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DATE: DECEMBER 8, 2011

FROM: OFFICE OF THE CITY ATTORNEY

SUBJECT: RESOLUTION NO. _____ - APPROVAL OF ELECTION TO PARTICIPATE AND RELEASE OF ALL CLAIMS *IN RE* OUT-OF-COURT SETTLEMENT BETWEEN VARIOUS STATE ATTORNEYS GENERAL AND BANK OF AMERICA CORPORATION

SUMMARY:

The City of Los Angeles Office of the City Attorney is transmitting to the Board of Harbor Commissioners (Board) an Election to Participate in Settlement (Election to Participate, Transmittal 1) and a Release by Participating Counterparties (Release, Transmittal 2) in the matter of an out-of-court settlement between 28 State Attorneys General and Bank of America Corporation (BAC) regarding alleged violations of state and federal antitrust laws, state consumer protection laws and false claims statutes in the marketing, sale and placement of Municipal Bond Derivatives (Settlement). If approved, the election to participate and release of all claims will entitle the City of Los Angeles Harbor Department (Harbor Department) to receive a payment of \$116,844.43 as part of a \$62.5 million fund established pursuant to the settlement agreement.

RECOMMENDATION:

It is recommended that the Board of Harbor Commissioners:

1. Consider the Election to Participate in Settlement with BAC and the Release to be entered into in order to participate in the Settlement among various Attorneys General and BAC, and if approved;
2. Authorize the Executive Director to execute and the Board Secretary to attest to the Election to Participate and the Release; and
3. Adopt the foregoing as Resolution No. _____.

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DISCUSSION:

Background – In December 2010, 28 States Attorneys General entered into an out-of-court settlement with Bank of America Corporation (BAC) to resolve alleged violations by BAC of various state and federal antitrust laws, state consumer protection laws and false claims statutes in the marketing, sale and placement of Municipal Bond Derivatives (Settlement). The Settlement is a result of an investigation conducted by certain Attorneys General that began in Spring 2008. The Attorneys General have alleged in the Settlement Agreement that with respect to public agency issuers: (i) certain BAC employees participated in an illegal scheme with other brokers and providers with whom they had relationships to put their mutual pecuniary interest ahead of those of the clients they represented; (ii) BAC and other providers and brokers were principal players in the conduct and obtained unjust profits as a result; and (iii) the wrongful conduct caused Issuers in virtually every state, district and territory in the United States to be paid artificially suppressed rates or yields on Municipal Bond Derivative transactions. BAC was the first entity to voluntarily self-report evidence relating to improper bidding and other practices in the Municipal Bond Derivative industry, agreed to cooperate in the investigation and agreed to pay restitution to parties injured by the relevant conduct alleged in the Settlement Agreement. A full copy of the Settlement Agreement is available at www.stateAGmunisettlement.com

As part of the Settlement, BAC established a \$62.5 million settlement fund (Fund) to pay restitution to public agencies and entities determined to be eligible for participation in the Settlement. Entities were determined eligible if they (1) entered into one or more Municipal Bond Derivative transactions between January 1, 1998 and December 31, 2003 inclusive; (2) where the provider of the Municipal Bond Derivative who won the bid was BAC; and (3) the Municipal Bond Derivative was alleged by the Attorneys General to have been impacted by the relevant conduct described in the Settlement Agreement.

A Municipal Bond Derivative is defined in the Settlement Agreement as (i) contracts involving the investment or reinvestment of the proceeds of tax-exempt bond issues, Qualified Zone Academy Bonds, or bonds issued by or on behalf of any governmental, quasi-governmental or non-profit entity and (ii) related transactions involving the management or transferal of the interest rate risk associated with those bond issues including, but not limited to, guaranteed investment contracts, forward supply, purchase, or delivery agreements, repurchase agreements, escrow agreements, security sales, swaps, caps, options, and swaptions. A Municipal Bond Derivative does not include (i) contracts to underwrite the issuance of municipal bonds, (ii) credit default products, such as credit default swaps and credit default options, (iii) inter-dealer swaps or (iv) swaps or other agreements between providers to hedge, manage or otherwise share or transfer their risk on a Municipal Bond Derivative.

The Attorneys General investigation identified one Harbor Department Municipal Bond Derivative transaction which is eligible for participation in the Settlement Fund. Specifically, the Harbor Department entered into an escrow agreement with BAC in

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2002 which restructured an existing escrow agreement established in 1993 for the defeasance of bonds issued in 1988.

Each eligible entity's share of the Fund was determined by a formula developed by the Attorneys General with the assistance of an independent economic expert. The formula used a blended overage methodology that takes into account the estimated overcharge percentage assigned for the type of Municipal Bond Derivative transaction undertaken. The formula defines dollar overcharge (which is used in estimating the overcharge percentage) as the difference between (1) the amount of estimated profit BAC attributed to the Municipal Bond Derivative transaction and (2) the estimated profit BAC would have earned absent the alleged misconduct. The share of the Fund was calculated by taking the percentage of the estimated dollar overcharge of a transaction as it relates to the total overcharge for all eligible claims and multiplying it by the Settlement Fund amount. Each eligible entity's Settlement Fund share amount is thereby proportional percentage-wise to the total estimated amount of damages resulting from BAC's alleged illegal activities. The Harbor Department has been offered to receive a share of the Fund in the amount of \$116,844.43 should it elect to participate in the Settlement.

In the event that the Harbor Department accepts the proposed settlement and payment of funds, there will be no issues with respect to compliance with Internal Revenue Code Section 148 regarding arbitrage requirements. BAC has entered into an agreement with the Internal Revenue Service (IRS) which required BAC to make payments to the IRS that satisfy any outstanding liability to the IRS that any entity may have as a result of BAC's conduct in connection with the alleged violations. Also under the terms of the settlement with the IRS, each transaction will be deemed to have been entered into on terms which represented the fair market value of the transaction. Moreover, pursuant to the terms of the Settlement Agreement, BAC has agreed to indemnify and hold harmless entities for any claims, demands or penalties of any nature whatsoever attributable to, arising out of or related to any liability that an entity may have to the IRS under the Internal Revenue Code as a result of BAC's participation in the alleged conduct that is not satisfied by BAC pursuant to its settlement with the IRS.

Should the Harbor Department elect to participate in the Settlement, the Harbor Department will be releasing BAC from all claims it may have, of any nature whatsoever, known or unknown, arising from any alleged anticompetitive conduct and/or unfair trade practices in relation to the marketing, sale or placement of Municipal Bond Derivatives that may have occurred during the time period January 1, 1998 through December 31, 2007. This Release would include the Harbor Department giving up any rights to participate as a putative class member in the civil class action against BAC in the *In re Municipal Derivative Antitrust Litigation*, MDL No. 1950, Master Civil Action no. 08-2516, currently pending in the Southern District of New York. The Release does not cover transactions that occurred before 1998 or after 2007, nor does it affect any claims an entity may have for damages against financial institutions other than BAC.

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The legal analysis and advice of the Office of the City Attorney is presented in an attorney-client privileged Closed Session memorandum.

ENVIRONMENTAL ASSESSMENT:

The proposed action is an Election to Participate in a Settlement and a Release of All Claims with Bank of America Corporation. As an administrative activity, the Director of Environmental Management has determined that the proposed action is exempt from the California Environmental Quality Act (CEQA) in accordance with Article II, Section 2(f) of the Los Angeles City CEQA Guidelines.

ECONOMIC BENEFITS:

This Board action will have no direct employment effect.

FINANCIAL IMPACT:

Approval of the proposed Election to Participate in Settlement with Bank of America will entitle the Harbor Department to receive its proportionate share of the settlement amount of \$116,844.43.

CITY ATTORNEY:

The Election to Participate in Settlement with Bank of America and the Release by Participating Counterparties have been reviewed by the Office of the City Attorney and approved as to form and legality.

TRANSMITTALS:

1. Election to Participate in Settlement with Bank of America
2. Release by Participating Counterparties


HEATHER M. MCCLOSKEY
Deputy City Attorney

FIS Approval: eg (initials)
CA Approval: RM (initials)

APPROVED:


THOMAS A. RUSSELL
General Counsel

HMM/anw
Author: H. McCloskey