injunction prohibiting Defendants from further violations of the relevant provision of the Exchange Act; (b) imposition of a civil penalty against the Defendants based on their alleged failure to satisfy their obligations under the Consent; and (c) such other relief this Court deems necessary and appropriate under the circumstances.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this matter pursuant to Sections 21(d)(1) and 27 of the Exchange Act [15 U.S.C. §§ 78u(d)(1), and 78aa].

6. BOA, directly or indirectly, used the mails and means and instrumentalities of interstate commerce in connection with the acts, practices, and courses of business alleged herein.

7. Venue is appropriate in this District pursuant to Section 27 of the Exchange Act because BAS is found, has its headquarters and principal executive offices, and transacts business in this District and because BAI is found and transacts business in this District.

DEFENDANTS

8. Banc of America Securities LLC is a Delaware corporation with its principal place of business in New York City, New York. It is the wholly-owned investment banking subsidiary of Bank of America Corporation. BAS is registered with the Commission as a broker and a dealer pursuant to Section 15(b) of the Exchange Act and

as an investment adviser pursuant to Section 203(c) of the Investment Advisers' Act of 1940 (the "Advisers' Act"). Among other things, during the relevant period, BAS marketed ARS to institutional and high net worth customers throughout the United States and ran the Short Term Trading Desk on which ARS are traded for BOA and its customers. It also provided underwriting services for issuers of ARS.

9. Banc of America Investment Services, Inc. is a Florida corporation with its principal place of business in Boston, Massachusetts. It is a wholly-owned subsidiary of Bank of America Corporation. BAI is registered with the Commission as a broker and a dealer pursuant to Section 15(b) of the Exchange Act and as an investment adviser pursuant to Section 203(c) of the Advisers' Act. During the relevant period, BAI marketed ARS to retail customers located throughout the United States.

FACTUAL ALLEGATIONS

Description of ARS

10. ARS are bonds issued by municipalities, student loan entities, and corporations, or preferred stock issued by closed-end mutual funds, with interest rates or dividend yields that are periodically reset through auctions typically occurring every seven, fourteen, twenty-eight, or thirty-five days. ARS are usually issued with maturities of thirty years, but the maturities can range from five years to perpetuity. Thus, while they are long-term obligations, they re-price frequently using short-term interest rates, which typically are lower than long-term rates.

11. The issuer of each ARS selects one or more broker-dealers to underwrite the offering. If there is more than one broker-dealer, then the issuer designates one of the broker-dealers as the lead broker-dealer, who then becomes the broker-dealer to whom

others look, when necessary, to place bids to ensure that the auction clears. Customers can only submit orders for that ARS through the selected broker-dealers.

12. Each participating broker-dealer accepts orders from its customers, as well as from non-participating broker-dealers, and then submits the orders to the auction agent, which runs the auction. Customers bid the lowest interest rate or dividend they are willing to accept. The auction clears at the lowest rate bid that is sufficient to cover all of the securities for sale, and that rate applies to all of the securities in the auction until the next auction. If there are not enough bids to cover the securities for sale, then the auction fails. If an auction fails, then the issuer pays a maximum rate, which either is a pre-determined flat rate or a rate set by a pre-determined formula described in the disclosure documents. The maximum rate may be higher or lower than the prior auction rates or the rates available on similar securities of similar credit quality and duration in the market place.

BOA's Role in the ARS Market

13. BAS marketed ARS to public and private issuers as an attractive way to obtain financing. For certain ARS, BAS was the sole or lead broker-dealer. BAS's practice, consistent with practice of other broker-dealers participating in the ARS market, was to submit cover or support bids in all auctions for which it was the sole or lead broker-dealer so that the auctions would not fail.

14. When successfully bid, BAS would purchase for its inventory the amount of ARS necessary to prevent a failed auction. BAS offered this inventory for sale in the secondary market between auctions and submitted sell orders for any ARS it still held at the next auction.

15. In addition to any interest payments for ARS held in its inventory, BAS received a fee from ARS issuers for underwriting the ARS offering. BAS also received an annual fee from ARS issuers for remarketing the ARS, whether the ARS were sold to customers or held in inventory.

16. BOA paid fees in the form of sales credits to BOA sales representatives who sold ARS to customers and, in some cases, awarded additional sales credits for sales of newly issued ARS. In contrast, no sales credits were paid for products such as CDs and money market accounts which were sold by the commercial bank, but touted by BOA as comparable to ARS.

17. BAS was a large participant in the ARS market and in particular, the student loan ARS market. BAS was a top originator and underwriter of student loan ARS.

18. BAS distributed ARS to customers through the Short Term Product Desk in its Public Finance Group ("ARS Desk"). The ARS Desk was comprised of two traders and three retail liaisons who handled orders from three sales groups: (1) Public Finance Sales—a group within BAS which handled large, institutional customers exclusively focused on the municipal bond market; (2) Client Investment Strategies ("CIS")—a group within BAS which handled corporate customers and a small number of wealthy individual customers; and (3) BAI—a separate broker-dealer that provided investment and brokerage services to retail customers. The majority of BOA's ARS customers were BAI customers.

19. As a broker-dealer, BAI had a duty to keep informed about ARS and market developments which could affect ARS and to relay material information to its customers. BAI chose to rely on BAS for ARS information, even though BAI and BAS officials

knew by 2007 that the information from BAS was inaccurate, incomplete and out-of-date, and continued to be so through the February 2008 failures.

BOA Improperly Marketed ARS as a Money Market or Cash Alternative

20. Many BOA sales personnel marketed ARS to customers as cash equivalents and money market alternatives that could be liquidated at the customer's demand on the next auction date. When customers asked about the safety of ARS investments, these sales representatives did not mention the liquidity risk; instead, they told customers their ARS were safe, highly rated, backed by the government, and/or insured.

21. Many BOA sales representatives told customers that ARS were "completely liquid," "cash equivalents," "as good as cash" and/or "money market instruments." BOA sales representatives encouraged customers to consider ARS to diversify their cash holdings. BOA made these and similar representations to its ARS customers.

22. Some BOA retail sales representatives did not use the word "auction" in their presentations to customers, but instead referred to ARS with misleading names such as "seven day notes," "commercial paper," "28-day liquid paper," or "7-day floater bonds." As a result, many retail customers believed they had purchased traditional bank notes, and did not know that they had purchased securities.

23. BOA marketing materials described ARS as short-term, highly liquid securities whose liquidity was ensured by the high credit ratings of underlying assets. One sales pamphlet stated that high credit ratings "generally provid[ed] a safeguard for auction success." These statements were false or misleading because they equated principal risk with liquidity. That is, they stated or implied, falsely, that high credit ratings of the underlying assets decreased the risk of auction failure.

24. The ARS Desk staff also misinformed some retail sales representatives, who told customers, that BAS would purchase the customer's ARS holdings if an auction failed.

25. As a result of these and other representations, numerous BOA customers invested funds they needed in the short-term into ARS. BOA did not adequately advise customers that, under certain circumstances, funds invested in ARS could become illiquid, possibly for long periods of time.

26. Representations by BOA sales representatives that ARS were money market and cash alternatives were misleading because they concealed the significant and increasing liquidity risk associated with ARS.

<u>BOA Knew that Its Sales Representatives Improperly Marketed ARS to Customers as Liquid Investments</u>

27. BOA knew or was reckless in not knowing that many of its sales representatives lacked a fundamental understanding of the nature and risk associated with ARS, but it did not correct the problem.

28. BOA provided no training to its sales representatives regarding ARS. Sales representatives could, at their option, review a short document that described some of the complex mechanics of ARS but that also contained outdated, false and misleading statements, as detailed above.

29. Although BOA held regular briefings about market conditions for its sales forces, it failed to convey material information about the ARS market as it deteriorated. As a result, many sales representatives—mostly retail—did not know the material information, and therefore could not convey it to customers.

30. BOA knew or was reckless in not knowing that its sales representatives marketed ARS to customers as a money market or cash alternative.

31. The ARS Desk had daily contact with the retail sales force and knew that many sales representatives were improperly describing ARS to their customers. For example, one liaison on the ARS Desk stated that retail sales representatives frequently told the ARS Desk that they described ARS to customers as liquid investments. The liaison reported these false or misleading statements to a senior colleague.

32. A senior BAS executive acknowledged that most retail customers viewed ARS as an alternative to money market accounts. He stated in November 2007 that his group was paying close attention to ARS "as they are 50% owned by retail investors who view them as a tax exempt money market fund surrogate."

33. BOA knew or was reckless in not knowing that its customers did not understand the significant and increasing liquidity risk associated with ARS, or that ARS are long-term securities whose liquidity depends on the success of the auction process.

BOA Failed to Disclose the Fact That Many ARS Paid Below-Market Interest Rates when Auctions Failed

34. BOA sales representatives rarely discussed the auction process with their customers and discussed auction failures even less frequently. When BOA sales representatives did address the possibility of failed auctions, they assured customers that ARS had high, above-market maximum rates. The sales representatives stated that in the event of an auction failure, the purportedly above-market maximum rates would compensate the ARS holder for the lack of liquidity, and would be an incentive for the issuer to redeem the ARS rather than pay high maximum rates, thereby restoring liquidity to the customer.

35. BOA's written materials also represented to customers that in the event of a failed auction, they would receive a maximum rate that was "usually a multiple of a reference

rate, such as LIBOR or an index of Treasury securities (not to exceed a fixed cap), or a fixed number, such as 15%" depending "on the credit rating of the issuer or the securities." BOA assured customers that this "above market rate" was "designed to compensate holders for the loss of liquidity resulting from a failed auction and to encourage the issuer to consider redeeming or restructuring the securities if future auctions also fail."

36. BOA failed to disclose that, under prevailing market conditions, many ARS (including almost all student loan ARS) had below-market maximum rates. These below-market maximum rates would neither compensate customers for the lack of liquidity nor cause issuers to redeem the issue rather than pay the maximum rate. In fact, the maximum rate formulas for many ARS—and for virtually all student loan ARS—were not multiples of reference rates and were below-market rates, far below the levels described in BOA's written materials.

37. BAS began compiling and calculating maximum rates for the ARS in its inventory in late 2007 and knew that ARS with low maximum rates were at greater risk of failure than others. BOA, however, continued to tell customers that the ARS market was fine and continued to distribute ARS sales materials that omitted any mention of the serious and increasing risk of prolonged illiquidity due to auction failures and below-market interest rates.

BOA Continued to Recommend ARS as Safe and Liquid Despite the Increasing Risk of Auction Failure

38. In the past, BAS supported its ARS auctions with BAS bids to buy. BOA never had an auction fail (other than for clerical reasons) prior to August 2007. BOA touted the

historical success of its auctions (without disclosing the extent of its own supporting bidding) to induce customers to buy and hold ARS.

39. Historically, BAS's inventory of ARS ranged from approximately $500 million to $1 billion, which BAS held on its balance sheet.

40. By August 2007, as the turmoil of the U.S. credit markets put stress on the ARS market, it also put stress on BAS's balance sheet. BAS was forced to buy larger quantities of ARS to keep auctions from failing. BOA told some customers that the increasing number of auction failures at BOA and other broker-dealers was due to unique, issuer-specific events related to sub-prime debt. In private, however, BAS managers and staff expressed concern about whether it and other broker-dealers could continue to support auctions and forestall the spread of auction failures.

41. BAS managers expressed concern that even a small number of failed auctions could trigger a meltdown of the entire ARS market. On August 17, 2007, a senior BAS official discussing a pending ARS deal stated that a prolonged liquidity crisis could trigger a "meltdown" in ARS. BAS officials also learned that other broker-dealers were struggling to support auctions. Even though BAS officials privately feared that failed auctions would spread to the student loan and municipal ARS, BOA continued to claim to its customers that the initial auction failures were confined to ARS resting on subprime-related assets.

42. In late August, discussing the possibility of an auction failure, a BAS trader warned her colleagues: "If we do not support this deal we anticipate a significant amount of selling in our . . . student loan deals and our insured municipal deals." In this internal discussion, senior BAS officials expressed concern about the fragile nature of the ARS

market, but agreed to support the auction in order to protect BOA's reputation and to avoid undermining the confidence of "middle market investors" in ARS. To customers, BOA representatives continued to blame the subprime debt crisis for the auction failures, and insisted that ARS were safe, secure and fully liquid investments.

43. On August 29, 2007, the ARS Desk organized a student loan "Teach-In" to give the retail sales force information about student loan ARS. The "Teach-In" material praised the retail sales representatives for selling student loan ARS to retail customers and underscored BAS's commitment to increasing retail sales. The materials stated: "Your focus on distributing ARS to retail accounts has greatly benefited BAS' student loan effort." The "Teach-In" also dismissed concerns about market risks and said that student loans were a particularly good investment because they were paying above-market interest rates. The "Teach-In" failed to state that the high ARS interest rates reflected a deteriorating market for ARS and increasing risk of auction failures and loss of liquidity. The "Teach-In" minimized ARS risk by stating that the customer's principal investment in ARS was secure because "rating agencies have **never** downgraded a student loan backed transaction" and stating that "there is virtually no interest rate risk in student loan ARS." (emphasis in original) Finally, the "Teach-In" materials failed to state the extent to which BAS supported the student loan auctions and the increasing liquidity risks.

44. In fact, student loan ARS were highly vulnerable to auction failures and loss of liquidity because their maximum rates in the event of auction failure were below the market interest rates for instruments of similar credit quality and duration. With below-market maximum rates, issuers would have little incentive to redeem their ARS.

45. In the fall of 2007, many BAS student loan ARS auctions were at risk of failing because maximum rate limits would keep their interest payments below-market. As a result, many issuers granted temporary waivers of their maximum rates to attract customers and avoid auction failures. BAS supported and facilitated these waivers. By December 2007, issuers in BAS auctions had executed 48 waivers. However, the auctions failed in February, and when the waivers expired, many interest rates on these ARS reset to zero percent. As a result, many BOA customers holding these student loan ARS received no interest on their principal and could not sell their ARS.

46. BOA did not disclose the existence or potential effects of these waivers to its customers who had been promised interest rates as high as 15% in the event of auction failure.

47. The ARS market continued to deteriorate in the Fall of 2007, and BOA continued to conceal from customers the risks associated with ARS, both in order to get rid of its inventory and protect its retail sales, and to avoid further reducing demand and endangering the ARS market.

48. During this time, BAS also was concerned about auctions insured by monoline insurers (used to enhance credit quality). On September 19, the BAS manager in charge of the ARS Desk warned of the consequences of not supporting a vulnerable auction: "We have seen our inventory balances increase, but a failed [monoline insurer] auction at B of A would lead to widespread selling in our other deals."

49. In October and November, BAS's internal concerns about the ARS market became more acute. On October 5, BAS's risk manager warned: "[W]e are very outsized in our exposure to student loans."

50. On November 1, 2007, the BAS official in charge of the Public Finance Group told his superior that the ARS market was fragile, that retail customers were not yet aware of the risk, and that he was preparing a plan in case the market failed. He wrote:

> The market we are watching most closely is insured auction rate bonds, as they are 50% owned by retail investors who view them as a tax exempt money market fund surrogate. Anything that upsets that mindset could cause a dislocation in the ARS market . . . Thus far, [there is] no sign of that mentality amongst retail investors as the monoline story is not really getting any play in the news media that individual investors watch/read. We are watching this space carefully and taking steps to assure that we can operate intelligently should the environment deteriorate.

51. On November 20, 2007, the BAS manager in charge of Public Finance Sales, Trading & Underwriting wrote that "quite a few issues in the student loan market have come precariously close to failing and probably would have were it not for dealers showing clearing bids just thru max rate."

52. On December 6, 2007, a BAS risk manager became so concerned about BAS's "ability to keep the Auction Rate programs floating" and about the related risk that BAS would be stuck with illiquid ARS for years to come, that he recommended BAS rid itself of all of ARS holdings. He wrote that BAS should "*make sure that we don't hold any ARS on our balance sheet.* We have $1.43 BN right now and given the precarious nature of these, *once we have a failed auction, the ultimate maturity is a question.*" (emphasis added).

53. A week later, on December 12, 2007, the same risk manager issued another warning about a meltdown in the ARS market. He wrote:

> The ARS book could get ugly. We don't have a legal obligation to support these deals, but we have a moral one. Given . . . the fact that many of the same customers help support the ARS business, the likelihood of some of these investors pulling out of these deals is very real. Once we have a failed auction, other will most likely follow. Reputation risk to [Bank of America Corporation] is high in this space right now. Very high.

54. Despite the significant deterioration in the market, BOA continued to promote student loan ARS to its customers and did not disclose the growing possibility of a meltdown in the ARS market.

55. At the same time, BOA encouraged more ARS sales to customers. Under pressure to reduce BAS's own ARS holdings, the manager in charge of the ARS Desk stated on November 21 that he was taking steps to reduce BAS's own exposure to ARS risk through: (1) "aggressive marketing" to institutional customers; (2) communicating to the sales force an expectation of better interest rates prior to auctions; and (3) offering discounts to buyers of BAS's own ARS holdings in the secondary market.

56. Also, in November and December 2007, BOA increased sales of ARS—including ARS at serious risk of failure—to its retail customers.

57. On December 11, 2007, a BAS senior executive reviewing BAS's efforts to reduce its holdings of ARS and to deal with the market risks posed by below-market maximum rates, warned that BAS was reaching the limit of its ability to bid in auctions and support the market. Six days later, on December 17, a BAS senior executive instructed the manager in charge of the ARS Desk to "leave no stone unturned in marketing ars [sic] to our long term investor base ASAP" because BAS needed to reduce its own inventory.

58. In January 2008, the ARS Desk was "actively discounting" ARS it had previously supported, including two student loan ARS, in order to reduce BAS's own ARS inventory.

59. Despite these efforts, BAS's ARS inventory remained at levels triple those of the same time periods in the previous year, and BAS's internal concerns about liquidity risk continued.

60. BOA knew that its ARS customers expected liquidity on demand and that liquidity was at increasing risk in late 2007 and early 2008. It also knew that customer purchases of ARS were essential to maintain its remarketing fees from the auction market and to reduce its own ARS inventory. As a result, BOA pressed ARS sales to its customers without also telling them about the significant and increasing risks associated with ARS, or about its efforts to reduce its own ARS holdings.

BOA Promoted ARS Sales to Customers in Spite of Two Alerts from Its Private Bank to Exit the ARS Market Entirely

61. In January, the ARS market continued to deteriorate as other brokers began to let some auctions fail. At midday on January 23, 2008, the Chief Investment Office for US Trust, Bank of America Private Wealth Management—a private bank owned by Bank of America, N.A. which manages discretionary accounts as a fiduciary—issued the following alert sent with high importance to its investment professionals:

> **[W]e are recommending that Portfolio Managers begin eliminating their client exposure to Dutch auction securities and refrain from additional purchases.** The Columbia Management Fixed Income group has begun eliminating their client exposure as well.

(bolded text originally in red font).

62. Several retail sales representatives who were associated with US Trust forwarded the alert to the traders on the ARS Desk. The ARS Desk staff did not forward the warning to all BOA sales representatives. BOA did not want customers to sell their ARS, regardless of the deteriorating market. One senior member of the ARS Desk staff reacted by stating: "Whoever sent this out should be shot!! Are they trying to put us out of

business?" The manager in charge of the ARS Desk responded: "I believe that is the managed money portion not the private bank nonetheless I thought we were on the same team."

63. The ARS Desk staff began to rebut the alert in an effort to prevent wider sales of ARS, which would have required BOA to take more ARS into its own holdings in order to prevent auction failures. One trader reported to the BAS manager in charge of the ARS Desk that she had some success in refuting the US Trust alert: "I'm hearing a lot more talk this morning from retail on failed auctions and that piece that was mailed out recommending liquidation of auctions [the US Trust alert]. Thankfully, we've been able to talk a lot of them into calming down . . . ."

64. On Friday, January 28, the US Trust Chief Investment Office issued a second alert reiterating its unequivocal warning to portfolio managers to take their customers out of the ARS market. The alert stated:

> In response to various requests . . . to purchase Auction Rate Securities despite our original Alert, we want to re-iterate our original recommendation to refrain from additional purchases and begin eliminating exposure. These securities should not be considered money market substitutes due to the risks entailed in the auction process.

65. Despite this second alert and learning that other broker-dealers were about to leave the ARS market, BOA continued to encourage customers to purchase and hold ARS. BOA assured its sales representatives that the market concerns were limited to only certain auctions and that BAS had a "continued commitment" to ARS. The ARS Desk staff described US Trust Chief Investment Office as "irresponsible" for sending the alert.

66. Staff on the ARS Desk also failed to inform retail sales representatives of the deteriorating market conditions in the ARS market. As late as February 5, 2008, ARS

Desk staff assured retail sales representatives that there were no problems in the ARS market.

BAS Let Auctions Fail

67. On Thursday, February 7, 2008, another broker-dealer allowed several ARS auctions to fail. The following weekend, BAS considered whether it would continue supporting the ARS market. On Monday, February 11, 2008, BAS decided to let select auctions fail by declining to make bids.

68. In response to the auction failures, on February 11, 2008, BOA issued an internal alert to its retail sales force. Unlike the internal marketing manual and sales pamphlet described above, the February 11 internal alert described accurately the liquidity risks associated with ARS. The alert instructed sales representatives: "Please recognize that strong credit quality alone does not guarantee a successful auction." It also stated that ARS were "Long-term Securities" which paid slightly higher interest than money market products with short-term maturities because "the investor gives up a measure of liquidity and assumes the risk of a failed auction." Failed auctions, the alert warned, could result in the customer having to hold the ARS until the final maturity date which could be as long as 30 years or, in some cases, in perpetuity.

69. BOA did not distribute the information contained in the February 11 alert to its sales representatives or customers prior to the widespread auction failures.

70. On February 13, 2008, decided to support only those auctions in which the maximum rates paid above 6% interest. Additional failures quickly ensued. Most of the failed auctions were for student loan ARS, and close to 100% of BOA's student loan ARS ultimately failed.

71. As a result of BOA's actions, its customers—including a large number of retail customers—were left holding billions of dollars of illiquid ARS. Customers were unable to access funds that BOA had told them were safe, liquid, and easily convertible to cash. These customers were unable to use their ARS investments as promised—to satisfy near-term needs such as living expenses, college tuitions, down payments for homes, and, in the case of small and mid-size companies, business operations and payroll expenses. In addition, some customers were forced to sell their ARS at a loss or incurred other expenses and/or losses as the market value and liquidity of their ARS investments evaporated.

CLAIM FOR RELIEF

[Violation of Section 15(c) of the Exchange Act]

72. Paragraphs 1 through 69 are realleged and incorporated by reference as if set forth fully herein.

73. The Defendants made use of the mails or means or instrumentalities of interstate commerce to effect transactions in, or to induce or attempt to induce the purchase or sale of, securities: (a) by means of a manipulative, deceptive, or other fraudulent device or contrivance, and (b) in connection with which Defendants engaged in a fraudulent, deceptive, or manipulative act or practice.

74. By engaging in the foregoing conduct, the Defendants violated Section 15(c) of the Exchange Act [15 U.S.C. §78o(c)].

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that this Court:

A. Permanently enjoin the Defendants and their respective agents, servants, employees, attorneys, assigns and all those persons in active concert or participation with it who receive actual notice of the injunction by personal service or otherwise, from directly or indirectly engaging in violations of Section 15(c) of the Exchange Act [15 U.S.C. §78o(c)];

B. Order the Defendants to pay civil monetary penalties pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. §78u(d)(3)]; and

C. Grant such other and further relief as this Court deems necessary and appropriate under the circumstances.

Respectfully submitted,

Mark A. Adler (MA-8703)
Securities and Exchange Commission
100 F Street NE, Mail Stop 4030
Washington, DC 20549-4030
(202) 551-4402 [Adler]
(202) 772-9245 [Adler FAX]
AdlerMa@sec.gov

Jordan A. Thomas
Fredric D. Firestone
Gerald W. Hodgkins
Moira T. Roberts
Conway T. Dodge, Jr.
Nicholas A. Brady
Mark M. Oh
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-4030
(202) 551-4475 [Thomas]
(202) 772-9245 [Thomas FAX]
ThomasJA@sec.gov

Attorneys for Plaintiff

Dated: May 26, 2009