

1 Division of Securities
Utah Department of Commerce
2 160 East 300 South
Box 146760
3 Salt Lake City, UT 84114-6760
Telephone: (801) 530-6600
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5
6 BEFORE THE DIVISION OF SECURITIES
OF THE DEPARTMENT OF COMMERCE
7 OF THE STATE OF UTAH

8
9 IN THE MATTER OF:

10 **BANC OF AMERICA SECURITIES LLC,**
11 **CRD#26091; and**
12 **MERRILL LYNCH, PIERCE, FENNER &**
13 **SMITH, INCORPORATED as successor by**
14 **merger to BANC OF AMERICA**
INVESTMENT SERVICES, INC.,
CRD#16361

15 Respondents.

**STIPULATION AND CONSENT
ORDER**

Docket No. SD-10-0007

Docket No. SD-10-0008

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17 The Utah Division of Securities (“Division”), by and through its Director of Compliance,
18 Dave R. Hermansen, and Banc of America Securities LLC (“BAS”) and Merrill Lynch, Pierce,
19 Fenner & Smith, Incorporated (“MLPF&S”) as successor by merger to Banc of America
20 Investment Services, Inc. (in such capacity, “BAI”) (collectively with BAS, “Respondents”) hereby
21 stipulate and agree as follows:

22 WHEREAS, on October 23, 2009, Banc of America Investment Services, Inc., merged with
23 Merrill Lynch, Pierce, Fenner & Smith, Incorporated; and

24 WHEREAS, it is in the interest of the parties to this order to address only pre-merger
25 conduct and customers of BAI; and
26

1 WHEREAS, Respondents are broker-dealers licensed in the state of Utah; and

2 WHEREAS, coordinated investigations into Respondents' activities in connection with
3 certain of their sales practices regarding the underwriting, marketing, and sale of Auction Rate
4 Securities ("ARS") during the period of approximately August 1, 2007, through February 11, 2008,
5 have been conducted by a multistate task force; and

6 WHEREAS, Respondents have cooperated with regulators conducting the investigations by
7 responding to inquiries, providing documentary evidence and other materials, and providing
8 regulators with access to facts relating to the investigations; and

9 WHEREAS, Respondents have advised regulators of their agreement to resolve the
10 investigations relating to their practices in connection with the underwriting, marketing, and sale of
11 ARS; and

12 WHEREAS, Respondents agree to make (or to have made on their behalf) certain payments
13 as part of the resolution of the investigations; and

14 WHEREAS, Respondents elect to permanently waive any right to a hearing and appeal
15 under the Utah Administrative Procedures Act, Title 63G, Chapter 4 of the Utah Code, with respect
16 to this Stipulation and Consent Order (the "Order");

17 NOW, THEREFORE, the Division, as administrator of the Utah Uniform Securities Act
18 ("Act"), hereby enters this Order:

19 **I.**

20 **FINDINGS OF FACT**

21 1. Respondents admit the jurisdiction of the Division, neither admit nor deny the
22 Findings of Fact and Conclusions of Law contained in this Order, and consent to the entry of this
23 Order by the Division.

24 2. Beginning in March 2008, the task force began its investigation of Respondents
25 underwriting, marketing, and sale of ARS.

1 3. In or about August and September 2007, some ARS auctions experienced failures.
2 These failures were primarily based on credit quality concerns related to the ARS at issue, which
3 often involved underlying assets of collateralized debt obligations.

4 4. During the fall of 2007 and into the beginning months of 2008, as the default rates
5 on subprime mortgages soared and the market in general began experiencing significant credit
6 tightening, monoline insurers that insured many issuances of ARS were also becoming distressed
7 and were at risk of ratings downgrades.

8 5. The result of the overall market conditions in the fall of 2007 and into the beginning
9 of 2008 resulted in increasing concerns regarding market liquidity, as well as a declining demand
10 for ARS.

11 6. The task force concluded that Respondents should have had knowledge that, during
12 the fall of 2007 and winter of 2008, the auction markets were not functioning properly and were at
13 increased risk for failure.

14 7. During that time period, significant numbers of buyers had been exiting the market
15 and the continued success of the auctions was reliant upon the lead broker-dealers, such as BAS,
16 making increased support bids. These support bids had the effect of artificially propping up the
17 market and creating the illusion that the auction rate market was functioning as normal.

18 8. However, during that time, Respondents continued to market and sell ARS without
19 informing customers of the heightened risks associated with holding these securities.

20 9. Instead, Respondents engaged in a concerted effort to market ARS underwritten by
21 BAS towards its large retail customer accounts without advising the retail customers of any of the
22 potential risks associated with a failed auction or market illiquidity.

23 10. On or about February 11, 2008, without notifying any of its customers, BAS
24 stopped broadly supporting the auctions for which BAS was lead broker-dealer

25 11. The decision left thousands of Respondents' customers stuck holding illiquid ARS.

26 12. On or about September 10, 2008, Respondents, Bank of America Corporation

1 (“BAC”), and Blue Ridge Investments, L.L.C. (“Blue Ridge”) agreed, in principle, that BAC
2 would cause Blue Ridge to buy back, at par plus accrued but unpaid interest or dividends, ARS for
3 which auctions were in failed mode from “Eligible Investors,” which included all individual
4 investors, all charitable organizations with account values up to \$25 million and small and medium
5 sized businesses with account values up to \$10 million who purchased ARS from Respondents.

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8 **II.**

9 **CONCLUSIONS OF LAW**

10 1. The Division has jurisdiction over this matter pursuant to Section 61-1-6 of the Act.
11 The Act authorizes the Division to regulate: 1) the offers, sales, and purchases of securities; 2)
12 those individuals and entities offering and/or selling securities; and 3) those individuals and entities
13 transacting business as investment advisers within the state of Utah.

14 Respondents Engaged in Dishonest and Unethical Practices.

15 2. As described in the Findings of Fact section above, Respondents inappropriately
16 marketed and sold ARS without adequately informing their customers of the increased risks of
17 illiquidity associated with the product for the time period August 1, 2007, through February 11,
18 2008.

19 3. As a result, Respondents engaged in dishonest or unethical practices, warranting
20 sanctions under Section 61-1-6(2)(a)(ii)(G) of the Act.

21 Respondents Failed to Supervise Their Agents.

22 4. As described in the Findings of Fact section above, Respondents failed to properly
23 supervise their agents with respect to the marketing and sale of ARS from October 1, 2007, to
24 February 2008.

25 5. As a result, Respondents failed reasonably to supervise, warranting sanctions under
26 Section 61-1-6(2)(a)(ii)(J) of the Act.

6. The Division finds the following relief appropriate and in the public interest.

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III.
ORDER

On the basis of the Findings of Fact, Conclusions of Law, and Respondents' consent to the entry of this Order,

IT IS HEREBY ORDERED:

1. This Order concludes the investigation by the Division and any other action that the Division could commence under applicable Utah law on behalf of Utah as it relates to Respondents' underwriting, marketing, and sales of ARS, provided however, that excluded from and not covered by this paragraph 1 are any claims by the Division arising from or relating to the "Order" provisions contained herein.

2. This Order is entered into solely for the purpose of resolving the referenced multistate investigation, and is not intended to be used for any other purpose.

3. Respondents will CEASE AND DESIST from violating the Act and will comply with the Act.

4. Within ten days after the date of this Order, Respondents shall pay the sum of \$172,449.72 as an administrative fine pursuant to Utah Code Ann. § 61-1-18.7, to be deposited in the Securities Investor Education and Training Fund.

5. In the event another state securities regulator determines not to accept Respondents' settlement offer, the total amount of the Utah payment shall not be affected, and shall remain at \$172,449.72.

6. Respondents shall comply with the following requirements:

a. Eligible Investors

i. No later than October 21, 2008, BAC shall have caused Blue Ridge to offer to buy back, at par plus accrued and unpaid interest or dividends, Eligible ARS (as such term is defined below) for which auctions are in failed mode from Eligible Investors (as such term is defined below) who purchased such Eligible ARS from Respondents prior to February 13, 2008 (the "Offer"). For purposes of the

1 Offer, Eligible ARS means ARS purchased from Respondents on or before February
2 13, 2008, that were subject to an auction failure on or after February 11, 2008. The
3 Offer shall remain open for a period between October 10, 2008, and December 1,
4 2009, unless extended by Blue Ridge.

5 ii. "Eligible Investors" shall mean:

6 (a) Natural persons (including their IRA accounts, testamentary
7 trust and estate accounts, custodian IGMA and UTMA accounts, and
8 guardianship accounts) who purchased Eligible ARS from Respondents;

9 (b) Charities, endowments, or foundations with Internal Revenue
10 Code Section 501(c)(3) status that purchased Eligible ARS from
11 Respondents and that had \$25 million or less in assets in their accounts with
12 Respondents as determined by the customer's aggregate household
13 position(s) at Respondents as of September 9, 2008; or

14 (c) Small Business that purchased Eligible ARS from
15 Respondents. For purposes of this provision, "Small Business" shall mean
16 Respondents' customers not otherwise covered in paragraph III.6.a.ii(a) and
17 ii(b) above that had \$15 million or less in assets in their accounts with
18 Respondents as of September 9, 2008.

19 iii. Respondents will have provided prompt notice to customers of the
20 settlement terms and Respondents will have established a dedicated telephone
21 assistance line, with appropriate staffing, to respond to questions from customers
22 concerning the terms of the settlement.

23 **b. Relief for Eligible Investors Who Sold Below Par**

24 No later than December 31, 2008, Respondents shall have promptly provided notice
25 to any Eligible Investor that Respondents could reasonably identify who sold Eligible ARS
26 below par between February 11, 2008, and September 22, 2008. Such investors will be
paid the difference by Respondents between par and the price at which the Eligible Investor

1 sold the Eligible ARS. Any such Eligible Investors identified after December 31, 2008,
2 shall be promptly paid the difference between par and the price at which the Eligible
3 Investors sold the Eligible ARS.

4 **c. Consequential Damages Claims**

5 No later than October 10, 2008, Respondents shall make reasonable efforts
6 promptly to notify those Eligible Investors who own Eligible ARS that, pursuant to the
7 terms of the settlement, an independent arbitrator, under the auspices of the Financial
8 Industry Regulatory Authority ("FINRA"), will be available for the exclusive purpose of
9 arbitrating any Eligible Investor's consequential-damages claim.

10 Respondents shall consent to participate in the North American Securities
11 Administrators Association ("NASAA") Special Arbitration Procedure (the "SAP")
12 established specifically for arbitrating claims arising out of an Eligible Investor's inability
13 to sell Eligible ARS. Respondents shall notify Eligible Investors of the terms of the SAP.
14 Nothing in this Order shall serve to limit or expand any party's rights or obligations as
15 provided under the SAP. Arbitration shall be conducted, at the customer's election, by a
16 single non-industry arbitrator and Respondents will pay all forum and filing fees.

17 Arbitrations asserting consequential damages of less than \$1 million will be decided
18 through a single chair-qualified public arbitrator who will be appointed through the FINRA
19 list selection process for single arbitrator cases. In arbitrations where the consequential
20 damages claimed are greater than or equal to \$1 million, the parties can, by mutual
21 agreement, expand the panel to include three public arbitrators who will be appointed
22 through FINRA's list procedure.

23 Any Eligible Investors who choose to pursue such claims through the SAP shall
24 bear the burden of proving that they suffered consequential damages and that such damages
25 were caused by their inability to access funds invested in Eligible ARS. In the SAP,
26 Respondents shall be able to defend themselves against such claims; provided, however,
that Respondents shall not contest liability for the illiquidity of the underlying ARS position

1 or use as part of their defense any decision by an Eligible Investor not to borrow money
2 from Respondents.

3 All customers, including but not limited to Eligible Investors who avail themselves
4 of the relief provided pursuant to this Order, may pursue any remedies against Respondents
5 available under the law. However, Eligible Investors that elect to utilize the SAP are
6 limited to the remedies available in that process and may not bring or pursue a claim
7 relating to Eligible ARS in another forum.

8 **d. Institutional Investors**

9 Respondents shall endeavor to work with issuers and other interested parties,
10 including regulatory and governmental entities, to expeditiously and on a best efforts basis
11 provide liquidity solutions for institutional investors that purchased Eligible ARS from
12 Respondents and are not entitled to participate in the buyback under Section III
13 (“Institutional Investors”).

14 Beginning on December 31, 2008, and then quarterly thereafter, Respondents shall
15 submit a written report to a representative specified by NASAA outlining the efforts in
16 which Respondents have engaged and the results of those efforts with respect to
17 Institutional Investors’ holdings in Eligible ARS. The written reports will be submitted 20
18 days following the end of the quarter. Respondents shall confer with the representative no
19 less frequently than quarterly to discuss Respondents’ progress to date. Such written
20 reports and quarterly meetings shall continue until no later than December 31, 2009.
21 Following every quarterly meeting, the representative shall advise Respondents of any
22 concerns and, in response, Respondents shall detail the steps that Respondents plan to
23 implement to address such concerns.

24 **e. Relief for Municipal Issuers**

25 Respondents shall refund refinancing fees to municipal auction rate issuers that
26 issued such securities through Respondents in the initial primary market between August 1,
2007, and February 11, 2008, and refinanced those securities through Respondents after

1 February 11, 2008. Refinancing fees are those fees paid to Respondents in connection with
2 a refinancing and are exclusive of legal fees and any other fees or costs not paid to
3 Respondents in connection with the transaction.

4 **f. Repayment of Interest on Loans Provided To Eligible Investors**

5 To the extent that Respondents loaned money to Eligible Investors secured by
6 Eligible ARS, after February 11, 2008, at an interest rate that was higher than that paid on
7 such Eligible ARS, Respondents shall refund the difference to such Eligible Investors.

8 **g. Penalties**

9 i. Respondents shall pay a total civil penalty of FIFTY MILLION
10 (\$50,000,000) DOLLARS, which shall be allocated among and paid to the
11 Commonwealth of Massachusetts, the state of New York, and such other states and
12 territories that enter administrative or civil consent orders approving the terms of the
13 NASAA settlement (together with the Commonwealth of Massachusetts and the
14 state of New York, the "Approving States"). Any such allocation shall be made at
15 the discretion of the Approving States;

16 ii. The Utah portion of the fine shall be \$172,449.72 and shall be paid to
17 the Division no later than ten business days after the date of the Consent Order.

18 **h. In Consideration of the Settlement**

The Division will:

19 i. Terminate the investigation of Respondents' underwriting,
20 marketing, and sale of ARS to Eligible Investors as defined herein; and

21 ii. Refrain from taking legal action, if necessary, against Respondents
22 with respect to their institutional investors until December 31, 2008; the Division
23 shall issue continuances of that period as it deems appropriate; and

24 iii. The Division will not seek additional monetary penalties from
25 Respondents in connection with all underlying conduct relating to Respondents'
26 underwriting, marketing, and sale of ARS to investors.

1 i. If, after this Order is executed, Respondents fail to comply with any of the
2 terms set forth herein, the Division may take appropriate remedial action.

3 7. If payment is not made by Respondents, or if Respondents default in any of their
4 obligations set forth in this Order, the Division may vacate this Order, at its sole discretion, upon
5 10 days notice to Respondents and without opportunity for administrative hearing.

6 8. This Order as entered into by the Division waives any disqualification contained in
7 the laws of the state of Utah, or rules or regulations thereunder, including any disqualifications
8 from relying upon the registration exemptions or safe harbor provisions that MLPF&S, BAS, or
9 any of their affiliates may be subject to as a result of the findings contained in this Order. This
10 Order also is not intended to subject MLPF&S or BAS or any of their affiliates to any
11 disqualifications contained in the federal securities laws, the rules and regulations thereunder, the
12 rules and regulations of self regulatory organizations, or various states' or U.S. Territories'
13 securities laws, including, without limitation, any disqualifications from relying upon the
14 registration exemptions or safe harbor provisions. In addition, this Order is not intended to form
15 the basis for any such disqualifications.

16 9. For any person or entity not a party to this Order, this Order does not limit or create
17 any private rights or remedies against Respondents including, without limitation, the use of any e-
18 mails or other documents of Respondents or of others for auction rate securities sales practices, limit
19 or create liability of Respondents, or limit or create defenses of Respondents to any claims.

20 10. Nothing herein shall preclude Utah, its departments, agencies, boards, commissions,
21 authorities, political subdivisions and corporations, other than the Division and only to the extent set
22 forth in paragraph 1 above, (collectively, "State Entities") and the officers, agents or employees of
23 State Entities from asserting any claims, causes of action, or applications for compensatory, nominal
24 and/or punitive damages, administrative, civil, criminal, or injunctive relief against Respondents in
25 connection with certain auction rate securities sales practices at Respondents
26

1 11. This Order and any dispute related thereto shall be construed and enforced in
2 accordance with, and governed by, the laws of the state of Utah without regard to any choice of law
3 principles.

4 12. Respondents, through their execution of this Order, voluntarily waive their right to a
5 hearing on this matter and to judicial review of this Order under the Utah Administrative
6 Procedures Act, Title 63G, Chapter 4 of the Utah Code.

7 13. Respondents enter into this Order voluntarily and represents that no threats, offers,
8 promises, or inducements of any kind have been made by the Division or any member, officer,
9 employee, agent, or representative of the Division to induce Respondents to enter into this Order.

10 14. This Order shall be binding upon Respondents and each of their successors and
11 assigns with respect to all conduct subject to the provisions above and all future obligations,
12 responsibilities, undertakings, commitments, limitations, restrictions, events, and conditions.

13 15. Respondents acknowledge that this Order, upon approval by the Utah Securities
14 Commission ("Commission") shall be the final compromise and settlement of this matter.
15 Respondents further acknowledge that if the Commission does not accept the terms of the Order, it
16 shall be deemed null and void and without any force or effect whatsoever.

17 16. This Order constitutes the entire agreement between the parties herein and
18 supersedes and cancels any and all prior negotiations, representations, understandings, or
19 agreements between the parties. There are no verbal agreements which modify, interpret, construe,
20 or otherwise affect this Order in any way.

21 Utah Division of Securities

22 Date: February 15, 2010

23 By: Dave R. Hermansen

24 Dave R. Hermansen
25 Director of Compliance
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BY THE UTAH SECURITIES COMMISSION:

The foregoing Stipulation and Consent Order is hereby accepted, confirmed, and entered by the Utah Securities Commission.

DATED this 25th day of February, 2010.



Tim Bangerter



Jane Cameron

Erik Christiansen

Michael O'Brien



Laura Polacheck

1 **CONSENT TO ENTRY OF ADMINISTRATIVE ORDER BY BANC OF AMERICA
SECURITIES LLC AND BANC OF AMERICA INVESTMENT SERVICES, INC.**

2 Banc of America Securities LLC ("BAS") and Merrill Lynch, Pierce, Fenner & Smith, Incorporated
3 ("MLPF&S") as successor by merger to Banc of America Investment Services, Inc. (collectively with BAS,
4 "Respondents"), hereby acknowledge that they have been served with a copy of this Administrative Order,
5 have read the foregoing Order, are aware of their right to a hearing and appeal in this matter, and have
6 waived the same.

7 Respondents admit the jurisdiction of the Division, neither admit nor deny the Findings of Fact and
8 Conclusions of Law contained in this Order, and consent to entry of this Order by the Division as settlement
9 of the issues contained in this Order.

10 Respondents agree that they shall not claim, assert, or apply for a tax deduction or tax credit with
11 regard to any state, federal, or local tax for any administrative monetary penalty that Respondents shall pay
12 pursuant to this Order.

13 Respondents state that no promise of any kind or nature whatsoever was made to them to induce
14 them to enter into this Order and that they have entered into this Order voluntarily.

15 Steve Chaiken represents that he/she is Managing Director of BAS, and that, as
16 such, has been authorized by BAS to enter into this Order for and on behalf of BAS.

17 _____ represents that he/she is _____ of MLPF&S and that,
18 as such, has been authorized by MLPF&S to enter into this Order for and on behalf of MLPF&S.

19 Dated this 25th day of January, 2010.

20 BANC OF AMERICA SECURITIES LLC

21
22 State of New York

23 County of Westchester

24 SUBSCRIBED AND SWORN TO before me this 25th day of January 2010.

25
26 _____
Notary Public

My commission expires:

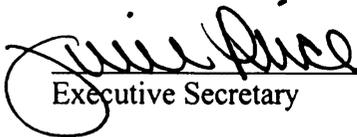
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Certificate of Service

I, Julie Price, certify that on the 4th day of March, 2010, I served the foregoing Stipulation and Consent Order by mailing a copy to:

Elizabeth Baird
O'Melveny & Myers LLP
1625 Eye Street NW
Washington, D.C. 20006

via e-mail: ebaird@omm.com



Executive Secretary

