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

DIVISION OF
CORPORATION FINANCE

Response of the Office of Mergers and Acquisitions
Division of Corporation Finance

January 23, 2026

Via Email

Robert Plesnarski, Esq.
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Glen Rae
Bank of America
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Re: BofA Securities, Inc., et al.: Request for Section 13 Interpretive Guidance
Incoming letter dated January 23, 2026

Dear Messrs. Plesnarski and Rae:

We are responding to your letter dated January 23, 2026, addressed to Tiffany Posil and Nicholas Panos. To avoid having to recite or summarize the facts set forth in your letter, we attach a copy of your letter. Unless otherwise noted, capitalized terms in this response letter have the same meaning as in your letter.

Based on the facts and representations presented in your letter, the Division of Corporation Finance will not object if BofA determines it does not "act as" a "group," as determined under Sections 13(d)(3) or 13(g)(3) of the Exchange Act, with any Counterparty to a Contract and thus is not required to report beneficial ownership together with any Counterparty as a single "person" as a consequence of entering into a Contract.

In particular, we note the following representations:

- BofA's entry into a Contract is undertaken in the ordinary course of its regular brokerage and banking business for strictly commercial purposes;

- The Contracts are arms-length commercial transactions between financial institutions, such as BofA, and sophisticated counterparties, and entered into to serve the Parties' distinctly different objectives and motivations;

- The Contracts include an express agreement and acknowledgement by the Counterparty that BofA may, in its sole discretion, hedge its exposure under the Contract and that the Counterparty has no right to control BofA's hedging activity;

- The Contracts do not provide for, and BofA otherwise does not permit, a Counterparty to vote or dispose of, or direct the voting or disposition of, any securities acquired or held by BofA in respect of its hedge position for a Contract;

- The acquisition and disposition of securities in connection with a Contract are limited to: (i) the arms-length transfer of securities from one Party to another at settlement, (ii) market transactions effected by BofA to establish prices for the Contract, or (iii) the proprietary purchases and sales of securities by BofA at its sole discretion to hedge its exposure under the Contract;

- BofA acts alone in making any risk management decisions for decidedly narrow commercial purposes based upon its own independent objectives and circumstances, and the Parties do not act in concert or otherwise act in furtherance of a common purpose or goal; and

- Under no circumstances would BofA enter into a Contract for the purpose of changing or influencing control of an issuer of a reference security.

This position is based on the representations made to the Division in your letter. Any different facts or conditions may require the Division to reach a different conclusion. This response does not express any legal conclusion on the question presented or any views regarding BofA's compliance with other provisions of the federal securities laws. In addition, this response does not express any views regarding any other person's compliance with the federal securities laws, including any beneficial ownership reporting obligations that might arise under Sections 13(d) or 13(g) and Regulation 13D-G for the institutional investor counterparties described in your letter following entry into a Contract.

Sincerely,

/s/ Tiffany Posil

Tiffany Posil
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January 23, 2026

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BY ELECTRONIC SUBMISSION

SECURITIES EXCHANGE ACT OF 1934
SECTION 13

Ms. Tiffany Posil, Chief
Mr. Nicholas Panos, Senior Special Counsel
Office of Mergers and Acquisitions
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: ***BofA Securities: Request for Section 13 Interpretive Guidance***

Dear Ms. Posil and Mr. Panos:

On behalf of our clients, Bank of America, N.A., BofA Securities, Inc. and their affiliates (collectively, "**BofA**"), we submit this letter to request interpretive guidance concerning Section 13 of the Securities Exchange Act of 1934 (the "**Exchange Act**"). Specifically, we respectfully request that the staff (the "**Staff**") of the U.S. Securities and Exchange Commission (the "**Commission**") not object to our determination that, under the facts described below, BofA and certain corporate or institutional investor counterparties do not "act as" a "group" as determined under Section 13(d)(3) and Section 13(g)(3) of the Exchange Act, with respect to securities of an issuer, and therefore should not report beneficial ownership as a single "person" for purposes of Section 13(d)(1) and Section 13(g)(1) of the Exchange Act as a consequence of entering into the derivative contracts described below in the ordinary course of business. As explained below, under no circumstances would BofA enter into the contracts described below for the purpose of changing or influencing control of the issuer.[1]

I. BACKGROUND

BofA routinely enters into over-the-counter derivative contracts (each, a "**Contract**"), typically under the International Swaps and Derivatives Association ("**ISDA**") documentation architecture, referencing equity or other securities with corporate or institutional investor counterparties, including investment companies registered under the Investment Company Act of 1940 (each, a "**Counterparty**" and, together with BofA, the "**Parties**"), to facilitate a variety of business and economic objectives of the Counterparty, including hedging price, market and other

[1] The "group" provisions of Sections 13(d) and 13(g) were first added to the Exchange Act by the U.S. Congress in order to protect other shareholders from the evasion of disclosure requirements by persons who collectively sought to change or influence control of an issuer yet who each acquired and held an amount of beneficial ownership at or just below the reporting threshold. See Senate Report No. 550, 90th Congress, 1st Session 8 (1967) and House Report No. 1711, 90th Congress, 2d Session 8-9 (1968).

economic risks, achieving indirect or synthetic exposure to particular assets or facilitating proprietary or customer-facing trading activities. Given the nature of these transactions, BofA will not want any economic risk to the price or value of the reference security underlying the Contract and will, therefore, be indifferent to the price and value of such reference security over the life of the Contract. BofA will customarily hedge its risk under the Contract by offsetting its exposure to the securities underlying the Contract, such as by purchasing or selling securities of the same class of securities or other correlated assets (for example, a class of securities convertible or exchangeable into the reference class of securities or different assets with similar risk), entering into opposite-way derivative contracts referencing the same class of securities or a related class of securities or netting the exposure against other assets in BofA's portfolio. Such hedging activity is in the sole discretion of BofA; BofA could elect to hedge some, all, or none of its exposure under a Contract, consistent with relevant regulatory requirements, and the terms of each Contract generally include an express agreement and acknowledgement by the Counterparty that BofA may hedge its exposure under the Contract in its sole discretion and that the Counterparty shall have no right to control BofA's hedging activity.[2] Indeed, BofA's hedge position in respect of a Contract is sensitive proprietary information and, while the Counterparty may have reason to speculate that BofA may elect to hedge its exposure under the Contract, the Counterparty will never be privy to the specific aspects of BofA's hedge position, including whether or not BofA elected to hedge some, all or no portion of its exposure under the Contract. Accordingly, a counterparty will never have the power to dispose or direct the disposition of any securities used in the hedge**.** Similarly, Contracts do not provide for, and BofA otherwise does not permit, the Counterparty to vote or direct the voting of any securities acquired or held by BofA in respect of its hedge position for a Contract.

II. ANALYSIS: SECTION 13 GROUPS

Section 13(d)(1) of the Exchange Act requires that any "person" who, after acquiring directly or indirectly the "beneficial ownership" of any security of a class of securities registered under Section 12 of the Exchange Act is directly or indirectly the beneficial owner of more than 5% of such class of securities, file with the Commission the information established by the Commission by rule (a Schedule 13D) within five business days after the date of acquisition, unless the person is exempt from such requirement. Section 13(g)(1) of the Exchange Act further requires that any "person" who is directly or indirectly the beneficial owner of more than 5% of such class of securities file with the Commission the information prescribed by the Commission by rule (a Schedule 13G) at such time as is prescribed by the Commission by rule. Pursuant to Section 13(d)(3) of the Exchange Act, when two or more persons "***act as***" a "partnership, limited partnership, syndicate, or other group" for the purpose of "acquiring, holding, or disposing" of securities of an issuer, such "syndicate or group" shall be a "person" for purposes of Section 13(d)

[2] Contracts will be priced around the time of entry and at settlement using specified pricing mechanisms. For example, Contracts could be priced by "passing-through" execution prices for purchases or sales of the reference security made by BofA (in the public markets, with third parties or with the Counterparty) or by objective market prices such as volume-weighted average prices or closing prices for the reference security, which involve varying degrees of probability that the Counterparty's order and BofA's order may meet in the market as both sides trade to match such objective market benchmarks when they are used, and any such pricing may involve additional specified parameters, including, for example, price limits. Any purchases or sales of the reference security made by BofA for purposes of establishing prices for a Contract (i.e., to set the price or prices for the arms-length transfer of securities from one Party to the other at settlement of the Contract or its cash settlement thereof) would not necessarily reflect or impact BofA's hedge position in respect of the Contract—BofA would always retain the right to independently manage its hedge position.

(emphasis added). The same language is set forth in Section 13(g)(3), for purposes of Section 13(g).

For the reasons set forth below, it is our determination that, under the facts described above, the Parties do not "act as" a "group" under Section 13(d)(3) and Section 13(g)(3) of the Exchange Act with respect to the securities of an issuer and, therefore, should not be treated as a single "person" for purposes of Section 13(d)(1) and Section 13(g)(1) of the Exchange Act as a consequence of entering into a Contract (i.e., not considering or taking into account any other direct or indirect arrangements, agreements or understandings between the Parties or any other facts that could cause the Parties to be deemed a group for the purpose of acquiring, holding or disposing of the securities of an issuer).

First, Section 13(d)(3) of the Exchange Act provides that "[w]hen two or more persons act as a … group for the purpose of acquiring, holding, or disposing of "***securities of an issuer***", such … group shall be deemed a 'person'…" for the purposes of Section 13(d) (emphasis added). Based on the plain language of the statute, relevant rules and legislative history, it is clear that the term "securities of an issuer" refers to a class of equity securities described in Section 13(d)(1) of the Exchange Act and Rule 13d-1(i) and generally means, with limited exceptions, a voting class of equity securities registered under Section 12 of the Exchange Act. Accordingly, any concerted actions for the purpose of acquiring, holding or disposing of any securities other than a voting class of equity securities registered under Section 12 ordinarily would not result in group formation for purposes of Section 13(d). It therefore follows that when BofA and a Counterparty enter into a Contract, the only relevant consideration for purposes of Section 13(d) is whether any additional concerted actions exist to acquire, hold or dispose of the reference securities underlying the Contract. And as we explain elsewhere in this letter, it is our belief that the Contracts, including any arms-length transfer of reference securities from one Party to the other at settlement or the proprietary purchases or sales of securities by BofA at its sole discretion to hedge its exposure under the Contract, alone and without more, should not be viewed as concerted action to acquire, hold or dispose of the reference security. On the contrary, the Contracts are arms-length commercial transactions between financial institutions such as BofA and sophisticated counterparties, into which the Parties have entered to serve distinctly different objectives and motivations. For example, Counterparties enter into Contracts to manage risks associated with price fluctuations in the equity markets or to profit from price movements and market volatility. For financial institutions such as BofA, the Contracts are simply a product offered to customers and designed to generate a profit for the financial institution that is independent of the Counterparty's objectives or motivations. In this regard, a financial institution's objectives and motivations when entering into a Contract are no different from those when the financial institution enters into other commercial agreements with a Counterparty, including those agreements that in substance or effect results in the financial institution facilitating a Counterparty's acquisition or disposition of a security or results in one Counterparty acquiring and the other Counterparty disposing of a security.

Second, we do not believe that a Contract results in the Parties acting as a "partnership, limited partnership, syndicate or other group for the purpose of acquiring, holding or disposing of securities" because the Contract is not an agreement to act together or collectively ***with a purpose*** to acquire, dispose or vote the underlying securities or any securities BofA may acquire to hedge its economic exposure related to the Contract. To the contrary, BofA's entry into a Contract is undertaken in the ordinary course of its regular brokerage and banking business for strictly commercial purposes. We firmly believe that this bona fide business purpose is beyond the scope of regulation contemplated by Congress when it amended the Exchange Act in 1968.

Indeed, when enacting Section 13(d), reports of both the United States Senate and House of Representatives expressed that Section 13(d)(3) "would prevent a group of persons who seek to pool their voting or other interests in the securities of an issuer from evading the provisions of the statute because no one individual owns more than [5%] of the securities."[3]

Although we are not aware of any binding federal court precedent addressing the specific question presented here, the Commission and the federal courts have evaluated the meaning of the phrase "act as a group", with respect to the securities of an issuer, for purposes of Section 13(d)(3) and Section 13(g)(3) under other circumstances.[4] "A group need not be formally organized, nor memorialize its intentions in writing. All that is required is that its members combine in furtherance of a common objective."[5] "In order to find that a 'group' exists under Section 13(d)(3), a court must find that two or more people have formed a combination in support of a common objective."[6] "In determining the sufficiency of a 'combination,' it is 'clear that whatever meeting of the minds, understanding, or arrangement that may exist need not be written. It is possible, indeed commonplace, for two or more to take concerted action informally."[7] "The use of 'any,' 'understanding,' 'relationship,' and 'other arrangement' [in the Senate and House Reports] emphasize the notion that concerted action need not be formalized or express. The scope of section 13(d)(3) was clearly intended to extend beyond agreements and contracts in the classical contractual 'offer' and 'acceptance' sense."[8] Importantly for purposes of BofA's current request for guidance in light of its cautionary approach to entering into Contracts, groups have even been held to exist on the basis of circumstantial evidence and in cases where no formal agreement has been found.[9] The Commission has stated that whether two or more persons have formed a group as contemplated by Sections 13(d)(3) and 13(g)(3) depends on a determination of whether they acted together for the purpose of "acquiring," "holding," or "disposing of" securities of an issuer. Such persons could be viewed as acting together if they are taking concerted actions in furtherance of any of these purposes.[10]

Physically settled Contracts (i.e., contracts settled in kind with the reference securities) may result in the purchase or sale of the securities referenced in such Contracts. Securities also may be disposed of or acquired in connection with BofA's hedging activities or to facilitate pricing or settlement of a Contract. But these facts do not evidence a common objective or acts in concert

[3] See, e.g., "Full Disclosure of Corporate Equity Ownership and in Takeover Bids" in the Report of the Committee on Banking and Currency, U.S. Senate to accompany S. 510, Report No. 550 (ordered to be printed August 29, 1967); See also Exchange Act Release No. 89372, at footnote # 59 (July 22, 2020).
[4] See, e.g., *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 286 F.3d 613, 617 (2d Cir. 2002), *Wellman v. Dickinson*, 682 F.2d 355, 363 (2d Cir. 1982), *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 95 F.Supp.2d 169, 176 (S.D.N.Y. 2000). We understand the Southern District of New York addressed the question in CSX Corp. v. Children's Investment Fund Management (UK) LLP, which was reversed on other grounds by the Second Circuit. *CSX Corp. v. Children's Investment Fund Management (UK) LLP*, 562 F.Supp.2d 511 (S.D.N.Y. 2008), *CSX Corp. v. Children's Inv. Fund Management (UK) LLP*, 562 F.Supp.2d 511 (2d Cir. 2011).
[5] In the Matter of John A. Carley et al., Exchange Act Release No. 50695 (November 18, 2004).
[6] Securities and Exchange Commission v. Leonard Levy, et al., 706 F. Supp. 61, 68-69 (D.D.C. 1989).
[7] Securities and Exchange Commission v. Savoy Industries, Inc., et al., 665 F.2d 1310 (D.C. Cir. 1981).
[8] Securities and Exchange Commission v. Savoy Industries, Inc. 587 F.2d 1149, 1163 (D.C. Cir 1978).
[9] See Savoy at 1162 and Securities and Exchange Commission v. First City Financial Corp., Ltd. 688 F.Supp. 705 (D.D.C. June 15, 1978). See also, Modernization of Beneficial Ownership Reporting, Release Nos. 33-11253 and 34-98704 (Oct. 10, 2023) [88 FR 76896 (Nov. 7, 2023)].
[10] See Modernization of Beneficial Ownership Reporting, Release Nos. 33-11253 and 34-98704 (Oct. 10, 2023) [88 FR 76896 (Nov. 7, 2023)].

to achieve a common goal: all such acquisitions and dispositions are (i) the arms-length transfer of securities from one Party to the other at settlement, (ii) market transactions effected by one Party (BofA) to establish prices for the Contract, or (iii) the proprietary purchases and sales of securities by BofA at its sole discretion to hedge its exposure under the Contract. That is, any acquisition or disposition of securities in connection with a Contract is either directional (from one Party to the other, including establishing the prices therefor) or proprietary (solely for the account and under the control of one Party)—each Party therefore acts for its own independent interests and not in furtherance of a common purpose or goal to acquire, hold or dispose of securities of the issuer. Indeed, BofA is not required to maintain a hedge position in the reference securities under the terms of the Contract—BofA could elect (i) to hedge its exposure under the Contract synthetically (for example, by purchasing or selling derivative instruments or futures in lieu of engaging in market activity), (ii) to effect its hedge position by crossing or offsetting other proprietary or customer-facing positions of BofA or (iii) to maintain only a partial hedge position or no hedge position at all consistent with relevant regulatory requirements. For example, BofA may make decisions in respect of its hedge position for a Contract in the context of its overall portfolio related to the securities underlying the Contract by netting exposure under different positions in the portfolio, in which case the exposure under the Contract would represent only one input to BofA's overall hedging strategy.

Under no circumstances would BofA permit or enable the Counterparty to control BofA's hedge position under the Contract or control whether or how BofA votes any securities held by BofA. We view these limitations of critical importance because the Counterparty's ability to control whether BofA acquires, holds, disposes of or votes reference shares could be deemed to be concerted action for the purpose of acquiring, holding, or disposing of securities of the issuer. So long as BofA (i) did not enter into the Contract with the purpose or effect of changing or influencing control of the issuer and (ii) did not otherwise act together with the Counterparty for the purpose of acquiring, holding, or disposing of securities of an issuer, the Parties should not be viewed as acting as a group as determined under Sections 13(d)(3) and 13(g)(3), as a consequence of entering into the Contract. Assuming that BofA neither entered into the Contract with the purpose or effect of changing or influencing control of the issuer nor acted together with the Counterparty for the purpose of acquiring, holding, or disposing of securities of an issuer, then the Counterparty's intent to enter into the Contract with the purpose or effect of changing or influencing control of the issuer should be of no consequence in determining whether the Parties acted as a group under Sections 13(d)(3) and 13(g)(3). That is, we do not believe that the Parties form a group as contemplated by Sections 13(d)(3) and 13(g)(3) simply as a consequence of the Parties entering into a Contract or BofA acquiring, holding, disposing of or voting reference shares as a hedge position at its sole discretion and not at the direction of the Counterparty.[11]

Third, we view the settlement of a Contract (including through physical settlement, which would result in a delivery of the securities by one party to the other) as being no different from any other agreement between two arms-length persons to purchase or sell securities from or to each other. The mechanics of this legitimate payment of cash or payment-in-kind at settlement is no

[11] See Modernization of Beneficial Ownership Reporting, Release Nos. 33-11253 and 34-98704 (Oct. 10, 2023) [88 FR 76896 (Nov. 7, 2023)], which at page 152 states: "While it may be true that but for the joint actions of the parties in entering into the agreement, that specific acquisition of beneficial ownership in the covered class by the financial institution would not have occurred, we believe that if the counterparty acts on its own initiative and not at the direction of the investor or otherwise on its behalf, there is no basis to assert that the investor and counterparty acted in concert and thus subject themselves to regulation as a group."

different from any number of other traditional broker-dealer activities that are not viewed as implicating Section 13(d)(3) or Section 13(g)(3), including underwriting public offerings, acting as a placement agent for private offerings, acquiring or disposing of a block of securities for, from or to a customer or effecting cash securities transactions for a customer. Settlement of a Contract evidences nothing more than a common course of conduct exhibited by the Parties in lawfully fulfilling their contractual obligations stemming from the terms of a Contract.

Last, we do not view the Contracts as part of a plan or scheme to avoid, much less evade, the requirements of Section 13(d) or Section 13(g). BofA simply views the execution of a Contract or Contracts, alone and without more, as being unregulated under Section 13(d) or Section 13(g). At the time the Parties enter into a Contract and during the life of the Contract, the Counterparty or affiliates of the Counterparty understand that each may be or will be separately required to file reports pursuant to Section 13(d)(1) or Section 13(g)(1) of the Exchange Act. To the extent a Counterparty, BofA or any of their respective affiliates individually are or become the beneficial owner of more than 5% of a class of equity securities registered under the Exchange Act, they fully recognize that each is independently required to comply with all applicable obligations under Section 13 of the Exchange Act. Similarly, to the extent a Counterparty, BofA or any of their respective affiliates individually are or become subject to other provisions of the federal securities laws in connection with a Contract (including, for example, Section 16 of the Exchange Act or Section 5 of the Securities Act), they are required to comply with all applicable obligations thereunder. At the time the Parties enter into a Contract and during the life of the Contract, the Counterparty or affiliates of the Counterparty may be or may become "affiliates" of the issuer of the securities underlying the contract, as defined in Rule 144(a)(1) under the Securities Act, or be subject to Section 16 of the Exchange Act with respect to the class of securities underlying the Contract (or the class of securities BofA uses to establish its hedge position in respect of the Contract).

In sum, it is our opinion that the entry into a derivative contract such as the Contracts, alone and without more, is not a sufficient legal basis to deem the Parties a single person under Section 13(d)(1) or Section 13(g)(1) of the Exchange Act. Absent evidence of coordination demonstrating that the Parties acted in concert to acquire, hold (including vote), or dispose of securities used to effect BofA's hedge position or satisfy an obligation under the Contract, any reporting pursuant to Section 13 with respect to such securities by BofA would not alert the issuer or market participants to a potential change of control or meaningfully contribute to price discovery. Accordingly, the imposition of a filing requirement upon the Parties in this discrete context would be unduly burdensome and possibly result in the disclosure of proprietary information that presumptively would be of questionable value to investors. Contracts, by their terms, do not obligate BofA to maintain a hedge position or seek the Counterparty's approval prior to effecting any hedge position and the Parties do not act in concert or otherwise act in furtherance of a common purpose or goal. BofA acts alone in making a risk management decision for decidedly narrow commercial purposes, based upon its own independent objectives and circumstances.

III. Significance of the Guidance Requested

This request for interpretive guidance is exceptionally significant to the business of facilitating Contracts with institutional investor counterparties. Although BofA and other similarly situated market participants believe that the entry into a Contract should not result in BofA and the Counterparty becoming a group as determined under of Section 13(d)(3) or Section 13(g)(3), the absence of specific guidance from the Commission, the Staff or the federal courts has resulted

in significant uncertainty and disparate market practice with respect to the entry into Contracts under certain circumstances. A few examples of disparate market practice are as follows; market participants may combine two or more of these approaches depending on the facts and circumstances.

1) Only enter into a Contract if the aggregate number of securities of which the Parties are the beneficial owners remains below a pre-determined threshold for the duration of the Contract (such threshold being below 10% of the total outstanding securities of that class).

2) Only enter into a Contract if the Counterparty is the beneficial owner of 10% or less of the outstanding class of securities for the duration of the Contract, regardless of the number of securities of the class of which the market participant is the beneficial owner.

3) Only enter into a Contract if the facts and circumstances support a conclusion that there is no intent by the Counterparty to control the issuer of the securities.

4) Only enter into cash-settled Contracts if any of 1, 2, or 3 above would apply.

5) Only enter into a Contract with "objective" pricing if any of 1, 2 or 3 above would apply.

6) If any of 1, 2 or 3 above would apply, only enter into a Contract if the market participant is able to suspend all trading in respect of the relevant class of securities for the duration of the Contract and the applicable short-swing period under Section 16(b).

7) In determining the appropriate thresholds, in addition to securities beneficially owned, also include the number of securities to which the Counterparty has synthetic exposure.

Of particular concern is the following fact pattern: if a Counterparty is subject to Section 16 of the Exchange Act by virtue of being the beneficial owner of more than 10% of a class of equity securities registered under Section 12 of the Exchange Act (or if in the aggregate the Parties would be the beneficial owners of more than 10% of the class of equity securities) and the Parties are alleged to "act as" a "group" as determined under Section 13(d)(3) or Section 13(g)(3), BofA and the Counterparty would each individually be deemed a ten percent owner for purposes of Section 16 and become subject to Section 16—even if BofA was not individually the beneficial owner of more than 10% of the class of securities.[12] Becoming subject to Section 16, including

[12] The Staff has provided guidance that group membership is construed the same way for purposes of Section 16 of the Exchange Act as for purposes of Section 13(d) of the Exchange Act. See Compliance & Disclosure Interpretation 110.02 (April 24, 2009).

> **Question**: Rule 16a-2(c) provides that "a ten percent beneficial owner not otherwise subject to Section 16 of the Act must report only those transactions conducted while the beneficial owner of more than ten percent of a class of equity securities of the issuer registered pursuant to Section 12 of the Act." A person is subject to Section 16 solely by being a member of a group, as described in Section 13(d)(3) and Rule 13d-5(b) thereunder, that beneficially owns more than 10 percent of such a class of equity security. The person no longer agrees to act together with the other group members for the purpose of acquiring, holding, voting or disposing of equity securities of the issuer. Does Rule 16a-2(c) require the person to report his or her transactions in issuer equity securities that occur after the person ceases to act as a member of the group?
>
> **Answer**: No. Group membership is construed the same way for purposes of Section 16(a) and Rule 16a-2(c) as for purposes of Section 13(d). Group membership terminates when the person no longer agrees to act together with the other group members for the purpose of acquiring, holding, voting or disposing of equity securities of the issuer. If after ceasing to act as a member of the group, the person's beneficial ownership does not exceed 10 percent of a class of issuer equity securities registered under Section 12, and the person is not otherwise subject to Section 16 with respect to the issuer, Rule 16a-2(c)

the short-swing profit disgorgement under Section 16(b), is a substantial consideration for large U.S. financial institutions that may simultaneously purchase and sell securities of that class in the ordinary course for a variety of different business purposes. This concern is heightened for market-makers, such as BofA, whose frequent purchases and sales of an issuer's securities would result in nearly unlimited Section 16(b) short swing liability. We understand that this uncertainty results in many market-makers electing not to enter into Contracts with Counterparties that would result in the market-maker becoming a ten percent owner, principally out of concern that (unfounded and insupportable) allegations could be made that the Parties "act[ed] as" a "group" under Section 13(d)(3) or Section 13(g)(3), with respect to the securities of an issuer. The resulting loss in business not only deprives BofA from entering into additional potentially profitable Contracts, but also could impair the investment returns ultimately earned by BofA shareholders.

Moreover, the risk described above is not proportionate to financial institutions that do not make a market (or otherwise engage in substantial trading activity) in the relevant class of securities, because such entities can mitigate the Section 16 risk by suspending trading activity in the relevant class of securities during the applicable periods subject to disgorgement under Section 16(b). Consequently, BofA and similarly situated market makers are penalized for being a market maker in addition to taking a more conservative position with respect to the types of counterparties with whom they are willing to enter into Contracts. Such regulatory conservatism places these financial institutions at a significant competitive disadvantage compared to many of their competitors. Further, because a substantial majority of market makers in the U.S. financial markets are U.S.-based financial institutions rather than foreign financial institutions, it is BofA and the other U.S.-based financial institutions who are placed at this competitive disadvantage. The issuance by the Staff of the interpretive guidance sought herein would remove this significant uncertainty and help to resolve the fundamental unfairness to financial institutions that may be engaged in independent market-making or other significant trading activities and which therefore do not have the ability to suspend purchases and sales of the relevant class of securities. In sum, BofA and similarly situated U.S. banks should not have to forgo meaningful and profitable business opportunities because of this regulatory conservatism.

IV. Relief Requested

For the reasons set forth above, we hereby respectfully request that the Staff not object to our determination that, under the facts described in this letter, the Parties do not "act as" a "group" as determined under Section 13(d)(3) and Section (g)(3) of the Exchange Act and therefore should not report beneficial ownership as a single "person" for purposes of Section 13(d)(1) and Section 13(g)(1) of the Exchange Act as a consequence of entering into a Contract. Accordingly, under the facts described in this letter, BofA does not believe that the Parties have a beneficial ownership reporting obligation under Section 13(d)(1) or Section 13(g)(1).

does not require the person to report his or her transactions in issuer equity securities that occur after the person ceases to act as a member of the group. [Apr. 24, 2009]

If you have any questions or otherwise require additional information, please contact Robert Plesnarski (202.383.5149) of O'Melveny & Myers LLP or Glen Rae (646.855.2556) of Bank of America. Thank you for your attention to this matter.

Sincerely,

/s/ Robert Plesnarski

Robert Plesnarski
of O'Melveny & Myers LLP

/s/ Glen Rae

Glen Rae
Bank of America

cc: Eric P. Hambleton
Michele Bianco
Miller Brownstein
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