

Committee on Oversight and Government Reform, Republican Staff
Memo on Full Committee Hearing
“Bank of America and Merrill Lynch: How Did a Private Deal
Turn into a Federal Bailout? Part II”

Thursday, June 25, 2009

Referenced Documents

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K.L. Lewis

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was some -- my impression was that most people thought that the severity of the reaction meant that they firmly believed it was systemic risk.

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Q. So on the 22nd the board gives the go-ahead to continue with the Merrill Lynch transaction.

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A. Yes.

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Q. Can you describe what happens between the 22nd and the end of the year in terms of that process?

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MR. LIMAN: You just said the board decides to go ahead with the transaction. I just want to make sure about what the board decided.

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THE WITNESS: Yes. Not to exercise the MAC and pursue it.

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Q. Go forward with the deal as scheduled on the 22nd. And between the 22nd and the end of the year, if you can take me through what happened at that point.

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A. Still a lot of intensity with Joe and others about the amounts and the forms of the TARP money and the wrap, so just a lot of that. Then, as I mentioned, I had -- I don't know if many, it

K.L. Lewis

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"?

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K.L. Lewis

THE WITNESS: The fact that somebody would say that to the CEO of Bank of America at a time that it was in good standing just showed to me that they had a deep belief that we should not call the MAC.

MR. LAWSKY: I'm going to jump back to the bonuses again. If Merrill Lynch had waited and not paid the bonuses out early, could you tell us how that would have worked? Would it have been Bank of America's Comp Committee, and, let's say, in January it would have paid out those bonuses?

THE WITNESS: Legally, I don't know. I would presume. I don't know what legal rights you would have to override what was done by a public company's compensation committee.

MR. LAWSKY: You testified earlier, I believe, that Steele Alphin and Andrea Smith were urging Thain to wait on awarding bonuses till the new year.

THE WITNESS: Right.

MR. LAWSKY: Had they done that -- so no Comp Committee action by Merrill, is it your

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.

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 Barnett, III, Frank P. Brantle, 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 E. Lozano, Meredith R. Spangler and Jackie M. Ward.

Also present were Messrs. J. Steele Alphin, Keith T. Banks, Gregory L. Gurl, Bruce Hammonds, Jack E. McGee, Brian T. Moynihan, Joe L. Pace, Richard K. Struthers, and Mmes. Amy Woods Brinkley, Barbara J. Desoer, Annie M. Fiaccane, 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

REDACTED

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 it 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;

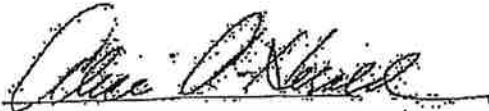
REDACTED

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
Kenneth D. Lewis
Chairman of the Board



Alice A. Herald
Alice A. Herald
Secretary

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.

From: Tim P. Clark
To: Adam Ashcraft
Cc: Arthur Angulo; Brian Peters; Christopher Calabia; Daniel Sullivan; Dennis Herbst; Jane Majeski; Kevin Coffey; Kevin Stiroh; Morgan Bushey; William Rutledge
Subject: Re: Revised Overview section for 1:00 discussion
Date: 12/21/2008 12:24 PM

My thoughts were more along the lines of possible market disruption when becomes public that they pull out and impact on bac funding and otherwise. But definitely get your point. Thanks

--Sent from my BlackBerry Wireless Handheld
▼ **Adam Ashcraft**

----- Original Message -----

From: Adam Ashcraft
Sent: 12/21/2008 12:21 PM EST
To: Tim Clark
Cc: Arthur Angulo; Brian Peters; Christopher Calabia; Daniel Sullivan; Dennis Herbst; Jane Majeski; Kevin Coffey; Kevin Stiroh; Morgan Bushey; William Rutledge
Subject: Re: Revised Overview section for 1:00 discussion

A collapse of the merger will have dire consequences for Merrill Lynch, and will likely have a severe adverse affect on Bank of America as well.

I would suggest the points here are a little over the top.

A collapse of the merger will have dire consequences for Merrill Lynch, and could have a severe adverse affect on Bank of America as well.

I think equally possible that the market looks at Merrill's 2008 q4 number and sees BOA making a smart move by walking away from a Black Hole into which large amounts of time, effort, and money would have been going. In other words, it is not clear that the market reaction to BOA is so clearly negative. It might be, but a little more balance here might be worthwhile.

You might add the bullet

It is possible that the market looks at Merrill's 2008 q4 earnings release and sees BOA making a smart move by walking away from a black hole into which large amounts of time, effort, and money would have been going, potentially overwhelming the firm and inviting further dilution through future capital injections


ABA

Adam B. Ashcraft
Financial Intermediation Function
Federal Reserve Bank of New York
[REDACTED] phone
[REDACTED] fax
[REDACTED] cell

B-CPP009075

BOG-BAC-ML-COGR- 000120

Jennifer Burns/
12/23/2008 06:06 PM

To Mac Alfriend , Jeffrey
Locker/
cc
bcc
Subject Re: Color from the Chairman 

Yep - I don't think they were ever really trying to shake anyone down We paint a bad picture of them - they are really difficult and often unlikable- but I think they have seen what has happened with other firms that have made bad acquisitions and they are worried. Me too!

Jennifer Burns
Federal Reserve Bank of Richmond




Jeffrey Locker

12/23/2008 05:34 PM

To Mac Alfriend Jennifer Burns
cc
Subject Color from the Chairman

Spoke with him and he confirmed KL's appeal for a letter committing to future support, which was denied. His sense is that KL is just generally anxious about the merger, not trying to shake anyone down.

From: [Kevin Stroh](#)
To: [Arthur Angulo](#); [Brian Peters](#); [Jamie McAndrews](#); [Thomas Baxter](#)
Cc: [Til Schuermann](#)
Subject: Re: BAC - Some thoughts...
Date: 12/28/2008 12:28 PM

Hi -

Here are some thoughts:

- How confident are we that we have until 1/20? Given the increase in MER losses and difference from expectations, there might be pressure for a pre-announcement to investors and analysts. Has this been discussed and ruled out by the companies?
- The concern about drawing attention to BAC is fair, but the upside is for the USG to be ahead of the curve and not appear so reactive. This ultimately depends on how confident we are in the loss estimates. If confidence is high, I think the benefit of acting early dominates. I haven't looked at analyst expectations lately, so I don't know if it is credible to say it is just MER's problem. We can check tomorrow what consensus estimates are.
- I can add the TCE/RWMA calculations to what I did last week. We should talk about the right target and how we want to model the asset rollforward.
- I think that any early intervention needs to be consistent in form with a broader policy to follow, including nonprice constraints like compensation or loan modifications. This puts a bit more pressure on getting the big picture in place. There may be more discretion in details on how the deal is priced, which assets are included, etc., but it would look odd and ad hoc if the structure was fundamentally different.

Kevin

▼ Arthur Angulo

Arthur Angulo,
12/22/2008 07:00 AM

To: Thomas Baxter, "Jovce Hansen"
cc: William Rutledge Peters, Brian
Subject: MER-BAC

Yesterday, Ken Lewis gave separate assurances to Sec Paulson and Chm. Bernanke that BAC will consummate the acquisition of MER as planned on 1/1/09. HMP and BSB will speak together with Lewis today, and they will express their commitment to work with BAC to come up with the "right response" to BAC's situation. The timeframe for doing so is before 1/20/09, which is when BAC is tentatively scheduled to publicly release its 4Q 2008 earnings.

I'll provide a more fulsome recap at today's 8:45 am briefing and/or in a separate e-mail, but I want to request legal support on one issue and give you a heads-up on another.

1) A critical issue is that, to the extent MER believes it needs to file an 8-K, it should do so as close as possible to BAC's 8-K filing as opposed to doing so in early January. An early January filing by MER that announces significantly higher losses than the market is expecting could put BAC under pressure in advance of its own filing and would

B-CPP008871

BOG-BAC-ML-COGR- 000126

not allow sufficient time for the Federal Reserve, UST and FDIC to consider alternatives, reach agreement and design/implement a package of industry wide (preferably) or BAC-specific actions.

I plan to call MER's CFO this morning. I'll ask about: MER's current estimate of 4Q loss v market expectations, and whether and when MER's intends to file an 8-K. If I get a sense that MER is leaning toward an early January filing, I'll try to steer him toward a later filing.

If I get a sense that MER is committed to an early January filing, I'll ask for a follow-up discussion with appropriate securities counsel at MER to gain a better sense as to the amount of flexibility MER has in this regard. This is where it would be helpful (and necessary!) to have one of our attorneys participate. I'll let you know if a second call is necessary...

2) On a principals call last night, various alternatives were discussed in broad terms. While no specific proposals were put forth or agreed on w.r.t. BAC, HMP gravitated toward a "Citi-type" guarantee arrangement over an aggregator bank concept espoused by Sheila Bair. With respect to BAC, he even threw out a figure of \$200B-\$300B of ring-fenced assets (so we're wondering what he has conveyed to Lewis). This is not a "today" issue, but we'll need to stay close to this to highlight the problems with using Citi as an exact template in other situations. The good news is that BSB isn't as enamored as HMP is with the Citi structure.

From: Cotty, Neil <neil.cotty@bankofamerica.com>
Sent: Monday, December 22, 2008 8:47 PM (GMT)
To: Hayward, Christopher (Finance Director) <christopher_hayward@ml.com>
Bcc: Hayward, Christopher (Finance Director) <chayward@ml.com>
Subject: Re: Fed

Tks

----- Original Message -----

From: Hayward, Christopher (Finance Director) <christopher_hayward@ml.com>
To: Cotty, Neil
Sent: Mon Dec 22 14:37:37 2008
Subject: FW: Fed

FYI. Can give you more color if needed.

----- Original Message -----

From: Chai, Nelson (CFO)
Sent: Monday, December 22, 2008 11:42 AM
To: Thain, John (Chairman and CEO)
Cc: Hayward, Christopher (Finance Director)
Subject: Fed

Had a call with art angelo at fed, had a quick discussion on where we are quarter to date. His hope is that there is no disclosure prior to BOA quarterly announcement. We told him this was the current plan. He asked this course changes and we planned on issuing an 8k on mer stand alone to alert him.

He is just planning the year end for him and his team.

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From: Scott Alvarez
To: Arthur Angulo
Cc: Coryann Stefansson; Deborah P. Bailey
Subject: Re: SEC
Date: 01/11/2009 06:56 PM

I have not discussed this with the SEC. BAC has complained that someone did talk to the SEC, with the result that the SEC called late last week to say they heard BAC was negotiation a Citi type deal with the USG and to ask BAC to explain the unexpectedly high losses at ML. That said, it sounds like Erik already knows something about what is going on. So I agree you should give him the broad and tentative outlines. I would also let him know that we think this is a matter of systemic importance and that BAC is very sensitive about this. Erik has been very helpful in the past with SEC enforcement and very discrete about sharing supervisory info we give him.

Scott

▼ [Arthur Angulo/NY/FRS@FRS](#)

Arthur Angulo/NY/FRS@FRS To Scott Alvarez/BOARD/FRS@BOARD, Deborah P Bailey/BOARD/FRS@BOARD, Coryann Stefansson/BOARD/FRS@BOARD
01/11/2009 06:35 PM cc
Subject SEC

Have we conveyed anything to the SEC re the BAC situation? I rec'd an e-mail and follow up VM from Erik Sirri on Friday evening -- he will be at the FRBNY tomorrow attending the regulators meeting re the CDS CCPs, and he wants to duck out to see me...Based on his VM, he knows something is up...I intend to give him the broad outlines, but before doing so I wanted to check to how much (if anything) has been shared with the SEC...Thx.

From: Jennifer Burns
To: Brian Peters; Tim P. Clark; Mac Alfriend
Cc: Arthur Angulo
Subject: Re: 5:30 call
Date: 12/19/2008 05:28 PM

Agreed. Also not the MAC discussion.

Jennifer Burns
Federal Reserve Bank of Richmond
[REDACTED]

▼ Brian Peters

----- Original Message -----

From: Brian Peters
Sent: 12/19/2008 05:21 PM EST
To: Tim Clark; Jennifer Burns; Mac Alfriend
Cc: Arthur Angulo/NY/FRS@NY
Subject: 5:30 call

Given the presence of the OCC on the call, I think we should not discuss or reference the call with Ken Lewis and Paulson.

From: Timothy Geithner
To: Timothy F. Geithner
Subject:
Date: 12/20/2008 08:02 AM

HMP

Stuart Levy. Treated like a principal. POTUS E designation/assurance.

BofA/ML. Can't MAC. Have to close. Maybe more time than 1/1.

CONFIDENTIAL

From: Kevin Warsh
To: Timothy Geithner
Subject: Re:
Date: 12/20/2008 10:28 AM

Your troops are preparing standalone and pro forma financials to share with ben don ma for tomorrow afternoon. Will also need to come to view on expected market reaction to different types of deal announcements.

Bigger issue is Treas -- who is undermanned and less than crisp in their views.

--Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Timothy Geithner
Sent: 12/20/2008 09:02 AM EST
To: Kevin Warsh

Are you all over BoA/ML and are you getting what you need from the troops?

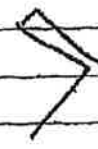
Notes of Joe Price
Bank of America

Frank P. 21-DEC-08

USI

- Mroch
- Shelin
- Loto
- Eric Adam
-
-
-

- All committed to rights
- FIRE BOA if you do it -
irresp. for country
- What we are
- Tim G. agrees
- Shapiro - timing - FED
- Boas + 1



- Earnings - ONE ANNOUNCEMENT
- ML - 18% we can do it

11-11-08
CPL



IS

21-DEC-08 FED (1500)

- Larry Summers + Tim agree
- This has been today


Jan 20th my stock price goes up

(1 sample)

- Flexible -
- CPL - Richard, misunderstanding behind us



Jennifer Burns
12/04/2008 02:10 PM

To "Andrew Foster"
Dobbeck/
cc Lisa A White/ Arthur Angulo/
bcc
Subject Re: BoA ML merger (Inquiry From UK FSA) 

Dianne

Brian Peters

Hello Andrew -

Apologies on the delayed response to your earlier e-mail. We have had recent discussions with BAC and ML management who contend that they have the required shareholder support and are confident that the transaction will be approved with tomorrow vote. If approval is withheld, ML would continue to have access to the various facilities and programs currently in place in the US. Additionally, it is reasonable to expect that ML would be provided support necessary to preclude significant systemic disruption. Finally, FRBNY staff remain involved with ML and are positioned to ensure information flows necessary to support this.

I hope that this provides a satisfactory response to your inquiry. Please let us know if you have additional questions. Thank you.

Jennifer

Jennifer Burns
Federal Reserve Bank of Richmond


From: Arthur Angulo
To: William Rutledge; Deborah P. Bailey; Brian Peters; Tim P. Clark; Corvann Stefansson
Bcc: Arthur Angulo
Subject: Liquidity Provision
Date: 12/21/2008 12:46 PM
Attachments: Emergency Liquidity.doc

Attached (and reproduced below for BB reading) is a one-pager re emergency liquidity provision to MER should BAC walk away.



Emergency Liquidity.doc

Contingency Actions re MER Should BAC Refuse to Consummate Acquisition

In the event that BAC were to abruptly announce that it does not intend to consummate its acquisition of MER on January 1, 2009, MER would face an immediate run. Emergency liquidity provision actions that could be taken to provide some time for the sale/disposition of MER businesses and assets include the following:

Reverse decision to scale back MER's planned reduction of PDCF usage [e.g., removal of BlackRock shares (\$5B) and munis/whole loans (\$4.2B)].

Expand PDCF eligibility (e.g., swap receivables a la MS contingency)

Expand borrowing capacity under Federal Reserves Commercial Paper Funding Facility

Expand borrowing capacity under FDIC's Temporary Liquidity Guarantee Program

Emergency conversion to BHC (a la GS and MS), followed by:

Max Discount Window borrowing from MLBUSA (ILC) – need to determine available DW collateral.

Large 23A waiver to allow loan from MLBUSA to parent company

A 13(3) loan secured by otherwise encumbered assets...or subsidiaries (a la AIG)

Contingency Actions re MER Should BAC Refuse to Consummate Acquisition

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- 1) Reverse decision to scale back MER's planned reduction of PDCF usage [e.g., removal of BlackRock shares (\$5B) and munis/whole loans (\$4.2B)].
- 2) Expand PDCF eligibility (e.g., swap receivables a la MS contingency)
- 3) Expand borrowing capacity under Federal Reserves Commercial Paper Funding Facility
- 4) Expand borrowing capacity under FDIC's Temporary Liquidity Guarantee Program
- 5) Emergency conversion to BHC (a la GS and MS), followed by:
 - a. Max Discount Window borrowing from MLBUSA (ILC) – need to determine available DW collateral.
 - b. Large 23A waiver to allow loan from MLBUSA to parent company
- 6) A 13(3) loan secured by otherwise encumbered assets...or subsidiaries (a la AIG)

▼ Deborah P Bailey/BOARD/FRS

**Deborah P
Bailey/BOARD/FRS**

01/14/2009 10:40 PM

To: Scott Alvarez/BOARD/FRS@BOARD, William B
English/BOARD/FRS@BOARD, Coryann
Stefansson/BOARD/FRS@BOARD, Mark
VanDerWeide/BOARD/FRS@BOARD

cc

Subject: Re: Draft BAC Memo

I can follow up with Cory but not quick sure of the purpose of the OCC's note which is a scaled down version of what Cory and others in the Fed have drafted from the Fed. I assume that if the FDIC does not join on this transaction the Fed and the OCC can proceed without them? At the end of the day, I would assume that the Fed and the Treasury can do this transaction without the FDIC if needed. Based on my experience with the FDIC, they are much more likely to make a decision after the evidence of instability actually exist. I think Cory has been doing a great job with the FDIC and making progress with them to understand the validity of the issues and the need for a systemic risk. Not sure she has fully convinced them yet but has made significant progress.

Question: Does Treasury now think that there is not an urgent need?

Sent from the Blackberry of Deborah Bailey

▼ Scott Alvarez

----- Original Message -----

From: Scott Alvarez
Sent: 01/14/2009 08:47 PM EST
To: William English; Deborah Bailey; Coryann Stefansson;
Mark VanDerWeide
Subject: Fw: Draft BAC Memo

Treasury asked for a memo explaining why we have to go so quickly on this deal in the event that the FDIC doesn't join and we don't make a systemic risk determination.

Treasury asked that it come from the Fed and OCC jointly. OCC took a crack at it based on our systemic risk memo.

Any thoughts?

Thanks!

Scott

----- Forwarded by Scott Alvarez/BOARD/FRS on 01/14/2009 08:45 PM -----

"Williams, Julie"

From: "Bair, Sheila C." [REDACTED]
Sent: 01/14/2009 08:43 PM EST
To: Chairman's Email Redacted
Subject: What we could do -- maybe

Dear Ben,

Strong discomfort with this deal at the FDIC, for all of the reasons you and I have discussed. Also, I understand from staff that the size and composition of the pool is still somewhat up in the air, so it is difficult for us to evaluate the adequacy of BoA's 10 billion deductible. Here is the best I think we can do. The FDIC will take 25% of the USG 10 billion loss share, which corresponds with the percentage of the ringfenced assets coming out of the insured entities. We will do the loss share with Treasury, pro-rata (taking 25 cents to their 75 cents for each dollar of loss) and similarly share pro rata with the preferred shares and warrants issued by BofA as premia. We will also amend the TLGP program to facilitate BofA doing a guaranteed covered bond deal, while announcing that we will entertain applications from other TLGP participants to do the same. We will work in good faith with you, Treasury, BofA and PIMCO to determine the appropriate deductible.

Let me know if you think this will work. My board does not want to do this, and I don't think I can convince them to take losses beyond the proportion of assets coming out of the depository institutions.

Sheila

PS Reading the term sheet, I think the FRB has ably covered itself on the tail risk. You guys are tough!

This message was secured by [ZixCorp](#)^(R).

From: [Scott Alvarez](#)
To: [Donald L Kohn](#)
Cc: [Kevin Warsh](#)
Subject: Re: Fw: BofA
Date: 12/29/2008 07:22 PM

I spoke with the Chairman a bit this afternoon about his proposal. His idea is more high-level than the write-up suggests, and some aspects (like the interest rate and the accounting requirements) are either already set or are based on features that can't be changed. I haven't quite figured out how to make the main suggestion work and still need to work it through with Brian.

Scott

▼ [Donald L Kohn/BOARD/FRS](#)

**Donald L
Kohn/BOARD/FRS**
12/29/2008 07:18 PM

To: [Kevin Warsh/BOARD/FRS@BOARD](#)
cc: [Scott Alvarez/BOARD/FRS@Board](#)
Subject: Re: Fw: BofA

got to admit i didn't really grasp his suggestion, though the motivation could be troublesome. A lot of what's under discussion, including aggeegator bank or Citi like wrap would involve at least the potnetial for FR balance sheet in size.

▼ [Kevin Warsh/BOARD/FRS](#)

**Kevin
Warsh/BOARD/FRS**
12/29/2008 02:56 PM

To: [Scott Alvarez/BOARD/FRS@BOARD](#)
cc: [Donald L Kohn/BOARD/FRS@BOARD](#)
Subject: Fw: BofA

scott

are you running traps with dudley and madigan on chairman idea?

thx

kevin

From: Brian Peters
To: William Butterfield; Terrence Check; Arthur Aoudo; William Dudley; Christine Cummano
Subject: Fw: Summing up C, BAC's earnings, insufficient bank equity
Date: 01/17/2009 09:51 AM

What is that popular phrase of late, "the Tipping Point?"

----- Forwarded by Brian Peters/NY/FRS on 01/17/2009 09:50 AM -----

Patricia Mosser/NY/FRS

01/16/2009 10:42 PM

To: Brian Peters/NY/FRS
CC:
Subject: Fw: Summing up C, BAC's earnings, insufficient bank equity

And there you have it. Nationalization here we come. Let me know what time tomorrow. (I'm hoping to call in rather than show up, if possible).

Patricia C. Mosser, FRB-NY
Sent from my BlackBerry Handheld.
▼ Michael Holscher

----- Original Message -----

From: Michael Holscher
Sent: 01/16/2009 07:31 PM EST
To: NY MKT INTEL; William Dudley; Meg McConnell; Adam Ashcraft; Kevin Stiroh
Subject: Summing up C, BAC's earnings, insufficient bank equity

This comment from GS notes sums up today's releases from C and BAC, and why some of us could have had (will have?) a rough weekend:

(1) BAC standalone was pretty bad, but not horrendous...

(2) Merrill was much, much worse than expected - Merrill lost \$15 bn. 3X worse than last quarter. To put \$15 bn after-tax in perspective, 60% of the common equity base of the company was lost in one quarter.

(3) As a result, Bank of America's pro forma capital position became very thin (2.6% tangible common post Merrill).

More broadly, BAC's loss coupled with Citigroup's loss (announced this morning) brings the banking system to an uncomfortable intersection of size and leverage: the two largest balance sheets accounting for roughly 40% of the industry's assets are also the two most levered from a tangible common equity perspective (BAC at 2.6%, Citigroup below 2%).

Michael Holscher
Markets Group, Federal Reserve Bank of New York
Office: [REDACTED]
Trading Desk: [REDACTED]
Fax: [REDACTED]

Note: All numbers may also be dialed with the 646 area code.

----- Forwarded by Michael Holscher/NY/FRS on 01/16/2009 07:24 PM -----

12-31-08

Bernake

He was expecting my call.

Said he wanted to reiterate what he had said previously that we had joint interests in having the market perceive the solution as a positive one and goal was to have our stock price go up and that we continued to be perceived as a strong company. They were committed and were working hard to find the right solution.

- Wanted the solution to be constructive and not punitive.
- Wanted this to be seen as helping out with Merrill and issuing a vote of confidence in BAC.
- Again said we are strongly committed to this being perceived as a positive for BAC. "We will not leave you in the lurch."
- Geithner, Sommers and Paulson up to date. Geithner would like to see what is done as a template for the industry. Bernake said clearly we are going to be dealing with systemic issues over the next few months.
- Said we view you as a strong company that has acted very appropriately throughout very difficult circumstances.
- Said you can assure your board that our interests are aligned.
- Wished me Happy New Year.

He did mention that if there were more efficient ways to get the same protection, the wrap model is somewhat inefficient from your standpoint as it chews up your liquidity capacity. Again, I think the message was try and be creative in reaching the objectives in the most efficient manner.

Lastly, we've heard it loud and clear that the agencies feel calling a MAC would be systemically unsafe and unsound to the system as well as Bank of America. In response to Ken's question on how we should respond to questions about the MAC, he said we could say our regulators and the Treasury strongly stated that to call a MAC would not be in our best interest.

I'll have my team continue to get our thoughts together but wanted to make sure we are consistent and see when you wanted to connect. I'll be in the office tomorrow morning (Tuesday). FYI, while not confirmed, I assume the Treasury contact will be Jeremiah.

I think you have it but my contact info is:

[REDACTED]
[REDACTED] - office
[REDACTED] - home - personal #
[REDACTED] - home - work #

It's easiest to reach me by just sending me a blackberry message. Hope you are having as much fun as I am. Take care.

jlp

From [REDACTED]
Sent Monday, December 22, 2008 10:08 PM (GMT)
To Lewis, Ken D [REDACTED]
Subject: Re: Privileged and Confidential to Board of Directors

Not a surprise to me thanks for sharing

In a message dated 12/22/2008 4:58:05 P.M. Eastern Standard Time, Ken D Lewis@bankofamerica.com writes:

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

One site keeps you connected to all your email: AOL Mail, Gmail, and Yahoo Mail. The NEW AOL.com.

From: Ryan, Tom M [mailto:tom.ryan@frb.org]
Sent: Monday, December 22, 2008 10:20 PM (GMT)
To: Lewis, Ken D [mailto:ken.lewis@frb.org]
Subject: RE: Privileged and Confidential to Board of Directors

I thought so

From: Lewis, Ken D [mailto:ken.lewis@frb.org]
Sent: Monday, December 22, 2008 4:58 PM
To: Barmel, Bill; Bramble, Frank; Collins, John; Collins, John, Countyman; Gary, Franks; Tommy, Gifford; Chad, Lozano; Morice, Massey; Waller, May; Tom, Mitchell; Pat, Ryan; Tom M; Sloan, Temple; Spangler, Meredith; Tilman, Bob; Ward, Jackie
Cc: Canipe, Linda; Clark, Dayna; Fennelly, Dana; Hemond, Terry M; Hroll, Joyce; Hull, Pam; McDonough, Jean; Scales, Shepherd; Patricia, Sullivan; Gracian, Wardlaw; 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



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
120 Broadway
New York, NY 10271

ANDREW M. CUOMO
Attorney General

(212) 416-8050

April 23, 2009

The Honorable Christopher J. Dodd,
Chairman
U.S. Senate Committee on Banking,
Housing, and Urban Affairs
534 Dirksen Senate Office Building
Washington, DC 20510

Mary L. Schapiro, Chairman
U.S. Securities and Exchange Commission
Office of the Chairman
100 F Street, NE
Washington, DC 20549

The Honorable Barney Frank, Chairman
House Financial Services Committee
Democratic Staff
2129 Rayburn House Office Building
Washington, DC 20515

Ms. Elizabeth Warren, Chair
Congressional Oversight Panel
732 North Capitol Street, NW
Rooms C-320 and C-617
Mailstop: COP
Washington, DC 20401

Re: Bank of America – Merrill Lynch Merger Investigation

Dear Chairpersons Dodd, Frank, Schapiro and Warren:

I am writing regarding our investigation of the events surrounding Bank of America's merger with Merrill Lynch late last year. Because you are the overseers and regulators of the Troubled Asset Relief Program ("TARP"), the banking industry, and the Treasury Department, we are informing you of certain results of our investigation. As you will see, while the investigation initially focused on huge fourth quarter bonus payouts, we have uncovered facts that raise questions about the transparency of the TARP program, as well as about corporate governance and disclosure practices at Bank of America. Because some matters relating to our investigation involve federal agencies and high-ranking federal officials charged with managing the TARP program, we believe it is important to inform the relevant federal bodies of our current findings. We have attached relevant documents to this letter for your review.

On September 15, 2008, Merrill Lynch entered into a merger agreement with Bank of America. The merger was negotiated and due diligence was conducted over the course of a tumultuous September 13-14 weekend. Time was of the essence for Merrill Lynch, as the company was not likely to survive the following week without a merger. The merger was approved by shareholders on December 5, 2008, and became effective on January 1, 2009.

The week after the shareholder vote – and days after Merrill Lynch set its bonuses – Merrill Lynch quickly and quietly booked billions of dollars of additional losses. Merrill Lynch's fourth quarter 2008 losses turned out to be \$7 billion worse than it had projected prior to the merger vote and finalizing its bonuses. These additional losses, some of which had become known to Bank of America executives prior to the merger vote, were not disclosed to shareholders until mid-January 2009, two weeks after the merger had closed on January 1, 2009.

On Sunday, December 14, 2008, Bank of America's CFO advised Ken Lewis, Bank of America's CEO, that Merrill Lynch's financial condition had seriously deteriorated at an alarming rate. Indeed, Lewis was advised that Merrill Lynch had lost several billion dollars since December 8, 2008. In six days, Merrill Lynch's projected fourth quarter losses skyrocketed from \$9 billion to \$12 billion, and fourth quarter losses ultimately exceeded \$15 billion.

Immediately after learning on December 14, 2008 of what Lewis described as the "staggering amount of deterioration" at Merrill Lynch, Lewis conferred with counsel to determine if Bank of America had grounds to rescind the merger agreement by using a clause that allowed Bank of America to exit the deal if a material adverse event ("MAC") occurred. After a series of internal consultations and consultations with counsel, on December 17, 2008, Lewis informed then-Treasury Secretary Henry Paulson that Bank of America was seriously considering invoking the MAC clause. Paulson asked Lewis to come to Washington that evening to discuss the matter.

At a meeting that evening Secretary Paulson, Federal Reserve Chairman Ben Bernanke, Lewis, Bank of America's CFO, and other officials discussed the issues surrounding invocation of the MAC clause by Bank of America. The Federal officials asked Bank of America not to invoke the MAC until there was further consultation. There were follow-up calls with various Treasury and Federal Reserve officials, including with Treasury Secretary Paulson and Chairman Bernanke. During those meetings, the federal government officials pressured Bank of America not to seek to rescind the merger agreement. We do not yet have a complete picture of the Federal Reserve's role in these matters because the Federal Reserve has invoked the bank examination privilege.

Bank of America's attempt to exit the merger came to a halt on December 21, 2008. That day, Lewis informed Secretary Paulson that Bank of America still wanted to exit the merger agreement. According to Lewis, Secretary Paulson then advised Lewis that, if Bank of America invoked the MAC, its management and Board would be replaced:

[W]e wanted to follow up and he said, 'I'm going to be very blunt, we're very supportive on Bank of America and we want to be of help, but' -- as 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 of “That threat, okay, do it. That would be systemic risk.”

In an interview with this Office, Secretary Paulson largely corroborated Lewis’s account. On the issue of terminating management and the Board, Secretary Paulson indicated that he told Lewis that if Bank of America were to back out of the Merrill Lynch deal, the government either could or would remove the Board and management. Secretary Paulson told Lewis a series of concerns, including that Bank of America’s invocation of the MAC would create systemic risk and that Bank of America did not have a legal basis to invoke the MAC (though Secretary Paulson’s basis for the opinion was entirely based on what he was told by Federal Reserve officials).

Secretary Paulson’s threat swayed Lewis. According to Secretary Paulson, after he stated that the management and the Board could be removed, Lewis replied, “that makes it simple. Let’s deescalate.” Lewis admits that Secretary Paulson’s threat changed his mind about invoking that MAC clause and terminating the deal.

Secretary Paulson has informed us that he made the threat at the request of Chairman Bernanke. After the threat, the conversation between Secretary Paulson and Lewis turned to receiving additional government assistance in light of the staggering Merrill Lynch losses.

Lewis spoke with individual Board members after his conversation with Secretary Paulson. The next day, December 22, 2008, the Board met and was advised of Lewis’s decision not to invoke the MAC. The minutes of that meeting listed the key points of Lewis’s calls with Secretary Paulson and Chairman Bernanke:

(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 system in America and would have adverse consequences for the Corporation; (ii) second, the Treasury and Fed state 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.

The Board Minutes further state that the “Board clarify[ied] that is [sic] 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 failed to complete the acquisition of Merrill Lynch.”

Another Board meeting was held on December 30, 2008. The minutes of that meeting stated that “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.”

Despite the fact that Bank of America had determined that Merrill Lynch’s financial condition was so grave that it justified termination of the deal pursuant to the MAC clause, Bank of America did not publicly disclose Merrill Lynch’s devastating losses or the impact it would have on the merger. Nor did Bank of America disclose that it had been prepared to invoke the MAC clause and would have done so but for the intervention of the Treasury Department and the Federal Reserve.

Lewis testified that the question of disclosure was not up to him and that his decision not to disclose was based on direction from Paulson and Bernanke: “I was instructed that ‘We do not want a public disclosure.’”

Secretary Paulson, however, informed this Office that his discussions with Lewis regarding disclosure concerned the Treasury Department’s own disclosure obligations. Prior to the closing of the deal, Lewis had requested that the government provide a written agreement to provide additional TARP funding before the close of the Merrill Lynch/Bank of America merger. Secretary Paulson advised Lewis that a written agreement could not be provided without disclosure.

Lewis testified that there was no discussion with the Board about disclosure to shareholders. However, on the night of December 22, 2008, Lewis emailed the Board, “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.” The December 30 Board meeting minutes further reflect that Bank of America was trying to time its disclosure of Merrill Lynch’s losses to coincide with the announcement of its earnings in January and the receipt of additional TARP funds: “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 [sic] release on January 20, 2009.”

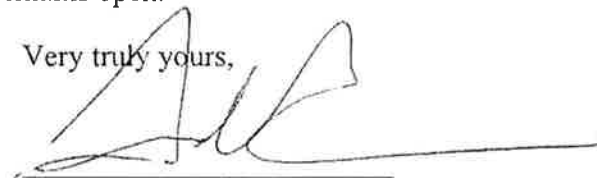
It also bears noting that while no public disclosures were made by Bank of America, Lewis admitted that Bank of America’s decision not to invoke the MAC clause harmed any shareholder with less than a three year time-horizon:

- 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.
- Q. From your perspective, wasn't that one of the effects of what he was doing?
- A. Over the short term, yes, but we still thought we had an entity that filled two big strategic holes for us and over long term would still be an interest to the shareholders.
- Q. What do you mean by "short-term"?
- A. Two to three years.

Notably, during Bank of America's important communications with federal banking officials in late December 2008, the lone federal agency charged with protecting investor interests, the Securities and Exchange Commission, appears to have been kept in the dark. Indeed, Secretary Paulson informed this Office that he did not keep the SEC Chairman in the loop during the discussions and negotiations with Bank of America in December 2008.

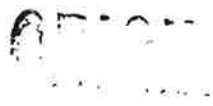
As this crucial recovery process continues, it is important that taxpayers have transparency into decision-making. It is equally important that investor interests are protected and respected. We hope the information herein is useful to you in your federal regulatory and oversight capacities and we remain ready to assist further in any way. We also note that we have been coordinating our inquiry with the Special Inspector General for the Troubled Asset Relief Program, whose investigation also remains open.

Very truly yours,



Andrew M. Cuomo
Attorney General of the
State of New York

cc: Neil Barofsky
Special Inspector General
Troubled Asset Relief Program



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 --

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K.L. Lewis

I'm not sure I was getting them every day. I don't recall getting them every day because they were projections, not daily P and L's. So the concern was, we had had a forecast on December 5th, as I recall, of \$9 billion, but \$3 billion pretax was a plod (phonetic) just for conservative reasons; so what you saw was basically a 7 to 12 if you could go through the plod, and then you get to the \$12 billion. So a staggering large percentage of the original amount in a very short period of time.

MR. LAWSKY: Just so the record is clear, I have your calendar in front of you, although you don't -- Counsel produced it. December 14 was on a Sunday. It says "depart to arrive 3:30." You're in New York leaving that day?

THE WITNESS: Yes.

MR. LAWSKY: So is that the day you have the meeting with Price?

THE WITNESS: Not a meeting, a phone call.

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 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.

K.L. Lewis

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

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K.L. Lewis

you?

THE WITNESS: Yes. I think her calendar is basically like mine, and she updates it.

MR. LAWSKY: There are days where you have nothing on there, which, I assume, you're doing stuff.

THE WITNESS: During this time, we agreed that we're going to keep our calendars fairly open because we go back and forth so much and there's so much happening. So it's not -- we didn't want a structured environment where we were in meetings all the time and we couldn't get to each other. That's not only about Merrill Lynch; it was about everything going on.

MR. LAWSKY: So this calendar reflects, basically, everything you were doing during this period of time. It's not like there is some other calendar somewhere elsewhere that has more.

THE WITNESS: No.

Q. So at some point earlier in the day you have a conversation with Mr. Paulson. During this call, does Mr. Paulson ask why do you think you

K.L. Lewis

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; Paulson was 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.

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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

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2 being very difficult -- and, again, the meetings
3 are running together on me -- I don't know what
4 would be the remedy -- I know at the end we were
5 basically told to stand down, let them go on boards
6 and see what they thought, and we left. It
7 wasn't -- as I recall, it wasn't a two-hour meeting
8 or something. I can't remember how long it was,
9 but it wasn't some marathon.

10 Q. Who at the meeting was expressing that
11 MACs are tough to qualify for?

12 A. I can't remember, but somebody did, as I
13 recall.

14 Q. Would it either have been -- let me put
15 it this way. Who did the speaking for the Treasury
16 and the Fed at the meeting?

17 A. Mainly Hank and Ben, but I think Alvarez
18 said a few things, too.

19 Q. By the way, was anyone from Wachtell at
20 the meeting?

21 A. No.

22 MR. CORNGOLD: Were you told in that
23 meeting that if you exercise the MAC clause
24 that they would seek to remove you and/or
25 Bank of America's board?

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THE WITNESS: No. That was not then.

They hadn't worked themselves up to that yet.

Q. So you meet with the federal regulators. I didn't quite understand what you said. What were they going to do? They asked you to do something?

A. They said stand down and then let's talk -- they basically said don't do anything by saying "stand down," and then "let's talk again." I don't remember if we arranged anything or not, but, obviously, they needed to put their heads together. And we left.

Q. Did you, at that meeting, agree when you would talk again?

A. I don't remember.

Q. When did you talk again?

A. I don't remember the date. There was a lot of discussions after that with Joe. I do remember a telephonic meeting after that, that we had a number of people together talking about the MAC, and I recall there being strong consensus -- I think at that meeting somebody from New York Fed, the Washington Fed and Richmond Fed was on the line, and then there was somebody -- I think it was a lawyer from the New York Fed -- who strongly

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Q. Was there anything else of substance discussed on the call that took place that you were discussing that you haven't discussed so far?

A. I don't recollect anything else.

Q. What is the next thing that happened after this conference call?

A. I don't recall the date, but --

Q. Let me interrupt you.

MR. MARKOWITZ: Counsel, do you have anything on your end that helps pinpoint the date any better?

MR. LIMAN: I think if you put the minutes in front of him --

MR. CORNGOLD: There was a board meeting on December 22nd, Monday, at 4 p.m.

MR. LIMAN: But the contents of the minutes go through the sequence of events, so if you put those in front of him it may help refresh his recollection.

A. I think that's the Sunday over that weekend. I think that's the time I talked to Paulson, and we got into the subject you were talking about before.

MR. LIMAN: If you give him the minutes

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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."

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MR. CORNGOLD: You said the board's reaction to that. Did you have conversations with the board, so you knew what their reaction was?

THE WITNESS: Is that Monday?

MR. CORNGOLD: December 22 is a Monday.

THE WITNESS: Yes. So that would be that day. I told them of the conversation.

MR. CORNGOLD: We're now talking about that conversation.

THE WITNESS: Correct.

MR. CORNGOLD: So in that conversation, did you say what the board's reaction is?

THE WITNESS: I'm sorry. I had a conversation with Hank, and then I had the conversation with the board.

MR. CORNGOLD: And then you had another conversation?

THE WITNESS: Yes.

Q. The conversation with Hank on the bike, that's also on Monday?

A. No. That was on Sunday -- I'm pretty sure that was Sunday. I just recall it wasn't a weekday, and that he was out of pocket.

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Q. So I think you said, "Let's deescalate this." How does he respond to that?

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A. He said, "Good." I think I recall him saying -- I'm not positive about this -- I think he said, "I'll call Ben and tell him that."

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MR. CORNGOLD: Before we do that, did

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you have an understanding of what powers the

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Treasury Department had to remove the board

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and/or the management of the bank?

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THE WITNESS: It was my understanding he

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said it -- that's why I said I think he said

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the government. I think -- my impression is,

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that was the language the Fed used to use in

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Texas, basically saying, Don't do something.

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MR. CORNGOLD: You had an understanding

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that the Fed could remove the board and/or

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the management of a bank that it regulated if

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it found certain things.

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THE WITNESS: Yes.

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MR. LAWSKY: Do you know what it has to

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find?

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THE WITNESS: They had been so strong

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about the fact that they strongly advised us

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not to do it that it would cause harm to the

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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.

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Q. And did you view it at as a threat?

A. I viewed it -- actually, I viewed it as just how strongly they felt about the issue. I also viewed it that it wasn't just about us; that he wouldn't say something that strong if he didn't feel like it was a systemic risk, as well.

MR. CORNGOLD: But if you played it out, it meant that Bank of America could not invoke the MAC clause; is that correct?

THE WITNESS: That's where I'm a little fuzzy on. I don't recall the wording was if "Before you did it we would," or "If you did it we would."

MR. CORNGOLD: But if you had done it -- to play out the hypothetical -- and they removed the board and placed in a board, it could have undone whatever it is that you had done.

MR. LIMAN: I guess that presupposes a whole bunch of stuff.

THE WITNESS: They said management and the board.

MR. LAWSKY: At this point, had you received TARP funds?

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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

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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

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of mind. Until we had that heated -- I guess you would call it -- from Paulson, we were still in the mode that the MAC was the best --

MR. CORNGOLD: Before the call with Paulson on Sunday, had you said to anyone or had anyone said to you in words or substance, Maybe we can get something out of the government?

THE WITNESS: I think everybody agreed with -- I guess, I don't know if we said this, or it was subconscious or whatever, we knew that it would be very dangerous to do that deal without some help, and so I think that was the mindset.

MR. LIMAN: That's to the system, as well, right?

THE WITNESS: Yes.

MR. CORNGOLD: And you said that in your conversations to members of the federal government, including the Feds.

THE WITNESS: I'm not sure when the conversations began, but, at some point, the conversations began around what could we do

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to help you with this. But I can't time it.

MR. CORNGOLD: And had you considered prior up to this Sunday conversation using the potential invocation of the MAC clause as a way to extract some changes from Merrill, whether it be price changes or conduct changes?

THE WITNESS: This was about just a sheer magnitude of loss, and either you do it or you don't. Behavioral changes, or whatever, wouldn't fill that hole what we thought was \$12 billion, which turned out to be \$15 billion.

Q. Did Paulson ever say to you during this time period -- or Bernanke, or people who work with them -- "Have you told Thain or Merrill what's going on here?"

A. I think, at some point -- Thain used to work for Hank. I vaguely recall he asked me if he knew, and I said "No." I said, "We had not talked to Merrill."

MR. LAWSKY: Did you have a view, at this time, about what invoking the MAC and backing out of the deal would do to Merrill?

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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

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Treasury were going to deliver.

A. Correct.

Q. Did you ask for any agreement from them?

A. There was a point after that that the board brought up the fact that we're relying on words that obviously has some very prominent people and honorable people, but, boy, what if they don't come through? So I called Bernanke -- I don't know why I called him versus Hank -- and said, "Would you be willing to put something in writing?" And he said, "Let me think about it." As I recall, he didn't call me back, but Hank called me back. And Hank said two things: He said, "First, it would be so watered down, it wouldn't be as strong as what we were going to say to you verbally, and secondly, this would be a disclosable event and we do not want a disclosable event."

MR. CORNGOLD: When was that conversation?

THE WITNESS: I think we can find it through the minutes, but it was after this and it was getting toward the end of the year.

MR. CORNGOLD: When you say "disclosable

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event," he means a disclosable event for the corporation.

THE WITNESS: Correct -- well, yes.

MR. CORNGOLD: Did he mean that? What did he mean?

THE WITNESS: I think he meant they would have to disclose it. That was my impression, that the government would have to disclose it.

MR. CORNGOLD: That if they put it in writing, they had a governmental obligation to disclose it.

THE WITNESS: That was my impression.

MR. CORNGOLD: Did you consider when he said that, whether if it was in writing you had an obligation to disclose it?

THE WITNESS: We hadn't gotten that far yet because at the end we didn't get it, and the premise was you wanted to have everything done in place so that you didn't set off alarms in a tragic economy.

MR. CORNGOLD: Who is the "you" here?

THE WITNESS: They did not want, and they didn't think it was in our best

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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.

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MR. CORNGOLD: Do they sometimes, because of who you are, do they contradict?

THE WITNESS: I don't know what you mean.

MR. CORNGOLD: Is it always the case that what's in the country's best interest is in Bank of America's shareholders' best interest?

MR. LIMAN: You mean ever in history?

MR. CORNGOLD: You made the point that sometimes they intertwine. Pregnant in that is, sometimes they don't intertwine. That's why I'm asking you if that's what you meant, or do you mean that they always intertwine.

THE WITNESS: I mean that in this particular case they intertwine -- is a better way of saying it.

Q. At the point in time of this board meeting, though, you were relating to the board that you felt you had a commitment from the Fed and the Treasury to make good on whatever harm is caused by the increased losses at Merrill Lynch; is that right?

A. I had verbal commitments from Ben

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Bernanke and Hank Paulson that they were going to see this through, to fill that hole, and have the market perceive this as a good deal.

MR. CORNGOLD: Isn't the only way to fill that hole, though, to give you money, not to give you money that you would have to pay back at some interest rate with some potential equity interest, too?

THE WITNESS: No. I think you have to separate the fact that, yes, there is still some short-term paying -- it's more short-term paying now than we would have had had all this not happened, but longer term we still see a strategic benefit. So we saw it as a short term versus a long term impact on the company.

MR. CORNGOLD: When you entered into the initial contract with Merrill Lynch did you get a fairness opinion about the transaction?

THE WITNESS: Yes.

MR. CORNGOLD: From whom?

THE WITNESS: Chris Flowers something.

MR. CORNGOLD: And did you get a fairness opinion from anyone about the

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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.

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Q. From your perspective, wasn't that one of the effects of what he was doing?

A. Over the short term, yes, but we still thought we had an entity that filled two big strategic holes for us and over long term would still be an interest to the shareholders.

Q. What do you mean by "short term"?

A. Two to three years.

Q. So isn't that something that any shareholder at Bank of America who had less than a three-year time horizon would want to know?

A. The situation was that everyone felt like the deal needed to be completed and to be able to say that, or that they would impose a big risk to the financial system if it would not.

MR. LAWSKY: When you say "everyone," what do you mean?

THE WITNESS: The people that I was talking to, Bernanke and Paulson.

MR. LAWSKY: Had it been up to you would you made the disclosure?

THE WITNESS: It wasn't up to me.

MR. LAWSKY: Had it been up to you.

THE WITNESS: It wasn't.

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MR. CORNGOLD: Why do you say it wasn't up to you? Were you instructed not to tell your shareholders what the transaction was going to be?

THE WITNESS: I was instructed that "We do not want a public disclosure."

MR. CORNGOLD: Who said that to you?

THE WITNESS: Paulson.

MR. CORNGOLD: When did he say that to you?

THE WITNESS: Sometime after I asked Ben Bernanke for something in writing.

Q. When did that occur?

A. Which one?

Q. When did Mr. Paulson state that he did not want a public disclosure?

A. It was sometime late in the year. I think it's actually in the minutes.

MR. LIMAN: If you have the next set of minutes it might help the witness.

Q. What's your best recollection of what Mr. Paulson said to you on that point?

A. That was the conversation that I mentioned that I went to Bernanke to ask the

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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.

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MR. CORNGOLD: Were you aware of other people having those conversations?

THE WITNESS: I don't recall the conversation.

Q. Did you consider the issue?

A. Of disclosure?

MR. LIMAN: Of the oral statements of Bernanke and Paulson.

MR. CORNGOLD: There were a number of -- nothing was disclosed, but of either the losses that you learned about at Merrill Lynch -- let's do it one at a time. Have you had conversations, or were you aware of any conversations, between December 12 and the end of the year?

THE WITNESS: I was not aware of any conversations, but that's not to say there weren't. It's just I was not.

MR. CORNGOLD: Are you aware of any conversations between December 12 and the end of the year about whether there was an obligation to disclose anything about your negotiations with the Fed and/or the Treasury Department?

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THE WITNESS: I was not aware -- I don't recall any and don't recall being aware of any.

Q. So when you're havin your conversations with the Fed and the Treasury, at any point, do you say, "I need an adjustment on the purchase price; just give me that"?

A. We were told that the deal needed to close on time under the deal that had been made.

MR. CORNGOLD: You're using passive voice; I want to know active voice, who told you?

THE WITNESS: I don't remember which one, but it was either Bernanke or Paulson.

MR. CORNGOLD: Was that in response to a question about whether the terms of the transaction could be changed?

THE WITNESS: No. Actually, I don't remember exactly, but it could have been when he had made the strong statement about management and stuff. I don't remember that, but it was a pretty strong statement --

MR. CORNGOLD: You're doing this transaction at the time you were supposed to

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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

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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