



DIVISION OF  
CORPORATION FINANCE

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



14005358

Received SEC  
FEB 07 2014  
Washington, DC 20549

No Act  
12/23/13

February 7, 2014

Ronald O. Mueller  
Gibson, Dunn & Crutcher LLP  
shareholderproposals@gibsondunn.com

Act: 1934  
Section: \_\_\_\_\_  
Rule: 14a-8 (ODS)  
Public \_\_\_\_\_  
Availability: 2-7-14

Re: Bank of America Corporation  
Incoming letter dated December 23, 2013

Dear Mr. Mueller:

This is in response to your letters dated December 23, 2013 and January 14, 2014 concerning the shareholder proposal submitted to Bank of America by Theodore Bernat. We also have received a letter from the proponent dated December 27, 2013. Copies of all of the correspondence on which this response is based will be made available on our website at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml>. For your reference, a brief discussion of the Division's informal procedures regarding shareholder proposals is also available at the same website address.

Sincerely,

Matt S. McNair  
Special Counsel

Enclosure

cc: Theodore R. Bernat

\*\*\* FISMA & OMB Memorandum M-07-16 \*\*\*

February 7, 2014

**Response of the Office of Chief Counsel  
Division of Corporation Finance**

Re: Bank of America Corporation  
Incoming letter dated December 23, 2013

The proposal relates to dividends.

There appears to be some basis for your view that Bank of America may exclude the proposal under rule 14a-8(f). Rule 14a-8(b) requires a proponent to provide a written statement that the proponent intends to hold his or her company stock through the date of the shareholder meeting. It appears that the proponent failed to provide this statement within 14 calendar days from the date the proponent received Bank of America's request under rule 14a-8(f). Accordingly, we will not recommend enforcement action to the Commission if Bank of America omits the proposal from its proxy materials in reliance on rules 14a-8(b) and 14a-8(f). In reaching this position, we have not found it necessary to address the alternative bases for omission upon which Bank of America relies.

Sincerely,

Norman von Holtendorff  
Attorney-Advisor

**DIVISION OF CORPORATION FINANCE  
INFORMAL PROCEDURES REGARDING SHAREHOLDER PROPOSALS**

The Division of Corporation Finance believes that its responsibility with respect to matters arising under Rule 14a-8 [17 CFR 240.14a-8], as with other matters under the proxy rules, is to aid those who must comply with the rule by offering informal advice and suggestions and to determine, initially, whether or not it may be appropriate in a particular matter to recommend enforcement action to the Commission. In connection with a shareholder proposal under Rule 14a-8, the Division's staff considers the information furnished to it by the Company in support of its intention to exclude the proposals from the Company's proxy materials, as well as any information furnished by the proponent or the proponent's representative.

Although Rule 14a-8(k) does not require any communications from shareholders to the Commission's staff, the staff will always consider information concerning alleged violations of the statutes administered by the Commission, including argument as to whether or not activities proposed to be taken would be violative of the statute or rule involved. The receipt by the staff of such information, however, should not be construed as changing the staff's informal procedures and proxy review into a formal or adversary procedure.

It is important to note that the staff's and Commission's no-action responses to Rule 14a-8(j) submissions reflect only informal views. The determinations reached in these no-action letters do not and cannot adjudicate the merits of a company's position with respect to the proposal. Only a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials. Accordingly a discretionary determination not to recommend or take Commission enforcement action, does not preclude a proponent, or any shareholder of a company, from pursuing any rights he or she may have against the company in court, should the management omit the proposal from the company's proxy material.

# GIBSON DUNN

Gibson, Dunn & Crutcher LLP  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036-5306  
Tel 202.955.8500  
www.gibsondunn.com

Ronald O. Mueller  
Direct: 202.955.8671  
Fax: 202.530.9569  
RMueller@gibsondunn.com

Client: 04081-00170

January 14, 2014

## VIA EMAIL

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: *Bank of America Corporation  
Supplemental Letter Regarding Stockholder Proposal of Theodore Bernat  
Securities Exchange Act of 1934—Rule 14a-8*

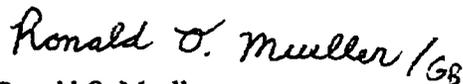
Ladies and Gentlemen:

This letter relates to the no-action request (the “No-Action Request”) submitted to the staff of the Division of Corporation Finance (the “Staff”) on December 23, 2013 on behalf of our client, Bank of America Corporation (the “Company”), in response to the stockholder proposal (the “Proposal”) and statements in support thereof received from Theodore Bernat (the “Proponent”).

After the submission of the No-Action Request, the Proponent submitted a letter to our office dated December 27, 2013. Enclosed with the letter was a dividend payment confirmation statement, on which the Proponent also provided a handwritten statement. The letter and enclosed materials from the Proponent are provided for the Staff’s information and attached hereto as Exhibit A.

The materials from the Proponent do not alter the bases for exclusion of the Proposal set forth in the No-Action Request. We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to [shareholderproposals@gibsondunn.com](mailto:shareholderproposals@gibsondunn.com). If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8671 or Jennifer E. Bennett, the Company’s Associate General Counsel and Assistant Corporate Secretary, at (980) 388-5022.

Sincerely,



Ronald O. Mueller

# GIBSON DUNN

Office of Chief Counsel  
Division of Corporation Finance  
January 14, 2014  
Page 2

Enclosure

cc: Jennifer E. Bennett, Bank of America Corporation  
Theodore Bernat

**GIBSON DUNN**

**EXHIBIT A**

**Theodore R Bernat**

\*\*\* FISMA & OMB Memorandum M-07-16 \*\*\*

December 27 2013

To Gibson,Dunn & Crutcher LLP  
Kevin Heilenday

This is a response to the notice of intent from Ronald Mueller that wants to exclude my proposal as a voting shareholder because he states I did not send my intent to keep my shares???. A letter was sent with that intent and a attachment of stock holding and ownership . It is rubbish that Ronald Mueller states I had not sent intent.

It is my right and the right of other stockholders to express their opinion of profit margin financially relating to share increases and offsets of wage increase. So stock should be more than a penny a share HONESTLY !!!

If the dividend is less than a dollar amount then why is this not a threshold?? So the threshold should be more than a dollar amount per share and the commission should not award executive wage increase and compensation.

I am asking not just for myself but for ALL shareholders. Why is it not our right to vote... why are you omitting this proposal??

If we the shareholders did not invest in Bank of America then there would be NO day to day business operations.

If my proposal is omitted I will seek legal action and a law suit, seeking one billion dollars, class action for stockholders

Regards



Theodore R Bernat  
client: 04081-00170

Page 8 redacted for the following reason:

-----  
\*\*\* FISMA & OMB Memorandum M-07-16 \*\*\*

RECEIVED

2013 JAN 13 AM 11:15

OFFICE OF CHIEF COUNSEL  
CORPORATION FINANCE

Theodore R Bernat

\*\*\* FISMA & OMB Memorandum M-07-16 \*\*\*

December 27 2013

To the Office of Chief Counsel and Finance  
Ronald Mueller

This is a response to the notice of intent from Ronald Mueller that wants to exclude my proposal as a voting shareholder because he states I did not send my intent to keep my shares??? A letter was sent with that intent and a attachment of stock holding and ownership . It is rubbish that Ronald Mueller states I had not sent intent.

It is my right and the right of other stockholders to express their opinion of profit margin financially relating to share increases and offsets of wage increase. So stock should be more than a penny a share HONESTLY !!!

If the dividend is less than a dollar amount then why is this not a threshold?? So the threshold should be more than a dollar amount per share and the commission should not award executive wage increase and compensation.

I am asking not just for myself but for ALL shareholders. Why is it not our right to vote... why are you omitting this proposal??

If we the shareholders did not invest in Bank of America then there would be NO day to day business operations.

If my proposal is omitted I will seek legal action and a law suit, seeking one billion dollars, class action for stockholders

Regards



Theodore R Bernat  
client: 04081-00170

Page 10 redacted for the following reason:

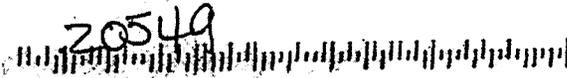
-----  
\*\*\* FISMA & OMB Memorandum M-07-16 \*\*\*



4561

Office of Chief Counsel  
Division of Corporation Finance,  
Securities & Exchange Commission  
100 F Street, NE.  
Washington DC.

Att: Ronald Mueller



December 23, 2013

VIA E-MAIL

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: *Bank of America Corporation*  
*Stockholder Proposal of Theodore Bernat*  
*Securities Exchange Act of 1934—Rule 14a-8*

Ladies and Gentlemen:

This letter is to inform you that our client, Bank of America Corporation (the “Company”), intends to omit from its proxy statement and form of proxy for its 2014 Annual Meeting of Stockholders (collectively, the “2014 Proxy Materials”) a stockholder proposal (the “Proposal”) and statements in support thereof received from Theodore Bernat (the “Proponent”).

Pursuant to Rule 14a-8(j), we have:

- filed this letter with the Securities and Exchange Commission (the “Commission”) no later than eighty (80) calendar days before the Company intends to file its definitive 2014 Proxy Materials with the Commission; and
- concurrently sent copies of this correspondence to the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“SLB 14D”) provide that stockholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the staff of the Division of Corporation Finance (the “Staff”). Accordingly, we are taking this opportunity to inform the Proponent that if the Proponent elects to submit additional correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

# GIBSON DUNN

Office of Chief Counsel  
Division of Corporation Finance  
December 23, 2013  
Page 2

## THE PROPOSAL

The Proposal states:

No raises, bonuses or stock options be granted when the dividends fall below a dollar a share. This proposal should be voted on by all stock holders. The board needs to seek higher dividends for the investors if management seeks raises, bonus or stock options[.]

A copy of the Proposal and the supporting statement is attached to this letter as Exhibit A.

## BASES FOR EXCLUSION

We hereby respectfully request that the Staff concur in our view that the Proposal may properly be excluded from the 2014 Proxy Materials pursuant to:

- Rules 14a-8(b) and 14a-8(f)(1) because the Proponent failed to provide a statement of intent to hold the requisite shares through the date of the 2014 Annual Meeting of Stockholders;
- Rule 14a-8(i)(7) because the Proposal deals with matters related to the Company's ordinary business operations; and
- Rule 14a-8(i)(13) because the Proposal relates to specific amounts of cash dividends.

## BACKGROUND

The Proponent, who is a registered holder of Company stock, submitted an initial version of the Proposal to the Company in a letter dated July 16, 2013 and received July 23, 2013. See Exhibit B. The Proponent's submission contained a procedural deficiency; it did not include a statement of the Proponent's intention to hold the requisite number of Company shares through the date of the 2014 Annual Meeting of Stockholders, as required by Rule 14a-8(b)(2).

Accordingly, in a letter dated August 5, 2013, which was sent on that date via overnight delivery, the Company notified the Proponent of the procedural deficiency, as required by

# GIBSON DUNN

Office of Chief Counsel  
Division of Corporation Finance  
December 23, 2013  
Page 3

Rule 14a-8(f)(1) (the “Deficiency Notice”).<sup>1</sup> In the Deficiency Notice, attached hereto as Exhibit C, the Company informed the Proponent of the requirements of Rule 14a-8(b) and how he could cure the procedural deficiency. The Deficiency Notice also included a copy of Rule 14a-8.

The Deficiency Notice was delivered to the Proponent at 10:12 a.m. on August 6, 2013. *See* Exhibit D. The Company received the Proponent’s response to the Deficiency Notice on August 12, 2013. The Proponent’s response states, in relevant part, that the Proponent “do[es] intend on keeping my stocks (holder of 348 shares) which entitles me to vote.” *See* Exhibit A.

## ANALYSIS

### **I. The Proposal May Be Excluded Under Rule 14a-8(b) And Rule 14a-8(f)(1) Because The Proponent Failed To Provide A Statement Of Intent To Hold The Requisite Shares Through The Date Of The 2014 Annual Meeting Of Stockholders.**

The Company may exclude the Proposal under Rule 14a-8(f)(1) because the Proponent did not substantiate his eligibility to submit the Proposal under Rule 14a-8(b). Rule 14a-8(b)(1) provides, in part, that “[i]n order to be eligible to submit a proposal, [a stockholder] must . . . continue to hold [at least \$2,000 in market value, or 1%, of the company’s] securities through the date of the meeting,” and Rule 14a-8(b)(2) requires stockholder proponents to provide companies with a written statement of their intent to comply with this requirement. The Company’s Deficiency Notice alerted the Proponent to this requirement, informed him that he failed to satisfy it and stated how he could cure the deficiency.

Specifically, the Deficiency Notice stated:

Rule 14a-8(b) also requires a stockholder to provide the Company with a written statement that he or she intends to continue to hold the requisite number of shares through the date of the stockholders’ meeting at which the Proposal will be voted on

---

<sup>1</sup> The Deficiency Notice also requested that the Proponent clarify which text in the July 16, 2013 correspondence was intended to constitute the Proposal and whether any part of the correspondence was intended to constitute a supporting statement. The Proponent revised the Proposal to make these clarifications, and the revised Proposal is the subject of this no-action request. *See* Exhibit A.

# GIBSON DUNN

Office of Chief Counsel  
Division of Corporation Finance  
December 23, 2013  
Page 4

by the stockholders. Your correspondence did not include such a statement. To remedy this defect, you must submit a written statement that you intend to continue holding the requisite number of Company shares through the date of the Company's 2014 Annual Meeting of Stockholders.

The Proponent failed to provide the Company with a written statement of his intent to hold the requisite amount of Company shares through the date of the 2014 Annual Meeting of Stockholders, as required by Rule 14a-8(b), despite the Company's timely Deficiency Notice. In his response to the Deficiency Notice, the Proponent only states that he "do[es] intend on keeping my stocks (holder of 348 shares) which entitles me to vote." See Exhibit A. This statement does not commit to continue to own sufficient shares through the date of the 2014 Annual Meeting of Stockholders; at most, it implies that he will hold shares through the record date of the meeting.

Rule 14a-8(b)(2) makes clear, with respect to proponents who are registered holders of a company's stock, that even though the company can verify the registered holder's stock ownership on its own, a registered holder "will still have to provide the company with a written statement that [he or she] intend[s] to continue to hold the securities through the date of the meeting of shareholders." Staff Legal Bulletin No. 14 (July 13, 2001) likewise provides:

Should a shareholder provide the company with a written statement that he or she intends to continue holding the securities through the date of the shareholder meeting?

Yes. The shareholder must provide this written statement regardless of the method the shareholder uses to prove that he or she continuously owned the securities for a period of one year as of the time the shareholder submits the proposal.

The Staff has consistently concurred in the exclusion of stockholder proposals submitted by proponents who have failed to provide the requisite written statement of intent to continue holding the requisite amount of shares through the date of the stockholder meeting at which the proposal will be voted on by stockholders. For example, in *Verizon Communications Inc.* (avail. Jan. 10, 2013), the Staff concurred that the company could exclude a stockholder proposal where the proponents stated that they intended to hold the company's shares "into the foreseeable future" rather than through the date of the stockholder meeting. Similarly, in *Exxon Mobil Corp.* (avail. Jan. 23, 2001), the Staff concurred that the company could

# GIBSON DUNN

Office of Chief Counsel  
Division of Corporation Finance  
December 23, 2013  
Page 5

exclude a stockholder proposal where the proponent stated that he held “and will hold if possible until after the [m]eeting the required \$2000.00 in stock.”<sup>2</sup>

As with the proponents’ statements in *Verizon Communications* and *Exxon Mobil*, the Proponent’s statement does not commit that he will hold sufficient shares through the date of the 2014 Annual Meeting of Stockholders. Thus, the Proposal is properly excludable under Rules 14a-8(b) and 14a-8(f)(1).

## **II. The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because The Proposal Deals With Matters Related To The Company’s Ordinary Business Operations.**

The Company may exclude the Proposal pursuant to Rule 14a-8(i)(7) because it deals with matters relating to the Company’s ordinary business operations, specifically, general employee compensation.

Rule 14a-8(i)(7) allows for exclusion of a proposal that “deals with a matter relating to the company’s ordinary business operations.” According to the Commission’s release accompanying the 1998 amendments to Rule 14a-8, the term “ordinary business” refers to matters that are not necessarily “ordinary” in the common meaning of the word, but instead the term “is rooted in the corporate law concept of providing management with flexibility in directing certain core matters involving the company’s business and operations.” Exchange Act Release No. 40018 (May 21, 1998) (the “1998 Release”). In the 1998 Release, the Commission explained that the ordinary business exclusion rests on two central considerations. As relevant here, one of these considerations is that “[c]ertain tasks are so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.”

---

<sup>2</sup> See also *AT&T Corp.* (avail. Jan. 3, 2013); *International Business Machines Corp.* (avail. Dec. 28, 2010); *Fortune Brands, Inc.* (avail. Apr. 7, 2009); *Rite Aid Corp.* (avail. Mar. 26, 2009); *Exelon Corp.* (avail. Feb. 23, 2009); *Fortune Brands, Inc.* (avail. Feb. 12, 2009); *Sempra Energy* (avail. Jan. 21, 2009); *Washington Mutual, Inc.* (avail. Dec. 31, 2007); *Sempra Energy* (avail. Dec. 28, 2006); *SBC Communications Inc.* (avail. Jan. 2, 2004); *IVAX Corp.* (avail. Mar. 20, 2003); *Avaya, Inc.* (avail. July 19, 2002); *Exxon Mobil Corp.* (avail. Jan. 16, 2001); *McDonnell Douglas Corp.* (avail. Feb. 4, 1997) (in each case, the Staff concurred in the exclusion of a stockholder proposal where the proponent did not provide a written statement of intent to hold the requisite number of company shares through the date of the meeting at which the proposal would be voted on by stockholders).

# GIBSON DUNN

Office of Chief Counsel  
Division of Corporation Finance  
December 23, 2013  
Page 6

The Proposal seeks to limit the compensation of the Company's employees by prohibiting "raises, bonuses or stock options . . . when the dividends fall below a dollar a share." In analyzing stockholder proposals relating to compensation under Rule 14a-8(i)(7), the Staff has made a clear distinction between proposals that relate to general employee compensation and proposals that relate to senior executive officer and director compensation.<sup>3</sup> The Staff has consistently concurred in the exclusion of stockholder proposals under Rule 14a-8(i)(7) when the proposals relate to general employee compensation rather than compensation of senior executive officers and directors. For example, in *Ford Motor Co.* (avail. Jan. 9, 2008), the proposal requested that the company stop awarding all stock options. The proposal did not limit the applicability of this ban on stock option awards to senior executive officers and directors, but instead applied the ban generally to all company employees. Accordingly, the Staff concurred that the company could "exclude the proposal under [R]ule 14a-8(i)(7), as relating to Ford's ordinary business operations (i.e., general compensation matters)."<sup>4</sup>

Like the *Ford* proposal, the Proposal addresses compensation generally and is not limited to compensation of the Company's senior executive officers or directors. It states, "no raises, bonuses or stock options be granted when the dividends fall below a dollar a share" and does not limit this mandate to the compensation of senior executive officers or directors. As disclosed in the Company's Form 10-Q filed on October 30, 2013, the Company had "approximately 248,000 full-time equivalent employees" as of September 30, 2013. Determining the amounts of employee compensation for approximately 248,000 full-time employees, and when additional compensation is appropriate for a particular employee, is a fundamental responsibility of the Company's management. It is not practical to subject these evaluations and decisions to stockholder oversight because stockholders are not in a position

---

<sup>3</sup> See Staff Legal Bulletin No. 14A (July 12, 2002); *Xerox Corp.* (avail. Mar. 25, 1993) ("[U]nlike proposals relating to the rank and file workforce, proposals concerning senior executive and director compensation are viewed by the Commission as inherently outside the scope of normal or routine practices in the running of the company's operations.").

<sup>4</sup> See also *Deere & Co.* (avail. Oct. 17, 2012); *Johnson Controls, Inc.* (avail. Oct. 16, 2012); *ENGlobal Corp.* (avail. Mar. 28, 2012); *Bank of America Corp.* (avail. Jan. 31, 2012); *KVH Industries, Inc.* (avail. Mar. 30, 2011); *Wells Fargo & Co.* (avail. Mar. 14, 2011, *recon. denied* Apr. 5, 2011); *International Business Machines Corp. (Boulain)* (avail. Jan. 22, 2009); *3M Co.* (avail. Mar. 6, 2008); *Xcel Energy, Inc.* (avail. Feb. 6, 2004); *Minnesota Mining and Manufacturing Co.* (avail. Mar. 4, 1999) (in each case, the Staff concurred in the exclusion of a stockholder proposal related to general employee compensation under Rule 14a-8(i)(7)).

# GIBSON DUNN

Office of Chief Counsel  
Division of Corporation Finance  
December 23, 2013  
Page 7

to weigh these factors with respect to the Company's employees. Thus, because it sets forth a policy that would impact the compensation of all Company employees generally, the Proposal is excludable under Rule 14a-8(i)(7).

References to "management" in the Proposal and to "upper management" in the supporting statement do not save the Proposal from exclusion. First, these terms do not limit the Proposal's applicability to all employees, mandating that "[n]o raises, bonuses or stock options be granted when the dividends fall below a dollar a share." The reference to "management" in the Proposal relates only to who requests compensation actions, not to whom those actions apply. The Proposal would limit management from seeking raises, bonuses or stock options for any employee.

Furthermore, the Staff has concurred in the exclusion of stockholder proposals that have referred to the compensation of management or used similar terms to identify the company personnel whose compensation they were intended to target, finding that such terms did not limit the application of the proposals to the compensation of senior executive officers or directors. For example, in *Alliant Energy Corp.* (avail. Feb. 4, 2004), the Staff concurred in the exclusion under Rule 14a-8(i)(7) of a stockholder proposal requesting that "[t]he salary of the president, all levels of vice president, the CEO, CFO and all levels of top management be determined" in a specified manner because the proposal related to "ordinary business operations (i.e., general compensation matters)." Similarly, in *Lucent Technologies Inc.* (avail. Nov. 6, 2001), the Staff concurred in the exclusion of a proposal seeking to decrease by 50% the compensation of "ALL officers and directors" as relating to general compensation matters. Similarly, the references to "management" and "upper management" in the Proposal and its supporting statement, which in this case do not even appear in the sentence containing the Proposal's mandate that "[n]o raises, bonuses or stock options be granted when the dividends fall below a dollar a share," do not cause the Proposal to target the compensation of only senior executive officers and directors.

Therefore, in accordance with the precedent discussed above, the Proposal is excludable under Rule 14a-8(i)(7) as relating to the Company's ordinary business operations, because it involves general employee compensation.

### **III. The Proposal May Be Excluded Under Rule 14a-8(i)(13) Because The Proposal Relates To Specific Amounts of Cash Dividends.**

The Company may exclude the Proposal under Rule 14a-8(i)(13), which permits the exclusion of stockholder proposals that concern "specific amounts of cash or stock dividends." The Staff has consistently interpreted this rule as permitting the exclusion of stockholder proposals that would set minimum amounts or ranges for dividends, including

# GIBSON DUNN

Office of Chief Counsel  
Division of Corporation Finance  
December 23, 2013  
Page 8

when such proposals would restrict executive compensation until a minimum dividend goal is achieved. For example, in *Wells Fargo & Co.* (avail. Jan. 14, 2010), the Staff concurred in the exclusion of a proposal requesting that the annual compensation and benefits paid to the 300 highest paid officers and all directors be maintained at the prior year's level until the dividend was "restored to the amount paid previously before the reduction for four (4) successive quarters." Similarly, in *Bank of America Corp.* (avail. Feb. 24, 2009), the Staff concurred in the exclusion of a proposal requesting that senior management reduce its compensation by 50% until the company's common stock dividend was restored. And, in *Wachovia Corp.* (avail. Feb. 17, 2002), the proposal requested that the total compensation for executive officers and directors be reduced until the dividend was at least "\$1.92 per share for a minimum of one year." The Staff concurred that the company could exclude the proposal under Rule 14a-8(i)(13) because it "relates to specific amounts of dividends."<sup>5</sup> As with the proposals in *Wells Fargo*, *Bank of America* and *Wachovia*, the Proposal establishes a minimum amount of cash dividends by seeking to prohibit "raises, bonuses or stock options . . . when the dividends fall below a dollar a share." By requiring that raises, bonuses and stock options be suspended when dividends fall below "a dollar a share," the Proposal essentially creates an incentive for the Board to keep the Company's dividends above \$1.00 per share. Therefore, the Proposal relates to a specific and quantifiable amount of cash dividends and may be excluded under Rule 14a-8(i)(13).

The Staff also has permitted the exclusion of stockholder proposals that would establish a formula for determining dividends, such as a request that dividends be increased over their current amount. For example, the proposal in *Duke Energy Corp.* (avail. Jan. 9, 2002) asked the company's board "to distribute earnings more equitably, to include dividend increases for shareholders, by adjusting, e.g., investments for growth, or executive salary increases and awards, so that shareholders may benefit in a more immediate and fungible way (i.e., higher dividends with higher profits and/or higher executive compensation) from the company's success." The Staff concurred that the proposal could be excluded, noting that "the proposal appears to amount to a formula that would result in a specific dividend amount." Similarly, in *DPL Inc.* (avail. Jan 11, 2002), the proposal asked the company to match the five most highly compensated executive officers' bonus and long-term compensation awards above a

---

<sup>5</sup> See also *The Boeing Co.* (avail. Feb. 7, 1998); *Northeast Utilities Service Co.* (avail. Mar. 3, 1997); *Central Vermont Public Service Corp.* (avail. Nov. 30, 1995); *Banknorth Group, Inc.* (avail. Feb. 16, 1995); *SCEcorp* (avail. Jan. 24, 1995); *UJB Financial Corp.* (avail. Mar. 4, 1994) (in each case, the Staff concurred in the exclusion under Rule 14a-8(i)(13) or its predecessor of a stockholder proposal that linked compensation with a specific amount of dividends).

# GIBSON DUNN

Office of Chief Counsel  
Division of Corporation Finance  
December 23, 2013  
Page 9

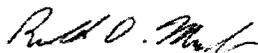
stated threshold with increased dividends. The Staff again concurred that the proposal could be excluded because “the proposal appears to include a formula that would result in a specific dividend amount.”<sup>6</sup> As with the proposal in *Duke Energy*, the Proposal includes a separate sentence that sets forth a formula for dividends, requiring the Company’s Board of Directors to “seek higher dividends for the investors.” Also, similar to the proposal that was excludable in *DPL*, the Proposal ties the requirement for higher dividends to employee compensation by stating, “if management seeks raises, bonus[es] or stock options.” Therefore, in accordance with the precedent discussed above, we believe the Proposal is excludable under Rule 14a-8(i)(13).

## CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its 2014 Proxy Materials pursuant to Rules 14a-8(b) and 14a-8(f)(1), Rule 14a-8(i)(7) and Rule 14a-8(i)(13).

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to [shareholderproposals@gibsondunn.com](mailto:shareholderproposals@gibsondunn.com). If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8671 or Jennifer E. Bennett, the Company’s Associate General Counsel and Assistant Corporate Secretary, at (980) 388-5022.

Sincerely,



Ronald O. Mueller

Enclosures

cc: Jennifer E. Bennett, Bank of America Corporation  
Theodore Bernat

101583409.13

---

<sup>6</sup> See also *International Business Machines Corp.* (avail. Jan. 2, 2001) (concurring in the exclusion of a stockholder proposal that requested an “equal or greater percentage of the dividend earnings per share each year”).

GIBSON DUNN

**EXHIBIT A**

Theodore Bernat

\*\*\*FISMA & OMB Memorandum M-07-16\*\*\*

August 8 2013

OFFICE OF THE

AUG 12 2013

CORPORATE SECRETARY

Dear Mr Johnston/Bank of America Corp

I am writing once again as a stockholder with the following proposal for the Companys 2014 Annual Meeting is as follows:

**PROPOSAL:** No raises, bonuses or stock options be granted when the dividends fall below a dollar a share. This proposal should be voted on by all stock holders. The board needs to seek higher dividends for the investors if management seeks raises, bonus or stock options

**OPTION:** I do intend on keeping my stocks (holder of 348 shares) which entitles me to vote. I do meet the criteria of \$2000.00 market value.

**SUPPORTING STATEMENT:** The 2012 Annual Report has stated raises for upper management and the board without share holders interventions for raises on their shares NOT FAIR

Sincerely,



Theodore Bernat  
Bank of America  
Stock Holder

GIBSON DUNN

**EXHIBIT B**

July 16 2013

Proposal: SEC Rule 14a-8

Theodore Bernat

\*\*\*FISMA & OMB Memorandum M-07-16\*\*\*

OFFICE OF THE

JUL 23 2013

CORPORATE SECRETARY

When the dividends fall below a dollar a share:

I propose that no raises,bonus or stock options be granted.

When other finical banks have a higher market value and their dividends are greater than a "penny" a share (insult to an investor),then I suggest that this proposal be voted on by stock holders

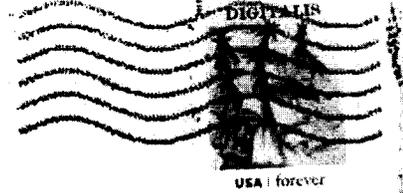
When upper management seeks raises.....Then: Why does the board not seek higher dividends for investors ?



\*\*\*FISMA & OMB Memorandum M-07-16\*\*\*

PROVIDENCE RI 028

17 JUL 2013 PM 5 L



Corporate Secretary at Hearst Tower  
214 North Tryon St.  
NC 28255  
Charlotte North Carolina 28255



\*\*\*FISMA & OMB Memorandum M-07-16\*\*\*

GIBSON DUNN

**EXHIBIT C**

Erin L.C. Johnston  
Assistant General Counsel,  
Assistant Corporate Secretary  
Office of the Corporate Secretary

August 5, 2013

**VIA OVERNIGHT MAIL**

Theodore Bernat

\*\*\*FISMA & OMB Memorandum M-07-16\*\*\*

Dear Mr. Bernat:

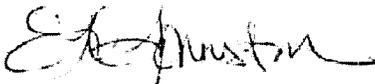
I am writing on behalf of Bank of America Corporation (the "Company"), which received on July 23, 2013, your correspondence titled "Proposal: SEC Rule 14a-8."

Your correspondence appears to be a stockholder proposal for consideration at the Company's 2014 Annual Meeting of Stockholders (the "Proposal"). However, please clarify to us which text in your correspondence is intended to constitute the text of your Rule 14a-8 Proposal, and also clarify whether any part of your correspondence is intended to constitute a supporting statement that would appear with your Proposal if the Proposal is included in the proxy materials for the Company's 2014 Annual Meeting of Stockholders.

In addition, the Proposal contains certain procedural deficiencies, which Securities and Exchange Commission ("SEC") regulations require us to bring to your attention. Rule 14a-8(b) under the Securities Exchange Act of 1934, as amended, provides that stockholder proponents must have continuously held at least \$2,000 in market value, or 1%, of a company's shares entitled to vote on the proposal for at least one year as of the date the stockholder proposal was submitted. Rule 14a-8(b) also requires a stockholder to provide the Company with a written statement that he or she intends to continue to hold the requisite number of shares through the date of the stockholders' meeting at which the Proposal will be voted on by the stockholders. Your correspondence did not include such a statement. To remedy this defect, you must submit a written statement that you intend to continue holding the requisite number of Company shares through the date of the Company's 2014 Annual Meeting of Stockholders.

The SEC's rules require that your response to this letter be postmarked or transmitted electronically no later than 14 calendar days from the date you receive this letter. Please address any response to me at 214 North Tryon Street, Mail Code: NC1-027-20-05, Charlotte, NC 28255-0001. Alternatively, you may transmit any response by facsimile to me at (704) 409-0350.

Sincerely,



Erin L.C. Johnston  
Assistant General Counsel  
Assistant Corporate Secretary

KM#

## Rule 14a-8 – Shareholder Proposals

---

This section addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders. In summary, in order to have your shareholder proposal included on a company's proxy card, and included along with any supporting statement in its proxy statement, you must be eligible and follow certain procedures. Under a few specific circumstances, the company is permitted to exclude your proposal, but only after submitting its reasons to the Commission. We structured this section in a question-and-answer format so that it is easier to understand. The references to "you" are to a shareholder seeking to submit the proposal.

(a) *Question 1: What is a proposal?* A shareholder proposal is your recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders. Your proposal should state as clearly as possible the course of action that you believe the company should follow. If your proposal is placed on the company's proxy card, the company must also provide in the form of proxy means for shareholders to specify by boxes a choice between approval or disapproval, or abstention. Unless otherwise indicated, the word "proposal" as used in this section refers both to your proposal, and to your corresponding statement in support of your proposal (if any).

(b) *Question 2: Who is eligible to submit a proposal, and how do I demonstrate to the company that I am eligible?*

(1) In order to be eligible to submit a proposal, you must have continuously held at least \$2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal. You must continue to hold those securities through the date of the meeting.

(2) If you are the registered holder of your securities, which means that your name appears in the company's records as a shareholder, the company can verify your eligibility on its own, although you will still have to provide the company with a written statement that you intend to continue to hold the securities through the date of the meeting of shareholders. However, if like many shareholders you are not a registered holder, the company likely does not know that you are a shareholder, or how many shares you own. In this case, at the time you submit your proposal, you must prove your eligibility to the company in one of two ways:

(i) The first way is to submit to the company a written statement from the "record" holder of your securities (usually a broker or bank) verifying that, at the time you submitted your proposal, you continuously held the securities for at least one year. You must also include your own written statement that you intend to continue to hold the securities through the date of the meeting of shareholders; or

(ii) The second way to prove ownership applies only if you have filed a Schedule 13D (§240.13d-101), Schedule 13G (§240.13d-102), Form 3 (§249.103 of this chapter), Form 4 (§249.104 of this chapter) and/or Form 5 (§249.105 of this chapter), or amendments to those documents or updated forms, reflecting your ownership of the shares as of or before the date on which the one-year eligibility period begins. If you have filed one of these documents with the SEC, you may demonstrate your eligibility by submitting to the company:

(A) A copy of the schedule and/or form, and any subsequent amendments reporting a change in your ownership level;

(B) Your written statement that you continuously held the required number of shares for the one-year period as of the date of the statement; and

(C) Your written statement that you intend to continue ownership of the shares through the date of the company's annual or special meeting.

(c) *Question 3:* How many proposals may I submit? Each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting.

(d) *Question 4:* How long can my proposal be? The proposal, including any accompanying supporting statement, may not exceed 500 words.

(e) *Question 5:* What is the deadline for submitting a proposal?

(1) If you are submitting your proposal for the company's annual meeting, you can in most cases find the deadline in last year's proxy statement. However, if the company did not hold an annual meeting last year, or has changed the date of its meeting by more than 30 days from last year's meeting, you can usually find the deadline in one of the company's quarterly reports on Form 10-Q (§249.308a of this chapter), or in shareholder reports of investment companies under §270.30d-1 of this chapter of the Investment Company Act of 1940. In order to avoid controversy, shareholders should submit their proposals by means, including electronic means, that permit them to prove the date of delivery.

(2) The deadline is calculated in the following manner if the proposal is submitted for a regularly scheduled annual meeting. The proposal must be received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting. However, if the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the deadline is a reasonable time before the company begins to print and send its proxy materials.

(3) If you are submitting your proposal for a meeting of shareholders other than a regularly scheduled annual meeting, the deadline is a reasonable time before the company begins to print and send its proxy materials.

(f) *Question 6:* What if I fail to follow one of the eligibility or procedural requirements explained in answers to Questions 1 through 4 of this section?

(1) The company may exclude your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it. Within 14 calendar days of receiving your proposal, the company must notify you in writing of any procedural or eligibility deficiencies, as well as of the time frame for your response. Your response must be postmarked, or transmitted electronically, no later than 14 days from the date you received the company's notification. A company need not provide you such notice of a deficiency if the deficiency cannot be remedied, such as if you fail to submit a proposal by the company's properly determined deadline. If the company intends to exclude the proposal, it will later have to make a submission under §240.14a-8 and provide you with a copy under Question 10 below, §240.14a-8(j).

(2) If you fail in your promise to hold the required number of securities through the date of the meeting of shareholders, then the company will be permitted to exclude all of your proposals from its proxy materials for any meeting held in the following two calendar years.

(g) *Question 7: Who has the burden of persuading the Commission or its staff that my proposal can be excluded? Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal.*

(h) *Question 8: Must I appear personally at the shareholders' meeting to present the proposal?*

(1) Either you, or your representative who is qualified under state law to present the proposal on your behalf, must attend the meeting to present the proposal. Whether you attend the meeting yourself or send a qualified representative to the meeting in your place, you should make sure that you, or your representative, follow the proper state law procedures for attending the meeting and/or presenting your proposal.

(2) If the company holds its shareholder meeting in whole or in part via electronic media, and the company permits you or your representative to present your proposal via such media, then you may appear through electronic media rather than traveling to the meeting to appear in person.

(3) If you or your qualified representative fail to appear and present the proposal, without good cause, the company will be permitted to exclude all of your proposals from its proxy materials for any meetings held in the following two calendar years.

(i) *Question 9: If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal?*

(1) *Improper under state law:* If the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization;

*Note to paragraph (i)(1):* Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.

(2) *Violation of law:* If the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject;

*Note to paragraph (i)(2):* We will not apply this basis for exclusion to permit exclusion of a proposal on grounds that it would violate foreign law if compliance with the foreign law would result in a violation of any state or federal law.

(3) *Violation of proxy rules:* If the proposal or supporting statement is contrary to any of the Commission's proxy rules, including §240.14a-9, which prohibits materially false or misleading statements in proxy soliciting materials;

(4) *Personal grievance; special interest:* If the proposal relates to the redress of a personal claim or grievance against the company or any other person, or if it is designed to result in a benefit to you, or to further a personal interest, which is not shared by the other shareholders at large;

(5) *Relevance:* If the proposal relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business;

(6) *Absence of power/authority:* If the company would lack the power or authority to implement the proposal;

(7) *Management functions*: If the proposal deals with a matter relating to the company's ordinary business operations;

(8) *Director elections*: If the proposal:

- (i) Would disqualify a nominee who is standing for election;
- (ii) Would remove a director from office before his or her term expired;
- (iii) Questions the competence, business judgment, or character of one or more nominees or directors;
- (iv) Seeks to include a specific individual in the company's proxy materials for election to the board of directors; or
- (v) Otherwise could affect the outcome of the upcoming election of directors.

(9) *Conflicts with company's proposal*: If the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting;

*Note to paragraph (i)(9)*: A company's submission to the Commission under this section should specify the points of conflict with the company's proposal.

(10) *Substantially implemented*: If the company has already substantially implemented the proposal;

*Note to paragraph (i)(10)*: A company may exclude a shareholder proposal that would provide an advisory vote or seek future advisory votes to approve the compensation of executives as disclosed pursuant to Item 402 of Regulation S-K (§229.402 of this chapter) or any successor to Item 402 (a "say-on-pay vote") or that relates to the frequency of say-on-pay votes, provided that in the most recent shareholder vote required by §240.14a-21(b) of this chapter a single year ( i.e., one, two, or three years) received approval of a majority of votes cast on the matter and the company has adopted a policy on the frequency of say-on-pay votes that is consistent with the choice of the majority of votes cast in the most recent shareholder vote required by §240.14a-21(b) of this chapter.

(11) *Duplication*: If the proposal substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting;

(12) *Resubmissions*: If the proposal deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding 5 calendar years, a company may exclude it from its proxy materials for any meeting held within 3 calendar years of the last time it was included if the proposal received:

- (i) Less than 3% of the vote if proposed once within the preceding 5 calendar years;
- (ii) Less than 6% of the vote on its last submission to shareholders if proposed twice previously within the preceding 5 calendar years; or
- (iii) Less than 10% of the vote on its last submission to shareholders if proposed three times or more previously within the preceding 5 calendar years; and

(13) *Specific amount of dividends*: If the proposal relates to specific amounts of cash or stock dividends.

(j) *Question 10*: What procedures must the company follow if it intends to exclude my proposal?

(1) If the company intends to exclude a proposal from its proxy materials, it must file its reasons with the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The company must simultaneously provide you with a copy of its submission. The Commission staff may permit the company to make its submission later than 80 days before the company files its definitive proxy statement and form of proxy, if the company demonstrates good cause for missing the deadline.

(2) The company must file six paper copies of the following:

(i) The proposal;

(ii) An explanation of why the company believes that it may exclude the proposal, which should, if possible, refer to the most recent applicable authority, such as prior Division letters issued under the rule; and

(iii) A supporting opinion of counsel when such reasons are based on matters of state or foreign law.

(k) *Question 11*: May I submit my own statement to the Commission responding to the company's arguments? Yes, you may submit a response, but it is not required. You should try to submit any response to us, with a copy to the company, as soon as possible after the company makes its submission. This way, the Commission staff will have time to consider fully your submission before it issues its response. You should submit six paper copies of your response.

(l) *Question 12*: If the company includes my shareholder proposal in its proxy materials, what information about me must it include along with the proposal itself?

(1) The company's proxy statement must include your name and address, as well as the number of the company's voting securities that you hold. However, instead of providing that information, the company may instead include a statement that it will provide the information to shareholders promptly upon receiving an oral or written request.

(2) The company is not responsible for the contents of your proposal or supporting statement.

(m) *Question 13*: What can I do if the company includes in its proxy statement reasons why it believes shareholders should not vote in favor of my proposal, and I disagree with some of its statements?

(1) The company may elect to include in its proxy statement reasons why it believes shareholders should vote against your proposal. The company is allowed to make arguments reflecting its own point of view, just as you may express your own point of view in your proposal's supporting statement.

(2) However, if you believe that the company's opposition to your proposal contains materially false or misleading statements that may violate our anti-fraud rule, §240.14a-9, you should promptly send to the Commission staff and the company a letter explaining the reasons for your view, along with a copy of the company's statements opposing your proposal. To the extent possible, your letter should include specific factual information demonstrating the inaccuracy of the company's claims. Time permitting, you may wish to try to work out your differences with the company by yourself before contacting the Commission staff.

(3) We require the company to send you a copy of its statements opposing your proposal before it sends its proxy materials, so that you may bring to our attention any materially false or misleading statements, under the following timeframes:

(i) If our no-action response requires that you make revisions to your proposal or supporting statement as a condition to requiring the company to include it in its proxy materials, then the company must provide you with a copy of its opposition statements no later than 5 calendar days after the company receives a copy of your revised proposal; or

(ii) In all other cases, the company must provide you with a copy of its opposition statements no later than 30 calendar days before its files definitive copies of its proxy statement and form of proxy under §240.14a-6.

GIBSON DUNN

**EXHIBIT D**

Page 35 redacted for the following reason:

-----  
\*\*\*FISMA & OMB Memorandum M-07-16\*\*\*