SEC Penalties on Trial

The court's rejection of the proposed $33 million settlement between Bank of America and the SEC raises several key issues, including the appropriateness of corporate civil penalties, the scope of the SEC's prosecutorial discretion, the future use of the attorney-client privilege in SEC enforcement actions, and the availability of early settlement options in the context of class actions.

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On September 14, 2009, Federal Judge Jed Rakoff of the Southern District of New York rejected a proposed $33 million settlement between Bank of America and the Securities and Exchange Commission (SEC). The SEC's charges arose from Bank of America's alleged failure to disclose that, as part of its agreement to buy Merrill Lynch on January 1, 2009, Bank of America had consented to allow Merrill to pay billions of dollars in bonuses to its employees in advance of the merger. Judge Rakoff's described the settlement as

> a contrivance designed to provide the S.E.C. with the facade of enforcement and the management of the Bank with a quick resolution of an embarrassing inquiry—all at the expense of the sole alleged victims, the shareholders.[1]

The very next day, the decision was the lead story in the *Wall Street Journal*[2] and a hot topic in the legal, political, and financial press and blogs. The decision also sparked immediate reactions from the New York Attorney General's Office and Congress, each promising to investigate thoroughly the circumstances surrounding the merger of Bank of America and Merrill. Some of the commentary painted Judge Rakoff as something of a folk hero—a lone judge standing up both to a financial behemoth that has accepted billions of dollars in government bailout funds and to the financial regulator that failed to prevent the credit crisis from befalling America. Some commentary took a different view, wondering aloud why Bank of America is "being put into court over a series of events that benefited the nation, its economy, its financial system, the shareholders of Bank of America and the bank itself."[3]

The enormous level of public interest in the bonus payments and the litigation arising from them was brought about largely by a confluence of divisive views about Troubled Asset Relief Program (TARP) funds, outrage over Wall Street bonuses, and frustration with the SEC in the wake of the financial crisis in general and the Madoff scandal more specifically. But for securities attorneys and their clients, the importance of Judge Rakoff's decision goes far beyond sensational financial market and political gossip.

Judge Rakoff's decision raises several critical legal issues for securities attorneys and their clients. First, the opinion calls into question whether, and in what circumstances, the SEC should impose penalties on corporations for disclosure violations, or whether such penalties merely "victimize the victims" of the alleged wrongdoing. Second, Judge Rakoff's call for the SEC to bring charges against the individual executives, or their attorneys, raises separation of power issues regarding the arguable interference with the SEC's prosecutorial discretion and the proper role of the judiciary in influencing charging decisions through its authority to accept or reject a settlement. Third, Judge Rakoff's rebuke of the SEC for failing to pursue waiver of the attorney-client privilege will be of grave concern for attorneys and their clients. Finally, Judge Rakoff's opinion suggests that, in certain cases, the need to determine the "truth" prior to accepting a proposed settlement

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may preclude settlement and force parties—against their mutual interests—to endure costly discovery and go to trial, a result that appears to undermine the fundamental purposes of settlement.

Bank of America Acquires Merrill Lynch in Last-Minute Deal

The SEC's charges against Bank of America arise from one of the critical events at the height of the financial crisis in the fall of 2008. During the second week of September, as Lehman's bankruptcy became inevitable with no government rescue plan forthcoming, Merrill Lynch watched its own stock drop by more than 30 percent and then sought a buyer. Merrill sought out Bank of America and over the weekend of September 13 and 14, 2008, the two companies negotiated a stock-swap merger. The merger agreement was executed and publicly announced on September 15. It provided for Merrill stockholders to receive an equivalent of $29 per share—a large premium over the price of their stock on the last trading day before the announcement of the merger. The deal was valued at $50 billion.

On November 3, 2008, Bank of America and Merrill sent a joint proxy statement to their shareholders, in advance of a December 5 vote to approve the merger. Attached to the proxy statement was a copy of the merger agreement, which included a series of negative covenants that constrained Merrill's conduct of its business prior to closing. These negative covenants included a promise that "except as set forth in . . . Section 5.2 of the Company Disclosure Schedule or . . . without the prior written consent of [Bank of America]," Merrill would not "pay any amounts to Employees not required by any current plan or agreement (other than base salary in the ordinary course of business)."[4] The "Company Disclosure Schedule" referenced in this provision was not attached to the proxy statement and was not disclosed publicly. According to the SEC, the disclosure schedule contained an agreement, apparently reached during the initial merger negotiations, that Merrill would be permitted by Bank of America to pay year-end bonuses to its employees totaling up to $5.8 billion.[5]

The merger was approved by shareholders and closed on January 1, 2009. By that date, roughly 40,000 Merrill employees had received $3.6 billion in bonuses, despite the company's $27.8 billion in losses in 2008. When these bonus payments came to light in mid-January, amid a firestorm of criticism over government bailout funds being used to bankroll Wall Street executives' compensation, the SEC launched an investigation of potential disclosure violations. The Commission staff reviewed documents and took testimony from eleven Bank of America executives. The SEC charged the bank with violation of Section 14(a) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 14a-9, which prohibits the solicitation of proxies

> by means of any proxy statement . . . containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in an earlier communication . . . .[6]

The complaint alleged a proxy violation based on Bank of America's failure to disclose to shareholders that, at the time Bank of America sent the proxy statement, it had, in fact, already consented to Merrill's bonus plan. The SEC and Bank of America agreed to settle the charges.

Judge Rakoff Questions the Proposed Settlement

On August 3, 2009, the SEC filed its complaint against Bank of America, along with the bank's consent to the entry of a final judgment reflecting the parties' settlement agreement. The proposed judgment, which required District Court approval, would have permanently enjoined Bank of America from violating Section 14(a) and imposed a $33 million penalty on the corporation. Under the terms of the settlement, as is typical, Bank of America neither admitted nor denied wrongdoing.

By August 5, Judge Rakoff had indicated his skepticism about the settlement, ordering the parties to appear at a hearing on August 10, and demanding more information about "the basis for the $33

million figure or whether any of this money is derived directly or indirectly from the $20 billion in public funds previously advanced to Bank of America as part of its 'bail out.'"[7] Judge Rakoff then requested two rounds of briefing by the parties.

SEC Defends the Settlement

In its briefs, the SEC defended the settlement, explaining that "the disclosure violation here [was] straightforward." The SEC contended that "Bank of America represented that Merrill had agreed not to pay year-end performance bonuses or other discretionary incentive compensation to its executives prior to the closing of the merger without Bank of America's consent" when, in fact, "Bank of America already had agreed that Merrill *could* pay a material amount of discretionary year-end and other bonuses to Merrill executives for 2008."[8] The SEC stated that "the parties' factual differences [arose] primarily from their respective interpretations of the relevant language" in the proxy statement, the merger agreement, and the "undisclosed 'disclosure' schedule," which "were prepared by outside counsel for the two companies."[9] The SEC characterized its claim against the corporation as "solid," but it acknowledged that Bank of America's defenses "while unavailing, are not facially frivolous," creating "litigation risk on both sides."[10]

The SEC's settlement filings also addressed the SEC's decision to charge the bank without bringing any charges against individual corporate executives. The SEC explained that while corporate liability under Section 14(a) and Rule 14a-9 require only a showing of negligence, the SEC would have to prove scienter to prevail on charges against individuals under Rule 10b-5 or, on a secondary liability theory, prove that individuals acted knowingly or recklessly or not in good faith.[11] Given these higher burdens, the SEC explained that its "investigative record [did] not provide a factual predicate to charge individuals."[12]

The SEC further explained that "[t]he extensive involvement of counsel in the disclosure materials at issue would present significant hurdles in connection with establishing scienter."[13] The SEC noted that Bank of America had not, expressly or impliedly, waived the attorney-client privilege because the assertion by individuals that they relied on or delegated decisions about the proxy disclosures to counsel "did not constitute or require a waiver of the attorney-client privilege."[14] There was no implied waiver because Bank of America had not asserted a reliance-on-counsel defense in any court proceeding. The SEC explained that no such defense would be required unless the Commission could "first allege, in good faith, a *prima facie* case" on scienter-based charges.[15] Thus, because its investigative record would not support any scienter-based charge, the SEC concluded that Bank of America had not waived the attorney-client privilege.

The SEC also attempted to de-politicize the nature of its claims against Bank of America. The SEC asserted that "[t]he gravamen of the violation alleged in the Complaint is Bank of America's failure to disclose bonus arrangements to its shareholders, not misappropriation or misuse" of TARP funds.[16] The SEC argued that the receipt of TARP funds "should not give rise to a different standard of review" of the settlement agreement:[17]

> While the possible misuse of TARP funds is a matter of great public importance, it does not, in and of itself, give rise to a federal securities law violation. Bank of America did not violate the federal securities laws because it agreed to allow Merrill to pay substantial bonuses before the merger closed, but because it failed to disclose that agreement in the proxy statement. The source of the funds used by Merrill to pay those bonuses is a separate matter and does not affect Bank of America's liability under the proxy rules and, as a result, should not be relevant in determining the appropriate penalty amount for the disclosure violation.[18]

Against this backdrop, the SEC argued that the "$33 million penalty . . . str[uck] the right balance between the goals of deterrence and the need to avoid unnecessary harm to innocent shareholders."[19] It asserted that "[t]he precise amount of any pecuniary gain [to Bank of America] and harm [to shareholders] is extremely difficult to quantify in this instance," but that the $3.6 billion bonus pool would not be the proper measure of the misconduct because Bank of America was charged with a failure

to disclose, rather than misappropriation.[20] Instead, the SEC pointed to the $37 million penalty imposed on Wachovia in 2004 for disclosure violations as an analogous, though arguably more egregious, case to be used as a benchmark for setting the corporate penalty here.[21] The SEC thus argued that the proposed settlement should be approved as "fair, reasonable, adequate, and squarely in the public interest."[22]

Bank of America Defends the Settlement

Bank of America, for its part, maintained that the settlement should be approved because it represented "a constructive conclusion to this matter" and would free the bank from "the unnecessary distraction of a protracted dispute with one of its principal regulators at a time of uncertain and difficult market conditions."[23] Nonetheless, the bank argued that if the case were to be litigated, it would have "powerful and successful defenses."[24] Bank of America explained that the proxy statement was accurate because the negative covenant regarding the payment of bonuses was not a representation that Merrill would not pay bonuses, but rather a qualified promise not to pay bonuses prior to closing without Bank of America's prior approval.

Bank of America also argued that the merger agreement and proxy statement "were drafted consistently with the custom and practice among corporate and securities lawyers."[25] Bank of America further contended that Merrill's intention to pay bonuses for 2008 effectively was disclosed through its quarterly filings, incorporated by reference into the merger agreement, which reflected quarterly accruals for compensation and benefits expenses that were only slightly below 2007 levels. Finally, Bank of America cited media reports throughout the fourth quarter of 2008 in which commentators predicted that Merrill would pay "multi-billions of dollars in year-end compensation," making it unlikely, in the bank's view, that any reasonable investor would have interpreted the proxy statement the way the SEC had, as a blanket prohibition on the payment of bonuses.[26]

Judge Rakoff Rejects the Settlement

Judge Rakoff remained unconvinced by the parties' arguments defending the settlement. On September 14, 2009, he issued a sharply-worded rebuke of the proposed consent judgment, describing it as failing to "comport with the most elementary notions of justice and morality."[27]

At the outset of the opinion, Judge Rakoff described the applicable standard as an exercise in "ascertain[ing] whether [the proposed settlement] is within the bounds of fairness, reasonableness, and adequacy—and, in certain circumstances, whether it serves the public interest."[28] He noted that "the review is highly deferential."[29] Nonetheless, he went on to conclude that the proposed settlement was "neither fair, nor reasonable, nor adequate."[30]

Judge Rakoff's principal objection to the settlement was that "it propose[d] that the shareholders who were the victims of the Bank's alleged misconduct now pay the penalty for that misconduct."[31] He characterized as "absurd" the SEC's argument that the imposition of a penalty on the corporation would send "a strong signal to shareholders" and allow them to "better assess the quality and performance of management."[32]

Judge Rakoff directly questioned the SEC for failing to "go after the company executives who were responsible for the lie" or the lawyers who advised them.[33] In this regard, Judge Rakoff repeatedly asserted that the SEC's decision to impose corporate penalties rather than file charges against individual executives violated the SEC's own policy in favor of pursuing individual wrongdoers whenever possible.[34] Judge Rakoff rejected the SEC's explanation that it had found no basis for scienter-based charges against individuals:

> [H]ow can such knowledge be lacking when . . . executives at the Bank expressly approved Merrill's making year-end bonuses before they issued the proxy statement denying such approval? The SEC states . . . that culpable intent was nonetheless lacking because the lawyers made all the relevant decisions. But, if so, then how can the lawyers be said to lack intent?[35]

Judge Rakoff further rejected the SEC's assertion that Bank of America's communications with its lawyers were shielded by the attorney-client privilege.

The judge asserted that "the SEC never seriously pursued whether [the executives' claims that they relied on lawyers to draft the disclosures] constituted a waiver of the privilege, let alone whether it fit within the crime/fraud exception to the privilege."[36]

Judge Rakoff also questioned Bank of America's willingness to pay a $33 million penalty to settle the charges if the bank was, as it asserted in its briefs, "innocent of lying to its shareholders."[37] He characterized Bank of America's decision to settle as a misguided exercise of "business judgment" and questioned whether the decision "was made by disinterested parties."[38] Then, in a line that some may argue is inconsistent with the earlier deferential standard of review he recited, Judge Rakoff explained that "greater scrutiny by the Court" was warranted when "the very management that is accused of having lied to its shareholders . . . determine how much of those victims' money should be used to make the case against management go away."[39] Judge Rakoff also questioned the efficacy of an injunction against conduct that Bank of America had asserted was "totally in accordance with the law."[40]

Finally, Judge Rakoff concluded that the proposed settlement was "inadequate" because "$33 million is a trivial penalty for a false statement that materially infected a multi-billion dollar merger."[41] In the end, Judge Rakoff refused to approve the proposed settlement and ordered the parties to prepare for a trial that he set to begin only months later, in March 2010.[42] He suggested that "the truth" about the merger would emerge at trial. Both parties subsequently requested a jury trial.[43]

Key Takeaways from the Decision

Judge Rakoff's opinion highlights concerns about the appropriateness of corporate civil penalties, the scope of prosecutorial discretion and the proper role of the judiciary, the future use of the attorney-client privilege in SEC enforcement actions, and the availability of early settlement options in the context of class actions.

"Victimizing the Victims"

The rejection of this settlement highlights the tension inherent whenever a corporation pays a penalty for alleged wrongdoing. Judge Rakoff repeatedly asserted that the proposed $33 million penalty was unfair because it would punish the very victims of the alleged disclosure violation—the bank's own shareholders. Judge Rackoff's reasoning calls into question the logic of ever imposing a corporate penalty against a public company for a disclosure violation.

The SEC's authority to seek civil monetary penalties against corporations arises out of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Remedies Act).[44] In considering the legislation, the Senate Committee appreciated that shareholders would indirectly bear the burden of these penalties. The Senate committee report regarding the Remedies Act explained:

> In cases in which shareholders are the principal victims of the violations, the Committee expects that the SEC, when appropriate, will seek penalties from the individual offenders acting for a corporate issuer. Moreover, in deciding whether and to what extent to assess a penalty against the issuer, the court may properly take into account whether civil penalties assessed against corporate issuers will ultimately be paid by shareholders who were themselves victimized by the violations. The court also may consider the extent to which the passage of time has resulted in shareholder turnover.[45]

Drawing on this Congressional guidance, the SEC, under then-Chairman Christopher Cox, announced a policy in 2006 addressing the exercise of its authority to pursue corporate penalties. Under that policy, the appropriateness of a corporate penalty would turn on two principal considerations: (1) "the presence or absence of a direct benefit to the corporation as a result of the violation;" and (2) "the degree to which the penalty will recompense or further harm the injured shareholders."[46] The Commission explained that certain other factors, including the need for deterrence, the extent of injury, the level of intent, the level of complicity within the organization, the difficulty of detection, the remedial actions taken, and the level of cooperation with the SEC, also would be taken into account.[47] Consistent with the cautious approach to corporate penalties

captured by this 2006 policy, the SEC began a "pilot program" in 2007 that required SEC enforcement attorneys to seek approval from the Commission before negotiating corporate penalties.

Shortly after taking office, SEC Chairman Mary Schapiro ended the "pilot program," announcing:

> In speaking to our Enforcement staff, I've been told that these special procedures have introduced significant delays into the process of bringing a corporate penalty case; discouraged staff from arguing for a penalty in a case that might deserve a penalty; and sometimes resulted in reductions in the size of penalties imposed. At a time when the SEC needs to be deterring corporate wrongdoing, the "penalty pilot" sends the wrong message. The action I am taking to end the penalty pilot is designed to expedite the Commission's enforcement efforts to ensure that justice is swiftly served to those public companies who commit serious acts of securities fraud.[48]

The 2006 policy came under fire as well, criticized by Commissioner Luis Aguilar and Director of Enforcement Robert Khuzami for failing to focus squarely on the nature of the corporate misconduct and the deterrence purpose behind the imposition of harsh corporate sanctions.[49] Last spring, the Government Accountability Office (GAO) further criticized the "pilot program" and the 2006 policy, reporting that the approval procedures and 2006 guidelines were perceived by SEC enforcement staff as sending a message that corporate penalties were disfavored by the Commission.[50] The GAO found that total annual corporate penalties fell by 84 percent following the adoption of the 2006 policy.[51] Thus, by mid-2009, sentiment within the SEC had shifted away from a concern over whether corporate penalties would further "victimize the victims," in favor of a focus on punishing and deterring corporate malfeasance.

Judge Rakoff's decision reflects the inherent tension, or indeed contradiction, involved in imposing corporate penalties for disclosure violations. Judge Rakoff's rejection of the proposed $33 million penalty against Bank of America could be read, on the one hand, as an endorsement of the more shareholder-centric view reflected in the SEC's 2006 policy. And yet, Judge Rakoff also concluded that the proposed penalty was "inadequate" to reflect the seriousness of the offense the SEC alleged, deeming the amount "trivial" in the context of a "multi-billion dollar merger."[52] Thus, the opinion provides no clear directive regarding the appropriate circumstances for, and size of, such corporate penalties.

Some commentators and practitioners will note that the concern with imposing penalties on "innocent shareholders" oversimplifies the real economics of corporate penalties. The ownership of shares in a public company is fluid and, as a result, the shareholders impacted by the corporate wrongdoing—in Judge Rakoff's terms, the "victims"—are, in fact, often not the same shareholders who would suffer the impact of the penalties. The Senate recognized this in its committee report on the Remedies Act, advising that courts could "consider the extent to which the passage of time has resulted in shareholder turnover."[53] In a *BusinessWeek* commentary, Michael Orey noted a similar problem inherent in shareholder class actions where damages paid to injured investors represent a "wealth transfer among equally innocent third parties"—the current and former shareholders.[54] In the end, Rakoff's rejection of the proposed Bank of America penalty merely underscores the inherent tension and does little to clarify the direction the SEC should or will take in developing a workable corporate penalty policy.

Separation of Powers Issues

Some may note that Judge Rakoff's repeated questions regarding why the SEC has not pursued individuals interferes with the SEC's prosecutorial discretion, raising separation of powers concerns. As an independent agency and part of the executive branch of government, the SEC is charged with investigating alleged wrongdoing and determining whether to bring charges, and if so, against whom. The judiciary's role is to determine whether those charges—and any proposed settlement of them—comport with the law. If the charges do not comport with the law, the judiciary is empowered to reject them, but it is not empowered to substitute other charges in their place. Nor, some will argue, is it the

role of the judiciary to use its power to reject settlements as a tool to compel the SEC to prosecute a case in a different manner? It appears Judge Rakoff would have preferred that individual executives, or their lawyers, been named as defendants. But his decision to make that preference explicit in his ruling, with the attendant implication that that preference influenced his decision to accept or reject the settlement, raises separation of power concerns. His open criticism of the SEC's discretionary determination that it lacked *prima facie* evidence to bring individual charges calls into question the proper scope of the separate roles of the prosecutor and adjudicator.

Waiver of Attorney-Client Privilege

Judge Rakoff's sharp criticism of the SEC for failing to bring individual charges against bank executives or the attorneys who advised them also raises practical questions about the strength of the shield provided by the attorney-client privilege, particularly in the context of SEC enforcement actions. Judge Rakoff scolded the SEC for failing to "seriously pursue" waiver of Bank of America's attorney-client privilege.

In this regard, the decision virtually challenges the SEC to resurrect its prior controversial practice of pressuring companies to forgo their privilege rights. In 2001, the SEC's so-called Seaboard Report listed disclosure of protected confidential information among the criteria that the SEC would consider when assessing whether a company's self-policing and cooperation efforts would influence the decision to bring an enforcement action.[55] The SEC's 2006 policy statement on corporate penalties also mentioned the extent of cooperation in the SEC's investigation—and, by extension, waiver of privilege—as an element in determining how high civil monetary penalties against corporations should be set.[56]

In 2008, these policies came under fire for effectively licensing SEC enforcement staff to pressure companies into waiving the attorney-client privilege. Then-Commissioner Paul Atkins explained the deleterious effects of such pressure in a speech in January 2008:

> As the SEC and other Federal agencies press to have the attorney-client privilege waived, the entire privilege is weakened. As knowledge of its weakening spreads, corporate employees will be less candid and forthcoming, corporate internal investigations will be less trustworthy, and shareholders and government investigators will be frustrated in their efforts to prevent misdeeds.[57]

Further, Atkins noted that companies waiving privilege in the context of SEC enforcement actions also could be forced to turn over those same privileged documents to third-party plaintiffs.[58] In June 2008, Senator Specter reintroduced the Attorney-Client Privilege Protection Act, a bill to prevent government attorneys from demanding or rewarding the waiver of privilege.[59] Although the bill did not pass, it did focus criticism on SEC practices.

Responding to this criticism, the SEC's Enforcement Manual, issued in October 2008, provides that "[t]he staff should not ask a party to waive the attorney-client or work product privileges and is directed not to do so."[60] To be sure, that policy is riddled with exceptions, including a provision that encourages the staff "to explore the possibility of an advice-of-counsel defense with a party's counsel at an early stage in the investigation."[61] But in this case, the SEC argued in its court filings that the advice-of-counsel defense exception had not been triggered because the SEC lacked sufficient evidence to establish a *prima facie* case of any scienter-based violation of the securities laws. Judge Rakoff sharply criticized that explanation and questioned how "the lawyers [could] be said to lack intent" in crafting the allegedly misleading proxy statement.[62]

Judge Rakoff's judicial second-guessing of the SEC's reasoning with respect to the attorney-client privilege in this case may well incite SEC enforcement attorneys to pursue waiver more vigorously in the future, lest they too be publicly criticized and their zeal questioned by the court. More pointedly, Judge Rakoff's call for the SEC to consider charges against the lawyers themselves certainly sounds an alarm for corporate counsel advising clients on disclosure issues.

Finding the "Truth" Undermines the Purpose of Settlements

The terms of Judge Rakoff's rejection of the proposed settlement suggest that there may have been *no* acceptable settlement between Bank of America and the SEC in this case in his view. If the penalties imposed had been higher, presumably the settlement would have still been rejected by the court because of the perceived harm to shareholders, and if the penalties imposed had been lower, the settlement presumably would have been deemed to be even more "inadequate." At the same time, Judge Rakoff did not suggest that the charges against the bank were legally infirm or otherwise subject to dismissal.

Judge Rakoff announced that he was dissatisfied with the settlement because he wanted to know the "truth" about what happened. But, of course, much of the point of any settlement is to resolve disputes short of further discovery and trial determining the "truth." If other judges follow this lead and question whether consent decrees and class action settlements presented to them represent a premature resolution of a dispute before the "facts" have been fully developed, parties would be forced to undertake expensive and time-consuming discovery and possibly trial against their mutual interests.

Given that the vast majority of SEC cases settle before trial (indeed, most often at the charging stage), the implication that settlements in some cases may fail simply because the reviewing court believes they are too early or are presented on an arguably underdeveloped record could have serious long-term consequences for corporate defendants. They often have compelling and legitimate business reasons to avoid facing expensive and distracting discovery and a protracted public fight against their chief regulator. For the SEC, the prospect of protracted discovery and trials against major companies in certain cases also would be unappealing, taxing the SEC's resources without notably furthering its enforcement objectives.

What's Next for Bank of America?

It remains to be seen whether the SEC will attempt to bring additional charges against individuals in this case. Ultimately though, whatever the outcome of *SEC v. Bank of America* in Judge Rakoff's courtroom, numerous other government investigators have become involved. In the wake of the judge's order, the media was filled with reports that the Bank of America-Merrill merger—and the individuals involved in approving it—were being investigated by the New York Attorney General's Office, the Department of Justice, and the FBI.[63] The SEC's Inspector General also reportedly was asked shortly after the announcement of the settlement, by Rep. Elijah Cummings, a Democrat from Maryland, to investigate potential conflicts of interest in the SEC's investigation.[64] Further, the House Committee on Government Oversight immediately announced its intention to hold hearings on the matter and aggressively questioned Bank of America's assertion of attorney-client privilege.[65] The one thing that appears certain for the SEC and Bank of America is that they will not soon achieve the "constructive conclusion to this matter" that they had sought in agreeing to settle the case.

NOTES

1. *SEC v. Bank of America Corp*., Memorandum Order, No. 09 Civ. 6829 (S.D.N.Y. Sept. 14, 2009) ("Mem. Order") at 8.
2. Kara Scannell, Liz Rappaport & Jess Bravin, "Judge Tosses Out Bonus Deal—SEC Pact with BofA Over Merrill is Slammed; New York Weighs Charges Against Lewis," *Wall Street Journal*, Sept. 15, 2009, at A1.
3. Zachery Kouwe, "Judge Rejects Settlement Over Merrill Bonuses," *New York Times*, Sept. 15, 2009 (quoting Richard X. Bove, a banking analyst with Rochdale Securities).
4. Bank of America Corp., Joint Definitive Proxy Statement (Schedule 14A), filed Nov. 3, 2008, Ex. B (Merger Agreement) at § 5.2(c)(ii).
5. *SEC v. Bank of America Corp*., Complaint, No. 09 Civ. 6829, (S.D.N.Y. filed Aug. 3, 2009), at ¶ 12; Mem. of Law on Behalf of Bank of America, No. 09 Civ. 6829, (S.D.N.Y. filed Aug. 24, 2009) ("BOA Opening Mem.") at 3.
6. 17 C.F.R. § 240.14a-9.
7. *SEC v. Bank of America Corp*., Order, No. 09 Civ. 6829 (S.D.N.Y. Aug. 5, 2009).
8. *SEC v. Bank of America Corp*., Mem. of SEC in Supp. of Entry of the Proposed Consent Judgment, No. 09 Civ. 6829, (S.D.N.Y. filed Aug. 24, 2009) ("SEC Opening Mem.") at 4.
9. SEC Opening Mem. at 4.
10. *Id.* at 6.
11. *Id.* at 24.
12. *SEC v. Bank of America Corp*., Reply Mem. of SEC in Supp. of Entry of the Proposed Consent Judgment, No. 09 Civ. 6829, (S.D.N.Y. filed Sept. 9, 2009) ("SEC Reply Mem.") at 3.

13. SEC Opening Mem. at 25.

14. *Id.* at 26.

15. *Id.*

16. *Id.* at 3.

17. *Id.* at 31.

18. *Id.* at 31–32.

19. *Id.* at 2.

20. *Id.* at 35.

21. *Id.* at 33-34 (citing *SEC v. Wachovia Corp.*, SEC Rel. No. 2004-152 (D.D.C. Nov. 4, 2004).

22. *Id.* at 2.

23. BOA Opening Mem. at 2-3.

24. *Id.* at 1.

25. *Id.* at 27.

26. *Id.* at 25.

27. Mem. Order at 4.

28. *Id.* at 3.

29. *Id.* at 3.

30. *Id.* at 3.

31. *Id.* at 4.

32. *Id.* at 4.

33. *Id.* at 4-5.

34. *Id.* at 4, 8, 9.

35. *Id.* at 9.

36. *Id.* at 9 n.3.

37. *Id.* at 6.

38. *Id.* at 6-7.

39. *Id.* at 7.

40. *Id.* at 10.

41. *Id.* at 11.

42. *SEC v. Bank of America Corp.*, Case Management Plan, No. 09 Civ. 6829 (S.D.N.Y. Setp. 21, 2009) at 4.

43. *SEC v. Bank of America Corp.*, Plaintiffs Demand for Jury Trial, No. 09 Civ. 6829 (S.D.N.Y. Oct. 7, 2009); *SEC v. Bank of America Corp.*, Defendant's Demand for Jury Trial, No. 09 Civ. 6829 (S.D.NM.Y. Oct. 9, 2009).

44. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, § 201, 101 Stat. 931 (amending 15 U.S.C. §78u(d)(3) to provide authority for the SEC "to seek . . . a civil penalty" against "any person who has violated any provision of this title, the rules or regulations thereunder").

45. S. Rep. No. 337, 101st Cong., 2d Sess. at 17 (1990).

46. Statement of the Securities and Exchange Commission Concerning Financial Penalties, SEC Rel. No. 2006-4 (Jan. 4, 2006).

47. *Id.*

48. Mary L. Schapiro, Address to Practicing Law Institute's "SEC Speaks in 2009" Program, Feb. 6, 2009, available at *http://www.sec.gov/news/speech/2009/ spch020609mls.htm.*

49. Luis A. Aguilar, Reinvigorating the Enforcement Program to Restore Investor Confidence, Mar. 18, 2009, available at *http://www.sec.gov/news/speech/2009/spch031809laa.htm;* Robert Khuzami, Testimony Concerning Strengthening the SEC's Vital Enforcement Responsibilities, May 7, 2009, available at *http://www.sec.gov/news/testimony/2009/ts050709rsk.htm*.

50. Government Accountability Office, Greater Attention Needed to Enhance Communication and Utilization of Resources in the Division of Enforcement, GAO-09-613T, May 7, 2009.

51. *Id.*

52. Mem. Order at 11.

53. S. Rep. No. 337, 101st Cong., 2d Sess. at 17 (1990).

54. Michael Orey, "Commentary: Do Shareholder Class Actions Make Sense?" *BusinessWeek*, Sept. 17, 2009 (*quoting* Stanford Law Professor and former SEC Commissioner Joseph A. Grundfest).

55. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exch. Act Rel. No. 44969 (Oct. 23, 2001), available at *http://www.sec.gov/litigation/investreport/34-44969.htm#P54_10935*.

56. Statement of the Securities and Exchange Commission Concerning Financial Penalties, SEC Rel. No. 2006-4 (Jan. 4, 2006).

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