



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

October 22 2009

Mr. J. Steele Alphin  
Chief Administrative Officer  
Bank of America Corporation  
100 N. Tyron Street  
NCI-007-58-22  
Charlotte, North Carolina 28255-001

***Re: Proposed Compensation Payments and  
Structures for Senior Executive Officers and  
Most Highly Compensated Employees***

Dear Mr. Alphin:

Pursuant to the Department of the Treasury's Interim Final Rule on TARP Standards for Compensation and Corporate Governance, the Office of the Special Master has completed its review of your 2009 compensation submission on behalf of the senior executive officers and certain most highly compensated employees of Bank of America Corporation ("BofA"). Attached as ***Annex A*** is a Determination Memorandum (accompanied by ***Exhibits I*** and ***II***,) providing the determinations of the Special Master with respect to 2009 compensation for those employees. 31 C.F.R. § 30.16(a)(3).

The Interim Final Rule requires the Special Master to determine whether the compensation structure for each senior executive officer and certain most highly compensated employees "will or may result in payments inconsistent with the purposes of section 111 of EESA or TARP, or [is] otherwise contrary to the public interest." *Id.* § 30.16(a)(3). The Special Master has determined that, to satisfy this standard, 2009 compensation for senior executive officers and certain most highly compensated employees of BofA generally must comport with the following standards:

- There can be no guarantee of any "bonus" or "retention" awards among the compensation structures approved by the Special Master. Cash guarantees payable in 2009 pursuant to previously existing agreements must be restructured to be payable in stock awards that may only be liquidated over time.
- Rather than cash, the majority of each individual's base salary will be paid in the form of stock. This stock will immediately vest, in accordance with the Interim Final Rule, but will only be redeemable in three equal, annual installments beginning on the second anniversary of grant, with each installment redeemable one year earlier if BofA repays its TARP obligations.

- Base salary paid in cash should not exceed \$500,000 per year, except in appropriate cases for good cause shown. Overall, cash compensation must be significantly reduced from cash amounts paid in 2008. In BofA's case, cash compensation for these employees will decrease 94% from 2008 levels
- Total compensation for each individual must both reflect the individual's value to BofA and be appropriate when compared with total compensation provided to persons in similar positions or roles at similar entities. Overall, total direct compensation must be significantly reduced from 2008 amounts. In BofA's case, total direct compensation for these employees will decrease 62% from 2008 levels. *Id.* § 30.16(a)(3)(i).
- If—and only if—the employee achieves objective performance metrics developed and reviewed in consultation with the Office of the Special Master, employee may be eligible for long-term incentive awards. These awards, however, must be payable in the form of restricted stock that will be forfeited unless the employee stays with BofA for at least three years following grant, and may only be redeemed in 25% installments for each 25% installment of BofA's TARP obligations that are repaid. Such long-term incentive awards may not exceed one-third of total annual compensation.
- Any and all incentive compensation paid to employees will be subject to recovery or “clawback” if the payments are based on materially inaccurate financial statements or any other materially inaccurate performance metrics, or if the employee is terminated due to misconduct that occurred during the period in which the incentive was earned.
- Any and all “other” compensation and perquisites will not exceed \$25,000 for each employee (absent exceptional circumstances for good cause shown).
- No severance benefit to which an employee becomes entitled in the future may take into account a cash salary increase, or any payment of stock salary, that the Special Master has approved for 2009.
- No additional amounts in 2009 may be accrued under supplemental executive retirement plans or credited by the company to other “non-qualified deferred compensation” plans after the date of the Determination Memorandum.

The Special Master has also determined that, in order for the approved compensation structures to satisfy the standards of 31 C.F.R. § 30.16(a)(3), BofA must adopt policies applicable to these employees as follows:

- The achievement of any performance objectives must be certified by the Compensation and Benefits Committee of BofA's Board of Directors, which is composed solely of independent directors. These performance objectives must be reviewed and approved by the Office of the Special Master.

- The employees will be prohibited from engaging in any hedging or derivative transactions involving BofA stock that would undermine the long-term performance incentives created by the compensation structures.
- BofA may not provide a tax “gross up” of any kind to these employees.
- At least once every year, the Compensation and Benefits Committee of BofA’s Board of Directors must provide to the Department of the Treasury a narrative description identifying each compensation plan for its senior executive officers, and explaining how the plan does not encourage the senior executive officers to take unnecessary and excessive risks that threaten BofA’s value.

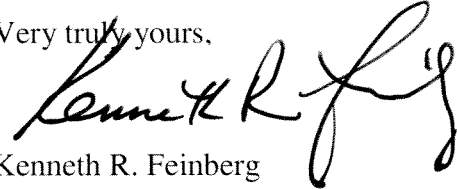
These requirements are described in further detail in the attached Determination Memorandum.

The Special Master’s review has been guided by a number of considerations, including each of the principles articulated in the Interim Final Rule. *Id.* § 30.16(b)(1). The following principles were of particular importance to the Special Master in his determinations with respect to BofA’s compensation structures:

- *Performance-based compensation.* The overwhelming majority of approved compensation depends on BofA’s performance, and ties the financial incentives of BofA employees to the overall performance of the company. A majority of the salary paid to employees under these structures will be paid in the form of stock; and, because the stock salary will become transferable only in three equal, annual installments beginning on the second anniversary of the date the salary stock is earned (with each installment redeemable one year earlier if BofA repays its TARP obligations), the ultimate value realized by the employee will depend on BofA’s performance over the long term. Guaranteed amounts payable in cash, in contrast, are generally rejected. *Id.* § 30.16(b)(1)(iv).
- *Taxpayer return.* The compensation structures approved by the Special Master reflect the need for BofA to remain a competitive enterprise and, ultimately, to be able to repay TARP obligations. The Special Master has determined that the approved compensation structures are competitive when compared to those provided to similarly situated employees of similarly situated companies. Overall, the compensation structures generally provide for total compensation packages that target the 50th percentile when compared to other executive officers and employees. *Id.* § 30.16(b)(1)(ii).
- *Appropriate Allocation.* The total compensation payable to BofA employees is weighted heavily toward long-term structures that are tied to BofA’s performance and are easily understood by shareholders. As a general principle, guaranteed income is rejected. Fixed compensation payable to BofA employees should consist only of cash salaries at sufficient levels to attract and retain employees and provide them a reasonable level of liquidity.

Pursuant to the Interim Final Rule, the Company may, within 30 days of the date hereof, request in writing that the Special Master reconsider the determinations set forth in the Determination Memorandum. If the Company does not request reconsideration within 30 days, these initial determinations will be treated as final determinations. *Id.* § 30.16(c)(1).

Very truly yours,

A handwritten signature in black ink, appearing to read "Kenneth R. Feinberg". The signature is fluid and cursive, with the first name "Kenneth" written in a larger, more prominent script than the last name "Feinberg".

Kenneth R. Feinberg  
Office of the Special Master  
for TARP Executive Compensation

Attachments

cc: Mr. Thomas M. Ryan  
Jana J. Litsey, Esquire  
Mr. Mark Behnke

## ANNEX A DETERMINATION MEMORANDUM

### I. INTRODUCTION

The Emergency Economic Stabilization Act of 2008, as amended by the American Recovery and Reinvestment Act of 2009 (“EESA”), requires the Secretary of the Treasury to establish standards related to executive compensation and corporate governance for financial institutions receiving financial assistance under the Troubled Asset Relief Program (“TARP”). Through the Department of the Treasury’s Interim Final Rule on TARP Standards for Compensation and Corporate Governance (the “Rule”), the Secretary delegated to the Office of the Special Master for TARP Executive Compensation (the “Office of the Special Master” or “the Office”) responsibility for reviewing compensation structures of certain employees at financial institutions that received exceptional financial assistance under the TARP (“Exceptional Assistance Recipients”). 31 C.F.R. § 30.16(a); *id.* § 30.16(a)(3). For these employees, the Special Master must determine whether the compensation structure will or may result in payments “inconsistent with the purposes of section 111 of EESA or TARP, or [is] otherwise contrary to the public interest.” *Id.*

Bank of America Corporation (“BofA” or the “Company”), one of seven Exceptional Assistance Recipients, has submitted to the Special Master proposed compensation structures for review pursuant to Section 30.16(a)(3) of the Rule. These compensation structures apply to 3 employees that the Company has identified as Senior Executive Officers (the “Senior Executive Officers,” or “SEOs”) for purposes of the Rule, and 11 employees the Company has identified as among the most highly compensated employees of the Company for purposes of the Rule (the “Most Highly Compensated Employees,” and, together with the SEOs, the “Covered Employees”).

The Special Master has completed the review of the Company’s proposals for the Covered Employees pursuant to the principles set forth in the Rule. *Id.* § 30.16(b)(1). This Determination Memorandum sets forth the determinations of the Special Master, pursuant to Section 30.16(a)(3) of the Rule, with respect to the Covered Employees.

### II. BACKGROUND

On June 15, 2009, the Department of the Treasury (“Treasury”) promulgated the Rule, creating the Office of the Special Master and delineating its responsibilities. Immediately following that date, the Special Master, and Treasury employees working in the Office of the Special Master, conducted extensive discussions with BofA officials. During these discussions, the Office of the Special Master informed BofA about the nature of the Office’s work and the authority of the Special Master under the Rule. These discussions continued for a period of months, during which the Special Master and BofA explored potential compensation structures for the Covered Employees.

The Rule required that each Exceptional Assistance Recipient submit proposals for each Senior Executive Officer and Most Highly Compensated Employee no later than

August 14, 2009. *Id.* § 30.16(a)(3). On July 20, 2009, the Special Master requested from each Exceptional Assistance Recipient, including BofA, certain data and documentary information necessary to facilitate the Special Master’s review of the Company’s compensation structures. The request required BofA to submit data describing its proposals, and the payments that would result from the proposals concerning each Covered Employee.

In addition, the Rule authorizes the Special Master to request information from an Exceptional Assistance Recipient “under such procedures as the Special Master may determine.” *Id.* § 30.16(d). BofA was required to submit competitive market data indicating how the amounts payable under BofA’s proposals relate to the amounts paid to similarly situated employees at similarly situated financial institutions. BofA was also required to submit a range of documentation, including information related to proposed performance metrics, internal policies designed to curb excessive risk, and certain previously existing compensation plans and agreements.

BofA submitted this information to the Office of the Special Master on August 14, 2009. Following a preliminary review of the submission, and the submission of certain additional information, on August 31, 2009, the Special Master determined that BofA’s submission was substantially complete for purposes of the Rule. *Id.* § 30.16(a)(3). The Office of the Special Master then commenced a formal review of BofA’s proposals for the Covered Employees. The Rule provides that the Special Master is required to issue a compensation determination within 60 days of a substantially complete submission. *Id.* § 30.16(a)(3).

The Office of the Special Master’s review of the Company’s proposals was aided by analysis from a number of internal and external sources, including:

- Treasury personnel detailed to the Office of the Special Master, including executive compensation specialists with significant experience in reviewing, analyzing, designing and administering executive compensation plans, and attorneys with experience in matters related to executive compensation;
- Competitive market data provided by the Company in connection with its submission to the Office of the Special Master;
- External information on comparable compensation structures extracted from the *U.S. Mercer Benchmark Database-Executive*;
- External information on comparable compensation structures extracted from Equilar’s *ExecutiveInsight* database (which includes information drawn from publicly filed proxy statements) and Equilar’s *Top 25 Survey Summary Report* (which includes information from a survey on the pay of highly compensated employees);
- Consultation with Lucian A. Bebchuk, a world-renowned expert in executive compensation and the William J. Friedman and Alicia Townsend Friedman

Professor of Law, Economics, and Finance and Director of the Program on Corporate Governance at Harvard Law School; and

- Consultation with Kevin J. Murphy, a world-renowned expert in executive compensation and the Kenneth L. Treftz Chair in Finance in the department of finance and business economics at the University of Southern California's Marshall School of Business.

The Special Master considered these views, in light of the statutory and regulatory standards described in Part II below, when evaluating the Company's proposals for the Covered Employees for 2009.

### **III. STATUTORY AND REGULATORY STANDARDS**

The Rule requires that the Special Master determine for each of the Covered Employees whether BofA's proposed compensation structures, including amounts payable or potentially payable under the compensation structure, "will or may result in payments that are inconsistent with the purposes of section 111 of EESA or TARP, or [is] otherwise contrary to the public interest." 31 C.F.R. § 30.16(a)(3) (as applied to Covered Employees of Exceptional Assistance Recipients, the "Public Interest Standard"). Regulations promulgated pursuant to the Rule require that the Special Master consider six principles when making these compensation determinations:

- (1) *Risk*. The compensation structure should avoid incentives which encourage employees to take unnecessary or excessive risks that could threaten the value of the Exceptional Assistance Recipient, including incentives that reward employees for short-term or temporary increases in value or performance; or similar measures that may undercut the long-term value of the Exceptional Assistance Recipient. Compensation packages should be aligned with sound risk management. *Id.* § 30.16(b)(1)(i).
- (2) *Taxpayer return*. The compensation structure and amount payable should reflect the need for the Exceptional Assistance Recipient to remain a competitive enterprise, to retain and recruit talented employees who will contribute to the recipient's future success, so that the Company will ultimately be able to repay its TARP obligations. *Id.* § 30.16(b)(1)(ii).
- (3) *Appropriate allocation*. The compensation structure should appropriately allocate the components of compensation such as salary and short-term and long-term performance incentives, as well as the extent to which compensation is provided in cash, equity, or other types of compensation such as executive pensions, or other benefits, or perquisites, based on the specific role of the employee and other relevant circumstances, including the nature and amount of current compensation, deferred compensation, or other compensation and benefits previously paid or awarded. *Id.* § 30.16(b)(1)(iii).

- (4) *Performance-based compensation.* An appropriate portion of the compensation should be performance-based over a relevant performance period. Performance-based compensation should be determined through tailored metrics that encompass individual performance and/or the performance of the Exceptional Assistance Recipient or a relevant business unit taking into consideration specific business objectives. Performance metrics may relate to employee compliance with relevant corporate policies. In addition, the likelihood of meeting the performance metrics should not be so great that the arrangement fails to provide an adequate incentive for the employee to perform, and performance metrics should be measurable, enforceable, and actually enforced if not met. *Id.* § 30.16(b)(1)(iv).
- (5) *Comparable structures and payments.* The compensation structure and amount payable should be consistent with, and not excessive taking into account, compensation structures and amounts for persons in similar positions or roles at similar entities that are similarly situated, including, as applicable, entities competing in the same markets and similarly situated entities that are financially distressed or that are contemplating or undergoing reorganization. *Id.* § 30.16(b)(1)(v).
- (6) *Employee contribution to TARP recipient value.* The compensation structure and amount payable should reflect the current or prospective contributions of an employee to the value of the Exceptional Assistance Recipient, taking into account multiple factors such as revenue production, specific expertise, compliance with company policy and regulation (including risk management), and corporate leadership, as well as the role the employee may have had with respect to any change in the financial health or competitive position of the recipient. *Id.* § 30.16(b)(1)(vi).

The Rule provides that the Special Master shall have discretion to determine the appropriate weight or relevance of a particular principle depending on the facts and circumstances surrounding the compensation structure or payment for a particular employee. *Id.* § 30.16(b). To the extent two or more principles may appear inconsistent in a particular situation, the Rule requires that the Special Master exercise his discretion in determining the relative weight to be accorded to each principle. *Id.*

The Rule provides that the Special Master may, in the course of applying these principles, take into account other compensation structures and other compensation earned, accrued, or paid, including compensation and compensation structures that are not subject to the restrictions of section 111 of EESA. For example, the Special Master may consider payments obligated to be made by the Company pursuant to certain legally binding rights under valid written employment contracts entered into prior to enactment of the statute and the accompanying Rule. *Id.* § 30.16(a)(3).



## IV. COMPENSATION STRUCTURES AND PAYMENTS

### A. BofA Proposals

BofA has provided the Office of the Special Master with detailed information concerning its proposed 2009 compensation structures for the Covered Employees, including amounts potentially payable under the compensation structure for each Covered Employee (the “Proposed Structures”).

BofA supported its proposal with detailed assessments of each Covered Employee’s tenure and responsibilities at the Company (or its applicable subsidiary) and historical compensation structure. The submission also included market data that, according to the Company, indicated that the amounts potentially payable to each employee were comparable to the compensation payable to similarly situated employees at a “peer group” of entities selected by the Company.

#### *1. Covered Employees Generally*

The following structures were proposed by BofA for the Covered Employee generally, with the exception of BofA’s Chief Executive Officer (“CEO”) and an employee with an existing arrangement that provides a cash guarantee; each of those employees are addressed separately.

##### a. Cash Salary

Except for the Company’s CEO, BofA proposed increasing the cash salary of each Covered Employee to annualized amounts of either \$700,000 or \$950,000. The Company’s proposal asserted that cash salaries at such levels could be justified by reference to the compensation of similarly situated employees at similarly situated companies.

##### b. Stock Salary

BofA proposed that Covered Employees receive substantial “stock salary,” in annualized amounts ranging from \$1,966,667 to \$19,050,000. Stock salary would be delivered on the Company’s regular payroll dates in the form of fully vested stock units, which would then “settle” into regular shares and become transferable 40% on the first anniversary of grant and 30% each on the second and third anniversaries.

##### c. Annual Long-Term Incentive Awards

BofA proposed that the Covered Employees be eligible in 2009 for substantial grants of annual long-term incentive awards, with total potential values ranging from \$1,333,334 to \$10,000,000. Under the proposal, the amount of an employee’s award would be calculated based on achievement of corporate and/or business unit financial goals. Awards would be paid in the form of long-term restricted stock with vesting subject to the employee providing two years of service from the date of award, and actual

payment in 25% installments for each 25% repayment of the Company's TARP obligations.

After submitting the Proposed Structures, the Company informed the Office of the Special Master that neither the CEO nor any of his direct reports who were serving in leadership positions at either legacy BofA or Merrill Lynch during 2008 (including those among the Covered Employees) would be eligible for an annual long-term incentive award in 2009.

d. "Other" Compensation and Perquisites

BofA proposed payments of "other" compensation, as well as perquisites, to the Covered Employees. These proposed payments varied in value.

e. Non-Qualified Deferred Compensation

BofA also proposed that certain Covered Employees receive compensation in the form of accruals under a "non-qualified deferred compensation" plan.

**2. *Certain other Covered Employees***

a. Covered Employee with a Cash Guarantee

BofA included a proposal with respect to a Covered Employee who is party to an agreement with the Company providing for a substantial guaranteed cash payment in 2009 BofA believed this agreement created a legally binding right under a valid written employment contract, *see* 31 C.F.R. § 30.10(e)(2). BofA proposed that the amount of cash that would otherwise be delivered to this Covered Employee be instead delivered as a \$700,000 cash salary, with the remainder of the guaranteed amount paid in salary stock provided on the same terms that BofA proposed for salary stock generally. The Covered Employee agreed to waive his right to the guaranteed cash payment in exchange for the proposed structure.

b. CEO

As initially submitted by BofA, the Proposed Structure for the CEO included cash salary of \$950,000 (reduced from his 2008 salary of \$1,500,000), stock salary of \$7,050,000 and eligibility for an annual long-term incentive award of up to \$4,000,000.

On September 30, 2009, the CEO announced his retirement from the Company, effective December 31, 2009. Following this announcement, the Company proposed instead that the CEO be paid no stock salary or long-term incentive award for 2009 and a prospective cash salary of \$0 from the date of this Determination Memorandum through his last day of employment.

## **B. Determinations of the Special Master**

The Special Master has reviewed the Proposed Structures in detail by application of the principles set forth in the Rule and described in Part II above. In light of this review and analysis, the Special Master has determined that both the structural design of BofA's proposals and the amounts potentially payable to Covered Employees under the proposals would be inconsistent with the Public Interest Standard and, therefore, require modification.

The Special Master has determined, in light of the considerations that follow, that the compensation structures described in *Exhibits I* and *II* to this Determination Memorandum will not, by virtue of either their structural design or the amounts potentially payable under them, result in payments inconsistent with the Public Interest Standard.

### ***1. Covered Employees Generally***

#### **a. Cash Salary**

The Special Master has reviewed the cash salary proposals in light of the principle that compensation structures should generally be comparable to "compensation structures and amounts for persons in similar positions or roles at similar entities." *Id.* § 30.16(b)(1)(v). The Special Master has concluded generally that, for Covered Employees at Exceptional Assistance Recipients, cash salaries should generally target the 50th percentile. Such levels of cash salaries balance the need to attract and retain talent with the need for compensation structures that reflect the circumstances of Exceptional Assistance Recipients

In conducting the review of the proposed amounts of cash salaries, the Special Master made use of the resources described in Part II. Based on this review, the Special Master has concluded that BofA's proposed cash salaries are inconsistent with the Public Interest Standard because the amounts potentially payable to certain Covered Employees cannot be supported by comparison to cash salaries provided to similarly situated employees of similar companies.

In addition, the Special Master has considered whether BofA's proposed salaries reflect the current or prospective contributions of an employee to the value of the [company]," *id.* § 30.16(b)(1)(vi). Under the BofA proposal, each Covered Employee would receive either a \$700,000 or \$950,000 cash salary. The Special Master has concluded that the proposed salaries are inconsistent with the Public Interest Standard because they do not differentiate among employees in a manner that reflects their individual values to the Company.

Finally, because cash salaries do not create incentives for employees to pursue long-term value creation or financial stability, the amount of cash salary provided to a Covered Employee must be considered in comparison to the portion of compensation that is "performance-based over a relevant period." *Id.* § 30.16(b)(1)(iv). The Special Master

has concluded that the portion of the Covered Employee's compensation that may be allocated to cash salary should in most cases not exceed \$500,000. See *id.* § 30.16(b)(1)(iii).

As described in further detail in *Exhibits I* and *II*, the cash salaries that the Special Master has determined to be consistent with the Public Interest Standard compare appropriately to those paid to similar employees at similar firms, and are generally less than \$500,000.

The Special Master has also concluded that, for cash salaries payable to certain employees to be consistent with the Public Interest Standard, further reductions are required in consideration of "other compensation earned, accrued, or paid" by BofA in 2009. *Id.* § 30.16(a)(3). These adjustments apply to certain employees who received cash bonus payments in 2009 that were excessive in light of bonuses provided to "persons in similar positions or roles at similar entities," *id.* § 30.16(b)(1)(v), and the "prospective contributions of [the employee] to the value of the exceptional assistance recipient, taking into account multiple factors such as...corporate leadership, as well as the role the employee may have had with respect to any change in the financial health or competitive position of the recipient." *Id.* § 30.16(b)(1)(vi).<sup>1</sup>

b. Stock Salary

The Special Master has reviewed the amount of stock salary BofA proposed to pay the Covered Employees in light of the principle that compensation structures should generally be comparable to "compensation structures and amounts for persons in similar positions or roles at similar entities." *Id.* § 30.16(b)(1)(v). Based on this review, the Special Master has concluded that the amount of stock salary BofA proposed paying to the Covered Employees is excessive and that the proposals are inconsistent with the Public Interest Standard. The compensation structures that the Special Master has determined are consistent with the Public Interest Standard provide lesser amounts of stock salary, as described in further detail in *Exhibits I* and *II*.

The Special Master also has concluded that, for the amount of stock salary potentially payable to certain employees to be consistent with the Public Interest Standard, further reductions were required in consideration of "other compensation earned, accrued, or paid" by BofA in 2009. *Id.* § 30.16(a)(3). These adjustments apply to certain employees who received cash bonus payments in 2009 that were excessive in light of bonuses provided to "persons in similar positions or roles at similar entities," *id.*

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<sup>1</sup> The Special Master's determinations regarding such "other compensation earned, accrued, or paid" considered only the extent to which the amounts of such compensation should be considered in the analysis with respect to whether the amounts potentially payable to the Covered Employees were consistent with the Public Interest Standard. See 31 C.F.R. § 30.16(a)(3)(i). The determinations are not, and should not be construed as an analysis, opinion, or determination under any other legal standard applicable to the payment or receipt of such compensation or to any act arising from or relating to such payment or receipt, including, without limitation, the Special Master's authority under 31 C.F.R. § 30.16(a)(3) to review whether such payments were "inconsistent with the purposes of section 111 of EESA or TARP, or otherwise contrary to the public interest." *Id.*

§ 30.16(b)(1)(v), and the “prospective contributions of [the employee] to the value of the exceptional assistance recipient, taking into account multiple factors such as...corporate leadership, as well as the role the employee may have had with respect to any change in the financial health or competitive position of the recipient.” *Id.* § 30.16(b)(1)(vi).<sup>2</sup>

The Special Master has also reviewed the structure of BofA’s stock salary proposal. The Rule requires that the Special Master consider whether an appropriate portion of an employee’s compensation is allocated to long-term incentives. *Id.* § 30.16(b)(1)(iii). Stock salary that can be liquidated too soon would not be performance-based over the relevant performance period to provide such a long-term incentive. *See Id.* § 30.16(b)(1)(iv). Instead, such stock salary could incentivize employees to pursue short-term results instead of long-term value creation by paying excessive benefits to employees for short-term increases in share price. *See Id.* § 30.16(b)(1)(i). Under the Company’s proposal, 40% of stock salary would be redeemable one-year after being granted. The Special Master has concluded that a one year holding period is insufficient to provide a long-term incentive and could result in payments that would be inconsistent with the Public Interest Standard.

As described in ***Exhibit I*** and ***II***, the compensation structures the Special Master has determined to be consistent with the Public Interest Standard require that, at a minimum, stock salary only become redeemable in three equal, annual installments beginning on the second anniversary of grant, with each installment redeemable one year earlier if BofA repays its TARP obligations.

### c. Annual Long-Term Incentive Awards

The Special Master has reviewed BofA’s proposed annual long-term incentive awards in light of the principle that performance-based compensation should be based on “performance metrics [that are] measurable, enforceable, and actually enforced if not met.” *Id.* § 30.16(b)(1)(iv). The Special Master, also has evaluated BofA’s proposed awards by application of recently adopted international standards that provide that incentive compensation should generally be payable over a period of three years, as well as the Rule’s principle that performance-based compensation should be payable “over a relevant performance period,” *id.*

Although BofA proposed individually tailored performance metrics to calculate the size of long-term restricted stock awards, which the Special Master concluded are generally consistent with the Public Interest Standard, the restricted stock would vest after only two years of service. The Special Master has concluded that BofA’s proposed annual long-term incentive awards are inconsistent with the Public Interest Standard because a two-year period of service is insufficient.

As described in ***Exhibits I*** and ***II***, the structures the Special Master has determined to be consistent with the Public Interest Standard include an annual long-term incentive award payable only upon the achievement of specified, objective performance

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<sup>2</sup> See *supra*, note 1.

criteria that have been developed and reviewed in consultation with the Office of the Special Master, and that will not vest unless the employee remains employed until the third anniversary of grant. In addition, as required by the Rule, these awards may only be redeemed in 25% installments for each 25% of BofA's TARP obligations that are repaid.

d. "Other" Compensation and Perquisites

BofA proposed limited payments of "other" compensation, as well as perquisites, to the Covered Employees. The Special Master has concluded that, absent special justification, employees—not the Company—generally should be responsible for paying personal expenses, and that significant portions of compensation structures should not be allocated to such perquisites and "other" compensation. *See id.* §30.16(b)(1)(iii).

The Rule requires that each Exceptional Assistance Recipient annually disclose to Treasury any perquisites where the total value for any Senior Executive Officer or Most Highly Compensated Employee exceeds \$25,000. An express justification for offering these benefits must also be disclosed. Accordingly, as described in *Exhibits I* and *II*, and the compensation structures the Special Master has determined to be consistent with the Public Interest Standard provide no more than \$25,000 in "other" compensation and perquisites to each of these employees. Any exceptions to this limitation will require that the Company provide to the Office of the Special Master an independent justification for the payment that is satisfactory to the Special Master. To the extent that payments exceeding this limitation have already been made to a Covered Employee in 2009, those amounts should be promptly returned to the Company.

e. Non-Qualified Deferred Compensation

BofA proposed that certain Covered Employees receive compensation in the form of accruals under a "non-qualified deferred compensation" plan. In such plans, employers periodically credit employees with an entitlement to post-retirement payments. Over time, these credits accumulate and employees may become entitled to substantial cash guarantees payable on retirement—in addition to any payments provided under retirement plans maintained for employees generally.

The Special Master has concluded that the primary portion of a Covered Employee's compensation package should be allocated to compensation structures that are "performance-based over a relevant performance period." *Id.* § 30.16(b)(1)(iv). Payments under the Company's "non-qualified deferred compensation" plans do not depend upon "individual performance and/or the performance of the [Company] or a relevant business unit," *id.*; instead, such accruals are simply guaranteed cash payments from the Company in the future. In addition, these payments can make it more difficult for shareholders to readily ascertain the full amount of pay due a top executive upon leaving the firm.

Covered Employees should fund their retirements using wealth accumulated based on Company performance while they are employed, rather than being guaranteed substantial retirement benefits by the Company regardless of Company performance

during and after their tenures. Accordingly, as described in *Exhibits I* and *II*, the compensation structures the Special Master has determined to be consistent with the Public Interest Standard prohibit further 2009 accruals for Covered Employees under supplemental retirement plans or Company credits to other “non-qualified deferred compensation” plans following the date of this Determination Memorandum.

f. Severance Arrangements

The Special Master has concluded that an increase in the amounts payable under these arrangements would be inconsistent with the principle that compensation should be performance-based, *id.* § 30.16(b)(1)(iv), and that payments should be appropriately allocated among the elements of compensation, *id.* § 30.16(b)(1)(iii). Accordingly, for the compensation structures described in *Exhibits I* and *II* to be consistent with the Public Interest Standard, the Company must ensure that 2009 compensation structures for these employees do not result in an increase in the amounts payable pursuant to these arrangements.

**2. *Certain other Covered Employees***

The proposals for two Covered Employees were reviewed and analyzed by the Special Master separately because of one employee’s existing cash guarantee and the other’s unique role in the Company, respectively.

a. Covered Employee with a Cash Guarantee

The Special Master has concluded that guaranteed cash payments are not “performance-based over a relevant performance period,” *Id.* § 30.16(b)(1)(iv). Indeed, the principles identified in the Rule are generally inconsistent with the payment of large guaranteed cash amounts. BofA proposed that the Covered Employee’s guarantee be restructured into a \$700,000 cash salary, with the remainder delivered as a stock salary with the same terms as the stock salary proposal for other Covered Employees.

Such a restructuring would be consistent with the principle that cash guarantees are generally disfavored, but inconsistent with the Special Master’s conclusion that the cash portion of a Covered Employee’s compensation that is not performance-based generally should not exceed \$500,000. See *Id.* § 30.16(b)(1)(iii). As a result, the proposed restructuring is inconsistent with the Public Interest Standard.

The Special Master has determined that, with respect to this employee, a restructuring of the cash guarantee providing a cash salary of less than \$500,000, with the remainder of the “guarantee” paid as stock salary, would be consistent with the Public Interest Standard. In addition, the Covered Employee’s compensation structures, will also be subject to the limitations described in Parts IV.A.4 (“other” compensation and perquisites), IV.A.5 (non-qualified deferred compensation), and IV.A.6 (severance plans) above.

b. CEO

The CEO has publicly announced his retirement from the Company. In addition, it is anticipated that he will receive a very substantial retirement compensation package consisting of cash, equity and other payments, all agreed upon during the CEO's lengthy tenure with the Company and its predecessors. Accordingly, the Special Master has determined that the payment of any amount of compensation to the CEO for 2009 is inconsistent with the Public Interest Standard.

**3. *Departed Employees***

In addition, eleven employees that would have been Covered Employees had remained employed are no longer employed by the Company. With respect to those employees, the Special Master has determined that cash salaries through the date of the termination of employment, and payment of up to \$25,000 in perquisites and "other" compensation are consistent with the Public Interest Standard. No other payments to these employees of any kind would be consistent with the Public Interest Standard. Any exceptions to this limitation will require that the Company provide to the Office of the Special Master an independent justification for the payment that is satisfactory to the Special Master.

**V. CORPORATE GOVERNANCE**

As noted in Part II above, the Rule requires the Special Master to consider the extent to which compensation structures are "performance-based over a relevant performance period," 31 C.F.R. § 30.16(b)(1)(iv). In light of the importance of this principle, BofA must take certain additional corporate governance steps, including those required by the Rule, to ensure that the compensation structures for the Covered Employees, and the amounts payable or potentially payable under those structures, are consistent with the Public Interest Standard.

**A. Requirements Relating to Compensation Structures**

In order to ensure that objective compensation performance criteria are "measurable, enforceable, and actually enforced if not met," *id.* § 30.16(b)(1)(iv), long-term incentive awards may not be granted unless the Compensation and Benefits Committee of BofA's Board of Directors determines to grant such an award in light of the employee's performance as measured against objective performance criteria that the Committee has developed and reviewed in consultation with the Office of the Special Master. This evaluation must be disclosed to shareholders in, and certified by the Committee as part of, BofA's securities filings. In addition, the Committee must retain discretion with respect to each employee to reduce (but not to increase) the amount of any incentive award on the basis of its overall evaluation of the employee's or BofA's performance (notwithstanding full or partial satisfaction of the performance criteria).



In addition, the structures determined by the Special Master to be consistent with the Public Interest Standard include grants of stock in BofA. It is critical that these compensation structures achieve the Rule's objective of "appropriate[ly] allocat[ing] the components of compensation [including] long-term incentives, as well as the extent to which compensation is provided in...equity," *id.* § 30.16(b)(iii).

BofA must have in effect a policy that would prohibit an employee from engaging in any hedging, derivative or other transactions that have an equivalent economic effect that would undermine the incentives created by the compensation structures set forth in *Exhibits I* and *II*. Such transactions would be contrary to the principles set forth in the Rule.

## **B. Additional Requirements**

In addition to the requirements set forth above, pursuant to the requirements of the Rule, BofA is required to institute the following corporate governance reforms:

- (1) *Compensation Committee; Risk Review.* BofA must maintain a compensation committee comprised exclusively of independent directors. Every six months, the committee must discuss, evaluate, and review with BofA's senior risk officers any risks that could threaten the value of BofA. In particular, the committee must meet every six months to discuss, evaluate, and review the terms of each employee compensation plan to identify and limit the features in (1) SEO compensation plans that could lead SEOs to take unnecessary and excessive risks that threaten the value of BofA; (2) SEO or other employee compensation plans that could encourage behavior focused on short-term results and not on long-term value creation; and (3) employees' compensation plans that could encourage the manipulation of BofA's reported earnings to enhance the compensation of any of the employees. *Id.* § 30.4; *id.* § 30.5.
- (2) *Disclosure with Respect to Compensation Consultants.* The compensation committee must disclose to Treasury an annual narrative description of whether the Company, its Board of Directors, or the committee has engaged a compensation consultant during the past three years. If so, the compensation committee must detail the types of services provided by the compensation consultant or any affiliate, including any "benchmarking" or comparisons employed to identify certain percentile levels of compensation. *Id.* § 30.11(c).
- (3) *Disclosure of Perquisites.* BofA must provide to Treasury an annual disclosure of any perquisite whose total value for BofA's fiscal year exceeds \$25,000 for each of the Covered Employees. BofA must provide a narrative description of the amount and nature of these perquisites, the recipient of these perquisites, and a justification for offering these perquisites (including a justification for offering the perquisite, and not only for offering the perquisite with a value that exceeds \$25,000). *Id.* § 30.11(b).

- (4) *Clawback.* BofA must ensure that any incentive award paid to a Covered Employee is subject to a clawback if the award was based on materially inaccurate financial statements (which includes, but is not limited to, statements of earnings, revenues, or gains) or any other materially inaccurate performance metric criteria. BofA must exercise its clawback rights except to the extent that it is unreasonable to do so. *Id.* § 30.8.
- (5) *Say-on-Pay.* BofA must permit a separate shareholder vote to approve the compensation of executives, as required to be disclosed pursuant to the federal securities laws (including the compensation discussion and analysis, the compensation tables, and any related material). *Id.* § 30.13.
- (6) *Policy Addressing Excessive or Luxury Expenditures.* BofA was required to adopt an excessive or luxury expenditures policy, provide that policy to Treasury, and post it on the Company's website. If BofA's board of directors makes any material amendments to this policy, within ninety days of the adoption of the amended policy, the board of directors must provide the amended policy to Treasury and post the amended policy on BofA's Internet website. *Id.* § 30.12.
- (7) *Prohibition on Tax Gross-Ups.* Except as explicitly permitted under the Rule, BofA is prohibited from providing (formally or informally) tax gross-ups to any of the Covered Employees. *Id.* § 30.11(d).
- (8) *CEO and CFO Certification.* BofA's CEO and chief financial officer must provide to the Securities and Exchange Commission written certification of BofA's compliance with the various requirements of section 111 of EESA. The precise nature of the required certification is identified in the Rule. *Id.* § 30.15 Appx. A.

## VI. CONCLUSION

The Special Master has reviewed the Proposed Structures for the Covered Employees for 2009 in light of the principles set forth at 31 C.F.R. § 30.16(b). On the basis of that review, the Special Master has determined that the Proposed Structures submitted by BofA require modification in order to meet the Public Interest Standard.

The Special Master has separately reviewed the compensation structures set forth in ***Exhibits I*** and ***II*** in light of the principles set forth at 31 C.F.R. § 30.16(b). Pursuant to the authority vested in the Special Master by the Rule, and in accordance with Section 30.16(a)(3) thereof, the Special Master hereby determines that the compensation structures set forth in ***Exhibits I*** and ***II***, including the amounts payable or potentially payable under such compensation structures, will not result in payments that are inconsistent with the purposes of section 111 of EESA or the TARP, and will not otherwise be contrary to the public interest.

Pursuant to the Interim Final Rule, BofA may, within 30 days of the date hereof, request in writing that the Special Master reconsider the determinations set forth in this

Determination Memorandum. The request for reconsideration must specify a factual error or relevant new information not previously considered, and must demonstrate that such error or lack of information resulted in a material error in the initial determinations. If BofA does not request reconsideration within 30 days, the determinations set forth herein will be treated as final determinations. 31 C.F.R. § 30.16(c)(1).

The foregoing determinations are limited to the compensation structures described in *Exhibits I* and *II*, and shall not be relied upon with respect to any other employee. The determinations are limited to the authority vested in the Special Master by Section 30.16(a)(3) of the Rule, and shall not constitute, or be construed to constitute, the judgment of the Office of the Special Master or Treasury with respect to the compliance of any compensation structure with any other provision of the Rule. Moreover, this Determination Memorandum has relied upon, and is qualified in its entirety by, the accuracy of the materials submitted by BofA to the Office of the Special Master, and the absence of any material misstatement or omission in such materials.

Finally, the foregoing determinations are limited to the compensation structures described herein, and no further compensation of any kind payable to any Covered Employee without the prior approval of the Special Master would be consistent with the Public Interest Standard.

**EXHIBIT I**  
**COVERED EMPLOYEES**

**2009 Compensation**

**Company Name: Bank of America Corporation**

<b>Employee ID</b>	<b>Cash Salary</b> (Rate going forward.)	<b>Stock Salary</b> (Performance based: The stock vests at grant and is redeemable in three equal, annual installments beginning on the 2nd anniversary of grant.)	<b>Long-Term Restricted Stock</b> (Performance based: Awarded based on achievement of objective performance goals. Vests after 3 years of service. Transferability dependent on TARP repayment.)	<b>Total Direct Compensation</b> (Cash salary paid to date plus two months at new run rate + stock salary + long-term restricted stock.)
1678	\$0	\$0	\$0	\$0
1029	\$500,000	\$1,750,000	\$1,125,000	\$3,375,000
1055	\$403,847	\$5,412,180	\$2,851,923	\$8,555,770
1108	\$412,500	\$1,914,583	\$1,106,250	\$3,318,750
1123	\$300,000	\$4,483,333	\$2,350,000	\$7,050,000
1143	\$500,000	\$9,316,667	\$0	\$9,900,000
1164	\$500,000	\$5,640,000	\$3,001,250	\$9,003,750
1227	\$352,500	\$4,797,917	\$2,526,250	\$7,578,750
1562	\$500,000	\$5,250,000	\$0	\$6,000,000
1564	\$412,500	\$5,114,583	\$2,706,250	\$8,118,750
1714	\$403,847	\$4,612,180	\$2,451,923	\$7,355,770
1787	\$412,500	\$2,114,583	\$1,206,250	\$3,618,750
1850	\$500,000	\$3,950,000	\$0	\$4,700,000

**Comparison of 2009 Compensation to Prior Years: 2007 & 2008 Compensation**

**2008** Cash decreased by \$89.3M or 94.5%

Total Direct Compensation decreased by \$149.2M or 65.5%

**2007** Cash decreased by \$49.8M or 92.2%

Total Direct Compensation decreased by \$112.6M or 63.3%

Note: 1: Amounts reflected in this Exhibit do not include amounts the Company has asserted to be payable pursuant to legally binding rights under valid employment contracts, see 31 C.F.R. § 30.10(e)(2).

Note: 2: The total number of Covered Employees may be less than 25 because of terminations, departures and retirements after January 1, 2009.

**EXHIBIT II**  
**TERMS AND CONDITIONS OF PAYMENTS AND STRUCTURES**  
**CONSISTENT WITH THE PUBLIC INTEREST STANDARD**

The following general terms and conditions shall govern the compensation structures described in *Exhibit I*. The Special Master's determination that those structures are consistent with the Public Interest Standard is qualified in its entirety by the Company's adherence to these terms and conditions.

- **Cash base salary.** Cash base salaries reflect the go-forward rate for the employee effective as of November 1, 2009. Compensation paid in the form of cash base salary prior to that date in accordance with the terms of employment as of June 14, 2009 shall be permitted unless otherwise noted. 31 C.F.R. § 30.16(a)(3)(iii).
- **Stock salary.** Rates of stock salary grants reflect full-year values. Because this is a new compensation element, the amounts are payable on a *nunc pro tunc* basis effective January 1, 2009. Stock salary must be determined as a dollar amount through the date salary is earned, be accrued at the same time or times as the salary would otherwise be paid in cash, and vest immediately upon grant, with the number of shares or units based on the fair market value on the date of award. Stock granted as stock salary may only be redeemed in three equal, annual installments beginning on the second anniversary of grant, with each installment redeemable one year early if TARP obligations are repaid.
- **Long-term restricted stock.** Long-term restricted stock may be granted upon the achievement of specified, objective performance criteria that have been developed and reviewed in consultation with the Office of the Special Master and certified by the Compensation and Benefits Committee of the Company's Board of Directors. Any such stock may vest only if the employee remains employed by the Company on the third anniversary of grant (or, if earlier, upon death or disability). The stock shall be transferable only in 25% increments for each 25% of TARP obligations repaid by the Company.
- **Other compensation and perquisites.** No more than \$25,000 in total other compensation and perquisites may be provided to any Covered Employee, absent exceptional circumstances for good cause shown, as defined by pertinent SEC regulations.
- **Supplemental executive retirement plans and non-qualified deferred compensation plans.** Following the date of the Determination Memorandum, no additional amounts may be accrued under supplemental executive retirement plans, and no Company contributions may be made to other "non-qualified deferred compensation" plans, as defined by pertinent SEC regulations.
- **Qualified Plans.** For the avoidance of doubt, the Special Master has determined that participation by the Covered Employees in tax-qualified retirement, health and welfare, and similar plans is consistent with the Public Interest Standard.