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BAC Letter to FCIC re Audio Files

Reginald J. Brown

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January 25, 2011

Reginald J. Brown

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Gary Cohen, Esq.
Cassidy Waskowicz, Esq.
Financial Crisis Inquiry Commission
1717 Pennsylvania Ave. NW, Suite 800
Washington, DC 20006-4614

Re: FCIC's Potential Release of Audio Files

Dear Gary and Cassidy:

We represent Bank of America Corporation, including Merrill Lynch and Countrywide ("BAC"), and submit this letter on BAC's behalf in response to your January 19, 2011 email notifying us of the Financial Crisis Inquiry Commission's ("FCIC") intent to post on its website audio files of the FCIC's interviews with certain current and former BAC employees.

As we have previously discussed, we have no objection to the FCIC's release of audio files from interviews with former CEOs Ken Lewis, Stan O'Neal, John Thain, and Angelo Mozilo.

With respect to other employees, however, we continue to believe that immediate release of audio files would be inappropriate and contrary to our expectations regarding confidentiality, as well as the personal privacy expectations of the individuals who spoke to you voluntarily in lieu of being subpoenaed. It has always been our understanding, based on communications with FCIC staff, that confidential materials would be presumptively protected for a period of five years, absent an overriding public interest as determined by a majority vote of Commissioners or by joint agreement of the Chairman and Vice Chairman. We are not aware of the basis for any such specific determination regarding the audio files of current or former employees below the CEO level, nor do we believe the public interest in these non-CEO interviews is sufficient to override the individuals' and company's legitimate privacy concerns.

As we explained in greater detail in our letters of October 29, 2010, November 5, 2010, and November 15, 2010, BAC and the individual interviewees have overlapping and distinct privacy interests weighing against immediate publication. The interviews contain confidential information relating to the interviewees themselves, as well as third parties. They also include discussions of sensitive and proprietary business information that could cause unwarranted competitive harm to BAC and its shareholders. In particular, the interviews contain information relating to internal business strategy; private and potentially privileged conversations with regulators; BAC's counterparty relationships; Board of Directors meetings and materials; and discussions regarding employee evaluation and performance.

Gary Cohen, Esq.
Cassidy Waskowicz, Esq.
January 25, 2011
Page 2

Per your request, we have identified below specific portions of each interview that we believe contain confidential information and should not be released by the FCIC at this time:

1. Andrew Plepler: The vast majority of Mr. Plepler's interview concerned mergers and announcements regarding community-based initiatives prior to 2000. We do not believe these topics are relevant to the FCIC's mission to explore the causes of the financial crisis. In addition, Mr. Plepler mentioned the names of several individuals during the interview who had no involvement in the activities of interest to the FCIC. *See, e.g.*, 12:44, 14:53, 15:07, 16:10, 17:38, 17:54, 56:50, 1:09:21, 1:10:50, 1:12:20. Mr. Plepler's interview also contains exchanges between a former FCIC staff member and counsel during which the former staff member misrepresented various matters that we have since discussed with you. *See, e.g.*, 45:45–52:10; 57:45–1:01:50; 1:13:15–1:14:45.
2. Dow Kim: The FCIC asked Mr. Kim questions regarding two presentations given to Merrill's Board of Directors. As we explained in more detail in our letters dated October 29, 2010, and December 13, 2010, Board of Directors meeting minutes and materials are highly confidential. We continue to object not only to the immediate release of such materials, but also to the portions of interviews where such materials are discussed, sometimes with line-by-line detail, which is tantamount to releasing the documents themselves. *See* 53:27–56:00; 1:52:40–1:54:30. The FCIC also asked a series of questions relating to Mr. Kim's expectation that Merrill would invest in his hedge fund, and Mr. Kim speculated as to why Merrill ultimately decided not to invest. We do not believe this topic is relevant to the FCIC's mission. *See* 1:17:05–1:18:11; 1:20:00–1:20:40; 1:21:20–1:24:35. The FCIC also questioned Mr. Kim at length about a misunderstanding regarding his eligibility for retirement benefits upon leaving Merrill, including private discussions between Mr. Kim and Merrill's human resources department, as well as involvement by Mr. Kim's personal counsel and the existence of a tolling agreement. This information is both confidential and irrelevant to the FCIC's inquiry and should not be released. *See* 1:37:15–1:49:20.
3. Jeffrey Kronthal: The FCIC asked Mr. Kronthal a series of questions relating to a presentation given to Merrill's Board of Directors. As we explained in more detail in our letters dated October 29, 2010, and December 13, 2010, Board of Directors meeting minutes and materials are highly confidential. We continue to object not only to the immediate release of such materials, but also to the portions of interviews where such materials are discussed, sometimes with line-by-line detail, which is tantamount to releasing the documents themselves. *See* 55:00–1:10:55.

Gary Cohen, Esq.
Cassidy Waskowicz, Esq.
January 25, 2011
Page 3

4. Christopher Ricciardi: Discussion of Mr. Ricciardi's employment agreement is an internal personnel matter irrelevant to the FCIC's work. *See* Part 2: 2:12. We also object to the release of the discussions relating to a list of Merrill CDOs that was handed to Mr. Ricciardi during the interview, which reveal confidential counterparty information. *See* Part 2: 28:58; Part 2: 31:35.
5. David Sambol: The FCIC on several occasions refers to and/or incorrectly characterizes internal business processes, non-public and proprietary documents, and confidential business discussions and strategy. These passages should not be released. *See* Part 1: 53:45–54:23; Part 3: 34:12–35:19. We also object to the release of the portion of the interview in which the FCIC requests information that was the subject of pending litigation. Following an appropriate objection by counsel for both Mr. Sambol and BAC, the FCIC agreed not to pursue the line of questioning and, in fact, the second half of this conversation was kept off the record. We believe this portion should remain off the record as well. *See* Part 2: 19:46–22:59. Finally, there is an exchange that refers to communications between Countrywide and the Federal Reserve Bank, which is protected by the bank examination privilege and should not be released. *See* Part 3: 27:46–30:26.
6. Mark Kemp: Mr. Kemp's description of a confidential personnel matter has no bearing on the causes of the financial crisis and should not be released. *See* 1:13:55–1:20:30. The FCIC should also redact, for personal privacy reasons, the portion of the interview in which Mr. Kemp describes his disability. *See* 3:12–3:20.
7. Frank San Pedro: Information regarding the number of fraud referrals and the number of employees who were terminated following internal fraud investigations is confidential, and release of this information could deter future fraud reporting. *See* 11:11–12:10; 38:08–38:35. Mr. San Pedro also discussed details of three specific investigations, including the allegations, evidence inspected, and job titles, functions, and departments of the individuals who were implicated. Such information, which relates to internal fraud investigations, is highly confidential. If released, this information could be used to identify the individuals who were the targets of those investigations. Release of this information could also result in unwarranted suspicions directed at individuals who had no involvement in the investigations but who happened to be working at Countrywide at the time and place described. *See* 48:36–55:27; 55:53–58:05; 1:02:43–1:04:03. With respect to two of the investigations, Mr. San Pedro discusses information that was later submitted in a non-public Suspicious Activity Report to the federal government. Release of this information could potentially violate federal laws expressly prohibiting the disclosure of a SAR or any information that would reveal the existence of a SAR. *See* 12 C.F.R. § 21.11(k).

Gary Cohen, Esq.
Cassidy Waskowicz, Esq.
January 25, 2011
Page 4

Please contact me (202-663-6430) or Sarah Pfuhl (212-295-6305) if you have any questions or would like to discuss this further.

Sincerely,

/s/ Reginald J. Brown

Reginald J. Brown
Sarah Pfuhl