

02/26/09

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.

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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.

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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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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

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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.

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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

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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

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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



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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.

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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

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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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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

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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.

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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?

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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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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

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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

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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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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.

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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

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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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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?



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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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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

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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?

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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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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

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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

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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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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

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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

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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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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.

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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

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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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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?

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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



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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. ~~When you're told that you can't.~~

24 Q. That's my question: Would you have  
25 tried to renegotiate the price if you weren't told

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2 noted by [REDACTED]

3 A. Yes.

4 Q. And why was it that you couldn't  
5 renegotiate the price?

6 A. I can't speak for Hank and the others,  
7 so it was pretty clear they wanted everything to  
8 stay as it was.

9 Q. I understand that you can't speak for  
10 him. I guess what I'm trying to say is, someone  
11 who recently told you that if you did something  
12 he'd remove senior management from the board, it  
13 seems to me that they would have to kind of pull,  
14 that they could accelerate the timing of things,  
15 they could change the price, they could use their  
16 influence to help a fair resolution of the deal.

17 MR. LIMAN: I'm sorry. The questions are  
18 very convoluted. Is your question, did he  
19 consider asking Merrill to give up their  
20 legal rights in the deal?

21 MR. MARKOWITZ: That's not my question.

22 MR. LIMAN: Is your question, did they  
23 have legal rights to change the deal absent  
24 the MAC? Ask a proper question.

25 MR. MARKOWITZ: My questions are proper;

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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

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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

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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

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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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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