

# CLEARY GOTTLIEB STEEN & HAMILTON LLP

ONE LIBERTY PLAZA  
NEW YORK, NY 10006-1470  
(212) 225-2000  
FACSIMILE (212) 225-3999  
WWW.CLEARYGOTTLIEB.COM

WASHINGTON DC • PARIS • BRUSSELS  
LONDON • MOSCOW • FRANKFURT • COLOGNE  
ROME • MILAN • HONG KONG • BEIJING

Writer's Direct Dial (212) 225-2550  
E-Mail [lliman@cgsh.com](mailto:lliman@cgsh.com)

MARK A. WALKER  
LESLIE B. SAMUELS  
EDWARD F. GREENE  
ALLAN D. SPIRLING  
MAX GITTER  
EVAN A. DAVIS  
LAURENT ALPERT  
VICTOR I. LEWKOW  
LESLIE N. SILVERMAN  
ROBERT L. TORTORIELLO  
A. RICHARD SUSKO  
LEE C. BUCHHEIT  
JAMES M. PEASLEE  
ALAN L. BELLER  
THOMAS J. MOLONEY  
WILLIAM F. GORIN  
MICHAEL L. RYAN  
ROBERT P. DAVIS  
YARON Z. REICH  
RICHARD S. LINCER  
JAIMÉ A. EL KOURY  
STEVEN G. HOROWITZ  
ANDREA G. PODOLSKY  
JAMES A. DUNCAN  
STEVEN M. LOEB  
DANIEL S. STERNBERG  
DONALD A. STERN  
CRAIG B. BROD  
SHELDON H. ALSTER  
WANDA J. OLSON  
MITCHELL A. LOWENTHAL  
DEBORAH M. BUELL  
EDWARD J. ROSEN  
LAWRENCE B. FRIEDMAN  
NICOLAS GRABAR  
CHRISTOPHER E. AUSTIN  
SETH GROSSHANDLER

WILLIAM A. GROLL  
JANET I. FISHER  
DAVID I. SUCERMAN  
HOWARD S. ZELBO  
DAVID F. BROSKY  
ARTHUR H. KOHN  
RAYMOND B. CHECK  
RICHARD J. COOPER  
JEFFREY S. LEWIS  
PAUL J. SHIM  
YVETTE P. TEOFAN  
STEVEN L. WILNER  
ERIKA W. NIJENHUIS  
LINDSEY P. GRANFIELD  
ANDRÉS DE LA CRUZ  
DAVID C. LOPEZ  
GARMEN A. CORRALES  
JAMES L. BROMLEY  
PAUL E. GLOTZER  
MICHAEL A. FERSTENZANG  
LEWIS J. LIMAN  
NEIL G. WHORISKEY  
JORGE G. JUANTORENA  
MICHAEL D. WEINBERGER  
DAVID LEINWAND  
JEFFREY A. ROSENTHAL  
ETHAN A. KLINGSBERG  
MICHAEL D. DAYAN  
GARMINE D. BOCCUZZI JR.  
JEFFREY D. KARFF  
KIMBERLY BROWN BLACKLOW  
ROBERT J. RAYMOND  
DAVID I. GOTTLIEB  
LEONARD C. JACOBY  
SANDRA L. FLOW  
DANA C. FLEISCHMAN  
FRANCESCA L. ODELL

WILLIAM I. MURAI  
JASON J. ACITOR  
MARGARET S. PEPPONIS  
LISA M. SCHWETZER  
KRISTINER W. HESS  
JOAN G. CHALDEZ  
DIANE M. LAUGHIN  
BRIAN S. PEAFF  
MEREDITH E. KOTLER  
CHARLIE T. KORCHI  
BENET J. CORRELLY  
DAVID AMAN  
ALIAM E. HENNER  
SEAN A. DONALD  
GLENN F. MCGRODY  
CHRISTOPHER P. MOORE  
JOON H. KIM  
RESIDENT PARTNERS  
SANDRA M. HICKS  
ELLEN M. BELLE  
S. DOUGLAS BORISKY  
JUDITH KASSEL  
DAVID E. WEBB  
PENELOPE L. CHRISTOPHER  
BEZAZ S. MORAD  
MARY E. ALUCK  
GABRIEL J. MESA  
DAVID H. HERRINGTON  
HEIDI H. HUGENBRITZ  
KATHLEEN M. EMBERGER  
NANCY J. HUSKIN  
WALLACE L. LARSON JR.  
JAMES D. SMALL  
AVRAM E. LITTE  
ELIZABETH LEWIS  
RESIDENT COUNSEL

September 8, 2009

## BY EMAIL AND HAND

Eric Corngold  
Deputy Attorney General  
Office of the Attorney General – New York  
120 Broadway  
23<sup>rd</sup> Floor  
New York, NY 10271

Re: Bank of America — Merrill Lynch

Dear Mr. Corngold:

Today, we received a letter from David Markowitz of your Office complaining that Bank of America's invocation of the attorney-client privilege was hindering the New York Attorney General's ability to make charging decisions in connection with your Office's investigation of the Bank of America-Merrill Lynch merger. We were extremely surprised and disappointed by the letter for several reasons. Before delineating those reasons, we should note that we have repeatedly asked to meet with your Office to explain the relevant facts with respect to each of the matters the letter states are under investigation. Each of those requests has been rejected. We do not understand your Office's apparent refusal to meet with Bank of America's counsel and to hear Bank of America and Merrill Lynch's side of the story, including why there is no basis for seeking to invade the attorney-client privilege here.

As to the other elements of the letter, there are several important points to emphasize:

First, the basic premise of the letter is simply wrong. Bank of America has not put at issue the subject matter of any advice of counsel. Nor has Bank of America offered reliance on legal advice as a justification for its disclosures. Bank of America's position has been clear and consistent throughout: the Proxy Statement and related disclosures complied with all applicable laws, rules and regulations. Because Bank of America did not violate the law, it has not offered reliance on legal advice as a defense.

Second, we have been cooperating extensively with your Office's investigation and have done so consistent with the existing policies endorsed by the federal government, as well as the bar associations of New York State and numerous other States, which make clear that waiver of the attorney-client privilege is not a necessary element of effective voluntary cooperation. Those policies include U.S. Department of Justice guidelines on cooperation published in August 2008, as well as the policies set out in a bill passed by the U.S. House of Representatives in 2007 and a similar bill introduced in the Senate in 2009.<sup>1</sup> They also include the policies of the Securities and Exchange Commission.<sup>2</sup> These policies uniformly admonish against seeking waiver of the attorney-client privilege in an investigation in all but the most extreme circumstances.

Third, the entire premise of the letter relies on questions asked of Bank of America and Merrill Lynch employees who were under subpoena – specifically, whether they relied on counsel's advice. Those witnesses' truthful responses that they did is the sole basis for asserting that Bank of America somehow is taking unfair advantage of the privilege. That suggestion is entirely unfounded. As you are no doubt aware, the doctrine that the letter relies upon is based on the concern that "it would be unfair for a party asserting [a contention that it relied on counsel] to an adjudicating authority to then rely on its privileges to deprive its adversary of access to material that might disprove or undermine the party's contentions." John Doe v. United States, 350 F.3d 299, 302 (2d Cir. 2003).<sup>3</sup>

---

<sup>1</sup> See, e.g., United States Attorneys' Manual, Principles of Federal Prosecution of Business Organizations §§ 928.710-720 (revised August 28, 2008) ("waiving the attorney-client and work product protections has never been a prerequisite under the Department's . . . guidelines for a corporation to be viewed as cooperative"); Attorney-Client Privilege Protection Act of 2009, S. 445, 111th Cong. (2009) (proposing that language similar to that of the August 28, 2008 United States Attorneys' Manual on the issue of privilege waiver be adopted as federal law); Attorney-Client Privilege Protection Act of 2009, H.R. 3013, 111th Cong. (2007) (finding that prosecutors and investigators "have been able to, and can continue to, conduct their work while respecting attorney-client and work product protections and the rights of individuals, including seeking and discovering facts crucial to the investigation and prosecution of organizations").

<sup>2</sup> See Securities and Exchange Commission Division of Enforcement, Enforcement Manual, pp. 98-99 (October 6, 2008) ("The staff must respect legitimate assertions of the attorney-client privilege and attorney work product protection . . . The staff should not ask a party to waive the attorney-client or work product privileges and is directed not to do so. . . . Waiver of a privilege is not a pre-requisite to obtaining credit for cooperation.").

<sup>3</sup> See also, Veras Investment Partners, LLC v. Akin Gump Strauss Hauer & Feld LLP, 860 N.Y.S.2d 78, 82 (1st Dep't 2008) ("The privilege is waived where a party affirmatively places the subject matter of its own privileged communications at issue in litigation, so that invasion of the privilege is required to determine the validity of the party's claim or defense, and application of the privilege would deprive the opposing party of vital information.");

That concern does not apply here. Bank of America has not asserted reliance on counsel as a defense to an adjudicating authority. Witnesses under subpoena answered a question that they were required to answer by your Office. Neither Bank of America nor the witnesses chose that question to be asked. Your Office chose to ask it. Once the question was asked, the witnesses and Bank of America were required to answer it truthfully. The answer to that question was not privileged. No one has sought to take unfair advantage of the assertion of the privilege by hiding information from your Office or anyone else. Contrast, Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 478-79 (S.D.N.Y. 1993) (“The attorney-client privilege is waived if the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication.”) (applying New York law and citing cases) (internal citation omitted). The compelled and truthful answer to a question posed by a regulator that the witness relied on counsel does not put the subject matter of the advice at issue or effect a waiver of the privilege.<sup>4</sup> Were the law otherwise, a regulator could compel a company to waive the privilege by simply asking a witness whether he or she relied on counsel and then claiming the communications themselves are at issue. To our knowledge, the New York Attorney General has never advocated such an extreme – and baseless – position, nor has any court accepted it.

Fourth, the letter contains a number of spurious and false allegations, including:

- The letter devotes an entire page to the timing of Merrill Lynch’s bonus payments and questions involving the role of counsel with respect to those payments without quoting a single question your Office asked of any witness regarding communications with counsel or

---

American Re-Insurance Co. v. United States Fidelity & Guaranty Co., 837 N.Y.S 2d 616, 622 (1st Dep’t 2007) (“This doctrine applies where a party, through its affirmative acts, places privileged material at issue and has selectively disclosed the advice.”); Orco Bank, N.V. v. Proteinas Del Pacifico, S.A., 577 N.Y.S.2d 841 (1st Dep’t 1992) (privilege waived only where plaintiff relied on advice of counsel in litigation and made selective disclosure of such advice), Village Board of the Village of Pleasantville v. Rattner, 515 N.Y.S.3d 585, 586 (2d Dep’t 1987) (“Where a party asserts as an affirmative defense the reliance upon the advice of counsel, the party waives the attorney-client privilege with respect to all communications to or from counsel concerning the transactions for which counsel’s advice was sought.”).

<sup>4</sup> Compare, United States v. White, 887 F.2d 267 (D.C. Cir. 1989)(statement that one’s lawyers “thoroughly reviewed” a matter is not a waiver); Sanofi-Synthelabs v. Apotex, Inc., 363 F. Supp. 2d 592, 595 (S.D.N.Y. 2005) (statement in deposition that certain patent claims were dropped on advice of counsel was not a waiver because “Sanofi has not asserted facts to a decision maker, such as a judge or jury, while shielding other facts from that decision maker”); Miteva v. Third-Point Mgmt. Co., 218 F.R.D. 397, 398 (S.D.N.Y. 2003) (no waiver even though testimony disclosed as a fact that a termination letter was written on advice of counsel, because witness did not selectively reveal any of the substance of the communication itself); United States v. Gasparik, 141 F. Supp. 2d 361, 371 (S.D.N.Y. 2001) (testimonial statement that a party would not act without the advice of counsel is not a waiver), Vicinanzo v. Brunshwig & Fils, Inc., 739 F. Supp. 891.893-94 (S.D.N.Y. 1990) (mere disclosure of review and approval by counsel does not waive the privilege); In re Joy Global, Inc., No. 01-039-LPS, 2008 U.S. Dist. LEXIS 46495, 2008 WL 2435552, at \*5 (D. Del. June 16, 2008) (“Disclosure of the fact that a client has consulted an attorney, and even disclosure that an attorney approved a course of conduct, does not waive the privilege otherwise attaching to communications between an attorney and client on the subject of the consultation.”); Nat’l Educ. Corp. v. Martin, No. 93 C 6247, 1994 WL 233661, at \*2 (N.D. Ill. May 26, 1994) (holding that an attorney’s mention of certain legal opinions and the ultimate legal conclusions reached by counsel did not waive attorney-client privilege).

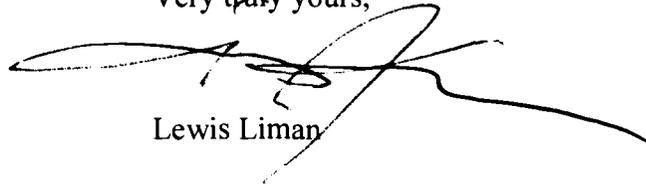
the role of counsel or any information it sought to elicit on those subjects. Apparently, your Office's interest in this subject arose only after, and as a result of, the proceedings before Judge Rakoff. As the SEC stated in open court, however, it "cannot infer any misconduct" from the timing of the bonus payments. Bank of America's position with respect to the Proxy Statement has been and continues to be that it did not contain any false or misleading statements.

- The letter refers to a goodwill charge of \$2 billion taken by Merrill Lynch at the end of the fourth quarter of 2008. However, it neglects to mention that the \$2 billion charge is an accounting charge that would be (and was) reconciled through the application of purchase accounting upon completion of the merger – and thus had no effect on the books and records of Bank of America after the merger. That testimony has been provided to your Office. We can only interpret your Office's allegations as reflecting a frustration that the truth does not fit its preconceived notions.
- Regarding the issue of Merrill Lynch's forecasted losses after the meeting where shareholders were asked to vote on the merger and the determination that Bank of America believed it had a good-faith basis to consider whether there had been a material adverse effect, no law required the Bank to report publicly the contents of its private conversations with its regulators or its contemplation of the termination of the merger. Nor did any law require Bank of America to report the intra-quarter results of Merrill Lynch. Bank of America and Merrill Lynch properly reported Merrill Lynch's results when they were required to do so – after the close of the quarter. We have responded previously to the erroneous suggestion that Bank of America decided against invoking the material adverse effect clause "when the jobs of its officers and directors were threatened by senior federal regulators." Bank of America decided not to invoke the material adverse effect clause because that determination was in the best interests of Bank of America's shareholders.
- Finally, with respect to the issue of disclosure of Merrill Lynch's forecasted losses in the fourth quarter of 2008, Bank of America's position has been that the forecasts – which reflected Merrill Lynch's estimates regarding the losses it might suffer at a point in time well before the close of the quarter, and were dependent on Merrill Lynch's assessments of the condition of global securities and credit markets during an extraordinary period of well-reported and acknowledged market volatility – were not appropriate for disclosure, especially in light of, among other things, the extensive risk disclosures Bank of

America and Merrill Lynch had already issued. The letter refers to testimony that Bank of America's then-general counsel gave advice at the beginning of December about whether or not he thought there was a material adverse effect (without disclosing that advice), but the testimony is uncontroverted that Bank of America did not consider invoking the material adverse effect clause until the middle of December, after the shareholders voted to approve the merger and after Bank of America had received updated forecasts including the actual results for November 2008.

Bank of America has spent thousands of hours and produced hundreds of thousands of documents in response to the New York Attorney General's requests. It has made all requested witnesses available. Its senior management has testified before the New York Attorney General, some on multiple occasions. Based on all of that evidence, we believe that the Proxy Statement and the others disclosures complied with all applicable laws, rules and regulations.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lewis Liman", is written over the typed name. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Lewis Liman

cc: David A. Markowitz, Esq.