

## CLIENT ALERT

### Mitigating the Risk of Subject-Matter Waiver When Disclosing Privileged Materials to the Government

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New Federal Rule of Evidence 502 has been invoked in a high-profile securities case to avoid subject-matter waiver in connection with the disclosure of privileged materials and information to the government. The approach taken in this case provides a valuable lesson for companies facing government investigations.

In a case concerning Bank of America's controversial acquisition of Merrill Lynch, Judge Jed Rakoff of the Southern District of New York has endorsed a stipulation between BOA and the SEC that allows BOA to produce privileged materials to the SEC and other governmental authorities while mitigating the usual risk that parties in parallel private litigation will successfully claim broad subject-matter waiver. The SEC and BOA invoked Rule 502, and in particular Rule 502(a), which provides that even intentional disclosures of privileged material do not result in subject matter waiver unless the disclosed and undisclosed material concern the same subject matter *and* "ought in fairness to be considered together." Rule 502(d) further provides that agreements between the parties limiting waiver can be enshrined in court orders so that the protections of the agreement extend beyond the litigation at hand. The court acknowledged that Rule 502 "permits such cabined waivers" and endorsed the stipulation, thus preventing parties in other proceedings from arguing broad subject-matter waiver based on the BOA's disclosures to the SEC.

Companies dealing with government investigations often conclude that it is in their best interest to disclose otherwise privileged information to investigators. A Rule 502 agreement endorsed by court order can mitigate the serious, and potentially costly, risk of subject-matter waiver in parallel civil litigation. It remains to be seen, however, whether Rule 502 can be used in an even more favorable manner - to accomplish a "selective waiver" under which even the privileged material disclosed to the government retains its privileged status as to other parties and proceedings.

*U.S. Securities and Exchange Commission v. Bank of America Corp .*, Case No. 09-cv-06829, is pending in the U.S. District Court for the Southern District of New York. Copies of [the order and attached stipulation are available here](#).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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