

**UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934
RELEASE NO. 51852 / JUNE 15, 2005**

**INVESTMENT ADVISERS ACT OF 1940
RELEASE NO. 2396 / JUNE 15, 2005**

**ADMINISTRATIVE PROCEEDING
FILE NO. 3-11952**

In The Matter Of	: ORDER INSTITUTING
BANC OF AMERICA INVESTMENT SERVICES, INC., and BACAP DISTRIBUTORS, LLC,	: PROCEEDINGS PURSUANT TO
Respondents.	: SECTION 15(b)(4) AND SECTION
	: 21C OF THE SECURITIES
	: EXCHANGE ACT OF 1934, AND
	: SECTION 203(e) AND SECTION
	: 203(k) OF THE INVESTMENT
	: ADVISERS ACT OF 1940, AND
	: MAKING FINDINGS AND
	: IMPOSING CEASE-AND-DESIST
	: ORDERS, PENALTIES, AND
	: OTHER RELIEF

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative proceedings pursuant to Section 15(b)(4) and Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”) be and hereby are instituted against BACAP Distributors, LLC (“BACAP Distributors”), and that public administrative proceedings pursuant to Section 15(b)(4) and Section 21C of the Exchange Act, and Sections 203(e) and (k) of the Investment Advisers Act of 1940 (“Advisers Act”), be and hereby are instituted against Banc of America Investment Services, Inc. (“Banc of America Investment Services”).

II.

In anticipation of the institution of these proceedings, Banc of America Investment Services, Inc. and BACAP Distributors, LLC (collectively, “Respondents”) have each submitted Offers of Settlement (“Offers”) to the Commission, 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, the Respondents, without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and over the subject matter of these proceedings, consent to the entry of this Order Instituting Proceedings Pursuant to Section 15(b)(4) and Section 21C of the Securities Exchange Act of 1934, and Section 203(e) and Section 203(k) of the Investment Advisers Act of 1940, and Making Findings and Imposing Cease-and-Desist Orders, Penalties, And Other Relief ("Order").

III.

On the basis of this Order and the Respondents' Offers, the Commission finds that:

A. RESPONDENTS

1. **Banc of America Investment Services** is a Florida corporation with its principal place of business in Charlotte, North Carolina. Banc of America Investment Services is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act and is a member of NASD. Banc of America Investment Services is also a registered investment adviser pursuant to Section 203(c) of the Advisers Act. Banc of America Investment Services engages in a nationwide securities business.

2. **BACAP Distributors** is a North Carolina limited liability company with its principal place of business in Charlotte, North Carolina. BACAP Distributors is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act and is a member of NASD. BACAP Distributors engages in a nationwide securities business.

B. SUMMARY

This action concerns violations by both Respondents of the record-keeping requirements of Section 17(a) of the Exchange Act and Rule 17a-4 thereunder, and violations by Respondent Banc of America Investment Services of the record-keeping requirements of Section 204 of the Advisers Act and Rule 204-2 thereunder, during the period from at least January 2001 to February 2004 (the "relevant period"). During the relevant period, Respondents failed to preserve for three years electronic mail communications (including inter-office memoranda and communications) received and sent by its associated persons and employees that related to its business as a broker or dealer as required by Rule 17a-4. During the same period, Respondent Banc of America Investment Services failed to keep in any easily accessible place for a period of five years, and/or to preserve in an appropriate office for a period of two years, true, accurate, and current written communications relating to recommendations made, advice given or proposed to be given; receipt, disbursement or delivery of funds or securities; and the placing or execution of orders to purchase and sell securities as required by Rule 204-2. In particular, Respondents lacked adequate systems and procedures for the preservation of electronic mail communications.

C. FACTS

The facts specific to these proceedings are set forth below:

1. The employees and agents of Respondents used electronic mail communications, in part, to conduct the Respondents' business as a broker or dealer, and Respondent Banc of America Investment Services used electronic mail communications that relate to recommendations made, advice given or proposed to be given; receipt, disbursement or delivery of funds or securities; and the placing or execution of orders to purchase and sell securities.

2. Both Respondents failed to preserve copies of such electronic mail communications relating to their businesses as brokers or dealers for three years. Respondent Banc of America Investment Services failed, for the requisite time period, to maintain electronic mail communications that relate to recommendations made, advice given or proposed to be given; receipt, disbursement or delivery of funds or securities; and the placing or execution of orders to purchase and sell securities. Specifically, Banc of America Investment Services failed to maintain such records in an easily accessible place for a period of not less than five years and to maintain and preserve such records in an appropriate office for two years. Respondents did not have adequate systems or procedures in place during all or part of the relevant periods to retain electronic mail communications. During an investigation, the Commission staff discovered Respondents' failures to preserve electronic mail communications. The deficiencies in Respondents' systems and procedures for the preservation of electronic mail communications pre-existed the underlying investigation. Upon discovery, Respondents attempted to determine the nature and scope of the failures, and took steps to address the failures.

3. Prior to June 2001, Respondents backed up electronic mail communications on tape or other media, primarily for disaster recovery purposes. While Respondents relied on these backups to preserve electronic mail communications, Respondents had inadequate systems or procedures to ensure the retention of such backups for the required periods. In fact, the Respondents generally retained the back-up tapes for no more than 90 days and then recycled or overwrote them.

4. Beginning in June 2001, Respondents implemented a software system that was designed to permit supervision of electronic mail communications, as well as retention of such communications. Respondents have utilized this system continuously from October 2001 until the present. However, prior to February 2004, Respondents had inadequate systems and procedures in place to ensure that the system was implemented properly and that Respondents were retaining all required electronic communications related to Respondents' business as such.

5. In administering the software system that allowed for retention of electronic mail communications, Respondents failed to ensure that the software system captured all electronic mail for the required employees and associated persons. For example, when Respondents hired new employees, or transferred employees to a location with a different computer server, Respondents often did not take steps to ensure that the electronic mail retention software captured the electronic mail of the newly hired or transferred employee. As a result, Respondents failed to retain electronic mail communications of a significant number of employees and associated persons during the relevant time period. Although Respondents knew that the software system had not retained electronic mail communications for all required employees and associated persons, Respondents did not adequately address the deficiencies in their administration of the software system to ensure retention of electronic mail communications prior to February 2004.

D. LEGAL DISCUSSION

1. Exchange Act Violations

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 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*, 4 SEC Docket 195 (April 26, 1974). The record keeping rules are “a keystone of the surveillance of broker and dealers by [Commission] staff and by the securities industry’s self-regulatory bodies.” *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).

Pursuant to its authority under Section 17(a)(1) of the Exchange Act, the Commission promulgated Rule 17a-4. Rule 17a-4(b)(4)¹ in turn requires each Respondent 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 electronic 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*, Rel. No. 34-38245 (Feb. 5, 1997).

¹ Rule 17a-4(b)(4) was amended effective May 2, 2003.

Based on the foregoing and Respondents' Offers of Settlement, the Commission finds that, with respect to electronic mail communications during the relevant period, both Respondents willfully violated Section 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder by failing to preserve electronic mail communications for three years.²

2. Advisers Act Violations

Rule 204-2 promulgated under the Advisers Act provides that every investment adviser registered under the Act "shall make and keep true, accurate and current the books and records relating to its investment advisory business," including "[o]riginals of all written communications received and copies of all written communications sent by such investment adviser relating to (i) any recommendation made or proposed to be made and any advice given or proposed to be given, (ii) any receipt, disbursement or delivery of funds or securities, or (iii) the placing or execution of any order to purchase or sell any security." Rule 204-2(a)(7). Such books and records are required to be "maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such records, the first two years in an appropriate office of the investment adviser." Rule 204-2(e)(1).

Respondent Banc of America Investment Services failed to preserve electronic mail communications received and sent relating to recommendations made or proposed to be made and advice given or proposed to be given to investment advisory clients; receipt, disbursement or delivery of funds or securities; or the placing or execution of orders to purchase and sell securities. By failing to do so, Banc of America Investment Services violated the retention provisions of the Advisers Act.

Based upon the foregoing and the Offer of Settlement of Respondent Banc of America Investment Services, the Commission finds that Banc of America Investment Services willfully violated Section 204 of the Advisers Act and Rule 204-2 promulgated thereunder by failing to maintain and preserve electronic mail communications related to its investment advisory business in an easily accessible place for a period of not less than five years, the first two years in an appropriate office of the investment adviser.

E. UNDERTAKINGS

Respondents have undertaken to review their procedures regarding the preservation of electronic mail communications for compliance with the federal securities laws and regulations, as well as applicable state laws and regulations and the rules of self-regulatory organizations. Within 90 days of the issuance of this Order, unless otherwise extended by the staff of the Commission for good cause shown, Respondents undertake and agree to inform the Commission in writing that they have completed their review and

² "Willfully" as used in this Order means intentionally committing the act which constitutes the violation. See *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000); *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). There is no requirement that the actor also be aware that he is violating one of the Rules or Acts.

that they have established systems and procedures reasonably designed to achieve compliance with those laws, regulations, and rules concerning the preservation of electronic mail communications.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions specified in Respondents' Offers.

ACCORDINGLY, IT IS HEREBY ORDERED:

- A. Respondents, pursuant to Section 21C of the Exchange Act, cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder.
- B. Respondent Banc of America Investment Services, Inc., pursuant to Section 203(k) of the Advisers Act, cease and desist from committing or causing any violations and any future violations of Section 204 of the Advisers Act and Rule 204-2 promulgated thereunder.
- C. Respondents are censured pursuant to Section 15(b)(4) of the Exchange Act. Respondent Banc of America Investment Services is also censured pursuant to Section 203(e) of the Advisers Act.
- D. Respondent Banc of America Investment Services, Inc., within ten days of the entry of this Order, and pursuant to Section 15(b)(4) and Section 21B of the Exchange Act and Section 203(i) of the Advisers Act, shall pay a civil monetary penalty of \$1,000,000 to the United States Treasury. Such payment to the U.S. Treasury 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 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 under cover letter that identifies the payor as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Lawrence A. West, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street N.E., Washington, DC 20549.
- E. Respondent BACAP Distributors, LLC, within ten days of the entry of this Order, and pursuant to Section 15(b)(4) and Section 21B of the Exchange Act, shall pay a civil monetary penalty of \$500,000 to the United States Treasury. Such payment to the U.S. Treasury 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 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 under cover letter that identifies the payor as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Lawrence A. West, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street N.E., Washington, DC 20549.

- F. Respondents shall comply with the undertaking contained in Section III., E, above.

By the Commission.

Jonathan G. Katz
Secretary