

1 STATE OF ALASKA
2 DEPARTMENT OF COMMERCE, COMMUNITY, AND ECONOMIC DEVELOPMENT
3 DIVISION OF BANKING AND SECURITIES

3 In the matter of)
4 BANC OF AMERICA SECURITIES LLC) **ADMINISTRATIVE CONSENT ORDER**
5 and) **ORDER NO: 10-11-S**
6 BANC OF AMERICA INVESTMENT)
7 SERVICES, INC.,)
8 Respondents.)

9 WHEREAS, Merrill Lynch, Pierce, Fenner & Smith Incorporated (“MLPF&S”) as
10 successor by merger to Banc of America Securities LLC (in such capacity, “BAS”) and Banc of
11 America Investment Services, Inc. (in such capacity, “BAI” and collectively with BAS and
12 MLPF&S, hereinafter “Respondents”) is a broker-dealer registered with the State of Alaska; and

13 WHEREAS, on October 23, 2009, BAI merged with MLPF&S; and

14 WHEREAS, on November 1, 2010, BAS merged with MLPF&S; and

15 WHEREAS, it is in the interest of the parties to this order to address only pre-merger conduct
16 and customers of BAI and BAS; and

17 WHEREAS, coordinated investigations into Respondents’ activities in connection with
18 certain of their sales practices regarding the underwriting, marketing, and sale of Auction Rate
19 Securities (“ARS”) during the period of approximately August 1, 2007, through February 11,
20 2008, have been conducted by a multistate task force; and

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

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

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

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

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

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

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

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

19 12. On or about September 10, 2008, Respondents, Bank of America Corporation
20 ("BAC"), and Blue Ridge Investments, L.L.C. ("Blue Ridge") agreed, in principle, that BAC
21 would cause Blue Ridge to buy back, at par plus accrued but unpaid interest or dividends, ARS for
22 which auctions were in failed mode from "Eligible Investors," which included all individual
23 investors, all charitable organizations with account values up to \$25 million and small and medium
24 sized businesses with account values up to \$10 million who purchased ARS from Respondents.

II. CONCLUSIONS OF LAW

1
2 1. The Division has jurisdiction over this matter pursuant to the Alaska Securities
3 Act. The Alaska Securities Act authorizes the Division to regulate: 1) the offers, sales, and
4 purchases of securities; 2) those individuals and entities offering and/or selling securities; and 3)
5 those individuals and entities transacting business as investment advisers within the State of
6 Alaska.

7 A. Respondents Engaged in Dishonest and Unethical Practices.

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

12 3. As a result, Respondents violated AS 45.55.060(a)(7).

13 B. Respondents Failed to Supervise Their Agents.

14 4. As described in the Findings of Fact section above, Respondents failed to properly
15 supervise their agents with respect to the marketing and sale of ARS from October 1, 2007, to
16 February 11, 2008.

17 5. As a result, Respondents violated AS 45.55.060(b)(1).

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

19 III. ORDER

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

22 IT IS HEREBY ORDERED:

23 1. This Order concludes the investigation by the Division and any other action that the
24 Division could commence under applicable Alaska law on behalf of the State of Alaska as it relates to

1 Respondents' underwriting, marketing, and sales of ARS, provided however, that excluded from and
2 not covered by this paragraph 1 are any claims by the Division arising from or relating to the
3 "Order" provisions contained herein.

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

6 3. Respondents will CEASE AND DESIST from violating the Alaska Securities Act and
7 will comply with the Alaska Securities Act.

8 4. Within ten days after the date of this Order, Respondents shall pay the sum of One
9 Hundred Thousand One Hundred Fifty-One Dollars and Three Cents (\$100,151.03) to the State of
10 Alaska, such amount to be restricted to the following specific use by the Division: promoting
11 investor education, investor protection, and compliance with the securities laws.

12 5. In the event another state securities regulator determines not to accept Respondents'
13 settlement offer, the total amount of the Alaska payment shall not be affected, and shall remain at
14 \$100,151.03.

15 6. Respondents shall comply with the following requirements:

16 **a. Eligible Investors**

17 i. No later than October 21, 2008, BAC shall have caused Blue Ridge
18 to offer to buy back, at par plus accrued and unpaid interest or dividends, Eligible
19 ARS (as such term is defined below) for which auctions are in failed mode from
20 Eligible Investors (as such term is defined below) who purchased such Eligible
21 ARS from Respondents prior to February 13, 2008 (the "Offer"). For purposes of
22 the Offer, Eligible ARS means ARS purchased from Respondents on or before
23 February 13, 2008, that were subject to an auction failure on or after February 11,
24 2008. The Offer shall remain open for a period between October 10, 2008, and

1 December 1, 2009, unless extended by Blue Ridge.

2 ii. “Eligible Investors” shall mean:

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

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

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

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

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

21 No later than December 31, 2008, Respondents shall have promptly provided notice
22 to any Eligible Investor that Respondents could reasonably identify who sold Eligible ARS
23 below par between February 11, 2008, and September 22, 2008. Such investors will be
24 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

1 were caused by their inability to access funds invested in Eligible ARS. In the SAP,
2 Respondents shall be able to defend themselves against such claims; provided, however,
3 that Respondents shall not contest liability for the illiquidity of the underlying ARS
4 position or use as part of their defense any decision by an Eligible Investor not to borrow
5 money from Respondents.

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

11 **d. Institutional Investors**

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

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

1 concerns and, in response, Respondents shall detail the steps that Respondents plan to
2 implement to address such concerns.

3 **e. Relief for Municipal Issuers**

4 Respondents shall refund refinancing fees to municipal auction rate issuers that
5 issued such securities through Respondents in the initial primary market between August 1,
6 2007, and February 11, 2008, and refinanced those securities through Respondents after
7 February 11, 2008. Refinancing fees are those fees paid to Respondents in connection with
8 a refinancing and are exclusive of legal fees and any other fees or costs not paid to
9 Respondents in connection with the transaction.

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

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

14 **g. Payments**

15 i. Respondents shall make a total civil payment of FIFTY MILLION
16 (\$50,000,000) DOLLARS, which shall be allocated among and paid to the
17 Commonwealth of Massachusetts, the State of New York, and such other states and
18 territories that enter administrative or civil consent orders approving the terms of
19 the NASAA settlement (together with the Commonwealth of Massachusetts and the
20 State of New York, the “Approving States”). Any such allocation shall be made at
21 the discretion of the Approving States;

22 ii. The Division’s portion of the civil payment shall be \$100,151.03 and
23 shall be paid to the Division no later than ten business days after the date of the
24 Consent Order.

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

2 The Division will:

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

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

8 iii. The Division will not seek additional monetary payments from
9 Respondents in connection with all underlying conduct relating to Respondents'
10 underwriting, marketing, and sale of ARS to investors.

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

13 7. If payment is not made by Respondents, or if Respondents default in any of their
14 obligations set forth in this Order, the Division may vacate this Order, at its sole discretion, upon
15 10 days notice to Respondents and without opportunity for administrative hearing.

16 8. This Order as entered into by the Division waives any disqualification contained in
17 the laws of the State of Alaska, or rules or regulations thereunder, including any disqualifications
18 from relying upon the registration exemptions or safe harbor provisions that Respondents or any of
19 their affiliates may be subject to as a result of the findings contained in this Order. This Order also
20 is not intended to subject Respondents or any of their affiliates to any disqualifications contained
21 in the federal securities laws, the rules and regulations thereunder, the rules and regulations of self
22 regulatory organizations, or various states' or U.S. Territories' securities laws, including, without
23 limitation, any disqualifications from relying upon the registration exemptions or safe harbor
24 provisions. In addition, this Order is not intended to form the basis for any such disqualifications.

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

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

11 11. This Order and any dispute related thereto shall be construed and enforced in
12 accordance with, and governed by, the laws of the State of Alaska without regard to any choice of
13 law principles.

14 12. Respondents, through their execution of this Order, voluntarily waive their right to a
15 hearing on this matter and to judicial review of this Order under the Alaska Securities Act and the
16 Administrative Procedures Act.

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

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

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STATE OF ALASKA
DEPARTMENT OF COMMERCE, COMMUNITY, AND ECONOMIC DEVELOPMENT
DIVISION OF BANKING AND SECURITIES
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SO ORDERED this 14th day of December, 2010.

State of Alaska
Department of Commerce, Community, and
Economic Development
Division of Banking and Securities

/s/ Lorie L. Hovanec
By: Lorie L. Hovanec, Director

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

3 Merrill Lynch, Pierce, Fenner & Smith Incorporated (“MLPF&S”) as successor by merger
4 to Banc of America Securities LLC and Banc of America Investment Services, Inc. (collectively,
5 the “Respondents”), hereby acknowledges that it has been served with a copy of this
6 Administrative Order, has read the foregoing Order, is aware of the right to a hearing and appeal in
7 this matter, and has waived the same.

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

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

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

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

19 MERRILL LYNCH, PIERCE, FENNER & SMITH
20 INCORPORATED as successor by merger to
21 BANC OF AMERICA SECURITIES LLC and
22 BANC OF AMERICA INVESTMENT SERVICES,
23 INC.

24 By: /s/ David Futterman

 Title: Associate General Counsel

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1 State of New York)
) ss.
2 County of New York)

3 SUBSCRIBED AND SWORN TO before me this 8th day of December, 2010.

4
5 /s/ Arleen R. Tluman
Notary Public

6 My commission expires:

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