



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

February 15, 2011

Russell G. Ryan
King & Spalding
1700 Pennsylvania Avenue, NW
Washington, DC 20006

Re: In the Matter of Certain GIC Brokers (P-01118)
**Merrill Lynch & Co., Inc. – Waiver Request of Ineligible Issuer Status under Rule
405 of the Securities Act**

Dear Mr. Ryan:

This is in response to your letter dated February 15, 2010, written on behalf of Merrill Lynch and Co., Inc. (ML&Co.) and its subsidiary Banc of America Securities LLC, now known as Merrill Lynch, Pierce, Fenner & Smith Incorporated, as successor by merger (BAS) and constituting an application for relief from the ML&Co. being considered an “ineligible issuer” under Rule 405(1)(vi) of the Securities Act of 1933 (Securities Act). ML&Co. requests relief from being considered an “ineligible issuer” under Rule 405, due to the entry on December 7, 2010, of a Commission Order (Order) pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act), naming BAS as a respondent. The Order, among other things, requires that BAS cease and desist from committing or causing any violations and any future violations of Section 15(c)(1)(A) of the Exchange Act.

Based on the facts and representations in your letter, and assuming ML&Co. and BAS comply with the Order, the Commission, pursuant to delegated authority has determined that ML&Co. has made a showing of good cause under Rule 405(2) and that ML&Co. will not be considered an ineligible issuer by reason of the entry of the Order. Accordingly, ML&Co.’s application for relief is hereby granted, and the effectiveness of such relief is as of the date of the entry of the Order. Any different facts from those represented or non-compliance with the Order might require us to reach a different conclusion.

Sincerely,

A handwritten signature in cursive script that reads "Mary Kosterlitz".

Mary Kosterlitz
Chief, Office of Enforcement Liaison
Division of Corporation Finance

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February 15, 2011

By Email and U.S. Mail

Mary Kosterlitz
Chief, Office of Enforcement Liaison
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: In the Matter of Certain GIC Brokers, SEC File No. P-01118

Dear Ms. Kosterlitz:

On behalf of our client Merrill Lynch & Co., Inc. ("ML&Co."), we submit this letter to request a determination that, for good cause shown, ML&Co. will not be classified as an "ineligible issuer" within the meaning of Rule 405 promulgated under the Securities Act of 1933 ("Securities Act") as a result of the December 7, 2010 administrative and cease-and-desist order (the "Order"¹) issued by the Commission against Banc of America Securities LLC ("BAS"), now known as Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill") (successor by merger), a wholly-owned broker-dealer subsidiary of ML&Co.² It is our understanding that the Division of Enforcement does not object to the requested determination, and we note that a request for similar relief was previously granted to Bank of America Corporation, the parent company of ML&Co., on the same day the Order was issued.³

The Order was issued after settlement discussions with the staff of the Philadelphia Regional Office that resulted in BAS submitting an Offer of Settlement, which the Commission

¹ The Order is available at www.sec.gov/litigation/admin/2010/34-63451.pdf.

² The merger of BAS into Merrill occurred on November 1, 2010, many years after the cessation of all conduct at BAS that is the subject of the Order.

³ The relevant correspondence is available at www.sec.gov/divisions/corpfin/cf-noaction/2010/boac120710-405.pdf.

accepted. The Order was issued pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (the “Exchange Act”), and, among other things, found that BAS willfully violated Exchange Act Section 15(c)(1)(A) by engaging in certain improper bidding practices involving the temporary investment of proceeds of tax-exempt municipal securities in reinvestment products; ordered BAS to refrain from committing or causing any violations and any future violations of that section; and required BAS to pay disgorgement plus prejudgment interest in the total amount of \$36,096,442 to specified entities. BAS neither admitted nor denied the Commission’s findings, and all of the required disgorgement payments have been made.

The Commission’s Securities Act rules provide substantial benefits to an issuer classified as a “well-known seasoned issuer” (“WKSI”), including the use of a streamlined automatic shelf registration process and exemption from “quiet period” restrictions prohibiting communication during the 30-day period prior to the filing of a registration statement.⁴ The rules also permit most other issuers to use a “free writing prospectus” after a registration statement is filed to communicate information about a registered offering of securities.⁵ However, these benefits are unavailable to issuers that are classified as “ineligible issuers” pursuant to Rule 405. Specifically, ineligible issuers are excluded from the WKSI definition, and therefore such issuers may not use automatic shelf registrations or make communications within 30 days prior to filing a registration statement. Similarly, the rules prohibit ineligible issuers from using post-filing free writing prospectuses.

An issuer becomes an ineligible issuer within the meaning of Rule 405 if, among other things, the issuer or any of its subsidiaries is made the subject of an administrative order arising from a governmental action that prohibits future violations of the anti-fraud provisions of the federal securities laws, requires the person to cease and desist from violating the anti-fraud provisions of the federal securities laws, or determines that the person violated the anti-fraud provisions of the federal securities laws.⁶ However, ineligible issuer status may be waived if “the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.”⁷ The Commission has delegated to the Division of Corporation Finance the authority to grant or deny applications requesting that an issuer not be considered an ineligible issuer as defined in Rule 405.⁸

Accordingly, ML&Co. hereby requests a determination that, for good cause shown, it should not be classified as an “ineligible issuer” under Rule 405 as a result of entry of the Order. ML&Co. requests that the Division of Corporate Finance make this determination for the following reasons:

1. The conduct addressed in the Order does not pertain to activities undertaken by ML&Co. or its subsidiaries in connection with ML&Co.’s status as an issuer of

⁴ See Securities Act Rules 405, 163, and 163A, 17 C.F.R. §§ 230.405, 203.163, and 203.163A.

⁵ See Securities Act Rule 164, 17 C.F.R. § 230.164. The rules permit WKSIs to use a free writing prospectus before a registration statement is filed as well. See Securities Act Rule 163, 17 C.F.R. § 230.163.

⁶ See Securities Act Rule 405, 17 C.F.R. § 230.405.

⁷ See *id.*

⁸ 17 C.F.R. § 200.30-1(a)(10).

securities (or any disclosures related thereto) or in connection with any of its filings with the Commission; indeed, the relevant conduct occurred at a time when ML&Co. was not affiliated with the legacy business entity and persons involved in the conduct.

2. ML&Co. and its subsidiaries have a strong record of compliance with the securities laws, and BAS cooperated extensively with the investigation into this matter by the Division of Enforcement and with parallel investigations by other government agencies and regulators. In particular, the Order specifically acknowledges BAS's extraordinary cooperation as follows:

“In determining to accept Respondent's Offer, the Commission considered the cooperation of and the remedial actions undertaken by Respondent in connection with the Commission's investigation as well as investigations conducted by other law enforcement agencies. Among other things, Respondent and its affiliates voluntarily self-reported the bidding practices described herein to the DOJ; cooperated extensively with investigations conducted by the Commission Staff, the DOJ, and other law enforcement and regulatory entities into these practices; implemented personnel actions and other remedial measures designed to prevent recurrence of these or similar practices; and committed to paying restitution to issuers affected by these practices. The DOJ accepted [Bank of America Corporation] into Part A of its Corporate Leniency Program, the Department's highest cooperation status.”

3. Classification of ML&Co. as an ineligible issuer would be unduly and disproportionately severe under the circumstances of this case.
4. The Order resulted from substantial negotiations between BAS and the Staff and its terms were carefully drafted to satisfy the competing concerns of both BAS and the Staff. Applying ineligible issuer status to ML&Co. would, in effect, unfairly inflict additional punishment beyond the negotiated settlement to which the parties have agreed in good faith.
5. The Commission has made similar determinations in comparable situations, including a determination concerning the same Order requested by ML&Co.'s parent company, Bank of America Corporation. *See e.g., Bank of America Corporation* (Dec. 7, 2010); *Deutsche Bank Securities, Inc.* (June 16, 2009); *Bank of America Corporation* (June 11, 2009); *RBC Capital Markets Corporation* (June 11, 2009); *Wachovia Securities, LLC* (Feb. 26, 2009); *Knight Capital Group, Inc.* (July 1, 2008); *Morgan Stanley & Co., Inc.* (May 11, 2007).

In light of the grounds for relief discussed above, we believe there is good cause to determine that ML&Co. should not be deemed an “ineligible issuer” as a result of the Order. Accordingly, we respectfully request that the Division of Corporation Finance make that determination, effective as of the date of the Order.

Mary A. Kosterlitz
February 15, 2011
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If you have any questions regarding this request, please do not hesitate to contact me at
(202) 661-7984 or rryan@kslaw.com.

Sincerely,

A handwritten signature in blue ink, appearing to read "Russell G. Ryan", with a long horizontal flourish extending to the right.

Russell G. Ryan