

REQUEST FOR LEGAL SERVICES

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CORPORATION COUNSEL
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Date: September 20, 2019
From: Michael J. Molina, Chair
Governance, Ethics, and Transparency Committee

TRANSMITTAL
Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Edward S. Kushi, Jr., Esq.

Subject: **BANK OF AMERICA'S COMMITMENT TO PROVIDE MORTGAGES FOR NATIVE HAWAIIANS ON HAWAIIAN HOME LANDS (GET-19)**

Background Data: Please review the revised proposed resolution and, if appropriate, approve as to form and legality. A hard copy of the proposed resolution is requested with your response.

Work Requested: FOR APPROVAL AS TO FORM AND LEGALITY
 OTHER:

Requestor's signature  Michael J. Molina	Contact Person Shelly Espeleta (Telephone Extension: 7134)
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- ROUTINE (WITHIN 15 WORKING DAYS)
- RUSH (WITHIN 5 WORKING DAYS)
- PRIORITY (WITHIN 10 WORKING DAYS)
- URGENT (WITHIN 3 WORKING DAYS)

SPECIFY DUE DATE (IF IMPOSED BY SPECIFIC CIRCUMSTANCES): September 25, 2019
REASON: For possible posting on October 4, 2019 Council meeting agenda.

FOR CORPORATION COUNSEL'S RESPONSE

ASSIGNED TO: <u>ESK RMT</u>	ASSIGNMENT NO. <u>2019-0065</u> <u>2019-1101</u>	BY: <u>JKO</u>
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TO REQUESTOR: APPROVED DISAPPROVED OTHER (SEE COMMENTS BELOW)
 RETURNING--PLEASE EXPAND AND PROVIDE DETAILS REGARDING ITEMS AS NOTED

COMMENTS (NOTE - THIS SECTION NOT TO BE USED FOR LEGAL ADVICE): _____

DEPARTMENT OF THE CORPORATION COUNSEL

Date 9/25/19

By 

get:ltr:019acc03:ske

(Rev. 7/03)

Attachments

Resolution

No. _____

AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO INVESTIGATE ACTIONABLE CLAIMS AGAINST BANK OF AMERICA AND THE BANKING AND MORTGAGE INDUSTRY

WHEREAS, wrongful foreclosure and other bad acts or failures to act committed by the banking and mortgage industry exacerbate Maui County's affordable housing crisis, negatively impact Maui County's economy, and have resulted in decreased real property tax revenue and increased County expenditures related to housing and social services throughout Maui County; and

WHEREAS, the above-described actions or failures to act include the Bank of America's failure to fulfill loan commitments to native Hawaiians, Filipinos, and others, as described on page 626 of the Federal Reserve Bulletin, July 1994, attached as Exhibit "A"; and

WHEREAS, the Council would like to retain special counsel with relevant expertise and experience to investigate actionable claims related to actions or failures to act by the banking and mortgage industry that have harmed and continue to harm the County's interests; and

WHEREAS, the Council alone is authorized to retain or employ special counsel by resolution adopted by a two-thirds vote;

WHEREAS the Council finds there is a real necessity to retain special counsel to investigate actionable claims against Bank of America and other banking and mortgage industry participants; and

WHEREAS, the Council recognizes the procurement of contracts on the County's behalf, including for special counsel, is usually a function of the executive branch; and

WHEREAS, because the County's proposed legal action on wrongful banking and mortgage industry activity is a Council-initiated action, it is appropriate for the Council Chair, as the legislative branch's chief procurement officer, to execute the contract with special counsel; now, therefore,

Resolution No. _____

BE IT RESOLVED by the Council of the County of Maui:

1. That the Council authorizes the employment of special counsel to represent the County to investigate actionable claims for wrongful foreclosure and other bad acts or failures to act committed by the banking and mortgage industry; and
2. That the total compensation for the investigation shall not exceed \$25,000. Within 30 days of the date of the contract, the special counsel will submit its confidential report to the Council's Governance, Ethics, and Transparency Committee with an analysis of the County's actionable claims; and
3. That compensable costs include fees for printing and witnesses; fees for copies necessarily obtained for use in the case; fees of the clerk and marshal; fees of the court reporter for necessary transcripts; docket fees; compensation of court-appointed experts and interpreters; and pre-approved travel; and
4. That non-compensable costs include telephone calls; facsimile charges; postal charges; messenger charges; fees for computerized legal research; investigative expenses; and other costs reasonably considered part of a law firm's overhead; and
5. That the expenditures of additional funds or substantial changes to the responsibilities of the special counsel require prior Council approval; and
6. That the Council must adopt a resolution expressly authorizing the filing of a complaint, motion, or other legal papers in court prior to a special counsel submitting documents on the County's behalf with any State or Federal court or agency; and
7. That certified copies of this resolution be transmitted to the Council Chair, the Mayor, the Corporation Counsel, the Director of Council Services, and the Director of Finance.

Resolution No. _____

APPROVED AS TO FORM AND LEGALITY



A handwritten signature in blue ink, appearing to read 'RDM', is written above a horizontal line.

Department of the Corporation Counsel
County of Maui

get:misc:019areso03

the safe and sound operation of such institutions. To accomplish this end, the CRA requires the appropriate federal supervisory authority to "assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution," and to take that record into account in its evaluation of this application.¹⁵

The Board has received comments from the Hawaii Protestants and an individual in California ("California Protestant") (the California Protestant and the Hawaii Protestants to be referred to collectively as "Protestants") critical of the efforts of BankAmerica, its subsidiary banks, and Liberty to meet the credit and banking needs of their communities. The Hawaii Protestants allege that Bank of America FSB has not generally met the convenience and needs of minority and low- and moderate-income individuals, and in particular, illegally discriminates in its efforts to meet the credit needs of native Hawaiians and Filipinos residing in its banking communities.¹⁶ The California Protestant alleges generally that Bank of America National Trust and Savings Association ("Bank of America - California"), BankAmerica's subsidiary bank operating in California, has not met the banking and credit needs of minorities, and in particular, Hispanics, and low- and moderate-income individuals in five counties in California.

In its consideration of the convenience and needs factor, the Board has carefully reviewed the entire record of CRA performance of BankAmerica, its subsidiary banks, and Liberty; all comments received on this application, and BankAmerica's response to those comments; and all the other relevant facts of record, in light of the CRA, the Board's regulations, and the Statement of the Federal Financial Supervisory Agencies Regarding the Community Reinvestment Act ("Agency CRA Statement").¹⁷

The Board also has evaluated the CRA performance record of Bank of America FSB, taking into consideration the fact that BankAmerica did not commence its activities in Hawaii until August 1992, and that the bank's overall volume of lending decreased in 1993 due, in part, to BankAmerica's reorganization of HonFed's operations and loan programs.

15. 12 U.S.C. § 2903.

16. The Hawaii Protestants maintain that data required to be filed by Bank of America FSB under the Home Mortgage Disclosure Act (12 U.S.C. § 2801 *et seq.*) ("HMDA") indicate that the bank's lending policies result in discriminatory treatment of individuals of Hawaiian and Filipino ancestry, and that the outreach efforts of both Bank of America FSB and Liberty are targeted primarily to nonminorities.

17. 54 *Federal Register* 13,742 (1989).

Record of CRA Performance

A. CRA Performance Examinations

The Agency CRA Statement provides that a CRA examination is an important and often controlling factor in the consideration of an institution's CRA record, and that these reports will be given great weight in the applications process.¹⁸ In this case, the Board notes that all of BankAmerica's subsidiary banks evaluated for CRA performance received "outstanding" or "satisfactory" ratings from their primary regulators during their most recent examinations. Bank of America FSB received a "satisfactory" rating from its primary federal regulator, the OTS, at its most recent examination for CRA performance as of September 7, 1993, and Bank of America — California received an "outstanding" rating from its primary federal regulator, the Office of the Comptroller of the Currency (the "OCC"), at its most recent examination for CRA performance as of January 28, 1994. Liberty received a "satisfactory" rating from its primary federal regulator, the FDIC, at its most recent examination for CRA performance as of May 27, 1992.

B. CRA Record of Performance of Bank of America FSB

HMDA Data. The Hawaii Protestants allege that 1992 HMDA data filed by Bank of America FSB indicate that the bank's lending policies resulted in discriminatory treatment of individuals of Hawaiian and Filipino ancestry.¹⁹ The Board has carefully reviewed these comments and the 1992 data in light of the preliminary 1993 HMDA data for the bank which represents the first full year of data accumulated under BankAmerica's ownership of the former HonFed. These data indicate that the volume of loan applications received from individuals within the Asian/Pacific Islander group²⁰ was proportional to that group's representation in the community, and that denial rates for that group were lower than denial rates for white applicants.²¹

18. *Id.* at 13,745.

19. The Hawaii Protestants also allege that Bank of America FSB has "redlined" the islands of Molokai and Lanai, which have large populations of Filipinos and native Hawaiians, by excluding them from the bank's delineated lending area. The OTS reviewed these exclusions in its most recent examination and determined that they were reasonable, noting that the primary owner of land on Lanai is converting the land to an affluent resort area, and that Molokai has a limited population to sustain a market presence.

20. Under the HMDA, separate reporting of loans made to native Hawaiians or Filipinos is not required, because these ethnic groups are included in the category of Asian/Pacific Islander for reporting purposes.

21. In 1993, the bank received 62 percent of HMDA-related loan applications from Asian/Pacific Islanders (60 percent of the population), with 65 percent of the banks' HMDA-related loans originated to