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Advance Copy Via E-Mail

Sebastian Gomez Abero, Esq.
Chief, Office of Small Business Policy
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

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

Dear Mr. Gomez Abero:

We are writing on behalf of Bank of America, N.A. ("BANA"), Banc of America Mortgage Securities, Inc. ("BOAMS"), and Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") (successor by merger to Banc of America Securities LLC ("BAS")) (collectively, the "Respondents"), wholly owned subsidiaries of Bank of America Corporation ("BAC") that entered into a settlement with the U.S. Securities and Exchange Commission ("SEC" or "Commission") in connection with the above-captioned proceeding ("BOAMS Action").[1] Pursuant to the terms of the settlement, it is anticipated that a Judgment will be entered by the District Court. The settlement follows an investigation by the Commission concerning the offer and sale of certain residential mortgage-backed securities ("RMBS") to investors. As described in detail below, this letter requests for Merrill Lynch and BANA (the "Applicants"), pursuant to Rule 506 of Regulation D ("Rule 506"), adopted under the Securities Act of 1933, as amended (the "Securities Act"), a waiver of any disqualifications from relying on exemptions under Rule 506 that will be applicable as the result of entry of injunctions described below in the Background section of this letter.[2]

Merrill Lynch currently acts, and in the future desires to continue to act, as (a) a "placement agent" for private placements of securities offered by third-party issuers ("Private Placements")[3]; and (b) "solicitor" or "promoter" pursuant to selling agreements

[1] *See* Exhibit B, Department of Justice ("DOJ") Settlement Agreement (Aug. 21, 2014).

[2] We are not seeking a waiver on behalf of BOAMS.

[3] Third-party issuers may offer a range of products such as, but not limited to, equity, debt and other securities.

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for funds sponsored, administered and/or advised by a Merrill Lynch affiliate (Merrill Lynch Alternative Investments ("MLAI"))[4] and for funds managed by third-parties (together the "Funds"). Merrill Lynch is the only broker-dealer through which MLAI distributes its Funds. Private Placements and Funds are offered and sold in reliance on the exemptions under Rule 506.[5]

BANA acts, and in the future desires to continue to act, as "solicitor" or "promoter" for Private Placements and Funds sold to its clients as described in greater detail below.

The issuers of Private Placements, the Funds and MLAI as sponsor, manager and/or investment adviser of Funds, have entered into placement agent agreements and selling agreements, as appropriate to each product, with Merrill Lynch and/or BANA.

Merrill Lynch offers the Private Placements and Funds to its qualified high net worth and institutional customers and BANA offers certain Funds to clients of its U.S. Trust line of business.[6]

Merrill Lynch and BANA, as the Applicants respectfully request, pursuant to Rule 506(d)(2)(ii), waivers of any disqualifications from relying on exemptions under Rule 506 as a result of the entry of the judgment enjoining the Respondents ("Injunctions").[7] The Commission has the authority under Rule 506(d)(2)(ii) to waive the Regulation D

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[4] MLAI is registered as an investment adviser under the Investment Advisers Act of 1940, as amended ("Advisers Act") and, among other things, serves as the manager to certain proprietary domestic Funds, sponsor to certain proprietary offshore Funds and investment adviser to certain funds of funds that are themselves Funds as defined in this letter. MLAI was not affiliated with BAC or any of its affiliates or subsidiaries at the time the alleged conduct occurred. MLAI has been an affiliate of Merrill Lynch since 1986, long before Merrill Lynch was acquired by BAC.

[5] Many of the Funds and issuers of Private Placements that sell their securities through Merrill Lynch in Rule 506 offerings have contracts that predate the acquisition by BAC of Merrill Lynch, and the majority of the placement agent, solicitor and promoter (*i.e.*, selling) agreements that the Funds and issuers of Private Placements have or will have entered into with Merrill Lynch were negotiated without taking into account the possible disqualification of Merrill Lynch under Rule 506.

[6] The customers to whom Merrill Lynch offers the Funds are all accredited investors and the substantial majority are "qualified purchasers." The US Trust clients to whom BANA offers the Funds also are all accredited investors and the substantial majority of whom are qualified purchasers. References in this letter to US Trust incorporate the Merrill Lynch Trust Company business.

[7] *See* 17 C.F.R. §§ 230.506(d)(2)(ii).

exemption disqualification upon a showing of good cause that it is not necessary under the circumstances that an exemption be denied. We respectfully submit that Merrill Lynch and BANA have shown good cause, for the reasons provided below.

BACKGROUND

The Staff of the Division of Enforcement ("Enforcement Staff") engaged in settlement discussions with Respondents in connection with allegations made in a complaint that the Commission filed on August 6, 2013, in federal district court (the "Complaint").[8] As a result of these discussions, on August 20, 2014, the Enforcement Staff and Respondents agreed to settle the BOAMS Action. As part of this settlement, the Respondents agreed to consent to the entry of Injunctions under Sections 17(a)(2) and (3) of the Securities Act, and Respondents Merrill Lynch and BOAMS, agreed to the entry of an Injunction with regard to Section 5(b)(1)[9] of the Securities Act, in each case, without admitting or denying the allegations contained in the Complaint from which the Injunctions arise (except as to jurisdiction, which is admitted solely for purposes of the proceedings) (the "Consent").[10] Additionally, "[a]s part of the global settlement, Bank of America agreed to resolve the SEC's original case by paying disgorgement of $109.22 million, prejudgment interest of $6.62 million, and a penalty of $109.22 million."[11] BANA was not named as a defendant in connection with the Commission's Section 5(b)(1) claim and therefore did not consent to entry of an injunction under that section.

In the Complaint, the Commission described two alleged violations of Sections 17(a)(2) and (3) of the Securities Act. First, the Commission alleged that the Respondents underwrote a prime RMBS known as BOAMS 2008-A and failed to comply with its representation that each mortgage underlying the securitization complied with

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

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

[10] The settlement of the BOAMS Action was one of several settlements that were agreed to with various government entities, including the United States Department of Justice, the Securities and Exchange Commission, the Federal Housing Administration (the "FHA"), the Government National Mortgage Association known as "Ginnie Mae"), Federal Deposit Insurance Corporation ("FDIC") and several states on August 20, 2014 (the "Global Settlement"). Only the BOAMS Action, discussed in detail in the Background section of this letter, subjects Respondents to the Rule 506 disqualification. Neither the Global Settlement nor any of its other components subjects Respondents to the Rule 506 disqualification.

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

Respondents' underwriting guidelines. Second, the Commission alleged that Respondents did not disclose the percentage of loans collateralizing BOAMS 2008-A that were originated by third-party mortgage brokers ("wholesale channel loans") and the risks attendant with such loans. Specifically, the Complaint alleged that wholesale channel loans were more likely to have material underwriting errors, become delinquent, fail early in the life of the loan, or to prepay. Finally, the Commission alleged that the Respondents provided investors and the various rating agencies with documents that materially misrepresented material facts about debt to income and original combined loan-to-value ratios for the loans underlying BOAMS 2008-A.

With respect to the alleged violation of Section 5(b)(1) of the Securities Act, the Commission alleged in the Complaint that BAS and BOAMS disclosed preliminary data, including preliminary loan tapes, which reflected the percentage of wholesale channel loans collateralizing BOAMS 2008-A to certain, but not all, investors and that these Respondents did not file this preliminary data with the Commission, as required by Section 5(b)(1) of the Securities Act.[12]

DISCUSSION

Respondents understand that the Injunctions will designate them as "bad actors" for purposes of Rule 506 pursuant to 17 C.F.R. § 230.506(d) resulting in disqualification of the Respondents[13] from Rule 506, unless the disqualification is waived. The Commission has the authority to waive the Rule 506 exemption disqualifications upon a showing of good cause that such disqualifications are not necessary under the circumstances.

Merrill Lynch and BANA respectfully request, pursuant to Rule 506(d)(2)(ii), waivers of any disqualifications from relying on exemptions under Rule 506 as a result of the Injunctions, on the following grounds:

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

[13] The disqualification referenced above would be applicable to Respondents and any issuer for which Respondents serve as predecessor of the issuer, affiliated issuer, director, executive officer, other officer participating in the offering, general partner or managing member of the issuer, beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power, any promoter connected with the issuer in any capacity at the time of such sale, investment manager of an issuer that is a pooled investment fund, person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with the sale of securities, general partner or managing member of such investment manager or solicitor, or any director, executive officer or other officer participating in the offering of any such investment manager or solicitor or general partner or managing member of such investment manager or solicitor.

1. The Alleged Misconduct Was Non-Scienter Based.

The Commission did not allege in the Complaint or the Consent that Respondents acted with scienter or intent to defraud. The Complaint and the Consent allege violations of Sections 17(a)(2) and (3) of the Securities Act, which are civil, non-scienter-based anti-fraud statutes.

2. The Alleged Misconduct Did Not Involve the Failure to Register an Offering Pursuant to Section 5(a) of the Securities Act; While BAS and BOAMS Were Alleged in the Complaint to have Engaged in Conduct that Violated Section 5(b) of the Securities Act, Merrill Lynch will be Enjoined from Violating Section 5(b)(1) of the Securities Act as BAS's Successor by Merger.

In adopting the disqualification provisions in Rule 506(d), the Commission included as a disqualifying event in Rule 506(d)(v)(B) an administrative order of the Commission ("C&D Orders") in which a person is ordered to cease and desist from violating Section 5 of the Securities Act.[14] There is no similar specific provision mandating disqualification when an issuer or other party is enjoined from violating Section 5.[15] We understand, however, that the Commission's concerns reflected in Rule 506(d)(v)(B) could impact its analysis of a waiver request when the disqualification will result from an injunction in which parties are enjoined from violating Section 5 of the Securities Act.

We do not believe that the Injunctions that will enjoin Merrill Lynch and BOAMS from violating Section 5(b)(1) of the Securities Act should impact this waiver request. Although Merrill Lynch and BOAMS will be enjoined in connection with the offer and sale of securities, neither will be enjoined under Section 5(a) of the Securities Act. First, as discussed above in the Background section of this letter, the Commission alleged in the Complaint that BAS, which no longer exists, and BOAMS, which is a Respondent but is not requesting a waiver from Rule 506 disqualification, violated Section 5(b)(1) of the Securities Act. The Complaint did not allege BANA violated Section 5(b)(1), and BANA is not the subject of an injunction prohibiting the violation of Section 5(b)(1) of

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[14] Section 5(b) is a provision relating to the quality of information in a prospectus relating to a security for which a registration statement has been filed (*i.e.*, information provided by an issuer that is not seeking to rely upon Rule 506 or another exemption from Section 5 to offer its securities).

[15] *See* Rule 506(d)(ii) (disqualifying a person subject to an order or judgment of a court of competent jurisdiction that enjoins such person from engaging or continuing to engage in any conduct or practice: (A) in connection with the purchase or sale of any security; (B) involving the making of any false filing with the Commission; or (C) arising out of the conduct of the business of any underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities).

the Securities Act. Furthermore, while Merrill Lynch will be enjoined from violating Section 5(b)(1) of the Securities Act, it is only named as a party in the Complaint and subject to an injunction because it is BAS's successor by merger. The Commission has not alleged that Merrill Lynch actually engaged in any of the alleged misconduct. Indeed, Merrill Lynch was not affiliated with BAS or BOAMS until 2009, and therefore could not have engaged in the alleged misconduct giving rise to the Section 5(b)(1) injunction.[16] Furthermore, the Commission did not allege violations of Section 5(a) of the Securities Act by *any* party.

In addition, in adopting the disqualification resulting from C&D Orders, the Commission discussed the disqualification arising from alleged violations of Section 5 of the Securities Act.[17] While the language of the disqualification refers to Section 5, generally, the Commission stated that it did not believe "that exemptions from registration based on Rule 506 should be available to persons whose prior conduct has resulted in an order to cease and desist from violations of *Section 5's registration requirements." (emphasis added)*[18] These are the requirements found in Section 5(a), rather than Section 5(b) of the Securities Act. As noted, the violations alleged in the Complaint involved Section 5(b)(1) of the Securities Act, a disclosure and filing requirement, not the Securities Act Section 5(a) registration requirements. Merrill Lynch and BOAMS will be enjoined only from violations of Section 5(b)(1) of the Securities Act. Therefore, we do not believe that the Injunctions regarding Section 5(b)(1) of the Securities Act should raise the concerns that would be raised by an injunction regarding Section 5(a).

Therefore, while BOAMS, and Merrill Lynch (strictly as successor to BAS by merger), will be enjoined from violating Section 5(b)(1) of the Securities Act, this should not impact the granting of a waiver from Rule 506 disqualification to BANA and Merrill Lynch.

3. The Alleged Misconduct Was Limited and of Limited Duration.

The duration of the conduct alleged in the Complaint was limited to a short time period. Since then, the Respondents' practices with regard to RMBS have undergone significant change (described below) and will continue to evolve as they implement the requirements of Regulation AB II.[19]

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[16] Merrill Lynch was acquired by BAC in January 2009 and was not merged into Merrill Lynch until 2010. Only a limited number of BAS personnel remain at Bank of America.

[17] *See* Securities Act Release No. 9414 (July 10, 2013), 78 FR 44730, 44765-66 (July 24, 2013).

[18] *Id.*

[19] Securities Act Release No. 9638 (Sept. 4, 2014).

The alleged misconduct related to a single RMBS transaction that closed in 2008 -- six years ago.[20] The alleged conduct relates only to disclosures in one specific RMBS offering sponsored by BANA, underwritten by BAS and offered by BOAMS. And BANA and Merrill Lynch have instituted policies and procedures (described in detail below) to address the issues raised by BOAMS 2008-A. Finally, BOAMS 2008-A was BOAMS's last RMBS issuance; BOAMS has been dormant ever since, and is not an Applicant for a waiver from the disqualifications under Rule 506(d).

4. The Senior Personnel Involved in the Conduct are No Longer Employed by Bank of America.

The Commission did not name any individuals in the Complaint or otherwise. The Complaint does refer to two senior personnel by title: a BOAMS Principal[21] and a BAS Managing Director.[22] The Commission alleged that "[d]espite the BOAMS Principal and others at the Bank of America Entities being on notice of the significant increase in serious or critical exceptions documented in the monthly QARs, the BOAMS 2008-A Offering Documents contained no disclosure of the heightened risk of serious or critical underwriting exceptions for wholesale channel loans."[23] The Commission also alleged that "[n]either the BAS Managing Director, the BOAMS Principal, or anyone else involved with BOAMS 2008-A, took any steps to ensure or even inquire into whether any of the loans in BOAMS 2008-A had been reviewed by BANA's quality assurance group."

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[20] The RMBS transactions was originally offered in January 2008. The substantial majority of the offering was sold in January 2008.

[21] The Commission alleged that the "BOAMS Principal was a Senior Vice President of BANA, who at all relevant times, had responsibility for reviewing the offering documents for BANA and managing the BOAMS' filings with the Commission. The BOAMS Principal (a) assisted with mortgage loan securitizations, (b) reviewed and signed public filings for RMBS, including the offering documents for BOAMS 2008-A and (c) was an agent of BAS responsible for investor relations." *See* Complaint.

[22] The Commission alleged that the "BAS Managing Director was a Senior Vice President of BANA [and] president and Chief Executive Officer of BOAMS." The Commission alleged that the quarterly assurance reports ("QARs") "were regularly received by the managing director of BAS who was responsible for creating and supervising BAS' RMBS program. The Commission also alleged that "at all relevant times, the BAS Managing Director was in charge of the BAS Mortgage Finance Group, responsible for the underwriting of BOAMS 2008-A [and] had supervisory responsibility for structuring BOAMS 2008-A and for preparing the offering documents." *See* Complaint.

[23] *See* Complaint.

Neither of these individuals has been employed by a Bank of America entity since 2011.

5. Remedial Steps Were, and Continue to be, Undertaken.

As discussed above, BOAMS 2008-A was BOAMS's last RMBS issuance. BOAMS has been dormant since the issuance closed. Even though neither BAC nor its affiliates ("Bank of America") currently are involved in the public RMBS market, Bank of America, on its own initiative, has undertaken a number of remedial efforts in the years since the issuance of BOAMS 2008-A.

In 2010, on its own initiative, Bank of America Merrill Lynch ("BAML"),[24] in collaboration with outside counsel, revised, enhanced and adopted policies and procedures with regard to all asset backed securities ("ABS"), including the RMBS that are the subject of the Injunctions. Outside counsel worked with BAML to develop policies and procedures reasonably designed to ensure that BAML's procedures for ABS reflected the disclosure requirements of Sections 943 and 945 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), and met or exceeded industry best practices. These changes include, but are not limited to, the following:

- Requiring the determination at the beginning of a transaction or, at the latest, before announcement or printing of a "red herring," what disclosures of pre-offering review will be made, including analysis of the processes and procedures for complying with Rule 193, the scope of any sampling employed, the role of any third parties in the review, the method for describing exceptions to underwriting criteria, and the presence of subjective determinations in underwriting criteria;

- Mandating that, if an investor's return is materially dependent upon third-party credit enhancement (including through a derivative instrument) or any other derivative contract, additional financial disclosure about the counterparty is required in the prospectus and in the issuer's Exchange Act reports;

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[24] "Bank of America Merrill Lynch" or "BAML" is the marketing name for the global banking and global markets businesses of Bank of America. Lending, derivatives, and other commercial banking activities are performed globally by banking affiliates of BAC, including BANA, member FDIC. Securities, strategic advisory, and other investment banking activities are performed globally by investment banking affiliates of BAC, including, in the United States, Merrill Lynch and Merrill Lynch Professional Clearing Corp., which are registered broker dealers and members of FINRA and SIPC, and, in other jurisdictions, by locally registered entities.

- Detailing how sponsors must disclose current and historical information regarding demands for the repurchase of assets due to the breach of representations and warranties;

- Requiring the approval of a select committee (described below) to review and approve engagement letters with nationally recognized statistical rating organizations ("NRSROs") to ensure that information is made available to both hired and non-hired NRSROs in the proper manner; and

- Confirming and reinforcing policies that require and facilitate the timely filing of prospectuses as necessary to meet the requirements of Section 5(b)(1) of the Securities Act.[25]

These policies and procedures, which are currently in effect, are designed to provide reasonable assurance that the disclosure with regard to the pool assets is accurate and complete in all material respects as and when required by Rule 193, including information about the origination channel. BAML has also, on its own initiative, significantly expanded the governance policies and procedures for ABS securities offerings, by requiring the approval of a select committee for all new ABS transactions. The committee is comprised of senior business and risk executives, with participation from legal, compliance and finance. The committee's mandate is to assess counterparty, credit, reputational and other potential risks in reviewing, evaluating and determining whether to approve participation in any ABS, including RMBS, transactions. Any BAML entity, including, but not limited to Merrill Lynch, BANA or BOAMS, that currently or in the future engages in ABS, including RMBS, transactions, is required to follow these new policies and procedures.

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[25] In addition, Bank of America has sponsored Commercial Mortgage-Backed Securities ("CMBS") deals since the mid-1990s, and the practices regarding diligence and disclosure relating to CMBS deals have been enhanced. These enhancements include but are not limited to the following: Since 2010, Bank of America has included greater detail on the underlying mortgage loans in certain sections of the disclosure including the "Risk Factors" and the "Description of the Mortgage Loans." Bank of America now includes a summary of the Top 15 Mortgage Loans (based on principal balance) in the disclosure rather than the Top 10 Mortgage Loans. Bank of America also notes in the offering documents the exceptions to the representations and warranties in order to facilitate investor review. Bank of America has voluntarily complied with SEC commentary made to other registrants such as those concerning filing documentation relating to split loans. In addition, Bank of America, in conjunction with its partner sponsors for public CMBS deals, has (a) implemented an Investor Q&A Forum which allows investors to ask questions of CMBS deal participants, and (b) adopted a Certificateholder Registry which allows investors to request names of other certificateholders to facilitate communications between investors.

In addition to the remedial efforts described above, on its own initiative, BAML, on behalf of its constituent entities has taken the following steps:

- BAML has engaged outside counsel to review, enhance and update the ABS policies and procedures, including ABS policies and procedures that further enhance compliance with Sections 5, 17(a)(2) and 17(a)(3) of the Securities Act;

- BAML has engaged outside counsel to further update the policies and procedures for Regulation AB II, adopted on August 27, 2014;[26]

- For future transactions in which BANA sponsors RMBS, if any, BAML will comply with the updated ABS policies and procedures, consistent with and when required by the requirements of the Dodd-Frank Act, Regulation AB and Regulation AB II;

- BAML is actively involved in industry initiatives (Securities Industry and Financial Markets Association ("SIFMA") and the Structured Finance Industry Group ("SFIG")) to develop RMBS issuer "best practices," including for disclosure; and

- If BAML decides in the future to become active as a sponsor of RMBS in the public market, then prior to doing so, the relevant business groups would receive training as to BAML's then current policies and procedures with regard to sponsoring such RMBS.

The efforts described above that BAML has undertaken and continues to undertake are, and in the future will be, reasonably designed to result in timely filing and additional disclosure, such as the disclosure that is the subject of the alleged misconduct, if relevant to an offering.

6. *Impact of Waiver Denial on Applicants, their Affiliates, the Funds, Issuers of Private Placements and, most importantly, their Customers/Clients.*

Disqualification of Applicants pursuant to Rule 506(d) would have a significant adverse impact on their customers and clients, as well as on the Applicants, their affiliates, such as MLAI, and on the Funds, including, but not limited to, Funds sponsored and/or administered by MLAI, Funds managed by third parties, and issuers of Private Placements that have retained, or in the future may retain, an Applicant, such as Merrill

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[26] Securities Act Release No. 9638 (Sept. 4, 2014).

Lynch, in connection with transactions that rely on the exemptions under Rule 506(b) or (c).[27]

a. Impact on Merrill Lynch Customers and BANA Clients.

Merrill Lynch and BANA offer access to Funds and Private Placements to approximately 415,000[28] Merrill Lynch eligible high-net-worth and institutional customers and BANA clients representing a combined net worth of at least $1.6 trillion.[29] Over 46,000 Merrill Lynch households and other accounts currently hold interests in Funds sold by Merrill Lynch.[30] Such access affords eligible high net worth and institutional customers an extensive range of investment options in addition to, among other things, traditional stocks, debt and mutual funds. In addition, Merrill Lynch regularly considers entering into new selling agreements with third-party Funds that have different strategies, terms and other features from those of Funds currently available that may more closely meet the needs of certain customers due to ever-changing market conditions. Applicant BANA also regularly evaluates the Funds available to US Trust clients and considers adding new third-party Funds that may be well suited to these clients' needs, including Funds offered

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[27] As noted earlier, most of the Funds for which MLAI serves as manager, sponsor or investment adviser are feeder funds through which qualified Merrill Lynch and BANA clients can invest in third-party Funds to which they might not otherwise have access. In particular, many of these third-party Funds have extremely high minimum investment requirements. The feeder fund structure also offers other potential benefits to customers and clients of Merrill Lynch and BANA, respectively.

[28] This number represents only those Merrill Lynch and BANA household accounts that meet the eligibility requirements to invest in Funds and Private Placements by virtue of having a net worth that exceeds $1 million (excluding the value of the primary residence). Accordingly, the actual number of Merrill Lynch high-net-worth and institutional customers and BANA clients with access through Merrill Lynch to Funds and Private Placements may be higher than 415,000, as (i) this number does not reflect institutional clients, and (ii) there are Merrill Lynch and BANA customers who do not have a net worth in excess of $1 million, but are able to satisfy the eligibility requirements to invest in Funds and Private Placements by meeting other criteria for eligibility.

[29] Many Merrill Lynch Funds and Private Placements may not be available to all Merrill Lynch high-net-worth and institutional customers and BANA clients, as many Funds and Private Placements may impose eligibility requirements that not all Merrill Lynch high-net-worth and institutional customers and BANA clients can meet.

[30] This number represents only Merrill Lynch or BANA household accounts, and does not reflect any institutional accounts. Accordingly, the actual number of Merrill Lynch accounts that presently hold interest in Funds may be higher than 46,000.

through Merrill Lynch selling agreements. In addition, Merrill Lynch offers access to Private Placements to its eligible high-net-worth and institutional customers.

If Merrill Lynch and/or BANA is unable, because of a disqualification, to act as a promoter or solicitor pursuant to selling agreements for MLAI-sponsored, -managed or -advised Funds and third-party Funds, and/or as placement agent for Private Placements, that offer their securities in reliance on the exceptions under Rule 506(b) or (c), the customers and clients of Merrill Lynch and BANA will be substantially negatively impacted by losing access to the many investment options represented by the Funds and Private Placements.[31]

Specifically, if Merrill Lynch or BANA is prohibited from acting as the solicitor/promoter for current or future Funds or as placement agent for the Private Placements, approximately 415,000 Merrill Lynch high-net-worth and institutional customers and BANA clients would lose access through Merrill Lynch to Funds and Private Placements that might in the future better suit their needs than public funds or offerings or other securities. This would unnecessarily disadvantage these customers and the BANA clients by limiting their ability to diversify their portfolios.

Merrill Lynch and BANA provide their customers and clients a wide selection of Fund and Private Placement investment options. Indeed, Merrill Lynch, through MLAI and its selling agreements with third-party Funds, offers one of the largest selections of alternative investments of any U.S. broker-dealer. In particular, 215 Funds are sponsored by MLAI with over 46,000 eligible Merrill Lynch and BANA households and other accounts investing $12.1 billion of assets in these Funds. Furthermore, Merrill Lynch or BANA serves as the solicitor/promoter for an additional 130 third-party Funds with approximately 40,000 Merrill Lynch and BANA customers investing $6.9 billion of assets in these Funds. Additionally, Merrill Lynch or BANA serves as solicitor to Private Placements with $600 million of Merrill Lynch and BANA customer assets invested. Moreover, Merrill Lynch and BANA customers have, in recent years, invested in a number of private equity funds offered and sold in reliance on the exemptions under Rule 506 (both MLAI sponsored funds and funds where Merrill Lynch serves as the solicitor/promoter) that are not reflected in the data provided above because they may be, among other things, in various stages of the liquidation or distribution cycle. Finally, as of the date of this letter, MLAI is in various stages of negotiations with third parties and

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[31] While any Fund or issuer can structure future offerings pursuant to Section 4(a)(2) of the Securities Act, such an offering can ONLY be made available to a very limited group of potential investors. As a result, if a Fund or issuer of a Private Placement advised, managed, sponsored or sold through Merrill Lynch or BANA were to rely on Section 4(a)(2), the majority of otherwise eligible Merrill Lynch and BANA clients likely would be directly impacted by the reduction in the number of Funds and Private Placements available for investment.

expects to act as solicitor/promoter for approximately 15 additional third-party Funds[32] by the end of 2014.[33]

While Merrill Lynch and BANA offer MLAI-sponsored and managed Funds, as well as third-party Funds (directly and through MLAI-established feeder funds) the adoption of the Volcker Rule makes it more difficult for firms (broker-dealers affiliated with banks and banks) to offer "affiliated" funds. Merrill Lynch and BANA want to be able to continue to provide their high-net-worth and institutional customers and clients with a wide selection of Funds. Therefore, increasingly, MLAI is offering third-party Funds through selling agreements and structuring feeder funds for third-party Funds, as well as offering Funds that it directly manages and/or sponsors.

Without a waiver, Merrill Lynch's high-net-worth and institutional customers and BANA clients would lose access to current and future third-party Funds unless they opened accounts with other broker-dealers that are solicitors or promoters of the Funds, or moved their accounts from Merrill Lynch and BANA to banks that are not disqualified from offering the third-party Funds.[34] This would impose an undue hardship for these customers and clients, for many reasons. Beyond the difficulty of maintaining accounts with different broker-dealers, it is unlikely that the other broker-dealers or banks will offer the variety of funds that Merrill Lynch currently offers and expects to offer in the

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[32] For instance, Merrill Lynch has to date offered one, and intends in the future to offer additional, social-impact investment opportunities, in reliance on Rule 506. These offerings may be structured as debt or equity and represent an emerging market in which private sector capital is raised to fund the expansion of effective social service programs. These programs provide funding for nonprofits with a proven track record of successfully addressing social problems; enable governments to save money and repay investors only when positive results are achieved; and, when identified success metrics are met, private and institutional investors can recoup their principal plus a rate of return. If Merrill Lynch does not receive a waiver from Rule 506 disqualification, then other social impact investment opportunities could become unavailable to eligible Merrill Lynch high-net-worth and institutional clients.

[33] As of the date of this letter, MLAI also is acting or expects to act as solicitor/promoter for additional funds that recently launched or are about to launch.

[34] We note that while pursuant to Rule 506(d)(2)(iv) an issuer is not disqualified if it "establishes that it did not know, and in the exercise of reasonable care, could not have known that a disqualification existed under paragraph (d)(1)," the disqualifying event described in the Background section above was widely publicized, casting some doubt on whether the standard for relying on paragraph 506(d)(2)(iv) could be satisfied by a Private Placement issuer or a Fund.

future. It also could be particularly punitive for BANA accounts that are fiduciary accounts held and advised through the BANA US Trust line of business.[35]

In addition, if Merrill Lynch is unable to act as placement agent for the Private Placements that rely on Rule 506 to offer securities, then its high-net-worth and institutional customers would lose access through Merrill Lynch to current and future Private Placements, because these issuers likely would offer their securities through placement agents other than Merrill Lynch in order to rely on Rule 506.

b. Impact on Merrill Lynch and BANA.

As discussed below, if Merrill Lynch and BANA are disqualified pursuant to Rule 506(d), they would be precluded from acting as placement agent, solicitor or promoter of Funds and Private Placements. If so limited, many of Merrill Lynch's customers, and BANA's clients, might determine that they would be better served by transferring their accounts to broker-dealers and banks that are able to offer securities issued in reliance on the Rule 506 safe harbor. Such private investment opportunities have become an increasing portion of the investment portfolios of high-net-worth investors and institutional investors seeking to diversify their portfolios. As we note earlier in this letter, over 46,000 eligible Merrill Lynch households and other accounts presently have invested, through Merrill Lynch, in Funds and in issuers of Private Placements. If Merrill Lynch were to lose even a small portion of these accounts, this could significantly impact the financial resources of Merrill Lynch and the scope of services it offers. In addition, financial advisors of Merrill Lynch could decide to move to third-party broker-dealers in order to ensure that their clients continue to have access to investments that are similar to the Funds. As a result, it is highly likely that additional customers beyond the over 46,000 eligible Merrill Lynch households and other accounts already invested in Funds would move their accounts in order to retain relationships with their financial advisors.

Moreover, BANA, in its fiduciary capacity must make available to its trust and other advised accounts a full range of investments to meet its investment objectives. If BANA is unable to offer and sell the Funds and Private Placements, it will make it more difficult for it to satisfy its fiduciary obligations. As such, it is possible that clients could terminate their business relationships with BANA, which would result in material adverse impact to its trust and fiduciary businesses.

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[35] We note that third-party Funds are likely to terminate selling agreements with an Applicant, rather than seek waivers to continue employing an Applicant as solicitor or promoter through a selling agreement, if Applicants become disqualified and the disqualifications are not waived. This would deny access to such Funds for eligible Merrill Lynch customers and BANA clients.

c. Impact on Funds and Issuers of Private Placements.

As discussed above, Merrill Lynch currently acts as solicitor for Funds that are sponsored, managed or advised by MLAI, as well as third-party Funds that rely on the exemptions under Rule 506(b) or (c). Indeed, the Applicants have served as solicitor, promoter or placement agent for approximately 353 offerings by Funds in the past three years which have raised approximately $17.6 billion dollars. Applicants believe, to the best of their knowledge, that all of these Fund offerings are currently active. These offerings have relied on the exemptions under Rule 506(b) or (c) of Regulation D. Additionally, one affiliate of Respondents also has a precious metals program that currently relies on the exemptions under Rule 506(b) and for which interests are solicited exclusively through Merrill Lynch. The precious metals program has 108 different coins or metals weight denominations offered and total value of over $268 million. Applicants currently have approximately 15 engagements under consideration for new Fund and new Private Placement transactions that would rely on the exemptions under Rule 506(b) or (c) and regularly seek to identify new Funds (through MLAI), and Private Placements (through Merrill Lynch) that it can offer through Merrill Lynch and BANA, to customers and clients, respectively.

If the Commission does not grant the requested waivers to Applicants, then if the Applicants enter into these proposed and future engagements with Funds or Private Placement issuers, the Funds and issuers of Private Placements will themselves be disqualified from relying on Rule 506 and therefore will be unable to offer interests in reliance on Rule 506 at all. The Funds and issuers of Private Placements would then only be able to offer interests in reliance on Section 4(a)(2) of the Securities Act. This would (i) significantly affect the number of customers that could invest in such funds, and (ii) most third parties, whether through funds or private placements, would not likely continue to use MLAI given that Section 4(a)(2) of the Securities Act offerings are not likely to raise much money so they would prefer to devote their limited resources to other platforms.

d. Impact on Certain Third-Party Funds and Issuers of Private Placements.

While third-party Funds could seek new distribution channels for their funds and Private Placement issuers can find new placement agents, if Merrill Lynch and BANA are disqualified under Rule 506, this would place a burden on the third-party Funds and Private Placement issuers that have long-standing and deep relationships with Merrill Lynch and rely on Merrill Lynch's institutional knowledge and extensive investor base. Some of these third-party Funds and issuers of Private Placements have offered their securities through Merrill Lynch and/or BANA for up to twenty-two (22) years, and as a result, have developed a high degree of confidence in the abilities of Merrill Lynch and BANA to offer and sell their securities, allowing the Funds and issuers to raise capital when needed. Furthermore, certain of the Funds distributed by Merrill Lynch and Private Placement issuers do not have large distribution channels outside of Merrill Lynch and

could be negatively impacted in their abilities to raise capital should Merrill Lynch customers be prevented from investing in such Funds.

e. Impact on Merrill Lynch Affiliate, MLAI.

Merrill Lynch is the only outlet for distribution of MLAI managed and sponsored funds, including the feeder funds advised by MLAI to provide Merrill Lynch customers access to certain third-party Funds. If Applicants do not receive a waiver from Rule 506 disqualification, they will effectively not be able to act as the promoters or solicitors for these Funds (those sponsored, managed or advised by MLAI) because to do so would result in the Funds becoming disqualified from being able to offer their securities pursuant to Rule 506. As a result, MLAI would have to find a new distribution outlet for these Funds. If MLAI finds such a new distribution outlet and contracts with a new broker-dealer to provide promoter or solicitor services for the Funds that MLAI manages, sponsors and advises, then Merrill Lynch customers and BANA clients would only have access to the MLAI Funds if they open accounts with the new broker-dealer. This would be an undue hardship on the Merrill Lynch and BANA client base, and, we believe, is not the intention of the Rule 506 disqualification provisions.

There is substantial benefit in MLAI using Merrill Lynch to sell the Funds it manages, sponsors and advises because Merrill Lynch and its financial advisors have substantial experience in offering and selling, and substantial knowledge about, the Funds. Most of the Funds use alternative investment strategies which can be complicated and difficult to understand. If MLAI is required to replace Merrill Lynch with a new broker-dealer, adverse consequences would include that it would take a substantial period of time to educate the registered representatives of the new broker-dealer about the array of Funds and the terms and strategies of each of the Funds. Funds managed, sponsored and advised by MLAI would lose the benefits of being part of the "Merrill Lynch" platform offered to Merrill Lynch's customers -- including an extensive, experienced and well-educated group of financial advisors who understand and offer a wide range of financial products to their qualified investors.[36]

Furthermore, if MLAI does not identify a new broker-dealer to serve as distributor of the Funds that MLAI sponsors, manages and advises, MLAI likely would be put out of business. The sponsorship, management and advising of new Funds constitutes one hundred percent (100%) of MLAI's business. Without a waiver for Merrill Lynch and

[36] We also note, and discuss above in this letter, that, like the funds managed, sponsored and advised by MLAI, this group of financial advisors is one of the primary reasons why third-party managers are interested in offering their funds through selling agreements with Merrill Lynch. However, if Merrill Lynch were disqualified, and such third-parties are directed to contract with another broker-dealer, identified by MLAI, for instance, it is likely that many of them will choose to work with other platforms, of their own choosing.

BANA, they would be precluded from offering these Funds because they are sold to Merrill Lynch's qualified customers and BANA's clients pursuant to Rule 506. If MLAI is unable to identify a new distribution outlet as discussed above, not only would the Merrill Lynch customers and BANA clients be denied access to the Funds MLAI currently sponsors, manages and advises, but MLAI would likely be required to cease managing, sponsoring and advising funds, the net effect of which would be to shutter MLAI and the Funds that Merrill Lynch customers and BANA clients currently invest in and would otherwise have invested in in the future.

Merrill Lynch has a well-earned reputation for offering one of the most diverse array of alternative investment products to Merrill Lynch's customers, and many of these Funds are sponsored, managed or advised by MLAI. This platform of Funds was developed over many years of devoting significant resources to educating financial advisors and, in turn, customers. If Merrill Lynch and BANA are disqualified, then the Funds advised, managed and sponsored by MLAI would not be able to be offered through Merrill Lynch, and it is likely that, as a result, MLAI's business would be fundamentally changed, and likely substantially reduced.

7. Provision of Written Description of the Injunctions.

For a period of five years from the date of the Injunctions, if Applicants receive the requested waiver they will furnish (or cause to be furnished) to each purchaser in a Rule 506 offering that would otherwise be subject to disqualification under Rule 506(d) as a result of the Injunctions, a description in writing of the Injunctions a reasonable time prior to the sale. As noted earlier, MLAI and Merrill Lynch currently provide (or cause to be provided) disclosures in accordance with Rule 506.

REQUEST FOR WAIVERS

In light of the foregoing, Applicants believe that disqualification is not necessary under the circumstances and that Applicants have shown good cause that relief in the form of waivers from disqualification should be granted. Accordingly, Applicants respectfully request that, pursuant to Rule 506(d)(2)(ii), the Commission waive the disqualification provisions of Rule 506 that would otherwise disqualify Applicants as a result of the entry of the Injunctions.[37]

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[37] We note in support of this request that the Commission recently has granted relief under Rule 506 in situations involving scienter-based fraud allegations and the entry of an injunction. *See, e.g., SEC v. Diamond Foods, Inc.*, SEC No-Action Letter (pub. avail. Mar. 6, 2014). The Commission has recently also granted relief under Rule 506 to named parties in connection with administrative proceedings. *See, e.g.,* Dominick & Dominick LLC, SEC No-Action Letter (pub. avail. July 28, 2014); Jefferies LLC, SEC No-Action Letter (pub. avail. March 12, 2014).

Applicants reiterate to the Commission the comprehensive adverse impact that denial of a waiver to the Applicants would have on Applicants, their affiliates, Funds managed, sponsored or advised by Applicants' affiliates, on third-party Funds and issuers of Private Placements with longstanding relationships with Applicants and, most importantly, Applicants' clients and customers. Therefore, Applicants believe that a waiver of disqualification is the most effective way to avoid this widespread adverse impact.

Applicants therefore reiterate that for the reasons discussed in detail above, the Commission has good cause to grant them the requested waivers.[38]

Please do not hesitate to contact me at 202.373.6118, if you have any questions about this request.

Sincerely yours,

Amy Natterson Kroll

cc: Johanna Losert, Esq.
Division of Corporation Finance

Mark Eric Harrison, Esq.
Division of Enforcement

Richard A. Goldman, Esq.
Bingham McCutchen LLP

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[38] Applicants understand that the Commission could decline to grant a waiver to the Applicants and instead grant waivers to MLAI, the current and future Funds and current and future issuers of Private Placements, that would be disqualified from relying on Rule 506 due to their agreements with Merrill Lynch and BANA. Applicants believe, however, that even this more limited relief could have a material adverse impact on Merrill Lynch's customers and BANA's clients, as well as on Merrill Lynch, BANA, the Funds and issuers of Private Placements, and MLAI. In particular, many current and future Funds and Issuers could be reticent to continue their engagements with, or in the future engage, Merrill Lynch and BANA once they are "bad actors". As a result, Applicants believe that the best way to avoid material adverse impact to their customers and clients, MLAI and others is to grant the relief to the Applicants sought in the body of this letter.