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BANK OF AMERICA AND MERRILL LYNCH: HOW DID A PRIVATE DEAL TURN INTO A FEDERAL BAILOUT?

JOINT HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

AND THE

SUBCOMMITTEE ON DOMESTIC POLICY

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

JUNE 11, 2009

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BANK OF AMERICA AND MERRILL LYNCH: HOW DID A PRIVATE DEAL TURN INTO A FEDERAL BAILOUT?

THURSDAY, JUNE 11, 2009

HOUSE OF REPRESENTATIVES, COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, JOINT WITH THE DOMESTIC POLICY SUBCOMMITTEE,

Washington, DC.

The committee and subcommittee met, pursuant to notice, at 10 a.m., in room 2154, Rayburn House Office Building, Hon. Edolphus Towns (chairman of the Committee on Oversight and Government Reform) presiding.

Present: Representatives Towns, Kucinich, Issa, Jordan, Kanjorski, Cummings, Clay, Watson, Lynch, Connolly, Quigley, Kaptur, Van Hollen, Welch, Foster, Speier, McHenry, Bilbray, Flake, Chaffetz, and Schock.

Staff present: John Arlington, chief counsel—investigations; Beverly Britton Fraser, counsel; Kwane Drabo and Katherine Graham, investigators; Brian Eiler, investigative counsel; Aaron Ellias, staff assistant; Linda Good, deputy chief clerk; Jean Gosa, clerk; Adam Hodge, deputy press secretary; Carla Hultberg, chief clerk; Marc Johnson, assistant clerk; Mike McCarthy, deputy staff director; Jesse McCollum, senior advisor; Amy Miller, special assistant; Leah Perry, senior counsel; Jenny Rosenberg, director of communications; Joanne Royce and Christopher Staszak, senior investigative counsels; Leneal Scott, information specialist; Ron Stroman, staff director; Jaron Bourke, staff director—Domestic Policy Subcommittee; Charisma Williams, staff assistant—Domestic Policy Subcommittee; Cate Veith, legislative assistant, Office of Congressman Dennis J. Kucinich; Lawrence Brady, minority staff director; John Cuaderes, minority deputy staff director; Jennifer Safavian, minority chief counsel for oversight and investigations; Frederick Hill, minority director of communications; Dan Blankenburg, minority director of outreach and senior advisor; Adam Fromm, minority chief clerk and Member liaison; Kurt Bardella, minority press secretary; Benjamin Cole, minority deputy press secretary; Christopher Hixon, minority senior counsel; and Brien Beattie and Molly Boyl, minority professional staff members.

Chairman TOWNS. Good morning. Thank you all for being here today.

On September 15, 2008, when the financial crisis was at its height, Bank of America announced that it was purchasing Merrill Lynch, creating one of the Nation's largest financial institutions. At

the time, Bank of America's CEO, Mr. Lewis, called the merger a great opportunity for Bank of America shareholders.

When it was announced on September 15th, this merger was a marriage negotiated between two willing parties. It was designed for the exclusive benefit of private shareholders, and it was to be paid for exclusively with private money.

Four months later, on January 16, 2009, after the merger was consummated and the quarterly earnings were announced, the world woke up to a different kind of marriage.

The American people discovered that Merrill Lynch had experienced a $15 billion fourth quarter loss. Most importantly, we found out that the merger had taken place only after the Federal Government had committed to give Bank of America billions in taxpayer money.

What happened in the interim?

When Bank of America urged its shareholders to approve the acquisition of Merrill Lynch on December 5, 2008, there was no public disclosure of any problems with the transaction.

However, in a deposition taken by New York Attorney General Cuomo, Mr. Lewis testified that just 9 days after the shareholder vote he discovered a $12 billion loss at Merrill Lynch. Mr. Lewis said he told then-Treasury Secretary Hank Paulson that he was strongly considering backing out of the deal. According to Mr. Lewis, Paulson ultimately told him that if he didn't go through with the acquisition, he and the Board would be fired.

However, internal emails we have obtained from the Federal Government indicate officials there were very skeptical about Mr. Lewis's motives in threatening to back out of the Merrill deal. Fed Chairman Ben Bernanke thought Lewis was using the Merrill losses as a bargaining chip to obtain Federal funds.

Other emails reveal that Federal analysts found it suspect that Mr. Lewis claimed to be surprised by the rapid growth of Merrill losses given the clear signs in the data. They noted that at a minimum it calls into question the due diligence process Bank of America has been doing in preparation for the takeover.

In short, the Treasury Department had provided $20 billion for a shotgun wedding. But the question may be, who was holding the shotgun?

At today's hearing we hope to better understand what happened in the 4-months between September 15, 2008, when the merger was announced, and January 16, 2009, when the public learned that Bank of America had received $20 billion in taxpayer money.

We will be looking for answers to some puzzling questions: Why did a private business deal, announced in September, and approved by shareholders in December, with no mention of government assistance, end up costing taxpayers $20 billion in January?

Did Paulson and Bernanke abuse their authority by ordering Mr. Lewis to go through with the Merrill acquisition, or did Mr. Lewis threaten to back out in order to squeeze more money out of the Federal Government?

Did the Federal Government tell Mr. Lewis to keep quiet about the escalating Merrill Lynch losses and the Government's commitment to provide billions in Federal funding?

I am sure there will be other questions, as well.

To get to the bottom of these issues, we also intend to invite Mr. Paulson and invite Mr. Bernanke to testify at a future date. The committee's willingness to issue subpoenas should clarify our expectation of full cooperation by prospective witnesses.

I want to thank Mr. Lewis for being here and I look forward to his testimony.

[The prepared statement of Chairman Edolphus Towns follows:]

HOUSE COMMITTEE ON
OVERSIGHT & GOVERNMENT REFORM

OPENING STATEMENT OF
CHAIRMAN EDOLPHUS TOWNS

Hearing: "Bank of America and Merrill Lynch: How Did a Private Deal Turn Into a Federal Bailout?"

June 11, 2009

Good Morning. Thank you all for being here today.

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Other emails reveal that Fed analysts found it "suspect" that Mr. Lewis claimed to be surprised by the rapid growth of Merrill losses "given the clear signs in the data." They noted that "as a minimum it calls into question the due diligence process Bank of America has been doing in preparation for the takeover."

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I want to thank Mr. Lewis for being here and I look forward to his testimony.

Chairman TOWNS. At this time, I yield to the ranking member of the committee, Mr. Darrell Issa of California.

Mr. ISSA. Thank you, Mr. Chairman, and thank you for holding this important bipartisan hearing today.

It is important that those who see this hearing today recognize that we are not here to evaluate the value of Bank of America or Merrill Lynch or their transaction, whether it was a good deal then or a good deal today for either of the parties. We are here because there has been a serious allegation and a number of pieces of evidence have arisen that make us believe that Government officials felt necessary to use the power, influence and, in fact, potentially threats in order to consummate this deal.

When Congress envisioned the TARP and other powers in order to help in the post-September meltdown of the economic market, we did so in a way that was intended to make dollars available to help lessen the impact as we unwound credit markets around the world. Nowhere in the legislation did it suggest that Hank Paulson, Ben Bernanke, or anyone else operating on behalf of the U.S. Government was given the power to force shotgun weddings.

Today we will hear from Ken Lewis, CEO of Bank of America, a man who has spent decades understanding the value of financial institutions. We undoubtedly will hear that, in fact, at the beginning of this transaction, the ratios determined for a stock trade type merger were in fact considered to be reasonable.

As the chairman has said, rightfully so, the Federal Government played a clear part in this. But the American people should understand their dollars were not given to any party in this transaction, but in fact loaned at an amount substantially greater than the interest rate paid by the Federal Reserve. As such, Ken Lewis and all the parties involved had an obligation to recognize they were going to have to pay this money back and that they had to receive value in this transaction.

Allegations have been made throughout the press, and will undoubtedly be reiterated here today, that the value that was being questioned by Bank of America had something to do with getting more money from the Federal Government. That may be true. Having done acquisitions myself, more often it is in fact the ratio being paid between the buying company and the selling company that is more at stake.

Had Bank of America had to pay a greater amount in the stock trade than it did, the value of Bank of America to the existing stockholders would have been reduced. Had, on the other hand, instead of a roughly 8 to 10 ratio, had it been a 5 to 10 ratio, the stockholders of Merrill Lynch would have had a significantly lower value to their stock.

We are not here, though, today to deal with any of that. We are clearly here today, as the Government Reform and Oversight Committee, to deal with the question of whether or not allegations made and evidence that has arisen lead us to believe that those operating under the color of our Government's seal used any unreasonable influence or threats in order to consummate this or any other deal.

Mr. Chairman, I thank you for holding this hearing. I appreciate the fact that this is clearly the first of two hearings that will be

necessary. Today we have part of the story. When we have Mr. Bernanke and Mr. Paulson, then we will have the other half of it. I look forward to this first hearing and yield back.

[The prepared statement of Hon. Darrell E. Issa follows:]

EDOLPHUS TOWNS, NEW YORK
CHAIRMAN

DARRELL E. ISSA, CALIFORNIA
RANKING MINORITY MEMBER

ONE HUNDRED ELEVENTH CONGRESS

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Representative Darrell E. Issa, Ranking Member
House Committee on Oversight and Government Reform
Opening Statement
"Bank of America and Merrill Lynch:
How Did a Private Deal Turn Into a Federal Bailout?"
June 11, 2009

Mr. Chairman, thank you for convening today's hearing on the abuse of government power in forcing Bank of America to buy Merrill Lynch. This is an important first step in asking the tough questions that need to be asked about the government's deepening intrusion into the private sector.

Unfortunately this hearing is incomplete because Mr. Lewis can only tell one part of the story. The most important part of this story will require this Committee to call key government officials in both the Bush and Obama Administrations to account. I want to thank you, Mr. Chairman, for committing to work with me in a bipartisan fashion to bring Henry Paulson and Ben Bernanke before this Committee at a hearing in the near future to answer these important questions.

Last December, Ken Lewis, CEO of Bank of America, called Bush Treasury Secretary Henry Paulson and Fed Chairman Ben Bernanke. He was concerned because he realized he had gotten himself into a fix. He made a bad call by deciding to buy Merrill Lynch, a once-proud investment bank which had fallen on hard times. In the depths of the financial crisis, Merrill Lynch's losses increased by over $3 billion in just the few weeks since his shareholders had approved the merger.

As a result, Mr. Lewis told Paulson and Bernanke he wanted to exercise a clause in the merger contract designed for just such an eventuality, letting Bank of America get out of the deal that had gone bad. This was standard practice and Mr. Lewis had a legal right and a legal responsibility to do so if he believed it was best for his shareholders.

Yet Paulson and Bernanke didn't see it that way. Instead, they threatened to fire Mr. Lewis, the CEO of a private company, along with the entire Board of Directors of Bank of America, if he didn't stick to their master plan for preventing an imminent collapse of Merrill Lynch. Internal emails obtained under subpoena also show that the government sought to manage the public disclosure of Merrill's mounting losses in order to control the situation.

Documents, which chronicle events that took place under the Bush Administration, are very troubling but not entirely surprising. This mentality has continued and even accelerated under the Obama Administration. Many of the players who enforced the shotgun marriage between Bank of America and Merrill Lynch including Timothy Geithner still have their jobs or have even been prompted to continue the politics of "bailout and bully" under the current Administration.

The political pressure that was applied to Bank of America is not an isolated case. This continues to occur in the current Administration's efforts to dictate to auto companies the terms of their survival and the use of TARP infusions in faltering banks and financial firms to push political goals that will ultimately harm the chance of taxpayers receiving fair return on investments that government shouldn't have made in the first place.

Mr. Chairman, we are all going to ask Mr. Lewis some hard questions today, and that is appropriate. However, I just want to remind my colleagues that this is first and foremost as a fact-finding hearing – not a "gotcha" hearing. I urge all of my colleagues to conduct themselves accordingly.

This committee should be most concerned about what is happening within our government – about financial vigilantes at the Federal Reserve and the Department of the Treasury who are dictating extralegal government directives through threats and intimidation to private companies even when such directives may pose significant risks or harm to private investors, taxpayers, and our economy. This bullying is done without accountability or transparency until all too rare hearings, such as what we are having here today, shines a light on what went on.

If this Administration continues to vilify private investors who choose to exercise their legal rights, to create a "command and control" economy in key economic sectors by bailing out firms deemed "too big to fail," and spending this country into a debt it cannot afford then, Mr. Chairman, I am concerned about the preservation of our free market principles, which I believe are a necessary condition for a free political system. Further extralegal secret actions by high level government officials could eventually precipitate a constitutional crisis.

Too much secrecy exists in the work of the Federal Reserve and the Department of the Treasury and this committee must work to continue to force some needed transparency onto the strategies and agendas being pursued.

Thank you Mr. Chairman.

Chairman TOWNS. Thank you very much.

I now yield 5 minutes to Mr. Kucinich, who is the chair of the subcommittee.

Mr. KUCINICH. Thank you very much, Mr. Chairman, members of the committee.

Bank of America became the largest commercial bank in the Nation, the 11th largest corporation in the United States, and the 23rd largest company in the world through the aggressive acquisition of other financial institutions, including the purchase of Merrill Lynch last year. But something went terribly wrong with the Merrill Lynch acquisition, nearly enough to bring Bank of America down.

Taxpayers now own $45 billion in preferred shares and warrants in Bank of America. That money was committed by the Treasury Department and the Federal Reserve, and Mr. Lewis is here today, as the CEO of Bank of America, thanks to the commitment of those funds through a series of events that unfolded through the end of December 2008 and into early January 2009.

Due to the secretive and unaccountable conduct of the Fed throughout its interventions addressing the current financial crisis, many questions about the Bank of America-Merrill Lynch deal and bailout have, until today, remained unanswered. Some of the key questions have been:

Were the Merrill Lynch losses that precipitated Bank of America's distress call to the Treasury on December 17th the first such accelerating losses Bank of America observed at Merrill Lynch since agreeing to purchase the company? Did the Government believe that Bank of America had a credible case for abandoning the deal? Did the Federal Reserve compel Bank of America to complete the deal against its will?

Or, Did Bank of America's mistakes and miscalculations, more than any other single factor, cause the experienced corporate dealmaker to be exposed to Merrill Lynch's predictably large losses? Did the Government believe that Bank of America knew or should have known about those losses before its shareholders ratified the merger? Did the Government have an opinion about whether Bank of America could be liable for securities fraud for withholding from its investors material information it possessed about a significant deterioration in Merrill Lynch's balance sheet? Did Bank of America in effect negotiate an extraordinary deal for billions of additional dollars from taxpayers to continue its growth as the Nation's largest commercial bank?

The hearing today will help to answer those questions. This committee's ongoing investigation and subsequent hearings will answer the following questions, among others: Did the Federal Reserve, in attempting to protect the system, apply well-established remedies when it engineered billions of dollars in subsidies to Bank of America to complete its deal with Merrill Lynch?

Or, Did the Federal Reserve pursue an untested experiment in banking regulation at variance with traditional remedies in committing billions of dollars in taxpayer funds to a corporate management that the Federal Reserve believed had failed in major ways?

Mr. Chairman, members of the committee, this committee has sifted through tens of thousands of pages of documents produced by

Bank of America, the Department of Treasury, and the Federal Reserve. Our investigation will help set the record straight about Bank of America and Merrill Lynch. Furthermore, the story of Bank of America's merger with Merrill Lynch and its huge taxpayer-provided subsidy helps to answer broader questions about how the corporate management of very large financial institutions operate with virtual impunity for their mistakes. The documents we will reveal today provide the public a rare look into the disconnection between the Fed's ability to analyze financial problems, and its ability to remedy them, when they involve very large financial institutions.

Finally, Mr. Chairman, before Congress rushes to revise the banking regulatory framework, we would do well to incorporate the lessons of the Bank of America-Merrill Lynch episode that this committee's hearings over the coming weeks will draw.

I yield back. Thank you.

[The prepared statement of Hon. Dennis J. Kucinich follows:]

Opening Statement
Of
Dennis J. Kucinich
Chairman
Domestic Policy Subcommittee
June 11, 2009

Bank of America became the largest commercial bank in the nation, the eleventh largest corporation in the United States, and the 23rd largest company in the world through the aggressive acquisition of other financial institutions, including the purchase of Merrill Lynch last year. But something went terribly wrong with the Merrill Lynch acquisition, nearly enough to bring Bank of America down. Taxpayers now own $45 billion in preferred shares and warrants in Bank of America. That money was committed by the Treasury Department and Federal Reserve, and Mr. Lewis is here today as the CEO of Bank of America, thanks to the commitment of those funds through a series of events that unfolded through the end of December, 2008 and into early January, 2009.

Due to the secretive and unaccountable conduct of the Fed throughout its interventions addressing the current financial crisis, many questions about the Bank of America-Merrill Lynch deal and bailout have, until today, remained unanswered. Some of the key questions have been:

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Chairman TOWNS. I thank the gentleman from Ohio.

Now I will yield to the ranking member, Jim Jordan, also from Ohio.

Mr. JORDAN. Thank you, Mr. Chairman, for holding today's hearing. I want to thank you and Ranking Member Issa, and also the chairman of the subcommittee for his tireless efforts to get to the truth about this issue. I believe today's hearing is an important first step in learning about the full extent of the Government's manipulation of the banking industry.

This committee's investigation of the Bank of America-Merrill Lynch transaction has raised troubling questions about potential abuses of Government power. As both the Chair and the ranking member have indicated, we have learned that, at a minimum, then-Secretary Hank Paulson threatened to remove Mr. Lewis and Bank of America's board of directors if Mr. Lewis exercised his legal option to attempt to back out of the deal to acquire Merrill Lynch. In addition, we have learned that the Department of Treasury and the Federal Reserve were involved in discussions about when and how the financial condition of Merrill Lynch was to be disclosed to the two companies' respective shareholders.

We have also learned that this transaction took place in a climate of fear and intimidation by Government officials. For example, we now know that, in October 2008, Mr. Paulson brought the CEOs of the largest private banks in America to the Treasury Department and demanded that they accept the partial nationalization of their banks in exchange for an amount of money of the Government's choosing.

Mr. Chairman, I understand the significant challenges that our economic system faced last fall, and I understand Mr. Paulson's and Mr. Bernanke's intention to do what they thought was in the best interest of the economic system as a whole. But in our constitutional system of government, the rule of law restricts the Government's ability to do whatever it wants. We must understand the full story of what happened in the process of the Government taking over much of the banking industry so that, when the next crisis occurs, we can understand the proper limits of Government action in a free and civil society.

I am grateful for Mr. Lewis's willingness to appear before the committee today. In addition to important questions regarding Bank of America's transaction with Merrill Lynch, I also hope Mr. Lewis can shed light on his personal interaction with Government officials, and I intend to ask him about his participation in the initial capital injections and to what extent they were forced upon Bank of America. And as someone who comes from auto-making country, I also would like to know the extent to which the Government is currently involved in day-to-day operations of the company.

A full and complete investigation underscores the facts surrounding the Bank of America-Merrill Lynch transaction requires the Government's decisionmakers, in this case Mr. Paulson and Mr. Bernanke, to appear before this committee to answer the tough questions that the American people demand to be answered, and I know that the chairman and the ranking member talked about that. We look forward to that happening in a bipartisan fashion in the near future.

Again, thank you, Mr. Chairman, for this opportunity to make an opening statement. With that, I would yield my time, if I could, to Mr. McHenry to introduce our witness.

Chairman TOWNS. Mr. McHenry.

Mr. MCHENRY. Thank you, Mr. Chairman.

Today, I have the privilege of introducing our witness, whose company is headquartered in Charlotte, NC, which my district is just to the west of; and, as the only member of the committee from the Carolinas, I think it is my duty and privilege to introduce our witness.

Kenneth D. Lewis is currently the chief executive officer of Bank of America. He is responsible for more than 55 million consumer and small business relationships and $1.7 trillion in total client assets. With various business and institutional clients in more than 150 countries and business relationships with 98 percent of U.S. Fortune 500 companies, Mr. Lewis oversees one of the largest financial services corporations in the world and is one of the largest institutions headquartered in North Carolina; in fact, is the largest institution headquartered in North Carolina.

Born in 1947 in Meridian, MS, Mr. Lewis earned a Bachelor's Degree in finance from Georgia State University and a graduate of the executive program at Stanford University. Arriving at NC&B in 1969, which was Bank of America's predecessor, he served more than 30 years within the bank, and, in 2001, attained his current position as CEO of Bank of America. Throughout his career with Bank of America, he has secured millions of new customers and paved the way for future expansion.

He was named, in 2007, as 1 of the 100 most influential people in the world by Time Magazine, has been twice named Banker of the Year by the American Bankers Association. He has been the former chairman of the National Urban League and has been involved in every possible community cause in Charlotte, large and small, and for that we do thank you for your leadership for our community.

Bank of America's presence is certainly felt in western North Carolina, in my district, and across North Carolina generally. The 10th District has become particularly hard hit in this economic recession, and Bank of America employs about 17,000 North Carolinians, many of whom are my constituents and are proud to work for a strong institution; and we look forward to stronger days ahead.

Thank you for your testimony here today and thank you for your presence.

Chairman TOWNS. Thank you very much, Mr. McHenry.

It is a longstanding tradition that we swear all of our witnesses in, so, Mr. Lewis, would you please stand and raise your right hand?

[Witness sworn.]

Chairman TOWNS. Let the record reflect that the witness answered in the affirmative.

Let me explain the light situation here. First of all, you have 5 minutes to summarize your statement, and then the yellow light will come on. That means you have 1 minute. Then, after the yellow light comes on, then there is a red light; and, of course, that

means stop. After that, we will allow the Members an opportunity to raise questions with you. So you may begin.

Turn your light on. Push that button.

STATEMENT OF KENNETH D. LEWIS, CHIEF EXECUTIVE OFFICER, BANK OF AMERICA

Mr. LEWIS. Chairman Towns, Ranking Member Issa, Subcommittee Chairman Kucinich, and Ranking Member Jordan, as has been said, my name is Ken Lewis, and I am chief executive officer of Bank of America.

This committee is reviewing important issues, and I hope my remarks will be helpful to you.

Let me tell you a little bit about Bank of America. Our business lines include deposits, wealth and investment management, corporate investment banking, credit cards, and mortgages. We have a deep commitment to serving all the communities in which we operate. We have committed to land and invest $1.5 trillion in low and moderate income communities over the next 10 years.

As everyone here is aware, the financial services industry underwent considerable turmoil in 2008. Bank of America was affected by that turmoil but, nonetheless, earned a profit of $4.2 billion for the year. We also made two significant acquisitions, Countrywide and Merrill Lynch.

There does not appear to be any debate that these acquisitions were in the best interest of the financial system, the economy, and the country. The failure of Countrywide would have caused a massive loss to the deposit insurance fund and could have destabilized an already crippled mortgage market. The failure of Merrill Lynch, particularly on the heels of Lehman's failure, could have caused systemic havoc or necessitated an AIG-style Government bailout.

These acquisitions, though, were also in the best interest of Bank of America and its shareholders. Certainly, the Merrill Lynch acquisition, in particular, came with risk, some of which materialized in the fourth quarter of 2008, when Merrill Lynch recognized significant losses. The Merrill Lynch acquisition, however, also came with the promise of significant long-term rewards, rewards Bank of America and its shareholders are already beginning to reap.

Through the acquisition of Merrill Lynch, we have put together what looks to be the preeminent investment bank and brokerage firm in the world, an organization that is already producing substantial profits, not losses, for our company. Understanding that fact is absolutely critical to understanding why we acquired Merrill Lynch.

When we bought Merrill Lynch, we really bought two businesses. The first is the world's most productive brokerage force, currently 14,000 Merrill Lynch financial advisors. Merrill Lynch has more financial advisors listed in Barron's Top 100, Top 1,000, and Top 100 Women financial advisors than any other firm.

The second major business of Merrill Lynch was investment banking and serving institutional investors.

The results here are nothing short of remarkable. As of the first quarter of 2009, Bank of America Merrill Lynch was first in U.S. equity-related underwriting, first in underwriting high-yield debt, second in underwriting investment-grade corporate debt, third in

global equity and equity-related underwriting, and fifth in global M&A and U.S. M&A.

In the first quarter of 2009, Bank of America earned $4.2 billion. Merrill Lynch contributed $3.7 billion, or 75 percent of that first quarter profit.

We continue to go about the business of lending. In the first quarter of 2009, Bank of America issued $85 billion in first mortgages, extended $3.9 billion in new credit to small businesses, and provided $31 million in community development loans, bolstering the country's most underserved people and businesses. I also want to stress that we have paid $1.1 billion in dividends to the Treasury on the TARP preferred.

While Bank of America earned $4.2 billion in 2008, that performance did not meet our expectations. As a result, neither I nor my senior team received any bonus. For the next level down, the bonus pool was cut by 80 percent from the previous year, and the level below that by 70 to 75 percent.

Now let me briefly walk you through the decision to purchase Merrill Lynch. We made that decision in September 2008. We did so because we saw the potential benefits I just described, and we did so without any promise or expectation of governmental support.

In mid-December, I was advised that Merrill Lynch had significantly raised its forecast of its losses, and we contacted officials of the Treasury and Federal Reserve to inform them that we had concerns about closing the transaction. At that time, we were considering declaring a material adverse change, which, as a matter of contract law, can, if upheld, allow an acquirer to avoid to consummate a deal. Treasury and Federal Reserve representatives asked us to delay any such action and expressed significant concerns about both the systemic consequences and the risk to Bank of America in pursuing this course.

We and the Government explored Government support as would limit the risk of proceeding with the transaction. We both were aware that the global financial system was in fragile condition and that a collapse of Merrill Lynch could hasten the crisis.

For its part, Bank of America concluded that there was serious risk to declaring a material adverse change and that proceeding with the transaction with governmental support was the better course. This course made sense for Bank of America and its shareholders and it made sense for stability of the markets.

I believe that committed people of good intentions in both the private sector and the Government worked desperately hard in late 2008 to prevent a collapse of the global financial system that would have resonated throughout the whole global economy. Even 6 months later it is easy to forget just how close to the brink our system came. I will never forget, and I believe those efforts will be well remembered long after any current controversy is forgotten.

With that, sir, I will conclude my remarks.

[The prepared statement of Mr. Lewis follows:]

Testimony of Kenneth D. Lewis
Chief Executive Officer
Bank of America

House Committee on Oversight and Government Reform and Subcommittee on Domestic Policy

June 11, 2009

Chairman Towns, Ranking Member Issa, Subcommittee Chairman Kucinich and Ranking Member Jordan, my name is Ken Lewis, and I am the Chief Executive Officer of Bank of America. I appreciate the opportunity to appear before you today to discuss Bank of America's acquisition of Merrill Lynch, the Bank's subsequent performance, and my thoughts regarding additional steps policymakers and business could take to help our financial markets remain the most vibrant in the world.

Before I turn to these issues, I want to note that I am also providing my testimony today to the Chairs and Ranking Members of the House Financial Services Committee and the Senate Banking, Housing, and Urban Affairs Committee. I appreciate the leadership of those Members on a wide range of issues relating to our financial markets and protection for consumers, particularly in these challenging economic times.

* * * * *

Let me tell you a little bit about Bank of America. I joined the bank in 1969 as a 22-year-old credit analyst, and I have never left. Today, the bank I lead consists of 300,000 dedicated associates serving customers in 36 states, and in scores of countries around the world. Our business lines include deposits, wealth and investment management, corporate and investment banking, credit cards, and mortgages. We continue to lead the industry in making new loans and serving our customers with a wide range of innovative products. We also have a deep commitment to serving all the communities in which we operate: we have committed to lend and invest $1.5 trillion in low and moderate income communities over the next ten years. And we provide $200 million every year in charitable giving to support non-profit organizations that help to assure the vibrancy of our nation's communities.

As everyone here is aware, the financial services industry underwent considerable turmoil in 2008. Bank of America was affected by that turmoil but nonetheless earned a profit of $4.2 billion for the year. We also made two significant acquisitions: Countrywide and Merrill Lynch.

There does not appear to be any debate that these acquisitions were in the best interest of the financial system, the economy, and the country. The failure of Countrywide would have caused a massive loss to the deposit insurance fund and

potentially destabilized an already crippled mortgage market. The failure of Merrill Lynch, particularly on the heels of Lehman's failure, could have caused systemic havoc or necessitated an AIG-style government bailout. In both cases, I am proud that Bank of America had the strength to step forward.

A question that has been raised, though, is whether the Merrill Lynch acquisition was in the best interest of Bank of America and its shareholders. Certainly, the acquisition of Merrill came with risks, and some of those risks materialized in the fourth quarter of 2008, when Merrill began recognizing significant losses. The Merrill acquisition, however, also came with the promise of significant long-term rewards – rewards Bank of America and its shareholders are already beginning to reap.

Through the acquisition of Merrill Lynch, we have put together what looks to be the preeminent investment bank and brokerage firm in the world – an organization that is already producing substantial profits, not losses, for our company. Understanding that fact is absolutely crucial to understanding why we made the decision to acquire Merrill in September 2008 and then to consummate the transaction in January 2009.

So, let me tell you about Bank of America Merrill Lynch.

Bank of America Merrill Lynch

When we bought Merrill Lynch, we really bought two businesses. The first is the world's most productive brokerage force – currently, 16,000 Merrill Lynch financial advisors. These financial advisors will be able to offer their securities brokerage customers a full range of banking services from Bank of America. At the same time, consumer bankers at Bank of America now can refer customers who are looking for a financial advisor to Merrill Lynch, and Bank of America's commercial lenders can refer customers seeking to tap the capital markets.

We recognize that the core of this business is the people. Financial advisors understand that this is the best place from which to serve their clients, and as a result, we have retained over 95 percent of Merrill Lynch's top advisors. Our financial advisors continue to exceed their peers in industry rankings: Merrill Lynch had more financial advisors listed in *Barron's* Top 100, Top 1,000, and Top 100 Women Financial Advisors than any other firm.

The continued integration of the Merrill Lynch and Bank of America businesses is already yielding significant benefits. On the retail side, we have put some 700 bankers into Merrill Lynch brokerage offices; these bankers help our financial advisors understand and access Bank of America's leading consumer banking products and services for our clients. Viewed along with U.S. Trust, our private bank, Bank of America now has industry-leading wealth management capabilities across all client segments.

We are seeing the same synergies between Merrill Lynch financial advisors and Bank of America's commercial lenders. Together, we can serve Main Street businesses in ways neither company could have done alone. We already have identified hundreds of opportunities to provide a wider range of services to mid- to large-sized businesses than we would ever be able to provide as separate businesses.

The second major business of Merrill Lynch was investment banking and serving institutional investors. The results here are remarkable. Merrill's global reach and longstanding leadership in M&A advisory and equity underwriting – areas where Bank of America was not as strong – have matched well with Bank of America's traditional leadership in raising debt capital for companies. We are better able to serve our clients with a full spectrum market-leading advisory, capital raising, sales, trading and research capabilities. As of the end of the first quarter of 2009, Bank of America Merrill Lynch was:

- *1st* in U.S. equity and equity-related underwriting (Bank of America had been fifth prior to the Merrill acquisition);
- *1st* in underwriting high-yield debt (second prior to Merrill);
- *2nd* in underwriting investment-grade corporate debt (third prior to Merrill);
- *3rd* in global equity and equity-related underwriting (seventh prior to Merrill); and
- *5th* in both global M&A and U.S. M&A (13th and 8th, respectively, prior to Merrill).

During just one recent week ending May 15th, we led twelve high-grade bond deals, thirteen equity deals, five high-yield bond deals, and seven municipal finance deals.

In addition to advising corporate clients, investment banks also provide critical assistance to state and local governments in meeting their financing needs. Prior to our merger, Bank of America ranked seventh in public finance capital raising. For the first quarter of 2009, our combined team was 1st -- responsible for more than 18 percent of the money raised by state and local governments.

While not the subject of this hearing, I feel compelled to say a few words about our Countrywide acquisition. Bank of America stopped making subprime mortgage loans in 2001 – seven years before the bubble burst. We acquired Countrywide in 2008 and quickly converted it to a prime lender. Since our acquisition of Countrywide, now renamed Bank of America Home Loans, we have established new management, developed a new risk culture, and created a new suite of products that are simpler and more transparent to customers. We have also managed to retain many very talented folks who were working there already.

Today, Bank of America Home Loans employs more than 47,000 people nationwide. Since we acquired Countrywide in July 2008, we have modified more than 311,000 loans, and expect that we will ultimately help more than 650,000 home owners with loan modifications. And Bank of America now has 7,200 associates dedicated to

Home Retention, working with distressed homeowners to help them retain their homes – the largest dedicated team in the industry.

Bank of America

In the first quarter of 2009, Bank of America earned net income of $4.2 billion. Merrill Lynch contributed $3.7 billion, or 75 percent of that first quarter profit. While analysts and some investors understand that point, it seems that much of the public is under the mistaken impression that Merrill Lynch has been costing us money; that just is not so.

As we reported last quarter, and as reflected in the recent stress test results from the Federal Reserve, Bank of America is suffering large losses on its consumer lending portfolio, particularly credit card, home equity and small business loans. More than any other bank, the fortunes of Bank of America's consumer business are inextricably linked to the fortunes of the American consumer: when unemployment rises, so do our credit losses; when consumer spending and borrowing slow, so do our revenues. That's largely because we lend more than any other bank. Under the stress test results made public by the Federal Reserve, our loss rates were consistent with our major competitors; however, those loss rates were applied to a much larger base.

Of course, this is precisely why the ability of Bank of America Merrill Lynch to earn investment banking, trading and brokerage income is so important to us. And the ability of Bank of America Home Loans to fund the refinancing wave has also been a major benefit. These businesses have made us more resilient in the face of a deep and prolonged recession.

I am also pleased to report that in the past four weeks we already have met the additional capital buffer required under the Federal Reserve's stress test. Moreover, we were able to raise equity at only a slight discount to our closing price prior to the announcement of the stress test results, even given the dilutive effects of the issuances. On the debt side, we have recently issued a total of $7.6 billion in long-term debt not guaranteed by the government, demonstrating our ability to fund ourselves in the capital markets. We believe that the stress test provided necessary and credible transparency to the markets, and gave investors confidence that Bank of America and other banks could manage even the adverse case specified in the test. We believe that the stress test results provided the markets both transparency and an independent and trusted third party opinion about the condition of the banking sector, and were a major factor in reopening the capital markets to bank holding companies.

We are now continuing to go about the business of lending – doing more than any other bank to fund an economic recovery. In the first quarter of 2009, Bank of America issued more than $183 billion in credit, including $85 billion in first mortgages, $82 billion in commercial loans, $3.9 billion in new credit to small businesses, and $31 million in Community Development Financial Institution lending and investments – bolstering the country's most underserved people and businesses. We have also paid

$1.1 billion in dividends to the Treasury (and ultimately the taxpayer) on the TARP preferred stock.

I should also note that while Bank of America earned $4.2 billion in 2008, that performance did not meet our expectations. As a result, neither I nor my senior team received any bonus. For the next level down, the bonus pool was cut by 80 percent from the previous year, and the level below that by 70-75 percent.

The Decision to Acquire Merrill

With this background established, let me now walk you through the decision to purchase Merrill Lynch. We made that decision in September 2008. We did so because we saw the potential benefits I have just described, and we did so without any promise or expectation of governmental support. Our shareholders approved that transaction on December 5, 2008.

In mid-December, after the shareholder vote, I became aware of significant, accelerating losses at Merrill Lynch, and we contacted officials at the Treasury and Federal Reserve to inform them that we had concerns about closing the transaction. At that time, we considered declaring a "material adverse change," which as a matter of contract law can, if upheld, allow an acquirer to avoid consummating a deal. Treasury and Federal Reserve representatives asked us to delay any such action, and expressed significant concerns about the systemic consequences and risk to Bank of America of pursuing such a course. We commenced discussions to determine whether governmental support could limit the risk of proceeding with the transaction. Both the government and Bank of America were aware that the global financial system was in fragile condition, and that a collapse of Merrill Lynch could hasten a crisis.

Officials of the company, the Treasury Department, and the Federal Reserve discussed a plan to close the transaction, with the government providing assistance. For its part, Bank of America concluded that there were serious risks to declaring a material adverse change, and that proceeding with the transaction, with governmental support, was the better course. This course made sense for Bank of America and its shareholders, and made sense for the stability of markets. We viewed those two interests as consistent.

I believe that committed people of good intentions, in both the private sector and the government, worked desperately hard in late 2008 to prevent a collapse of the global financial system that would have resonated throughout the global economy. Even six months later, it is easy to forget just how close to the brink our system came. I will never forget, and I believe those efforts will be well remembered long after any current controversy is forgotten.

With that, I will conclude my prepared remarks, and await your questions.

Chairman TOWNS. Thank you very much for your statement.

Let me begin the questions.

I ask unanimous consent that we have 10 minutes on each side initially, and then after that 5 minutes for each Member. And, of course, if we need a second or third round, we will do that as well. Without objection, so moved.

One of the key questions is when you discovered the massive losses at Merrill Lynch, Mr. Lewis, you have said that you learned of them late and they came as a big surprise. But the emails from the Fed tell a different story. Tim Clark from the Fed said that your claim to be surprised seemed somewhat suspect. The Federal Reserve Governor Kevin Warsh wrote that this claim is not credible, and there are more like this. It is clear that the Feds think you either knew or you should have known about these losses sooner.

I have to say that with everything that was happening in the financial markets last fall, your claim that you had no idea about Merrill's losses until December is remarkable. The Fed seem to think that you are either not being forthcoming about that or you were completely clueless about the merger and the situation on Wall Street.

My question is when exactly did you know about these losses and why didn't you know about them sooner?

Mr. LEWIS. Thank you for the question. The financial markets in the fourth quarter of 2008 suffered a massive credit meltdown, something that probably had not been seen during our lifetimes, and we saw that happening in September and in October, and we saw things that were evidenced in our own book that suggested that things were bad and getting worse. We also had heard rumors on the street that other banks were suffering losses as well. So the losses at that particular time were not concerning because they were consistent with others in the marketplace and what we were seeing as well.

But then, in mid-December, the forecast losses accelerated dramatically. So it wasn't that we didn't know about losses. The concern was the fact that these losses accelerated, and that was what gave us the grave concern.

Chairman TOWNS. Let me put it this way. Did you move forward with the Merrill deal because of pressure from Government officials or because you thought it was in the best interest of Bank of America and its shareholders?

Mr. LEWIS. There has been a lot of talk about the pressure from the Federal Government. It is true that we were told that if we went through or—I can't remember the exact words, so please give me license with word for word, but basically if we went through with calling the MAC, that the Government could or would remove management and the board. And I have said in the past that the threat was not what gave me concern. What gave me concern that they would make that threat to a bank in good standing. So it showed the seriousness with which they thought that we should not call a MAC, a material adverse change.

So as a result of that, that was a factor in our decisions, because here your regulators and the Federal Government was saying we

don't think calling the MAC is the best thing for you or the financial system.

But there were also other considerations. You weren't assured you would win the MAC. If in fact you lost the MAC, you were subject to severe lawsuits and severe amounts of money that you would have to pay. So we thought that, given the fact that the Government felt that strongly and the fact that there was a risk that you would not win the MAC and then, finally, that you might end up not getting Merrill Lynch in any sense, even after paying the fines, we felt like, because of all of those factors, that it was in our best interest, that is, the Bank of America shareholders' best interest, to go through with the merger.

Chairman TOWNS. So you were pressured?

Mr. LEWIS. It is hard to find the exact right word to describe what I just described, so I have found, as I have tried to have different words, that it is best just to describe it and let people come to a conclusion.

Chairman TOWNS. I yield to the subcommittee chair for the rest of my minutes.

Mr. KUCINICH. Thank you very much, Mr. Chairman.

Mr. Lewis, in our review of the Fed's documents, it reveals that, in contrast to your representations to us today, Fed officials concluded that you must have known about the accelerating losses at Merrill much earlier, as early as mid-November, when your shareholders could have voted to disapprove the merger.

Now, an email from a senior advisor sent to assistant to Chairman Bernanke on December 13, 2008; and it is up there on the board for everyone to see. Writes of "clear signs in the data we have that the deterioration at Merrill Lynch has been observably underway over the entire quarter, albeit picking up significantly around mid-November. Ken Lewis's claim that they were surprised by the rapid growth of the losses seems somewhat suspect."

Another memo, restricted Federal Reserve analysis of Bank of America and Merrill Lynch merger, dated December 21, 2008. "BAC management's contention that the severity of Merrill's losses only came to light in recent days is problematic and implies substantial deficiencies in the due diligence carried out in advance of and subsequent to the acquisition . . . (Talking about Merrill's losses) were clearly shown in Merrill Lynch's internal risk management reports that Bank of America reviewed during their due diligence."

And then there is an email from the Fed General Counsel to Chairman Bernanke on December 23, 2008. "Lewis should have been aware of the problems at Merrill Lynch earlier, perhaps as early as mid-November, and not caught by surprise. That could cause other problems for him around the disclosures Bank of America made for the shareholder vote."

Now, Mr. Lewis, I am going to ask you a series of simple questions, and if you are not forthcoming, I am not going to have any choice but to interrupt you. I am asking for your cooperation.

Isn't it true that Bank of America examined Merrill Lynch's book of business before signing the merger agreement, and then received detailed financial reports every week from Merrill Lynch after signing the merger agreement on September 15th?

Mr. LEWIS. That is true.

Mr. KUCINICH. And isn't it true that the Merrill losses of mid-December, that you claim motivated you to go to the Government, were not the largest week-to-week losses at Merrill you observed since agreeing to purchase the company? In fact, wasn't the week-to-week loss experienced in mid-November larger than the one in mid-December?

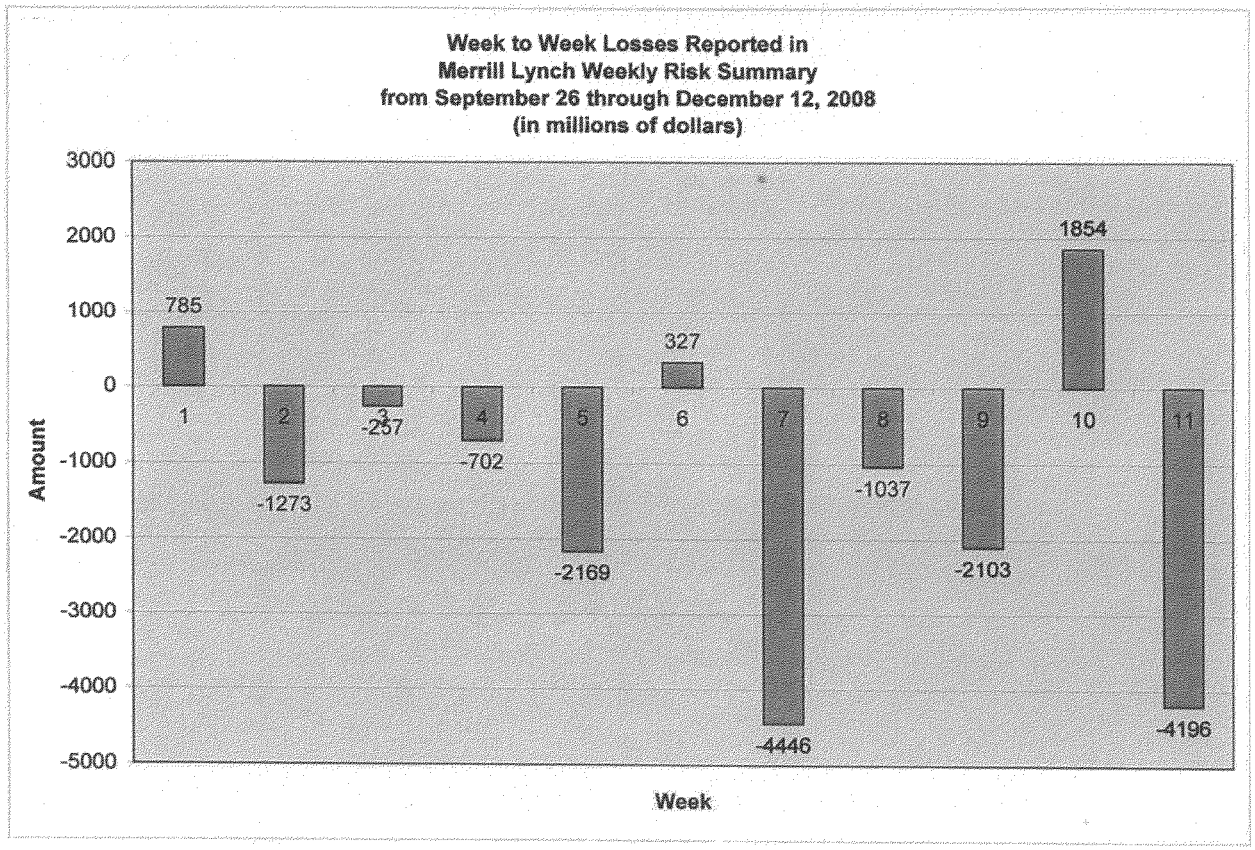
Mr. LEWIS. The losses that were causing this forecast to increase were partly based on losses in November. So I am not saying that the losses in that timeframe were what caused the increase; it was the increased projections of the losses based on some of those losses in November.

Mr. KUCINICH. Mr. Chairman, I move to insert into the record a bar graph representing the week-to-week losses reported by Merrill Lynch to Bank of America, which clearly shows that the mid-November loss exceeded the one in mid-December.

Chairman TOWNS. Without objection.

Mr. KUCINICH. I also move to insert an analysis by a statistics expert finding that the mid-November loss should have alerted Bank of America to an accelerating deterioration in Merrill Lynch, and the loss evident in mid-December merely confirms a trend apparent in mid-November.

[The information referred to follows:]


Week to Week Losses Reported in
Merrill Lynch Weekly Risk Summary
from September 26 through December 12, 2008
(in millions of dollars)
Amount
3000
2000
1000
0
-1000
-2000
-3000
-4000
-5000
785
-1273
-257
-702
-2169
327
-4446
-1037
-2103
1854
-4196
1
2
3
4
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6
7
8
9
10
11
Week

To Chairman Dennis Kucinich:

At the request of the Domestic Policy Subcommittee, I have done a statistical analysis of the Merrill Lynch weekly loss data for the 12 weeks from September 26 to December 12, 2008. The purpose of the analysis was to determine what loss trends could reasonably be deduced from the loss data available to decision makers at three points in time: November 7, November 14, and December 12. I have used the widely accepted and highly standardized least squares regression curve fitting technique to test both a straight (linear) and a curved (parabolic or second order) fit to the data. This has resulted in the following conclusions:

1. Looking first at the 7 weeks of loss data available by November 7 shows:

a. It is clear that there is a strong downward trend in the data that is almost certainly not due to chance.

b. A straight line downward trend showing a steady $701 million loss per week fits the data quite well.

c. If one were trying to determine whether the loss per week might be increasing or decreasing rather than staying steady at $701 million per week (i.e. by fitting a curved rather than a straight line), there is i) no evidence that the loss per week is decreasing, and ii) some evidence that the losses per week are increasing.

The best curved (parabolic) line fit to the data shows the weekly losses worsening to $1250 million loss per week by November 7--and, when projected forward, worsening every week thereafter due to the downward curvature of the fitted line. Note that this curved line fit only improves the accuracy (root mean square error) of the fit by about 5%, so the case for increasing losses per week by November 7 is not overwhelming.

2. Adding one more week of data to assess the situation as of November 14 shows:

a. Fitting a straight line downward trend yields a steady $1007 million lost per week, over 40% worse than the November 7 assessment.

b. Adding in the November 14 week significantly strengthens the evidence for deteriorating (as opposed to steady) weekly losses. The curved line fit now shows the weekly loss deteriorating to $2400 million per week by November 14, nearly double the November 7 curved line assessment. Relative to the straight line fit, the curved line now improves the accuracy of the fit by 51% (root mean square error)--an improvement in accuracy that it would be imprudent to ignore.

3. Looking at the 12 weeks of loss data available by December 12 shows:

a. Assuming steady weekly losses, the best straight line fit shows $1276 million lost per week, over 80% worse than the November 7 weekly loss estimate--and almost identical to the November 7 curved line assessment.

b. Assuming the possibility of a deteriorating trend, the curved line fit yields a weekly loss that has worsened to $2030 million by December 12, not as bad as the November 14 estimate but still 62% higher than the November 7 curved line weekly loss. The curved line fit yields 14% better accuracy (root mean square error) than the straight line fit, stronger evidence for a deteriorating trend than on November 7, but not strong enough to make the curved line fit an obvious choice.

c. Given the weekly loss data available to decision makers on November 14 as compared to the data available on December 12, the evidence for a constantly deteriorating (i.e. curved) trend is much stronger on November 14 than it is on December 12. This follows from the fact that the November 14 curved fit improves accuracy over the straight line fit by 51% whereas the December 12 curved fit only yields 14% improvement.

As a caveat to the above conclusions, it is important to keep in mind that all of the above numerical estimates are necessarily quite imprecise because statistical sample sizes of 7 to 12 data points are much too small for, say, plus or minus 10% accuracy. That caveat does not invalidate any of the above conclusions as to what a decision maker could reasonably conclude on November 7, November 14, and December 12.

For documentary support of the above, I have attached the detailed results of the computer runs on which I have based these conclusions.

Pierre M. Sprey
June 9, 2009

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     +-------------------------------+
     |    qtd      ytd   week   week2 |
     |-------------------------------|
  1. |  -8412   -19824      1       1 |
  2. |   -323   -19039      2       4 |
  3. |   -650   -20312      3       9 |
  4. |   -907   -20569      4      16 |
  5. |  -1609   -21271      5      25 |
     |-------------------------------|
  6. |  -3778   -23440      6      36 |
  7. |  -3451   -23113      7      49 |
  8. |  -7897   -27559      8      64 |
  9. |  -8933   -28596      9      81 |
 10. | -11037   -30699     10     100 |
     |-------------------------------|
 11. |  -9182   -28845     11     121 |
 12. | -13863   -33041     12     144 |
     +-------------------------------+

. plot ytd week

  -19039 +
         |       *
         |
         | *           *
         |                   *
         |                         *
         |
         |                               *    *
   Y     |
   T     |
   D     |
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         |                                         *
         |                                              *
         |                                                        *
         |
         |                                                   *
         |
         |
  -33041 +                                                          *
         +-------------------------------------------------------------+
               1                        week                        12


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. *
. *       Weeks 1-7
. *
.
. reg ytd week if _n<8
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      Source |       SS       df       MS              Number of obs =       7
-------------+------------------------------           F(  1,     5) =   26.73
       Model |    13759228     1    13759228           Prob > F      =  0.0036
    Residual |  2574094.86     5  514818.971           R-squared     =  0.8424
-------------+------------------------------           Adj R-squared =  0.8109
       Total |  16333322.9     6  2722220.48           Root MSE      =  717.51

------------------------------------------------------------------------------
         ytd |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
        week |       -701   135.5964    -5.17   0.004    -1049.562   -352.4383
       _cons |  -18277.14   606.4057   -30.14   0.000    -19835.96   -16718.33
------------------------------------------------------------------------------

. * F-test and (equivalent) t-test indicate 0.36 percent chance of
. * random occurrence if there is no linear relation
.
. reg ytd week week2 if _n<8

      Source |       SS       df       MS              Number of obs =       7
-------------+------------------------------           F(  2,     4) =   15.42
       Model |    14457747     2  7228873.52           Prob > F      =  0.0132
    Residual |  1875575.81     4  468893.952           R-squared     =  0.8852
-------------+------------------------------           Adj R-squared =  0.8278
       Total |  16333322.9     6  2722220.48           Root MSE      =  684.76

------------------------------------------------------------------------------
         ytd |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
        week |   28.52381   611.5544     0.05   0.965    -1669.423    1726.471
       week2 |  -91.19048   74.71326    -1.22   0.289    -298.6277    116.2468
       _cons |  -19371.43   1067.119   -18.15   0.000    -22334.23   -16408.63
------------------------------------------------------------------------------

. * F-test indicates 1.32 percent chance of random occurrence given
. * that there is no quadratic relation, but neither coefficient is
. * significant even at the 10 percent level and the second-order term
. * only marginally improves the fit.
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. *
. *       Weeks 1-8
. *
.
. reg ytd week if _n<9

      Source |       SS       df       MS              Number of obs =       8
-------------+------------------------------           F(  1,     6) =   24.47
       Model |    42603150     1    42603150           Prob > F      =  0.0026
    Residual |  10447476.9     6  1741246.14           R-squared     =  0.8031
-------------+------------------------------           Adj R-squared =  0.7702
       Total |  53050626.9     7  7578660.98           Root MSE      =  1319.6

------------------------------------------------------------------------------
         ytd |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
        week |  -1007.155    203.613    -4.95   0.003    -1505.378   -508.9318
       _cons |  -17358.68   1028.195   -16.88   0.000    -19874.58   -14842.78
------------------------------------------------------------------------------

. * F-test and (equivalent) t-test indicate 0.26 percent chance of
. * random occurrence if there is no linear relation
.
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. reg ytd week week2 if _n<9

      Source |       SS       df       MS              Number of obs =       8
-------------+------------------------------           F(  2,     5) =   32.25
       Model |   49234246     2   24617123             Prob > F      =  0.0014
    Residual |  3816380.86     5  763276.173            R-squared     =  0.9281
-------------+------------------------------           Adj R-squared =  0.8993
       Total |  53050626.9     7  7578660.98            Root MSE      =  873.66

------------------------------------------------------------------------------
         ytd |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
        week |   780.8988   621.4349     1.26   0.264    -816.5506    2378.348
       week2 |  -198.6726   67.40408    -2.95   0.032    -371.9403    -25.4049
       _cons |  -20338.77   1218.878   -16.69   0.000    -23471.99   -17205.54
------------------------------------------------------------------------------

. * F-test indicates 0.14 percent chance of random occurrence given
. * that there is no quadratic relation and the second-order term
. * improves the fit.
.
. *
. *       Weeks 1-12
. *
.
. reg ytd week

      Source |       SS       df       MS              Number of obs =      12
-------------+------------------------------           F(  1,    10) =  110.08
       Model |  232938917     1  232938917             Prob > F      =  0.0000
    Residual |  21160593.7    10  2116059.37            R-squared     =  0.9167
-------------+------------------------------           Adj R-squared =  0.9084
       Total |  254099511    11  23099955.5            Root MSE      =  1454.7

------------------------------------------------------------------------------
         ytd |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
        week |  -1276.301   121.6455   -10.49   0.000    -1547.344   -1005.258
       _cons |  -16396.38   895.2863   -18.31   0.000     -18391.2   -14401.56
------------------------------------------------------------------------------

. * F-test and (equivalent) t-test indicate 0.00 percent chance of
. * random occurrence if there is no linear relation
.
. reg ytd week week2

      Source |       SS       df       MS              Number of obs =      12
-------------+------------------------------           F(  2,     9) =   72.29
       Model |  239209821     2  119604910             Prob > F      =  0.0000
    Residual |   14889690     9    1654410             R-squared     =  0.9414
-------------+------------------------------           Adj R-squared =  0.9284
       Total |  254099511    11  23099955.5            Root MSE      =  1286.2

------------------------------------------------------------------------------
         ytd |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
        week |  -385.2098   470.1662    -0.82   0.434      -1448.8    678.3801
       week2 |  -68.54545    35.2075    -1.95   0.083    -148.1903    11.09944
       _cons |  -18475.59   1329.365   -13.90   0.000    -21482.82   -15468.36
------------------------------------------------------------------------------

. * F-test indicates 0.00 percent chance of random occurrence given
. * that there is no quadratic relation and the second-order term
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. * improves the fit.
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. *
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Mr. KUCINICH. Now, Mr. Lewis, isn't it true that you understood the composition and performance of Merrill's portfolio because it was similar to your own in that it was a portfolio that contained complex structured derivative products? Isn't that true?

Mr. LEWIS. It is true. The issue, though, is nobody predicted a meltdown like occurred in the fourth quarter of 2008.

Mr. KUCINICH. But you were getting weekly reports, and you certainly understood Merrill because of the similarities in the composition and performance of their portfolio. Now, our investigation found that the Fed believed you should have understood the potential for losses at Merrill because your own portfolio was similar to Merrill's.

I want you to look at the following from the Fed's restricted analysis of Bank of America and the Merrill Lynch merger, dated December 21, 2008. "The potential for losses from other risk exposures cited by management, including those coming from leverage loans and trading and complex structured credit derivative products—what they also call "correlation trading"—should also have been reasonably well understood, particularly as Bank of America itself is also active in these products."

Now, Mr. Lewis, how do you explain the apparent contradiction between your sworn testimony and the Fed's findings that you knew about the acceleration and losses and the potential for future losses as early as mid-November?

Mr. LEWIS. I can only tell you what I just said, that part of the November losses were causing this projection that we were getting in December, so they were a factor in the increased projection.

Chairman TOWNS. My time has expired, so let me yield now to the ranking member from California, Congressman Issa, for his 10 minutes.

Mr. ISSA. Thank you, Mr. Chairman. Mr. Chairman, at this time, I would like to ask unanimous consent that all opening statements by all Members be allowed to be inserted into the record.

Chairman TOWNS. Without objection.

Mr. ISSA. Mr. Chairman, I would also ask unanimous consent that the minority background memo, as well as documents referred to in it, be included in the hearing record.

Chairman TOWNS. Without objection.

Mr. ISSA. Thank you, Mr. Chairman.

[The information referred to follows:]

From: Tim P Clark
To: Rita C Proctor; Donald L Kohn; Kevin Warsh; Deborah P Bailey; Roger Cole; Coryann Stefansson; William Rutledge; Arthur Angulo; Brian Peters; Jennifer Burns; Mac Alfriend; Randall S Kroszner; Scott Alvarez
Subject: Update on BAC_ML
Date: 12/19/2008 02:29 PM

The following is a quick update and some preliminary views in advance of the call at 3:30 today.

We (FRB Richmond, FRB NY and Board staff) are continuing to gather needed info for full assessment of ML through Bank of America (BAC) management, though much of what is needed for a good preliminary assessment on ML is in our possession and being analyzed. We also had a pretty good sense already of conditions at BAC, which have also deteriorated recently as evidenced by their own projection for Q4 having gotten significantly worse in the past week or two, and we are currently working to update are views on BAC as a stand alone entity. As they themselves noted the other night at our meeting, even on a stand alone basis, the firm is very thinly capitalized in terms of tangible common equity (TCE) relative to assets and exposures.

- It is notable that a quick analysis of the TCE/assets ratios of BAC and ML on stand-alone basis and as a combined entity implies that the recent decline in BAC's projected year-end 2008 stand alone number appears to be driving as much of the decline in the combined pro forma ratios as the losses at ML, even as they are portraying the losses at ML as being the key issue here. This is largely the result of declining ratio at BAC stand alone and the fact that most capital in the combined entity will be coming from BAC.

The preliminary assessment on the ML loss numbers is that ML does not appear to be being overly aggressive in some of its larger markdowns -- though we can't yet say that with certainty and for all positions -- so the size of the losses/write downs may <u>not</u> be over-stating the problems at ML to a large extent in an attempt to 'kitchen sink' the losses in advance of the acquisition date. Details on the sources of the 'new' $4 billion of losses are being sought right now and that will be included in the analysis once we get a bit more clarity.

General consensus forming among many of us working on this is that given market performance over past several months and the clear signs in the data we have that the deterioration at ML has been observably under way over the entire quarter -- albeit picking up significant around mid-November and carrying into December -- Ken Lewis' claim that they were surprised by the rapid growth of the losses seems somewhat suspect. At a minimum it calls into question the adequacy of the due diligence process BAC has been doing in preparation for the takeover. [As an aside, BAC management told us they could not provide electronic versions of ML files, and one wonders how that is possible since they have been doing the due diligence for months and having e-files would have made that much simpler and more effective for them. May have helped limit their current surprise.]

As per our meeting with management the other night, BAC management has identified a $78 billion portfolio of positions and exposures that are causing the problems at ML. Those are as follows:

From: Donald L Kohn
To: Scott Alvarez; Kevin Warsh
Cc: Brian F Madigan; Michelle A Smith
Subject: Re: BofA
Date: 12/30/2008 08:34 PM

Agree with scott until last sentence. "If trouble occurs" implies we wouldn't work with them to head off trouble. One of the options discussed today was a limited ringfence maybe plus capital raise announced on Jan 20. It's tricky because of tarp, but tarp should have some unused, though committed, resources. I think such a plan is risky for BAC because its an admission of weakness. Very different circumstances from BS-JPM. But if bac and our staff think it's needed we shouldn't rule out. Could be necessary to buy time to the more general tarp capital injection.

Sent from my BlackBerry Wireless Handheld
▼ Scott Alvarez

----- Original Message -----
From: Scott Alvarez
Sent: 12/30/2008 07:58 PM EST
To: Kevin Warsh
Cc: Brian Madigan; Donald Kohn ; Michelle Smith
Subject: Re: BofA

Mr. Chairman,

Ken will want to get you to commit as much as possible on this call. I'd be cautious for two reasons. First, we aren't sure yet what exactly we should do here. There is some disagreement between the OCC and BA, on the one hand, and our collective staff (Board, Richmond and NY), on the other, about what type and how big of a problem exists at BA (as opposed to ML). Any help will depend on getting our arms around that, and then judging the market reaction to our aid. Second, our potential solutions depend significantly on some amount of TARP money being available when it comes time to act and on the FDIC being willing to play a role like it did in Citi. BA won't want a loan, which is all we can do on our own. The availability of TARP money around January 20 will depend on Paulson's ability to convince Congress to give the funds to Tim, on Congress acting without imposing new restrictions on hows the funds are to be used, and on whether a new, unexpected problem arises before January 20 (or whenever the next tranche is granted). So we can't be sure at this point what we can do.

So, I'd stick to the message you suggested before. Consummating the deal is important to BA and ML as well as financial markets. Failure to consummate at this point would send bad signals about BA, not just ML. And we will watch carefully how events develop and work with BA if trouble occurs.

Happy to talk with you about this.

Scott

From: Arthur Angulo
To: Lisa A White
Cc: Brian Peters; Jennifer Burns; Kevin Coffey; Tim P Clark
Subject: Re: BoA/ML FG Information
Date: 01/02/2009 09:23 PM

I fully agree that BAC should realize that getting us complete info ASAP is in their interest...and that it is inconceivable that the type of info to which Kevin referred is not readily available.

▼ Lisa A White address deleted

Lisa A White address deleted
01/02/2009 05:53 PM

To Kevin Coffey address deleted
cc Arthur Angulo address deleted Brian Peters address deleted, Jennifer Burns/address deleted Tim P Clark address deleted
Subject Re: BoA/ML FG Information

Kevin--

We were surprised as well. I think we still need to work to our original deadline. If after the initial conversations on Monday, it still seems like it's going to take a longer period of time to get me the information, I'm happy to quickly elevate this up the chain as they are aware of the timelines we're working under and it's in their best interest for us to have as much info as possible as soon as we need it.

Will you please call me asap on Monday if you're not getting what you need on these topics?

Thanks for your help, Kevin.

Lisa address deleted
▼ Kevin Coffey/I

Kevin Coffey/I address deleted
01/02/2009 05:45 PM

To Lisa A White/ address deleted
cc Brian Peters/ address deleted, Arthur Angulo/ Jennifer Burns/address deleted Tim P Clark/
Subject BoA/ML FG Information

Lisa, just wanted to follow-up from the phone call with BoA and get your thoughts.

I was a little surprised that the BoA folks thought getting more granular information on the FG deals would take a fair amount of time (ie., try to get things Tuesday

address deleted

12/22/2008 02:14 PM

To Scott Alvarez/address deleted

cc Kevin Warsh/ , Randall S Kroszner/address deleted Donald L Kohn/ , Deborah P Bailey/

Subject BAC

Had a good conversation with Lewis just now. He confirms his willingness to drop the MAC and to work with the government to develop whatever support package might be needed for earnings announcement dates around Jan 20. We discussed his common equity issue. We agreed that having a significant amount of TARP capital in the form of common was not an ideal solution, given the ownership implications. But we agreed both to think about possible solutions (eg, a govt backstop of a capital raise, govt common with limited control rights etc.).

He had a question which I will address to Scott (also to Deborah). He said he now fears lawsuits from shareholders for NOT invoking the MAC, given the deterioration at ML. I don't think that's very likely and said so. However, he still asked whether he could use as a defense that the govt ordered him to proceed for systemic reasons. I said no. It is true, however, that we have done analyses that indicate that not going through with the merger would pose important risks to BAC itself. So here's my question: Can the supervisors formally advise him that a MAC is not in the best interest of his company? If we did, could he cite that in defense if he did get sued for not pursuing a MAC?

From:
To: Scott Alvarez
Subject: Re: Fw: BAC
Date: 12/23/2008 11:08 AM
Encrypted

Thanks, Scott. Just to be clear, though we did not order Lewis to go forward, we did indicate that we believed that going forward would be detrimental to the health (safety and soundness) of his company. I think this is remote and so this question may be just academic, but anyway: What would be wrong with a letter, not in advance of a litigation but if requested by the defense in the litigation, to the effect that our analysis supported the safety and soundness case for proceeding with the merger and that we communicated that to Lewis?

▼ Scott Alvarez/address deleted

Scott Alvarez/address deleted | To address deleted
cc
12/23/2008 10:18 AM | Subject Re: Fw: BAC

Mr. chairman,

Shareholder suits against management for decisions like this are more a nuisance than successful. Courts will apply a "business judgment" rule that allows management wide discretion to make reasonable business judgments and seldom holds management liable for decisions that go bad. Witness Bear Stearns. A different question that doesn't seem to be the one Lewis is focused on is related to disclosure. Management may be exposed if it doesn't properly disclose information that is material to investors. There are also Sarbanes-Oxley requirements that the management certify the accuarcy of various financial reports. Lewis should be able to comply with all those reporting and certification requirements while also completing this deal. His potential liability here will be whether he knew (or reasonably should have known) the magnitude of the ML losses when BA made its disclosures to get the shareholder vote on the ML deal in early December. I'm sure his lawyers were much involved in that set of disclosures and Lewis was clear to us that he didn't hear about the increase in losses till recently.

All that said, I don't think it's necessary or appropriate for us to give Lewis a letter along the lines he asked. First, we didn't order him to go forward--we simply explained our views on what the market reaction would be and left the decision to him. Second, making hard decisions is what he gets paid for and only he has the full information needed to make the decision--so we shouldn't take him off the hook by appearing to take the decision out of his hands.

Let me know if you'd like any more info on this.

Scott
address deleted

From: Scott Alvarez
To:
Subject: Re: Fw: BAC
Date: 12/23/2008 11:23 AM
Encrypted

I agree we and Treasury gave our views on what we thought the likely effects would be of not proceeding, but that's different than ordering Lewis to proceed. We didn't take the decision out of his hands or threaten punitive supervisory action if he didn't proceed. I want to avoid the Fed being the centerpiece of the litigation. Lewis needs to have every incentive to analyze the facts and document and justify his decision. If he thinks he can rely on us, he'll assert there was nothing he could do and he can be reckless--not the right incentive. Moreover, once we're in the litigation, all our documents become subject to discovery and, as you'll remember from Deborah's presentation, some of our analysis suggests that Lewis should have been aware of the problems at ML earlier (perhaps as early as mid-November) and not caught by surprise. That could cause other problems for him around the disclosures BA made for the shareholder vote. In any event, we can always decide at the time of litigation whether to help even if now we hold fast.

Scott

Mac Alfriend/address deleted

12/21/2008 08:17 AM

To Christopher Calabia/address deleted

cc Alexa Philo/address deleted, Arthur Angulo/address deleted
brian.peters@address deleted Coryann
Stefansson/address deleted, Daniel
Sullivan/address deleted Deborah P
Bailey/address deleted Dennis
Herbst/address deleted, Grace.Dailey@occ address deleted
Jane Majeski/address deleted, Jefrey M
Robles/address deleted, Lisa A White/
Morgan Rushev/, Scott D
Nesson/, Stacy L
Coleman, Tim P
Clark/

Subject Re: ZFRSSE - MER stand-alone analysis

Good analysis of both companies. Merrill is really scary and ugly..Probably will not be on 9:30 call

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Mac Alfriend
Senior Vice President, Banking Supervision and Regulation
The Federal Reserve Bank of Richmond
Office 804- 697- 8411 - Cell 804- 512- 4186
address deleted
www.richmondfed.org

From:
To: Deborah P Bailey
Cc: Donald L Kohn; Kevin Warsh; Michelle A Smith; Randall S Kroszner; Rita C Proctor; Roger Cole; Scott Alvarez
Subject: Re: status
Date: 12/21/2008 10:03 AM
Encrypted

Thanks. I think the threat to use the MAC is a bargaining chip, and we do not see it as a very likely scenario at all. Nevertheless, we need some analysis of that scenario so that we can explain to BAC with some confidence why we think it would be a foolish move and why the regulators will not condone it.

My current thinking is that we should have a regulator call without treasury (including though occ and fdic) to work out our joint position. We then need a second call, perhaps with fewer staff than the first, to discuss the findings and implications with Treasury. That all has to happen today, so anything we can do to move the regulators call up a bit would probably be helpful. Depending on how that goes, it might be principals only calling Lewis tonight or tomorrow morning.

I talked to Lacker yesterday but have not spoken to Lewis since the call on Friday.

Jeffrey Lacker/address deleted

Jeffrey Lacker/address deleted
12/20/2008 11:12 AM

To "Mac Alfriend"/address deleted , "Sally Green"
address deleted , "Jennifer Burns"
, "James McAfee"
, Trish
Nunley/address deleted
cc
Subject The ChairMan

Just had a long talk with Ben. Says they think the MAC threat is irrelevant because its not credible. Also intends to make it even more clear that if they play that card and then need assistance, management is gone. (Forgot to tell him KL is near retirement.) Hopes a Citi-like deal can be done w/o us taking 3rd loss, but if we got away w/ the gov just backstopping $74 that would be cheap given the size of the companies. He'd be surprised if that's all it takes though.

Preliminary, confidential views from scott and me (see note below plus attachment) without benefit of sup and reg staff input

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--Sent from my BlackBerry Wireless Handheld

From: Kevin Warsh
Sent: 12/21/2008 12:42 PM EST
To: Kevin Warsh, Chairman's email address redacted.

Attached please find some discussion points that Scott and I iterated overnight. Obviously, the actual talkers will depend significantly on what we hear from our Staff this afternoon.

Great work on de-escalating BA, the more time we have the better.

It is key that we understand how December is faring for BA's comparable banks. It is also critical to understand BA's view on disclosure requirements (e.g., 8-K), particularly whether they would need to discuss pro forma financials if and when transaction is consummated in first week of January. If their first disclosure is at time of Jan 19 earnings announcement, then we can better evaluate the prospects for a private capital raise by the company in the new year.

Thanks

Kevin

December 21, 2008

Talking points for BankAmerica Discussion

[Bracketed language below is for further internal discussion purposes and subject to revision based upon briefing by Staff this afternoon]

1. Abandonment of the transaction on the eve of consummation, especially after the extensive preparations that BA has already taken, would surprise the market and have serious adverse effects not only for ML, but also for BA. Of course, it would have negative implications for the System.

* The market would doubt the judgment of BA's management and its ability to perform adequate due diligence and manage risks. It would call into question the risks inherent BA's existing footprint, including Countrywide.

* Abandoning the transaction would expose the weaknesses in BA's capital and asset quality, as analysts attempt to determine why BA did not believe it had the resources to acquire ML.

* The market would conclude that BA was too weak to address the problems at ML, particularly because ML brings with it $10 billion in Government TARP capital in addition to its own capital.

2. BA's assertion that it would successfully exercise the material adverse effects clause is not credible, according to Fed and other key US Government (USG) attorneys.

*The public assertion of the claim, however, would likely cause the demise of ML in much the same fashion as the collapse of Lehman.

*This would cause significant reputational consequences for BA, in the markets, with the public and with the regulators.

3. If USG were to provide aid to BA in connection with the acquisition of ML, BA would look very weak in the eyes of the market (e.g., look more like Citi and less like JPM)

* Except for the CPP (which has already provided BA with $15 billion and promised BA another $10 billion upon completion of the ML transaction), the Fed and Treasury have established a policy on assisting only troubled companies in time-constrained, emergency situations.

* The ML deal has taken place in full view of the market over an extended period of time and without any indication of extraordinary weakness. Markets will be focused on the 2009 pro forma financials, not the 4Q ML write-downs.

*Were the US Government to provide aid at this point, it would appear that BA was itself too weak to acquire ML and had poor leadership and inadequate risk-management systems in place across its entire footprint.

4. In spite of all of this, if BA believes that aid from USG is essential, and the USG chooses to provide aid to BA, it will come at a price – both economically and reputationally. Assistance, generally, has taken any/all of three forms – regulatory, capital, or with respect to distressed assets. [We may need to revise this judgment later today]

*Regulatory: Relief takes various forms [but we must be alert here that extraordinary relief might smack of forebearance and markets and ratings agencies may not be as tolerant as regulators]

*Capital: [The central problem here is likely to be insufficient capital in a fast deteriorating economic environment. The solution, thus, may well be a new capital raise, which could include a mix of private and public capital as USG could provide backstop in various forms].

*Distressed Assets: [The pool of "distressed assets" at ML have already undergone massive write-downs, so tail-risk looks smaller than in other situations. Also, the size of the distressed pool looks relatively small compared to size of pro forma BA balance sheet]

5. If, however, BA maintains that the distressed assets are the central cause of the expected pro forma weakeness, and USG more clearly understands BA's rationale, then BA should be expect to be required to —

* take all the expected losses from any designated portfolio plus provide an additional cushion for extraordinary losses;

* pay rates for any aid it receives significantly in excess of the CPP ; and

* provide some measure of upside compensation to the US Government.

Moreover, BA will be subject to restrictions on its business activities that, at a minimum, will include—

* a ban on dividends without US Government approval,

* more severe executive compensation limitations than those from the CPP,

* limitations on various types of corporate expenses,

* a government foreclosure prevention policy,

* restrictions on further acquisitions/transactions,

* requirements to raise additional capital in agreed time-frame, and

* more intrusive review and involvement by the US Government in the selection of management of BA, including the board of directors.

6. [BA has made clear previously to the regulators and to the marketplace that it believes this deal is strategically and financially good for BA in the medium-term. BA has said that the franchise value of ML is very strong and its long-term prospects appear good. BA should proceed with the deal and manage the deal as capably as possible, including consideration of announcing a capital raise]

*[BA should consider the following contingent support of USG. That is, if unforeseen market events threaten the viability of BA, the Federal Reserve and the other Federal Government agencies will consider and use all options available to address the situation at that time.]

From: Mac Alfriend
Sent: 12/23/2008 05:44 PM EST
To: Jeffrey Lacker
Cc: Jennifer Burns
Subject: Re: Color from the Chairman

I think he is worried about stockholder lawsuits; knows they did not do a good job of due diligence and the issues facing the company are finally hitting home and he is worried about his own job after cutting loose lots of very good people.

Mac Alfriend
Senior Vice President, Banking Supervision and Regulation
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From: Kevin Warsh
To:
Cc: Donald L Kohn; Michelle A Smith
Subject: BofA
Date: 12/26/2008 11:01 AM

Don and i did conference calls with Staff from Board, Richmond, NY on situation on Wednesday. Still seems to be consensus that that problems are more significant than ML alone.

We are reconvening with our guys again on Tuesday to discuss in more detail strawman proposals that deal with ML problems predominantly and a more aggressive case that deals with BoA/ML together. Key to our ultimate determination will be market perceptions (that is, will markets see problems beyond ML, particularly given relatively low levels of tangible common equity at parent). To that end, we are working on mix of distressed asset fixes and capital injections that may diverge from Citi model. For example, we are considering a structure where the Government is backstop funder or provides capital match for private capital raise by BoA.

I spoke with Joe Price (CFO of BofA) several times in last couple of days, urging them to think with force and speed during our little window of seeming calm in next week. I asked him and his team to have their own version of strawman proposal for us to consider by next Tuesday as well. They need to take more ownership of situation. Also, spoke with Dugan and McCormick. Dugan's staff will be working with ours to further evaluate pro forma entity and alternatives for consideration on Tuesday. Will continue to keep Treas posted

Separately, Don is continuing to lead discussion about broader uses of TARP and other USG facilities with Tim for Jan 20 and beyond. His group (including NY Fed) is reconvening Monday to discuss.

Thanks

Kevin

address deleted
▼ Kevin Warsh

Kevin Warsh/address deleted

12/29/2008 12:58 PM

To address deleted

cc Donald L Kohn, Michelle A Smith/BOARD/FRS@BOARD, Scott Alvarez address deleted

Subject BofA

Ben:

Spoke with BoA folks this morning, mostly Joe Price (CFO) They seem to have taken on board some of the ideas we discussed with them last week, but did not instill a ton of confidence that they have got a comprehensive handle on the situation. Their views, however, are evolving towards asking for some relief to parent co in addition to ML.

ML: They proposed mix of government capital (common-like, non-voting equity) plus asset wrap ($140Bn) with "fill the whole" at ML for the "good of the system". Cost of government support here will need to be negotiated here, but they think they are entitled to some favorable terms because they have agreed to go forward to closing. I reminded them that they are the ones who would look equally bad in eyes of market and regulators if they chose to terminate transaction. T

Parent: With respect to BoA, they now propose reducing dividend payout to "nominal" amount.. With respect to capital raise, they want to target all-in-capital raise that takes TCE ration to 3 to 3.5%, which seems like a total capital raise of $12-15 Bn, with government serving as backstop in event they couldn't raise capital themselves. They'd also like asset wrap of about $50 Bn for BoA assets "that are comparable to" ML. On BoA pieces, recognize that terms of government support would be more expensive.

They would hope to announce comprehensive package with our support on Jan 20 (happy inauguration day, mr. president).

address deleted
▼ Kevin Warsh

Kevin Warsh/address deleted

12/29/2008 12:58 PM

To address deleted

cc Donald L Kohn, Michelle A Smith/BOARD/FRS@BOARD, Scott Alvarez address deleted

Subject BofA

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They would hope to announce comprehensive package with our support on Jan 20 (happy inauguration day, mr. president).

Don and I are talking with Fed staff plus OCC plus Treas tomorrow afternoon, and should have better view of way forward after that. BoA is going to talk with Exec Committee of its Board on Wednesday, and I told Price I'd give him some preliminary guidance by then

Thanks

Kevin

Mr. ISSA. Mr. Lewis, in your 35 years, how many acquisitions, including stock trades, would you say you have been involved in, roughly? Including boards you sat on or were involved in in some tangential way.

Mr. LEWIS. Off the top of my head, 10.

Mr. ISSA. And probably hundreds that you have looked at in your review of other people's, competitor's, transactions and so on.

Isn't it true that it is fairly common to get down the road, particularly in a stock transaction, and find that the original anticipated ratio is changed, either favorably or not favorably, and it is often written into the contracts that there were certain break points based on a material change in stock trading or other material facts, such as you had in your MAC agreement, right?

Mr. LEWIS. Yes, that is not uncommon.

Mr. ISSA. OK. So the Fed should not have been surprised that would be questioned as this very turbulent market continued to have a number of changes in what was going on at B of A and what was going on at Merrill Lynch.

Mr. LEWIS. It is hard for me to speak, or I shouldn't and can't speak——

Mr. ISSA. Well, let me just say this. Were you at all surprised that there were day-to-day, week-to-week changes that you had to evaluate and forecast what they really meant over a much longer period during this turbulent time?

Mr. LEWIS. No. And the way I would characterize it would be, not speaking for the Fed, but somebody on the outside who was familiar with mergers and acquisitions, had that person known that not strongly considered a material adverse change, they would have thought we were asleep at the switch.

Mr. ISSA. And as a fiduciary to your corporation, now the combined, but at that time B of A, didn't you have a responsibility to weigh that and, in fact, when in doubt, assert the possibility? In other words, if you had to err, you had to err on the side that you had to look for the material adverse change, not assume it wasn't there. You had to assume that it could be there and you had to look for it.

Mr. LEWIS. Well, particularly when we saw the acceleration, yes, sir.

Mr. ISSA. OK. I don't want to spend a lot of time on that part of it because I think it is beyond the purview of this committee, but on December 17th, when you called Chairman Bernanke and Secretary Paulson to tell them you were thinking of exercising the MAC clause, which, again, you had an obligation to at least consider, were you motivated to do so because of your fiduciary obligation to your stockholders?

Mr. LEWIS. I was, sir.

Mr. ISSA. I am going to ask a question that perhaps shows too much of my background off the dais, but to the extent that you were borrowing or potentially borrowing money from taxpayer money, was that really—let me put it this way—that was still borrowed money, it wasn't a gift. You were not trying to renegotiate a gift from the Government or even the amount of money coming from them. If you had cited and they had said, yes, go ahead and exercise that clause, would the more likely outcome change have

been a difference in the purchase price of Merrill Lynch relative to B of A?

Mr. LEWIS. That is one possibility, but I can't predict the future, obviously.

Mr. ISSA. OK. And when you looked at the material adverse clause, and particularly the losses that were building up, did you do so as an officer of a regulated company who, if your capital dropped below a certain point, could be in fact closed by the FDIC? In other words, were you protecting B of A's position that you not take an anchor that could lead to insolvency of your own company?

Mr. LEWIS. Yes, that was a factor.

Mr. ISSA. So we have a combination of what was Merrill really worth relative to what they were getting in B of A stock, and, as a regulated entity, the real risk if you did not ensure that B of A's capital base was sufficient—we recently had the stress test, obviously—sufficient for you to be a going concern.

Mr. LEWIS. I want to at least make sure I give full disclosure here. If we had done this deal, at least our tier one ratio, which is the one that the regulators look at the most, would have still been over well capitalized, but it would have been well under our internal objective and would have been a relatively low ratio in this environment.

Mr. ISSA. So today's hearing, at least from this Member's standpoint, is really about whether or not the Government asserted either strong influence that would be outside the ordinary influence one would expect from a neutral party or/and whether or not you felt that there was an implied threat, either to yourself, your board, or your company, in any of the verbal or written correspondence you had with Government officials, including Bernanke and Paulson.

Mr. LEWIS. Well, there was the strong advice that I just mentioned. I do want to put it——

Mr. ISSA. I realize that you don't want to characterize it as a threat or any one word, but did you feel that you were being pressured to go through with the deal at least as strongly as that salesman trying to sell you the car and get you to close, or the insurance salesman? You know the pressure I am talking about. Were they advocating strongly and using both positive and negative forces to do so in those conversations?

Mr. LEWIS. Yes, sir, but I think it was in the context of them thinking that was in the best interest of Bank of America and the financial system.

Mr. ISSA. I am going to call you to task a little bit. You said the best interest of Bank of America and the financial system. I am not going to quibble over their motives on the financial system, but why do you say Bank of America? Did you believe that they really believed this was a good deal for Bank of America, even though you were seeing a change which would have affected your arm's length negotiation of a price?

Mr. LEWIS. Well, their concern, obviously, was from the top, and that is for the financial system. But we are so intertwined with the financial system, I think they thought that by all of this happening and the uncertainty coming back into the financial system, that in fact that would hurt the system and us.

Mr. ISSA. OK, so when you say "and Bank of America," you really mean the financial system and, as a member of the financial system, you would be affected.

Mr. LEWIS. Yes.

Mr. ISSA. But if they went and sold it to somebody else or lowered the price and packaged it up, or if Merrill Lynch had gone through a bankruptcy and been offered to you free and clear, all of those alternatives, strictly relative to Bank of America, would have been either better or at least no worse.

Mr. LEWIS. I can't speak to that, but those would be options. But I can't speak to whether it would be better or worse.

Mr. ISSA. My last question, then I am going to yield to one of the other Members, if you did not have the Government at the table—and I know that is hypothetical, but if you did not have the Government at the table, would you have, A, asserted the clause and, B, either walked away or substantially changed the deal?

Mr. LEWIS. It didn't happen that way, so it is hard for me to project what I would have ultimately done, but, obviously, we were strongly considering it.

Mr. ISSA. So it would be somewhere between possible and likely.

Mr. LEWIS. I don't know how to characterize it. I will just stick to how I described it, I think.

Mr. ISSA. Thank you. Your constituent, Mr. McHenry, will control the balance of my time.

Mr. MCHENRY. Thank you, Ranking Member Issa.

Mr. Lewis, you have been with Bank of America and its predecessor companies for how long?

Mr. LEWIS. September will be 40 years.

Mr. MCHENRY. Forty years. How many mergers or acquisitions have you personally been involved with in your career?

Mr. LEWIS. I would have to take a few moments and count them up, but obviously probably more than 1, less than 10.

Mr. MCHENRY. OK. Would this be the largest merger or acquisition that your company and the predecessor companies have taken?

Mr. LEWIS. No. The Nations Bank-Bank of America acquisition would have probably been—I would have to think back to the market caps and things, but that would be the biggest. This would be one of the biggest, however.

Mr. MCHENRY. Certainly. Now, in terms of how you analyze these deals, do you have a process within your bank to analyze appropriate growth measures and acquiring other institutions or merging with other institutions?

Mr. LEWIS. We do.

Mr. MCHENRY. You do. And did you conduct that same method with this Merrill acquisition?

Mr. LEWIS. Yes, we did. We used the same methodology.

Mr. MCHENRY. OK. Thank you. My time has expired and I have other questions in that regard later. Thank you.

Chairman TOWNS. Thank you very much.

Let me now yield to the chairman of the subcommittee, Mr. Kucinich, for 5 minutes.

Mr. KUCINICH. Mr. Chairman, members of the committee, our investigation, Mr. Lewis, also finds that Fed officials believed that you were potentially liable for violating securities laws by with-

holding material information in your possession from shareholders before the vote to approve the merger with Merrill Lynch on December 5, 2008.

Mr. Lewis, please look at the following email from the Fed's General Counsel to Chairman Bernanke on December 23, 2008. "A different question that doesn't seem to be the one Lewis is focused on is related to disclosure. Management may be exposed if it doesn't properly disclose information that is material to investors. His potential liability here will be whether he knew or reasonably should have known the magnitude of Merrill Lynch losses when Bank of America made its disclosure to get the shareholder vote on the Merrill Lynch deal in early December."

Mr. Lewis, did Bank of America supplement the proxy solicitation it sent to shareholders with what the company learned in mid-November about the rapidly mounting losses and potential for future losses at Merrill Lynch before the shareholder vote on December 5th?

Mr. LEWIS. Congressman, we take disclosure very, very seriously. If any——

Mr. KUCINICH. Were there supplements? Can you say were there supplements?

Mr. LEWIS. If anybody in our legal group had suggested we do anything of that nature, we would have done it.

Mr. KUCINICH. There were no supplements, isn't that right?

Mr. LEWIS. There was no suggestions to have a supplement.

Mr. KUCINICH. There were no supplements. OK. So, Mr. Lewis, look at the following email that circulated among officials at the Richmond Fed on December 23, 2008. "I think he's worried about stockholder suits. Knows they did not do a good job of due diligence, and the issues facing the company are finally hitting home and he's worried about his own job after cutting loose lots of very good people."

Now, Mr. Lewis, was your decision to tell the Government you were considering invoking a MAC, which, of course, refers to a clause in a merger agreement that allows the acquirer to abandon the deal if a material adverse change is judged to have occurred, was your threat to invoke a MAC in fact a strategy you deployed to protect yourself from shareholder lawsuits?

Mr. LEWIS. No, it was not.

Mr. KUCINICH. Isn't it true, Mr. Lewis, that during the course of your conversations with Chairman Bernanke and Secretary Paulson, you in fact requested a letter from the Government saying that the Government ordered you to close the deal to acquire Merrill?

Mr. LEWIS. No, that was not what I asked for. Our board was concerned——

Mr. KUCINICH. Your answer is no? Are you sure that is your answer?

Mr. LEWIS. Our board was concerned that we had verbal assurances, but had nothing in writing, about getting some assistance. So I called Chairman Bernanke and asked him——

Mr. KUCINICH. But you are referring to a different letter. I am talking about a letter. You requested a letter from the Government

saying that the Government ordered you to close the deal to acquire Merrill. Wasn't there such a letter?

Mr. LEWIS. I don't recall such a letter.

Mr. KUCINICH. You are under oath but your answer is you don't recall.

Mr. LEWIS. I do not recall.

Mr. KUCINICH. Isn't it true that your request of that letter was motivated by your desire to protect yourself from your shareholders?

Mr. LEWIS. Well, sir, if I can't recall it, I can't answer the second question.

Mr. KUCINICH. Well, our investigation reveals that Chairman Bernanke believed that your request for such a letter was motivated by a desire to protect you from shareholder lawsuits, as demonstrated in this email from Chairman Bernanke to the Fed's General Counsel on December 23, 2008, "He"—speaking of you, Mr. Lewis—"said he now fears lawsuits from shareholders for not invoking the MAC, given the deterioration at Merrill Lynch. "He"—they are speaking of you, Mr. Lewis—"still asked whether he could use as a defense that the Government ordered him to proceed for systemic reasons. I said no." This is from Chairman Bernanke.

Mr. Lewis, is Chairman Bernanke's email describing his call with you an accurate statement of your concerns and of Bank of America's situation?

Mr. LEWIS. I can't recall the exact email, but we did have concerns and we wanted some assurances that they would support our position.

Mr. KUCINICH. I yield back, Mr. Chairman.

Chairman TOWNS. Thank you very much.

I now yield to the ranking member of Ohio, Mr. Jordan.

Mr. JORDAN. Thank you, Mr. Chairman.

Let me go back to this so-called threat concern here, Mr. Lewis. I just want to be clear. On December 17th, when you called Mr. Paulson and Mr. Bernanke, I just want to know the nature of your call. Did you say "we are going to exercise the MAC clause" or did you say "we are thinking about exercising the MAC clause?"

Mr. LEWIS. Again, it seems like a long time ago. To the best of my recollection, I said we are strongly considering a MAC.

Mr. JORDAN. So, in other words, the response you then got changed your decision. You were going to exercise the clause; you felt that was in the best interest of your bank, of your shareholders. You were going to do it and then, based on what the Government told you, you took a different course.

Mr. LEWIS. No, sir, it was a factor because they felt so strongly. But it was not the only factor in making the decision. We also thought, after a lot of consideration, that there was downside risk in not winning the MAC.

Mr. JORDAN. Let me change direction, because we have talked about this a lot. I want to get to just a big concern I have with the unprecedented level of involvement the Government now has in the private sector in way too many industries, in my judgment; and let me provide a little context.

I was on a conference call a week ago Sunday with members of the Auto Task Force, talking about the GM situation. I happen to

come from car country, as I said in my opening statement. We had a GM plant that was closed a week ago Monday; 800 jobs, 800 families and a whole community impacted, as you would expect. The night before that announcement, we were on this conference call. Members of the Task Force talked about what was going to happen and one member of the Auto Task Force indicated, he said, "we are not going to run General Motors; we will only get involved if there is a major event"—major event was the language he used—and they explained the whole deal.

When we got done, I asked a question. It was Mr. Spurling who made that statement. I said, "Mr. Spurling, define major event. Define what is major." I said, "because it is going to be pretty major tomorrow in our district when 800 people find out they are not going to have a job." And he didn't have a definition. In fact, he said, "we don't have a working definition; it would be something along the lines of a merger, a major change in corporate structure," which basically told me it could be any darned thing they wanted it to be.

So my question to you is what day-to-day involvement does the Government have in decisions you are making relative to TARP funds, relative to any—if any, talk about that if you would, please.

Mr. LEWIS. Well, sir, there is an oversight committee, a TARP committee that actually does look at our lending and see if we are using the TARP funds to lend money, so that is a report we just requested. There obviously is the involvement of our regulators, as there normally would be.

Mr. JORDAN. I am talking over that, more than that.

Mr. LEWIS. The only involvement that would be explicit would be after we were ordered to attain more capital as a part of this stress test. They did suggest to all banks that were raising that capital to re-look at their boards for financial expertise and to look at their management and succession as a part of this process; and we have been doing that, but no day-to-day decisions made by regulators.

Mr. JORDAN. OK, talk to me about TARP funds you have, any kind of undue influence you felt there in relation to when you initially accepted the TARP dollars.

Mr. LEWIS. No undue influence, no, sir.

Mr. JORDAN. OK.

I would be happy to yield to the ranking member, Mr. Chairman.

Mr. ISSA. Thank you. Just a couple of followups.

Although the threat seems to have been stated, whether or not it influenced you, to your understanding under U.S. law—and I realize we are not asking a banker to be a lawyer, but does the Federal Reserve chairman have the right to fire you or any member of your board?

Mr. LEWIS. I think there is something called a "cease and desist," which gives them power to do things like that. I have been told that; I haven't read it myself.

Mr. ISSA. OK. And the U.S. Treasury Secretary, any similar power?

Mr. LEWIS. No, sir, I don't think he would have the power.

Mr. ISSA. OK. But when acting in concert, you would perceive that threat to be real, that he could execute on that threat, of having you and/or your board relieved.

Mr. LEWIS. My perception was that he was speaking on behalf of himself and the regulators. And my perception was, in concert, they would have that power.

Mr. ISSA. Thank you.

Chairman TOWNS. Thank you very much.

I now yield to the gentleman from Pennsylvania who has been working on these issues for more than 20 years, Congressman Kanjorski.

Mr. KANJORSKI. Thank you very much, Mr. Chairman.

Mr. McHenry made a comment in his introduction of you that Bank of America has business relations with 98 percent of the Fortune 500 companies. What I want to know is what are the 10 companies that aren't doing business with you? [Laughter.]

Mr. LEWIS. I don't know, but it is a very interesting question.

Mr. KANJORSKI. Get home and check that.

Mr. Lewis, in some regard we have important questions that we are trying to resolve with reforming regulatory authority in the United States, so to that extent these hearings are helpful. But I don't hear anything thus far, either by my colleagues or yourself in responding, that there was some perceived threat or abuse of action on the part of Federal regulators, so I am going to ask you directly. Do you think Mr. Bernanke or anyone working under the Federal Reserve chairman took unauthorized, illegal, or improper action toward you or the Bank of America during these trying times?

Mr. LEWIS. I do not.

Mr. KANJORSKI. All right.

Mr. LEWIS. And I would say they strongly advised and they spoke in strong terms, but I thought it was with good intention.

Mr. KANJORSKI. If I had to characterize it, I was thinking that if the Titanic were going down and some of us were in the life rafts, it sounds like an argument between the captain and some that are in the water and they are refusing to get on board, and he is ordering them to get on board. Is that not too dissimilar to what happened here on this mid-September to December period of time, when all of us, admittedly, had our hair on fire?

Mr. LEWIS. And I think they saw, probably with their perspective, they saw rougher seas ahead that no one institution would be able to see.

Mr. KANJORSKI. My Subcommittee on Financial Services is charged with looking at the reform of regulation. Is there anything that you could see that in, granted, extreme circumstances such as that weekend of September 15th and the failure of Lehman Brothers and what was happening in the implosion or the collapse of the financial system, is there anything that we could do in reforming the regulations to provide for faster disclosure?

For instance, the 8-K requirements that were not carried out precisely in this case, and that disclosures by the company were not necessarily made within the 4-days. I know there is an argument as to whether or not they legally had to or were defined as required, but is there something we could do to assure shareholders, who do get at risk as a result of not force, but encouraged, acquisitions such as this, is there anything we in the Federal Government

can do to clarify that problem and to make it clearer that would help the banking institutions in future events of this sort?

Mr. LEWIS. Sir, are you speaking to the Lehman or to the Merrill Lynch?

Mr. KANJORSKI. No, to the requirement of your filing for disclosure notice to your shareholders when all of this was pending. You didn't necessarily precisely follow what could be considered a notice requirement.

Mr. LEWIS. I think clarity is always better. If it were left up to me, I would go to clarity first.

Mr. KANJORSKI. So what would you recommend that we do, go into that area and declare more disclosure as to what is happening or how it is happening? Shall we put you on the net or what?

Mr. LEWIS. I am not sure I am following you in terms of the disclosure that you are speaking to, so I am a little shaky on your question, frankly.

Mr. KANJORSKI. OK. Well, do you know of any disclosure, do you have any feelings of any disclosures that could be made at those highly charged, extreme circumstances that you were operating under? Is there anything that we could create in the reform of our regulatory requirements on acquisitions or mergers?

Mr. LEWIS. It would be difficult because you don't have an event, many times, because you are still looking at alternatives and negotiating Lehman or the Merrill Lynch-Bank of America situation, and then it could be well into the morning before you actually get a signed deal, and then you do announce it the next day, for instance. So the ebb and flow of the circumstances would make it very difficult to describe it as an event, because it just may not happen that way.

Mr. KANJORSKI. Now, I understood in your testimony you pointed out that the Merrill Lynch acquisition was responsible for 75 percent of your last quarter's profits. Are you aware of shareholders that are complaining about that acquisition as a result of that?

Mr. LEWIS. No, sir, not now.

Mr. KANJORSKI. OK. Thank you very much.

I yield back.

Chairman TOWNS. Thank you very much.

I now yield to Mr. Chaffetz, the gentleman from Utah, for 5 minutes.

Mr. CHAFFETZ. Thank you, Mr. Lewis. I appreciate your being here. I am looking at some notes here dated December 31st. These are your notes. Also looking at some notes taken by Joe Price, the CFO at Bank of America, that were taken on December 21, 2008, about the attempt to use the MAC clause and get out of the Merrill Lynch transaction. In those notes it says "fire board of directors if you do it, irresponsible for country. TG agrees."

TG, I would assume, would be Timothy Geithner?

Mr. LEWIS. Those are Joe Price's notes?

Mr. CHAFFETZ. Yes.

Mr. LEWIS. I would have to assume with you, because they are his notes.

Mr. CHAFFETZ. Based on your recollection of what was going on and based on the notes that we see from the CFO that was there, "fire board of directors if you do it." Was that your understanding?

Mr. LEWIS. That is probably a reference to the conversation I have mentioned that I had with Secretary Paulson. But again, those are his notes.

Mr. CHAFFETZ. But based on your personal recollection, is that your understanding, that the board of directors would be let go if this MAC clause was invoked?

Mr. LEWIS. You know, I mentioned that I need a license with whether he said could or would, but basically the premise was that management and the board would be removed if in fact we did call the MAC.

Mr. CHAFFETZ. Including yourself.

Mr. LEWIS. Correct.

Mr. CHAFFETZ. So if the suggestion from the Federal Government was to have your job removed, as well as the board of directors, can it be looked at any other way other than a threat?

Mr. LEWIS. Well, actually, we didn't actually have much of reaction to the comments themselves as it related to us being removed. Again, what impressed us was here was the Government telling a bank in good standing that they would do something like this. So it was the seriousness of it which caused us to believe that they really did believe that there was an issue here with the MAC and not calling it that did influence us. But it wasn't the threat to have us lose our jobs, it was the seriousness because they made it, not the threat it itself.

Mr. CHAFFETZ. I am sorry, I didn't catch the last part of that.

Mr. LEWIS. It was the seriousness with which they made it, not the threat itself.

Mr. CHAFFETZ. Tell me about your discussion. You call, at one point, as I am looking at the time line here, Mr. Paulson is taking a bike ride, I guess, on December 21st. Tell me specifically what was going on in that conversation.

Mr. LEWIS. Well, I called him to get an update and I think that was the Sunday. I am pretty sure that was the Sunday that I called him. As I recall the conversation, he said "I want to give you some blunt language and I first want to start out by saying that we are very supportive of Bank of America," and then went one step further and said what I have already said. He said "but we feel very strongly that you should not call the MAC, and if in fact you do," and, again, I think he said would, but it was would or could, as I recall, "remove the board and management."

Mr. CHAFFETZ. Well, that certainly sounds like a threat to me and an amazing use of power there. Tell me about your interactions with Timothy Geithner. How early in this process was he involved and engaged in this process?

Mr. LEWIS. After the confirmation hearings or once he excused himself from the New York Fed, I had no contact with Mr. Geithner.

Mr. CHAFFETZ. But he was involved before he was named and brought in as the Treasury Secretary, correct?

Mr. LEWIS. Well, he had been involved in the original TARP money, yes.

Mr. CHAFFETZ. Right. And tell me about Mr. Summers, the interaction and place of involvement that he had in this process.

Mr. LEWIS. I personally had no involvement with Mr. Summers.

Mr. CHAFFETZ. He was not engaged in any of these?

Mr. Chairman, I would ask unanimous consent that Mr. Price's notes from December 21, 2008 and Mr. Lewis's notes from the conversation with Ben Bernanke on December 31, 2008 also be entered into the record.

Chairman TOWNS. Without objection, so ordered.

Mr. CHAFFETZ. Thank you.

Tell me about the interaction that you continue to have with Mr. Bernanke and Mr. Geithner at this point.

Mr. LEWIS. Well, I have had very little conversation with—in fact, I can't recall a conversation that I have had with Mr. Bernanke in terms of being one-on-one. I am a member of a council called the Federal Reserve Advisory Council, and there are 12 of us, and we have a dialog with the Federal Reserve, including Mr. Bernanke, but that is in a group setting. So no——

Mr. CHAFFETZ. Any interaction with the administration——

Chairman TOWNS. May I say to the gentleman from Utah, your time has expired.

Mr. CHAFFETZ. My apologies, Mr. Chairman. Thank you.

Chairman TOWNS. I now yield 5 minutes to the gentleman from Maryland, Mr. Cummings.

Mr. CUMMINGS. Mr. Lewis, I have listened to your testimony very carefully and, you know, I understand and I have read a lot about you. You are a great man, but I think one of the things that you have tried to do today is to walk a very thin line. You just heard Republicans and Democrats say, to some degree, that whatever was said to you about losing your job and the board being dismissed, basically what we have said is we don't buy it.

I assume the minutes are accurate from your board meetings. Are these things you vote on, the minutes from board meetings?

Mr. LEWIS. Yes, sir, we do——

Mr. CUMMINGS. Very well. I am talking about December 22, 2008.

Mr. LEWIS. Yes. Right.

Mr. CUMMINGS. Let me read something you to. It says "Mr. Lewis reported a series of calls," and you talk about a number of things, but this is one thing that I found very interesting, the second point. This is what you told your board. It says "the Treasury and the Fed stated strongly that were the corporation to invoke the material adverse change, MAC, clause in the merger agreement with Merrill Lynch and fail to close the transaction, the Treasury and the Fed would remove the board and management of the corporation."

If that isn't a threat, I don't know what is. If I say I am going to fire you if you don't do what I tell you to do, not only am I going to fire you, but I am going to fire your board. I mean, what you said—and I know that you are caught in a difficult situation. I know that after this merger was done your folks benefited tremendously, and I know that Bank of America is doing fine now. But I am here to tell you that no matter how great Bank of America is doing today, the means does not justify the end. In other words, throughout these transactions we must have honesty, integrity, and transparency, period.

So what I am saying to you is I know you are trying to be nice, but here we have a situation where, apparently, Mr. Paulson has told you, "do it." Sort of like the Nike commercial, just do it. And then you come in here trying to tell us, "oh, no, I was worried, the sky was falling, I was just so upset." And we don't buy it. So I am going to give you another chance. You didn't feel threatened?

Mr. LEWIS. Well——

Mr. CUMMINGS. I mean, don't get us to describe it. We are trying to figure out what you were feeling. And you know why we want to know? Because we want to straighten out this mess.

Mr. LEWIS. I have been pretty consistent, as you have just described it as it happened.

Mr. CUMMINGS. Yes, well, maybe you need to be inconsistent and tell us how you felt.

Mr. LEWIS. Well, I did, as I think I have said at some point in time, maybe not today, it was a strong influence on my decision, but it wasn't the only influence.

Mr. CUMMINGS. I understand. So apparently you are going to—OK. Now, let me ask you this. Did Mr. Bernanke have any influence with regard—I understand you just answered the question, but did he ever say that you should not disclose certain information, you should do this deal? I mean, did that ever come to you in any kind of way from Bernanke?

Mr. LEWIS. No, sir. Well, he never said we should not disclose anything that was disclosable; that would be our decision. And I never heard from him on the issue of us not disclosing something.

Mr. CUMMINGS. All right. Or anything else? You look like you are trying to go somewhere. Go ahead.

Mr. LEWIS. Well, the second piece I thought that you asked me, sir, was the issue of him not wanting us to call the MAC, and he did express that to us.

Mr. CUMMINGS. And when did he do that?

Mr. LEWIS. He expressed it on more than one occasion. I can't remember which dates, but several times.

Mr. CUMMINGS. And last but not least, you are an experienced man. I understand you have great judgment. Apparently, when you thought about this MAC thing, it was based upon your own experiences, was it not?

Mr. LEWIS. Yes, sir.

Mr. CUMMINGS. You just don't say I think we may have a MAC here out of the clear blue sky. What were you thinking?

Mr. LEWIS. I was thinking that the losses had accelerated to a point that they were out of line with other institutions and our institution.

Mr. CUMMINGS. Now, if you were to go back, you think it was not a MAC situation?

Mr. LEWIS. I wouldn't change my decision, but I can't say that there wasn't a MAC, because we never called it, so we just don't know.

Mr. CUMMINGS. Very well. I see my time is up.

Mr. ISSA. If the gentleman would yield for a moment.

Mr. CUMMINGS. My time is up.

Chairman TOWNS. The gentleman's time is expired.

I now yield to Congressman Flake from Arizona. Congressman Flake for 5 minutes.

Mr. FLAKE. Thank you, Mr. Chairman.

I just want to share my colleague's skepticism here about whether or not this was a threat. It just seems completely incredulous that this wouldn't be considered a threat. If this wouldn't be considered a threat, if I might just ask you what would be considered a threat. I mean, kidnap the family dog, release your college GPA scores? What is a threat if this is not a threat, firing and the firing of your board?

Mr. LEWIS. I am just trying to describe the circumstance and not put one word to it myself.

Mr. FLAKE. Well, from this vantage point, it seems there is kind of a Stockholm Syndrome thing going here. I mean, you are still regulated by these entities and it seems that you have identified with your captors or your regulators in some way here. But we would like to have a candid answer here, and I don't know if you can wiggle your pinky finger at us or give some sign that nobody else will see. The big grin, maybe that gives it away. But let me just tell you from this vantage point it just seems very difficult to accept that would not seem threatening behavior.

Now, again, from the notes that I believe Mr. Price, the CFO, took during one of these meetings, identified Hank P., Hank Paulson here, "fire board if you do it, invoke the MAC; irresponsible for the country. Tim G. agrees." I mean, it just seems like there is no other explanation here. And I can understand, maybe from the smile and whatnot, that you agree but can't say it here, but let me just say if you learned later on that there was $12 billion in losses that you didn't know about, but you said they were compelling. It wasn't so much what they said, but how they said it, the seriousness of which they explained the need for you to move forward with this merger. If not $12 billion, where is the threshold that you would have said "can't do it?" Can you enlighten us there a bit?

Mr. LEWIS. I can't because I dealt with the circumstances that existed, and I don't think there is a rule of thumb or whatever to cause that to happen. But to your point, whatever you want to call it, I wouldn't change how I described it. So I will let you put the word to whether it was a threat or whatever, but the circumstances that I described remain the same.

Mr. FLAKE. Well, how compelling was the seriousness of that conversation? Would it have compelled you if the losses were twice as big, as you didn't understand that they were, $24 billion instead of $12?

Mr. LEWIS. Well, at some point you couldn't have made it a viable deal, so there is, at some point, a number that the hole would have been just too big.

Mr. FLAKE. But if the taxpayers backfill, $24 is just as easy as $12.

Mr. LEWIS. No, sir, because you would, all of a sudden, have—remember, this is 8 percent after tax dividends that you are paying, and at some point you just couldn't bear the burden of that kind of cash-flow drain.

Mr. FLAKE. But the $12 billion was within the range.

Mr. LEWIS. Within the range. It was painful and it caused us to have to push out our horizon in terms of accretion for the deal to work, but it was workable.

Mr. ISSA. Mr. Flake.

Mr. FLAKE. I would yield to the gentleman from California.

Mr. ISSA. I would like to associate myself both with your comments and the gentleman from Maryland when you are a little incredulous, when it has been previously stated under oath before the New York attorney general, that in fact the gentleman was threatened. We are, oddly enough, arguing over whether, when you are threatened, you feel threatened, but we are not arguing over whether in fact there was a threat. I think we have made that pretty clear today and I appreciate your sticking to a position of not further indicting those who regulate you. But it is our job to get to the truth, and I think we have.

Yield back.

Chairman TOWNS. Thank you very much.

I now yield to the gentleman from Massachusetts, Mr. Lynch.

Mr. LYNCH. Thank you, Mr. Towns. I want to thank Chairman Kucinich as well, along with Ranking Member Issa and Ranking Member Jordan.

Thank you, as well, Mr. Lewis, for coming before the committee. Let me just go back to a point that Mr. Cummings and also Mr. Kucinich raised a little earlier. Mr. Kucinich seemed to be hung up on the fact of when there was a significant indicator that Merrill Lynch was in rapid decline, and rather than focus of November 2008, we can go all the way back to fall of 2007 when they announced an almost $8 billion loss and Mr. O'Neill was forced into retirement. There is a long history of decline here, albeit accelerated to some degree around the time of your purchase, but there was significant evidence that they had overloaded with collateral debt obligations and other complex derivatives and they were in pretty tough straits for a while, isn't that true?

Mr. LEWIS. Yes, sir, it is true.

Mr. LYNCH. Let me ask you. There are a couple of emails and, unfortunately, they are very, very small up there, but let me try to help you. One is from Chairman Bernanke to a selection of the Board of Reserve Governors, and this is December 21, 2008, around the time that you were thinking about this material adverse change being existent or not. This is a quote from Chairman Bernanke: "I think the threat to use the MAC"—which is the material adverse change—"is a bargaining chip and we do not see it as a very likely scenario at all. Nevertheless, we need some analyses of that scenario so that we can explain to Bank of America with some confidence why we think it would be a foolish move and why regulators will not condone it."

The other email sort of reinforces that, and that is from Jeffrey Lacker, who was a President, I believe, of the Federal Reserve Bank of Richmond at the time, and I think he is a member of the Federal Open Markets Committee now, a voting member. This email was also cc'd to the chairman, I believe, and it says "Just had a long talk with Ben." Ben Bernanke, I presume. "Says they think the MAC threat is irrelevant because it is not credible. Also intends to make it even more clear that if they"—meaning Bank of Amer-

ica—"play that card and then need assistance, management is gone." Then, in parentheses, says "Forgot to tell him that K.L."—I believe that is you, Ken Lewis—"is near retirement."

So there is a different dynamic going on here. Remember the context of all this is the sky is falling, as Mr. Cummings said, and tremendous pressure on everyone. And they think you are playing a game, they think you are throwing this thing out as a red herring, and they think what you are really trying to do, and what some people suggest you might have been doing, is to leverage taxpayer support by falsely putting this MAC out there, the fact that you are going to let this deal crash, walk away, even asserting you don't have to win the MAC, as you said before, you don't have to win it, this deal just has to stop, and then I think the weight of all the forces at play there, with Lehman and everything else, you know, we are in some pretty deep trouble.

So what I am asking you is was that your strategy here? Did you use this MAC as leverage to force Bernanke and Paulson to come in with taxpayer support? I also want to note that your own firm was in pretty tough shape at the time. Everybody seems to think there was a perception that you were the white knight here and you were the strong party, but I think, as Mr. Kucinich has indicated, Bank of America had its problems, too, at this time. But tell me what your strategy was in your negotiations there and what was the motivating force behind your decision to put forward this MAC.

Mr. LEWIS. Thank you. And thank you for reminding us we were in the middle of a pretty bad financial crisis, and I do think we had people of good intentions, despite what they have said about me. We grew more and more convinced that there was a distinct possibility that we had a MAC as a result of these accelerated losses.

Mr. LYNCH. You didn't disclose that to your shareholders, though.

Mr. LEWIS. But the acceleration really took place about a week after. That is when you saw massive acceleration, not necessarily those days, but as result of the forecast increasing. So this was not some wild bluff. We thought we had the real possibility of a MAC.

Mr. LYNCH. OK.

Mr. Chairman, I yield back.

Mr. KUCINICH [presiding]. The Chair recognizes Mr. McHenry.

Mr. MCHENRY. Thank you, Mr. Chairman.

Were there specific details that the Federal Reserve and Treasury told you not to disclosure to your shareholders?

Mr. LEWIS. No, sir. Neither Secretary Paulson, nor the chairman of the Federal Reserve, Mr. Bernanke, ever told me not to disclose something that we thought should be publicly disclosed.

Mr. MCHENRY. OK. Mr. Kucinich referenced some emails, and I just wanted to get on the record had you seen those emails before today?

Mr. LEWIS. No.

Mr. MCHENRY. OK. I just wanted to make sure we got that on the record, Mr. Chairman, with all due respect to you.

Mr. Lewis, as I asked earlier, you have been involved in a number of mergers and acquisitions. Your institution has been involved in dozens upon dozens over your career with the bank. To your

knowledge, have there been material adverse change clauses included in previous deals of this sort?

Mr. LEWIS. Virtually every acquisition would include some form of material adverse change clause, and it is not totally uncommon to have them invoked.

Mr. MCHENRY. Has your institution invoked this clause before?

Mr. LEWIS. Yes, sir. We invoked it on a deal that was with Sally Mae.

Mr. MCHENRY. All right. And looking at the list of Federal Reserve regulators who were second-guessing your decision or your raising the issue of the material adverse change clause, it is probably fair to say that you have done more of these deals than they have in their careers as bureaucrats. Is that safe to say?

Mr. LEWIS. I am sorry?

Mr. MCHENRY. Is it safe to say you have done more deals that include MAC clauses than the bureaucrats that were second-guessing your decision?

Mr. LEWIS. I don't know their backgrounds.

Mr. MCHENRY. OK. Well, I understand you are still a regulated institution, so no need to hit on the Federal Reserve and their staff there. To go to another subject matter, there have been reports about efforts of various banks to raise capital in the wake of stress test results. What is the status of your capital-raising efforts?

Mr. LEWIS. We were required to raise $33.9 billion, and I am pleased to say that we have raised that amount and we will raise more than that. That should be completed sometime toward the end of this month.

Mr. MCHENRY. OK. My constituents are concerned about access to credit. We have a mortgage foreclosure issue that is widespread across this country. Can you tell me about Bank of America's actions as it relates to foreclosure mitigation and helping those folks that are facing the loss of their homes?

Mr. LEWIS. One of the issues with the loan modification issue was that, initially, the banks were just not staffed up to handle that kind of volume and the different type things that were being asked. Since then, we now have 7,200 associates that just focus on loan modifications. And since July 2008, so less than a year, we actually already have modified 311,000 loans.

Mr. MCHENRY. There's been a discussion about access to credit and whether or not institutions are lending. With the downturn in the economy, certainly, institutions have a more difficult time in a down economy to find creditworthy individuals and make loans. Can you discuss the loans that you have made over the last two or three quarters?

Mr. LEWIS. Well, it is a great question and it is also the key to us getting this country back on track, because, if the financial system doesn't make loans, then we have an issue.

First, I would say that I am very proud that Bank of America is the largest lender in the United States. I am very proud of that. Second, I can assure you that we are making every good loan that we can make. Simply put, banks take deposits and make loans; that is how we make money. So it is in our own self-interest to do that. If we don't, we don't optimize our profits.

But I will say, to your point, that in a recession that is this deep and this prolonged, you do get an issue with demand. People start cutting back, they spend less, and companies expand less. So I can't assure you that these loan increases are going to continue because of loan demand. What I can assure you is we are going to make every good loan there is to be made.

Mr. MCHENRY. Thank you, Mr. Chairman.

Mr. KUCINICH. The gentleman's time has expired.

The Chair recognizes Mr. Quigley.

Mr. QUIGLEY. Thank you, Mr. Chairman.

It is good morning, still. There has been discussion of a new stress test as it relates to our financial institutions. I guess the question comes was the current test good enough? Do we need a new one? And would either of these kinds of stress tests have helped us to understand or prevent these issues when all these issues took place with your acquisition?

Mr. LEWIS. I do think the stress test was a good one, and I think the fact that they probably used higher standards in terms of things getting worse than hopefully they will was helpful too, because those things can happen. So I know it has caused us to look forward with a greater sense of pessimism or greater sense of things could be worse than we actually think they are, so you should have higher buffers of capital; and that will show up in our internal objectives going forward. So I do think it was a very good thing.

I don't see any evidence, particularly as we talk about there being some signs that the economy may be improving somewhat, to put another stress test on top of that. If you think about the last 2 years, the industry has gone through a significant stress test in actuality, and then we were getting a stress test on top of that. So I think that is enough.

Mr. QUIGLEY. But you know what the stress test was that we just went through. If Merrill had gone through that stress test and you had gotten the results prior to the board's vote, would it have affected what your board did?

Mr. LEWIS. I don't know if—the stress test, of course, came after the fact of all of this happening. What we didn't project, and what nobody that I know projected, was the severity of the credit crunch or the credit crisis that occurred during that fourth quarter. It wasn't that we hadn't identified the instruments; we just didn't see the depth of the decline that happened during that quarter, and most people didn't. So, to answer your question, if in fact we had been able to predict that, no, we would not have done the deal, because the hole would have been too big.

Mr. QUIGLEY. So you don't think that this stress test would have indicated the problems that Merrill was going to face because you couldn't have predicted the fourth quarter collapse.

Mr. LEWIS. No, sir. I don't know of anybody that would have predicted that. Actually, you can see some evidence of that in the fact that virtually every major bank had an operating loss in the fourth quarter, and even the financial analysts were not predicting those losses prospectively.

Mr. QUIGLEY. Sure.

Switching ground here just for a second, you also acquired with that acquisition a significant ownership in BlackRock?

Mr. LEWIS. Yes, sir, 49.9 percent.

Mr. QUIGLEY. OK. I am aware they do have contracts with the Federal Reserve and the Department of Treasury, BlackRock?

Mr. LEWIS. Yes, they do. I think they do. We don't manage them, but——

Mr. QUIGLEY. I am sorry?

Mr. LEWIS. We don't manage the company, but I have heard they do have contracts, yes.

Mr. QUIGLEY. So you may not know, then, were any of these contracts given to BlackRock in furtherance of financial support to Bank of America from the Government?

Mr. LEWIS. No. There is a big distinction in the management of the two companies, and we in fact make it a point not to be part of the management team.

Mr. QUIGLEY. But you could see the potential for a conflict of interest, then. You have to have some control over them.

Mr. LEWIS. We actually don't, but I do see the cosmetics of the potential conflicts.

Mr. QUIGLEY. And cosmetics are becoming important.

Mr. LEWIS. They certainly are, yes, sir.

Mr. QUIGLEY. So how do you avoid even the appearance of conflicts or impropriety in that vein?

Mr. LEWIS. Well, you make it very clear, in terms of how the company is managed, that you have nothing to do with their management; and it is pretty clear in the bylaws of the company that we do not manage the company.

Mr. QUIGLEY. Very good. Thank you.

Chairman TOWNS [presiding]. We now go to one of our senior Members in Congress in terms of service, not age, Marcy Kaptur from Ohio.

Ms. KAPTUR. Thank you, Mr. Chairman. You are a very diplomatic man.

Mr. Lewis, thank you for appearing this morning. As you can tell, there are serious questions being raised about how much you actually knew about Merrill Lynch's condition and, indeed, the condition of Bank of America that you then did or didn't share with your shareholders; and I would like to cast a wider lens on a pattern of behavior of Bank of America, and perhaps other institutions in our country that some have dubbed "crony capitalism" that has led our Nation to the precipice that it now faces.

On August 20, 2007, the Federal Reserve replied to a Bank of America request to waive banking regulation that limited the amount that federally insured banks can lend to related brokerage companies to 10 percent of bank capital. Until that point, banking regulation was that banks with federally insured deposits should not be put at risk by brokerage activities.

Four months after that waiver was provided to Bank of America, Bank of America bought Countrywide, which has proven to be the worst subprime lender in our Nation, and I would like to place in the record a report by the Center for Public Integrity that documents that.

The question that I have is who headed Bank of America at the time that the request was made of the Fed to waiver that, to allow Bank of America to enter into that brokerage activity?

Mr. LEWIS. I was the chairman and the CEO of the company.

Ms. KAPTUR. You were chairman and CEO. So you made the request.

Mr. LEWIS. I don't know of this particular request.

Ms. KAPTUR. But you are aware that Bank of America then bought Countrywide 4 months later.

Mr. LEWIS. Yes, ma'am, I am very aware of that.

Ms. KAPTUR. OK. What kind of due diligence was done on their portfolio?

Mr. LEWIS. We did a great deal of due diligence on the portfolio, and I am proud to tell you that we bought them, we changed all of their lending practices. They are now a prime lender. They are the ones that are doing these loan modifications. They are not doing Alt-As and subprimes. Bank of America had gotten out of subprime in 2001; we were not doing it at all. So we have turned that company around to a very reputable mortgage lender doing the right things.

Ms. KAPTUR. But you had to absorb all their losses?

Mr. LEWIS. No, ma'am. In the transaction, there is an accounting thing called purchase accounting, where you mark the assets down before you buy them.

Ms. KAPTUR. That sort of leads me to my next question. It has been stated that the Bank of America, in 2008, conspired with Merrill Lynch in a sweetheart deal to give out exorbitant bonuses to Merrill executives totaling over $4 billion—that is with a B—in December 2008. Soon after, Bank of America got major infusions from taxpayer TARP money. But in 2008, on its Federal taxes, Bank of America, though it earned $4.4 billion that year, apparently paid just $120 million in taxes and deferred $5 billion in taxes for 2008.

Some people are saying that Bank of America acquiesced to the Merrill bonuses because, otherwise, all of Bank of America's 2008 earnings would have been consumed with bonuses for Merrill. How do you respond to that?

Mr. LEWIS. Well, the transaction with Merrill took place on January 1st of this year, and until that time they had a separate board and a separate compensation committee. We had entered into agreement which allowed us to cap the bonuses and to have influence on the bonuses, but that the final decision would be made by their compensation committee and their board, because it was still a separate public company. So there was not a connectivity fully until after they became a subsidiary of Bank of America.

Ms. KAPTUR. But it certainly looks like, I don't want to use the word hedge, but it certainly looks like financial people inside your company were anticipating what might occur, and the deferral of taxes in 2008 seems most curious.

Mr. LEWIS. Well, I am no a tax attorney and I don't know exactly what the hedging was, but it was not—I don't see the connection to Merrill because Merrill was the next year.

Ms. KAPTUR. Well, I would sure appreciate, Mr. Lewis, if you could provide for the record what net effective tax your company paid in 2008, because, to me, it looks like you paid one-fiftieth of

what you should, and I would like to compare what tax rate was paid and the amount that was paid versus what the average middle-class family in our country pays. I think the record will show you paid actually substantially less.

Mr. LEWIS. I would be happy to do that.

Ms. KAPTUR. I have a request, Mr. Chairman, if I could, for information for the record.

Mr. Lewis, is it possible that in the spring of 2008, I have information that Bank of America bought a portfolio of subprime loans from the Federal Deposit Insurance Corporation that had been previously originated by Superior Bank of Illinois. Subsequently, Bank of America sold those same loans, valued at hundreds of billions of dollars, to investors who, as of last year, have now suffered major realized losses. Has Bank of America estimated the amount of those losses attributable to the acquisition of the Superior FDIC portfolio sold to Bank of America and can you provide that to the record?

Mr. LEWIS. Yes, ma'am, I would be happy to do that.

Chairman TOWNS. Thank you very much.

Ms. KAPTUR. Thank you, Mr. Chairman.

Chairman TOWNS. I now yield to Congressman Welch from Vermont.

Mr. WELCH. Thank you, Mr. Chairman, and thank you, Mr. Lewis, for being here.

A couple of questions. My understanding is that the original transaction started out as a private deal between Bank of America and Merrill Lynch, correct?

Mr. LEWIS. Yes, sir.

Mr. WELCH. And you did the due diligence financial review to make you come to the conclusion that it was in the best interest of the shareholders of Bank of America to proceed, correct?

Mr. LEWIS. Yes, that is correct.

Mr. WELCH. And then, sometime after you made this decision, you became aware of the $12 billion additional hole in the balance sheet, is that correct?

Mr. LEWIS. Yes, sir.

Mr. WELCH. And that was on December 14, 2008?

Mr. LEWIS. That is when we saw the accelerating losses.

Mr. WELCH. Well, accelerating as in $12 billion additional.

Mr. LEWIS. Correct.

Mr. WELCH. OK. Now, your shareholders had already voted to approve the merger based on information that you had provided up to that point, is that correct?

Mr. LEWIS. Yes.

Mr. WELCH. But the $12 billion figure that you became aware of on December 14th was of such magnitude that it made you believe that, in your capacity as the CEO, you would have to consider invoking the MAC clause, is that correct?

Mr. LEWIS. Yes, sir.

Mr. WELCH. And is it fair to say that the MAC clause would be considered, in effect, the nuclear option?

Mr. LEWIS. I don't know——

Mr. WELCH. Well, here is what I mean. If you invoke the MAC clause to get out of a deal that you entered into, then there is obviously reputational consequences in litigation, correct?

Mr. LEWIS. Yes, sir, that is a possibility.

Mr. WELCH. And if you lose the litigation, there are financial consequences to your shareholders, correct?

Mr. LEWIS. Yes, sir.

Mr. WELCH. So you wouldn't even consider invoking the MAC clause unless there was something of enormous magnitude and consequence to the company and the shareholders, correct?

Mr. LEWIS. That is correct.

Mr. WELCH. Now, in order to invoke the MAC clause and avoid the consequences of perhaps losing, would it be prudent, in the ordinary course, to get financial advice from your financial advisors as to the impact of this $12 billion hole on the business plan that justified the original decision to enter into the agreement?

Mr. LEWIS. Well, we had finance people looking at all of that, so we were looking at that issue.

Mr. WELCH. Well, obviously. This is my question: If you found out about a $12 billion additional hole, whatever model you had about payback and value to the shareholders, now it was called into question, right?

Mr. LEWIS. I tried to mention this before, but it extended the amount of time that you were going to get your payback, yes.

Mr. WELCH. It affected shareholder value, correct?

Mr. LEWIS. Correct.

Mr. WELCH. All right, basically two questions. One, did you get a financial analysis that you reviewed before you made a decision to discuss with the Treasury officials the invocation of the MAC——

Mr. LEWIS. There was financial analysis that I saw, yes.

Mr. WELCH. OK. These were made available to you?

Mr. LEWIS. Yes.

Mr. WELCH. And what was the conclusion of those financial analyses?

Mr. LEWIS. The conclusion was that you pushed out your payback or your accretion because you had these preferred shares now that you were having to pay back.

Mr. WELCH. That is obvious. I mean, the bottom line is was there a conclusion about what the viability of this transaction was.

Mr. LEWIS. Well, we still felt very strongly that all the strategic issues that were being addressed prior to Merrill Lynch were being addressed by the acquisition of Merrill Lynch.

Mr. WELCH. Have you made these financial studies available to the committee for its review?

Mr. LEWIS. I don't know. I don't know what this committee has.

Mr. WELCH. All right. So what you are saying is that you did review financial statements from your advisors. Those being whom, by the way?

Mr. LEWIS. Our financial advisors are us.

Mr. WELCH. So all internal. And on the basis of that you decided that, despite the knowledge of the $12 billion hole, it was prudent to proceed, correct?

Mr. LEWIS. Yes, sir.

Mr. WELCH. So whatever threat or whatever word it is we are going to use for Mr. Bernanke and Mr. Paulson interactions, you had come to an independent conclusion on the basis of financial review by your people that it still made sense for your shareholders to proceed, correct?

Mr. LEWIS. No. As I recall, they were done in the context of receiving the money.

Mr. WELCH. Let's be clear. You are saying two things now. One, you did an independent financial analysis that said it will stretch out the payback time, but it still is prudent to proceed; but, on the other hand, you had Bernanke and Paulson breathing down your neck, so that was a factor. Are you saying those two things?

Mr. LEWIS. No, I don't think I am. I am trying to say that we——

Mr. WELCH. OK, I am going to interrupt. I don't understand that, because I think you have said those two things.

Another thing that is very important I think to shareholders, $12 billion is of consequence to you, correct?

Mr. LEWIS. Yes, it is.

Mr. WELCH. Did you tell your shareholders that you had come upon this information that the deal they voted on is not the deal that was going through because it had a $12 billion hole that was accelerated? Did you tell them that?

Mr. LEWIS. The $12 billion was what we discovered later.

Mr. WELCH. And do you think after the fact information is not of interest to investors?

Mr. LEWIS. What I do know is that when our lawyers tell us we have a disclosable event, we disclose it.

Mr. WELCH. If you have——

Chairman TOWNS. I must interrupt the gentleman.

Mr. WELCH. If I can ask just one final question.

If there is an event that you consider so significant that it may allow you to invoke the material adverse consequence contract clause, do you not think that same event is of interest to shareholders and requires you, in your fiduciary duty, to disclose it?

Mr. LEWIS. I leave that decision to our security lawyers and our outside counsel.

Mr. WELCH. You are not CEO?

Mr. LEWIS. I am not a securities lawyer.

Mr. WELCH. You are not the ultimate one responsible?

Chairman TOWNS. I have to interrupt the gentleman. We have votes and we have other Members who have not had an opportunity.

Mr. WELCH. OK. Thank you. Yield back.

Chairman TOWNS. The gentleman from Virginia, Mr. Connolly.

Mr. CONNOLLY. I thank the chairman.

Again, Mr. Lewis, thank you for being here this morning. Several questions. One is when did you decide that the financial losses being incurred by Merrill Lynch should be disclosed to your shareholders?

Mr. LEWIS. Again, I don't decide on disclosures; we have securities lawyers, and many times they talk to external counsel to determine that.

Mr. CONNOLLY. Well, presumably, you—I mean, I worked for a company. Presumably, you, as the CEO, are in those conversations.

Mr. LEWIS. No. They come to me and they are done.

Mr. CONNOLLY. Right. So when did that happen? When was the decision made and how was it made to disclose or not to disclose to the shareholders of your company?

Mr. LEWIS. We disclosed the losses at Merrill Lynch consistent with disclosing the agreement we had with the Government and consistent with us announcing our earnings on January 16th.

Mr. CONNOLLY. January? Why such a long delay?

Mr. LEWIS. Again, I am not a securities lawyer. That is when we announced according to schedules given to us by our lawyers.

Mr. CONNOLLY. Were you ever encouraged or pressured by anyone at the U.S. Treasury or by the Federal Reserve not to disclose until January?

Mr. LEWIS. No. We were working on a goal of getting everything done at once.

Mr. CONNOLLY. I am sorry, I cannot hear you.

Mr. LEWIS. We were working on a goal of getting everything done at once so that we didn't have an announcement of something that would cause more damage to the economy. But nobody ever told us that we should not disclose a disclosable event.

Mr. CONNOLLY. So, for example, nobody at the Federal Reserve and no one at the U.S. Treasury urged you to manage the timing of the disclosure so that Merrill's earnings and the receipt of TARP money were all disclosed in January?

Mr. LEWIS. The target was to do that so that we didn't damage the economy any more.

Mr. CONNOLLY. So there were discussions about that with the U.S. Treasury and with the Federal Reserve.

Mr. LEWIS. It was about announcing everything at once.

Mr. CONNOLLY. I understand, but the timing is interesting; let's announce it in January, not in December. Was there something critical that had happened on Wall Street that made it better in January than December?

Mr. LEWIS. There was not an agreement in December.

Mr. CONNOLLY. I am sorry?

Mr. LEWIS. There was not an agreement in December.

Mr. CONNOLLY. There was not an agreement among whom?

Mr. LEWIS. Among us, us being the Federal Reserve or the Treasury.

Mr. CONNOLLY. So there were discussions, but not an agreement, in December.

Mr. LEWIS. There were discussions, but not an agreement, yes.

Mr. CONNOLLY. Did those discussions involve the Secretary of Treasury himself and the chairman of the Federal Reserve himself?

Mr. LEWIS. Yes, they did.

Mr. CONNOLLY. And yourself.

Mr. LEWIS. Yes, they did.

Mr. CONNOLLY. And the agreement was "let's hold off until January because we are not in agreement yet about what to disclose and when to disclose it?"

Mr. LEWIS. We did not have an agreement and we had not agreed on all the details or the amounts.

Mr. CONNOLLY. Were the reports that you were reluctant to accept TARP funds true?

Mr. LEWIS. I am sorry? I couldn't hear you.

Mr. CONNOLLY. There was a report that you did not want to accept TARP funding. Is that correct?

Mr. LEWIS. It is true that we did not think we needed the TARP funds at the time we were asked to take them.

Mr. CONNOLLY. And was there any connection between your reluctance in accepting them and the exhortation from Secretary Paulson at that time to accept them and the issue of don't disclose the $12 billion worth of losses you had just discovered?

Mr. LEWIS. No, absolutely not.

Mr. CONNOLLY. It never came up?

Mr. LEWIS. No.

Mr. CONNOLLY. Why did you accept TARP funds if you didn't think you needed them?

Mr. LEWIS. Because after hearing the various regulators, I felt like, given what they were saying about the potential of further deterioration in the economy, that we should have a healthy fear of the unknown.

Mr. CONNOLLY. How much in TARP funds did you accept, Mr. Lewis?

Mr. LEWIS. $15 billion.

Mr. CONNOLLY. That is a lot of money for insurance against the unknown, especially if your initial reaction was we don't need them.

Mr. LEWIS. Yes. But if you then see that credit meltdown of epic proportions that happened in the fourth quarter, it may not have been such a big insurance policy after all.

Mr. CONNOLLY. My time is almost up. One final question. Greg Curl replaced Amy Brinkley at BoA's chief risk officer. Given the fact that Mr. Curl failed to notice $12 billion of Merrill Lynch's losses, is it wise to have Mr. Curl be your chief risk officer, and did you approve of that decision?

Mr. LEWIS. Mr. Curl didn't miss the instruments which caused the loss. What happened is we did not anticipate the meltdown of such significant proportions in the fourth quarter. So he had identified everything properly; no one thought things would get as bad as it did in the fourth quarter. And I made that decision.

Mr. CONNOLLY. You made the decision that Mr. Curl should go ahead to become the CRO.

Mr. LEWIS. To become the COO. I am sorry, the CRO.

Mr. CONNOLLY. Thank you. My time is up.

Chairman TOWNS. Let me thank you too. Let me announce that we have two votes on the floor and that we will recess until 12:30, and we will be returning at 12:30 and, of course, continue the questions. So the committee is in recess until 12:30.

[Recess.]

Chairman TOWNS. The committee will resume. May I remind the witness that he is still under oath.

At this time, I yield 5 minutes to the gentlewoman from California, Ms. Diane Watson.

Ms. WATSON. Thank you, Mr. Chairman, and thank you, Mr. Lewis for enduring all of this time.

In your testimony, you stated that 9 days afer the shareholders' vote approving the merger, you became aware of significant accel-

erating losses, the MAC, at Merrill Lynch, raising concerns that the Bank of America might want to avoid finalizing the deal due to the revelation of MAC. However, it is difficult to understand how this came as a complete surprise, given reports by the New York Times that shortly after the deal was announced in September, B of A had quickly installed 200 people at Merrill Lynch to thoroughly review their books.

Were any of the 200 Bank of America employees responsible for analyzing Merrill Lynch aware of the potential for the $12 billion loss before you allegedly discovered it in mid-December?

Mr. LEWIS. I apologize if I haven't been clear. We did have people there and we did know that there were losses; that was clear both at our company and theirs. We could see that was happening and there were rumors on the street that was happening across all financial institutions, and we saw evidence of that after the fourth quarter close because we saw most everybody had losses.

The thing that caused us to be concerned was the acceleration that we saw when we got the numbers that we did on the 14th.

Ms. WATSON. Did you feel that the reviews of Merrill Lynch's books were thoroughly adequate? Were they researched and analyzed adequately?

Mr. LEWIS. Yes, ma'am. I thought the due diligence was done adequately. We identified the instruments that we thought might have issues if you have credit deterioration, but we did not expect the magnitude of the deterioration that occurred in the fourth quarter.

Ms. WATSON. So you are saying that you really weren't aware of the substantial loss before the shareholders' meeting on December 5th?

Mr. LEWIS. No, ma'am. We saw losses, but they seemed consistent with what we were hearing about in the marketplace and consistent with what we were seeing at our company. It was only when we saw the acceleration, when we got the reports, when we did, that caused the alarm.

Ms. WATSON. Well, do you think if you had that knowledge before, you would have proceeded with that merger differently?

Mr. LEWIS. Well, I can't—it is hard to predict what I would have done other than what we did when we had them, so——

Ms. WATSON. Well, the scenario that I just gave you. If you were aware, would you have proceeded differently?

Mr. LEWIS. Well, I don't know because it didn't occur that way.

Ms. WATSON. In testimony to the New York State attorney general, Andrew Cuomo, you stated that you had been advised by representatives from the Treasury Department and the Federal Reserve not to disclose details of Merrill Lynch's difficult financial position. So why do you believe that representatives from the Federal Government would not want you to disclose knowledge you had of Merrill Lynch's increasingly dire economic position?

Mr. LEWIS. During all of that time, there was never ever a time that the Federal Reserve or the Treasury Department told me that we should not disclose something that we thought would be a disclosable event.

Ms. WATSON. So there was never a time that you were told to hold back on this information?

Mr. LEWIS. Not as regards something that should be disclosed.

Ms. WATSON. OK, remember you are under oath.

OK, despite the fact that the plan for a merger was announced on September 15, 2008, there was no mention of the $20 billion capital injection from the Government until January 16th. At what point during the negotiations between the B of A, Merrill Lynch, and the Federal Government was it determined that this money would be necessary for the merger to be finalized?

Mr. LEWIS. The discussions around the injection of the preferred stock took place after we went to the Federal Reserve and the Treasury on the 17th, so during that time we began to talk about various ways to inject capital and so-called filled the hole. We did not come to a conclusion about amounts and the nature of the structure until sometime well into that first few weeks of January 2009.

Ms. WATSON. Thank you. My time is up.

Thank you, Mr. Chairman.

Chairman TOWNS. Thank you very much, gentlewoman of California.

Just before I move to the other Members, let me just ask a couple other questions.

Mr. Lewis, did Merrill Lynch give you all the information that you needed to make a decision, an informed decision? Did you get all the material that you needed in order to be able to make an informed decision?

Mr. LEWIS. Yes, sir, they did. We, in fact, not only were we looking at the data, but we had an outside firm that had looked at the data before, a company run by Chris Flowers, who was looking at the data alongside of us, and he had looked at their data some time ago, a few months before then, so they had a very good knowledge of the various instruments and securities. So we actually had two sets of eyes looking at that. Again, sir, it was not the fact that we didn't identify the securities, it was that we did not expect the credit to deteriorate like it did in the fourth quarter.

Chairman TOWNS. So do you agree that the decision on whether to proceed with the merger was ultimately yours? Was it yours?

Mr. LEWIS. Well, it was my recommendation to the board and it was mine and the board's decision to go forward, yes, sir.

Chairman TOWNS. Thank you very much.

I understand that we got out of rotation here. I understand it was Mr. Connolly next and then go back to Mr. Jordan. OK, Congressman Connolly.

No, no, no, Mr. Jordan has to—you yield to him?

Mr. CONNOLLY. I thank my colleague.

Chairman TOWNS. Briefly, he says.

Mr. CONNOLLY. I will be brief. I have to get back to the floor. So I thank my colleagues and I thank the Chair.

Mr. Lewis, if you look at the minutes of the Bank of America dated December 30, 2008, it says "special meeting." Starting at the top of page 3, it reads, "Mr. Lewis reported that management has obtained detailed oral assurances from the Federal regulators with regard to their commitment and has documented those assurances with emails and detailed notes of management's conversations with the Federal regulators." It goes on to say that you discussed in de-

tail "the commitment of the Federal regulators to deliver assistance in the form of capital and asset protection to the corporation."

In all, the word "commitment" in those minutes is used at least nine times. But just before the committee recessed for this vote, in response to my question, you said there was no agreement in December. In fact, you said that it was for lack of agreement in December that you decided to make the announcement in January, and that all three parties—Treasury, Federal Reserve, and Bank of America—agreed to that. How do you reconcile your testimony today with what you told the board on December 30th?

Mr. LEWIS. Well, we had an agreement that we would work toward a solution, but even from December 30th until the time that we signed the agreement, there was back and forth in terms of amounts, in terms of structure, and in terms of securities to be included in what was then called a wrap. So we had agreement for a solution, but we didn't have any kind of agreement as I would think of it as a business person.

Mr. CONNOLLY. Well, what about commitment? What was your understanding of the commitment, that word used nine times in those minutes?

Mr. LEWIS. Commitment to work toward a solution.

Mr. CONNOLLY. Well, but it says that you received, as part of that commitment, detailed oral assurances from the Federal regulators with regard to their commitment.

Mr. LEWIS. Yes, sir. And you can——

Mr. CONNOLLY. That sounds like more than a commitment to find a solution. That sounds like it is pretty detailed and we have already worked out the solution, and I am verbally sharing with you at the "special meeting" the nature of that commitment.

Mr. LEWIS. No. Different structures had been talked about, different amounts had been talked about, so there was a back and forth about different types of securities, different types of ways we could go about filling the hole. But there was never a specific agreement with specific numbers of that sort. So it took several more weeks before we could actually come to terms as to exactly what it would look like.

Mr. CONNOLLY. And it is your testimony that it is that failure to come to a specific agreement in December, that is the reason the announcement was put off until January?

Mr. LEWIS. That and the desire by the Federal Reserve and the Treasury to have an objective of having it all be able to be announced at one time, so that it would not spook the capital markets because they were so fragile.

Mr. CONNOLLY. Final question, if I may, Mr. Chairman.

Was there any intentional reason not to put the agreement in writing?

Mr. LEWIS. No, sir, because there was not enough specifics to put into writing.

Mr. CONNOLLY. But at some point there were.

Mr. LEWIS. Yes, sir, and that was in the first few weeks of January of the following year.

Mr. CONNOLLY. But I want to be very clear. Under oath, it is your testimony today there was no intentional evasion or reason to not put the agreement in writing. Nobody had a conversation with

Treasury, the Federal Reserve, or at the Bank of America "let's not put this in writing right now."

Mr. LEWIS. I can only speak to what was happening at the time. I don't know what was said to everybody, but the two things that I would continue to say is, No. 1, the goal was to get this done comprehensively so it was one time and we would not shock the markets with something that was dangling that was needed; and, second, we had not come to a final conclusion and did not do so for several weeks.

Mr. CONNOLLY. I yield back and I thank my colleagues for their indulgence.

Chairman TOWNS. Thank you very much.

I now yield to Mr. Jordan, gentleman from Ohio.

Mr. JORDAN. Thank you, Mr. Chairman.

Mr. Lewis, thank you. I know sitting there for 3 hours and answering questions is not the greatest thing in the world to be able to have to do.

In my first round, I asked about whether you felt the Government, in connection with the TARP program, exercised any excessive influence in day-to-day operations, and your answer was no. But I want to go back to—and I am taking this from a May 13th Bloomberg News story, documents obtained by Judicial Watch relative to a meeting that you had with Mr. Paulson, Mr. Bernanke, Mr. Geithner, and Ms. Bair. Did you and eight other bank CEOs meet with those individuals here in Washington back in looks like October 13th?

Mr. LEWIS. Yes, sir, we did.

Mr. JORDAN. OK. Tell us what happened at that meeting, because what the documents indicate is that we had a lot of conversation, discussion about the threat that has been talked about here by just about everyone relative to the MAC clause, but it looks like there was maybe threats here or at least strong suggestions that you initially participate in the TARP program. So can you tell me about what took place at that meeting and walk me through that October 13th meeting?

Mr. LEWIS. The nine chief executives were called by Hank Paulson, or at least I was——

Mr. JORDAN. Let me interject, if I could, real quick. You said earlier, I believe, too—and I forget to which Member's questions—that you initially, your board and your bank and you felt your bank did not need any infusion of cash or TARP money from the Government. Is that right?

Mr. LEWIS. Yes, sir, and it was——

Mr. JORDAN. What was that date? When did you make that decision as a bank?

Mr. LEWIS. Well, the first reaction that I had to the fact that we were being offered $15 billion was that we didn't need it; the prior week we had raised $10 billion in equity.

Mr. JORDAN. OK.

Mr. LEWIS. And that it could have been—I am speculating, but it could have been that is why we were offered $15, and not $25, like some of the other big banks were.

But, as you mentioned, the people that were there, they were on the other side of the table. There were nine of us, the nine bank

CEOs, and each of those people spoke about the possibility of deterioration in the economy. Finally, and I think it is a little grey with me, but I think it was Secretary Paulson then began to tell each bank what amount they should take.

Mr. JORDAN. Were you required to sign a form at that meeting?

Mr. LEWIS. Yes.

Mr. JORDAN. What did the form say?

Mr. LEWIS. It basically was a very short form that talked about the interest rate of the preferred and the amount. In fact, we wrote in the amount. It was a blank and so each individual wrote in——

Mr. JORDAN. You wrote in the amount, but it was suggested by the Treasury Secretary?

Mr. LEWIS. We were told what to write in, so to speak.

Mr. JORDAN. OK. You did that at that meeting? You wrote in the amount at that meeting?

Mr. LEWIS. Not until I had called my executive committee.

Mr. JORDAN. OK.

Mr. LEWIS. So we talked about various things——

Mr. JORDAN. So how long did this meeting last?

Mr. LEWIS. I think it was less than an hour, but, again, it has been a while.

Mr. JORDAN. In less than an hour, nine banks decided to take billions of dollars?

Mr. LEWIS. Well, we ended up——

Mr. JORDAN. Sign a form? Did you have to check with your board first before you signed the form?

Mr. LEWIS. No, no. I ended up, at least, in a position, and I think most of my colleagues in the various banks ended up, thinking that if this group of people, with the knowledge they have of the economy, were saying that this may be necessary, you should take it, that we felt like it was probably the right thing to do to have a healthy fear of the unknown. So on that basis I called my executive committee and got permission to sign it.

Mr. JORDAN. OK. And did the events of that hour, on that day in October, did that weigh on your mind fast-forward a few months in December, when you were deciding or thinking about—I think your answer to me earlier was when you called Secretary Paulson and Mr. Bernanke and told them about the MAC clause, you said you were seriously considering. I think that was your answer to me earlier.

Did the events of October, that meeting, that 1 hour meeting, where they put a form in front of you and said "you need to sign this, you need to write in the amount, you are going to participate in this program whether you like it or not," did those events impact your decision in December, when they said "we don't want you exercising this MAC clause?"

Mr. LEWIS. No, I didn't correlate them or connect them in any way. I was never thinking about that in relation to the circumstances.

Mr. JORDAN. Did you know—if I could, Mr. Chairman.

When you walked into that meeting in October, October——

Mr. KUCINICH. Request unanimous consent to give the gentleman another 2 minutes.

Chairman TOWNS. Without objection, so moved.

Mr. JORDAN. I thank the subcommittee chairman and the chairman.

When you walked into that meeting on the 13th, did you know what it was about? Did you know it was going to be they are going to ask us all to take TARP dollars?

Mr. LEWIS. No, sir, I did not.

Mr. JORDAN. You had no idea? You thought it was about just the general concern of the economy?

Mr. LEWIS. I didn't know, but——

Mr. JORDAN. What were the rumors on the street? I think that is the term you used earlier about some other information you had gathered about Merrill Lynch. What were the rumors on the street amongst your colleagues in the other big lending institutions and banks around the country?

Mr. LEWIS. It was a weekend. I think Monday was a holiday or something, so I didn't hear a lot of things in that time period. So I don't know if it ever got out as to what was going to—but I did talk to at least one other person, and he did not know anything about it either.

Mr. JORDAN. Did anyone in that meeting express any reservations about—and forgive me, I don't have the data in front of me. Did anyone not sign?

Mr. LEWIS. Not to my knowledge. I think everyone signed.

Mr. JORDAN. Did anyone express reservations about not signing?

Mr. LEWIS. One person expressed reservations, yes.

Mr. JORDAN. Was that you?

Mr. LEWIS. No, it was not I.

Mr. JORDAN. OK.

Mr. Chairman, thank you for the time. I have to run to a 1 o'clock meeting.

And I want to thank the witness for his patience and his thoughtful answers.

Chairman TOWNS. Thank you very much.

I now yield to the gentleman from Ohio again, this time, Mr. Kucinich.

Mr. KUCINICH. Thank you, Mr. Chairman.

Mr. Lewis, we would hope that a CEO would have both a good memory and the integrity to take responsibility for his decisions. Mr. Lewis, you stated, in response to my previous question, that you did not recall asking for a letter from the Government stating that Bank of America was ordered to proceed with the purchase of Merrill Lynch. This is the lynchpin of clarifying whether you were threatened by the Fed or whether the Fed was tough with you because you were threatening to be irresponsible. I want to direct your attention to an email response from the Fed's General Counsel to Chairman Bernanke's email, which I previously disclosed.

"Mr. Chairman," it says, "I don't think it is necessary or appropriate for us to give Lewis a letter along the lines he asked. First, we didn't order him to go forward; we simply explained our views and what the market reaction would be and left the decision to him. Second, making hard decisions is what he gets paid for, and only he has full information needed to make the decision, so we shouldn't take him off the hook by appearing to take the decision out of his hands."

I am entering this into the record.

Chairman TOWNS. Without objection.

Mr. KUCINICH. Now, Mr. Lewis, is it still your testimony that you don't recall asking for a letter to absolve you of your responsibility for acquiring Merrill Lynch's huge losses?

Mr. LEWIS. Congressman, what I do remember is calling Chairman Bernanke and asking him if he could give us something in writing along the lines of what the solution would be.

Mr. KUCINICH. We are now updating Mr. Lewis's previous testimony.

Mr. LEWIS. Sir——

Mr. KUCINICH. That may help you escape perjury, but it doesn't get away from the question of whether or not you were trying to absolve yourself of responsibility for acquiring Merrill Lynch's huge losses. I mean, we are talking about events that transpired only a few months ago, and the decision to withhold from Bank of America's shareholders material information about the deterioration of Merrill Lynch's finances was key here. This isn't about a threat, this is about your responsibility, and your failure to inform your shareholders could constitute a fundamental violation of security laws.

I have just given you documentation, Mr. Chairman, that Mr. Lewis tried to deflect the matter to the Fed by asking for a letter that they made him do it.

Now, I want to ask you, Mr. Lewis, our investigation finds that Mr. Bernanke believed that your threat to invoke a MAC was not credible. I want you to take a look at the following email from Chairman Bernanke dated December 21, 2008. "I think the threat to use MAC is a bargaining chip, and we don't see it as a very likely scenario at all."

You did get a significant amount of financial assistance when you dropped the threat to back out of your deal, isn't that true?

Mr. LEWIS. Yes, we did.

Mr. KUCINICH. Tell the committee what you received, how much money.

Mr. LEWIS. $20 billion.

Mr. KUCINICH. And you got the promise of $118 billion, didn't you, in asset protection for a combination of Merrill and Bank of America toxic assets? Didn't you get that?

Mr. LEWIS. We hadn't settled on an amount until some time, but the wrap was being considered, yes.

Mr. KUCINICH. Now, that was in addition to the $15 billion in TARP moneys you received directly in October, $10 billion in TARP moneys you received upon acquiring Merrill, isn't that right?

Mr. LEWIS. We did not ever sign the agreement on the wrap.

Mr. KUCINICH. Now, our investigation also finds that, contrary to your representations to the Fed, that you were concerned primarily about the losses at Merrill Lynch. Merrill's losses were less than half of the problem you faced; losses originating at Bank of America itself were larger than the losses at Merrill.

Mr. Lewis, please look at the following email dated December 18, 2008, between officials at the New York Fed. One reports his findings saying that on the total of 30 basis points deterioration of the tangible common equity ratio of the combined Bank of America-

Merrill Lynch entity, they go on to say that 16 basis points of deterioration is due to Bank of America, 14 basis points due to Merrill Lynch. The other official described this discovery as a "smoking gun."

Isn't it true that more than half of the decline in your all-important tangible common equity ratio evident in mid-December was not caused by Merrill Lynch?

Mr. LEWIS. Your apples and oranges. The securities——

Mr. KUCINICH. Well, maybe it is rotten apples and rotten apples, because isn't it true that you were told that if you went through with the MAC, and if you later needed financial assistance from the Government, you wouldn't get it? Isn't that true?

Mr. LEWIS. I am sorry, repeat that, please.

Mr. KUCINICH. That if you went through with the MAC, and if you later needed financial assistance from the Government, weren't you told you wouldn't get it?

Mr. LEWIS. I think I have seen that in an email, but I don't——

Mr. KUCINICH. Were you told that, yes or no?

Mr. LEWIS. I do not recall being told that.

Mr. KUCINICH. Isn't it true that given the precarious state of your balance sheet and especially your inadequate levels of tangible common equity, you believed at the time you reasonably could need financial assistance from the Government in the future?

Mr. LEWIS. The preferred stock does nothing to help your tangible common equity ratio.

Mr. KUCINICH. You wouldn't think about it? I mean, if you got $15 billion in October and you are going to come back 2 months later and ask for another $20 billion—you to $15 and then, 2 months later, $20 billion—doesn't it show that it really increased your Tier 1 capital ratio? Doesn't it show that?

Mr. LEWIS. Not tangible.

Mr. KUCINICH. Tier 1.

Mr. LEWIS. Tier 1, yes.

Mr. KUCINICH. Now, Mr. Lewis, the Government believed that you knew or should have known about the Merrill losses long before you said you did based on data that Bank of America possessed and had reasonably reviewed. The Government believed you could be in violation and breach of securities laws.

The Government didn't believe you that Merrill was the primary cause of your problems, but thought that Merrill losses were less significant than the losses that Bank of America was experiencing as a standalone entity. The Government even thought that you were making the threat to use MAC as a bargaining chip and that it was not credible. The Government had already given you $25 billion before you approached it about Merrill Lynch.

If the Government believed all of that about you and your management team, were you surprised that the Fed arranged for you to receive considerable additional financial support in January? Did that surprise you?

Mr. LEWIS. We received $15 billion, not $25 billion, from the original TARP package. It did not surprise me they were willing to give us more because we had talked about coming to a solution to get the Merrill Lynch deal done.

Mr. KUCINICH. Well, there was a financial crisis and they thought it was necessary for——

Unanimous consent for 2 more minutes, and then I should wrap it up.

Chairman TOWNS. Without objection.

Mr. KUCINICH. There was a financial crisis and they thought it was necessary for the system for the deal to go through. If there is one thing about your record that is clear, it is that you have experience in negotiating deals. What do you believe your leverage with the Government was at the end of 2008?

Mr. LEWIS. The only leverage I would say we had was that two honorable people trying to come to the right solution had given me their word that they would try their best to find a solution.

Mr. KUCINICH. Isn't it true that it was because Bank of America is a big bank, and if you hadn't been the CEO of the largest bank in America, if you had been the top executive, let's say, at a midsize or small regional bank and you had been acquiring another similarly sized bank during the fall of 2008, you think the Federal regulator would have behaved in the same way?

Mr. LEWIS. Well, sir, I don't think I was such a favorite son from some of the emails that you have just read.

Mr. KUCINICH. Well, wouldn't you have, if you were a smaller institution, been taken over and liquidated?

Mr. LEWIS. I can't speculate on that, sir.

Mr. KUCINICH. It is fair to say we have a large financial institution, Mr. Chairman, that doesn't face the same consequences for management as small ones, and the Fed had an opinion that there was considerable evidence of mismanagement. There has been a misconception here that the Government put a gun to the head of Bank of America, when it is quite possible that it was the Bank of America that put a gun to the head of the Fed by threatening to invoke the MAC, and I think that this whole idea, Mr. Chairman, about Mr. Lewis somehow being a victim here flies in the face of the fact that you were CEO of the largest bank and that you are pretending that you didn't ask for help from the Government to take the burden off your back, that you didn't ask for a letter.

You are going to have to excuse me, but this is not credible. You are trying to change the scenario from you as a victim to you as a powerful CEO who made a decision that denied your stockholders, your shareholders material information that they needed prior to a vote on a merger, and I think that is the central point of this hearing, and I am sorry that you haven't been forthcoming enough about that central point.

I yield back.

Chairman TOWNS. Well, one thing is for sure, there was a shotgun marriage, a shotgun wedding. There is no question about that.

Let me just sort of raise this issue. On December 22, 2008, Mr. Lewis, you sent an email to your board, and let me just quote. It says, "I just talked with Hank Paulson. He said that there was no way the Federal Reserve and the Treasury could send us a letter of any substance without public disclosure, which, of course, we do not want." Do you remember that?

Mr. LEWIS. Yes, sir. I do, yes, sir.

Chairman TOWNS. And I was raising this because of the answer that you gave to my colleague from Virginia, Mr. Connolly. I didn't get that point that you actually sent that memo. I mean, it seemed to me, in his questioning, that didn't come out.

Mr. LEWIS. No. May I give you the context?

Chairman TOWNS. Sure.

Mr. LEWIS. I had called Mr. Bernanke and said "is there something you can give us in writing, because my board is concerned that everything is verbal and we have nothing concrete, and we are going in toward the end of the year and about to have to consummate this deal without anything in writing." And he said "let me think about it," and the next call I got was from Hank Paulson, and he told me that, first of all, if they gave us any kind of agreement, it would be so watered down that the board would not find it satisfactory and, second, that they did not want disclosure. He was talking about the Government not wanting to create a disclosable event and have to disclose, not Bank of America.

Chairman TOWNS. You sure didn't make that clear with my colleague from Virginia. But let me just move on.

Mr. LEWIS. I apologize.

Chairman TOWNS. Congresswoman Kaptur from Ohio.

Ms. KAPTUR. Thank you, Mr. Chairman, very much.

Mr. Lewis, I have been here since this morning and find your testimony a bit disquieting today for some of the following reasons: Bank of America owns 49.9 percent of BlackRock, but you seem not to know anything of its activities.

No. 2, you are the person who was in charge when Bank of America acquired Countrywide over a year ago, but you apparently weren't aware of its books and the losses inherent in that purchase.

No. 3, you are the CEO of the largest bank in the country and you seem to present yourself as having a rather hands-off relationship with the Federal Reserve and the Treasury. I find that somewhat incredulous.

So let me ask some followup questions. In terms of the purchase of BlackRock that was a part of your Merrill Lynch merger, it is my understanding that BlackRock now is valued at over $1.3 trillion and that they just received five no-bid contracts from the Federal Reserve, among them managing troubled subprime mortgages in the Freddie Mac and Fannie Mae portfolios. The people of the United States, through the Fed, have propped up Fannie and Freddie now to the tune of over $200 billion. For the record, can you provide the contract that BlackRock has with the Fed, particularly the one regarding the management of Fannie Mae and Freddie Mac's portfolios?

Mr. LEWIS. I don't know if I can because, again, we don't run BlackRock. We have two or three seats on the board, but we don't have a CEO or chairman, and he does not report to anybody in Bank of America-Merrill Lynch.

Ms. KAPTUR. And yet you own 49.9 percent of it? Isn't that a rather strange relationship?

Mr. LEWIS. Well, we don't own 51 percent. That would be the difference.

Ms. KAPTUR. Do you know how much BlackRock will earn from that contract with the Federal Reserve to manage Fannie and Freddie paper?

Mr. LEWIS. No. Possibly some of our board members would, but I don't.

Ms. KAPTUR. Let me mention the New York Times wrote the following: "Can a company that is being paid to price and sell troubled assets for the Government buy the same kinds of assets for private clients without showing preference? And should the Government seek counsel from a company whose clients stand to make or lose billions if those policies are enacted?"

Can you outline for us how the Bank of America will avoid conflict of interest in its mortgage portfolios and insider dealing charges as mortgage portfolios are resolved and Bank of America mortgages are involved when BlackRock is actually the designee to manage the Freddie and Fannie portfolios on behalf of the Federal Reserve?

Mr. LEWIS. BlackRock would have to manage those and with the client would have to manage anything like that.

Ms. KAPTUR. But obviously Bank of America, some of your mortgages are held by Fannie Mae and Freddie Mac. You were the acquirer of Countrywide, the largest subprime abuser in the country, so you must have a pretty healthy portfolio there that is going to undergo scrutiny.

Mr. LEWIS. And BlackRock would have to take that into account, yes.

Ms. KAPTUR. Can you provide for the record the documents that you may have at Bank of America that contain or record the conflict of interest review undertaken by Bank of America to ensure proper ethics as these mortgages are resolved?

Mr. LEWIS. The conflict would be with BlackRock and the client, which would be Freddie or Fannie Mae. And, by the way, Countrywide is doing quite well, and we have changed the policies dramatically to become one of the most responsible lenders in the country.

Ms. KAPTUR. Well, you know, I think there is a whole hearing that could be held just on Countrywide, and——

Mr. LEWIS. It would be pre-Bank of America.

Ms. KAPTUR. And are any of the former Countrywide staff on your staff now at Bank of America?

Mr. LEWIS. There is some staff, but nobody in executive management.

Ms. KAPTUR. I beg your pardon?

Mr. LEWIS. Nobody in executive management. We sent our CEO to run the company, a woman named Barbara Desoer.

Ms. KAPTUR. You know, Mr. Chairman, it wouldn't be bad to hold a hearing on the interrelationship between Bank of America, BlackRock, Countrywide, the Federal Reserve, Fannie Mae, and Freddie Mac, and explore these interlocking, rather shadow, relationships that you claim have no bearing on activities within your institution, but which sound very unusual as you state them before the committee today.

I wanted to just, in my second question here, relating to Superior Bank, which had the largest settlement in American history at the FDIC in 2001, over $450 million as a result of their subprime ac-

tivities in Chicago and beyond, including servicing by Merrill Lynch, which is how you would acquire the Superior troubled loans. Let me ask you, when Bank of America acquired those loans, did you audit them prior to reselling them to investors?

Mr. LEWIS. I am not sure of that transaction, so I would have to get you somebody who was more familiar with the transaction.

Ms. KAPTUR. Well, then explain to us, as head of this massive and important bank in our country, what is your plan for dealing with bad loans such as the Superior loans that came to you through the FDIC Merrill acquisition?

Mr. LEWIS. Well, to the extent that you have loans you can rehabilitate, you do. To the extent that you can sell loans for discounts, you do. To the extent that you can't do either, you hold them on your books and at some point write them off.

Ms. KAPTUR. But if you sell them to knowing investors and they were bad loans, what happens?

Mr. LEWIS. Well, you would take a massive discount. The bank selling them would take a massive discount.

Ms. KAPTUR. Well, I would certainly like the paper trail, the audit trail on those Superior loans that your bank has been handling.

I thank you, Mr. Chairman.

Chairman TOWNS. Thank you very much. I thank the gentlewoman from Ohio.

I now yield 5 minutes——

Ms. KAPTUR. Mr. Chairman, may I ask the gentleman to yield just for a second? May I place in the record an article from the Atlantic Monthly, May 2009, on the financial crisis, please?

Chairman TOWNS. Without objection.

Mr. KUCINICH. I ask unanimous consent to insert all the emails that I offered on the screen there for the record.

Chairman TOWNS. Without objection.

[The information referred to follows:]

Email from a senior adviser at the Federal Reserve, December 12, 2008

From: [illegible]
To: [illegible]
Subject: Update on BAC_ML
Date: 12/10/2008 02:29 PM

The following is a quick update and some preliminary views in advance of the call at 3:30 today.

We (FRB Richmond, FRB NY and Board staff) are continuing to gather needed info for full assessment of ML through Bank of America (BAC) management, though much of what is needed for a good preliminary assessment on ML is in our possession and being analyzed. We also had a pretty good sense already of conditions at BAC, which have also deteriorated recently as evidenced by their own projection for Q4 having gotten significantly worse in the past week or two, and we are currently working to update are views on BAC as a stand alone entity. As they themselves noted the other night at our meeting, even on a stand alone basis, the firm is very thinly capitalized in terms of tangible common equity (TCE) relative to assets and exposures.

- It is notable that a quick analysis of the TCE/ on stand-alone basis and as a combined entr decline in BAC's projected year-end 2008 star be driving as much of the decline in the comb losses at ML, even as they are portraying the issue here. This is largely the result of declin and the fact that most capital in the combine BAC.

The preliminary assessment on the ML loss numbers is be being overly aggressive in some of its larger markd say that with certainty and for all positions -- so the si may not be over-stating the problems at ML to a large extent in an attempt to 'kitchen sink' the losses in advance of the acquisition date. Details on the sources of the 'new' $4 billion of losses are being sought right now and that will be included in the analysis once we get a bit more clarity.

General consensus forming among many of us working on this is that given market performance over past several months and the clear signs in the data we have that the deterioration at ML has been observably under way over the entire quarter – albeit picking up significant around mid-November and carrying into December -- Ken Lewis' claim that they were surprised by the rapid growth of the losses seems somewhat suspect. At a minimum it calls into question the adequacy of the due diligence process BAC has been doing in preparation for the takeover. [As an aside, BAC management told us they could not provide electronic versions of ML files, and one wonders how that is possible since they have been doing the due diligence for months and having e-files would have made that much simpler and more effective

clear signs in the data we have that the deterioration at ML has been observably under way over the entire quarter – albeit picking up the significant around mid-November

Ken Lewis' claim that they were surprised by the rapid growth of the Losses seems somewhat suspect

Restricted Federal Reserve Analysis of Bank of America & Merrill Lynch Merger, December 21, 2008

- MER's deterioration has been substantially worse than BAC's and all but ensures that the firm could not survive as a stand-alone entity without raising substantial new capital (and/or government support) that is unlikely to be available given the uncertainty about its prospects and further future losses.

- Management now projects Q4 after-tax losses of roughly $14 billion for MER, and approximately a $1.4 billion after-tax quarterly net loss for BAC, which for BAC represents more than four times management's projected losses from just two weeks ago. The losses at MER will erode over 50% of MER's tangible common equity.

While the extent of the market disruptions that have occurred since mid-September were not necessarily predictable, BAC management's contention that the severity of MER's losses only came to light in recent days is problematic and implies substantial deficiencies in the due diligence carried out in advance of and subsequent to the acquisition.

- In the merger proxy statement and investor presentations the firm explicitly asserts that it has an understanding of MER's business activities, financial condition and prospects as well as an understanding of the outlook for the firm based on prospective economic and market conditions.
- Staff at the Federal Reserve has been aware of the firm's potentially large losses stemming from exposures to financial guarantors, which is the single largest area of risk exposure and driver of recent losses that have been identified by management. **These were clearly shown in Merrill Lynch's internal risk management reports that BAC reviewed during their due diligence.**
  - The potential for losses from other risk exposures cited by management, including those coming from leveraged loans and trading in complex structured credit derivatives products ('correlation trading') should also have been reasonably well understood, particularly as BAC itself is also active in both these products.
  - Having done a quick analysis on the specific positions/exposures at MER that generated the largest losses for MER in Q4, FRS staff see no clear indication that they were driven by overly aggressive marking down of positions in advance of the acquisition. This general conclusion notwithstanding, some of the marks do appear somewhat conservative and the appropriateness of the timing of the impairment charge taken against goodwill is hard to assess. On the other hand, credit valuation adjustments against financial guarantors are not particularly aggressive relative to those staff has observed at other firms.

The combined firm remains vulnerable to a continuing downturn.

BAC management's contention that the severity of MER's losses only came to light is problematic and implies substantial deficiencies in the diligence carried out in advance of and subsequent to the acquisition.

These were clearly shown in Merrill Lynch's internal risk management reports that BAC reviewed during their due diligence

Email from General Counsel to Chairman Bernanke on December 23, 2008

From: Scott Alvarez
To:
Subject: Re: Fw: BAC
Date: 12/23/2008 11:23 AM
Encrypted

I agree we and Treasury gave our views on what we thought the likely effects would be of not proceeding, but that's different than ordering Lewis to proceed. We didn't take the decision out of his hands or threaten punitive supervisory action if he didn't proceed. I want to avoid the Fed being the centerpiece of the litigation. Lewis needs to have every incentive to analyze the facts and document and justify his decision. If he thinks he can rely on us, he'll assert there was nothing he could do and he can be reckless--not the right incentive. Moreover, once we're in the litigation, all our documents become subject to discovery and, as you'll remember from Deborah's presentation, some of our analysis suggests that Lewis should have been aware of the problems at ML earlier (perhaps as early as mid-November) and not caught by surprise. That could cause other problems for him around the disclosures BA made for the shareholder vote. In any event, we can always decide at the time of litigation whether to help even if now we hold fast.

Scott

Lewis should have been aware of the problems at ML earlier (perhaps as early as mid-November) and not caught by surprise. That could cause other problems for him around the disclosures BA made for the shareholder vote.

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Email from General Counsel to Chairman Bernanke, December 23, 2008

From:
To: Scott Alvarez
Subject: Re: Fw: BAC
Date: 12/23/2008 11:08 AM
Encrypted

Thanks, Scott. Just to be clear, though we did n
did indicate that we believed that going forward w
(safety and soundness) of his company. I think t
may be just academic, but anyway: What would b
advance of a litigation but if requested by the defe
that our analysis supported the safety and soundn
merger and that we communicated that to Lewis?

▼ Scott Alvarez/address deleted

Scott Alvarez/address deleted
cc
12/23/2008 10:18 AM Subject Re: Fw: BAC

address deleted

Mr. chairman,

Shareholder suits against management for decisions like this are
than successful. Courts will apply a "business judgment" rule th
management wide discretion to make reasonable business judgm
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to comply with all those reporting and certification requirements
completing this deal. His potential liability here will be whether
reasonably should have known) the magnitude of the ML losses
disclosures to get the shareholder vote on the ML deal in early D
his lawyers were much involved in that set of disclosures and Lewis was clear to us
that he didn't hear about the increase in losses till recently.

All that said, I don't think it's necessary or appropriate for us to give Lewis a letter along the lines he asked. First, we didn't order him to go forward--we simply explained our views on what the market reaction would be and left the decision to him. Second, making hard decisions is what he gets paid for and only he has the

A different question that doesn't seem to be the one Lewis is focused on is related to disclosure. Management may be exposed if it doesn't properly disclose information that is material to investors.

His potential liability here will be whether he knew (or reasonably should have known) the magnitude of the ML losses when BA made its disclosures to get the shareholder vote on the ML deal in early December.

Email from official at the Richmond Fed, December 23, 2008

I think he is worried about stockholder lawsuits; knows they did not do a good job of due diligence and the issues facing the company are finally hitting home and he is worried about his own job after cutting loose lots of very good people.

From: Mac Alfriend
Sent: 12/23/2008 05:44 PM EST
To: Jeffrey Lacker
Cc: Jennifer Burns
Subject: Re: Color from the Chairman

I think he is worried about stockholder lawsuits; knows they did not do a good job of due diligence and the issues facing the company are finally hitting home and he is worried about his own job after cutting loose lots of very good people.

Mac Alfriend
Senior Vice President, Banking Supervision and Regulation
The Federal Reserve Bank of Richmond
Office 804 697 8411 · Cell 804 512 4166
address deleted
www.richmondfed.org

THE FEDERAL RESERVE BANK OF RICHMOND
RICHMOND • BALTIMORE • CHARLOTTE

Email from Chairman Bernanke to the Fed's General Counsel, December 23, 2008

address deleted

12/23/2008 02:14 PM

To Scott Alvarez/address deleted

cc Kevin Warsh/ , Randall S Kroszner/address deleted Donald L Kohn/ , Deborah P Bailey

Subject BAC

Had a good conversation with Lewis just now. He confirms his willingness to dro the MAC and to work with the government to develop whatever support package might be needed for earnings announcement dates around Jan 20. We discusse his common equity issue. We agreed that having a significant amount of TARP capital in the form of common was not an ideal solution, given the ownership implications. But we agreed both to think about possible solutions (eg, a govt backstop of a capital raise, govt common with limited control rights etc.).

He had a question which I will address to Scott (also to Deborah). He said he now fears lawsuits from shareholders for NOT invoking the MAC, given the deterioration at ML. I don't think that's very likely and said so. However, he still asked whether he could use as a defense that the govt ordered him to proceed for systemic reasons. I said no. It is true, however, that we have done analyses that indicate that not going through with the merger would pose important risks to BAC itself. So here's my question: Can the supervisors formally advise him that a MAC is not in the best interest of his company? If we did, could he cite that in defense if he did get sued for not pursuing a MAC?

He said he now fears lawsuits from shareholders for NOT invoking the MAC, given the deterioration at ML.

[H]e still asked whether he could use as a defense that the govt ordered him to proceed for systemic reasons. I said no.

Email from Chairman Bernanke, December 21, 2008

From:
To: Deborah P. Bailey
Cc: Donald L. Kohn; Kevin Warsh; Michelle A. Smith; Randall S. Kroszner; Rita S. Proctor; Brian Cole; Scott Alvarez
Subject: Re: status
Date: 12/21/2008 10:03 AM
Encrypted

Thanks. I think the threat to use the MAC is a bargaining chip, and we do not see it as a very likely scenario at all. Nevertheless, we need some analysis of that scenario so that we can explain to BAC with some confidence why we think it would be a foolish move and why the regulators will not condone it.

My current thinking is that we should have a regulator call without treasury (including though occ and fdic) to work out our joint position. We then need a second call, perhaps with fewer staff than the first, to discuss the findings and implications with Treasury. That all has to happen today, so anything we can do to move the regulators call up a bit would probably be helpful. Depending on how that goes, it might be principals only calling Lewis tonight or tomorrow morning.

I talked to Lacker yesterday but have not spoken to Lewis since the call on Friday.

I think the threat to use the MAC is a bargaining chip, and we do not see it as a very likely scenario at all.

Email between officials at the New York Fed, December 18, 2008

Smoking gun… You're the man!

From: [redacted]
To: [redacted]
Subject: Re: Looking at the BAC BOD deck
Date: 12/18/2008 06:05 PM

Smoking gun...You're the man!

▼ Brian Peters/[redacted]

Brian Peters/[redacted]

12/18/2008 05:55 PM

To: Arthur Angulo/[redacted] Christopher Cash/[redacted] Tim P Curry/[redacted] Kevin Stump/[redacted]

cc:

Subject: Looking at the BAC BOD deck

	Dec 9, 2008 BOD	12/17 phone call	Delta
BAC Only	2.81%	2.60%	(0.21)
BAC + ML Proforma	2.50%	2.20%	(0.30)
Delta	(0.31%)	(0.40%)	

If I look at pg 61, BAC capita is 78% of proforma combined capital. If we model what the proforma would have looked like if there had been no change at ML, I come up with a proforma of 2.34. So 16bp of the deterioration is due to BAC (2.50-2.34), and 14bp is ue to ML (2.34-2.20)

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From:
To: Scott Alvarez
Subject: Re: Fw: BAC
Date: 12/23/2008 11:09 AM
Encrypted:

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did indicate that we believed that going forward would be d
(safety and soundness) of his company. I think this is rem
may be just academic, but anyway: What would be wrong
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All that said, I don't think it's necessary or appropriate for us to give Lewis a letter along the lines he asked. First, we didn't order him to go forward--we simply explained our views on what the market reaction would be and left the decision to him. Second, making hard decisions is what he gets paid for and only he has the full information needed to make the decision--so we shouldn't take him off the hook by appearing to take the decision out of his hands.

Let me know if you'd like any more info on this.

Scott
address deleted

I don't think it's necessary or appropriate for us to give Lewis a letter along the lines he asked. First, we didn't order him to go forward.

Second, making hard decisions is what he gets paid for and only he has the full information needed to make the decision – so we shouldn't take him off the hook by appearing to take the decision out of his hands.

Chairman TOWNS. The gentleman from Maryland.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Mr. Lewis, I am confused. Just picking up on some of the things that the chairman and Mr. Kucinich were just asking about, I can kind of understand your reaction to discovering that there was a $12 billion loss suffered by Merrill Lynch, especially when it was coming after a shareholders' vote to purchase Merrill Lynch. I can understand you telling the Fed and Secretary Paulson and Treasury you were thinking of backing out of the deal. I can understand that. I think that was based upon your expertise and your experience.

I cannot understand the agreement that you made with Treasury and the Fed, which they both deny, to disclose the $12 billion loss. If the loss made this a horrible business deal to acquire Merrill Lynch, why did you still do it? And I know you have told us over and over again, but let's be frank. I mean, I am wondering how do you determine what it is you must disclose? I mean, we have shareholders here who are concerned.

You are about to go into a deal with a company that is worse off than is made to believe, and it just seems to me that a person with your experience, there are a lot of people in this situation—and I don't care what Paulson may have said. I don't care what Bernanke may have said. They would have said "to hell with you." They would have said "I am going to stand on principle, and my principles tell me that there is a MAC here, and here is a real problem; and if I go down, I go down, but I am going down on principle."

I just want to give you an opportunity to tell us, because I have to tell you I am kind of concerned, because I think there are some serious credibility issues, and I think Mr. Kucinich has raised some things that, if I were your lawyers, I would be concerned about. So help me.

Mr. LEWIS. You are referring to the fact that, despite the fact we thought we could have a MAC, we relied on the——

Mr. CUMMINGS. Yes. And I am also going to the point that I believe that when you said to—you don't just go and tell the Feds and you don't tell Paulson that, "look, I smell a rat here." Somebody of your stature. I can understand if you were some guy that just came off the street 6 months ago and the last thing you did was you were a bank teller—no offense to bank tellers, but that was all you did. You are a major player, and when you speak, people listen.

So I am trying to figure out. I mean, you said there is a problem here, but then you let these folks—and all due respect to Bernanke, all due respect to the Feds, all respect to Paulson. You are the head of this bank, you are the head of Bank of America; they are not. They may be on high, but you have to answer to the shareholders.

And I am trying to figure out why—and this is stuff that, seems to me, if I had this kind of information, I wouldn't even want my shareholders to be voting on something and they did not have full disclosure, and I am trying to figure out where does the disclosure come in, why weren't things disclosed. I get the impression that there was insufficient due diligence. I know you were dealing with a crunch time. I know it was only a matter of hours that you were trying to turn all of this over. I got that. But a man of your stature, I refuse to believe that you set integrity, honesty, and transparency

to the side for expediency. I just don't believe it. And I am trying to give you an opportunity to explain this to us. Now, if you don't want to, that is up to you, but I am asking you to.

Mr. LEWIS. Yes, sir. Well, if you ask, I will do my best. I don't know what else I can say other than we were influenced by the strong nature of the wording from the Federal Reserve and the Treasury in the sense that they obviously felt very strongly that we did not have a MAC. I also still thought we had strategic reason to do Merrill Lynch, despite the fact it had a financial issue. And then, third, I thought the downside of calling the MAC and not winning was pretty severe. So all of those factors were factors in me making that decision. But if I had thought that it was a MAC and all these other things didn't matter, I would have called a MAC, or we would have called a MAC.

Mr. CUMMINGS. I see my time is up, Mr. Chairman.

Chairman TOWNS. Let me thank the gentleman from Maryland and let me say that, as we come to the conclusion of this hearing, it is important to remember that we have heard only one side of the story today. The committee needs to hear from Mr. Paulson and Mr. Bernanke before we draw any hard and fast conclusions. I do believe in fairness.

However, I do think it is fair to observe that a flawed financial regulatory process was at work in this case. We see closed door meetings, coded messages, motives, questions, and private emails. Basically, the regulators and financial institutions seemed to be making up the rules as they went along.

As Congress considers financial regulatory reform, one of the lessons from this case is that we need much more transparency and accountability in the financial regulatory and oversight process. The American taxpayers and corporate shareholders deserve no less. They need to know what is going on.

Let me again thank you, Mr. Lewis, for being here today. Before we adjourn, let me state that this committee has and will continue to protect the American taxpayers, and will continue to make sure the taxpayers' dollars are spent in a transparent and wise manner.

Without objection, I enter this binder into the committee record and, without objection, the committee stands adjourned.

[Whereupon, at 1:25 p.m., the committee was adjourned.]

[The prepared statements of Hon. Edolphus Towns, Hon. Diane E. Watson, Hon. Gerald E. Connolly, and additional information submitted for the hearing record follow:]

Closing Statement of Chairman Edolphus Towns

As we come to the conclusion of this hearing it's important to remember that we have heard only one side of the story today. The Committee needs to hear from Mr. Paulson and Mr. Bernanke before we draw any hard and fast conclusions.

However, I do think it is fair to observe that a flawed financial regulatory process was at work in this case. We see closed door meetings, coded messages, motives questioned and private e-mails. Basically the regulators and the financial institutions seemed to be making up the rules as they went along.

As Congress considers financial regulatory reform, one of the lessons from this case is that we need much more transparency and accountability in our financial regulatory and oversight process. The American taxpayers and corporate shareholders deserve no less.

Opening
OF
Statement

Congresswoman Diane E. Watson

"Bank of America and Merrill Lynch: How did a Private Deal Turn into a Federal Bailout?"

Joint Hearing
Oversight and Government Reform Committee
Domestic Policy Hearing Subcommittee

Thursday, June 11, 2009
2154 Rayburn HOB
10:00 A.M.

Thank you Chairman Towns, Chairman Kucinich, and Ranking Member Issa for working together to hold today's important hearing on the merger between Bank of America and Merrill Lynch, and the $45 billion in direct Federal assistance Bank of America has received since September 2008. I look forward to hearing the perspective of today's sole witness, Bank of America CEO Kenneth Lewis, on the sequence of events which allowed Bank of America to acquire Merrill Lynch

during the same period of time it was determined a Federal bailout was necessary for their survival.

The current global economic crisis is a result of a systemic unwillingness on behalf of institutions and individuals at all levels to routinely self-examine their financial practices to verify that they are responsible and sustainable in the long run. Now, as we continue to implement an unprecedented reorientation of the relationship between business and government it is critical that we apply this lesson to our oversight of the actions of the second largest recipient of TARP funds- Bank of America.

I look forward to hearing more detailed insight into the role Federal officials played in the orchestration of

the merger, the factors which guided Bank of America's decision to acquire Merrill Lynch, the perceived consequences of the merger, how the acquisition transformed from a private deal to a public bailout, and CEO Lewis's vision for the future of Bank of America.

Thank you Mr. Chairman and I yield back.

Opening Statement of Congressman Gerald E. Connolly

Committee on Oversight and Government Reform

Bank of America and Merrill Lynch: How Did a Private Deal Turn Into a Federal Bailout?

June 11th, 2009

Thank you, Chairman Towns for convening this hearing. The sequence of events that we are investigating is truly incredible. What seemed to be a private bank merger ended up being subsidized by taxpayers, with absolutely no oversight or approval by Congress. Once again we are reminded of the folly of TARP as executed by the prior administration, and of how essential our role as an oversight body is in the present.

The founders of this country could not have imagined vesting a single unelected individual with the power that Secretary Paulson accrued by the end of 2008, when he apparently brokered a taxpayer-subsidized merger of Bank of America and Merrill Lynch. Perhaps we have come too far from our political moorings when we have leapt far beyond the Hamiltonian and Jacksonian debates about national infrastructure investments and national banks, and now find ourselves with the equivalent of a national CEO who has the authority to merge or terminate private companies.

As disturbing as the power and the secrecy of the newly empowered Secretary of the Treasury may be, we have too much taxpayer money at stake merely to lament the mistakes of a prior administration. Our most germane task today is to determine how we can maximize taxpayer return on an investment.

I am troubled by reports that many of the same individuals who oversaw the merger of Bank of America and Merrill Lynch have since ascended to positions of greater authority or appear prepared to do so. I cannot fathom why Bank of America's chief risk officer would be replaced with the person who oversaw the merger for Bank of America, and who did not notice a $12 billion hole in the deal until it was nearly executed.

While we cannot undo the mistakes of the prior administration I would hope that we can use our newfound authority through the Treasury to root out the individuals who executed a flawed merger which necessitated an infusion of $20 billion of taxpayer money. Otherwise it may be unrealistic to expect that we will recover our investments.

Once again, I thank the Chairman for convening this meeting and look forward to applying what we learn today to protect taxpayer money invested in poorly planned bailouts executed by the prior administration.

Thursday, June 11, 2009
Room 2154 of the Rayburn House Building

"Bank of America and Merrill Lynch: How Did a Private Deal Turn Into a Federal Bailout?"

Exhibit Book

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Bank of America

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Press Release

Bank of America Buys Merrill Lynch Creating Unique Financial Services Firm

Combines leading global wealth management, capital markets and advisory company with largest consumer and corporate bank in U.S.

CHARLOTTE (September 15, 2008) -- Bank of America Corporation today announced it has agreed to acquire Merrill Lynch & Co., Inc. in a $50 billion all-stock transaction that creates a company unrivalled in its breadth of financial services and global reach.

"Acquiring one of the premier wealth management, capital markets, and advisory companies is a great opportunity for our shareholders," Bank of America Chairman and Chief Executive Officer Ken Lewis said. "Together, our companies are more valuable because of the synergies in our businesses."

"Merrill Lynch is a great global franchise and I look forward to working with Ken Lewis and our senior management teams to create what will be the leading financial institution in the world with the combination of these two firms," said John Thain, chairman and CEO of Merrill Lynch.

Under terms of the transaction, Bank of America would exchange .8595 shares of Bank of America common stock for each Merrill Lynch common share. The price is 1.8 times stated tangible book value.

Bank of America expects to achieve $7 billion in pre-tax expense savings, fully realized by 2012. The acquisition is expected to be accretive to earnings by 2010.

The transaction is expected to close in the first quarter of 2009. It has been approved by directors of both companies and is subject to shareholder votes at both companies and standard regulatory approvals.

Under the agreement, three directors of Merrill Lynch will join the Bank of America Board of Directors.

The combined company would have leadership positions in retail brokerage and wealth management. By adding Merrill Lynch's more than 16,000 financial advisers, Bank of America would have the largest brokerage in the world with more than 20,000 advisers and $2.5 trillion in client assets.

The combination brings global scale in investment management, including an approximately 50 percent ownership in BlackRock, which has $1.4 trillion in assets under management. Bank of America has $589 billion in assets under management.

Adding Merrill Lynch both enhances current strengths at Bank of America and creates new ones, particularly outside of the United States. Merrill Lynch adds strengths in global debt underwriting, global equities and global merger and acquisition advice.

After the acquisition, Bank of America would be the number one underwriter of global high yield debt, the third largest underwriter of global equity and the ninth largest adviser on global mergers and acquisitions based on pro forma first half of 2008 results.

Bank of America was advised by J.C. Flowers & Co. LLC, Fox-Pitt Kelton Cochran Caronia Waller and Bank of America Securities.

Latest News

Fully FDIC Insured Sweep Now Available Through the Merrill Lynch Bank Deposit Program

Merrill Lynch Fund Manager Survey Finds Risk Appetite Returning as Aversion to Banks Eases

Bank of America Merrill Lynch Hires Bryan Weadock as Head of Americas Fixed Income Sales

More news

It was represented by Wachtell, Lipton, Rosen & Katz. Merrill Lynch was represented by Shearman & Sterling.

Bank of America

Bank of America is one of the world's largest financial institutions, serving individual consumers, small and middle market businesses and large corporations with a full range of banking, investing, asset management and other financial and risk-management products and services. The company provides unmatched convenience in the United States, serving more than 59 million consumer and small business relationships with more than 6,100 retail banking offices, more than 18,500 ATMs and award-winning online banking with more than 25 million active users. Bank of America offers industry leading support to more than 4 million small business owners through a suite of innovative, easy-to-use online products and services. The company serves clients in more than 150 countries and has relationships with 99 percent of the U.S. Fortune 500 companies and 83 percent of the Fortune Global 500. Bank of America Corporation stock (NYSE: BAC) is a component of the Dow Jones Industrial Average and is listed on the New York Stock Exchange. http://www.bankofamerica.com/

Note: Bank of America Chief Executive Officer Ken Lewis, Chief Financial Officer Joe Price and Merrill Lynch Chief Executive Officer John Thain will hold a conference call 8 a.m. EDT on Monday, September 15 for investors. The presentation and supporting materials can be accessed on the Bank of America Investor Relations Web site at http://investor.bankofamerica.com/. For a listen-only connection to the conference call, dial 877-585-6241 in the U.S. and 785-424-1734 from outside the U.S. The conference passcode is 79795.

Lewis and Thain will also host a press conference at 10 a.m. in the auditorium at Bank of America's New York City headquarters, One Bryant Park. A webcast will be available at http://investor.bankofamerica.com/

Merrill Lynch

Merrill Lynch is one of the world's leading wealth management, capital markets and advisory companies, with offices in 40 countries and territories and total client assets of approximately $1.6 trillion. As an investment bank, it is a leading global trader and underwriter of securities and derivatives across a broad range of asset classes and serves as a strategic advisor to corporations, governments, institutions and individuals worldwide. Merrill Lynch owns approximately half of BlackRock, one of the world's largest publicly traded investment management companies with $1.4 trillion in assets under management at June 30, 2008. For more information on Merrill Lynch, please visit www.ml.com.
www.bankofamerica.com

Forward-Looking Statements

This press release contains forward-looking statements, including statements about the financial conditions, results of operations and earnings outlook of Bank of America Corporation. The forward-looking statements involve certain risks and uncertainties. Factors that may cause actual results or earnings to differ materially from such forward-looking statements include, among others, the following: 1) projected business increases following process changes and other investments are lower than expected; 2) competitive pressure among financial services companies increases significantly; 3) general economic conditions are less favorable than expected; 4) political conditions including the threat of future terrorist activity and related actions by the United States abroad may adversely affect the company's businesses and economic conditions as a whole; 5) changes in the interest rate environment and market liquidity reduce interest margins, impact funding sources and effect the ability to originate and distribute financial products in the

primary and secondary markets; 6) changes in foreign exchange rates increases exposure; 7) changes in market rates and prices may adversely impact the value of financial products; 8) legislation or regulatory environments, requirements or changes adversely affect the businesses in which the company is engaged; 9) changes in accounting standards, rules or interpretations, 10) litigation liabilities, including costs, expenses, settlements and judgments, may adversely affect the company or its businesses; 11) mergers and acquisitions and their integration into the company; and 12) decisions to downsize, sell or close units or otherwise change the business mix of any of the company. Accordingly, readers are cautioned not to place undue reliance on forward-looking statements, which speak only as of the date on which they are made. Bank of America does not undertake to update forward-looking statements to reflect the impact of circumstances or events that arise after the date the forward-looking statements are made. For further information regarding Bank of America Corporation, please read the Bank of America reports filed with the SEC and available at www.sec.gov.

Additional Information About this Transaction

In connection with the proposed merger, Bank of America will file with the SEC a Registration Statement on Form S-4 that will include a joint proxy statement of Bank of America and Merrill Lynch that also constitutes a prospectus of Bank of America. Bank of America and Merrill Lynch will mail the joint proxy statement/prospectus to their respective stockholders. Bank of America and Merrill Lynch urge investors and security holders to read the joint proxy statement/prospectus regarding the proposed merger when it becomes available because it will contain important information. You may obtain copies of all documents filed with the SEC regarding this transaction, free of charge, at the SEC's website (www.sec.gov). You may also obtain these documents, free of charge, from Bank of America's website (www.bankofamerica.com) under the tab "About Bank of America" and then under the heading "Investor Relations" and then under the item "SEC Filings". You may also obtain these documents, free of charge, from Merrill Lynch's website (www.ml.com) under the tab "Investor Relations" and then under the heading "SEC Filings."

Proxy Solicitation

Bank of America, Merrill Lynch and their respective directors, executive officers and certain other members of management and employees may be soliciting proxies from stockholders in favor of the merger. Information regarding the persons who may, under the rules of the SEC, be considered participants in the solicitation of the stockholders in connection with the proposed merger will be set forth in the joint proxy statement/prospectus when it is filed with the SEC. You can find information about Bank of America's executive officers and directors in its definitive proxy statement filed with the SEC on March 19, 2008. You can find information about Merrill Lynch's executive officers and directors in its definitive proxy statement filed with the SEC on March 14, 2008. You can obtain free copies of these documents from Bank of America and Merrill Lynch using the contact information above.

Investors May Contact:
Kevin Stitt, Bank of America, 1.704.386.5667
Lee McEntire, Bank of America, 1.646.855.1183
Leyla Pakzad, Bank of America, 1.704.386.2024

Reporters May Contact:
Robert Stickler, Bank of America, 1.646-855-1182
Robert.Stickler@bankofamerica.com

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provides banking and investment products and other financial services.

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Investing in securities involves risks, and there is always the potential of losing money when you invest in securities.

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Bank of America Earns $4 Billion in 2008

Fourth-Quarter Net Loss of $1.79 Billion

Extends $115 Billion in New Credit in Fourth Quarter

$15.31 Billion Fourth-Quarter Net Loss at Merrill Lynch

U.S. Invests $20 Billion in Bank of America; Also Provides Insurance for $118 Billion in Exposure

Quarterly Dividend Reduced to $.01

CHARLOTTE, N.C., Jan. 16 /PRNewswire-FirstCall/ -- Bank of America Corporation today reported full-year 2008 profit of $4.01 billion compared with net income of $14.98 billion a year earlier.

(Logo: http://www.newscom.com/cgi-bin/prnh/20050720/CLW086LOGO-b)

Earnings after preferred dividends and available to common shareholders were $2.56 billion, or $0.55 per diluted share, down from $14.80 billion, or $3.30 per share.

In the fourth quarter of 2008, the company had a net loss of $1.79 billion compared with net income of $268 million a year earlier. The net loss applicable to common shareholders was $2.39 billion, or $0.48 per diluted share, down from net income of $215 million, or $0.05 per share, in the same period in 2007. Results include Countrywide Financial, which Bank of America purchased on July 1, but not Merrill Lynch & Co., Inc., which was acquired on January 1, 2009.

Fourth quarter results were driven by escalating credit costs, including additions to reserves, and significant writedowns and trading losses in the capital markets businesses. These actions reflect the deepening economic recession and extremely challenging financial environment, both of which significantly intensified in the last three months of 2008.

Global Consumer and Small Business Banking and Global Wealth and Investment Management were profitable, paced by Bank of America's successful and expanding deposit business. Negative results in Capital Markets and Advisory Services masked the profitability in Business Lending and Treasury Services within Global Corporate and Investment Banking.

Bank of America ended 2008 with a Tier 1 capital ratio of 9.15 percent.

Merrill Lynch preliminary results indicate a fourth-quarter net loss of $15.31 billion, or $9.62 per diluted share, driven by severe capital markets dislocations. (See the Transition Update section of this news release and supplemental earnings information provided on http://investor.bankofamerica.com for further details.)

In view of the continuing severe conditions in the markets and economy, the U.S. government agreed to assist in the Merrill acquisition by making a further investment in Bank of America of $20 billion in preferred stock carrying an 8 percent dividend rate.

In addition, the government has agreed to provide protection against further losses on $118 billion in selected capital markets exposure, primarily from the former Merrill Lynch portfolio. Under the agreement, Bank of America would cover the first $10 billion in losses and the government would cover 90 percent of any subsequent losses. Bank of America would pay a premium of 3.4 percent of those assets for this program.

On a pro forma basis, this additional capital would boost the company's Tier 1 capital ratio to approximately 10.70 percent.

In light of continuing severe economic and financial market conditions, the Bank of America Board of Directors has declared a first-quarter dividend of $.01 per share payable March 27, 2009 to shareholders of record as of March 6, 2009.

Combined, these actions strengthen Bank of America and will allow the company to continue business levels that both support the U.S. economy and create future value for shareholders.

Bank of America extended more than $115 billion in new credit in the fourth quarter. It is increasing staff in its mortgage unit to meet a surge in demand that began late in December as mortgage rates fell. The company continues to prudently extend credit to commercial and consumer borrowers throughout its product line.

Customer Highlights

-- Of the more than $115 billion in new credit extended during the quarter, about $49 billion was in commercial non-real estate; $45 billion was in mortgages; nearly $8 billion was in domestic card and unsecured consumer loans; nearly $7 billion was in commercial real estate; more than $5 billion was in home equity products; and approximately $2 billion was in consumer Dealer Financial Services.

-- During the fourth quarter, Small Business Banking extended nearly $1 billion in new credit to over 47,000 new customers.

-- Mortgages made to low- and moderate-income borrowers and areas totaled $11.3 billion in the fourth quarter, serving more than 77,000 borrowers.

-- To help homeowners avoid foreclosure, Bank of America and Countrywide modified approximately 230,000 home loans during 2008. This year the company embarked on a loan modification program projected to modify over $100 billion in loans to help keep up to 630,000 borrowers in their homes. The centerpiece of the program is a proactive loan modification process to provide relief to eligible borrowers who are seriously delinquent or are likely to become seriously delinquent as a result of loan features, such as rate resets or payment recasts. In some instances, innovative new approaches will be employed to include automatic streamlined loan modifications across certain classes of borrowers. The program utilizes an affordability equation to qualify borrowers for loan modifications at a targeted first year mortgage debt to income ratio of 34 percent.

-- The company established a lending initiative group: senior officers meeting with the chief executive every week to evaluate how much Bank of America is lending, to whom, and what more can be done while remaining prudent and responsible. The company will report findings monthly.

Fourth Quarter 2008 Financial Summary

Revenue and Expense

Revenue net of interest expense on a fully taxable-equivalent basis rose 19 percent to $15.98 billion from $13.45 billion a year earlier.

Net interest income on a fully taxable-equivalent basis rose 37 percent to $13.41 billion from $9.82 billion in the fourth quarter of 2007 on higher market-based income, the favorable rate environment, loan growth and the acquisition of Countrywide. The net interest yield improved 70 basis points to 3.31 percent.

Noninterest income declined 29 percent to $2.57 billion from $3.64 billion a year earlier. Mortgage banking income, gains on sales of debt securities, insurance premiums and service charges increased. The increases were more than offset by sales and trading losses in the Capital Markets and Advisory Services business.

Noninterest expense rose 5 percent to $10.95 billion from a year earlier mainly because of the addition of Countrywide, which was partially offset by lower personnel costs. Pretax merger and restructuring charges related to acquisitions were $306 million compared with $140 million a year earlier. Given the capital markets disruptions, the company's efficiency ratio remains above normal levels.

Credit Quality

Credit quality deteriorated further during the quarter as the recession worsened. Consumers continued to experience high levels of stress from declining home prices, rising unemployment and tighter credit conditions. These factors led to higher losses and an increase in delinquencies in all consumer portfolios.

Declining home values, a slowdown in consumer spending and continued turmoil in the global financial markets negatively impacted the commercial portfolios. Commercial losses increased during the quarter driven by higher broad-based losses in the non-real estate domestic portfolios, the homebuilder portfolio, and several large defaults by foreign financial services borrowers.

Nonperforming assets were $18.23 billion or 1.96 percent of total loans, leases and foreclosed properties, compared with $13.58 billion, or 1.45 percent, at September 30 and $5.95 billion, or 0.68 percent, at December 31, 2007.

Total managed net losses were $7.40 billion, or 2.84 percent, of total average managed loans and leases compared with $6.11 billion, or 2.32 percent, in the third quarter and $3.28 billion, or 1.34 percent, in the fourth quarter of 2007.

Net charge-offs were $5.54 billion, or 2.36 percent of total average loans and leases compared with $4.36 billion, or 1.84 percent, in the third quarter and $1.99 billion, or 0.91 percent, in the fourth quarter of 2007.

The provision for credit losses was $8.54 billion, up from $6.45 billion in the third quarter and $3.31 billion in the fourth quarter of 2007. The company added $2.99 billion to the allowance for loan and lease losses during the quarter. The additions were across most consumer portfolios reflecting economic stress on consumers. Reserves were also increased on commercial portfolios.

Capital Management

Total shareholders' equity was $177.05 billion at December 31. Period-end assets were $1.82 trillion. The Tier 1 capital ratio was 9.15 percent, up from 7.55 percent at September 30, 2008. The Tier 1 ratio was 6.87 percent a year earlier.

Bank of America issued 455 million common shares for $9.88 billion, $15 billion of preferred stock issued to the U.S. Department of the Treasury and did not repurchase any shares in the period. Period-end common shares issued and outstanding were 5.02 billion for the fourth quarter of 2008, 4.56 billion for the third quarter of 2008 and 4.44 billion in the year-ago quarter. The company paid a cash dividend of $0.32 per common share and recorded $472 million in preferred dividends during the quarter. An additional $131 million of preferred dividends were deducted in the calculation of net income applicable to common shareholders.

In January 2009, an additional $10 billion of preferred stock (part of the original $25 billion assigned to Bank of America and Merrill Lynch) was issued to the U.S. Department of the Treasury as part of the Troubled Asset Relief Program (TARP). The company also issued approximately 1.4 billion shares of common stock associated with the acquisition of Merrill Lynch.

Full-Year 2008 Financial Summary

Revenue and Expense

Revenue on a fully taxable-equivalent basis increased 8 percent to $73.98 billion from $68.58 billion a year earlier.

Net interest income on a fully taxable-equivalent basis increased to $46.55 billion from $36.19 billion in 2007 on higher market-based income, consumer and commercial loan growth, the favorable rate environment and the addition of Countrywide and LaSalle. The net interest yield widened 38 basis points to 2.98 percent reflecting the more favorable interest rate environment and product mix.

Noninterest income fell 15 percent to $27.42 billion from $32.39 billion in 2007. Writedowns in the wake of market disruptions of $10.47 billion reduced results. Higher mortgage banking income, service charges and insurance premiums along with an increase in gains on sales of debt securities partially offset the decline.

Noninterest expense increased 11 percent to $41.53 billion from $37.52 billion a year ago mainly due to the addition of Countrywide. The increase was partially offset by lower incentive compensation. Given the capital markets disruptions, the company's efficiency ratio remains above normal levels.

Credit Quality

Provision expense increased $18.44 billion to $26.83 billion in 2008 because of higher net charge-offs and additions to the reserve. The majority of the reserve additions were in the consumer and small business portfolios as the housing markets weakened and the economy slowed. Reserves on commercial portfolios were increased as the homebuilder and commercial domestic portfolios within Global Corporate and Investment Banking deteriorated.

Total managed net losses were $22.90 billion during 2008, or 2.27 percent of total average managed loans and leases, compared with $11.25 billion or 1.29 percent during the prior year. Net charge-offs totaled $16.23 billion, or 1.79 percent of average loans and leases, compared with $6.48 billion, or 0.84 percent in 2007. Portfolios directly tied to housing, including home equity, residential mortgage and homebuilders drove a significant portion of the increase. The weaker economy also drove higher levels of net losses across the Card Services portfolios as well as the commercial portfolios.

Capital Management

For 2008, Bank of America recorded $10.26 billion in dividends to common shareholders and $1.32 billion to preferred shareholders. The company also issued approximately 580 million common shares, including 455 million during the fourth quarter and 107 million related to the Countrywide acquisition. In addition, Bank of America obtained nearly $35 billion in additional capital in connection with preferred stock issuances throughout the year.

2008 Business Segment Results

Global Consumer and Small Business Banking(1)

(Dollars in millions)	2008	2007
Total managed revenue, net of interest expense(2)	$58,344	$47,855
Provision for credit losses(3)	26,841	12,920
Noninterest expense	24,937	20,349
Net income	4,234	9,362
Efficiency ratio(2)	42.74%	42.52%
Return on average equity	5.78	14.81
Managed loans(4)	$350,264	$294,030
Deposits(4)	370,961	330,661
	At 12/31/08	At 12/31/07
Period ending deposits	$393,165	$346,908

1 Results shown on a managed basis. Managed basis assumes that loans that have been securitized were not sold and presents earnings on these loans in a manner similar to the way loans that have not been sold (i.e., held loans) are presented. For more information and detailed reconciliation, please refer to the data pages supplied with this Press Release.

2 Fully taxable-equivalent basis

3 Represents provision for credit losses on held loans combined with realized credit losses associated with the securitized loan portfolio

4 Balances averaged for period

Global Consumer and Small Business Banking net income declined from a year ago as credit costs more than doubled. Expenses rose mostly on the addition of Countrywide.

Managed net revenue rose 22 percent due to the Countrywide acquisition and organic loan

and deposit growth.

The provision for credit losses increased by $13.92 billion to $26.84 billion. Net losses increased $8.38 billion to $19.18 billion as housing market deterioration and weak economic conditions impacted most consumer portfolios. Loan loss reserve additions related to deterioration and increased delinquencies contributed to higher credit costs.

-- Deposits and Student Lending net income increased by 9 percent to $6.21 billion, while net revenue increased 10 percent to $20.65 billion as net interest income, service charges and debit card income all showed strong growth.

-- Card Services net income fell 85 percent to $521 million as credit costs rose. Managed net revenue grew 12 percent to $28.43 billion as higher average loan balances increased net interest income.

-- Mortgage, Home Equity and Insurance Services reported a net loss of $2.50 billion as home equity credit costs rose. Higher noninterest expense was offset by increases in mortgage banking income, net interest income and insurance premiums. Expense and revenue increases are due to the addition of Countrywide.

Fourth-quarter net income for Global Consumer and Small Business Banking declined 56 percent to $835 million from a year earlier. The provision for credit losses rose 77 percent as the economy weakened, and expenses rose 28 percent due to the addition of Countrywide. Net revenue increased 26 percent to $15.91 billion on higher net interest income, mortgage banking income and insurance premiums related to the addition of Countrywide and organic loan and deposit growth.

Global Corporate and Investment Banking

(Dollars in millions)	2008	2007
Total revenue, net of interest expense(1)	$13,440	$13,651
Provision for credit losses	3,080	658
Noninterest expense	10,381	12,198
Net income (loss)	(14)	510
Efficiency ratio(1)	77.24%	89.36%
Return on average equity	(0.02)	1.12
Loans and leases(2)	$337,352	$274,725
Trading-related assets(2)	341,544	362,195
Deposits(2)	239,097	219,891

1 Fully taxable-equivalent basis
2 Balances averaged for period

Global Corporate and Investment Banking had a net loss of $14 million on significant writedowns, higher credit costs and lower net revenue. A 48 percent increase in net interest income and higher service charges and investment banking income were more than offset by market disruption charges of $10.47 billion, which were $6.45 billion a year earlier. Included in those charges were CDO-related writedowns of $4.78 billion, down from $5.65 billion during 2007, and leveraged loan writedowns of $1.08 billion, compared with $196 million a year earlier.

The provision for credit losses increased $2.42 billion to $3.08 billion. Net charge-offs rose from low 2007 levels and with the exception of homebuilders were across a broad range of borrowers and industries. Reserves were increased due to deterioration in the homebuilder, commercial domestic and dealer-related portfolios.

-- Business Lending net income decreased 14 percent to $1.72 billion as strong revenue growth and lower expenses were offset by higher credit costs. Net revenue increased 29 percent to $7.82 billion on organic and merger- related average loan growth of more than

$62 billion.

-- Capital Markets and Advisory Services recorded a net loss of $4.95 billion compared with a net loss of $3.39 billion a year earlier. Net revenue losses of $3.02 billion were lower compared with net revenue of $549 million a year earlier, driven by writedowns associated with credit-related positions including CDO-related investments and auction rate securities.

-- Treasury Services net income increased 28 percent to $2.73 billion as net revenue grew 10 percent to $7.78 billion. Net revenue increased as favorable pricing and increased volume drove deposits and service charges higher. Both revenue and expenses were favorably impacted by the Visa IPO.

Global Corporate and Investment Banking reported a net loss of $2.44 billion for the quarter, compared with a net loss of $2.77 billion last year. The net loss narrowed on lower market disruption losses, higher net interest income due to lower short term rates, wider spreads and increased customer balances, and investment banking income, offset by higher credit costs.

Capital Markets and Advisory Services had negative net revenue of $4.64 billion in the period.

Market disruption-related impacts of $4.61 billion in the quarter include:

-- Total CDO-related losses of $1.72 billion.

-- Writedowns of commercial mortgage-backed securities and related transactions of $853 million.

-- Leveraged lending-related writedowns of $429 million.
-- Writedowns on auction rate securities of $353 million.

Global Wealth and Investment Management

(Dollars in millions)	2008	2007
Total revenue, net of interest expense(1)	$7,785	$7,553
Provision for credit losses	664	14
Noninterest expense	4,904	4,480
Net income	1,416	1,960
Efficiency ratio(1)	62.99%	59.31%
Return on average equity	12.11	19.83
Loans(2)	$87,591	$73,473
Deposits(2)	159,525	124,871

(in billions)	At 12/31/08	At 12/31/07
Assets under management	$524.0	$643.5

1 Fully taxable-equivalent basis
2 Balances averaged for period

Net income declined 28 percent to $1.42 billion as support for certain cash funds increased and credit costs rose.

Net revenue increased 3 percent from the 2007 addition of U.S. Trust and LaSalle and organic loan and deposit growth. The increase was offset by support to certain cash funds, writedowns related to auction rate securities and weaker equity markets.

The provision for credit losses increased $650 million to $664 million as a result of additions

to the reserve and higher net charge-offs reflecting housing market deterioration and the slowing economy.

-- U.S. Trust, Bank of America Private Wealth Management net income declined 2 percent to $460 million. Net revenue rose 14 percent to $2.65 billion due to the addition of U.S. Trust and LaSalle, partially offset by the weaker equity markets.

-- Columbia Management reported a net loss of $459 million compared with net income of $21 million a year ago mainly due to an additional $725 million in support provided to certain cash funds and weaker equity markets.

-- Premier Banking and Investments net income fell 54 percent to $584 million as credit costs increased by $534 million on higher home equity loan losses. Net revenue decreased 15 percent to $3.20 billion on lower net interest income as spread compression driven by deposit mix and competitive deposit pricing more than offset deposit growth.

Fourth-quarter net income for Global Wealth and Investment Management increased 65 percent to $511 million compared with a year earlier due to higher net revenue and lower expenses. Net revenue increased 12 percent to $1.98 billion as higher net interest income driven by growth in loans and deposits was partially offset by weaker equity markets. Expenses declined 2 percent on lower incentive compensation.

All Other(1)

(Dollars in millions)	2008	2007
Total revenue net of interest expense(2)	$(5,593)	$(477)
Provision for credit losses(3)	(3,760)	(5,207)
Merger and restructuring charges	935	410
All other noninterest expense	372	87
Net income (loss)	(1,628)	3,150
Loans and leases(4)	$135,671	$133,926

1 All Other consists primarily of equity investments, the residential mortgage portfolio associated with asset and liability management activities, the residual impact of the cost allocation processes, merger and restructuring charges, intersegment eliminations, and the results of certain consumer finance, investment management and commercial lending businesses that are being liquidated. All Other also includes the offsetting securitization impact to present Card Services on a managed basis. Our view of Global Consumer and Small Business Banking operations are also shown on a managed basis. For more information and detailed reconciliation, please refer to the data pages supplied with this Press Release.

2 Fully taxable-equivalent basis

3 Represents the provision for credit losses in All Other combined with the GCSBB securitization offset.

4 Balances averaged for period

All Other had a net loss of $1.63 billion for 2008 compared with net income of $3.15 billion a year earlier. For the fourth quarter, the net loss of $693 million compared with net income of $830 million a year earlier. The declines are attributable to lower equity investment income, higher credit costs and increased merger and restructuring charges, which more than offset gains on the sales of debt securities. Results were also adversely impacted by the absence of earnings due to the sale of certain businesses and foreign operations during 2007. Credit costs rose, primarily in the residential mortgage portfolio due to deterioration in the housing markets and the impacts of a slowing economy.

Transition Update

(Merrill Lynch results are not part of Bank of America fourth-quarter or full-year 2008

results)

Merrill Lynch was acquired on January 1, 2009 creating a premier financial services franchise with significantly enhanced wealth management, investment banking and international capabilities.

Merrill Lynch preliminary results indicate a fourth-quarter net loss of $15.31 billion, or $9.62 per diluted share, driven by severe capital markets dislocations.

Merrill Lynch's Global Wealth Management division generated $2.6 billion in net revenue in the period as fees held up well in the declining markets. The strongest performance came from the U.S. Advisory portion of the business. Retention of financial advisors remains consistent with historical trends.

Significant negative fourth-quarter items for Merrill Lynch include:

-- Credit valuation adjustments related to monoline financial guarantor exposures of $3.22 billion.

-- Goodwill impairments of $2.31 billion.

-- Leveraged loan writedowns of $1.92 billion.

-- $1.16 billion in the U.S. Bank Investment Securities Portfolio writedowns.

-- Commercial real estate writedowns of $1.13 billion.

The LaSalle transition reached a significant milestone in the quarter with successful systems conversions, marking the completion of the integration. In addition, cost savings exceeded original projections.

The integration of Countrywide is on track and expected to reach targeted cost savings, which are currently expected to be around $900 million after-tax and are expected to be fully realized by 2011.

Note: Chief Executive Officer Kenneth D. Lewis and Chief Financial Officer Joe L. Price will discuss fourth-quarter 2008 results in a conference call at 7 a.m. (Eastern Time) today. The presentation and supporting materials can be accessed on the Bank of America Investor Relations Web site at http://investor.bankofamerica.com. For a listen-only connection to the conference call, dial 877.585.6241 (domestic) or 785.424.1732 (international) and the conference ID: 79795.

Bank of America

Bank of America is one of the world's largest financial institutions, serving individual consumers, small and middle market businesses and large corporations with a full range of banking, investing, asset management and other financial and risk-management products and services. The company provides unmatched convenience in the United States, serving more than 59 million consumer and small business relationships with more than 6,100 retail banking offices, nearly 18,700 ATMs and award-winning online banking with nearly 29 million active users. Following the acquisition of Merrill Lynch on January 1, 2009, Bank of America is among the world's leading wealth management companies and is a global leader in corporate and investment banking and trading across a broad range of asset classes serving corporations, governments, institutions and individuals around the world. Bank of America offers industry-leading support to more than 4 million small business owners through a suite of innovative, easy-to-use online products and services. The company serves clients in more than 40 countries. Bank of America Corporation stock is a component of the Dow Jones Industrial Average and is listed on the New York Stock Exchange.

Forward-Looking Statements

Bank of America may make forward-looking statements, including, for example, statements about management expectations and intentions regarding our future financial results, integration plans and cost savings, growth opportunities, business outlook, loan and deposit growth, mortgage production, credit losses, and other similar matters. These forward-looking statements are not historical facts, but instead represent Bank of America's current expectations, intentions or forecasts of future events, circumstances or results. These

statements are not guarantees of future results or performance and involve certain risks, uncertainties and assumptions that are difficult to predict and often are beyond Bank of America's control. Actual outcomes and results may differ materially from those expressed in, or implied by, any of these forward-looking statements.

You should not place undue reliance on any forward-looking statement and should consider the following possible events or factors that could cause results or performance to differ materially from those expressed in the forward-looking statements: negative economic conditions; changes in interest rates and market liquidity; changes in foreign exchange rates; adverse movements and volatility in debt and equity capital markets; changes in market rates and prices, which may adversely impact the value of financial products and instruments; estimates of fair value of assets and liabilities; legislative and regulatory actions in the United States and internationally; liabilities resulting from litigation and regulatory investigations; changes in domestic or foreign tax laws, rules and regulations and governmental interpretations thereof; monetary and fiscal policies and regulations; changes in accounting standards, rules and interpretations; increased competition; the ability to grow Bank of America's core businesses; the ability to develop and introduce new banking-related products, services and enhancements; mergers and acquisitions and their integration; decisions to downsize, sell or close units or otherwise change Bank of America's business mix; management's ability to identify and manage these and other risks; and the other risk factors discussed in Bank of America's Annual Report on Form 10-K for 2007, Quarterly Report on Form 10-Q for the quarter ended September 30, 2008, and in any of Bank of America's other subsequent SEC filings.

Forward-looking statements speak only as of the date they are made, and Bank of America undertakes no obligation to update any forward-looking statement to reflect the impact of circumstances or events that arise after the date the forward-looking statement was made.

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Bank of America Corporation and Subsidiaries
Selected Financial Data
(Dollars in millions, except per share data; shares in thousands)

Summary Income Statement	Three Months Ended December 31		Year Ended December 31	
	2008	2007	2008	2007
Net interest income	$13,106	$9,165	$45,360	$34,441
Total noninterest income	2,574	3,639	27,422	32,392
Total revenue, net of interest expense	15,680	12,804	72,782	66,833
Provision for credit losses	8,535	3,310	26,825	8,385
Noninterest expense, before merger and restructuring charges	10,641	10,269	40,594	37,114
Merger and restructuring charges	306	140	935	410
Income (loss) before income taxes	(3,802)	(915)	4,428	20,924
Income tax expense (benefit)	(2,013)	(1,183)	420	5,942
Net income (loss)	$(1,789)	$268	$4,008	$14,982
Preferred stock dividends	603	53	1,452	182
Net income (loss) applicable to common shareholders	$(2,392)	$215	$2,556	$14,800
Earnings (loss) per common share	$(0.48)	$0.05	$0.56	$3.35
Diluted earnings				

(loss) per common share (1)	(0.48)	0.05	0.55	3.30

Summary Average Balance Sheet	Three Months Ended December 31		Year Ended December 31	
	2008	2007	2008	2007
Total loans and leases	$941,563	$868,119	$910,878	$776,154
Debt securities	280,942	206,873	250,551	186,466
Total earning assets	1,616,673	1,502,998	1,562,729	1,390,192
Total assets	1,948,854	1,742,467	1,843,979	1,602,073
Total deposits	892,141	781,625	831,144	717,182
Shareholders' equity	176,566	144,924	164,831	136,662
Common shareholders' equity	142,535	141,085	141,638	133,555

Performance Ratios	Three Months Ended December 31		Year Ended December 31	
	2008	2007	2008	2007
Return on average assets	(0.37)%	0.06 %	0.22 %	0.94 %
Return on average common shareholders' equity	(6.68)	0.60	1.80	11.08

Credit Quality	Three Months Ended December 31		Year Ended December 31	
	2008	2007	2008	2007
Total net charge-offs	$5,541	$1,985	$16,231	$6,480
Annualized net charge-offs as a % of average loans and leases outstanding (2)	2.36 %	0.91 %	1.79 %	0.84 %
Provision for credit losses	$8,535	$3,310	$26,825	$8,385
Total consumer credit card managed net losses	3,263	2,138	11,382	8,214
Total consumer credit card managed net losses as a % of average managed credit card receivables	7.16 %	4.75 %	6.18 %	4.79 %

	December 31	
	2008	2007
Total nonperforming assets	$18,232	$5,948
Nonperforming assets as a % of total loans, leases and foreclosed properties (2)	1.96 %	0.68 %
Allowance for loan and lease losses	$23,071	$11,588
Allowance for loan and lease losses as a % of total loans and leases (2)	2.49 %	1.33 %

Capital Management	December 31	
	2008	2007
Risk-based capital ratios:		
Tier 1	9.15 %	6.87 %
Total	13.00	11.02
Tangible equity ratio (3)	5.01	3.62
Tangible common equity ratio (4)	2.83	3.35
Period-end common shares issued and		

outstanding	5,017,436	4,437,885

	Three Months Ended December 31		Year Ended December 31	
	2008	2007	2008	2007
Shares issued	455,381	3,730	579,551	53,464
Shares repurchased	-	(2,700)	-	(73,730)
Average common shares issued and outstanding	4,957,049	4,421,554	4,592,085	4,423,579
Average diluted common shares issued and outstanding (1)	4,957,049	4,470,108	4,612,491	4,480,254
Dividends paid per common share	$0.32	$0.64	$2.24	$2.40

Summary Ending Balance Sheet	December 31	
	2008	2007
Total loans and leases	$931,446	$876,344
Total debt securities	277,589	214,056
Total earning assets	1,536,198	1,463,570
Total assets	1,817,943	1,715,746
Total deposits	882,997	805,177
Total shareholders' equity	177,052	146,803
Common shareholders' equity	139,351	142,394
Book value per share of common stock	$27.77	$32.09

(1) Due to the net loss for the three months ended December 31, 2008, the impact of antidilutive equity instruments have been excluded from diluted earnings per share and average diluted common shares.

(2) Ratios do not include loans measured at fair value in accordance with SFAS 159 at and for the three months and year ended December 31, 2008 and 2007.

(3) Tangible equity ratio equals shareholders' equity less goodwill and intangible assets divided by total assets less goodwill and intangible assets.

(4) Tangible common equity ratio equals common shareholders' equity less goodwill and intangible assets divided by total assets less goodwill and intangible assets.

Certain prior period amounts have been reclassified to conform to current period presentation.

Information for periods beginning July 1, 2008 includes the Countrywide acquisition; prior periods have not been restated. This information is preliminary and based on company data available at the time of the presentation.

Bank of America Corporation and Subsidiaries
Business Segment Results
(Dollars in millions)

Global Consumer and Small Business Banking (1)	Three Months Ended December 31		Year Ended December 31	
	2008	2007	2008	2007
Total revenue, net of interest expense (2)	$15,911	$12,621	$58,344	$47,855
Provision for credit losses (3)	7,584	4,287	26,841	12,920
Noninterest expense	7,145	5,572	24,937	20,349
Net income	835	1,899	4,234	9,362
Efficiency ratio (2)	44.91 %	44.15 %	42.74 %	42.52 %
Return on average equity	4.13	11.23	5.78	14.81
Average - total loans and leases	$364,114	$317,629	$350,264	$294,030
Average - total deposits	396,497	342,926	370,961	330,661

Deposits and Student Lending				
Total revenue, net of interest expense (2)	$5,364	$4,843	$20,649	$18,851
Net income	1,753	1,536	6,210	5,713
Card Services (1)				
Total revenue, net of interest expense (2)	7,316	6,590	28,433	25,315
Net income (loss)	(204)	498	521	3,590
Mortgage, Home Equity and Insurance Services				
Total revenue, net of interest expense (2)	3,231	1,188	9,262	3,689
Net income (loss)	(714)	(135)	(2,497)	59

Global Corporate and Investment Banking	Three Months Ended December 31		Year Ended December 31	
	2008	2007	2008	2007
Total revenue, net of interest expense (2)	$(265)	$(695)	$13,440	$13,651
Provision for credit losses	1,415	274	3,080	658
Noninterest expense	2,229	3,453	10,381	12,198
Net income (loss)	(2,442)	(2,771)	(14)	510
Efficiency ratio (2)	n/m	n/m	77.24 %	89.36 %
Return on average equity	(14.24)%	(20.53)%	(0.02)	1.12
Average - total loans and leases	$343,379	$327,622	$337,352	$274,725
Average - total deposits	249,301	235,730	239,097	219,891
Business Lending				
Total revenue, net of interest expense (2)	$2,226	$1,901	$7,823	$6,085
Net income	301	608	1,722	2,000
Capital Markets and Advisory Services				
Total revenue, net of interest expense (2)	(4,639)	(4,489)	(3,018)	549
Net income (loss)	(3,615)	(3,782)	(4,948)	(3,385)
Treasury Services				
Total revenue, net of interest expense (2)	1,916	1,890	7,784	7,104
Net income	756	488	2,732	2,136

Global Wealth and Investment Management	Three Months Ended December 31		Year Ended December 31	
	2008	2007	2008	2007
Total revenue, net of interest expense (2)	$1,984	$1,768	$7,785	$7,553
Provision for credit losses	152	34	664	14
Noninterest expense	1,068	1,297	4,904	4,480
Net income	511	310	1,416	1,960
Efficiency ratio (2)	53.77 %	73.34 %	62.99 %	59.31 %
Return on average equity	17.32	10.85	12.11	19.83
Average - total loans and leases	$88,874	$82,816	$87,591	$73,473
Average - total deposits	171,340	138,163	159,525	124,871
U.S. Trust (4)				
Total revenue, net of interest expense (2)	$640	$700	$2,650	$2,320
Net income	121	124	460	470
Columbia Management				
Total revenue, net of interest expense (2)	88	20	391	1,076
Net income (loss)	(64)	(175)	(459)	21
Premier Banking and Investments				
Total revenue, net of interest expense (2)	776	932	3,201	3,749
Net income	201	292	584	1,267

All Other (1)	Three Months Ended December 31		Year Ended December 31	
	2008	2007	2008	2007
Total revenue, net of interest expense (2)	$(1,650)	$(240)	$(5,593)	$(477)
Provision for credit losses (5)	(616)	(1,285)	(3,760)	(5,207)
Noninterest expense	505	87	1,307	497
Net income	(693)	830	(1,628)	3,150
Average - total loans and leases	145,196	140,052	135,671	133,926
Average - total deposits	75,003	64,806	61,561	41,759

(1) Global Consumer and Small Business Banking is presented on a managed basis, specifically Card Services, with a corresponding offset recorded in All Other.

(2) Fully taxable-equivalent (FTE) basis. FTE basis is a performance measure used by management in operating the business that management believes provides investors with a more accurate picture of the interest margin for comparative purposes.

(3) Represents provision for credit losses on held loans combined with realized credit losses associated with the securitized loan portfolio.

(4) In July 2007, the operations of the acquired U.S. Trust Corporation were combined with the former Private Bank to create U.S. Trust, Bank of America Private Wealth Management. The results of the combined business were reported for periods beginning on July 1, 2007. Prior to July 1, 2007, the results solely reflect that of the former Private Bank.

(5) Represents provision for credit losses in All Other combined with the Global Consumer and Small Business Banking securitization offset.

Certain prior period amounts have been reclassified to conform to current period presentation.

Information for periods beginning July 1, 2008 includes the Countrywide acquisition; prior periods have not been restated. This information is preliminary and based on company data available at the time of the presentation.

Bank of America Corporation and Subsidiaries
Supplemental Financial Data
(Dollars in millions)

Fully taxable-equivalent basis data	Three Months Ended December 31		Year Ended December 31	
	2008	2007	2008	2007
Net interest income	$13,406	$9,815	$46,554	$36,190
Total revenue, net of interest expense	15,980	13,454	73,976	68,582
Net interest yield	3.31 %	2.61 %	2.98 %	2.60 %
Efficiency ratio	68.51	77.36	56.14	54.71

Other Data	December 31	
	2008	2007
Full-time equivalent employees	243,075	209,718
Number of banking centers - domestic	6,139	6,149
Number of branded ATMs - domestic	18,685	18,753

Certain prior period amounts have been reclassified to conform to current period presentation.

Information for periods beginning July 1, 2008 includes the Countrywide acquisition; prior periods have not been restated. This information is preliminary and based on company data available at the time of the presentation.

Bank of America Corporation and Subsidiaries
Reconciliation - Managed to GAAP
(Dollars in millions)

The Corporation reports Global Consumer and Small Business Banking's results, specifically Card Services, on a managed basis. This basis of presentation excludes the Corporation's securitized mortgage and home equity portfolios for which the Corporation retains servicing. Reporting on a managed basis is consistent with the way that management evaluates the results of Global Consumer and Small Business Banking. Managed basis assumes that securitized loans were not sold and presents earnings on these loans in a manner similar to the way loans that have not been sold (i.e., held loans) are presented. Loan securitization is an alternative funding process that is used by the Corporation to diversify funding sources. Loan securitization removes loans from the Consolidated Balance Sheet through the sale of loans to an off- balance sheet qualified special purpose entity which is excluded from the Corporation's Consolidated Financial Statements in accordance with accounting principles generally accepted in the United States (GAAP).

The performance of the managed portfolio is important in understanding Global Consumer and Small Business Banking's and Card Services' results as it demonstrates the results of the entire portfolio serviced by the business. Securitized loans continue to be serviced by the business and are subject to the same underwriting standards and ongoing monitoring as held loans. In addition, retained excess servicing income is exposed to similar credit risk and repricing of interest rates as held loans. Global Consumer and Small Business Banking's managed income statement line items differ from a held basis reported as follows:

-- Managed net interest income includes Global Consumer and Small Business Banking's net interest income on held loans and interest income on the securitized loans less the internal funds transfer pricing allocation related to securitized loans.

-- Managed noninterest income includes Global Consumer and Small Business Banking's noninterest income on a held basis less the reclassification of certain components of card income (e.g., excess servicing income) to record managed net interest income and provision for credit losses. Noninterest income, both on a held and managed basis, also includes the impact of adjustments to the interest-only strip that are recorded in card income as management continues to manage this impact within Global Consumer and Small Business Banking.

-- Provision for credit losses represents the provision for credit losses on held loans combined with realized credit losses associated with the securitized loan portfolio.

Global Consumer and Small Business Banking

	Year Ended December 31, 2008		
	Managed Basis (1)	Securitization Impact (2)	Held Basis
Net interest income (3)	$33,851	$(8,701)	$25,150
Noninterest income:			
Card income	10,057	2,250	12,307
Service charges	6,807	-	6,807
Mortgage banking income	4,422	-	4,422
Insurance premiums	1,968	(186)	1,782
All other income	1,239	(33)	1,206
Total noninterest income	24,493	2,031	26,524
Total revenue, net of interest expense	58,344	(6,670)	51,674
Provision for credit losses	26,841	(6,670)	20,171
Noninterest expense	24,937	-	24,937
Income before income taxes	6,566	-	6,566
Income tax expense (3)	2,332	-	2,332
Net income	$4,234	$-	$4,234
Average - total loans and leases	$350,264	$(104,401)	$245,863

All Other

	Year Ended December 31, 2008		
	Reported Basis (4)	Securitization Offset (2)	As Adjusted
Net interest income (3)	$(8,610)	$8,701	$91
Noninterest income:			
Card income	2,164	(2,250)	(86)
Equity investment income	265	-	265

Gains on sales of debt securities	1,133	-	1,133
All other income (loss)	(545)	219	(326)
Total noninterest income	3,017	(2,031)	986
Total revenue, net of interest expense	(5,593)	6,670	1,077
Provision for credit losses	(3,760)	6,670	2,910
Merger and restructuring charges	935	-	935
All other noninterest expense	372	-	372
Income (loss) before income taxes	(3,140)	-	(3,140)
Income tax expense (benefit) (3)	(1,512)	-	(1,512)
Net income (loss)	$(1,628)	$-	$(1,628)
Average - total loans and leases	$135,671	$104,401	$240,072

Bank of America Corporation and Subsidiaries
Reconciliation - Managed to GAAP
(Dollars in millions)

Global Consumer and Small Business Banking

	Year Ended December 31, 2007		
	Managed Basis (1)	Securitization Impact (2)	Held Basis
Net interest income (3)	$28,712	$(8,027)	$20,685
Noninterest income:			
Card income	10,194	3,356	13,550
Service charges	6,007	-	6,007
Mortgage banking income	1,332	-	1,332
Insurance premiums	912	(250)	662
All other income	698	(38)	660
Total noninterest income	19,143	3,068	22,211
Total revenue, net of interest expense	47,855	(4,959)	42,896
Provision for credit losses	12,920	(4,959)	7,961
Noninterest expense	20,349	-	20,349
Income before income taxes	14,586	-	14,586
Income tax expense (3)	5,224	-	5,224
Net income	$9,362	$-	$9,362
Average - total loans and leases	$294,030	$(103,284)	$190,746

All Other

	Year Ended December 31, 2007		
	Reported Basis (4)	Securitization Offset (2)	As Adjusted
Net interest income (3)	$(7,645)	$8,027	$382
Noninterest income:			
Card income	2,817	(3,356)	(539)
Equity investment income	3,745	-	3,745
Gains on sales of debt securities	180	-	180
All other income (loss)	426	288	714
Total noninterest income	7,168	(3,068)	4,100
Total revenue, net of interest expense	(477)	4,959	4,482
Provision for credit losses	(5,207)	4,959	(248)
Merger and restructuring charges	410	-	410
All other noninterest expense	87	-	87
Income (loss) before income taxes	4,233	-	4,233
Income tax expense (benefit) (3)	1,083	-	1,083
Net income (loss)	$3,150	$-	$3,150
Average - total loans and leases	$133,926	$103,284	$237,210

(1) Provision for credit losses represents provision for credit losses on held loans combined with realized credit losses associated with the securitized loan portfolio.

(2) The securitization impact/offset on net interest income is on a funds transfer pricing methodology consistent with the way funding costs are allocated to the businesses.

(3) FTE basis

(4) Provision for credit losses represents provision for credit losses in All Other combined with the Global Consumer and Small Business Banking securitization offset.

Certain prior period amounts have been reclassified among the segments to conform to the current period presentation.

Information for periods beginning July 1, 2008 includes the Countrywide acquisition; prior periods have not been restated. This information is preliminary and based on company data available at the time of the presentation.

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Press conference Bank of America Acquiring Merrill Lynch - Final FD (Fair Disclosure) Wire September 15, 2008 Monday

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FD (**Fair Disclosure**) **Wire**

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BODY:

Corporate Participants

* Bob Stickler **Bank of America** - Contact * Ken Lewis **Bank of America** - Chairman, President, CEO * John Thain **Merrill Lynch** - Chairman, CEO

Conference Call Participants

* Rick Carol Financial Times - Analyst * Dan Gross Newsweek - Analyst * Andrew Clark The Guardian - Analyst * Heather Lende the Washington Post - Analyst * Liz Hester Bloomberg News - Analyst * Dan Fitzpatrick Wall Street Journal - Analyst * Marshall Eckblad Dow Jones Newswires - Analyst * Margaret Popper Bloomberg Television - Analyst * Rick Rothacker Charlotte Observer - Analyst * Jay Antenen - Analyst * Brad Keoun Bloomberg News - Analyst * Melissa Lee CNBC - Analyst

Presentation

BOB STICKLER, CONTACT, **BANK OF AMERICA**: (presentation already in progress) Bob Stickler. I'm from Corporate Communications at **Bank of America,** and I just want to briefly go over what the rules have to be in order for us to do this, since it's being broadcast live and also being webcast. So, we would appreciate, when you've got a question, that you wait for us to get you a mic so everybody who is on the phone and on the webcast can hear what the question is, and then if you want to direct your question to either Ken Lewis of **Bank of America** or John Thain of **Merrill Lynch.** We will also be, for those of you on the phone, be taking questions off the telephone during the conference.

So with that, I would like to turn it over to Ken Lewis of **Bank of America.**

KEN LEWIS, CHAIRMAN, PRESIDENT, CEO, **BANK OF AMERICA**: Welcome. We appreciate you coming. I don't have any prepared remarks. You've probably read about the deal or heard the analyst conversation.

We obviously have the opportunity, John and I do, and our teams, to create the premier financial services company in the world, and that's what we're going to be all about going forward. We thought this was the strategic opportunity of a lifetime, and I think that as much today as I did yesterday or the day before. So we are very, very pleased with this. We get no pushback about the strategic opportunity here. We can talk about deal details but everybody sees this opportunity, and it flows very well.

We can do so much more for our clients, both on the retail side and the corporate banking side, with the capabilities that **Merrill Lynch** brings for us. We always say, as we take care of our customers, they will take care of our shareholders, so we really believe that here.

We know we have some hard work to do in this transition, but in fact we're good at that and we intend to be very focused on having just the best transition ever done in the world to create the best financial service company in the world.

Again, I have nothing prepared but I will see if John wants to say anything, and after that, we will take your questions.

JOHN THAIN, CHAIRMAN, CEO, **MERRILL LYNCH**: Thank you, Ken. I would just echo what Ken said. This is a transaction that makes tremendous strategic sense. We think it gives us great opportunities, both on the **Bank of America** side and on the

Merrill Lynch side. The combination of our businesses, the fit of our businesses, the opportunity, both in the United States and around the world, just makes all the sense in the world to us. You know, the reaction, both internally and externally, has been incredibly positive, so we are very, very excited about the prospects going forward.

KEN LEWIS: So we will turn it back to you, Bob.

BOB STICKLER: Okay, well, let me recognize you and as I said, please wait for the mic in order to ask your question. Yes sir?

Questions and Answers

RICK CAROL, ANALYST, FINANCIAL TIMES: Rick Carol from Financial Times to ask about what happened yesterday. At what point did **Bank of America** move off Lehman? And also, John, how long has this been in the making? Have you been in discussions for a few weeks? Because I gather you've been thinking about this longer than just 24 or 48 hours.

KEN LEWIS: We're not going to talk about Lehman. We're going to talk about **Merrill Lynch.** So now it's your turn, John. (LAUGHTER)

JOHN THAIN: Well you know, this really is again actually a much shorter time frame. The problems with Lehman over the weekend, the fact that all of us had been at the Federal Reserve Friday, Saturday and Sunday, and the expectation for the difficulties in the marketplace following the Lehman bankruptcy really lead up to start to think about what types of transactions might make sense for us. Although this will sound very short, actually the first conversation began Saturday morning. The fact that we could put this transaction together basically in 48 hours I think is a great statement on the strength of both of our teams, but also the great strategic fit, which from the instant we talked was very, very clear that this transaction made a lot of sense.

UNIDENTIFIED AUDIENCE MEMBER: People are calling this a 70% premium. Clearly, Merrill stock is at was at $[26] a week earlier, so it's not really accurate to say that. Having said that, you could have probably bought the firm at a cheaper price if you waited until the end of, say, today, even with what's going on with Lehman Brothers. Was there any pressure on the part of regulators, or why did you pay this price?

KEN LEWIS: Yes, it's a great question. First of all, there was no pressure from regulators. I'm sure, after the fact, that having this not be an issue is obviously very positive to them, but absolutely no pressure.

The first question, though, we've thought about your question. Why not just wait? But as we looked at the strategic opportunity -- again, as I said, nobody pushes back on the Fed and how much it makes sense. We don't think many people, if any, can ever call the bottom. We do not think that -- we do think **Merrill Lynch** would have seen this through if they had been independent. It has been rough obviously, over this week probably, and then they could have gone somewhere else. There's also the way they could've just continued on their own.

Secondly, there's always the possibility of someone else making a strategic investment and us not being included. So, as we weighed everything, we said it is better to seize on this opportunity as we see it at the moment, as opposed to trying to catch the very bottom and possibly not catching it at all.

UNIDENTIFIED AUDIENCE MEMBER: John, (inaudible) you say?

JOHN THAIN: Well, because this discussion really began Saturday morning, we really have focused 100% of the time getting the deal done, making sure we're doing the right things for our shareholders and our employees, and to be honest, we really haven't had time to flush out that discussion.

KEN LEWIS: That's a credit to John. It usually doesn't happen that way and he never -- it was never about him; it was always about the deal.

DAN GROSS, ANALYST, NEWSWEEK: I'm Dan Gross with Newsweek. If you'll indulge me a two-parter for Mr. Lewis. You said I think it was earlier this year that you've had about all the fun you could take in investment banking. You are about to buy a lot more fun. What makes you think it's going to be more fun this time around? What have changed about the conditions?

For Mr. Thain -- I'll give you both time to think -- what does this message send to the sovereign wealth funds and the big foreign investors who came in within the past many months and bought relatively large chunks of Merrill and also other firms? How are they riding this out? Have you talked to them? What's been their reaction?

KEN LEWIS: **Merrill Lynch** of course is the best wealth manager and the premier wealth manager in the world, and they have a world-class investment bank. So, this is not just about investment banking, but we are very pleased.

The frustration I think I've had with our position in investment banking is that it's hard to be narrowly focused in that business without getting some mission creep at times. That has happened to us over time.

So, as I look at it in retrospect, I think we did -- it was a very difficult task staying so narrowly focused. Just, it's not the way of most investment banks, of most investment bankers. So this causes us to, in an immediate fashion, to be a world-class investment bank and not have to build these things out slowly, not have to worry about being able to get and attract and retain world-class people. So it just solves a lot of issues.

So, I do think we are now in a position that I can say that I truly do like the business at this scale and with this global footprint that we have, and it really does mean -- it will mean a lot in terms of being able to bring a much broader breadth of products to our corporate clients. We [bank] 99% of the Fortune 500, 82%, 83% of the international Fortune 500. We are the largest small-business bank in the country with the largest middle-market bank in the country. There's just a lot of things we can bring to bear there.

Then of course there's the wealth-management opportunity with the mass affluent that this is -- it's just a major grand slam home run combining **Merrill Lynch**'s capabilities with **Bank of America**'s.

JOHN THAIN: Your question on our shareholders -- because this is a stock transaction, our shareholders, including our sovereign wealth fund investors, will own approximately 25% of the world's leading, most diversified financial services company. So, I think the outlook for them is very attractive, and I, frankly, think that, from a shareholder point of view, including our big investors, this is going to be very attractive.

ANDREW CLARK, ANALYST, THE GUARDIAN: Andrew Clark from the Guardian. A question for John Thain -- you have been in charge for about nine or ten months, nine or ten months on **Merrill Lynch** losing its independence and quite a lot of people are likely to lose their jobs. Have you been a success or a failure as Chief Executive?

JOHN THAIN: Well, it's fair to say that this isn't necessarily the outcome that I would've expected when I took this job, but we have been consistently cleaning up the balance sheet, repairing the damage that had been done over the course of the last few years. Frankly, this opportunity is, I think, a very good opportunity both for our shareholders and for our employees.

The fact that the combination fits so well, it makes strategic sense, there isn't that much overlap in the vast majority of the businesses -- I think this is going to be a very attractive transaction from a shareholder point of view, but also from an employee point of view.

HEATHER LENDE, ANALYST, THE WASHINGTON POST: Heather Lende for the Washington Post. Can you tell us a little bit more about what actually happened at the Fed this weekend? What was the moment? Who approached through to get this deal done? What was the moment that was sort of the inflection point when Merrill and **Bank of America** looked at each other and said "We need to do this and we need to do it now"?

KEN LEWIS: Well, first of all, John was that at the New York Fed a lot this weekend but I was not. We had someone else there, but I was doing other things, obviously. John called me on Saturday morning, and we began to talk about this opportunity over the phone. Then a few hours later, we were talking about it in person, and then basically went from there.

We obviously -- it didn't take but about two seconds to see the strategic implications, or positive implications, and so then it got to the harder parts, the deal itself and pricing and those kinds of things. But it was obviously a fairly short period of time, so very intense and we saw a lot of each other.

Of course, our two teams, in doing the due diligence -- because we do due diligence but also **Merrill Lynch** does reverse due diligence -- so it was a very, very intense time.

HEATHER LENDE: (inaudible)

JOHN THAIN: Well, most of the discussions at the Fed revolved around what were the prospects for Lehman and what would be the implications for a Lehman bankruptcy. Over the course of those discussions, it became clear to me that it would make sense to explore options for us, that the funding of independent investment banks was going to come under pressure, and we really began the discussion which quickly turned into an agreement that the strategic combination made a huge amount of sense, and the opportunity to put this transaction together really was a unique one that we both decided we wanted to take the opportunity.

LIZ HESTER, ANALYST, BLOOMBERG NEWS: Liz Hester from Bloomberg News. I just want to follow-up with both of you. What's the implications for the independent broker/dealer model on Wall Street after doing this deal?

KEN LEWIS: Well, I will be consistent. For seven years now as CEO, I have said that I thought that the commercial banks would eventually own investment banks because of the funding issue, and I still think that. So again, I was a little ahead of my time seven years ago. The first interview I ever did as CEO was with [Maria Bharata Romo], and she asked me the **Merrill Lynch** question in that interview, so seven years later it's actually happening.

DAN FITZPATRICK, ANALYST, WALL STREET JOURNAL: Dan Fitzpatrick, Wall Street Journal. Ken, can you talk about the conversation you had with **Paulson on** Friday, and sort of the reasons that you gave for backing away from the Lehman deal?

Just to add on to that, are you getting any sort of capital relief **here from regulators as part of this deal?**

KEN LEWIS: Well, first of all, I've had a lot of conversations with Secretary Paulson over the last week or so about the Lehman issue and ideas that we had, but I will leave those to just to be in private. **But we have asked for no relief,** no capital relief **on this deal.** As Joe Price, our Chief Financial Officer, said, this deal will take us to about a 740 tier one ratio; 6% is well-capitalized. We will look to rebuild that capital back to our 8% target over time, but that's something we've done with most every single acquisition we've done.

I will remind you that actually, after the LaSalle acquisition, which we did for $21 billion in cash, the tier 1 was around 676, so we built that back over about six months, back to 8.25 prior to the Countrywide and the **Merrill Lynch** deal.

MARSHALL ECKBLAD, ANALYST, DOW JONES NEWSWIRES: Marshall Eckblad, Dow Jones Newswires. What kind of message are you guys working to send to Merrill's thundering herd of 16,000 brokers and how are you working to get that message out? Thanks.

KEN LEWIS: Well, John will obviously be the first to do it, but what I will say at some point is that we know that is the crown jewel of **Merrill Lynch,** that's the heart of **Merrill Lynch;** secondly, they have created the best wealth management company in the world, and we acknowledge that; then finally, that we will keep the name and keep their organization intact.

JOHN THAIN: Yes, I think this is a great opportunity for the financial advisors in the wealth-management system. The ability to access the customer base of **Bank of America,** particularly for that section you called the premier group -- $500,000 to $5 million, which is really the sweet spot in financial advisors -- they are going to have a lot of opportunity. They are going to have a lot of leads. This gives them a tremendously stable base to work from, and already this morning almost 100% of the financial advisor reaction has been very positive.

KEN LEWIS: We actually have a referral system in place at **Bank of America;** we have about 2000 brokers. The thing that will be doing over the next few months is strengthening the infrastructure because the flow will be very substantial.

BOB STICKLER: Let me see if there are any questions on the phone. Operator, are you with us? No? Okay, well, let's go in the room, then. Yes sir?

UNIDENTIFIED AUDIENCE MEMBER: A question for Ken Lewis -- Mr. Lewis, you talked about LaSalle, the Countrywide acquisition earlier this year, and now this one, the biggest. How are you going to be able to integrate all of this into **Bank of America?**

KEN LEWIS: Well, it's a great question. We just finished US Trust. In October, so a month away, we have our conversion of LaSalle, the LaSalle system, so that will be done.

Then we will have Countrywide before us, which we will convert probably in the fourth quarter of -- I'm sorry, the third quarter of next year. So if we in fact close the deal in January, we will then begin the normal transition process with **Merrill Lynch.** But we will have to convert -- or would not even think about converting it probably until 2010, early 2010. So, we will have gotten the Countrywide conversion behind us.

So we will use some similar people but they will be going from one conversion to the next. But the things around organization, those kind of things, those are separate people who would know that individual organization.

So I think it's very manageable. We will do it in a very process-driven way. That is a core competency. We know how to manage transitions. So, I don't want to underestimate the size and the degree of difficulty, because our people do really well at it and are very good at it, but it will be done and it will be done very professionally.

BOB STICKLER: I was going to let Margaret have a turn, and then we'll go with you. Yes?

MARGARET POPPER, ANALYST, BLOOMBERG TELEVISION: Margaret Popper with Bloomberg Television. You set the price on Friday of $29 a share and there was a specific -- because this is an all-stock transition -- a specific ratio that you are exchanging at. Since then, **Bank of America** shares have dropped. Is that going to affect the overall price or does the ratio change?

KEN LEWIS: No. First of all, we didn't set the price on Friday since we hadn't talked until Saturday morning. I can't recall actually the exact time we set the price but (multiple speakers) --

MARGARET POPPER: Sorry, I meant to Friday's price.

KEN LEWIS: But that's why you set the ratio, because it stays etched in stone. So the movements affect -- I mean the price is affected but the number of shares the **Merrill Lynch** shareholder is getting will not change.

MARGARET POPPER: So the ultimate price could come down?

JOHN THAIN: It's a fixed exchange ratio, so what will happen is you'll see that Merrill stock would just trade in a relationship to **Bank of America** stock, and it will always trade at a slight discount because of the arbitrage. But the fixed exchange ratio stays in place.

UNIDENTIFIED AUDIENCE MEMBER: (inaudible) with the New York Times. I wanted to see if each of you could tell us a little bit, as you look ahead, a year out, how you think the industry will look different -- areas like jobs, leverage ratios, business mix, competitive landscape. What do you think are going to be the most different-looking parts of the business in a year? And I mean industrywide?

KEN LEWIS: You mean financial services, not just investment banking and not just banks?

UNIDENTIFIED AUDIENCE MEMBER: Yes, yes.

KEN LEWIS: I think it's going to be -- I think the remainder of this year and all of next year will be a relatively tough time for the financial services industry.

Now, having said that, we expect the economy to begin recovering in the second half of next year, but not at a pace that would cause charge-offs to dramatically decrease. I think that's probably a 2010 situation. So, I think revenue opportunities will be tough, and high levels of charge-offs will continue in the commercial banking side, and we're going to have to be very focused on being efficient and gaining market share to get the kind of revenue growth that we want. But I don't see the clouds parting as I would like them to in 2009.

JOHN THAIN: I think the only thing I would add to that is, for those firms who have large trading businesses and/or carry large amounts of less liquid assets, I think you'll see a continued reduction in risk, a continued shrinkage in leverage ratios, and a continued focus on improving core equity ratios to risk-weighted assets. Of course, with the demise of both Bear Stearns and Lehman, there's already been a pretty dramatic change to the shape of the industry.

I also would say that, as we go forward, size is going to matter, so the ability to have a diversified stream of earnings, the ability to maintain high degrees of funding certainty are going to continue to be very important.

KEN LEWIS: You could probably look back and say, I would think, that we've gone through a golden era of banking and financial services in general, and things are just going to be -- they may be simpler because you're not going to have the highly complex structured products, etc., but it's going to be tougher and so there are going to be fewer companies, and we're going to have to be better at what we do.

BOB STICKLER: Operator, are there some questions on your line?

OPERATOR: Yes, and our first question comes from Rick Rothacker from the Charlotte Observer.

RICK ROTHACKER, ANALYST, CHARLOTTE OBSERVER: Good morning. I will, if I could, throw out two questions at you, Ken. First, I wanted to -- (technical difficulty)

UNIDENTIFIED AUDIENCE MEMBER: (multiple speakers) from Fox Business. Have there been any decisions made on Merrill's workforce and how many folks might not be integrated into **Bank of America?**

KEN LEWIS: No, we don't get to the (multiple speakers) --

BOB STICKLER: Rick, I don't know if they could hear you. I apologize.

KEN LEWIS: -- (multiple speakers) normal merger process as we put the two teams together to form that merger team. We're not talking -- we're talking about the combined company. So it's not just about **Merrill Lynch;** it's not just about **Bank of America.** It's the combined company that we will be looking at to get the efficiencies.

JAY ANTENEN, ANALYST: Jay Antenen, (inaudible) Report. Can you talk about the role of J.C. Flowers in the thing, and did they consider investing in **Bank of America?**

KEN LEWIS: I'm sorry, I didn't hear the last part. (multiple speakers)

JAY ANTENEN: What was the role of J.C. Flowers in the transaction? Did they at all consider investing in **Bank of America,** or what was their role as the advisor?

KEN LEWIS: Yes, we didn't ask them to invest. J.C. Flowers or Chris Flowers is someone we've known for quite some time. We've done several deals with him. We know his firm very well, and it was fortunate that we did because his firm -- he and his firm had done quite an amount of due diligence on **Merrill Lynch** fairly recently, and it was very, very extensive. They had looked at the marks very comprehensively, so this allowed us to have him and team as an advisor, and just update the information they already had. So that was one of the key ingredients to being able to do this as quickly as we did.

I will say that Chris's comment was it's night and day from the time we first looked at it to now. He was very complimentary of what John and his team had done in terms of dramatically reducing the marks, in many cases not only -- not reducing the marks but getting rid of the assets, which is the best thing to do, so a much lower risk profile than he'd seen earlier on.

UNIDENTIFIED AUDIENCE MEMBER: (inaudible). What do you want to tell the everyday person who's reading the newspaper today? As financial leaders, people in this city are nervous. The mayor canceled his trip today because of the situation on Wall Street. What is it that you want to tell people, if anything, so that they can sort of understand what's happening, sort of get a sense of -- there's a lot of uneasiness in this city and we in this city rely a lot on what happens on Wall Street. What message do you guys want to send the everyday person who's reading what's going on?

KEN LEWIS: Well, I will let John answer, too, but I think, as it relates to us, the combined company is a much stronger entity and will survive most anything as a result of the combination. So, we have an opportunity now not to -- obviously we've got a time where we eliminate the redundancies and have the issues of layoffs, but longer-term, we have the prospects to grow and prosper because we are a strong company in an industry that is having issues. So we come out of this able to grow, gain market share, do more business with our clients, and actually bring to them the best array of products of any company in the world.

JOHN THAIN: I guess what I would add is that financial markets go in cycles and financial services firms are subjected to those cycles.

This is probably the most difficult environment in the financial markets that I've experienced in my 30 years in the business, but it is a cycle and we will get through it. It will get better, and when it gets better, I think this combination will be incredibly strong and do very, very well. But it is definitely a very, very difficult time and it's not going to get better quickly, but it will eventually and we will be well positioned when it does.

UNIDENTIFIED AUDIENCE MEMBER: A lot of the issues we've seen with commercial banks basically reacquiring investment banks, is that they held better because they had much lower ratios of leverage -- they were required to by regulation, whereas the investment bank could sort of take up as much as they want. For Mr. Thain, what was Merrill's leverage ratio as of last week? If those taking (inaudible) (technical difficulty) conform and fit into **Bank of America**'s going forward, what sorts of things will Merrill not be able to do, either on the proprietary trading, private equity writing side that they had been doing in the past?

JOHN THAIN: Well, as we talked about before, the leverage in the system and the leverage of all financial services, particularly investment banks, has been coming down anyways. The tests that are being used for financial institutions are moving toward a tier 1 equity to risk-weighted asset test. As of our last reported quarter, pro forma for a number of the transactions that we've done to reduce the risk on our balance sheet, most importantly the sale of the $30 billion notional amount of CDOs, our tier 1 capital to risk-weighted assets was around 11%. So from that perspective and in fact going forward, I don't think this transaction in any way will constrict or restrict our ability to conduct our businesses.

KEN LEWIS: We actually thought **Merrill Lynch** 's capital structure was very good and had a lot more of a base of common equity than some others we had seen, so it looks good.

BOB STICKLER: Let's see if there's a question on the phone this time, see if we get through.

OPERATOR: Let's try with Rick Rothacker from Charlotte Observer.

RICK ROTHACKER: Hopefully this is working. Two questions for you, Ken -- one, I was wondering what this deal says about your commitment to Charlotte now that you'll be a bigger bank in New York and bigger in investment banking. And also, what's next? Do you need an international bank or any other product that you would need to expand in that you still like?

KEN LEWIS: The last one is pretty ambitious. I don't know if I will get to do another acquisition during my career. This is too important not to get right, so we're going to be focused on this one for quite some time. The headquarters will be in Charlotte, Rick.

Having said that, we are a very diverse company in terms of the need for the corporate headquarters. Our investment bank is headquartered here. We have major pieces of our asset management group here as well as Boston. Our credit card headquarters is Wilmington, Delaware, and our mortgage and home equity group is Calabasas, California. So, we are pretty well spread out across the United States in terms of our businesses' headquarters.

BOB STICKLER: Another question from the phone, please?

OPERATOR: Brad Keoun, Bloomberg News.

BRAD KEOUN, ANALYST, BLOOMBERG NEWS: I've got a question for John, I guess two questions. The first question is can you explain how the payment of or release of the vesting and restrictions on the stock for **Merrill Lynch** employees works, and how much that's going to cost **Bank of America?**

The second question, John, if you can just address what your role is going to be at the Company going forward?

JOHN THAIN: Well, I already answered the second question, although I will repeat it. We really have spent the last 48 hours getting this transaction done, doing the right thing for shareholders, and we really haven't had time to talk much about my role going forward, so that's something we have to do.

In terms of your first question, we have a number of different stock plans, so for the most part, our stock, it is a double-trigger structure, so for the most part, for those employees who continue with the company, the existing shares will be replaced by **Bank of America** shares, and they will continue. That swap doesn't I don't think have any particular negative impact on **Bank of America.**

BOB STICKLER: Okay, we've got time for one more question, because both of these gentlemen need to go to employee meetings. The lady in (inaudible).

MELISSA LEE, ANALYST, CNBC: Melissa Lee with CNBC. Given the criticism emerging this morning about the size of the price tag of the deal, Ken, can you tell us whether you've entertained other offers if other firms have approached you in addition to **Merrill Lynch,** or if you have approached others?

John, the question for you would be was the phone call to Ken the only one that you made this weekend, or did you make others?

KEN LEWIS: I certainly hope he says only us! (LAUGHTER) No, we did not think of or approach anybody else. This is the strategic deal of a lifetime. We've known that for a long time, and you can't do a strategic plan and look at opportunities or alternatives and not have this one as a top priority. We just never have been able to find the right time and the right moment. So this was the one.

JOHN THAIN: To answer the second part of your question, I did not make any other phone calls.

BOB STICKLER: Okay, I'm sorry, I need to cut off the conference. If anybody needs more information, please call our media relations staff. The phone numbers are on the press release or on the news room at BankofAmerica.com. So, thank you very much for coming.

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IN RE: EXECUTIVE COMPENSATION INVESTIGATION

BANK OF AMERICA - MERRILL LYNCH

EXAMINATION of KENNETH LEE LEWIS, taken at the State of New York, Office of the Attorney General, 120 Broadway, New York, New York, on February 26, 2009 at 4:30 p.m., before SARA FREUND, a Shorthand Reporter and a Notary Public of the State of New York.

1 K.L. Lewis

2 Q. When did you first consider doing that?

3 A. I want to make sure I get the date

4 right. I'm pretty sure it was December the 13th --

5 if that's a Sunday because I was in New York, and I

6 was about to go home -- and what triggered that was

7 that the losses, the projected losses, at Merrill

8 Lynch had accelerated pretty dramatically over a

9 short period of time, as I recall, about a week or

10 so.

11 Q. How did you come to learn of that?

12 A. Joe Price, our CFO, called me.

13 Q. Take me through what Mr. Price

14 communicated to you on that call.

15 A. He basically said what I just said: The

16 projected losses have accelerated pretty

17 dramatically. We earlier on had more days in the

18 month, so that it was a possibility that at least

19 some of the marks could come back, but now we had

20 not very many business days because Christmas was

21 coming and all of that. So we became concerned

22 just of the acceleration of the losses.

23 Q. What did Mr. Price tell you about the

24 extent of the losses, basically?

25 A. He just talked about the amounts.

K.L. Lewis

Q. And what were they as of the time you spoke to Mr. Price?

MR. LIMAN: To the extent that you remember.

A. To the extent that I remember, the losses had accumulated to about $12 billion after tax.

Q. Anything else?

A. That was the whole focus.

MR. LAWSKY: Were you getting a daily P and L at the time?

THE WITNESS: We were getting projections. I was getting a P and L at Bank of America, but we were getting projections. I don't recall getting them every day, but I was either hearing about them and in some cases I saw them.

MR. LAWSKY: Can you explain, when you say a conversation with Price is what got you thinking this way, if you were getting these P and L's over time, what was it about the Price conversation which put you over the edge?

THE WITNESS: Just that that amount --

1 K.L. Lewis

2 I'm not sure I was getting them every day. I
3 don't recall getting them every day because
4 they were projections, not daily P and L's.
5 So the concern was, we had had a forecast on
6 December 5th, as I recall, of $9 billion, but
7 $3 billion pretax was a plod (phonetic) just
8 for conservative reasons; so what you saw was
9 basically a 7 to 12 if you could go through
10 the plod, and then you get to the $12
11 billion. So a staggering large percentage of
12 the original amount in a very short period of
13 time.
14 MR. LAWSKY: Just so the record is
15 clear, I have your calendar in front of you,
16 although you don't -- Counsel produced it.
17 December 14 was on a Sunday. It says "depart
18 to arrive 3:30." You're in New York leaving
19 that day?
20 THE WITNESS: Yes.
21 MR. LAWSKY: So is that the day you have
22 the meeting with Price?
23 THE WITNESS: Not a meeting, a phone
24 call.
25 MR. LAWSKY: So Sunday, December the

1 K.L. Lewis

2 14th.

3 THE WITNESS: Correct.

4 Q. I think you just answered the next

5 question I had, but prior to the 14th the last time

6 you saw a projection was December 9?

7 A. The last time I focused -- really

8 focused -- I'm not sure if I saw some between that

9 or not, because I was just as concerned about the

10 credit meltdown and all of the things that were

11 happening in the economy at Bank of America.

12 MR. LAWSKY: I thought you said it was

13 December 5.

14 THE WITNESS: It was 5.

15 MR. MARKOWITZ: It was my mistake.

16 MR. LAWSKY: He's probably got December

17 9 in his head because on the 9th you have a

18 board meeting, I think. Do you recall that?

19 THE WITNESS: Yes.

20 MR. LAWSKY: Does this issue come up at

21 that board meeting?

22 THE WITNESS: Yes.

23 MR. LIMAN: What issue is that?

24 MR. LAWSKY: The issue regarding the

25 deteriorating health of Merrill.

K.L. Lewis

THE WITNESS: We gave the forecast to the board. We also talked about the things that were going on in the economy and in our trading book and in the credit deterioration in general, so it was not just about that.

Q. Did Mr. Price explain to you what his understanding was of what caused this deterioration between the 5th and 14th?

A. I don't recall what he said. I just recall just that staggering amount of deterioration. We had seen the credit marks widening, so I assumed that was part of it. I don't recall what was said about that particular issue.

Q. Your main concern was that that number increased, that the loss increased.

A. The pace of the loss increased so dramatically.

Q. Is there anything else about the December 14th call with Mr. Price that you hadn't already described to us?

A. I told you what I recall.

Q. Now, I believe we've been discussing this in the context of when you started considering

1 K.L. Lewis
2 Q. Why don't you describe what the events
3 were leading up to it and then your call with Mr.
4 Paulson.
5 MR. LAWSKY: Before we get there,
6 talking about December 14th, you get a
7 starker picture from Price about the
8 escalating or the accelerating losses at
9 Merrill obviously made you think about the
10 MAC clause. But Merrill had very bad months
11 in October and November -- in fact, I think,
12 October was worse than December, I believe.
13 THE WITNESS: Remember, that these were
14 projections for the quarter, so you weren't
15 seeing the months; you were seeing the
16 quarter projection.
17 MR. LIMAN: That's what you were looking
18 at.
19 THE WITNESS: That's what I was looking
20 at.
21 MR. LAWSKY: When? On December 14th or
22 in October, November?
23 THE WITNESS: I wasn't intensely
24 following the projections during the early
25 times -- or maybe they weren't so bad. I

1 K.L. Lewis
2 don't remember. I was so focused on the Bank
3 of America losses and that deterioration.
4 What we were seeing in that time frame were
5 projections for the quarter.
6 MR. LAWSKY: In the October, November
7 time frame.
8 THE WITNESS: In that time frame that
9 we're talking about in December. I don't
10 recall the projections until that kind of
11 time frame.
12 MR. LAWSKY: In October, November, were
13 you made aware of the mounting losses at
14 Merrill Lynch?
15 THE WITNESS: I don't remember a
16 conversation or any document, again, because
17 we were so focused on us. We had sent Neil
18 Cotty, who is our chief accounting officer,
19 there, and we had Joe looking at it. So the
20 intensity didn't really start until much
21 later with me.
22 MR. LAWSKY: Thank you. I think you're
23 saying the answer is "no," but I just want to
24 get a clear "no." Were you aware in October
25 and November of the mounting losses at

1 K.L. Lewis

2 Merrill Lynch?

3 THE WITNESS: I don't recall that issue.

4 MR. LAWSKY: You don't recall whether

5 you were aware, or you don't --

6 THE WITNESS: No. I don't recall -- if

7 I had been made aware, I don't recall being

8 made aware.

9 Q. So on the 17th, what happens with

10 respect to --

11 MR. LAWSKY: Last question -- we do this

12 a lot, so it's going to be annoying --

13 looking back on it, do you think you should

14 have been made aware given the type of losses

15 they were having in October and November?

16 THE WITNESS: In the context of what was

17 going on in the marketplace; what we were

18 seeing; the rumors we were hearing about

19 other investment banks and losses, I don't

20 think alarms bells would have gone off and

21 necessarily somebody would have thought they

22 needed to make me aware. But, again, I may

23 have seen something, I just may not recall

24 it.

25 Q. On the 17th, you call Secretary Paulson.

Describe that call, please.

A. I told him that we were strongly considering the MAC and thought we actually had one. He said, "We probably should talk," and he said, "Could you be here by 6 o'clock," -- I think it was; give me license on that, I think it was around 6 o'clock -- "on the 17th, and I'll have a meeting arranged with me and the Feds, Ben Bernanke." So we did that.

Q. So when did you call him on the 17th, about what time?

A. I don't remember.

MR. LAWSKY: Let me show you a calendar, if it helps. Does that say "Leave at 3"?

THE WITNESS: Yes.

MR. LAWSKY: And you have "Hurley at noon."

THE WITNESS: My best recollection is that it was mid-morning, but I don't remember talking -- I don't put things like that on my calendar.

MR. LAWSKY: Does that say "Gone to D.C."?

THE WITNESS: Correct. So sometime

1 K.L. Lewis
2 before then, obviously, and my best
3 recollection is it was mid-morning. I'm not
4 sure.
5 (Exhibit 1 was marked for
6 identification.)
7 MR. LIMAN: It would also help to -- and
8 I apologize we didn't bring copies -- but if
9 you have copies of the minutes. Those also
10 mark the sequence of events.
11 Q. Exhibit 1 is a copy of a calendar which
12 counsel produced to us today, and you can keep
13 Exhibit 1 in front of you to help refresh your
14 memory.
15 MR. LAWSKY: Is this your handwriting in
16 the calendar?
17 THE WITNESS: Let me make sure. Yes.
18 That's my handwriting.
19 MR. LAWSKY: Is this the only calendar
20 you keep? You don't have an electronic
21 calendar?
22 THE WITNESS: No. This is the only one
23 I keep.
24 MR. LAWSKY: Does a secretary or an
25 assistant or anyone else keep a calendar for

1 K.L. Lewis

2 you?

3 THE WITNESS: Yes. I think her calendar

4 is basically like mine, and she updates it.

5 MR. LAWSKY: There are days where you

6 have nothing on there, which, I assume,

7 you're doing stuff.

8 THE WITNESS: During this time, we

9 agreed that we're going to keep our calendars

10 fairly open because we go back and forth so

11 much and there's so much happening. So it's

12 not -- we didn't want a structured

13 environment where we were in meetings all the

14 time and we couldn't get to each other.

15 That's not only about Merrill Lynch; it was

16 about everything going on.

17 MR. LAWSKY: So this calendar reflects,

18 basically, everything you were doing during

19 this period of time. It's not like there is

20 some other calendar somewhere elsewhere that

21 has more.

22 THE WITNESS: No.

23 Q. So at some point earlier in the day you

24 have a conversation with Mr. Paulson. During this

25 call, does Mr. Paulson ask why do you think you

have a MAC?

A. I don't recall him saying that. Obviously, when we got to the meeting, everybody did, but I recall that as being more of, Let's get together and address this.

Q. Why don't you describe that meeting? You're talking about the phone call now?

MR. MARKOWITZ: Yes. I want to make sure we have the phone call down, and we'll get to the meeting later in the day.

Q. Was there any discussion about why the MAC on the call with Paulson?

A. I don't recall anything but getting the logistics done and getting up there. We may have, but I don't remember.

Q. Did you say anything along the line of, There's several billion dollars in additional losses?

A. I don't remember. I remember saying, "We think we've got a MAC." That's all I remember of that conversation -- and the fact that he was going to set up the meeting.

Q. Where does the meeting take place?

A. At the Federal Reserve.

1 K.L. Lewis

2 Q. And who attends the meeting?

3 A. Well, the two main players -- excuse

4 me -- Joe Price and Brian Moynihan. And Bernanke

5 was there; Paul sonwas there; Alvarez, his chief

6 counsel, and a cast of a lot of others that I

7 didn't recognize.

8 Q. The "others" were Treasury and Fed

9 officials?

10 A. Yes.

11 Q. Was there any attendance list taken at

12 the meeting?

13 A. Not to my knowledge, but there could

14 have been.

15 Q. No one passed around a list or something

16 like that?

17 A. No.

18 Q. If you can take me through that meeting.

19 A. Well, we described -- Joe, basically --

20 first of all, I talked a little bit about our

21 current situation with the market deterioration. I

22 told him that we probably would have a loss, which

23 would be the first quarterly loss in 17 years.

24 Q. Let me jump in. You kicked off the

25 meeting yourself?

1 K.L. Lewis

2 A. Yes.

3 Q. And you started by talking about Bank of

4 America results?

5 A. Yes.

6 MR. CORNGOLD: I suggest we take a

7 five-minute break to let us all look at the

8 minutes we got in this afternoon. I think it

9 would be more useful that we do that.

10 (Recess was taken.)

11 Q. Before we took the short break we were

12 talking about the meeting, I think that's the

13 meeting that you had at the Fed on the 17th. I

14 believe you started off by talking about Bank of

15 America's position. If you can pick up --

16 A. Just a quick update on us, and I don't

17 remember if I said much else or not, but then Joe

18 walked through some of the numbers on the

19 acceleration.

20 Q. So Joe Price is the person who detailed

21 what happened with respect to Merrill and Merrill's

22 worsening financial condition?

23 A. Yes. I may have said a few things, but

24 my best recollection is that Joe carried that

25 conversation.

K.L. Lewis

Q. And in terms of just to get the full picture, you spoke and then Joe spoke?

A. Yes.

Q. What happened after that?

A. The meetings are going to run together on me. At some point, there was strong advice against the MAC. We had to have talked about -- I don't remember which meeting which, but the main thing we were concerned about was the very large hole that would have been created by that loss.

Q. And what was the hole that was going to be created by the loss?

A. At that point, we thought it was roughly $12 billion.

Q. And what was that going to do to the combined entity? Did you detail, for example, at the meeting the harm that would cause to Bank of America?

A. I don't know if we got into ratios or not, but we said it was going to hurt our tangible common ratio and it was going to hurt our two-and-one ratio. I don't recall having handouts.

Q. What happened next?

A. Well, there was discussion about MACs

being very difficult -- and, again, the meetings are running together on me -- I don't know what would be the remedy -- I know at the end we were basically told to stand down, let them go on boards and see what they thought, and we left. It wasn't -- as I recall, it wasn't a two-hour meeting or something. I can't remember how long it was, but it wasn't some marathon.

Q. Who at the meeting was expressing that MACs are tough to qualify for?

A. I can't remember, but somebody did, as I recall.

Q. Would it either have been -- let me put it this way. Who did the speaking for the Treasury and the Fed at the meeting?

A. Mainly Hank an Ben, but I think Alvarez said a few things, too.

Q. By the way, was anyone from Wachtell at the meeting?

A. No.

MR. CORNGOLD: Were you told in that meeting that if you exercise the MAC clause that they would seek to remove you and/or Bank of America's board?

1 K.L. Lewis

2 THE WITNESS: No. That was not then.

3 They hadn't worked themselves up to that yet.

4 Q. So you meet with the federal regulators.

5 I didn't quite understand what you said. What were

6 they going to do? They asked you to do something?

7 A. They said stand down and then let's talk

8 -- they basically said don't do anything by saying

9 "stand down," and then "let's talk again." I don't

10 remember if we arranged anything or not, but,

11 obviously, they needed to put their heads together.

12 And we left.

13 Q. Did you, at that meeting, agree when you

14 would talk again?

15 A. I don't remember.

16 Q. When did you talk again?

17 A. I don't remember the date. There was a

18 lot of discussions after that with Joe. I do

19 remember a telephonic meeting after that, that we

20 had a number of people together talking about the

21 MAC, and I recall there being strong consensus -- I

22 think at that meeting somebody from New York Fed,

23 the Washington Fed and Richmond Fed was on the

24 line, and then there was somebody -- I think it was

25 a lawyer from the New York Fed -- who strongly

1 K.L. Lewis

2 Q. Was there anything else of substance
3 discussed on the call that took place that you were
4 discussing that you haven't discussed so far?
5 A. I don't recollect anything else.
6 Q. What is the next thing that happened
7 after this conference call?
8 A. I don't recall the date, but --
9 Q. Let me interrupt you.
10 MR. MARKOWITZ: Counsel, do you have
11 anything on your end that helps pinpoint the
12 date any better?
13 MR. LIMAN: I think if you put the
14 minutes in front of him --
15 MR. CORNGOLD: There was a board meeting
16 on December 22nd, Monday, at 4 p.m.
17 MR. LIMAN: But the contents of the
18 minutes go through the sequence of events, so
19 if you put those in front of him it may help
20 refresh his recollection.
21 A. I think that's the Sunday over that
22 weekend. I think that's the time I talked to
23 Paulson, and we got into the subject you were
24 talking about before.
25 MR. LIMAN: If you give him the minutes

it might trigger some recollection.

A. I think I got it now. I remember, for some reason, we wanted to follow up and see if any progress -- as I recall, we, actually, had not agreed not to call a MAC after the conversation that we had, and so I tried to get in touch with Hank, and, as I recall, I got a number that was somebody at the Treasury kind of guard-like thing. He had a number for Hank, and Hank was out, I think, on his bike, and he -- this is vague; I won't get the words exactly right -- and he said, "I'm going to be very blunt, we're very supportive of Bank of America and we want to be of help, but" -- I recall him saying "the government," but that may or may not be the case -- "does not feel it's in your best interest for you to call a MAC, and that we feel so strongly," -- I can't recall if he said "we would remove the board and management if you called it" or if he said "we would do it if you intended to." I don't remember which one it was, before or after, and I said, "Hank, let's deescalate this for a while. Let me talk to our board." And the board's reaction was one of "That threat, okay, do it. That would be systemic risk."

1 K.L. Lewis

2 MR. CORNGOLD: You said the board's

3 reaction to that. Did you have conversations

4 with the board, so you knew what their

5 reaction was?

6 THE WITNESS: Is that Monday?

7 MR. CORNGOLD: December 22 is a Monday.

8 THE WITNESS: Yes. So that would be

9 that day. I told them of the conversation.

10 MR. CORNGOLD: We're now talking about

11 that conversation.

12 THE WITNESS: Correct.

13 MR. CORNGOLD: So in that conversation,

14 did you say what the board's reaction is?

15 THE WITNESS: I'm sorry. I had a

16 conversation with Hank, and then I had the

17 conversation with the board.

18 MR. CORNGOLD: And then you had another

19 conversation?

20 THE WITNESS: Yes.

21 Q. The conversation with Hank on the bike,

22 that's also on Monday?

23 A. No. That was on Sunday -- I'm pretty

24 sure that was Sunday. I just recall it wasn't a

25 weekday, and that he was out of pocket.

1 K.L. Lewis

2 Q. So I think you said, "Let's deescalate

3 this." How does he respond to that?

4 A. He said, "Good." I think I recall him

5 saying -- I'm not positive about this -- I think he

6 said, "I'll call Ben and tell him that."

7 MR. CORNGOLD: Before we do that, did

8 you have an understanding of what powers the

9 Treasury Department had to remove the board

10 and/or the management of the bank?

11 THE WITNESS: It was my understanding he

12 said it -- that's why I said I think he said

13 the government. I think -- my impression is,

14 that was the language the Fed used to use in

15 Texas, basically saying, Don't do something.

16 MR. CORNGOLD: You had an understanding

17 that the Fed could remove the board and/or

18 the management of a bank that it regulated if

19 it found certain things.

20 THE WITNESS: Yes.

21 MR. LAWSKY: Do you know what it has to

22 find?

23 THE WITNESS: They had been so strong

24 about the fact that they strongly advised us

25 not to do it that it would cause harm to the

bank and the system, and the system wouldn't be good for us, either -- that it would damage the system. That's kind of how it was being portrayed.

MR. CORNGOLD: Was this the first you heard about the government -- to use your term -- was considering that threat?

THE WITNESS: Yes. I don't know when they were going to play that, and that kind of forced it by calling him out.

Q. Did you ask him, "By the way, what do you mean by that" -- I'm sorry, the comment about the removal?

A. No. It was pretty clear.

Q. And at that time, did you sort of have that preexisting understanding of the Texas Fed way of communicating?

A. I had heard that at some point. I don't know why that's in my mind, but I've heard of that before that that's a way of telling you not to do something.

Q. Have you heard any kind of communication like that from a federal official to you before?

A. No.

1 K.L. Lewis

2 Q. And did you view it at as a threat?

3 A. I viewed it -- actually, I viewed it as

4 just how strongly they felt about the issue. I

5 also viewed it that it wasn't just about us; that

6 he wouldn't say something that strong if he didn't

7 feel like it was a systemic risk, as well.

8 MR. CORNGOLD: But if you played it out,

9 it meant that Bank of America could not

10 invoke the MAC clause; is that correct?

11 THE WITNESS: That's where I'm a little

12 fuzzy on. I don't recall the wording was if

13 "Before you did it we would," or "If you did

14 it we would."

15 MR. CORNGOLD: But if you had done it --

16 to play out the hypothetical -- and they

17 removed the board and placed in a board, it

18 could have undone whatever it is that you had

19 done.

20 MR. LIMAN: I guess that presupposes a

21 whole bunch of stuff.

22 THE WITNESS: They said management and

23 the board.

24 MR. LAWSKY: At this point, had you

25 received TARP funds?

1 K.L. Lewis

2 THE WITNESS: We had. Yes. That was in

3 September when we called Washington.

4 MR. LAWSKY: That was the initial

5 tranche that you got.

6 THE WITNESS: Yes.

7 Q. Did you connect the receipt of the TARP

8 funds to the statement that if you invoked the MAC

9 that your board would be removed?

10 A. No. I did not take any connection to

11 that at all. I took this as, actually, in good

12 faith that that's what they felt.

13 MR. LAWSKY: At the initial meeting with

14 Paulson when you flew there in the evening of

15 the 17th, does the fact that you're a TARP

16 recipient come up in the meeting at all?

17 THE WITNESS: I don't recall that ever

18 coming up. Remember, at that point, we had

19 not sought any funds. We were taking 15 at

20 the request of Hank and others.

21 MR. CORNGOLD: By the way, the TARP

22 funds had an effect on the shareholders; is

23 that correct? The process of the transaction

24 by which you received TARP funds had -- did

25 they have a dilutive effect on the

shareholders' equity?

THE WITNESS: They had a dilutive effect in the sense that you had preferred dividends that took away from comp equity -- and took away from net income available to shareholders. Yes.

MR. CORNGOLD: At this point, did you want to invoke the MAC, if you could?

THE WITNESS: Yes. I think that's why I got the strong reaction from Hank because we left the other meeting that I mentioned not having resolved it.

MR. CORNGOLD: Did you contemplate using the threat of invoking the MAC clause as a way to get something of value from the federal government, at this time?

THE WITNESS: You mean --

MR. CORNGOLD: What I mean to say is, had you contemplated the negotiation position that it put you in vis-a-vis the federal government, knowing that the federal government did not want you to invoke the MAC clause?

THE WITNESS: I can't remember my state

1 K.L. Lewis

2 of mind. Until we had that heated -- I guess
3 you would call it -- from Paulson, we were
4 still in the mode that the MAC was the best
5 --
6 MR. CORNGOLD: Before the call with
7 Paulson on Sunday, had you said to anyone or
8 had anyone said to you in words or substance,
9 Maybe we can get something out of the
10 government?
11 THE WITNESS: I think everybody agreed
12 with -- I guess, I don't know if we said
13 this, or it was subconscious or whatever, we
14 knew that it would be very dangerous to do
15 that deal without some help, and so I think
16 that was the mindset.
17 MR. LIMAN: That's to the system, as
18 well, right?
19 THE WITNESS: Yes.
20 MR. CORNGOLD: And you said that in your
21 conversations to members of the federal
22 government, including the Feds.
23 THE WITNESS: I'm not sure when the
24 conversations began, but, at some point, the
25 conversations began around what could we do

1 K.L. Lewis

2 to help you with this. But I can't time it.

3 MR. CORNGOLD: And had you considered

4 prior up to this Sunday conversation using

5 the potential invocation of the MAC clause as

6 a way to extract some changes from Merrill,

7 whether it be price changes or conduct

8 changes?

9 THE WITNESS: This was about just a

10 shear magnitude of loss, and either you do it

11 or you don't. Behavioral changes, or

12 whatever, wouldn't fill that hole what we

13 thought was $12 billion, which turned out to

14 be $15 billion.

15 Q. Did Paulson ever say to you during this

16 time period -- or Bernanke, or people who work with

17 them -- "Have you told Thain or Merrill what's

18 going on here?"

19 A. I think, at some point -- Thain used to

20 work for Hank. I vaguely recall he asked me if he

21 knew, and I said "No." I said, "We had not talked

22 to Merrill."

23 MR. LAWSKY: Did you have a view, at

24 this time, about what invoking the MAC and

25 backing out of the deal would do to Merrill?

took place with either Hank or other officials from the Treasury or Fed?

A. I don't remember any, but that doesn't mean that there weren't any.

Q. Were you the primary contact from Bank of America with the Fed and Treasury during this time period?

A. I was the primary contact, but Joe was involved, as well.

Q. Besides you and Joe, anyone else from Bank of America that participated?

A. Brian Moynihan had conversations.

Q. That would be it, the three of you?

A. As best as I can recollect, those were the three.

Q. Fourth, "The Fed and Treasury stated that the investment and asset protection promised could not be provided or completed by the scheduled closing date of the merger, January 1, 2009. That the merger should close as scheduled, and that the corporation can rely on the Fed and Treasury to complete and deliver the promise by January 20." I think that's what we were just talking about. But you, basically, had to go on faith that the Fed and

1 K.L. Lewis

2 Treasury were going to deliver.

3 A. Correct.

4 Q. Did you ask for any agreement from them?

5 A. There was a point after that that the

6 board brought up the fact that we're relying on

7 words that obviously has some very prominent people

8 and honorable people, but, boy, what if they don't

9 come through? So I called Bernanke -- I don't know

10 why I called him versus Hank -- and said, "Would

11 you be willing to put something in writing?" And

12 he said, "Let me think about it." As I recall, he

13 didn't call me back, but Hank called me back. And

14 Hank said two things: He said, "First, it would be

15 so watered down, it wouldn't be as strong as what

16 we were going to say to you verbally, and secondly,

17 this would be a disclosable event and we do not

18 want a disclosable event."

19 MR. CORNGOLD: When was that

20 conversation?

21 THE WITNESS: I think we can find it

22 through the minutes, but it was after this

23 and it was getting toward the end of the

24 year.

25 MR. CORNGOLD: When you say "disclosable

1 K.L. Lewis

2 event," he means a disclosable event for the

3 corporation.

4 THE WITNESS: Correct -- well, yes.

5 MR. CORNGOLD: Did he mean that? What

6 did he mean?

7 THE WITNESS: I think he meant they

8 would have to disclose it. That was my

9 impression, that the government would have to

10 disclose it.

11 MR. CORNGOLD: That if they put it in

12 writing, they had a governmental obligation

13 to disclose it.

14 THE WITNESS: That was my impression.

15 MR. CORNGOLD: Did you consider when he

16 said that, whether if it was in writing you

17 had an obligation to disclose it?

18 THE WITNESS: We hadn't gotten that far

19 yet because at the end we didn't get it, and

20 the premise was you wanted to have everything

21 done in place so that you didn't set off

22 alarms in a tragic economy.

23 MR. CORNGOLD: Who is the "you" here?

24 THE WITNESS: They did not want, and

25 they didn't think it was in our best

interest, to have anything announced until you can announce the whole thing, and the promise was to get it announced before or during that earnings.

MR. CORNGOLD: They didn't think it was in the best interest if you announced to your shareholders what you were negotiating?

THE WITNESS: No. They thought it was in our best interest for the deal to be completed and to be able to say "This is what we have," as opposed to prospectively.

MR. LIMAN: I think you also said that they thought it was in the country's best interest.

THE WITNESS: It's kind of a circular because it's kind of systemic.

MR. CORNGOLD: But it's your obligation, do you agree, to consider what's in your shareholders' best interest; is that true?

THE WITNESS: Yes.

MR. CORNGOLD: And that's your board's obligation, too.

THE WITNESS: Yes. And sometimes, because of who we are, they intertwine.

1 K.L. Lewis

2 MR. CORNGOLD: Do they sometimes,

3 because of who you are, do they contradict?

4 THE WITNESS: I don't know what you

5 mean.

6 MR. CORNGOLD: Is it always the case

7 that what's in the country's best interest is

8 in Bank of America's shareholders' best

9 interest?

10 MR. LIMAN: You mean ever in history?

11 MR. CORNGOLD: You made the point that

12 sometimes they intertwine. Pregnant in that

13 is, sometimes they don't intertwine. That's

14 why I'm asking you if that's what you meant,

15 or do you mean that they always intertwine.

16 THE WITNESS: I mean that in this

17 particular case they intertwine -- is a

18 better way of saying it.

19 Q. At the point in time of this board

20 meeting, though, you were relating to the board

21 that you felt you had a commitment from the Fed and

22 the Treasury to make good on whatever harm is

23 caused by the increased losses at Merrill Lynch; is

24 that right?

25 A. I had verbal commitments from Ben

1 K.L. Lewis

2 Bernanke and Hank Paulson that they were going to
3 see this through, to fill that hole, and have the
4 market perceive this as a good deal.
5 MR. CORNGOLD: Isn't the only way to
6 fill that hole, though, to give you money,
7 not to give you money that you would have to
8 pay back at some interest rate with some
9 potential equity interest, too?
10 THE WITNESS: No. I think you have to
11 separate the fact that, yes, there is still
12 some short-term paying -- it's more
13 short-term paying now than we would have had
14 had all this not happened, but longer term we
15 still see a strategic benefit. So we saw it
16 as a short term versus a long term impact on
17 the company.
18 MR. CORNGOLD: When you entered into the
19 initial contract with Merrill Lynch did you
20 get a fairness opinion about the transaction?
21 THE WITNESS: Yes.
22 MR. CORNGOLD: From whom?
23 THE WITNESS: Chris Flowers something.
24 MR. CORNGOLD: And did you get a
25 fairness opinion from anyone about the

transaction that you entered into with the federal government and the Fed?

THE WITNESS: No.

MR. CORNGOLD: Did you consider whether you had a legal obligation to do that?

THE WITNESS: I would rely on the advice of the general counsel for that.

MR. CORNGOLD: But when you say that, does that mean that you asked and got advice, or that you didn't ask but relied --

THE WITNESS: I would rely on somebody bringing that question forth, and nobody did.

Q. Did you ask anyone to look into whether the oral, verbal commitments from the Fed and Treasury were enforceable?

A. No. I was going on the word of two very respected individuals high up in the American government.

Q. Wasn't Mr. Paulson, by his instruction, really asking Bank of America shareholders to take a good part of the hit of the Merrill losses?

A. What he was doing was trying to stem a financial disaster in the financial markets, from his perspective.

1 K.L. Lewis

2 Q. From your perspective, wasn't that one

3 of the effects of what he was doing?

4 A. Over the short term, yes, but we still

5 thought we had an entity that filled two big

6 strategic holes for us and over long term would

7 still be an interest to the shareholders.

8 Q. What do you mean by "short term"?

9 A. Two to three years.

10 Q. So isn't that something that any

11 shareholder at Bank of America who had less than a

12 three-year time horizon would want to know?

13 A. The situation was that everyone felt

14 like the deal needed to be completed and to be able

15 to say that, or that they would impose a big risk

16 to the financial system if it would not.

17 MR. LAWSKY: When you say "everyone,"

18 what do you mean?

19 THE WITNESS: The people that I was

20 talking to, Bernanke and Paulson.

21 MR. LAWSKY: Had it been up to you would

22 you made the disclosure?

23 THE WITNESS: It wasn't up to me.

24 MR. LAWSKY: Had it been up to you.

25 THE WITNESS: It wasn't.

1 K.L. Lewis

2 MR. CORNGOLD: Why do you say it wasn't

3 up to you? Were you instructed not to tell

4 your shareholders what the transaction was

5 going to be?

6 THE WITNESS: I was instructed that "We

7 do not want a public disclosure."

8 MR. CORNGOLD: Who said that to you?

9 THE WITNESS: Paulson.

10 MR. CORNGOLD: When did he say that to

11 you?

12 THE WITNESS: Sometime after I asked Ben

13 Bernanke for something in writing.

14 Q. When did that occur?

15 A. Which one?

16 Q. When did Mr. Paulson state that he did

17 not want a public disclosure?

18 A. It was sometime late in the year. I

19 think it's actually in the minutes.

20 MR. LIMAN: If you have the next set of

21 minutes it might help the witness.

22 Q. What's your best recollection of what

23 Mr. Paulson said to you on that point?

24 A. That was the conversation that I

25 mentioned that I went to Bernanke to ask the

question, and he didn't call me back but Hank did. The request was for a letter stating what they would do, and he had those two elements in there. But the thing that we're talking about is that he said "We do not want a public disclosure."

Q. A public disclosure of what?

A. Of what they were going to be doing for us until it was completed.

Q. How about of Merrill fourth-quarter losses?

A. That wasn't an issue that was being exchanged.

Q. Did anyone consider that the oral agreement was a commitment for financing, so under SEC rules there had to be a disclosure?

A. I did not. That's all I can tell you.

MR. CORNGOLD: Between December 12 and the 1st of the year, did you have any conversations with anyone at Bank of America or representing Bank of America, concerning whether Bank of America had an obligation to make any disclosure?

THE WITNESS: I do not recall having any.

1 K.L. Lewis

2 MR. CORNGOLD: Were you aware of other

3 people having those conversations?

4 THE WITNESS: I don't recall the

5 conversation.

6 Q. Did you consider the issue?

7 A. Of disclosure?

8 MR. LIMAN: Of the oral statements of

9 Bernanke and Paulson.

10 MR. CORNGOLD: There were a number of --

11 nothing was disclosed, but of either the

12 losses that you learned about at Merrill

13 Lynch -- let's do it one at a time. Have you

14 had conversations, or were you aware of any

15 conversations, between December 12 and the

16 end of the year?

17 THE WITNESS: I was not aware of any

18 conversations, but that's not to say there

19 weren't. It's just I was not.

20 MR. CORNGOLD: Are you aware of any

21 conversations between December 12 and the end

22 of the year about whether there was an

23 obligation to disclose anything about your

24 negotiations with the Fed and/or the Treasury

25 Department?

1 K.L. Lewis

2 THE WITNESS: I was not aware -- I don't

3 recall any and don't recall being aware of

4 any.

5 Q. So when you're havin your conversations

6 with the Fed and the Treasury, at any point, do you

7 say, "I need an adjustment on the purchase price;

8 just give me that"?

9 A. We were told that the deal needed to

10 close on time under the deal that had been made.

11 MR. CORNGOLD: You're using passive

12 voice; I want to know active voice, who told

13 you?

14 THE WITNESS: I don't remember which

15 one, but it was either Bernanke or Paulson.

16 MR. CORNGOLD: Was that in response to a

17 question about whether the terms of the

18 transaction could be changed?

19 THE WITNESS: No. Actually, I don't

20 remember exactly, but it could have been when

21 he had made the strong statement about

22 management and stuff. I don't remember that,

23 but it was a pretty strong statement --

24 MR. CORNGOLD: You're doing this

25 transaction at the time you were supposed to

1 K.L. Lewis

2 A. No.

3 Q. Did you not do that because of the

4 statements made by Mr. Paulson?

5 A. No. The price itself being renegotiated

6 wouldn't have solved the issue. It was a MAC --

7 you have a lower price, obviously, but you still

8 have that hole.

9 Q. But it would help?

10 A. Excuse me. After the instructions by

11 Paulson, etc., no, I didn't have a chance.

12 MR. LIMAN: Absent the ability to clear

13 MAC, is there any way to renegotiate the

14 price?

15 THE WITNESS: Plus, it was said that "We

16 want this deal done on time on these terms."

17 There wasn't an ability to renegotiate.

18 Q. Why wouldn't you be able to renegotiate

19 the price and still do it in a timely matter?

20 MR. LIMAN: You mean absent a MAC or

21 with a MAC?

22 Q. You can always renegotiate.

23 A. [redacted]

24 Q. That's my question: Would you have

25 tried to renegotiate the price if you weren't told

K.L. Lewis

not [redacted]

A. Yes.

Q. And why was it that you couldn't renegotiate the price?

A. I can't speak for Hank and the others, so it was pretty clear they wanted everything to stay as it was.

Q. I understand that you can't speak for him. I guess what I'm trying to say is, someone who recently told you that if you did something he'd remove senior management from the board, it seems to me that they would have to kind of pull, that they could accelerate the timing of things, they could change the price, they could use their influence to help a fair resolution of the deal.

MR. LIMAN: I'm sorry. The questions are very convoluted. Is your question, did he consider asking Merrill to give up their legal rights in the deal?

MR. MARKOWITZ: That's not my question.

MR. LIMAN: Is your question, did they have legal rights to change the deal absent the MAC? Ask a proper question.

MR. MARKOWITZ: My questions are proper;

1 K.L. Lewis

2 government wanted to happen.

3 Q. Did you feel like you had a choice in

4 the matter?

5 A. No.

6 Q. Were you angry about that -- or some

7 other emotion? I don't want to put words in your

8 mouth.

9 A. Yes. I think I was a little shocked.

10 Everything got back to the fact that I was shocked

11 at how strongly they felt about the consequences,

12 and so it was more that a little anger. I think

13 they were doing it in good faith. They thought

14 everything they said was true.

15 MR. CORNGOLD: But you understood --

16 tell me if this is a fair presentation of

17 your testimony -- what they were telling you

18 to do was not in the one-to-three year

19 interest of your shareholders.

20 THE WITNESS: I thought about in terms

21 of it was in the best interest long term, and

22 it was the only way to go under the

23 circumstances.

24 MR. CORNGOLD: Well, there were other

25 ways to go, weren't there? You could have

said no, couldn't you?

THE WITNESS: I did not -- at that time, or sometime, I became convinced that they were right and that --

MR. CORNGOLD: They were right -- I'm sorry for interrupting.

THE WITNESS: -- they were right in the sense that it was not in the best interest of Bank of America, and they had strongly advised us of that, and their intensity with which they said it and the things around that convinced me that they were sincere in saying that.

MR. CORNGOLD: But you could have said no and resigned, correct?

THE WITNESS: I could have said no and resigned. Yes.

MR. CORNGOLD: Did you ever consider that from December 12 to December 31st?

THE WITNESS: No, I didn't. I thought it was in the best interest to go forward as had been instructed and --

Q. During the board meeting that took place on the 22nd -- or, for that matter, any time

1 K.L. Lewis

2 leading up to that meeting -- did any of the board
3 members say anything along the lines or in
4 substance, Hey, our shareholders are getting hurt
5 by this?
6 A. I don't recall the exact words, but we
7 knew that we had put off the timetable that should
8 get you a normal incretion, etc. because of the
9 preferred.
10 Q. Did any of the board members say, Hey,
11 we need to do something about this?
12 A. Well, we were going to call the MAC.
13 Q. Right. Did they say, In lieu of calling
14 the MAC is there anything we should do?
15 A. No. It went from calling the MAC to
16 strong admonition that we shouldn't.
17 Q. And, at that point, is there any
18 discussion about disclosure to shareholders?
19 A. I don't recall it.
20 Q. Did any board member suggest that the
21 answer to Mr. Paulson -- well, not the answer --
22 that Bank of America should go ahead and invoke the
23 MAC?
24 A. No, not at that point. I think
25 everybody -- I can't speak for the board, but there

1 K.L. Lewis

2 was some -- my impression was that most people
3 thought that the severity of the reaction meant
4 that they firmly believed it was systemic risk.
5 Q. So on the 22nd the board gives the
6 go-ahead to continue with the Merrill Lynch
7 transaction.
8 A. Yes.
9 Q. Can you describe what happens between
10 the 22nd and the end of the year in terms of that
11 process?
12 MR. LIMAN: You just said the board
13 decides to go ahead with the transaction. I
14 just want to make sure about what the board
15 decided.
16 THE WITNESS: Yes. Not to exercise the
17 MAC and pursue it.
18 Q. Go forward with the deal as scheduled on
19 the 22nd. And between the 22nd and the end of the
20 year, if you can take me through what happened at
21 that point.
22 A. Still a lot of intensity with Joe and
23 others about the amounts and the forms of the TARP
24 money and the wrap, so just a lot of that. Then,
25 as I mentioned, I had -- I don't know if many, it

couple of months. That would have led to considerable uncertainty." Do you see that?

MR. LIMAN: And it goes on "it could well have cost more than the repricing would have saved."

MR. MARKOWITZ: Yes.

Q. And in answering this question, did you consider whether you should also put in the response about Mr. Paulson's communication to you that if you did invoke the MAC he would replace the management and the board?

A. No. Because that was not the reason that we went ahead with the deal. As I said, the threat wasn't as meaningful to us or to me and the board as the severity of it. Meaning, that if they felt that strongly, that that should be a strong consideration for us to take into account.

Q. So the communication that Mr. Paulson made was, in fact, the turning point for you in terms of your decision-making?

A. The seriousness of the statement more than the threat itself.

MR. LIMAN: What do you mean by "the seriousness of the statement"?

1 K.L. Lewis

2 THE WITNESS: The fact that somebody
3 would say that to the CEO of Bank of America
4 at a time that it was in good standing just
5 showed to me that they had a deep belief that
6 we should not call the MAC.
7 MR. LAWSKY: I'm going to jump back to
8 the bonuses again. If Merrill Lynch had
9 waited and not paid the bonuses out early,
10 could you tell us how that would have worked?
11 Would it have been Bank of America's Comp
12 Committee, and, let's say, in January it
13 would have paid out those bonuses?
14 THE WITNESS: Legally, I don't know. I
15 would presume. I don't know what legal
16 rights you would have to override what was
17 done by a public company's compensation
18 committee.
19 MR. LAWSKY: You testified earlier, I
20 believe, that Steele Alphin and Andrea Smith
21 were urging Thain to wait on awarding bonuses
22 till the new year.
23 THE WITNESS: Right.
24 MR. LAWSKY: Had they done that -- so no
25 Comp Committee action by Merrill, is it your

MINUTES OF SPECIAL MEETING OF BOARD OF DIRECTORS
OF
BANK OF AMERICA CORPORATION

December 22, 2008

Pursuant to due notice, a special meeting of the Board of Directors of Bank of America Corporation (the "Corporation") was held by telephone at 4:00 p.m. EST on Monday, December 22, 2008.

The following Directors were present constituting a quorum: Messrs. William Barnet, III, Frank P. Bramble, Sr., John T. Collins, Gary L. Countryman, Tommy R. Franks, Charles K. Gifford, Kenneth D. Lewis, Walter E. Massey, Thomas J. May, Thomas M. Ryan, O. Temple Sloan, Jr., Robert L. Tillman, and Mmes. Monica C. Lozano, Meredith R. Spangler and Jackie M. Ward.

Also present were: Messrs. J. Steele Alphin, Keith T. Banks, Gregory L. Curl, Bruce Hammonds, Liam E. McGee, Brian T. Moynihan, Joe L. Price, Richard K. Struthers, and Mmes. Amy Woods Brinkley, Barbara J. Desoer, Anne M. Finucane, and Alice A. Herald, officers of the Corporation.

Mr. Lewis chaired the meeting and Ms. Herald kept the minutes.

Mr. Lewis noted that roll call had been taken. Mr. Lewis stated that he had spoken to most of the Directors by telephone earlier in the day regarding the events of the preceding weekend.

Mr. Lewis stated the purpose of the special meeting is to insure that the Board is in accord with management's recommendation to complete the acquisition of Merrill Lynch & Co., Inc. ("Merrill Lynch"), as scheduled on January 1, 2009, pursuant to the terms of that certain Agreement and Plan of Merger ("Merger Agreement"), dated September 15, 2008, after due consideration of the undertakings and admonitions of the federal regulators.

Mr. Lewis reported that a series of calls had occurred between management of the Corporation and federal regulators as well as individual calls with Mr. Paulsen, Secretary of the Treasury ("Treasury") and Mr. Bernanke, Chairman of the Board of Governors of the Federal Reserve ("Fed"). He reported the key points of the calls to be: (i) first and foremost, the Treasury and Fed are unified in their view that the failure of the Corporation to complete the acquisition of Merrill Lynch would result in systemic risk to the financial services system in America and would have adverse consequences for the Corporation; (ii) second, the Treasury and Fed stated strongly that were the Corporation to invoke the material adverse change ("MAC") clause in the merger agreement with Merrill Lynch and fail to close the transaction, the Treasury and Fed would remove the Board and management of the Corporation; (iii) third, the Treasury and Fed have confirmed that they will provide assistance to the Corporation to restore capital and to protect the Corporation against the adverse impact of certain Merrill Lynch assets; and (iv) fourth, the Fed and Treasury stated that the investment and asset protection promised could not be provided or completed by the scheduled closing date of the merger, January 1, 2009; that the merger should close as scheduled; and that the Corporation can rely on the Fed and Treasury to complete and deliver the promised support by January 20, 2009, the date scheduled for the release of earnings by the Corporation.

Mr. Lewis reiterated that he had discussed in detail the content of the previous conversations with federal regulators with the Board. He reported that in addition to the previously described conversations, he had spoken again with Mr. Bernanke who stated that he, Mr. Bernanke, has spoken to other federal regulators, including the Office of the Comptroller of the Currency ("OCC") and the FDIC, and has confirmed that the OCC, FDIC, the current and incoming Treasury officials, and the incoming economic team of the new administration are informed of the commitment to the Corporation by the Fed and Treasury and that all concur with the commitment of the combined federal regulators ("federal regulators") to the Corporation.

Mr. Lewis stated that, based on his discussions with members of the Board, management recommended that the Corporation not exercise the MAC clause under the Merger Agreement with Merrill Lynch and that the Corporation proceed and close the Merrill Lynch acquisition on January 1, 2009, as originally contemplated. The Board discussed with Mr. Moynihan

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Mr. Lewis stated further that the Corporation will proceed diligently with the work required to document the commitment from the Fed, Treasury and others to facilitate an announcement of the commitment in conjunction with the Corporation's earnings release on January 20, 2009.

Mr. Lewis restated that management's recommendation is based on the following facts: instruction from the Fed and Treasury not to exercise the MAC clause in the Merger Agreement; the assurance of the Fed and Treasury that the Corporation can complete the acquisition of Merrill Lynch on the verbal commitment of the Fed and Treasury to have a transaction evidencing the Fed and Treasury's committed assistance in existence no later than January 20, 2009, the scheduled date of the Corporation's earnings release; and Mr. Lewis' comfort with the assurances which have been made by the Fed and Treasury and clarification that funds under the TARP program are available for distribution to the Corporation to fulfill the commitment of the Treasury and Fed.

Mr. Lewis noted that no vote was required by the Board, but that he wished to open the recommendation for discussion among the Board and management.

Discussion ensued, with the Board clarifying that is was not persuaded or influenced by the statement by the federal regulators that the Board and management would be removed by the federal regulators if the Corporation were to exercise the MAC clause and fail to complete the acquisition of Merrill Lynch. The Board concurred it would reach a decision that it deemed in the best interest of the Corporation and its shareholders without regard to this representation by the federal regulators.

Further discussion ensued including accurate characterization by the federal regulators of their commitment to the Corporation when announced; the relevant assets of Merrill Lynch; the importance of the timing of the announcement of the commitment of the Fed and Treasury; the Corporation's dividends and incentive compensation; the desirability of a written commitment from the federal regulators; the reliability of the representatives of the federal regulators; the desirability of asset purchases and equity infusions; the Corporation's ability to further negotiate after the consummation of the merger; further inquiry regarding specific assurances by the federal regulators; the Corporation's recent responses to certain requests of federal regulators; REDACTED

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After discussion, the Board requested that management obtain further clarification of certain potential terms, conditions and assurances regarding the commitment from the federal regulators.

There being no further business to come before the Board, the meeting was adjourned.

Kenneth D. Lewis
Chairman of the Board

Alice A. Herald
Secretary

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BAC-ML-NYAG00003876

MINUTES OF SPECIAL MEETING OF BOARD OF DIRECTORS
OF
BANK OF AMERICA CORPORATION

December 30, 2008

Pursuant to due notice, a special meeting of the Board of Directors of Bank of America Corporation was held at 4:00 p.m. on Tuesday, December 30, 2008.

The following Directors were present constituting a quorum: Messrs. William Barnet, III, Frank P. Bramble, Sr., John T. Collins, Gary L. Countryman, Tommy R. Franks, Charles K. Gifford, Kenneth D. Lewis, Walter E. Massey, Thomas J. May, O. Temple Sloan, Jr., Robert L. Tillman, and Mmes. Monica C. Lozano, Patricia E. Mitchell, Meredith R. Spangler and Jackie M. Ward.

Also present were: Messrs. Brian T. Moynihan, and Joe L. Price, and Mmes. Amy Woods Brinkley, and Alice A. Herald, officers of the Corporation,

Mr. Lewis called and chaired the special meeting and Ms. Herald kept the minutes.

Mr. Lewis advised the Board that he wished to fully inform the Board regarding discussions between management of the Corporation and federal regulators which had occurred since the Board meeting of December 22, 2008, including the federal regulators' dim view of the economy.

Mr. Lewis reported that the Board had requested that management obtain greater clarity regarding the assurances provided to him by Mr. Bernanke, Chairman of the Board of Governors of the Federal Reserve ("Fed") and Mr. Paulson, Secretary of the Treasury ("Treasury") and to advance the completion of the commitment to the Corporation from the federal regulators on which the Board and management would rely to consummate the scheduled acquisition of Merrill Lynch & Co. ("Merrill Lynch"). He reported that management had requested that the Treasury and the Fed confirm the terms and conditions of their commitment before the closing date of the acquisition of Merrill Lynch on January 1, 2009. He

further reported that management had engaged in a series of telephone calls and communications with the federal regulators to obtain greater certainty with regard to the terms and conditions of the federal regulators' commitment.

Mr. Lewis reported that in his conversations with the federal regulators regarding the Corporation's pending acquisition of Merrill Lynch, he had stated that, were it not for the serious concerns regarding the status of the United States financial services system and the adverse consequences of that situation to the Corporation articulated by the federal regulators (the "adverse situation"), the Corporation would, in light of the deterioration of the operating results and capital position of Merrill Lynch, assert the material adverse change clause in its merger agreement with Merrill Lynch and would seek to renegotiate the transaction.

Further, Mr. Lewis reported that it was also made clear to the federal regulators that, because of the federal regulators' express concerns regarding the adverse situation that would occur if the Corporation failed to acquire Merrill Lynch, it is appropriate that the federal government make the Corporation whole for the deterioration in Merrill Lynch's operating results and financial condition.

Mr. Lewis described the conversations that had occurred predominately with Mr. Warsh, with whom Mr. Bernanke had directed management to communicate. He reported the purpose of such conversations was to sufficiently detail the needs and expectations of the Corporation to the federal regulators before the effective date of the acquisition of Merrill Lynch.

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Mr. Lewis stated that the Corporation did not have a written agreement with the federal regulators and that the Corporation could only rely on the oral commitments of Messrs. Bernanke and Paulson and their senior representatives at the Treasury and Fed, including Mr. Warsh. Mr. Lewis explained that written assurances would not be received before January 1, 2009; because any written assurances would require formal action by the Fed and Treasury, which formal action would require public disclosure. Mr. Lewis also reported that according to the federal regulators any written assurances delivered prior to January 1, 2009, would not, in any event, provide sufficient detail to provide comfort to the Board and management of the commitment by the federal regulators.

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In accordance with the recommendation of the Board at the preceding meeting, Mr. Lewis reported that management has obtained detailed oral assurances from the federal regulators with regard to their commitment and has documented those assurances with e-mails and detailed notes of management's conversations with the federal regulators. Mr. Lewis reported the dates and times of certain of the communications and the significant extent of management's efforts. Mr. Lewis then discussed in detail several of the conversations between Mr. Price and Mr. Warsh establishing essential elements of the commitment of the federal regulators, including: (i) an agreement from the federal regulators that their commitment be fully documented on or before January 20, 2009; (ii) a confirmation of the continuing and strong admonition of the federal regulators that failure of the Corporation to consummate the acquisition of Merrill Lynch would cause significant systemic risk to the financial system and the economy of the United States and would be specifically adverse to the Corporation; and (iii) the commitment of the federal regulators to deliver assistance in the form of capital and asset protection to the Corporation.

Mr. Lewis noted that Mr. Price has shared with the government management's expectations as to the amount of capital expected to be provided to the Corporation and the general construct of any equity position to be received by the federal regulators, as well as the Corporation's efforts with counsel and the Corporation's accountants with regard thereto. Mr. Lewis also noted that Mr. Price had been clear in his discussions regarding the Corporation's concerns about preventing dilution of the interests of the existing shareholders of the Corporation.

Mr. Lewis shared the Corporation's expectations presented to the federal regulators regarding the amount of proposed protection from the federal regulators against the impact of the on and off balance sheet assets of Merrill Lynch, the specific assets identified, current carrying values and related items, including the government's rate and order of absorption of losses upon reduction of market values and substantial discounts to original market values. He reported that management has also asserted clearly in discussions with the federal regulators that any "premium" charged by the government for such insurance should be modest. He also stated the Corporation's proposal insulates the most troubling Merrill Lynch assets, and retains upside potential for the Corporation.

Mr. Lewis stated that management has been insistent with the federal regulators that clarity exist with regard to their commitment. He reported that management is confident

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that Mr. Warsh understands the Corporation's position clearly. He further confirmed that Mr. Bernanke had assured him the Corporation would not be penalized by accepting the commitment of the federal regulators and that acceptance of the commitment would be beneficial to the Corporation and its shareholders. Mr. Lewis also noted, however, that the details of the commitment were not finalized.

Mr. Lewis explained that recent discussions had begun to address concerns raised by the supervisory regulators of the Fed. These regulators had expressed concern regarding the Corporation's ability to remain stable in light of their own view of the economy, the Corporation's earnings prospects and the stability of the banking industry. Mr. Lewis reported the Fed's objective is that the Corporation remain above reproach as a stable member of the financial system as the recession continues.

Mr. Lewis described the federal regulators' dim view of the near term economy and their projections of the economy's impact on the Corporation's earning prospects for 2009. He reported the regulators concern that weakened earnings and dividend payments could cause capital issues for the Corporation by early in the second quarter in view of the low tangible common equity ratio.

Mr. Lewis shared his and Mr. Price's conversations with the federal regulators, particularly Mr. Warsh, who articulated the government's desire for an injection of new private capital into the industry and future offerings of common stock by the Corporation in which the government would participate. He described discussions with the regulators regarding projected target common equity ratios, dividends, ring-fencing of certain assets of the Corporation, capital cushions for the Corporation and the government's long term and short term views regarding the provision for addition equity. Mr. Lewis explained the government's desire to see of a reduction of the Corporation's dividend to a nominal amount, perhaps 5 cents per share per quarter to protect the Corporation's capital.

Mr. Lewis stated the federal regulators' clear position that if the Corporation declined on an equity infusion at this time only to later come back and request that the government make a further equity infusion with respect to the Corporation, its terms would be onerous to the Corporation.

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Mr. Lewis discussed the implications of government ownership of a portion of the Corporation and two potential transactions with the government: a capital injection including a wrap of certain assets and a capital offering including ring-fencing of certain assets of the Corporation. He noted that both potential transactions remain under discussion with the federal regulators.

Mr. Lewis stated that no definitive agreement has been reached with the federal regulators, but that management of the Corporation had clearly explained to the federal regulators the terms and conditions required by the Corporation to consummate the acquisition of Merrill Lynch on January 1, 2009. In return, he reported, management has received strong assurances from all relevant federal regulators and policy makers that the Corporation will receive adequate and appropriate assets to neutralize the impact to the financial condition of the Corporation resulting from the Corporation's acquisition of Merrill Lynch on January 1, 2009. He stated that federal regulators had advised management of their desire that the Corporation remain stable and their willingness to assist the Corporation to raise capital, if necessary, to stabilize the Corporation's asset base.

Mr. Lewis concluded his remarks by stating that management will continue to work with the federal regulators to transform the principles that have been discussed into an appropriately documented commitment to be codified and implemented in conjunction with the Corporation's earning release on January 20, 2009.

Robust discussion ensued, including the Corporation's recourse should the federal regulators fail to comply with their assurances on which the Board and management have relied.

Mr. Price elaborated on his conversations with Messrs. Bernanke and Paulson. He reported that he had confirmed to Mr. Bernanke and Mr. Paulson the reliance of the Board and management on the federal regulators' assurances. He described the alternatives potentially available to the Corporation in a transaction with the government and the terms and conditions of agreements between the federal regulators and other institutions in the industry.

Mr. Moynihan REDACTED

REDACTED

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Further discussion ensued including backstops available to the Corporation. capital ratios and dividends.

After summary remarks by Mr. Lewis, there being no further business to come before the Board, the meeting was adjourned.

Kenneth D. Lewis
Chairman of the Board

Alice A. Herald
Secretary

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BAC-ML-NYAG00003882

From Ryan, Tom M <TMRyan@gvs.com>
Sent Monday, December 22, 2008 10 20 PM (GMT)
To Lewis, Ken D <Ken D Lewis@bankofamerica com>
Subject RE Privileged and Confidential to Board of Directors

thought so

From Lewis, Ken D [mailto Ken D Lewis@bankofamerica com]
Sent Monday, December 22, 2008 4 55 PM
To Barnet, Bill, Bramble, Frank, Collins John, Collins, John, Countryman, Gary, Franks, Tommy, Gilliard, Chad, Lozano, Monica, Massey, Walter, May, Tim, Mitchell, Pat, Ryan, Tom M , Sloan, Temple, Spangler, Meredith, Tillman, Bob, Ward, Jackie
Cc Cangus, Linda, Clark, Dayna, Fennally, Dana, Hemond, Terry M , Hoss, Joyce, Hull, Pam, McDonough, Jean, Scales, Shepherd, Patricia, Sullivan, Graceann, Wardlow, Barbara
Subject Privileged and Confidential to Board of Directors

I just talked with Hank Paulson He said that there was no way the Federal Reserve and the Treasury could send us a letter of any substance without public disclosure which, of course, we do not want

Ken