908:What to Do When the SEC Enforcement Division Comes Calling

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Timothy E. Flanigan is the general counsel, corporate and international law, of Tyco International (US) Inc. in Princeton, New Jersey. He is responsible for corporate and international legal functions for Tyco, including corporate governance and compliance programs. He reports to Tyco general counsel, William B. Lytton.

Mr. Flanigan was most recently deputy counsel and deputy assistant to President George W. Bush. Prior to serving on the current President's staff, he was a partner with the international law firm of White & Case LLP. Earlier Mr. Flanigan served as assistant attorney general for the Office of Legal Counsel at the U.S. Department of Justice. In this role, he was a principal legal advisor for then President George Bush, the Attorney General, and the heads of executive branch agencies. From 1985 to 1986 he served as senior law clerk to the late Chief Justice Warren E. Burger and is the author of the forthcoming authorized biography of Chief Justice Burger.

Mr. Flanigan graduated from Brigham Young University and from the University of Virginia School of Law.

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Scott W. Friestad is an assistant director in the Division of Enforcement of the United States Securities and Exchange Commission. Since joining the SEC nearly ten years ago, Mr. Friestad has been responsible for investigating and litigating cases involving a wide range of complex securities issues, including issuer reporting and financial fraud violations, insider trading violations, Foreign Corrupt Practices Act cases, and cases involving broker-dealers, investment advisers, and other regulated entities. During his tenure at the SEC, Mr. Friestad has brought dozens of enforcement proceedings involving financial statement fraud and other violations of the federal securities laws.

Prior to joining the Commission, Mr. Friestad was a litigator at a large law firm in New York.

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George J. Terwilliger III is a senior partner in the Washington, DC office of White & Case LLP, an international law firm. Mr. Terwilliger primarily represents domestic and international clients in civil and criminal litigation and other proceedings involving the United States government. He is a veteran litigator with over fifty jury trials and many appearances and arguments in appellate cases.

Mr. Terwilliger was the deputy attorney general of the United States (1991-92), the second ranking official in the Department of Justice. He was appointed by President Reagan as United States attorney in Vermont (1986-91) and also served as assistant United States attorney in Vermont and Washington, DC (1978-86).

In private practice, Mr. Terwilliger has represented both U.S. and international companies facing litigation, government inquiries and in other public policy matters. These institutions include banks, other financial companies, telecommunications, and industrial concerns as well as large educational and non-government organizations. He has also represented prominent individuals, including public officials and media personalities. He was a leader as well as public spokesman on the legal team that represented President Bush and Vice President Cheney in the Florida recount of the 2000 presidential election. He is also regularly asked to provide his views on matters of legal and public policy, including to congressional committees and executive agencies.

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CORPORATE CRISIS:

CONSIDERATIONS FOR COUNSEL MANAGING THE RESPONSE TO INVESTIGATIONS, LITIGATION, AND OTHER CRITICAL CORPORATE EVENTS

BY
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I. The Nature of "Crisis"

The term "crisis" connotes an occurrence or issue where an adverse outcome can be devastating to an established interest. For example, energy prices being too high is a problem, perhaps at times a critical one. Energy being unavailable is a crisis. In the world of corporate legal interests, several sets of circumstances typically give rise to the corporate legal crisis. Government investigations or other enforcement proceedings, coupled with media attention, can easily escalate to the crisis stage. The same is true of civil proceedings involving private litigants, especially where mere allegations are sensationalized and widely reported. Less frequently, but not with less significance, an event or events, sometimes catastrophic, sometimes not, occur which give rise to a corporate crisis. So-called whistle blowers are also fuel for crises, often provoking investigations and civil proceedings, other times just bringing immediate and intense media attention.

Sometimes, a generalized trend or widespread issue can turn common problems into crises. In the past several years, for example, questions concerning allegedly misstated or outright falsified corporate financial statements, first noticed in connection with emerging information technology companies, have reached mainstream corporate America.

By its nature, a crisis often results from a confluence of events, frequently not obviously connected and most often unforeseeable. The weather crisis captured in the popular movie "The

Perfect Storm," adapted from actual events, is a vivid example. Three storm systems came together to create a crisis for those trapped in the convergence. The corporate storm can be like that. A cascade of negative events, none on its own sufficient to create a crisis, becomes one by virtue of the collective effect of all - often with media attention as a catalyst.

The events in Florida during the contested 2000 Presidential Election were clearly a crisis for both campaigns. More importantly, a widespread recognition quickly developed that the uncertainty and controversy surrounding the Presidential Election in Florida was a very public crisis for our country, the outcome of which would have a great effect on far more than just the candidates' interests. Yet, despite the public nature of an election, the crisis dimensions of the Florida recount were not easily foreseen and did not really materialize until a day or so after the election. Likewise, a corporate crisis can easily arise from unforeseeable events totally beyond a corporation's control.

Crisis circumstances often have several factors in common. First, in the truest sense of a crisis, an adverse outcome could severely depress stock price, create extremely adverse publicity or even cost the company its life. Second, intense media exposure of allegations or negative events may exact a significant toll on the corporate image. Third, crises circumstances often involve legal proceedings, with the company frequently on the defensive. The combination of these factors often overwhelms the management, legal and public relations capabilities of the corporation.

Of course, a crisis avoided is better than a crisis solved in most instances. I am told that in the Chinese language, however, one of the two symbols that combine to represent the concept of crisis is a symbol of opportunity. Indeed, a corporate crisis can be an opportunity. If it is

successfully handled and the dangerous waters navigated to a safe and calm harbor, the corporate image may be substantially improved.

II. Early Detection

Because crisis is commonly the product of disconnected events and arises without warning, it can be difficult to avoid. There are circumstances, however, where in retrospect an impending crisis may be detected in its embryonic stages. The most alert corporate managers, including lawyers, stay on the lookout for the formation of potential crises. Early warning signs may include, for example, the termination of a long-disgruntled employee who might have been involved in potentially controversial corporate undertakings. An ongoing or sustained media interest, particularly by an investigative reporter, into some aspect of corporate operations is another harbinger of potential trouble. Facts known internally which, if disclosed, could likely boil to the crisis level are one of the surest blips on the early warning crisis radar.

Unfortunately, but often for good and valid reasons, such early indicators of critical problems are frequently ignored. In many corporate cultures, those who report bad news or suggest trouble around the corner may be viewed as overly negative. As lawyers, however, we are paid to worry. Thus, we have a duty to inquire, analyze and report potentially problematic circumstances (and the best lawyers propose solutions as well). But, potentially problematic issues are easily shunted aside, shifted to the back burner. More pressing problems can demand all of the available time and attention of management and a legal department. In addition, corporate managers, like many people, often default to denial when presented with a potentially explosive development that may have arisen on their watch.

In fact, even when an actual crisis arises, denial can be a common reaction. This reaction can manifest itself in ways that are not conducive to sound management of a corporate crisis. Denial may send executives who could otherwise contribute to the crisis management effort diving for cover. If there is a perception that the company is on the line, it is not at all unusual for some corporate executives to step back, not up. Crisis is more often seen as an opportunity to fail, rather than an occasion to shine. Even those who may eventually shoulder blame, deserved or not, for a corporate crisis may resort to that age-old problem-solving technique of simply wishing it away through denial.

There is no easy solution for these initial crisis-related problems. It is important, though, that the range of normal human reactions simply be recognized. By doing so, we can prepare ourselves to deal more effectively with such reactions and the crisis that creates them.

III. The Initial Response

Assessing the Relevant Law

The phenomena of crisis will visit great responsibility on corporate counsel, but often without the comfort of a clearly defined legal context within which to analyze the problem. Of course, there is no body of law associated with managing a corporate crisis, including its legal ramifications. Thus, as lawyers, we are deprived of one of the more comforting tools of our trade: a body of guiding law and legal principles. Even the most familiar aspects of corporate governance and internal customs may be of little utility in a crisis. Successful crisis management often means abandoning these conventions in favor of far more direct, and more expeditious, action.

Nonetheless, legal proceedings are going to be part and parcel of the crisis atmosphere. The crisis itself may actually first arise in the context of legal proceedings, and it is the rare corporate crisis that does not involve legal proceedings. Thus, the law can provide both issues and options in the corporate crisis. More particularly, managing the legal proceedings in a crisis can be a substantial part of managing the crisis itself.

A key to any successful management of crisis is gaining control of the crisis itself. A crisis manager, or management team, constantly on the defensive and being whipsawed by events beyond its control is one that is unlikely to succeed. Therefore, in crisis, understanding relevant legal proceedings that exist, and those that might be brought, is essential. Using them to control the course and conduct of crisis and its response can be critical to success.

A grand jury investigation, especially when reported in the media, provides a valuable illustration. To most corporate managers, the legal procedures, customs and practices involved in a grand jury matter are as foreign as the moonscape. But where a grand jury or similar official inquiry is the catalyst for crisis, understanding the investigative process is essential to properly directing the crisis response. The fact that prosecutors are bound by the rule of grand jury secrecy, but witnesses are not, for example, may provide a tool for use by a corporation involved in an investigation.

Sometimes it is to the crisis manager's advantage to slow events down. This can permit time to gather pertinent facts, organize a studied response and take other steps that, simply by their nature, take time. In these circumstances, utilizing the law and its procedures to gain some breathing room can become a valuable tool in successful crisis management.

Conversely, it can be advantageous to speed up the legal process. For example, where a company is being buffeted by news stories arising from a series of as-yet-unanswered allegations, speeding up that answer may have significant value. Utilizing legal procedures to establish and promulgate the corporate side of the story can be important tools to fight back against the adverse implications of the allegations.

Thus, initial response to crisis should involve a survey of pending and potential legal actions, with an assessment of their effect and utility in achieving crisis management objectives. This assessment also has obvious, but no less critical, value in the next step of the initial response: assembling the correct legal team to deal with the situation.

Choosing a Team

As in many other aspects of successful crisis management, choosing and assembling the legal team may require some breaking of the mold. First, authority to manage the crisis and its legal dimensions needs to be clearly established. Nothing is more inimical to successful crisis management than undue delay in decision-making occasioned by an unclear line of authority for making critical decisions.

As discussed in greater detail below, the team approach to tasks can be valuable in many circumstances. In the initial response to crisis, however, assembling a core team with relevant expertise and experience in making the critical judgments is the start of successful management of a corporate crisis.

Crisis leadership may not involve a single individual but rather a team, pooling in one operation the key decision makers with the authority to act. Indeed, in the most acute

circumstances, it may be necessary to gather in one room the individuals with the institutional knowledge and skills essential to quickly directing a positive response to crisis developments.

Likewise, a legal team is required to guide the corporate response to any underlying legal proceedings. Assessing the nature of those proceedings and the challenges they present, and marshaling the best expertise available to meet those challenges, are strong initial steps. This may require going beyond existing relationships with individual lawyers or firms. It may also involve teaming lawyers and firms in ad hoc project groups.

It is critical that this core team functions with clear authority and that its work be streamlined. Speed counts when dealing with a crisis. Often, a decision not made becomes, in fact, a decision itself. This, in turn, can lead to a loss of control of events, a poison in the mix necessary to successful crisis control.

Getting the Facts

Rapid gathering of facts is essential in a crisis. Facts are critical for several reasons. As in all circumstances, credible representations to a court and to the public can only be made with an adequate foundation of facts to support them. Moreover, a rapid gathering of the necessary facts is not only the basis for a credible response, but for some control over the unfolding story. This in and of itself has value on the public relations front. It shows a company in command of the facts and on top of the situation. The media and the public will make judgments about the company based on the credibility of its statements about factual matters in a crisis. Damage done, particularly at the outset, by factual misstatements can be costly, and sometimes impossible to repair. Further, in a circumstance where there is widespread and/or intense media interest in a subject matter, someone is going to be talking about the facts. If the involved

corporation does not address the relevant facts, someone else will fill in the blanks. The corporation armed with facts has a much better chance to exert a positive influence on the story.

Lastly, again as in most circumstances, a thorough grounding in the facts is necessary to sound legal analysis and reasoned judgment concerning legal issues. Legal advice to the client in the absence of facts can become, and most often is, bad advice. In a high stakes crisis situation, it can become a disaster.

An Agenda for Action

With at least the critical facts in hand, the next phase of the initial response to a corporate crisis involves identifying the issues and formulating, on at least a preliminary basis, the response. Indecision is the enemy of successful crisis management.

Framing the issues and outlining a potential response provides the architecture for executive decision-making necessary to a sound management response to crisis. The analysis also provides a foundation for a discussion of an affirmative agenda for crisis management. This, in turn, has several beneficial effects. First, it identifies tasks, and division of tasks, that can begin the process of getting the crisis manager ahead of the curve. Second, it provides a unifying element to the crisis team's management approach. Third, it identifies additional expertise needed or likely to be needed, speeding the process of acquiring appropriate resources. Establishing objectives, timelines and responsibilities are the first steps in having an affirmative agenda to actively manage the crisis and not be hostage to its continued developments.

IV. The Value of Strategies - Legal and Public Relations

A strategy is a reasoned plan for accomplishing one or more objectives. In the practice of law, we employ strategies, simple and grand, on a regular basis. In the world of public relations consultants, strategies capture both the message to be conveyed and the means of doing so.

In a crisis, making sure that these strategies are complementary is critical. It is far too easy to have divergent public relations and legal strategies in any circumstance. But it is an invitation to failure to permit such divergence in a crisis situation. More importantly, the careful coordination of legal and public relations strategies can become a powerful tandem weapon in the fight for success in the crisis atmosphere.

The lack of a strategy, legal or public relations, will almost always produce several undesirable developments in a crisis response. First, any crisis is bound to provoke corporate action. Without a strategy, however, that action can lack unifying purpose and become chaotic. In addition, action without a strategy means that decisions and actions will be taken independent of any unified purpose, with the real risk of being at cross-purposes. Second, the lack of an articulated strategy leads to a lack of direction in the crisis response. This can lead to unnecessary, wasteful and even counter-productive undertakings by those involved in the crisis response, operating without strategic direction.

A strategy provides a unifying plan, a sense of direction and purpose for all involved. It is a force for positive, coordinated action. It supports the team effort by providing a baseline for identifying issues, tasks and decisions. While it certainly must be continuously reevaluated, a strategy also provides a set of guiding principles that can have sustained value as management tools throughout the crisis period.

V. A Team Approach to Tasks

Components of the Team

The notion that extraordinary circumstances call for extraordinary remedies applies to staffing crisis management and related litigation efforts. When the stakes are extremely high, as is commonly the case in a crisis litigation environment, finding and utilizing specialists for discrete tasks is often well advised. For example, it may be critical in crisis-related litigation to effectively cross-examine opposing or other experts. Selecting a lawyer with talent and experience in cross-examination obviously makes sense. However, few, if any, lawyers are expert at all things, and the skilled cross-examiner may not be the best attorney to argue a dispositive motion founded upon complex and technical legal grounds. Thus, there is merit to assembling a comprehensive legal team that will permit matching talent to the work required.

Oftentimes, the multiplicity and variety of tasks, and the expertise required, suggests that combining individual practitioners and firms on a team is the best course. For understanding reasons, law firms sometime tend to avoid teaming with other firms on projects. But as is the case in so many other aspects of crisis management, this tendency cannot be allowed to control the determination of the team's composition. In fact, an individual attorney or lead firm should be encouraged to search for and recommend experts from a wide range of other legal service providers, including competitors.

Division of Tasks

In addition to matching talent to task, the teaming approach permits a strong concentration on discrete aspects of the work that needs to be done. Some teams may concentrate strictly on research and legal analysis. Others may focus on fact gathering and assessment of expert testimony. Still others may concentrate on the drafting of pleadings and the

development of legal theories and arguments. Obviously, to avoid unnecessary duplication and ensure that all work is directed toward primary objectives, it is important to coordinate the overall effort.

Managing the Teamwork

An additional benefit of team concentration on a discrete task is the opportunity for the lawyers involved to explore issues, analyses and arguments not necessarily envisioned at the outset of an assignment. Concentrating talented people on a discrete aspect of a problem or an objective can produce the kind of insight and exceptional lawyering of which great casework is made. Thus, it is important to balance coordination and efficiency in managing a team with providing sufficient latitude to fully utilize a team's talent.

This can often be accomplished by what might be termed "macro-managing." That is, a balance in directing a team's effort is struck that lies between micro-managing every detail of its work and simply assigning a task and receiving a work product. Lead counsel, and the client, can work with the team on an assignment or task through, by example, frequent discussions of progress and direction. This not only provides for coordinated effort, but also can be the basis for an ongoing assessment of a team's progress and reevaluation of the direction of the effort. This can be especially important in the development of particular aspects of a more comprehensive legal argument or position by different teams. It is also critical where the drafting of pleadings and briefs by several teams will bring together disparate aspects of a given matter. Lastly, it can also promote efficiency by providing a mechanism to identify errant or nonproductive work that is not consistent with overall project objectives or other critical aspects of the crisis strategy.

Teamwork in Public Relations

On the public relations side, the team approach is also essential. It is of clear and utmost importance that the media team and the legal team coordinate their efforts. Coordinated strategies are just the starting point. The real value of the strategy is in its execution. Unless the execution of the legal and media strategies is coordinated, including making necessary adjustments as events unfold, the value of having complementary legal and public relations strategies can be lost.

VI. Ethics in the Crisis Environment

A legal and/or corporate crisis can also be a time of ethical peril, including for the attorneys involved. When the stakes for the client are the highest, the pressure to obtain results that are favorable at any cost can be the greatest. In addition, since this pressure works both ways, opponents may be skirting ethical limits and this, too, can add pressure to respond in kind with equal disregard for ethical concerns.

Few attorneys set out intentionally to commit ethical violations. Rather, they often find themselves in the midst of questionable circumstances as a result of incremental, perhaps unconscious, steps. In the highly pressurized environment of a crisis, where decision-making is done at warp speed and patience for lawyers who dither is short, the atmosphere is ripe for ethical issues to be inadequately considered. It is, of course, in just such circumstances that an attorney should be most sensitive to ethical concerns, lest one arise and fly past in the flurry of crisis events.

Realistically, no one can suggest that there can be a time for calling a truce in a crisis while ethical concerns are contemplated and ethical analyses undertaken. Rather, like everything

else that occurs in a crisis atmosphere, decisions on ethical issues must be made as best as the circumstances will permit. This necessarily involves a heavy reliance on instinct and experience. There is seldom a clear answer to the most vexing ethical dilemmas; if the answer were clear, the decision would be easy. This makes decisions about choosing a course in the face of ethical concerns in a crisis atmosphere all the more difficult. Nonetheless, the most important consideration is that ethical issues be recognized, and then addressed as well as the circumstances allow.

Many times, aspects of a crisis which give rise to legal or business ethics issues can also be an opportunity to demonstrate commitment to good corporate citizenship. Conversely, actions taken in crisis response which raise questions of legal or business ethical misbehavior can redound to a corporation's detriment. Simply put, it is easy to do the right thing when all is going well. It can be extremely difficult to do the right thing and thereby lose some advantage that doing otherwise might present in the midst of a corporate crisis. But ethics and ethical considerations are meant to be guideposts for just such trying times.

One way to address attention to ethical considerations in a crisis atmosphere is to recognize that the outcome of a crisis will most often be determined by how well a relatively few "critical decisions" are made. The next section discusses critical decisions and their importance to successful crisis management. Any ethical concern ought to be considered a critical decision. In a very real sense, all elements of successful crisis management have a foundation in ethics. The most successful corporate response to a crisis situation is to do the right thing, even if it must necessarily, in extreme circumstances, acknowledge having done the wrong thing previously. To borrow a phrase, the first rule of successful crisis management must be to do no harm. A solution to a crisis should not involve steps that could lead to the creation of new

allegations, particularly ones of business or legal ethical misbehavior. A client's interests are simply not well served in a crisis by unethical tactics.

VII. Critical Issues

In a post mortem review of any crisis management, it often becomes apparent that there were several critical decision points. Seeing those same critical issues in real time is, of course, a far more difficult task. How these relatively few critical issues are identified and decided can determine success or failure in crisis management.

There is no formula for identifying these issues. Quite the contrary, these issues are most often discerned by application of sound judgment coupled with experience and some degree of educated intuition.

One characteristic of a critical issue is that it is of a nature that one would take it to the highest corporate levels. While at first blush this seems obvious, in the midst of crisis it may not be so clear. A decision that forecloses options, establishes a public position or renders a significant judgment on a material matter may well be a critical one. Such actions deserve full and careful consideration. This often requires a studied effort to step back from the fray and resort to a more overarching consideration of the issues and challenges a given crisis may present. That perspective is most often a prerequisite to identifying critical issues.

Another valuable avenue to identifying critical issues is measuring decisions or options against the crisis strategy. Those issues or decisions that can alter the strategy or the achievement of its objectives are critical ones. Thus, consideration of a potential course of conduct in light of strategic objectives can help to isolate critical issues, as well as provide a basis for re-examination of their strategic implications.

Those who have been through crisis often refer to the "fog of battle" and similar expressions that capture the difficulty of maintaining an appropriate level of comfort with and clarity concerning all that is going on. This can be especially troubling to lawyers accustomed to long hours of consideration and deliberation. It is all the more difficult to isolate critical issues in such an environment. That environment, however, is the reality of crisis. It should simply be recognized that one must make a conscious effort to separate the critical decisions from the cascade of issues that confront us in a crisis.

VIII. Crisis is Also Opportunity

At the beginning of this paper, crisis was defined in part as an issue or problem that could be fatal or seriously injure the corporate body. But that same circumstance can be an opportunity. If a crisis meets the description of "bet the company," then there is an argument to be made that the bet should be leveraged by actively seeking opportunity to benefit the company through the crisis management process.

Moreover, whether we wish it or not, the measure of a company will be taken in a crisis where, by definition, there will be a greater than usual amount of public interest in its corporate behavior. This public interest provides an opportunity for the corporation to demonstrate its good corporate citizenship and other attributes that can contribute to a positive public image.

It is readily apparent that merely succeeding in managing the crisis may not be sufficient to call the outcome of the crisis a success. Rather, how the corporation is perceived to have addressed the crisis may have as much effect on whether the outcome is a "success" as does the outcome itself. In addition, handling a crisis well, that is, in a manner perceived by the public

and by shareholders to be exemplary of good corporate citizenship, can often mitigate the damages that might arise from an otherwise less than advantageous outcome.

These considerations make the formulation and execution of the media strategy critical to successful corporate crisis management. In addition, however, they underscore the value of coordination of the legal and public relations strategies. Nothing could be more disadvantageous to successful crisis management than to have the company's best intentions undermined by missteps taken either in the legal or public relations arena. This can easily arise even where the step or steps in question are perfectly well intentioned and legitimate in their own right. But if not in concert, the risk that a legal or public relations undertaking can discredit the corporation and undo goodwill is real. By emphasizing the importance of having both a legal and public relations strategy and coordinating the two, one may not just successfully manage a crisis, but take advantage of the opportunity that crisis may present.

IX. Conclusion

A criminal investigation, enforcement proceeding or other occasion of crisis need not be a career crisis for corporate managers and lawyers. With some forethought, application of good judgment and sound, experienced assistance, the storm of the crisis can be weathered, and even result in an opportunity that might not have otherwise occurred. The foregoing is designed to provide some assistance in the process of addressing a crisis, and living to tell about it.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 49386 / March 10, 2004

Admin. Proc. File No. 3-11425

In the Matter of

Banc of America Securities LLC,

Respondent.

ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTIONS 15(b)(4) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Banc of America Securities LLC ("Respondent" or "BAS").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which Respondent admits, Respondent consents to the issuance of this Order Instituting Proceedings Pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order").

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:1

A. Respondent

*Banc of America Securities LLC*is a broker-dealer registered with the Commission since March 22, 1990 (File No. **8-42263**) and is the successor-in-interest to NationsBanc Montgomery Securities. BAS is a subsidiary of Bank of America Corporation and, during the relevant period, had its principal offices in San Francisco, New York and Charlotte. BAS is a member of the New York Stock Exchange, the National Association of Securities Dealers and other national securities exchanges.

B. Summary

This action results from BAS's violations of the recordkeeping and access requirements under Sections 17(a) and 17(b) of the Exchange Act and Rule 17a-4(j) thereunder. These violations were committed during a pending Commission investigation that is seeking to determine whether, among other things, BAS and other persons have engaged in improper securities trading prior to the public dissemination of the firm's equity research. During the investigation, BAS has repeatedly failed promptly to furnish documents that have been requested by the staff. Specifically, BAS failed in a timely manner (i) to produce electronic mail, including a particular e-mail exchange relating to matters that BAS knew were under investigation, (ii) to produce certain compliance reviews after the staff had requested them, and (iii) to produce compliance and supervision records concerning the personal trading activities of a former senior employee of the firm. When questioned about certain production failures and delays, BAS provided the staff with misinformation concerning the availability and the production status of such documents, and engaged in dilatory tactics that delayed the investigation.

The failures that give rise to this action impeded the Commission's ability to discharge its investigative and law enforcement responsibilities. The recordkeeping and access requirements that Section 17 of the Exchange Act imposes on broker-dealers are essential to the Commission's ability to enforce the federal securities laws and to protect investors. The Commission's authority to access a broker-dealer's books and records is unconditional, subject only to the requirement that any such examination be reasonable. Throughout the investigation, the staff's requests to obtain copies of or inspect BAS's records were reasonable. BAS failed to preserve or promptly furnish certain records after they were requested. As a result, BAS willfully violated Sections 17(a) and 17(b) of the Exchange Act and Rule 17a-4(j) thereunder.

C. BAS's Production Failures

1. Background

In the Summer of 2001, the Commission received a letter from an anonymous informant (the "Anonymous Letter") containing allegations that, among other things, senior managers within BAS's equities department may have caused the firm to purchase or sell securities in the firm's proprietary accounts knowing that such securities would be the

subject of forthcoming upgrades, downgrades or other market-moving research reports by the firm's equity research department.2 Attached to the Anonymous Letter was a sequence of e-mails from October 2000 between BAS's then-Director of Marketing and a news reporter ("the E-mail Exchange") discussing the impact of certain BAS downgrades on stocks featured in the reporter's news reports.

In November 2001, the staff issued BAS requests for documents and information concerning the allegations in the Anonymous Letter, including certain e-mail of seven senior managers for three years. In response, BAS undertook a prolonged process for recovering e-mail and having it reviewed by its former counsel for responsiveness and privilege before production to the staff. In many instances, BAS missed the deadlines set by the staff for responding to its requests. BAS also frequently failed to contact the staff to request extensions of time, failed to alert the staff that it would only be providing partial responses to pending requests, failed accurately to explain the reasons for the firm's production delays and, in certain instances, failed to disclose promptly that responsive documents had been destroyed or rendered unavailable for inspection by the staff. When BAS ultimately did respond to the staff's requests, its responses were often incomplete, inaccurate or unreliable.

The staff repeatedly expressed its dissatisfaction to former counsel for BAS about the manner in which BAS was responding to the requests. In May 2002, the staff objected to the rate at which BAS was producing e-mail. In November 2002, the staff informed BAS that its conduct was not consistent with the Commission's expectations of a regulated entity during an investigation. On December 19, 2002, the Commission issued an Order Requiring the Filing of a Sworn Statement Pursuant to Section 21(a) of the Exchange Act ("Section 21(a) Order"), which ordered BAS to provide much of the information that the staff had previously requested, but had not yet received. In February 2003, the staff again confronted former counsel for BAS about the production failures. The staff told counsel that adequate resources were not being devoted to the investigation and that BAS was not meeting the production obligations of a regulated entity. Despite these admonitions, the problems with BAS's production persisted and, in some cases, worsened. BAS and its former counsel continued to provide the staff with inaccurate information concerning the availability of documents and the status of BAS's production.

2. BAS's Failure to Promptly Produce E-Mail

By letter dated November 8, 2001, the staff requested BAS to produce e-mail for seven senior managers for the period January 1, 1999 through November 8, 2001. Unbeknownst to the staff, BAS had also received a copy of the Anonymous Letter months earlier and deduced that the staff's requests related to the allegations in that letter. BAS hired outside counsel ("former counsel") who began an investigation and learned, among other things, that the Director of Marketing had sent "blind carbon copies" (the "BCCs") of the E-mail Exchange to other senior BAS employees. The BCCs were responsive to the staff's November 8 request. Because the informant claimed to have worked for a recipient of the E-mail Exchange, the identity of the BCC recipients was material to the staff's ability to

identify other BAS employees who may have knowledge of the matters alleged in the Anonymous Letter.

In responding to the staff request, BAS did not disclose its possession of the Anonymous Letter, the E-mail Exchange, and the BCCs. In December 2001, BAS advised the staff that it could readily produce e-mail created after June 2001, but that recovery of e-mail before then would require restoration from back-up tapes that would cause BAS to incur an "unreasonable amount of time, labor and expense."

Notwithstanding its advice to the staff that it could not restore pre-June 2001 e-mail without incurring significant burden and expense, BAS promptly restored the specific backup tape that was determined to have the E-mail Exchange on it in order to identify the BCC recipients to the E-mail Exchange. Within one week, BAS obtained copies of the E-mail Exchange reflecting the identities of the BCC recipients. The e-mail retrieved from the backup tape was then deleted from the firm's computer system. After retrieving the E-mail Exchange and identifying the BCC recipients, BAS did not promptly produce that information to the staff.

At the same time, BAS undertook a review of the post-June 2001 e-mail for production to the staff. By late May 2002, more than six months after the staff's initial request, BAS had produced only a small fraction of the responsive e-mails. On May 24, 2002, the staff informed BAS that its document production was delaying the staff's investigation and directed BAS to complete its production. The staff also directed the firm to produce, in electronic form, all e-mail for three of the seven individuals whose e-mail previously had been requested. The E-mail Exchange and the BCCs were responsive to this request, as well.

Over the next six months, BAS made several productions of e-mail responsive to the November 8, 2001 and May 24, 2002 requests. In August 2002, the staff scheduled testimony of the firm's former Marketing Director to occur in October 2002. In connection with that testimony, the staff reiterated its prior request that BAS complete its production of e-mail for the Marketing Director. On October 28, 2002, the staff convened the testimony of the firm's former Marketing Director. Prior to testimony, BAS's former counsel represented that the firm's production of the employee's e-mail in electronic format for October 2000 was complete. In preparing for testimony, however, the staff determined that the last transmission in the sequence of e-mails comprising the E-mail Exchange had not been produced. Moreover, during testimony, the staff learned that the former Director of Marketing had sent BCCs of the E-mail Exchange to four BAS employees and that BAS had received a copy of the Anonymous Letter and E-mail Exchange in June 2001. The staff demanded that BAS immediately produce a complete copy of the E-mail Exchange, including the copy reflecting all the BCC recipients, and directed BAS to provide a detailed explanation why these documents were not included in the firm's prior e-mail productions.

In the firm's response, BAS denied that it had intentionally withheld the documents from the staff. BAS explained that the omissions were due to a "technical glitch" that caused

the e-mail recovery from the back-up tapes to be incomplete. However, BAS did not disclose that it had separately retrieved a copy of the E-mail Exchange reflecting the BCCs nearly a year earlier or that it had known since December 2001 that the E-mail Exchange had been copied to other senior managers within the firm.

On November 6, 2002, the staff instructed BAS to immediately complete its production in response to all prior requests in the investigation. On January 10, 2003, the staff requested that former counsel meet to discuss document production issues. On February 6, 2003, fifteen months after the staff's original request and the evening before the meeting was to occur, BAS produced most of the remaining e-mails for three of the seven individuals whose e-mail had been requested. At the time of the meeting, the firm's production as to the other four individuals remained incomplete. Ultimately, BAS's production of e-mail in response to the November 8, 2001 and May 24, 2002 requests was not substantially complete until the fall of 2003, nearly two years after the staff's original request.

3. BAS's Failure to Promptly Produce Compliance Reviews

To monitor for possible improper trading ahead of research, BAS's Compliance Department placed stocks that were the subject of material research changes3 on certain of the firm's restricted lists. Each day, the firm's computers matched the restricted lists against recent trading by the firm, its employees and its clients, and generated exception reports identifying trading in restricted securities. Using printouts of the exception reports, BAS compliance officers identified suspicious trades and conducted inquiries to determine whether the firm, its employees or its clients may have known of forthcoming research at the time they placed their trades. The compliance officers made notes regarding their review directly on the printouts (hereinafter "Compliance Reviews"), and once any necessary actions had been completed, the Compliance Reviews were collected and periodically sent to offsite storage for future reference.

a. The "Missing" or Destroyed Compliance Reviews

On November 6, 2002, the staff requested information and documents concerning securities trading by the firm in advance of research, including whether such trading had ever been the subject of a Compliance Review. Approximately one week later, several boxes of BAS documents stored at the facilities of a third-party vendor were destroyed by the vendor.4

BAS did not produce the trading information and Compliance Reviews by the deadline set forth in the November 6 request. On December 19, 2002, the Commission issued the Section 21(a) Order, which ordered BAS to provide, among other things, information "concerning whether [certain trades were] ever flagged, questioned or investigated by BAS." Information responsive to the Commission's Section 21(a) Order would have been contained in the Compliance Reviews.

In early to mid-January, BAS learned that certain boxes which likely contained Compliance Reviews had been destroyed two months earlier. On January 23, 2003, while continuing to investigate which boxes had been destroyed and the extent to which they contained responsive material, BAS requested a number of deferrals by the staff with respect to the Section 21(a) Order. In particular, BAS asked that the staff defer the firm's obligations with respect to information contained in the Compliance Reviews, claiming that the Section 21(a) Order was unduly burdensome. In doing so, BAS did not disclose that boxes containing Compliance Reviews had been destroyed. Based on the firm's representations, the staff agreed to defer BAS's obligations with respect to information in the Compliance Reviews. However, the staff conditioned the deferral on BAS's agreement to make certain Compliance Reviews available for inspection at the firm's offices in San Francisco.

On February 24, 2003, the staff traveled from Washington, D.C. to San Francisco to examine the Compliance Reviews, as well as to take testimony from certain BAS employees. In preparation for the staff's visit, BAS had prepared a spreadsheet showing the availability of Compliance Reviews. The spreadsheet contained two tabs: tab 1 showed routine reports ("List One") and tab 2 showed ad hoc reports ("List Two"). As the staff was about to begin its inspection, BAS through its former counsel provided the staff with List One, which identified hundreds of individual Compliance Reviews as "missing." Counsel explained that the "missing" Compliance Reviews on List One included documents that were destroyed in November, as well as other Compliance Reviews, which, while not destroyed, could nevertheless not be located. Thus, although the firm had known for weeks that the staff would be traveling to San Francisco to examine documents that BAS knew were "missing," BAS did not disclose this information until the moment the staff was about to begin the examination.

b. The Undisclosed Compliance Reviews

BAS did not give a copy of List Two to the staff. Moreover, BAS did not produce for examination the Compliance Reviews identified thereon, even though the firm was in a position to do so. Thus, when the staff left BAS's offices, the staff had received List One and knew only that hundreds of Compliance Reviews that it had expected to examine were "missing." The staff did not know, and would not learn for another eight months, that BAS had prepared List Two identifying many Compliance Reviews that it had neither disclosed nor provided to the staff. When asked to explain why these documents had not been identified or produced previously, BAS was unable to do so.

c. Some of the "Missing" Compliance Reviews are Found, but BAS Fails to Promptly Produce Them to the Staff

After returning from San Francisco, the staff demanded that BAS explain the facts and circumstances surrounding the "missing" Compliance Reviews. In response, BAS represented to the staff that it had engaged in an "extensive and comprehensive search for the requested compliance reviews . . . [and that] counsel has produced or [would] produce to the staff copies of all compliance reviews in its possession." Notwithstanding these

representations, the firm's production failures continued. Moreover, the firm still did not disclose the existence of List Two or produce the documents identified on the list.

In May 2003, during a relocation of the Compliance department, BAS discovered numerous Compliance Reviews, including documents that previously had been identified as "missing" on List One, in the work space of the compliance department. BAS sent these documents to its former counsel for production to the staff. Former counsel, however, failed to produce these documents. When asked by the staff to explain why these Compliance Reviews had not been produced, BAS was unable to provide a satisfactory explanation.

In July 2003, BAS conducted another search for Compliance Reviews and located an additional 28,000 pages of Compliance Reviews that it had not previously produced, or that it had previously identified as "missing." The firm did not immediately advise the staff of this discovery. In August 2003, BAS hired new lead counsel to represent the firm in connection with the investigation, and in September 2003, the staff asked new counsel to review the completeness of the firm's prior productions. BAS's new counsel located the Compliance Reviews that BAS had discovered in July, as well as other documents that it determined had not been provided to the staff. Among the documents that new counsel located were the Compliance Reviews identified on List Two. The firm produced all of these documents in October 2003.

4. BAS's Failure to Promptly Produce Compliance and Supervision Documents

a. E-mail Concerning Compliance Inquiries into the Former Director of Marketing's Personal Trading

During its investigation, the staff issued multiple requests for compliance and supervision documents concerning the personal trading activities of BAS's former Director of Marketing. Among these was a request in November 2002 for "all documents concerning each compliance inquiry" into the Director of Marketing's trading activities.

Subsequently, in the Section 21(a) Order, the Commission ordered BAS to provide a statement concerning whether certain trades by the Director of Marketing were "ever flagged, questioned or investigated by BAS" and to "provide a detailed description of all of the facts and circumstances concerning each such instance." While preparing the firm's response to the Order, BAS's former counsel received detailed information concerning an inquiry that the firm's Compliance Department had conducted into stock purchases by the Director of Marketing and others prior to a ratings upgrade of the security by a BAS research analyst. The information referenced an e-mail indicating that BAS had flagged the suspicious trading and was conducting an inquiry. The e-mail, which previously had not been produced to the staff, described additional steps that BAS intended to take to investigate whether the Director of Marketing and others knew about the upgrade at the time of their purchases.

Although the documents and information concerning the Compliance Department's inquiry were responsive to the November 6, 2002 request and to the Commission's Section 21(a) Order, BAS failed to produce the e-mails concerning the inquiry to the staff and failed to disclose the information in its response to the Section 21(a) Order. In December 2003, the staff requested new counsel to investigate with respect to the prior productions on this subject. In response to that request, in January 2004, more than a year after the initial requests, BAS produced the e-mails concerning the Compliance Department's inquiry.5

b. Other Compliance Documents Concerning the Director of Marketing's Trading

As described above, throughout the investigation, the staff made multiple requests for compliance and supervision documents concerning trading by BAS's former Director of Marketing. During testimony in November 2003, the staff learned that BAS's Compliance Department may have maintained a separate file concerning the Director of Marketing's personal trading. Until then, the staff had received no such file from the firm and had been led to believe that no such file existed. On December 2, 2003, the staff requested that BAS's new counsel determine whether BAS had produced the complete compliance file relating to the Director of Marketing.

On December 23, 2003, BAS produced a compliance file relating to the Director of Marketing. Included in the file were documents concerning a regulatory inquiry that the firm had received concerning suspicious trading by the employee. Although it is unknown whether this particular file was the separate file that BAS maintained concerning the Director of Marketing's trading activities, it contained documents that were responsive to multiple prior requests.

IV.

LEGAL ANALYSIS

Prompt access to a broker-dealer's books and records is fundamental to the Commission's ability to discharge its examination, investigative and law enforcement responsibilities.6 The Commission's authority to examine a broker-dealer's books and records is unconditional, and is subject only to the requirement that any such examination be reasonable.7 Prompt access to books and records is particularly critical during an enforcement investigation. When a broker-dealer unreasonably delays producing documents sought during an investigation, it impedes the staff's fact finding capability, can prevent the staff from determining whether violations of law have occurred or are occurring, and can interfere with the Commission's ability to prevent future harm to investors. Such misconduct compromises the integrity of the Commission's processes and warrants immediate, independent enforcement action.

A. Section 17(a) of the Exchange Act and Rule 17a-4(j) Thereunder

Section 17(a)(1) of the Exchange Act provides that each member of a national securities exchange, broker, or dealer "shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title." The Commission has emphasized the importance of the records required by the rules as "the basic source documents" of a broker-dealer. *Statement Regarding the Maintenance of Current Books and Records by Brokers and Dealers*, Exchange Act Rel. No. 10756 (April 6, 1974).

Pursuant to its authority under Section 17(a)(1) of the Exchange Act, the Commission promulgated Rule 17a-4. Rule 17a-4(b)(4)8 requires broker-dealers to "preserve for a period of not less than 3 years, the first two years in an accessible place... [o]riginals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to his business as such." Rule 17a-4 is not by its terms limited to physical documents. The Commission has stated that internal e-mail communications relating to a broker-dealer's "business as such" fall within the purview of Rule 17a-4 and that, for the purposes of Rule 17a-4, "the content of the electronic communication is determinative" as to whether that communication is required to be retained and accessible. *Reporting Requirements for Brokers or Dealers under the Securities Exchange Act of 1934*, Exchange Act Rel. No. 38245 (Feb. 5, 1997); *see also In the Matter of Robertson Stephens, Inc.*, Exchange Act Rel. No. 47144 (Jan. 9, 2003); *In the Matter of Deutsche Bank Securities, Inc., et al.*, Exchange Act Rel. No. 46937 (Dec. 3, 2002).

Rule 17a-4(j)9 provides that "[e]very member, broker, or dealer subject to this rule shall furnish promptly to a representative of the Commission such legible, true and complete copies of those records of the member, broker or dealer, which are required to be preserved under this Rule, as are requested by the representative of the Commission." The Commission has enforced Rule 17a-4(j) when broker-dealers have failed promptly to furnish records requested by the staff that are required to be maintained under Section 17(a) of the Exchange Act and Rule 17a-4 thereunder. *See SEC v. J.W. Korth & Co.*, 991 F.Supp. 1468 (S.D. Fla. 1998); *In the Matter of Dominick & Dominick, Inc. et al.*, Exchange Act Rel. No. 29243 (May 29, 1991).

The e-mail communications that the staff requested from BAS were records that the firm was required to preserve under Section 17(a). While BAS does not appear to have violated the preservation requirements under Section 17(a) based on the facts described herein, Rule 17a-4(j) required BAS to promptly furnish these records to the staff upon request. As set forth above, by failing to produce the E-mail Exchange reflecting the BCCs until eleven months after receiving the staff's request, by failing to complete the e-mail production for the seven individuals identified in the staff's November 8, 2001 request until almost two years after receiving the staff's request, and by failing to produce Compliance Department e-mails concerning trading by the firm's former Director of Marketing for more than a year, BAS failed to promptly furnish these communications to

the staff. Accordingly, BAS violated Section 17(a) of the Exchange Act and Rule 17a-4(j) thereunder.

B. Section 17(b) of the Exchange Act

Section 17(b) of the Exchange Act provides, in pertinent part, that "[a]ll records of persons described in subsection (a) of this section are subject at any time, or from time to time, to such reasonable periodic, special or other examinations by representatives of the Commission and the appropriate regulatory agency for such persons as the Commission or the appropriate regulatory agency for such persons deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title." The Commission's examination authority under Section 17(b) is self-executing.10 Included in the authority to examine records is the authority to make or require copies of such records.11

The Commission's staff may make or require copies of a broker-dealer's records without a formal Commission request or subpoena. Moreover, the Commission has made clear that it is of "overriding importance" that broker-dealers comply with the requests of regulatory authorities during investigations. *See In the Matter of Wedbush Securities, Inc.*, 48 S.E.C. 963, 971-2, Exchange Act Rel. No. 25504 (Mar. 24, 1988). "If a firm is ill-equipped to provide the full degree of cooperation necessitated by such an investigation . . . it has the obligation to act to correct that situation . . .. Failure to do so is certainly no defense." *In the Matter of Donald T. Sheldon*, Exchange Act Rel. No. 31475 (Nov. 18, 1992), *aff'd*, 45 F.3d 1515 (11th Cir. 1995) (internal citations omitted); *see also In the Matter of Stephen S. York World Wide Investments, Inc*., Exchange Act Rel. No. 23382 (June 30, 1986) (registrant violated Section 17(b) of the Exchange Act by failing to make its books and records available to Commission representatives for examination and inspection during normal business hours); *In the Matter of Bangs Securities, Inc.*, Exchange Act Rel. No. 21167 (July 24, 1984) (registrant violated Section 17(b) of the Exchange Act by failing to make its books and records available for inspection by Commission staff members). Thus, the refusal to produce records for reasonable examination or removal by Commission staff members, or any unreasonable delay in producing such documents, constitute violations of law.

In this case, the Commission's staff made reasonable requests to BAS for access to its records, and the firm unreasonably delayed furnishing such records to the staff. BAS failed to produce e-mail in a timely manner, including the complete E-mail Exchange reflecting the BCCs, the e-mail for the seven individuals identified in the staff's November 8, 2001 request, and the Compliance Department e-mail concerning securities trading by the firm's former Director of Marketing. In addition, after receiving the staff's November 6, 2002 request for the Compliance Reviews, BAS failed to preserve such reviews for examination by the staff. BAS also failed to produce in a timely manner the Compliance Reviews that were not "missing" or destroyed, and failed to produce the Compliance Reviews identified on List Two even though they were readily accessible for examination. Finally, BAS failed to produce in a timely manner the compliance and

supervision records concerning the personal trading activities of the firm's Director of Marketing. Accordingly, BAS violated Section 17(b) of the Exchange Act.

V.

Based on the foregoing, the Commission finds that BAS willfully violated Sections 17(a) and 17(b) of the Exchange Act and Rule 17a-4(j) thereunder.

VI.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions specified in Respondent Banc of America Securities LLC's Offer.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

A. Pursuant to Section 21C of the Exchange Act, BAS shall cease and desist from committing or causing any violations and any future violations of Sections 17(a) and 17(b) of the Exchange Act and Rule 17a-4(j) thereunder;

B. BAS is censured pursuant to Section 15(b)(4) of the Exchange Act; and

C. BAS shall, within ten days of the entry of this Order, pay a civil penalty in the amount of $10,000,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the U.S. Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted with a cover letter that identifies BAS as the Respondent in this proceeding and includes the file number of this proceeding, a copy of which cover letter and money order or check shall be sent to Scott W. Friestad, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington DC, 20549-0708.

By the Commission.

Jonathan G. Katz
Secretary

Footnotes

1 The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

2 The staff's investigation of these allegations is continuing.

3 Such changes included, for example, upgrades and downgrades of firm research ratings, initiations of research coverage, and significant price target and earnings estimate adjustments.

4 According to BAS and the storage vendor, the destruction was inadvertent and attributable to an error in the manner in which the boxes were coded during a record reclassification program that lasted from August 2001 until December 2002. Although BAS has been unable to identify all of the contents of these boxes, the firm has confirmed that a number of Compliance Reviews were destroyed.

5 Additional Compliance Department e-mails concerning securities trading by the firm's former Director of Marketing, which were responsive to the staff's previous document requests, were also included in the January 2004 production.

6 The record keeping rules are "a keystone of the surveillance of brokers and dealers by [Commission] staff and by the security industry's self-regulatory bodies." *In the Matter of Edward J. Mawod & Co.*,46 S.E.C. 865, 873 n.39 (1977) (citation omitted), *aff'd sub nom . Mawod & Co. v. SEC*, 591 F.2d 588 (10th Cir. 1979). The Commission's "examination authority . . . is, of course, essential to any effort by the Commission to discharge its responsibilities under the Act." S. Rep. No. 94-75, 94th Cong., 1st Sess. 120 (1975).

7 In applying the access provisions of Section 17 to national securities exchanges and associations, the Commission has observed "Commission staff members are authorized directly, by Section 17 of the Act, to obtain copies of exchange and association records for examination and for removal from their premises. That statutory authorization is unconditional except for the requirement that any such record examination be `reasonable.'" *Interpretive Release Relating to Recordkeeping and Record Production Obligations of National Securities Exchange and Registered Securities Associations*, 18 S.E.C. Docket 670, Exchange Act Rel. No. 16278 (Oct. 12, 1979). These provisions apply to brokers and dealers as well.

8 Rule 17a-4(b)(4) was amended effective May 3, 2003.

9 Rule 17a-4(j) was amended effective May 3, 2003.

10 S. Rep. No. 94-75, 94th Cong., 1st Sess. 120 (1975) ("The language of Section 17(b), which confers the examination authority, makes clear that it is self-executing, *i.e.*, there would be no need for the Commission, as a condition precedent to inspecting any reports, to require by rule that the persons described in Section 17(a) keep any such records.")

11 *Id.*("[T]he authority to examine records would include the authority to make or require copies of such records.")

http://www.sec.gov/litigation/admin/34-49386.htm

