

# DOJ & Bank of America Enter Biggest Civil Settlement in U.S. History

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On August 21, the Department of Justice (DOJ) and other federal and state regulators [announced](#) a nearly \$17 billion [Legal Settlement](#) with Bank of America (BOA) to settle civil claims involving the company's securitization, issuance, marketing, and sale of residential mortgage-backed securities (RMBS) and collateralized debt obligations (CDOs). As part of the settlement, BOA will pay \$9.65 billion in civil penalties and "[compensatory remediation payments](#)" to the parties and will provide an additional \$7 billion in [Consumer Relief](#), which could take the form of mortgage modifications and refinancings for troubled mortgage borrowers, mortgage down payment assistance, and community reinvestment. [According to the DOJ](#), this represents the largest civil accord with a single company in U.S. history.

Of the cash payments, BOA will pay: approximately \$7 billion to settle claims with the DOJ, a little over \$1.3 billion to settle claims with the Federal Deposit Insurance Corporation (FDIC), and approximately \$245 million to settle claims with the Securities and Exchange Commission (SEC). BOA also will pay just under \$1 billion combined to settle claims with the six state parties: \$300 million to California; \$300 million to New York; \$200 million to Illinois; \$75 million to Maryland; \$45 million to Delaware; and \$23 million to Kentucky. In addition to the \$9.65 billion in cash payments, more than \$490 million will be set aside in a [Tax Relief Payment Account](#) to cover consumers' tax liabilities resulting from receipt of the Consumer Relief component of the settlement. Each of the state and federal parties are members of the [President's Financial Fraud Enforcement Task Force's RMBS Working Group](#). BOA, in a [Statement of Facts](#), also admitted to various actions and behavior that served as a foundation for the Legal Settlement. Many of these actions occurred at Countrywide and Merrill Lynch before BOA [acquired](#) those entities in July 2008 and January 2009, respectively; however, some of the conduct covered by the settlement occurred as late as December 2013. This settlement is similar to the RMBS working group's [\\$7 billion accord](#) with Citigroup last month and its [\\$13 billion accord](#) with JPMorgan late last year.

[DOJ and the state parties](#) conducted "investigations of the packaging, origination, marketing, sale, structuring, arrangement, and issuance of [RMBS] and [CDOs]" by BOA and its [affiliates](#) and [subsidiaries](#), including Merrill Lynch and Countrywide. Through these investigations, the federal and state parties determined that there was a sufficient evidentiary basis to support lawsuits for civil violations of both federal and state laws. According to the Statement of Facts, primarily from 2005-2008, BOA securitized many thousands of mortgages and sold billions of dollars' worth of RMBS to the investing public. In its securitization and issuance process, the company conducted due diligence on and made representations and warranties regarding the quality of the mortgages underlying the RMBS. In the course of at least several securitization transactions detailed in the Statement of Facts, however, BOA marketed, sold, and issued RMBS even after the company's own due diligence uncovered unusually high numbers of mortgages in relevant securitization pools that did not comport with the representations and warranties in its marketing and offering documents. For example, BOA subsidiary Merrill Lynch used a third-party vendor to conduct due diligence on subprime mortgages before they were securitized and marketed to the public. During this due diligence process, some reviews of mortgage pools showed that up to half of the mortgages in a sample failed to comply with the company's underwriting standards. In spite of this, the internal Merrill Lynch traders "overruled the vendor's grade and 'waived'" a significant number of the mortgages in the pools, prompting a due diligence vendor to send an internal email stating: "[h]ow much time do you want me to spend looking at these [loans] if [the co-head of Merrill Lynch's RMBS business] is going to keep them regardless of issues? . . . Makes you wonder why we have due diligence performed other than making sure the loan closed." Many of the "waived" mortgages were ultimately securitized, but the offering and marketing documents for those securities were not modified to account for their increased riskiness. As

another example, May 1, 2009 through March 31, 2012, the company underwrote and endorsed mortgages with Department of Housing and Urban Development-Federal Housing Administration (FHA) insurance that did not meet FHA guidelines and regulations, which resulted in FHA “incurr[ing] hundreds of millions of dollars of losses when it paid insurance claims on those [BOA]-endorsed loans.”

Of the approximately \$7 billion worth of claims settled with DOJ, \$5 billion represents a civil penalty assessed under the [Financial Institutions Reform, Recovery and Enforcement Act of 1989 \(FIRREA\)](#), which will be remitted to the Treasury’s General Fund. Other claims settled with the DOJ are associated with several sealed lawsuits (\$1.05 billion) and various alleged frauds against FHA (\$800 million) and Ginnie Mae (\$200 million). Some of the cash payments settling claims associated with FHA and Ginnie Mae likely will go to FHA’s Capital Reserve Account and Ginnie Mae’s Financing Account, respectively. The [payments to the FDIC](#) were in its capacity as receiver for 26 failed depository institutions to cover various legal claims, including alleged securities fraud associated with RMBS purchased from BOA by the depositories. The payments to the [SEC](#) cover alleged violations of the Securities Act of 1933 and the Securities Exchange Act of 1934. The payments to the SEC take several different forms, including \$129.22 million in penalties and nearly \$110 million in disgorgement. The payments to the state parties are subject to specific instructions by each of the attorneys general of those respective states (see [California](#); [New York](#); [Illinois](#); [Maryland](#); [Delaware](#); [Kentucky](#)).

The [Consumer Relief](#) will be overseen by an independent monitor. BOA generally must satisfy its Consumer Relief responsibilities by September 1, 2018. BOA also must cooperate with DOJ in conjunction with any future investigations and prosecutions stemming from the conduct covered by the Legal Settlement.

In exchange for the cash payments, Consumer Relief, and cooperation, BOA is released from various federal and state civil legal claims arising out of the covered conduct. These releases include certain civil claims pursuant to [FIRREA](#), the federal [Racketeer Influenced and Corrupt Organizations Act](#) (RICO), the federal [False Claims Act](#), as well as common law civil claims for fraud, misrepresentation, and unjust enrichment, among others. The agreement does not release BOA from a case involving its “[High Speed Swim Lane](#)” program or from criminal prosecution in the future; nor does it release any employees, officers, directors, or other individuals from either civil or criminal claims.

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