No. 11-1957

# In the
# United States Court of Appeals
# for the Seventh Circuit

GEORGE MCREYNOLDS, MAROC HOWARD, FRANKIE ROSS, MARVA YORK, LEROY BROWN, GLENN CAPEL, CARNELL MOORE, MARK JOHNSON, AND CATHY BENDER-JACKSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

*Plaintiffs-Appellants*,

v.

MERRILL LYNCH & CO., INC., MERRILL LYNCH, PIERCE, FENNER & SMITH, BANK OF AMERICA CORPORATION,

*Defendants-Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, CIVIL ACTION NO. 08 C 6105
HON. ROBERT W. GETTLEMAN

## BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE AMERICAN BANKERS ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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# CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 11-1957

Short Caption: McReynolds, et al. v. Merrill Lynch & Co., Inc., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Securities Industry and Financial Markets Association ("SIFMA")

American Bankers Association ("ABA")

Chamber of Commerce of the United States of America ("Chamber of Commerce")

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Morgan, Lewis & Bockius LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

SIFMA, ABA and Chamber of Commerce have no parent corporations.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

No publicly held company owns 10% or more of SIFMA's ABA's, or Chamber of Commerce's stock.

---

Attorney's Signature: s/ Samuel S. Shaulson Date: September 27, 2011

Attorney's Printed Name: Samuel S. Shaulson

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Attorney's Signature: s/ Michael S. Burkhardt Date: September 27, 2011

Attorney's Printed Name: Michael S. Burkhardt

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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The Securities Industry and Financial Markets Association, the American Bankers Association, and Chamber of Commerce of the United States of America (collectively, "*Amici*") respectfully submit this brief as *amici curiae* contingent upon the granting of the accompanying motion for leave to file. This brief urges the Court to affirm the District Court's decision below, A2-A10 ("*McReynolds II*"), and supports the position of Defendants-Appellees Merrill Lynch & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, and Bank of America Corporation (collectively, "Merrill Lynch").

## STATEMENT OF INTEREST[1]

The Securities Industry and Financial Markets Association ("SIFMA") represents the shared interests of hundreds of securities firms, banks and asset managers. SIFMA supports a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building public trust and confidence in the financial markets. With offices in New York and Washington, D.C., SIFMA is the U.S. regional member of the Global Financial Market Association. SIFMA members have over 800,000 employees throughout the United States. An important function of SIFMA is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern in the securities and financial industry.

[1] Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

The American Bankers Association ("ABA") is the largest national trade association in the banking industry. It represents bankers and holding companies of all sizes in each of the fifty states and the District of Columbia. The ABA's members include community, regional and money center banks, as well as savings associations, trust companies and savings banks. Due to its size and experience, the ABA is the recognized voice for the nation's $13 trillion banking industry and its members' two million employees. In this role, the ABA provides its members with insight, in-depth expertise and resources to assist with their success. Likewise, the ABA promotes the interests of its members, and the banking industry as a whole, through its appearance in litigation as *amicus curiae*.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region throughout the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

*Amici* support a workplace that is free of discrimination. The vast majority of *Amici's* members are employers or representatives of employers that are subject to various federal, state and local labor and employment statutes and regulations, including federal non-discrimination laws such as Title VII of the Civil Rights Act of

1964, as amended ("Title VII"). *Amici* recognize the importance of these laws to deter improper behavior, remedy wrongdoing, and provide for a discrimination-free workplace. Plaintiffs-Appellants' ("Plaintiffs") interpretation of Section 703(h) of Title VII, however, would wreak havoc on the ability of businesses in America to use objective, non-discriminatory production- and/or merit-based criteria to compensate millions of employees while failing to provide those same employees with any additional protection against discrimination. As discussed below, formulaic production and merit-based compensation programs are permitted within Section 703(h) of Title VII, and such programs are a "win/win" for employers and employees. Moreover, contrary to arguments offered by another *amicus*, affirming the decision below will not immunize employers from liability where compensation differentials are the product of discriminatory inputs into an otherwise facially neutral compensation system. Quite to the contrary, employees are still able to pursue claims that discrimination affected the inputs into the neutral compensation system – just as Plaintiffs have done in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Case No. 05-C-6583 (N.D. Ill.) ("*McReynolds I*").

*Amici's* members have a direct and ongoing interest in the issue presented in this appeal concerning whether employers subject to Title VII can be held liable for utilizing a facially neutral, objective compensation system based on an employee's merit or quantity or quality of production. *Amici* seek to assist the Court by addressing matters in this brief that go beyond the immediate concerns of the parties. Because of their scope and experience, *Amici* are well-situated to brief the

Court on the relevant concerns of not only the securities and banking industries in particular, but also the business community in general and the considerable significance that the issue of Section 703(h) liability has to the members *Amici* represent.

## ARGUMENT

### I. Formulaic Production- And Merit-Based Compensation Programs That Fall Within Section 703(h) Of Title VII Are Prevalent Throughout The United States.

Section 703(h) of Title VII provides that it "shall not be an unlawful employment practice . . . to apply different standards of compensation . . . pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production [when] such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(h); *see also* 110 Cong. Rec. 12723 (1964) (Congress agreed to protect facially neutral compensation systems "unless it is shown that the employer was intending to discriminate for or against one of the [protected] groups"). Facially neutral compensation systems[2] like those described in Section 703(h) – *i.e.,* systems which formulaically measure earnings by quantity or quality of production, or which are merit-based in whole or in part – are prevalent throughout not only the securities and banking industries, but also a significant portion of the American workforce.

[2] For purposes of this brief, *Amici* use the terms "compensation systems" and "compensation programs" interchangeably.

**A. The securities industry routinely uses formulaic production-based programs for most compensation paid to revenue-generating employees, including retention bonus award programs like the one at issue in *McReynolds II*.**

Merrill Lynch has firm-wide annual compensation plans pursuant to which "[Financial Advisors ("FAs")] are compensated based on 'production credits' generated for the FA's assets under management on the purchase or sale of certain investment products on behalf of Merrill Lynch clients." A21, ¶19. A financial advisor's "compensation is largely determined by a 'grid' formula that applies different commission rates based on an FA's level of production credits." A21, ¶19. The grid formula and the compensation plans are "neutral on their face." A21, ¶19. *See also McReynolds v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 05-C-6583, 2010 U.S. Dist. LEXIS 80002, at *16-17 (N.D. Ill. Aug. 9, 2010) ("*McReynolds I*") ("[Merrill Lynch] pays its FAs based on production. . . . There is no discretion in calculating FA incentive compensation, which is based on a precise mathematical formula and grids contained in the program."); *reconsideration denied,* 2011 U.S. Dist. LEXIS 14360, at *11 (N.D. Ill. Feb. 14, 2011), *appeal denied*, (7th Cir. Apr. 20, 2011); *amended motion to certify class denied*, (N.D. Ill. Sept. 19, 2011).

Production-based compensation programs similar to the one utilized by Merrill Lynch are prevalent in the securities industry. *See, e.g., SEC v. Bravata*, 763 F. Supp. 2d 891, 905-06 (E.D. Mich. 2011) (agent at Bravata Financial Group was paid quarterly compensation "based on production in the previous quarter"); *In re RBC Dain Rauscher Overtime Litig.*, 703 F. Supp. 2d 910, 915 (D. Minn. 2010) (RBC compensates its securities brokers principally on a commission basis); *Good v.*

*Ameriprise Fin., Inc.,* 248 F.R.D. 560, 562 (D. Minn. 2008) (financial advisors compensated through a simplified commission system known as "Gross Dealer Concession"). The securities and financial services industry employs literally hundreds of thousands of employees who provide investment services and advice and who are compensation based on production they generate. *See* United States Department of Labor Bureau of Labor Statistics' Career Guide to Industries (2010-2011 Edition), Securities, Commodities, and Other Investments ("The securities, commodities, and other investments industry employed 858,100 wage and salary workers in 2008"), available at *http://www.bls.gov/oco/cg/cgs029.htm*; United States Department of Labor Bureau of Labor Statistics' Occupational Outlook Handbook (2010-11 Edition) (hereinafter "BLS Handbook"), Securities, Commodities and Financial Services Sales Agents (317,200 jobs)[3], available at *http://www.bls.gov/oco/ocos122.htm;* BLS Handbook, Personal Financial Advisors (208,400 jobs), available at *http://www.bls.gov/oco/ocos302.htm*; BLS Handbook, Financial Analysts (539,300 jobs), available at *http://www.bls.gov/oco/ocos010.htm*.

As part of Merrill Lynch's acquisition by Bank of America, these entities "announced that they would pay retention bonuses to Merrill Lynch FAs." A15, ¶7. These retention bonuses were based on a FA's annualized "'production credits,' in essence, commissions earned on client assets managed by FAs." A15, ¶7; *see also* A21, ¶20 (annualized production credits through September 2008 were the basis of the retention awards). The genesis of Plaintiffs' claims in this action is the

[3] Figures provided for each occupational category are of all such jobs as of 2008, which may include independent contractors and the self-employed.

contention that the Retention Program had a disparate impact on African-Americans because they received lower bonuses due to lower production credits. *See* A15-16, ¶¶7-9, A21-22, ¶¶19-24. The District Court below held that, "as described in plaintiffs' complaint, the method used to compute the retention awards qualifies as a production-based compensation system under § 703(h)." A7; *see also Goodman v. Merrill Lynch & Co., Inc.,* 716 F. Supp. 2d 253, 261 (S.D.N.Y. 2010) (finding Merrill Lynch's Retention Program "itself remains a protectable production based compensation system under section 703(h)").

The Bank of America/Merrill Lynch Retention Program is typical of retention programs used throughout the securities industry when one entity acquires another and seeks to incentivize the most successful FAs – and, correspondingly, their clients with large monetary assets – to remain with the new venture rather than join a competitor. *See* A22, ¶22 ("Defendants identified and selected for higher compensation the FAs they would try hardest to retain via the retention bonuses"); *see also, e.g.,*:

- Neal St. Anthony, *Piper Reps Say: 'You and Us' to UBS,* RegisteredRep.com, Sept. 1, 2006, http://registeredrep.com/career/finance_piper_reps_say/index.html (UBS offers retention bonuses to top Piper Jaffray brokers, notes Merrill Lynch previously offered retention bonuses to Advest brokers);

- Halah Touryalai, *An Offer They Can't Refuse*, RegisteredRep.com, Sept. 8, 2006, *http://registeredrep.com/news/ubs-mcdonald-retention/index.html* (UBS offers retention bonuses to certain McDonald Investments' advisors);

- Kevin Burke, *Wachovia Extends Olive Branch to A.G. Edwards Will They Accept?*, RegisteredRep.com, June 15, 2007, *http://registeredrep.com/advisorland/Wachovia_AGEdwards_Retention_Pack* *age/* (Wachovia Securities offers retention packages to A.G. Edwards' brokers);

- Christina Mucciolo, *Morgan, Smith Barney Reps Get Retention Awards, NOT Bonuses,* RegisteredRep.com, Feb. 23, 2009, *http://registeredrep.com/advisorland/career/morgan_stanley_smith_barney_reps_get_retention_awards_bonuses_0223/index.html* (Morgan Stanley Smith Barney offers retention awards to certain top advisors);

- Diana Britton, *SAI Sale to Ladenburg Mostly a Positive for Reps – Depends on Retention Packages,* RegisteredRep.com, Aug. 17, 2011, *http://registeredrep.com/advisorland/mergers-acquisitions/sai_sale_to_ladenburg_positive_for_reps_retention0810/index.html* (Ladenburg Thalman to offer retention packages to Securities America's advisors).

**B. Many other industries and businesses routinely use formulaic production-, commission- or merit-based compensation programs.**

Many industries have compensation models that provide for remuneration based upon production credits, commissions, and/or other performance-based pay. *See, e.g., Yi v. Sterling Collision Ctrs., Inc.,* 480 F.3d 505, 508 (7th Cir. 2007) ("The essence of a commission is that is bases compensation on sales, for example a percentage of the sales price, as when a real estate broker receives as his compensation a percentage of the price at which the property he brokers is sold."); *Gold v. New York Life Ins. Co.,* No. 09-cv-3210, 2011 U.S. Dist. LEXIS 62095, at *5 (S.D.N.Y. May 19, 2011) (insurance agent compensated purely on a commission basis and pursuant to a ledger-based compensation system whereby various expenses were debited against credited commissions to determine earnings); *Powers v. Centennial Comm. Corp.,* 679 F. Supp. 2d 918, 919 (N.D. Ill. 2009) (sales representative working for wireless and telecommunications services provider paid by salary and monthly commissions); *Levy v. Verizon Info. Sys. Inc.,* 498 F. Supp.

2d 586, 589-91 (E.D.N.Y. 2007) (describing in detail allegations regarding various written compensation plans providing for a modest base wage and incentive compensation in the form of commissions that applied to advertising sales representatives); *Gatto v. Mortg. Specialists of Ill., Inc.,* 442 F. Supp. 2d 529, 532 (N.D. Ill. 2006) (loan officers for mortgage broker "receive no draw, no salary, no base pay, no hourly wages and no overtime compensation;" rather, loan officers were paid semimonthly by commissions paid on loans closed with approved lenders); BLS Handbook:

- **Insurance Sales Agents** (434,800 jobs), available at *http://www.bls.gov/oco/ocos118.htm* ("Many independent agents are paid by commission only, whereas sales workers who are employees of an agency or an insurance carrier may be paid in one of three ways: salary only, salary plus commission, or salary plus bonus. In general, commissions are the most common form of compensation . . . [b]onuses usually are awarded when agents meet their sales goals or when an agency meets its profit goals.");

- **Real Estate Brokers and Sales Agents** (517,800 jobs), available at *http://www.bls.gov/oco/ocos120.htm* ("Commissions on sales are the main source of earnings of real estate agents and brokers.");

- **Retail Salespersons** (4,489,200 jobs), available at *http://www.bls.gov/oco/ocos121.htm* ("Compensation systems can vary by type of establishment and merchandise sold. Salespersons receive hourly wages, commissions, or a combination of the two. Under a commission system, salespersons receive a percentage of the sales they make.");

- **Advertising Sales Agents** (166,800 jobs), available at *http://www.bls.gov/oco/ocos297.htm* ("Performance-based pay, including bonuses and commissions, can make up a large portion of an advertising sales agent's earnings. Most employers pay some combination of salaries, commissions, and bonuses. Commissions are usually based on individual sales numbers, whereas bonuses may depend on [performance of the individual, a group, or the entire company].");

- **Sales Representatives, Wholesale and Manufacturing** (1,973,200 jobs), available at *http://www.bls.gov/oco/ocos119.htm* ("Most employers use a combination of salary and commissions or salary plus bonus. Commissions usually are based on the value of sales, whereas bonuses may depend on performance of the individual, a group, or the entire company].")

Even outside the typical production/commission-based sales professions, many employers utilize performance/merit-based compensation systems. Many companies, for example, have compensation programs that offer employees the opportunity to either increase their annual base pay and/or earn an annual bonus based upon their individual annual performance evaluation ratings. *See, e.g., Bryan v. William M. Mercer, Inc.,* 76 F. Supp. 2d 198, 200 (D. Conn. 1999) (management consultant participated in an incentive compensation program which provided significant bonus opportunities based on 'a combination of firmwide and individual performance against quantitative and qualitative goals achieved,'" then participated in award program under which he "could earn a bonus of '0-45% of base compensation depending on performance'") (record citations omitted). For illustrative purposes, for example, a program will provide that a performance rating of 5 (on a scale of 1 to 5) will automatically result in a salary increase and/or bonus of 5% of an employee's base pay, whereas a rating of 3 will only result in a 3% increase/bonus. As long as the system is created without any intent to discriminate and consistently applied to all eligible employees, this type of bona fide merit-based compensation system would be protected under Section 703(h). *See* A5-8; *Goodman*, 716 F. Supp. 2d at 261.

Protecting the bona fide merit-based compensation system, however, does not mean, as *amicus* Equal Employment Opportunity Commission ("EEOC") suggests, that "discrimination in compensation would be immune from challenge under Title

VII whenever it was accomplished by means of a facially neutral compensation system that bases compensation on merit or production." EEOC Br. at 8. Quite to the contrary, the District Court below determined that employees are still able to pursue claims of compensation discrimination by proving discrimination in the inputs that could lead to a compensation differential, even if the compensation itself was determined under a system that was objective and neutral on its face. For example, should an employee believe that her individual performance rating was the product of discrimination, then she can bring a claim under Title VII and seek damages that would include the wage/bonus differential she would have received had she not been given the allegedly discriminatory performance rating. *See, e.g., Goodman*, 716 F. Supp. 2d at 261 ("To the extent that other acts of discrimination in violation of Title VII affect the 'inputs' into a bona fide merit, seniority, or production-based system, a plaintiff's remedy lies in challenging those violations directly.").

This is precisely the type of claim brought by Lilly Ledbetter in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* – she alleged that certain poor performance evaluations she received were discriminatory based on sex and resulted in lower pay than her male coworkers through the end of her career. *See* 550 U.S. 618, 621-22 (2007), *superceded by statute,* Lilly Ledbetter Fair Pay Act of 2007 ("LLFPA"), Pub. L. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).[4] Accordingly, the EEOC's characterization of the District Court's

[4] *Ledbetter* held that the statute of limitations for a Title VII claim of discriminatory compensation begins on the date the discriminatory "pay-setting

ruling as one that would "foreclose" all compensation discrimination claims like Ledbetter's from proceeding is grossly misleading. *See* EEOC Br. at 12-14. Affirmation of the District Court's ruling would not "severely undermine Title VII's protection against compensation discrimination," EEOC Br. at 8, as employees can always bring claims of compensation discrimination by alleging that discrimination with respect to some aspect of their job (*e.g.,* performance evaluation ratings, dissemination of accounts or teaming opportunities) affecting pay led to a differential in compensation under a facially neutral objective compensation program. The District Court's decision simply holds that a plaintiff cannot state a claim under Title VII merely by alleging that an employer's facially neutral compensation program has a disparate impact on a protected class because the mere existence or knowledge of such disparate impact does not plausibly establish the discriminatory intent in adopting such a program necessary to overcome Section 703(h)'s protection. *See* A6-A8. Thus, there is no reason to believe that compensation-related disparate treatment claims similar to Ms. Ledbetter's would somehow be foreclosed by Section 703(h) if the decision below is not reversed.

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decision" is made, not the date the most recent paycheck reflecting that decision is received. 550 U.S. at 628-29. However, the *Ledbetter* decision was explicitly superceded by the LLFPA, which amended Title VII and other anti-discrimination statutes to provide that the statute of limitations for filing a lawsuit regarding alleged compensation discrimination resets with each paycheck allegedly tainted by discrimination. Pub. L. 111-2, 123 Stat. 5. The *Ledbetter* decision and the LLFPA, however, only address the statute of limitations issue; they do not alter the substantive scope of Title VII protections. The fact that an individual can challenge a prior discriminatory performance evaluation as affecting future pay does not mean he or she can challenge the objective merit-based pay system itself, which is expressly protected by Section 703(h).

Indeed, the fact that the same court that authored the Opinion and Order at issue on appeal, *see* A2-A10, is allowing plaintiffs in *McReynolds I* to pursue their race discrimination claims regarding the inputs into Merrill Lynch's compensation systems, *see* A8, further evidences that the ruling below will not have the negative consequences suggested by the EEOC and Plaintiffs.

## II. Objective Production-Based And Merit-Based Compensation Programs Are A "Win/Win" For Employers And Employees.

Compensation programs that are premised, in whole or in part, upon objective production-based and/or merit-based criteria align the interests of employers and employees alike.

For employees, these types of compensation programs provide an opportunity to gain more control over their own income. Employees who understand that their hard work can pay off in terms of greater commissions or bonuses are incentivized to be more successful. "Short and long-term incentives are a valuable motivation and engagement tool for employers." *Using Job Evaluation to Strengthen Human Capital Management,* MERCER, LLC, p. 3 (December 2010), *http://www.mercer.com/attachment.dyn?idContent=1315735&filePath=/attachments/English/Mercer_Job_evaluation_HCmgmt_tool.pdf.* These programs also help manage employees' expectations relating to compensation because employees understand the thresholds and/or formulas being used and have some means by which to predict their future earnings. *See Compensation Planning 2011*, MERCER, LLC, p. 6, *http://www.mercer.com/attachment.dyn?idContent=1391945&filePath=/attachments/English/Mercer_CompPlan_2011.pdf* (last visited

Sept. 27, 2011) ("Managing expectation and facilitating frequent communication [about compensation programs] are essential ingredients for employee engagement"). Employees also have a sense of fairness regarding the type of compensation covered by the program, knowing that all employees are held to the same standard.

For employers, having employees motivated by compensation programs with objective production-based and/or merit-based criteria can be favorable for many of the same reasons. Employees who are incentivized by compensation are more likely to provide better service to customers or clients, which will consequently increase the employers' bottom line in terms of profitability, efficiency and reputation. *C.f., Using Job Evaluation…, supra,* p. 2 ("Compensation can powerfully enhance business results when it reflects the value of each role to business success. . . . [J]ob evaluation can provide a solid foundation for the development of . . . long- and short-term incentive programs, and benefits programs. This helps to more closely align the company's people to its strategy, effectively improving business performance."). A financial advisor who is paid on the basis of production credits, for example, will be motivated to gain clients who are most likely to need the services and financial products she and her firm can provide, to increase the level of client assets under her management, and to continually provide excellent service so that clients will continue to rely upon her expertise and guidance with respect to their investments, insurance, financial planning and other needs. Similarly, a retail salesperson in a clothing store who is paid not only a minimum hourly wage, but also a commission on sales he processes, is more likely to provide better service to customers who shop at the store than a salesperson who is paid a set amount regardless of the volume of merchandise sold from the store. Employers are able to remove, or at least greatly minimize, the risk of employee complaints of unequal treatment if they uniformly apply objective criteria to all employees irrespective of race, sex, age, national origin or any other protected characteristic via a facially neutral compensation policy.[5]

## III. If Plaintiffs' View Is Adopted And Employers Are No Longer Able To Rely On Section 703(h)'s Exception, The Practical Consequences Would Negatively Impact Employers, Employees And The Courts.

As addressed above, affirmation of the District Court's ruling would not immunize employers from liability where compensation differentials are the product of discriminatory inputs into an otherwise facially neutral formula. *See supra* pp. 16-18. The District Court only held that Section 703(h) protects a facially neutral compensation program from challenge on the sole basis that such a program has a disparate impact on a protected class. *Id.*; A6-8.

If the District Court's ruling below is reversed, however, and Plaintiffs' and their *amicus'* interpretation of Section 703(h) is endorsed, millions of employers around the country who utilize facially neutral compensation programs based on merit or quantity or quality of production will suddenly be potentially subject to Title VII litigation and liability. Employers would be prohibited from having

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[5] *Amici* recognize that Plaintiffs advocate that Section 703(h) should not insulate such facially neutral compensation programs, arguing that if the employer has knowledge of a program's disparate impact on a protected class, the employer intended to discriminate against such class. *See* Pl. Br. at 18-19. *Amici* respectfully disagree for all of the reasons set forth in Merrill Lynch's Response Brief. *See, generally,* Resp. Br. at 16-20.

facially neutral compensation programs that provide results-oriented incentives to motivated employees without opening themselves up to individual and class action lawsuits asserting disparate impact on the sole basis of the existence of such a program. Such a flood of new cases could immediately clog court dockets around the country for years to come with such discrimination claims.

For the vast majority of compensation programs – *i.e.,* those not retroactively-based, like the Retention Program at issue before this Court – employers would not know until *after* the compensation program is announced and implemented whether it had, or likely will continue to have, a disparate impact on a protected class or classes. Moreover, since the statistics that are needed to calculate whether disparate impact exists (such as demographics, production/commission numbers, earnings, performance ratings, etc.) are constantly changing, employers would have to consider engaging employment statisticians on a regular basis as a risk management tool. Employers would therefore be unable to avoid the risk of liability and would be burdened with the cost of litigating disparate impact claims every time they paid employees or implemented a new compensation system. *See* LLFPA, Pub. L. No. 111-2, 123 Stat. 5 (codified in part at 42 U.S.C. §2000e-5(e)(3)) ("[A]n unlawful employment practice occurs, with respect to discrimination in compensation . . . when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of [such a] decision or other practice, including each time wages, benefits, or other compensation is paid….").

Simply eliminating the use of objective performance- or production-based systems would lead to the perverse result of actually creating an environment (*i.e.,* more subjectivity in compensation decisions) that Plaintiffs' contend leads to discrimination. *See McReynolds I, 2010 U.S. Dist. LEXIS 80002 at *14* ("plaintiffs allege that defendant has a corporate culture of racial discrimination that it implements through the discretionary decisions of over 15,000 FAs, over 600 branch managers [and many others]"). Similarly, in many other discrimination cases, plaintiffs often challenge the use of subjective decision-making by employers and argue that subjective decision-making leads to both unintentional and intentional discrimination prohibited by Title VII. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2548 (2011) (in largest proposed class in history, the "basic theory of [the employees'] case [was] that a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each [manager]"); *Velez v. Novartis Pharm. Corp.,* 244 F.R.D. 243, 258 (S.D.N.Y. 2007) ($250+ million dollar jury verdict in class action where plaintiffs alleged, in part, that the employer's "personnel evaluation and management system is overly subjective, and that this subjectivity leads to discrimination"); *Smith v. Nike Retail Svcs., Inc.,* 234 F.R.D. 648, 656 (N.D. Ill. 2006) (certifying a class and several subclasses where "plaintiffs charge that, supported by that decentralized delegation of discretion to Nike Chicago's managers, Nike has subjected Nike Chicago's African-American employees to a variety of discriminatory practices"); *c.f., Thomas v. Troy City Bd. of Ed.,* 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004) (granting summary judgment to employer, but noting that "subjective decision-making processes are particularly susceptible to being influenced not by overt bigotry and hatred, but rather by unexamined assumptions about others that the decisionmaker may not even be aware of").

Furthermore, employees who suddenly find themselves no longer subject to predictable formulaic compensation programs – particularly those employees in industries where earnings have historically been exclusively or primarily contingent upon production or sales figures – will be negatively impacted. Employees may also quickly lose the motivation consistently to produce or perform if there were no assurances that such efforts would result in greater compensation at a level each employee expect to be warranted by his or her efforts. If managers and supervisors had to constantly assess employees' performance in order to determine an appropriate level of compensation, a significant amount of administrative time would have to be diverted for this purpose, which would raise costs and conceivably decrease the amount of money available to pay employees. Even the most careful and well-intentioned employers would also likely find themselves deluged by questions and complaints by employees. Those whose earnings decreased for whatever reason might be more likely to complain and eventually file suit under Title VII under a reverse discrimination or other theory if they believe any of the subjective compensation-related decisions being made were premised on a protected characteristic.

Any or all of these possible outcomes would, in turn, negatively impact the most successful employees' level of income, the productivity of the workforce, the quality of service enjoyed by clients and customers, and the employers' balance sheets. Given how widespread and ingrained these objective, facially neutral compensations systems are in this country, particularly in the securities, banking, insurance, real estate and retail sales industries (to name just a few), the disruption could very easily negatively impact the economy as a whole.

Consequently, Plaintiffs' and their *amicus'* position regarding Section 703(h) is untenable. A facially neutral compensation program – even one that has a disparate impact for reasons unrelated to the compensation system itself – should not be held unlawful under Title VII unless, as Congress made clear, plaintiffs can show that *the program itself* was created with discriminatory intent. Under the District Court's ruling, Plaintiffs can still challenge any underlying alleged discrimination that may exist in the inputs to the Retention Program, as indeed they already have in *McReynolds I*. A8-9; *McReynolds I,* 2010 U.S. Dist. LEXIS 80002, at *16-18. Similarly, any employee who believes he or she is being discriminated against as a result of some action or practice can sue under Title VII about that action or practice that affects the generating of production upon which compensation is based. *See Goodman*, 716 F. Supp. 2d at 261 ("To the extent that other acts of discrimination in violation of Title VII affect the 'inputs' into a bona fide merit, seniority, or production-based system, a plaintiff's remedy lies in challenging those violations directly."). For example, assume a group of Hispanic insurance agents believe that they are being discriminated against in terms of geographic territory assignments made by a Caucasian district manager, which in turn allegedly leads to fewer sales opportunities and, correspondingly, lower earnings pursuant to their employer's facially neutral commission-based compensation system. These employees can sue under Title VII and seek the difference in earnings that such territory assignments allegedly caused. *C.f., Massey v. Zema Sys. Corp.,* No. 95 C 3504, 1998 U.S. Dist. LEXIS 15736, at * 9 (N.D. Ill. Sept. 30, 1998) (alleging racial discrimination based on the assignment of territories); *McReynolds I,* 2010 U.S. Dist. LEXIS 80002, at *11-12 (alleging racial discrimination based on a variety of practices, including training, teaming, and account distribution and transfer). But if the commission-based compensation program was uniformly applied to everyone on a race-neutral basis, the program *itself* should not be subject to challenge simply because an individual or group generates less in sales and, therefore, is paid less pursuant to an objective formula. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 347-48 (1977) (a §703(h) system cannot be attacked merely because it perpetuates discrimination in other employment practices); *Larkin v. Pullman-Standard Div., Pullman, Inc.,* 854 F.2d 1549, 1577 (11th Cir. 1988), *vacated on other grounds by Pullman-Standard, Inc. v. Swint,* 493 U.S. 929 (1989) (noting the Supreme Court's requirement that courts keep in mind the distinction between evidence that "tends to prove . . . that [the employer] engaged in a number of other, separate discriminatory practices" and evidence that goes to the employer's "intent regarding the [§703(h)] *system [itself]*," finding that the former did not prove the later) (emphasis in original).

## CONCLUSION

For the foregoing reasons, the District Court's grant of Merrill Lynch's motion to dismiss for failure to state a claim should be affirmed.

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Respectfully submitted,

By: /s/ Samuel S. Shaulson

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## CERTIFICATE OF COMPLIANCE

I, Samuel S. Shaulson, the undersigned counsel of record, pursuant to Fed. R. App. P. 32(a)(7)(C)(i), certify that the foregoing *Brief Of The Securities Industry And Financial Markets Association, The American Bankers Association And Chamber Of Commerce Of The United States Of America As Amici Curiae In Support Of Defendants-Appellants And Affirmance* complies with both the page limitations of Rule 32(a)(7)(A) and the type-volume limitations of Rule 32(a)(7)(B). The Brief is 22 pages long and contains 5,262 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This Brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32, as it was prepared using the proportional typeface Century 12-point font in Microsoft Word 2007.

September 27, 2011

/s/ Samuel S. Shaulson

**CERTIFICATE OF SERVICE**

I hereby certify that on September 27, 2011, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Samuel S. Shaulson