

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9682 / November 25, 2014

In the Matter of

BANK OF AMERICA, N.A. and

**MERRILL LYNCH, PIERCE, FENNER &
SMITH, INC.**

Respondents.

**ORDER UNDER RULE 506(d) OF THE
SECURITIES ACT OF 1933 GRANTING
A WAIVER OF THE RULE 506(d)(1)(ii)
DISQUALIFICATION PROVISION**

I.

Bank of America, N.A. and Merrill Lynch, Pierce, Fenner & Smith Inc. (the “Respondents”), submitted a letter dated November 18, 2014, requesting that the Securities and Exchange Commission (the “Commission”) grant a waiver of disqualification under Rule 506(d)(1)(ii) of Regulation D under the Securities Act of 1933 (the “Securities Act”) upon entry of the final judgment (the “Judgment”) by the United States District Court for the Western District of North Carolina Charlotte Division (Civil Action No. 3:13-cv-447). The Judgment enjoins the Respondents from committing violations of Sections 17(a)(2) and (3), and Section 5(b)(1) of the Securities Act of 1933.

Rule 506(d)(2)(ii) of Regulation D provides that disqualification “shall not apply. . . upon a showing of good cause and without prejudice to any other action by the Commission, if the Commission determines that it is not necessary under the circumstances that an exemption be denied.” The Commission has determined that as part of the Rule 506(d)(2)(ii) showing of good cause, the Respondents will comply with the following:

- A. Retain, at Respondents' expense and within sixty (60) days of the issuance of this Order, a qualified independent consultant (the "Consultant") not unacceptable to the Staff. Respondents shall require the Consultant to conduct a comprehensive review of the policies and procedures relating to compliance with Rule 506 of Regulation D by Respondents and the subsidiaries of Respondents conducting any activities that would otherwise be disqualified pursuant to the Judgment (together with Respondents, the "Rule 506 Entities").
- B. Cooperate fully with the Consultant, including providing the Consultant with access to the Rule 506 Entities' files, books, records, and personnel as reasonably requested for the review, obtaining the cooperation of employees or other persons under Respondents' control, and permitting the Consultant to engage such assistance (whether clerical, legal, technological, or of any other expert nature) as necessary to achieve the purposes of the retention.
- C. Require the Consultant to complete its review and submit a written preliminary report ("Preliminary Report") to the Respondents and Commission staff within three hundred and sixty (360) days of the issuance of this Order. Respondents shall require that the Consultant test the Rule 506 Entities' policies and procedures relating to Rule 506 of Regulation D by conducting a statistically valid random sampling of transactions conducted in reliance on Rule 506 of Regulation D. Respondents also shall require the Preliminary Report to identify any instances of potential non-compliance with the policies and procedures relating to Rule 506 identified in the Preliminary Report, include a description of the review performed, the conclusions reached, recommendations for any changes in or improvements to the Rule 506 Entities' policies and procedures, and a procedure for implementing such recommended changes.
- D. Within one hundred and eighty (180) days of receipt of the Preliminary Report, adopt and implement all recommendations contained in the Preliminary Report; provided, however, that as to any recommendation that Respondents consider to be, in whole or in part, unduly burdensome or impractical, Respondents may submit in writing to the Consultant and Commission staff, within thirty (30) days of receiving the Preliminary Report, an alternative policy, practice, or procedure designed to achieve the same objective or purpose. Within forty-five (45) days of receiving the Preliminary Report, the Respondents and the Consultant shall attempt in good faith to reach an agreement relating to each recommendation that the Respondents consider to be unduly burdensome or impractical. Within fifteen (15) days after the discussion and evaluation by Respondents and the Consultant, Respondents shall require that the Consultant inform Respondents and Commission staff of the Consultant's final determination concerning any

recommendation that Respondents consider unduly burdensome or impractical, and Respondents shall abide by the determinations of the Consultant and adopt and implement all recommendations within the 180-day time period set forth in this paragraph. Respondents shall notify the Consultant and Commission staff, in a writing signed by the Respondents' principal executive officers or principal legal officers, when the recommendations have been implemented.

- E. Within one hundred and eighty (180) days from the date of the Respondents' implementation of the recommendations contained in the Preliminary Report, require the Consultant to submit a final written report ("Final Report") to the Respondents, including their principal executive officers and principal legal officers, and Commission staff. The Consultant shall certify in the Final Report that the Respondents have implemented the recommendations contained in the Preliminary Report and that the Respondent's policies and procedures designed to ensure compliance by the Rule 506 Entities with their obligations under Rule 506 of Regulation D are reasonably designed to achieve their stated purpose.
- F. On or after the date that the Respondents have adopted and implemented all recommendations referenced in paragraph D of this Order, and in no event earlier than the date when the Final Report is delivered pursuant to paragraph E of this Order, the Respondents may apply to the Commission for a waiver covering the remaining 30 months in the disqualification period that are not covered by this Order.
- G. Require the Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with the Rule 506 Entities, or any of their present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. The agreement will also provide that the Consultant will require that any firm with which the Consultant is affiliated or of which the Consultant is a member, and any person engaged to assist the Consultant in performance of the Consultant's duties under this Order shall not, without prior written consent of Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with the Rule 506 Entities, or any of their present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.
- H. To ensure the independence of the Consultant, Respondents shall not have the authority to terminate the Consultant without prior written approval of Commission staff and shall compensate the Consultant and persons engaged

to assist the Consultant for services rendered pursuant to this Order at their reasonable and customary rates.

Based on the foregoing, Commission has determined that pursuant to Rule 506(d)(2)(ii) of Regulation D under the Securities Act a showing of good cause has been made that it is not necessary under the circumstances that the exemptions be denied.

Accordingly, **IT IS ORDERED**, pursuant to Rule 506(d) of Regulation D under the Securities Act, that a waiver from the application of the disqualification provision of Rule 506(d)(1)(ii) under the Securities Act for a period of 30 months resulting from the entry of the Judgment is hereby granted to the Respondents.

By the Commission.

Brent J. Fields
Secretary