

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

JOINT HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM

AND THE

SUBCOMMITTEE ON DOMESTIC POLICY
OF THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

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

TUESDAY, NOVEMBER 17, 2009

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

Washington, DC.

The committee and subcommittee met, pursuant to notice, at 10 a.m., in room 2157, Rayburn House Office Building, Hon. Edolphus Towns (chairman of the Committee on Oversight and Government Reform) presiding.

Present from Committee on Oversight and Government Reform: Representatives Towns, Issa, Cummings, Kucinich, Tierney, Clay, Watson, Lynch, Connolly, Quigley, Kaptur, Norton, Davis, Cuellar, Welch, Speier, Chu, Bilbray, Jordan, Chaffetz, Luetkemeyer, and Cao.

Present from Subcommittee on Domestic Policy: Representatives Kucinich, Cummings, Tierney, Kaptur, Welch, and Jordan.

Staff present: John Arlington, chief counsel—investigations; Jean Gosa, clerk; Velginy Hernandez, press assistant; Adam Hodge, deputy press secretary; Carla Hultberg, chief clerk; Marc Johnson and Ophelia Rivas, assistant clerks; Mike McCarthy, deputy staff director; Jenny Rosenberg, director of communications; Christopher Staszak, senior investigative counsel; Alex Wolf, professional staff member; Lawrence Brady, minority staff director; John Cuaderes, minority deputy staff director; Rob Borden, minority general counsel; Jennifer Safavian, minority chief counsel for oversight and investigations; Adam From, minority chief clerk and Member liaison; Kurt Bardella, minority press secretary; Benjamin Cole, minority deputy press secretary; Christopher Hixon, minority senior counsel; Hudson Hollister, minority counsel; and Brien Beattie, minority professional staff member.

Chairman TOWNS. The committee will come to order.

Let me begin by thanking all of you for being here.

When the committee held its first hearing on the Bank of America-Merrill Lynch merger over 5 months ago, I asked a few simple but vital questions: First, how did a private sector deal announced in September 2008 wind up as a major Government bailout with the taxpayers on the hook for \$20 billion?

Second, I asked whether the Government forced Bank of America to go through with this deal.

Finally, I asked whether Bank of America CEO Ken Lewis really had a legitimate basis for backing out of the Merrill Lynch deal, or, when he realized late in the game that there were serious problems with the deal, did he threaten to back out to gain leverage for a taxpayer bailout?

Today, as a result of our investigation, I think the answers to those questions are much clearer.

Each senior Bank of America executive who was involved in the deal has told the committee that the Government did not force them to go through with it.

Ken Lewis has also told us that nobody in the Government did anything improper during this transaction.

If there are still people who want to say the Government forced Bank of America to go through with the deal, they are turning a blind eye to the facts we have before us.

A simple but important fact is that the Government did not elbow its way into this transaction. Ken Lewis called then-Treasury Secretary Hank Paulson on December 17, 2008, and brought the Government to the table. That one phone call started everything in motion.

On that phone call, Ken Lewis claimed that he believed Bank of America could back out of the deal with Merrill Lynch based on the material adverse change clause in the merger agreement, the so-called "MAC clause."

What we know now is that Bank of America's top lawyer, Tim Mayopolous, told two top Bank of America executives on December 1, 2008, that Bank of America did not have a MAC. Mr. Mayopolous was suddenly fired 9 days later, without explanation, and replaced by a senior insider who had not practiced law in years.

Our investigation has also uncovered documents showing that on December 15, 2008, lawyers working for Bank of America knew that to win a MAC, "it is not enough to show a short-term earnings decline, no matter how severe. Must show decline in value over period of years, not months."

Nonetheless, Ken Lewis called Hank Paulson on December 17th and said Bank of America actually had a MAC.

Again, on December 19th, lawyers working for Bank of America gave its executives a memo that noted that Delaware courts had never found that a MAC occurred allowing the buyer to terminate a merger agreement.

Nonetheless, 2 days after receiving that memo, Mr. Lewis again called Secretary Paulson and threatened to back out of the deal.

Finally, the committee has obtained notes showing Bank of America's outside counsel believed on December 18th that they had at least an 80 percent chance of losing a MAC claim. Perhaps the most telling of all documents is the one where a lawyer for Bank of America writes, "threat of MAC-don't push too far-could turn against us."

The documents and testimony the committee has reviewed clarify that the Bank of America was aware that the chances of prevailing on the MAC were very slim. Merely invoking the MAC could have led to significant adverse financial consequences for the company.

Based on the facts we have before us, it sure looks like it was Bank of America that was holding the shotgun at this wedding.

Today, we will hear from Tim Mayopolous, the lawyer who was fired 9 days after telling Bank of America executives there was no MAC. We will also hear from Brian Moynihan, the person who replaced Mr. Mayopolous and who determined some time between December 15th and 17th that Bank of America could back out of the deal by invoking the MAC.

After replacing Mr. Mayopolous, Mr. Moynihan served as the general counsel for about 44 days. He stopped serving as the general counsel about 6 days after the bailout was a done deal. He is now president of consumer and small business lending at Bank of America.

We will also hear from two Bank of America directors who were on the Board when this deal and the bailout went through, and who now are helping choose the next Bank of America CEO.

At this point, our investigation has shed a great deal of light on a deal that was secretly made and that cost taxpayers billions. Although the investigation may be coming to a close, I am certain that no member of this committee will stop working until all the taxpayer dollars that Bank of America received are paid back.

Thank you very much, and on that note I yield to the ranking member of the committee, Mr. Darrell Issa of California.

[The prepared statement of Chairman Edolphus Towns follows:]



**OPENING STATEMENT OF
CHAIRMAN EDOLPHUS TOWNS**

**COMMITTEE ON OVERSIGHT AND GOVERNMENT
REFORM**

November 17, 2009

**“Bank Of America And Merrill Lynch: How Did A Private
Deal Turn Into A Federal Bailout? Part IV”**

Good morning and thank you all for being here.

When the Committee held its first hearing on the Bank of America-Merrill Lynch merger over five months ago, I asked a few simple but vital questions:

First, how did a private sector deal announced in September 2008 wind up as a major government bailout with the taxpayers on the hook for \$20 billion?

Second, I asked whether the government forced Bank of America to go through with this deal.

Finally, I asked whether Bank of America CEO Ken Lewis really had a legitimate basis for backing out of the Merrill Lynch deal, or, when he realized late in the game that there were serious problems with the deal, did he threaten to back out to gain leverage for a taxpayer bailout?

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A simple, but important fact is that the government did not elbow its way into this transaction. Ken Lewis called then-Treasury Secretary Hank Paulson on December 17, 2008 and brought the government to the table. That one phone call started everything in motion.

On that phone call, Ken Lewis claimed that he believed Bank of America could back out of the deal with Merrill Lynch based on the Material Adverse Change clause in the merger agreement – the so-called “MAC clause.”

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Again, on December 19, lawyers working for Bank of America gave its executives a memo that noted that "no Delaware court has ever found that a MAC occurred permitting an acquirer to terminate a merger agreement."

Nonetheless, two days after receiving that memo, Mr. Lewis again called Secretary Paulson and threatened to back out of the deal.

Finally, the Committee has obtained notes showing Bank of America's outside counsel believed on December 18 that they had at least an 80 percent chance of losing a MAC claim. Perhaps the most telling of all documents is the one where a lawyer for Bank of America writes, "threat of MAC- don't push too far- turn against us."

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At this point our investigation has shed a great deal of light on a deal that was secretly made and that cost taxpayers billions. Although the investigation may be coming to a close, I am certain that no member of this Committee will stop working until all the taxpayer dollars that Bank of America received are paid back.

Thank you.

Mr. ISSA. Thank you, Mr. Chairman. I have greatly appreciated your willingness to engage in necessary oversight of the Bush administration's—I repeat, the Bush administration's—decision to force Bank of America and other banks to accept TARP funds and subsequently force Bank of America to acquire Merrill Lynch. Unfortunately, the bipartisan nature of the investigation appears to have stalled at today's hearing.

First, Mr. Chairman, there has never been a shotgun wedding in which the groom held a shotgun to himself. As you have said in the past, this was a shotgun wedding and the only people that could have held the shotgun was the Bush administration, Paulson, and Geithner, and we all know that.

I regret the investigation today has become an apparent cover-up of the continuing activities of the Obama administration, and particularly Secretary Geithner, in securing promises of billions of dollars of taxpayer support in exchange for Bank of America's waiver of its contractual right—even if it was only 20 percent likely—to attempt to negotiate a lower price using that 20 percent likely MAC clause for Merrill Lynch.

At one time, Mr. Chairman, you were willing to follow the trail of misconduct wherever it led. Now that the trail may lead to a cabinet officer in the Obama administration, this committee's time and resources have been redirected toward the political scapegoating of Bank of America.

As a businessman, I said some time ago that I saw through what Ken Lewis was doing. What he had was he had losses which, if put back into the correct places they should have been, in other words, recalculating the profits not made as a result of those losses, he had a good case for a MAC; he had a good cause for saying, in an Enron-like fashion, that in fact Merrill Lynch had overstated their profits by booking these as good when in fact, after the fact, they were known to be wrong.

That is no different than Enron. You can't call a profit a profit when it is clear that it ultimately was a risky investment likely to lead to failure and, in fact, it had led to billions of dollars in failure.

Ken Lewis was doing what most tough negotiators do: found an opportunity, get a dramatically better price, one that would have saved his company money and ultimately the stockholders money.

And yet, the Bush administration, under Secretary Geithner, then Fed chairman of New York, and Secretary Paulson forced the issue and used money, both literally and figuratively, as justification for why they must go through. Literally because they offered the money and Secretary Geithner offered it repeatedly verbally during the transition team; figuratively because they offered to take Ken Lewis and his company down if they later needed money and did not go through with the merger.

Bank of America CEO Ken Lewis repeatedly asked the Bush administration to put purely verbal comments for additional taxpayers' money into writing, but both Hank Paulson and Ben Bernanke refused. Instead, they sought to control disclosure for this new bailout until the last possible date.

The incoming Obama administration's support for the commitment of billions of additional taxpayer dollars was absolutely essen-

tial to ensure Bank of America's cooperation in this purely verbal back-door deal.

Mr. Chairman, we do not want to see lawyers doing verbal things, and yet in this case we had no memos that we could rely on and no written contracts. Mr. Chairman, where is Tim Geithner, who could in fact verbally and under oath give us the answers to our questions?

The fact is, where is Sheila Bair? Where in fact is Mary Shapiro, or even where is Chris Cox? Where is the Government?

Change has come, Mr. Chairman. Under the Bush administration, whether Republicans or Democrats were in charge of this committee, we brought in administration officials. The witnesses we are going to hear from today are appropriate, and they will speak to their view of what happened. But we have already had Ken Lewis here, under oath, testifying to his explanation of what happened, and it has not been refuted by any of the subsequent documentation, discovery, or testimony.

Mr. Chairman, as ranking member, I do not have subpoena authority. As ranking member, I do not have the ability to get a witness. As ranking member, I will be asking for, in writing, another minority hearing. I will because, in fact, we had majority and minority agreement on this panel and the panel which is not here today. Mr. Chairman, my request for a minority hearing will be for the exact people that you have chosen to drop off of this list after agreeing. I ask for nothing more.

Mr. Chairman, it is very clear that we cannot field that change has come and therefore the Obama administration no longer can make a mistake, even when in fact the people who made the mistake under the Bush administration are now in the Obama administration.

With that, I yield back.

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

EDOLPHUS TOWNS, NEW YORK
CHAIRMAN

DARRELL E. ISSA, CALIFORNIA
RANKING MINORITY MEMBER

ONE HUNDRED ELEVENTH CONGRESS
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Statement of Rep. Darrell Issa, Ranking Member

**"Bank of America and Merrill Lynch: How did a Private Deal Turn Into a Federal Bailout?
Part IV."**

November 17, 2009

Mr. Chairman, I have greatly appreciated your willingness to engage in necessary oversight of the Bush Administration's decision to force Bank of America and other banks to accept TARP funds and to subsequently force Bank of America to acquire Merrill Lynch. Unfortunately, the bipartisan nature of this investigation appears to have stalled with today's hearing.

I regret that this investigation has now become an apparent cover-up of the Obama Administration's actions in securing the promise of billions of dollars of taxpayer support in exchange for Bank of America's waiver of its contractual right to attempt to renegotiate a lower purchase price for Merrill Lynch. At one time, Mr. Chairman, you were willing to follow the trail of misconduct wherever it led. Now that the trail has led to Obama Administration officials, this Committee's time and resources have been redirected to pursue politically convenient scapegoats at Bank of America.

It is the job of the appropriate regulatory agencies to investigate and prosecute the responsible parties if, in fact, there has been corporate misconduct in this transaction. This Committee, in contrast, has a unique responsibility to address the misconduct of government officials.

Documents provided to the Committee demonstrate that a crucial component of the Bush Administration's strategy in getting Bank of America to back down from its intention to exercise the MAC and renegotiate the deal with Merrill Lynch was the provision of additional taxpayer funds. These funds were a quid pro quo to entice Bank of America to go through with the merger.

Bank of America CEO Ken Lewis repeatedly asked the Bush Administration to put its purely verbal commitment of additional taxpayer money into writing, but both Hank Paulson and Ben Bernanke refused. Instead they sought to control disclosure of this new bailout until the latest possible date. The incoming Obama Administration's support for the commitment of billions of additional taxpayer dollars was absolutely essential in ensuring Bank of America's cooperation in this purely verbal, back-room deal.

*Statement of Rep. Darrell Issa, Ranking Member
November 17, 2009
Page 2*

Mr. Chairman, where is Timothy Geithner, who provided the essential verbal commitment of taxpayer support that Bank of America required to go through with the deal? Where is Sheila Bair, who objected to the bailout of Bank of America? Where is Mary Schapiro, who as head of the SEC agreed to a settlement with Bank of America which one federal judge described as a "cynical" and came at the expense of the shareholders and the truth?

The witnesses this Committee needs to hear from are the government officials who think they can use taxpayer money to turn America into a place where Big Government and Big Business march in lockstep to the beat of the same drummer. I for one intend to do everything in my power to keep that from happening because that's not the kind of America I want to live in. We need to keep America a place where everyone can have a fair shot at the American dream and, with hard work and a little luck, rise to the top.

Therefore, Mr. Chairman, I want to inform you and the Committee that the Republican Members intend to demand a day of minority hearings on the Bank of America-Merrill Lynch merger. I had hoped to have a balanced hearing today on a bipartisan basis that would hear from relevant government witnesses. Unfortunately, we were misled by your staff to believe that government witnesses would be invited to testify today and were told at the eleventh hour that they have been excused from appearing here today. Based on these new documents and on Secretary Geithner's central role in this back-room deal, we must have him and others from the Obama Administration here to answer these fundamental questions. If they do not agree to appear voluntarily, I intend to demand a subpoena to compel their appearance.

Chairman TOWNS. Here we go again. Let me say that if the ranking member would like for me to pull out a calendar, I am happy to do so and remind him that this merger and bailout occurred during the previous administration. And if he had such strong feelings and concerns about this bailout, I wonder why he was not asking the Bush administration the tough questions last year.

I now yield to the gentleman from Ohio.

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

This investigation started with questions: How could a merger of the largest bank and second largest investment bank in the country require a Government bailout only weeks after shareholders had voted to approve it as a private deal? Was it true that the financial situation shifted so dramatically in that short amount of time? Or did top management know, or should they have known, about the changing situation much earlier? Did they fail to make necessary disclosures to their shareholders?

When we asked Ken Lewis, Bank of America's CEO, about this at our first hearing, he told us that he relied on the advice of counsel and that he relied on forecasts from Merrill Lynch. Recently, in response to our requests, Bank of America produced to us the documents on which they based their decision not to make additional shareholder disclosures, as well as the notes from some of the discussions that led to that decision. This included the actual forecast that was created by Merrill Lynch and used by Bank of America's lawyers as the basis to determine if there was something shareholders should know before they approved the merger.

Our examination of this forecast and how it was used should sound alarms about how Wall Street really operates. The forecast, when it was created by Merrill Lynch on November 12th, revealed that in October the company had absorbed in just 1 month more losses than in the entire previous quarter, and half the amount of losses in the fourth quarter of the previous year. Yet, incredibly, the forecast omitted to make any projections of how the most troublesome investments—collateralized debt obligations, subprime mortgage-backed securities, credit default swaps—would perform in the next 2 months, November and December. The forecast assumed those investigations would have zero effect on Merrill Lynch's bottom line for two-thirds of the remaining fourth quarter.

Bank of America saw the deficiency in the document, but they have not shown us that they actually did any actual analysis to make up for Merrill's omissions. On the contrary, the evidence we have suggests that Bank of America pulled a number out of thin air. Far from being consistent with the actual experience of October, or what they knew about the third quarter, the guess wishfully assumed that the markets for collateralized debt obligations and credit default swaps would be significantly better in November and December. It was assumed that Merrill Lynch would almost break even for November, thereby spreading October's bad results over 2 months.

Then the attorneys at Bank of America and Wachtell Lipton went to work. They did not question the financial information they were given. They began with the assumption that additional shareholder disclosure was necessary and they discussed what kind of disclosure they would make. But after studying the question for a

week, they decided that the news was not sufficiently out of line from past performance and previous disclosures to warrant further shareholder disclosure. Thus, on the advice of counsel, Bank of America did not make any further disclosures to its shareholders in advance of the merger vote.

Within only weeks, however, reality crowded out the wishful thinking. Far from having a small effect, those collateralized debt obligations and other exotic instruments continued to lose large amounts of money. Bank of America's guess, which had played a significant role in the decision not to make additional disclosures to shareholders, proved to be billions off the mark. That is when Bank of America went to the U.S. Government for help.

This investigation has opened up a rare window onto the management suite of the largest bank in the country. Here is a story of how Bank of America's top executives allowed guesswork—guesswork—to masquerade as actual expert knowledge, and how numbers pulled out of the air, without any actual analysis, served as the basis for corporate decisions made about other people's money, shareholders' money.

Unfortunately for all of us, I doubt Bank of America is unique. Look around to see what the geniuses of Wall Street have wrought. The house of cards they have built has buried our constituents under debt they can't pay, record rates of foreclosure and joblessness. If you think these bankers and financiers deserve the millions of dollars they are paid and the bonuses they award themselves, if anyone thinks they can be trusted with running companies that are too big to fail, think again. The wizards of Wall Street are no more wizard than the Wizard of Oz, except, unlike the Kingdom of Oz, when that kingdom falls, there is wreckage all over America.

I yield back.

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

**Opening statement of
Dennis J. Kucinich
Chairman, Domestic Policy Subcommittee
November 17, 2009**

This investigation started with questions: how could a merger of the largest bank and second largest investment bank in the country require a government bailout, only weeks after shareholders had voted to approve it as a private deal? Was it true that the financial situation shifted so dramatically in that short amount of time? Or did top management know, or should they have known, about the changing situation much earlier? Did they fail to make necessary disclosures to the shareholders?

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Chairman TOWNS. Thank you very much. I now yield to the gentleman from Ohio, Mr. Jordan.

Mr. JORDAN. Thank you, Mr. Chairman. Mr. Chairman, I just want to respond to your previous statement. This is not about holding one administration accountable and not the other. This is about holding Government accountable. I mean, that is this committee. This is the Government Oversight Committee, and the ranking member's suggestion that we need Ms. Shapiro, Mr. Cox, Ms. Bair, and Mr. Geithner here is exactly on target.

No one in our previous hearings, which I appreciate, no one went after the previous administration, specifically Secretary Paulson, harder than Ranking Member Issa and myself. We just want the opportunity to question the same folks who are now in our current administration who were involved in this decision.

The chairman mentioned a shotgun being held. The only shotgun involved here was what the Government held to Bank of America's head when they forced them to take TARP. Nine days after this passed, when Bank of America had to sit down with eight other big institutions in this country, forced them to take TARP money. Then, in the deal itself. That is why we need officials who were involved in this whole decision here.

As I suggested in some of our previous hearings, I think Mr. Paulson actually misled the Congress when he came in front of the Congress last year asking for the TARP money and then, as I said, 9 days later changing course dramatically and saying we are not going to purchase any of these mortgage-backed securities, we are just going to give capital to the banks.

So the question that Mr. Issa asked I think is right on target. The unprecedented moves we have seen from the Government, the unprecedented pressure we have seen from the Government on this institution I think requires us to get Mr. Geithner, Mr. Cox, Ms. Bair, and Ms. Shapiro in front of this committee, and I hope that the chairman will do that so we can have a full airing of what took place and ask the appropriate questions.

With that, I would yield some time to the ranking member, if he would like.

Mr. ISSA. I thank the gentleman. I just want to set the record straight a little bit because I think it is important.

First of all, we understand that we are not the Financial Services Committee; the SEC does not report to us and, in fact, the SEC has more jurisdiction over this commercial portion than we do. But we the Government Oversight Committee and I would join with my colleague from Ohio, in this case Marcy Kaptur. We led the charge and worked to try to defeat the TARP because we knew that the money would not be properly spent the way the administration brought it to us. And, as it turns out, just days after they got the money, they spent it in a very different way.

So I think that when we are setting the record straight, we are setting the record straight that we didn't think the last administration should have these hundreds of billions of dollars of walking around money loosely disguised as an emergency fund for a specific reason, and that, in fact, a merger which was approved on December 5th, consummated on December 31st, in those 20 days that

President Bush was still in office, there wasn't any oversight we could have done; we weren't even in session except to organize.

What we did do is those of us who fought, on a bipartisan basis, the funding of TARP continued to say that these were outlandish ways to spend the money, that this was wrong for us to be part and parcels of mergers and acquisitions and price setting.

So today I think this committee needs to stand up to what we were doing in the last Congress and continue to look at where Government failed us; and it doesn't matter whether it was Republican or Democratic Government. We need to continue to do that and we certainly need to see that the remainder of the TARP not continue to be spent in a way that you yourself, Mr. Chairman, have called a shotgun wedding.

I thank the gentleman for yielding.

Mr. JORDAN. Thank you, Mr. Chairman. I yield back.

Chairman TOWNS. Let me just say, before we move forward, I think that to make that assessment before we hear from our witnesses, I mean, you don't know what they are going to say, how much they are going to say. And based on the fact that, what has been said up to this point by Mr. Lewis, who indicated that the Government in no way acted improperly—this is what he said. Now, the question is if you don't believe him in terms of his comments or his statements, then that is another issue. But, in the meantime, we are going to move forward.

Would the witnesses please stand?

[Witnesses sworn.]

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

You may be seated.

Going from my left to right, our witnesses today are Timothy Mayopolous, who was general counsel of Bank of America for nearly 5 years, from January 2004 until December 10, 2008. He is currently the executive vice president of general counsel and secretary of Fannie Mae.

Mr. Moynihan was the general counsel of Bank of America from December 10, 2008 to January 22, 2009. He currently serves as the president of consumer and small business lending at Bank of America.

Mr. Gifford and Mr. May are currently on Bank of America's Board of Directors, and were on the Board last December when the Bank received its bailout. They are both also on the committee that is selecting the replacement for Mr. Lewis.

Mr. Mayopolous, please give your opening statement. You have 5 minutes, and the light starts out on green, then it turns to yellow, and then, of course, it turns to red, and when it gets to red we ask that you stop, which will allow the Members an opportunity to be able to raise questions after all the witnesses have finished. Thank you.

STATEMENTS OF TIMOTHY J. MAYOPOLOUS, FORMER GENERAL COUNSEL, BANK OF AMERICA; BRIAN MOYNIHAN, PRESIDENT OF CONSUMER AND SMALL BUSINESS BANKING, BANK OF AMERICA CORP.; CHARLES "CHAD" GIFFORD, MEMBER OF THE BOARD OF DIRECTORS, BANK OF AMERICA; AND THOMAS J. MAY, MEMBER OF THE BOARD OF DIRECTORS, BANK OF AMERICA

STATEMENT OF TIMOTHY J. MAYOPOLOUS

Mr. MAYOPOLOUS. Chairman Towns, Ranking Member Issa, and members of the committee, thank you for the committee's invitation to appear before you today. My name is Tim Mayopolous. Bank of America recently waived its attorney-client privilege with respect to the Merrill Lynch merger and has instructed me that I am free to answer questions the committee may have for me.

Accordingly, as the committee has requested, I will briefly summarize, and have set forth in more detail in my written testimony, the legal advice Bank of America received in connection with the Merrill Lynch merger, as well as the circumstances of my departure from the company on December 10, 2008.

I served as general counsel of Bank of America for 5 years. I was responsible for overseeing a very large number and wide range of legal matters. In the case of the Merrill Lynch merger, I relied heavily on the company's outside counsel, who were leading lawyers at the esteemed law firm of Wachtell Lipton Rosen & Katz, as well as my own in-house legal department.

Questions have been raised about what legal advice Bank of America received as to whether to disclose to shareholders the amount of the potential 2008 bonus pool for Merrill Lynch employees. To my recollection, I had no role in this issue. I do not recall anyone raising or discussing with me whether the potential year-end bonus pool for Merrill employees should be disclosed to shareholders. As far as disclosure was concerned, as was my practice, I relied on Wachtell Lipton and our in-house legal staff to prepare the proxy statement properly and accurately.

The committee has asked what legal advice Bank of America received regarding the material adverse change provisions of the merger agreement. The only advice I recall giving about these provisions was on December 1, 2008. I advised Joe Price, Bank of America's chief financial officer, and Greg Curl, then Bank of America's head of corporate strategy, that for Merrill's poor financial performance to constitute a material adverse change, it had to be disproportionate to that of other companies in the industry, including Bank of America. We discussed the relative performance of the two companies since the merger had been announced, and I advised Mr. Price and Mr. Curl that there was no basis to conclude that a material adverse change had occurred with respect to Merrill Lynch.

The committee has also asked what advice Bank of America received with regard to whether it should disclose Merrill Lynch's projected losses for the fourth quarter of 2008. The Wachtell Lipton lawyers and I gave advice on that topic to Mr. Price. Everyone involved concluded that disclosure of the projected losses was not warranted. There were a number of reasons.

First, because the materials announcing the merger on the proxy statement did not contain any projections or estimates of Merrill Lynch's future performance, there was no legal duty to update past disclosures about future performance.

Second, Merrill Lynch's recent financial performance put investors on notice that Merrill might well suffer multi-billion dollar losses in the fourth quarter. Over the 12-month period beginning with the fourth quarter of 2007, Merrill Lynch had experienced after-tax losses of approximately \$22 billion, for an average quarterly after-tax loss of more than \$5 billion.

Third, the proxy statement and other disclosure statements clearly informed investors that unprecedented adverse market and business conditions could continue to impact Merrill Lynch negatively.

Finally, there were also many highly publicized events that were warning signs to investors that financial institutions would remain under great stress and might continue to incur significant losses, including, among others, the near failure of Bear Stearns, the collapse of Lehman Brothers, the Government's rescue of AIG—and the Government's extraordinary actions to authorize the expenditure of \$700 billion to try to save the financial system.

Moreover, the estimates were based in part on guesses as to what the loss would ultimately be. It is obvious, in hindsight, that if either the \$5 billion or the \$7 billion loss estimates of which I was informed had been publicly disclosed to shareholders at that time, shareholders would have been misled, as these estimates turned out to be wildly incorrect. No one ever suggested to me that the losses were expected to reach \$15 billion, as they ultimately did.

With regard to my departure from Bank of America, Amy Brinkley, the company's Chief Risk Officer, advised me a little before noon on December 10, 2008, that Ken Lewis had decided to replace me as general counsel. Ms. Brinkley said I was being terminated effective immediately and that I was to leave the premises immediately. I was stunned. I had never been fired from any job, and I had never heard of the general counsel of a major company being summarily dismissed for no apparent reason and with no explanation. I cannot tell you why I was fired. I don't know.

After I left Bank of America on December 10th, I was never consulted about any of the matters I had been working on. Accordingly, I cannot tell you what legal advice the company received after I was gone.

I can assure the committee that at all times I acted in good faith to provide legal advice that I believed to be appropriate, considered, and in the best interest of Bank of America and its shareholders. I did my best to be a good, careful, and honest lawyer.

I would be pleased to answer any questions that Members may have.

[The prepared statement of Mr. Mayopolous follows:]

STATEMENT OF TIMOTHY J. MAYOPOULOS
BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
AND
SUBCOMMITTEE ON DOMESTIC POLICY

NOVEMBER 17, 2009

Chairman Towns, Ranking Member Issa, and Members of the Committee:

Thank you for the Committee's invitation to appear before you today. The Committee has asked me to describe the legal advice Bank of America received in connection with its merger with Merrill Lynch, as well as the reasons for my departure from Bank of America on December 10, 2008. Like all lawyers, I am bound by professional ethics rules not to reveal any confidential communications I have had with my clients. However, Bank of America has recently waived its attorney-client privilege as to various issues relating to the Merrill Lynch merger, and has instructed me that I am free to answer questions that the Committee or other authorities may have for me with regard to those issues. In the hope that it will aid the Committee in its important work, and to avoid continued speculation about these matters, I have set forth below in considerable detail the legal advice I and other attorneys gave to the Company, as well as the circumstances of my departure.¹

I served as Executive Vice President and General Counsel of Bank of America for nearly five years, from January 2004 until December 10, 2008. I have practiced law for 25 years in a variety of settings: in private practice at a major Wall Street law firm, in government service

¹ This statement is based on my best recollection of events that took place approximately one year ago. When I left Bank of America, I was not allowed to take any of my files with me, and I have not had the opportunity to review all of the many relevant contemporaneous documents. It is certainly possible that the review of additional relevant documents and other materials might refresh or refine my recollections of the events discussed in this statement.

and in senior in-house legal roles at several major financial institutions. I have spent most of my career in financial services, representing major financial institutions. As the Committee requested, I have submitted a CV outlining my experience, a copy of which is attached.

During my tenure at Bank of America, I was involved in six significant mergers: FleetBoston, MBNA, U.S. Trust, LaSalle, Countrywide Financial, and Merrill Lynch. The Merrill Lynch merger was announced on September 15, 2008 and consummated on December 31, 2008. I was the General Counsel of Bank of America for only part of this period, until December 10, 2008.

In my role as General Counsel of Bank of America, I was the senior legal officer of the Company. My client was the Company, not the management team. I was responsible for the delivery of all legal services to the Company, one of the largest financial institutions in the world. This meant that I was responsible for overseeing a very large number and wide range of legal matters, from major litigation and regulatory matters, to corporate governance issues, to complex transactions, and a multitude of other issues. To handle this volume and range of work, the Company employed over 350 in-house lawyers in 40 cities around the world. We also employed hundreds of outside law firms to handle significant matters for the Company.

As a result of the thousands of diverse legal issues facing Bank of America at any given time, I necessarily delegated many responsibilities to in-house lawyers and outside lawyers, and instructed them to bring important issues to my attention. In the case of the Merrill Lynch merger, I relied heavily on Bank of America's outside counsel, Ed Herlihy and Nick Demmo, partners at the esteemed law firm of Wachtell Lipton Rosen & Katz. Messrs. Herlihy and Demmo, together with their colleagues at Wachtell Lipton, are among the most highly respected mergers and acquisitions and securities lawyers in the country. I also relied on certain

in-house lawyers for the transaction, primarily Teresa Brenner, a long-time Bank of America lawyer who also had substantial experience in M&A and securities law. Shearman & Sterling, another preeminent law firm, represented Merrill Lynch in the merger.

Merrill Lynch Compensation Issues

In the context of the pending Securities and Exchange Commission lawsuit against Bank of America, questions have been raised as to what legal advice the Company received as to whether to disclose to shareholders the amount of the potential year-end bonus pool for Merrill Lynch employees. To my recollection, I had no role in this issue. I had no role in negotiating or drafting those provisions of the merger agreement or the disclosure schedule relating to the bonus pool for Merrill Lynch employees. That was done by others. As far as disclosure was concerned, I had no role in drafting the proxy statement sent to shareholders to solicit their approval of the merger. To the best of my knowledge, the lawyers at Wachtell Lipton and Shearman & Sterling drafted all of these materials, with the involvement of Ms. Brenner and other Bank of America in-house lawyers.

As was my practice, I relied on Wachtell Lipton and our in-house Bank of America lawyers to prepare the proxy statement properly and accurately, although I did review a draft of the proxy statement before it was mailed to shareholders. To the best of my recollection, at no time did anyone raise or discuss with me whether the potential year-end bonus pool for Merrill Lynch employees should be disclosed to shareholders. To the best of my recollection, I gave no advice on that topic.

I do recall giving advice with regard to Merrill Lynch compensation to Steele Alphin, Bank of America's Chief Administrative Officer, in late November or early December 2008. I advised Mr. Alphin that Merrill Lynch, and not Bank of America, was the proper party

to determine year-end bonuses for Merrill Lynch employees, as Merrill Lynch remained a separate company until the merger closed. I also advised Mr. Alphin, however, that it was appropriate for him to make clear to the Chairman of the Merrill Lynch Board of Directors Compensation Committee (who I understood had reached out to Mr. Alphin) that if Bank of America had experienced the very poor financial results for 2008 that Merrill Lynch had, Bank of America would not pay year-end bonuses to its senior employees. I also advised Mr. Alphin that he should make clear to the Chair of Merrill's Compensation Committee that it would be inappropriate for John Thain, Merrill Lynch's CEO, to be paid a year-end bonus. My advice to Mr. Alphin was not legal advice that such a bonus would be illegal, but rather my business judgment as to what would be best for the combined company.

Discussion of "Material Adverse Change" Provisions

The Committee has asked what legal advice Bank of America received regarding the "material adverse change" provisions of the merger agreement. To the best of my knowledge, from the time the merger agreement was signed until the time I left the Company, the only advice I or other lawyers gave regarding these provisions was on December 1, 2008. On that day, Joe Price, Bank of America's Chief Financial Officer, and Greg Curl, then Bank of America's head of Corporate Strategy, asked me to review with them the terms of the material adverse change provisions of the merger agreement. I do not recall why they asked for this briefing (or whether they provided me with a reason at the time). Neither of them suggested to me that they thought a material adverse change had occurred.

I reviewed the provisions with Messrs. Price and Curl, and we discussed what they meant and how they should be interpreted. I advised Messrs. Price and Curl that, based on the facts of which I was aware, no material adverse change existed. I explained that, for Merrill

Lynch's poor financial performance to constitute a material adverse change under the terms of the merger agreement, it needed, among other things, to be disproportionate to that of other companies in the industry. I advised that a court would likely start such an analysis with a comparison of Merrill Lynch's performance during the period since the merger had been announced with Bank of America's performance during that same period. If the two companies had similar performance following the merger announcement, it would be difficult to contend successfully that there had been a material adverse change that had a disproportionate impact on Merrill Lynch.

To the best of my recollection, we discussed the fact that the stock prices of the two companies had declined by similar percentages since the merger was announced. To my recollection, we also discussed that, in the two-and-one-half months since the deal had been signed, Bank of America had substantially cut its dividend, undertaken a significant stock offering to raise new capital, substantially increased its credit provisions, reported substantially lower than expected earnings, and accepted a \$15 billion TARP preferred stock investment from the federal government. For all of these reasons, I concluded that there was no basis to conclude that a material adverse change had occurred with regard to Merrill Lynch.

Projected Merrill Lynch Fourth Quarter Losses

The Committee has also asked what legal advice Bank of America received as to whether to disclose Merrill Lynch's projected losses for the fourth quarter of 2008. Ed Herlihy and Nick Demmo at Wachtell Lipton and I gave advice on that topic to Mr. Price.

To the best of my recollection, this issue first arose around November 12, 2008. On that date or shortly thereafter, I was provided with a written forecast projecting that Merrill Lynch would have a fourth-quarter after-tax loss of approximately \$5 billion. I understood that

this forecast had been prepared by Merrill Lynch and reviewed and commented upon by executives in Bank of America's Finance department. Between November 12 and November 18, I had several conversations with Messrs. Herlihy and Demmo related to whether the \$5 billion projected loss should be disclosed.² In addition, I asked Ms. Brenner and others to provide me with a significant amount of information to evaluate this question, including to the best of my recollection: Merrill Lynch's earnings results over the prior five quarters, the materials Bank of America and Merrill Lynch disseminated announcing the merger, the proxy statement, and the Merrill Lynch and Bank of America public disclosures that are incorporated by reference into the proxy statement. To my recollection, I personally reviewed relevant portions of these materials and discussed them with Ms. Brenner.

On November 20, Mr. Price, other senior Bank of America business executives, Messrs. Herlihy and Demmo, and Ms. Brenner and I had a conference call to address the disclosure issue. To my recollection, we discussed the materials that I had reviewed and the legal principles applicable to the question of whether to make a disclosure of projected losses. All of the lawyers and business executives involved concluded that disclosure of the projected loss was not warranted. We concluded that disclosure was not warranted for a number of reasons:

First, neither the materials announcing the merger nor the proxy statement contained any projections or estimates of Merrill Lynch's future performance. Accordingly,

² I do not remember having detailed discussions about the component parts of the fourth quarter projection, apart from being informed that the projection contained a \$1 billion contingency, which I understood to be an estimate of certain of the losses. In addition, although I do not remember such discussions, documents I have been shown recently suggest that, in seeking advice from Wachtell Lipton, I provided Wachtell Lipton with information about both the fourth quarter projection as a whole and losses incurred to date for the month of October.

Bank of America and Merrill Lynch had no legal duty to update past disclosures about future performance.

Second, based on information already disclosed to shareholders, a reasonable investor would have been on notice that Merrill Lynch might well suffer multi-billion dollar losses in the fourth quarter of 2008. Indeed, that had been Merrill Lynch's experience since the financial crisis began in 2007. Over the 12-month period beginning with the fourth quarter of 2007, Merrill Lynch had experienced after-tax losses of approximately \$22 billion, for an average quarterly after-tax loss of more than \$5 billion. Merrill's after-tax losses in those four quarters ranged from \$2 billion to nearly \$10 billion. The projected losses of which I was advised were no greater.

Third, the proxy statement and public documents incorporated into the proxy statement unambiguously disclosed to investors that adverse business and market conditions could continue to impact Merrill Lynch negatively. These disclosures made clear that the entire financial services industry, including both Merrill Lynch and Bank of America, was facing tremendous challenges, that markets were extremely volatile, and that financial results were highly uncertain. Among other things, disclosures described the prevailing market conditions as "unprecedented" and "unparalleled."

As an example of the disclosures already given to shareholders, I quote below selected statements made in Bank of America's 10-Q for the third quarter of 2008, which was incorporated into the proxy statement. As noted below, the Bank's disclosure specifically stated that the risks identified applied to Merrill Lynch:

Risk Factors

Difficult market conditions have adversely affected our industry . . . We do not expect that the difficult conditions in the financial markets are likely to improve in the near future. A worsening of these conditions would likely

exacerbate the adverse effects of these difficult market conditions on us and others in the financial institutions industry.

Current levels of market volatility are unprecedented . . . The capital and credit markets have been experiencing volatility and disruption for more than 12 months. In recent weeks, the volatility and disruption has reached unprecedented levels. In some cases, the markets have produced downward pressure on stock prices and credit availability for certain issuers without regard to those issuers' underlying financial strength. If current levels of market disruption and volatility continue or worsen, there can be no assurance that we will not experience an adverse effect, which may be material, on our ability to access capital and our business, financial condition, and results of operations.

The soundness of other financial institutions could adversely affect us . . .

[D]efaults by, or even rumors or questions about, one or more financial services institutions, or the financial services industry generally, have led to market-wide liquidity problems and could lead to losses or defaults by us or by other institutions. Many of these transactions expose us to credit risk in the event of default of our counterparty or client. In addition, our credit risk may be exacerbated when the collateral held by us cannot be realized upon or is liquidated at prices not sufficient to recover the full amount of the loan or derivative exposure due us. There is no assurance that any such losses would not materially and adversely affect our results of operations.

Many of the difficult market conditions that we face have adversely impacted Merrill Lynch as well. Merrill Lynch and its business are subject to many of the same difficulties resulting from the market turmoil and tightening of credit as we are. Merrill Lynch has exposure to the mortgage market through securities, derivatives, loans and loan commitments, including CDOs and subprime mortgages or related securities, with respect to which Merrill Lynch has entered into credit derivatives with various counterparties, including financial guarantors. Like us, Merrill Lynch also faces counterparty risk. Valuation of these exposures will continue to be impacted by external market factors, including default rates, rating agency actions, and the prices at which observable market transactions occur and the continued availability of these transactions. Merrill Lynch's ability to mitigate its risk by selling or hedging its exposures is also limited by the market environment, and its future results may continue to be materially impacted by the valuation adjustments applied to these positions. Many of the risks discussed above relating to the financial institutions industry, the difficult market conditions that exist in our industry, the volatility of the capital and credit markets and our credit risks apply to Merrill Lynch as well. Certain of these risks may have a differing impact, which in certain cases may be, or may have been, more adverse with respect to Merrill Lynch than with respect to us. In addition, Merrill Lynch may face risks in addition to those that we face.

Finally, in addition to the factors outlined above, there were numerous highly publicized events throughout 2008 that served as warning signs to investors that financial institutions such as Merrill Lynch would remain under great stress and might continue to incur significant losses. These included:

- Bear Stearns' near failure and arranged distressed sale to JP Morgan Chase;
- the collapse and Chapter 11 bankruptcy filing of Lehman Brothers, reportedly the largest bankruptcy in history;
- the failure of Washington Mutual and its sale to JP Morgan Chase;
- the near failure of Wachovia and its distressed sale to Wells Fargo;
- the government's rescue of AIG to stave off a collapse of the financial system;
- the government's takeover of Fannie Mae and Freddie Mac, the giant mortgage companies; and
- the government's extraordinary actions to authorize the expenditure of \$700 billion to try to save the financial system.

For all of these reasons, Wachtell Lipton and I concluded no disclosure of the projected \$5 billion loss was legally required. No one on the November 20 conference call disagreed with that conclusion.

Sometime on December 3, 2008, I learned from Joe Price that Merrill Lynch's projected after-tax loss for the fourth quarter had increased to approximately \$7 billion. Mr. Price told me about the new forecast; I do not recall ever receiving or reviewing a copy of this forecast. I reviewed with Mr. Price the relevant facts and the applicable legal principles that we had discussed in the November 20 conference call with Wachtell Lipton. Based on the new forecast Mr. Price described to me, we concluded that disclosure of the \$7 billion projected loss was not warranted for the same reasons as the \$5 billion projected loss.

I have read in the press that, late in the afternoon of December 3, Ken Lewis, the CEO of Bank of America, John Thain, the CEO of Merrill Lynch, Mr. Price, and Neil Cotty, the Chief Financial Officer for Bank of America's Corporate and Investment Banking division, discussed Merrill's potential losses. I did not participate in that discussion and was not aware of it at the time. Press reports indicate that a revised forecast was prepared that produced a \$9 billion projected after-tax loss. I have no recollection of receiving or reviewing a copy of that forecast. I have read that the \$9 billion projected loss included an additional \$2 billion after-tax "plug" figure, referred to as "WAG" – which reportedly stood for "Wild Ass Guess." My recollection is that the first I learned of a \$9 billion projected loss was at the Bank of America Board of Directors meeting the following week on December 9.

While I do not recall receiving or reviewing the \$9 billion forecast, if in fact a big part of it was a "Wild Ass Guess," I believe my legal advice would have been that such a guess was not an appropriate basis for a public disclosure. The law is clear that public disclosures to shareholders must be based on information that is reasonably reliable.

With regard to the earlier \$5 billion and \$7 billion forecasts I had discussed with Mr. Price, I was concerned that they were also based in part on guesses that might not be sufficiently reliable for investors to make an investment decision. Indeed, it is obvious in hindsight that, if any of the estimates had been publicly disclosed to shareholders at the time, shareholders would have been misled. All of the estimates that were developed through December 3 turned out to be materially incorrect when compared against Merrill Lynch's actual reported fourth quarter after-tax loss of \$15.31 billion. If we had made a disclosure of any of these forecasts, shareholders would have likely sued the Company for misleading them as to the extent of the fourth quarter losses.

On December 5, the shareholders of Bank of America and Merrill Lynch voted to approve the merger. On December 9, I attended a meeting of the Bank of America Board of Directors. At that meeting, Mr. Price gave a presentation in which he indicated that the projected fourth quarter after-tax loss for Merrill Lynch was \$9 billion. As this figure was higher than what I recalled discussing with Mr. Price on December 3, I sought to meet with Mr. Price to understand the \$9 billion projected loss figure.

To my recollection, I was advised that Mr. Price was not available to meet after the Board meeting on December 9, as he was in a meeting with Mr. Lewis and other senior business executives for the rest of the day. I decided to try to meet with him the next day, December 10. We never met.

My Termination by the Bank

A little before noon on December 10, while I was in a meeting with Legal department personnel planning the integration of the Bank of America and Merrill Lynch Legal departments, my assistant told me that Amy Brinkley, the Company's Chief Risk Officer, was in my office and wanted to see me. When I arrived in my office, Ms. Brinkley advised me that Ken Lewis had decided to replace me as General Counsel. She said that Mr. Lewis had made this decision quickly and recently. Ms. Brinkley said that Brian Moynihan, a Bank of America business executive, would be assuming the role of General Counsel immediately.

Ms. Brinkley said I was being terminated effective immediately and that I was to leave the premises immediately. She said I should take nothing with me, and that a representative from the Company's Human Resources department was waiting outside to give me my severance papers. The HR representative came in and gave me the severance papers and took my corporate ID card, company credit card, blackberry and office keys. He reiterated that I

could not take anything with me and that my personal effects would be sent to me. He then escorted me to the executive parking garage. I got in my car and drove home.

I was stunned. I had never been fired from any job, and I had never heard of the general counsel of a major company being summarily dismissed for no apparent reason and with no explanation.

I was surprised for many additional reasons, including the following:

First, Ms. Brinkley, to whom I had reported for much of my tenure at the Company, consistently advised me that I was regarded as a “top talent” in the Company and had been identified to the Board of Directors as such. Ms. Brinkley also repeatedly advised me that there was concern that the Company did not have a qualified succession candidate for my role should anything happen to me.

Second, throughout my years at Bank of America, I consistently received outstanding performance reviews. Indeed, in the days immediately preceding my dismissal, I had received outstanding year-end comments about my performance and the performance of the Company’s Legal department from nearly every member of the executive management team, including Mr. Alphin, Ms. Brinkley, Mr. Price, Mr. Curl, Keith Banks (the head of the Wealth Management division), Liam McGee (the head of the Consumer and Small Business Banking division), Bruce Hammonds (the head of the Credit Card business), and Barbara Desoer (the head of the Mortgage business).

Third, Ken Lewis never expressed any dissatisfaction with my performance to me or, to my knowledge, to anyone else. In fact, Mr. Lewis himself informed me the night we began work on the Merrill Lynch merger that I would be the General Counsel of the combined company following the merger.

Fourth, Brian Moynihan confirmed that Mr. Lewis had confidence in me and that I would be the General Counsel of the combined company. After I began to report to Mr. Moynihan in late September or early October 2008, Mr. Moynihan also assured me that, even though he was once a practicing lawyer, I should continue to do my work as the General Counsel without regard to his legal background. Mr. Moynihan informed me that he had no interest in being the General Counsel. It had been at least 10 years since he had last practiced law.

Finally, I could not understand why I was dismissed so abruptly. I was surprised that I was given no opportunity to say goodbye to my colleagues and staff, and why there was no orderly transition of my work to Mr. Moynihan. No one, including Mr. Moynihan, ever contacted me to discuss what I had been working on.

Nearly a year later, I still do not know why I was terminated, who was involved in the decision to do so, or what their reasons or motivations were.

Events Following My Termination

After I left the Company on December 10, I was never consulted about any of the matters I had been working on. Accordingly, I cannot tell you what legal advice the Company received after I was fired.

I understand from media reports that, after my departure from the Company, Merrill Lynch's projected losses continued to increase to levels that were much higher than previous estimates, and much higher than the losses Merrill Lynch had experienced in the fourth quarter of 2007 and in the first three quarters of 2008. Ultimately, on January 16, 2009, Merrill Lynch reported a \$15.31 billion after-tax loss for the fourth quarter of 2008. Any questions about what legal advice the Company received about whether to disclose these much larger

losses after my termination on December 10 would have to be answered by Mr. Moynihan and Wachtell Lipton.

I also understand that, after I left the Company, Bank of America considered declaring a "material adverse change" under the merger agreement and terminating the merger. Mr. Lewis has testified before this Committee that he had discussions with Treasury Secretary Paulson and Federal Reserve Chairman Bernanke about declaring a material adverse change. These discussions were after my termination. Again, any questions as to what legal advice Bank of America received as to whether there was a material adverse change, what should be said to government officials about that, or whether the Company should disclose to shareholders that it was considering invoking the material adverse change provisions, would have to be answered by Mr. Moynihan and Wachtell Lipton.

* * *

I have sought to provide in this statement a detailed description of the information the Committee has requested, that is, the legal advice Bank of America received in connection with the Merrill Lynch merger and the reasons for my departure from the Company on December 10, 2008. Throughout my 25-year career as a lawyer, and throughout my tenure at Bank of America, I have sought to conduct myself in accordance with the highest standards of my profession. At all times while I served as the General Counsel of Bank of America, I acted in good faith to provide legal advice that I believed was appropriate, considered and in the best interests of the Company and its shareholders. I did my best to be a good, careful and honest lawyer. I look forward to answering any questions that Members may have.

Chairman TOWNS. Thank you very much, Mr. Mayopolous.
Mr. Moynihan.

STATEMENT OF BRIAN MOYNIHAN

Mr. MOYNIHAN. Good morning, and thank you, Mr. Chairman, Congressman Issa, Subcommittee Chairman Kucinich, Ranking Member Jordan, and the rest of the committee.

My name is Brian Moynihan and I serve as the president of Global Consumer, Small Business, and Card Services at Bank of America. Prior to that job, I served in many capacities, including running the group that Merrill Lynch came into in January 2009. I also served as Bank of America's general counsel. Prior to that I served as deputy general counsel for a predecessor company. Prior to that I was a law partner in private practice, and I specialized in mergers and acquisitions, financial institutions, securities law, and other matters relating in particular to the financial sector.

I want to touch on two points today. First, while not the specific point, but the backdrop of this committee's hearing, I want to briefly discuss how our company, Bank of America, continues to help homeowners, families, and businesses weather the economic challenges we all face.

Second, I want to talk about how our acquisition of Merrill Lynch helped prevent a further financial collapse last winter. The deal turned out to be a good deal for our shareholders and our customers. But, most importantly, it turned out to be a good deal for the taxpayers who provided assistance. We acted in good faith, in the best interest of our shareholders and the country in mind.

Let me turn to my first point. I know you hear from constituents, as we hear from our customers, about the challenges they face in today's economy.

Bank of America is doing all we can to help them. We understand the public expects that of us, especially as a financial institution that received taxpayer assistance.

As we recently announced in our quarterly lending and investment report, we have extended \$759 billion in loans since our first report late last year. That represents \$17 for every \$1 of financial assistance we have received.

Making home loans is a priority for our company. In the first 9 months of 2009, we have made almost \$300 billion in home loans available to over a million customers. We have also made \$255 billion of credit available to large and small businesses. In addition to that, we made \$26 billion in credit available to municipalities and other non-profits.

All these figures don't include the \$1.5 trillion that we committed to invest in low- and moderate-income communities around our country, and also don't include the \$200 million in support we provide to charitable organizations on a yearly basis.

I now turn to my second point, the topic of today's hearing. I think it is important to keep one thought in mind throughout our discussion today. Although the Merrill Lynch transaction, and Merrill Lynch itself as a company, was severely impacted by the worst dislocation that the financial markets have seen since the Great Depression, our acquisition of Merrill Lynch is a success.

First, the acquisition has provided great benefits to our customers. A stable Bank of America-Merrill Lynch platform can simply provide more capital to more businesses in these tough times.

Second, the taxpayers are also benefiting, from a stronger financial system and more directly in the form of the financial return they are receiving on their investments.

Third, closing the transaction in December 2008 was in the best interest of the financial system, the economy, and the country. As the committee has heard in prior testimony, the failure of Merrill Lynch in December 2008, particularly on the failure of Lehman Brothers and other financial firms, would have exacerbated the economic havoc that our country faced, and I am proud that Bank of America stepped forward.

Bank of America has cooperated and will continue to cooperate with this committee to help develop a better understanding of the circumstances surrounding this transaction.

The record created by the testimony and those documents shows—and I hope my testimony today will help further demonstrate—that throughout the deliberations with Merrill Lynch around the acquisition, Bank of America acted in good faith and consulted with one of the premier law firms in the country to address very difficult issues.

Business people, confronted with complex business and legal issues, acted in an open and honest manner. All the parties involved, including the lawyers, did their level best to address and balance the merits of these complex questions in a time of great stress and in the face of unprecedented economic conditions.

Thank you for the opportunity to make this statement, and I am pleased to answer your questions.

[The prepared statement of Mr. Moynihan follows:]

Brian Moynihan

President of Global Consumer, Small Business, and Card Services

Bank of America

Testimony to the Committee on Oversight and Government Reform

U.S. House of Representatives

November 17, 2009

Good morning Mr. Chairman, Congressman Issa, Sub-Committee Chairman Kucinich, Ranking Member Jordan, committee members.

My name is Brian Moynihan. I am president of the Global Consumer, Small Business, and Card Services at Bank of America. I have had the opportunity to serve as president of other businesses at Bank of America, including the Merrill Lynch businesses acquired in January of this year. I also served as General Counsel at Bank of America and Deputy General Counsel for FleetBoston Financial, a predecessor company. Prior to that I was a law partner in private practice, where I specialized in M&A in the financial sector.

In my time at Bank of America and predecessor companies, I have been fortunate to lead businesses serving individual customers, small and medium sized businesses, large corporate customers, and institutional investors. I have seen firsthand the difference a financial partner can make by helping people and companies reach their full potential. I am proud of the role Bank of America plays in the U.S. and global economy during this period of economic difficulty. It is a responsibility I and my 300,000 fellow associates in 36 states and scores of countries take seriously.

I want to touch briefly on two key points today:

First, while not the specific point of today's hearing, I want to discuss how Bank of America continues to help homeowners, families, and businesses of all sizes weather the economic challenges.

Second, our acquisition of Merrill Lynch helped prevent a further financial collapse last fall. The deal has turned out to be a good deal for our shareholders, our customers, and the taxpayers who provided the assistance to help close the deal. We acted in good faith, and with the best interests of our shareholders and the country in mind.

Let me turn to my first point. I want to take just a moment and provide some information that I hope you will find helpful. I know you hear from constituents probably every day about the challenges they are facing in today's economy. We know that households, businesses of all sizes, and communities across America feel the financial strain.

Bank of America is doing all we can to help revitalize the economy. We understand that the public expects that of us, in particular because we are a financial institution that has benefited from taxpayer assistance in the past year.

We are committed to demonstrating that to the public and its elected representatives. As we recently announced in our quarterly Lending and Investing Initiative report, we have extended \$759 billion in new credit since we filed our first report in the fourth quarter of 2008. That represents almost \$17 for every dollar of the \$45 billion of taxpayer assistance to Bank of America. This is in addition to more than \$2.5 billion in dividend payments to the U.S. Treasury.

Making home loans continues to be one of our highest priorities. Between July and September of this year alone, the company extended \$96 billion in first mortgages, helping nearly 450,000 people purchase a home or refinance an existing mortgage. In the first nine months of the year, we extended \$292 billion in first mortgages to more than 1.3 million customers. We also made \$78 billion in small business and commercial loans from July through September, and \$255 billion during the first nine months of 2009.

Bank of America also is responding to consumers' needs for simpler, clearer products and pricing with such initiatives as the Home Loans Clarity Commitment and new Basic BankAmerica Visa Card.

In addition to consumer and business lending, we are providing credit to municipalities and nonprofits that serve local needs and communities across the country. This includes \$7 billion from July to September, and \$26 billion in 2009, to some 7,500 governmental entities and more than 1,400 large nonprofit clients.

These figures do not include Bank of America's commitment to lend and invest \$1.5 trillion in low and moderate income communities over the next ten years. We also will provide \$200 million in charitable giving to support non-profit organizations that help to assure the vibrancy of our nation's communities.

I turn now to my second point, and the prime topic of today's hearing. Of the many businesses I have had the good fortune of leading for Bank of America, I am particularly gratified to have been able to lead those businesses that most directly benefited from our acquisition of Merrill Lynch.

I think it is important to keep one thought front and center throughout our discussion today: Although the transaction was severely impacted by the worst dislocation of the financial markets and most severe recession since the depression, Bank of America's acquisition of Merrill Lynch is a success.

First, the acquisition has provided benefits to Bank of America customers. A stable Bank of America-Merrill Lynch has been able to provide more capital to businesses in these tough times.

Second, the taxpayers are also benefiting – from a stronger financial system, and more directly in the form of the financial return they are receiving from the investment.

Third, the deal was in the best interest of the financial system, the economy, and the country. As the committee has heard in prior testimony, the failure of Merrill Lynch, particularly on the heels of the failure of Lehman and other firms, could have exacerbated the systemic havoc the country faced. I am proud that Bank of America stepped forward.

Bank of America has cooperated and will continue to cooperate with this committee as you seek to better understand the circumstances surrounding this transaction. Our Chief Executive Officer and several other current and former executives have met with you and with committee staff. We have provided hundreds of thousands of documents.

The record created by that testimony and those documents shows, as I hope my testimony today will show, that throughout the deliberations around our acquisition of Merrill Lynch, Bank of America acted in good faith and consulted

with one of the premier law firms in the United States to work through a very difficult issue.

Business people, confronted with complex business and legal issues, acted in an open and honest manner. All parties involved, including the lawyers, did their best to address difficult questions in a time of great stress and in the face of unprecedented economic conditions.

Thank you for the opportunity to make this statement, and I am pleased to answer your questions.

Chairman TOWNS. Thank you very much, Mr. Moynihan.
Mr. Gifford.

STATEMENT OF CHARLES “CHAD” GIFFORD

Mr. GIFFORD. Chairman Towns, Ranking Member Issa, Subcommittee Chairman Kucinich, Ranking Member Jordan, my name is Chad Gifford. I have been a member of the Bank of America Board of Directors since 2004, when Bank of America acquired FleetBoston, where I had served as chairman and chief executive officer. I was chairman of the Bank of America Board from April 2004 to January 2005, and I have continued to serve as a member of the Board since then.

Mr. Chairman, I understand the committee’s interest in gaining my perspective on Bank of America’s acquisition of Merrill Lynch. I would only like to make two observations at this point.

First, I believe the Bank of America-Merrill Lynch combination is already bearing fruit. Merrill Lynch has been accretive to Bank of America’s earnings for the year-to-date, and the systemic benefits envisioned when the Board approved the merger are already beginning to take hold. Although it is fair to say I had a number of probing questions about the transaction at the start, I firmly believe that over the long haul Merrill Lynch will continue to be an important contributor to Bank of America’s profitability.

Second, as someone who has spent his entire professional career in the banking sector, I can attest that the financial crisis of 2008 was simply unprecedented in its depth, breadth, and velocity. Even in the midst of it, predictions of how bad it would get consistently understated the scope, the severity, and its duration. Our Government, elected and appointed officials, took bold action and made extraordinary decisions to stabilize the financial system.

For these measures, those of us in the banking industry should be grateful. I want to take this opportunity to personally say thank you to the American people. As the process of the recovery moves forward, admittedly slowly, we at Bank of America will always remain mindful of what was done to stabilize our system and of our important role in helping these decisions work for our customers—families, businesses, and investors.

Thank you again for the opportunity to participate in today’s hearings, and I too look forward to your questions.

[The prepared statement of Mr. Gifford follows:]

Testimony of Charles K. Gifford
Member, Board of Directors
Bank of America

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

November 17, 2009

Chairman Towns, Ranking Member Issa, Subcommittee Chairman Kucinich and Ranking Member Jordan, my name is Chad Gifford. I have been a member of the Bank of America Board of Directors since 2004, when Bank of America acquired FleetBoston, where I had served as Chairman and Chief Executive Officer. I was Chairman of the Bank of America Board from April 2004 to January 2005, and I have continued to serve as a member of the Board since then.

Mr. Chairman, I understand the Committee's interest in gaining my perspective on Bank of America's acquisition of Merrill Lynch and stand ready to answer your questions. I would only like to make two observations at this point. First, I believe the Bank of America - Merrill Lynch combination is already bearing fruit. Merrill Lynch has been accretive to Bank of America's earnings for the year to date, and the systematic benefits envisioned when the Board approved the merger are already beginning to take hold. Although it is fair to say I had a number of tough questions about the transaction at the start, I firmly believe that over the long haul, Merrill Lynch will continue to be an important contributor to Bank of America's profitability.

Second, as someone who has spent his entire professional career in the banking sector, I can attest that the financial crisis of 2008 was simply unprecedented in its depth, breadth and velocity. Even in the midst of it, predictions for how bad it would get consistently understated the scope, severity, and duration. Our government – elected and appointed officials – took bold action and made extraordinary decisions to stabilize the financial system. For those measures, those of us in the banking industry should be grateful. I want to take this opportunity to personally say “Thank You” to the American people. As the process of recovery moves forward, we at Bank of America will always remain mindful of what was done to stabilize our system, and of our important role in helping ensure those decisions work for our customers – families, businesses and investors.

Thank you again for the opportunity to participate in today’s hearing, and I look forward to your questions.

Chairman TOWNS. Thank you very much, Mr. Gifford. We were caught off-guard by your shortness. That is unusual around here; we generally have to stop people. Thank you.

Mr. May.

STATEMENT OF THOMAS J. MAY

Mr. MAY. Chairman Towns, Ranking Member Issa, Subcommittee Chairman Kucinich, and Ranking Member Jordan, my name is Tom May. I am chairman, president, and CEO of NSTAR, a Massachusetts-based public utility holding company, and I have been a member of the Bank of America Board of Directors since 2004.

I also appreciate the opportunity to be here today to discuss Bank of America's acquisition of Merrill Lynch. I would like to associate myself with the remarks of Mr. Gifford and Mr. Moynihan so that I can be brief also.

The Bank of America-Merrill Lynch merger is working, thanks in no small part to our extraordinary associates. We all remain mindful of the extraordinary circumstances the global financial system faced in late 2008, the assistance we received to complete the Merrill merger and the commitments we made at that time to the American taxpayers. We look forward to fulfilling those commitments and to ensuring that the Bank of America and Merrill Lynch continue to provide exceptional value to our customers and our investors.

I also am pleased to answer any questions you may have today. [The prepared statement of Mr. May follows:]

Testimony of Tom May
Member, Board of Directors
Bank of America

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

November 17, 2009

Chairman Towns, Ranking Member Issa, Subcommittee Chairman

Kucinich and Ranking Member Jordan, my name is Tom May. I am Chairman and CEO of NSTAR, a Massachusetts power company. I have been a member of the Bank of America Board of Directors since 2004.

I appreciate the opportunity to be here today to discuss Bank of America's acquisition of Merrill Lynch. I'd like to associate myself with the remarks of Mr. Gifford and Mr. Moynihan. The Bank of America - Merrill Lynch merger is working thanks in no small part to our extraordinary associates. We all remain mindful of the extraordinary circumstances the global financial system faced in late 2008, the assistance we received to complete the Merrill merger, and the commitments we made at that time to the American taxpayers. We look forward to fulfilling those commitments and to ensuring that Bank of America and Merrill Lynch continue to provide exceptional value to our customers and investors.

I am pleased to answer any questions you may have.

Chairman TOWNS. Thank you very much. Let me thank all of you for your testimony.

Let me begin with you, Mr. Mayopolous. On December 1, 2008, did you tell Bank of America CFO Joe Price that you did not think Bank of America could back out of the Merrill Lynch deal, by invoking the MAC?

Mr. MAYOPOLOUS. Yes, Mr. Chairman, I gave that advice.

Chairman TOWNS. Were you fired 9 days after giving that advice?

Mr. MAYOPOLOUS. Yes, Mr. Chairman, I was.

Chairman TOWNS. Do you know why you were fired?

Mr. MAYOPOLOUS. No, Mr. Chairman, I don't know why I was fired. I don't know whether it had anything to do with the advice I gave or might give, or whether it had to do with something else. I don't know why I was fired; I wasn't given an explanation.

Chairman TOWNS. Did you, at any point, have a conversation with Ken Lewis, talking about your role after the merger of Bank of America and Merrill Lynch? At any point did they talk to you about what your role would be after that?

Mr. MAYOPOLOUS. Yes, Mr. Chairman. On the evening that we negotiated the Merrill Lynch merger, Mr. Lewis told me personally that I would be the general counsel of the combined company following the merger.

Chairman TOWNS. But it didn't happen.

Mr. MAYOPOLOUS. No, sir, it didn't.

Chairman TOWNS. Let me just move forward to you, Mr. Moynihan. Just to make sure I am clear, did anyone in the Government force Bank of America to go through with this deal?

Mr. MOYNIHAN. No, sir.

Chairman TOWNS. No one in the Government?

Mr. MOYNIHAN. No, sir.

Chairman TOWNS. We know much more now about the MAC and this entire deal than we did last summer. If you believe there was something material about the Merrill deal that made you want to back out of it, why didn't you think it was material to the average American who was thinking about buying some of your stock and disclosing it publicly?

Mr. MOYNIHAN. Mr. Chairman, when I became general counsel and we worked and looked at the \$18 billion loss that we were facing at Merrill Lynch, we believed that we had a valid claim for a MAC. The disclosure requirements would arise when we had a duty to disclose those, which was later, when we announced our earnings in January.

Chairman TOWNS. Being you are sitting next to Mr. Mayopolous, let me ask you a question. Did you think he was a good lawyer? You are sitting next to him.

Mr. MOYNIHAN. Yes, sir, I did think Tim was a good general counsel.

Chairman TOWNS. I am sorry?

Mr. MOYNIHAN. Yes, I did think he was a good general counsel.

Chairman TOWNS. Do you think it made sense to fire someone who had been the top lawyer for the previous 5 years, especially right in the middle of one of the biggest deals in Bank of America's history? Didn't you feel uncomfortable with that?

Mr. MOYNIHAN. Mr. Chairman, the times that we were going through in December 2008 was we were downsizing the company relatively dramatically, and we were changing 10 percent of our executives, were terminated then, which was terrible things and terrible times to go through, but part of the economic stress, and the changes that were made, as best I know, were made in the context of us changing the numbers of senior executives we had because of the economic stress we were under. It is a tough thing to go through, but it is part of being about business, and I think it is clear that is what drove the decision.

Chairman TOWNS. I just want you to repeat one thing. There are some questions about the Government's involvement here. The Government did not pressure you at any point to do anything that you did not want to do?

Mr. MOYNIHAN. I did not personally feel at any point pressure by the Government to do something that was not in the best interest of our shareholders.

Chairman TOWNS. Thank you.

Mr. Gifford, the committee has obtained two emails you sent regarding the Bank of America deal with Merrill Lynch. In one of those emails you used the phrase "screw the shareholders." Screw the shareholders. In the other you expressed disagreement with the way Bank of America approved mergers. Can you tell us anymore about what you had in mind when you wrote those emails? Is there anything else you can tell us?

Mr. GIFFORD. I can, Mr. Chairman. I am, obviously, not terribly proud of the choice of words, to be sure. The first reference to an email was, as I recall, the middle of January, and it happened during the middle of a board meeting in an exchange with a very good friend, and we were being rather informal, as the words might suggest. We were going back and forth, and it was during that meeting that we were announcing earnings for January, for the fourth quarter in the year, which were certainly unsatisfactory and we knew would have a very negative effect on share price. We also eliminated the dividend down to a penny.

For me, my holdings in Bank of America are very significant for me and my family, so you took it a little out of context. The actual expression or the actual line was "Unfortunately, it is also screw the shareholders." I don't like saying that word in a public forum. What I was doing was expressing remorse for all shareholders.

Chairman TOWNS. Let me just ask this very quickly, before we move on. Mr. May and Mr. Gifford, Ken Lewis told this committee that he and the Board ultimately decided to go through with the Merrill deal because it was in the best interest of the company. Do you agree that buying Merrill Lynch was in the best interest of Bank of America?

Mr. GIFFORD. Yes, I do, sir. Back in September, when the Board was first presented with this opportunity, after many probing questions, I might add, because these were difficult times,—it was not a, if you will, a slam dunk transaction—but, in my opinion, the long-term strategic benefits were such that I voted for the transaction.

Mr. MAY. I also voted for the transaction and, to this day, still feel that it is a tremendous combination of two wonderful companies.

Chairman TOWNS. Yield 5 minutes to the gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman.

And thank you both for your doing your fiduciary duty; I am sure it was not easy as \$10, then \$18 billion of unexpected losses piled up at a company in the middle of a merger. I have done a few acquisitions in my day and still sit on the board of my company, and I wouldn't want to try to decide whether to pull the trigger or not pull the trigger with so many people on both sides, and particularly at a time when Secretary Paulson, President Bush himself were up here on the Hill telling us it was a crisis, and, if we didn't vote money in a matter of hours, the world as we knew it was going to come to an end. Of course, as you know, the world, as you know, it never comes to an end in Washington because we just print money. We have had no layoffs.

Mr. Moynihan, it won't surprise you, but Government has grown net by 139,000 new employees just since this administration took office. We don't feel your pain.

But let me go through a couple of set the record straight. If we can put up slide 1.

Slide 1: When it gets up there, is hard to read, but it says "before formally call MAC, get Government in. Geithner gone on vacation." This is from Eric Roth, BofA lawyer.

Then slide 2: "Fire Board if you do it. Tim G. agrees. Larry Summers and Tim agree." This is from Joe Price, one of your CFOs of the company.

Slide 3: "Hank Paulson made it clear that Treasury and the Fed were prepared to deliver an assistance package. Hank made it clear that he had concurrence of the Fed and Tim Geithner and others. Ben also stated that Geithner and, in addition, Larry Summers were both on board with this transaction."

Those, Mr. Chairman, are the words of Ken Lewis.

Slide 4: "Ben says \$45 billion TARP available if necessary. Obama team informed and agrees." Tommy Franks, BofA Board member, not here today, of course.

Slide 5: "Incoming team at Fed and Treasury in agreement." This is from another Board member not here, Tim Sloan of your Board.

Slide 6: "Paulson and Bernanke spoke to Geithner. You have our commitment that this will be resolved. You will get some additional investment." Eric Roth, BofA lawyer.

Questions for you gentlemen: None of these are in dispute here today. None of the testimony that we have had up until now disputes the fact that, in various ways, then Fed New York Bank Chairman Tim Geithner was in the loop, because this was after he was the likely and, in fact, now is the Secretary.

Knowing all of this, do you believe today that if the money had not been made available—and this is for the Board members primarily—in the form of a loan or, in this case, a loan through preferred stock with interest, do you believe that you would have likely pulled the MAC and disputed going through with the deal at the current cost based on the \$18 billion in losses?

And, Mr. Gifford, particularly, I would like you to answer that, since your career has been in banking. If you take \$18 billion out of your balance sheet and then try not to have the FDIC come in and take you out, isn't that a real concern that you would have had to deal with?

Mr. GIFFORD. Ranking Member Issa, it was a confusing time, for sure. I can tell you that as we learned—we, the Board—originally on December 19th of the growing and very significant losses at Merrill Lynch, management presented to the Board the opportunity to exercise the privileges of a MAC, material adverse change clause, and get out of the transaction because of how much damage had been, if you will, invoked on Merrill Lynch. We then talked later with Mr. Lewis, we being the Board, a few days later, and he expressed the fact that the Government thought it would be a major mistake for us to walk away; they thought it was be very dangerous systemically and very dangerous and not positive at all for the Bank of America.

Mr. ISSA. Let me just interrupt you. Did he express that if you walked away from it and then needed help later, the Fed wasn't going to be there for you?

Mr. GIFFORD. No, he didn't. He expressed the sentiment, and there was another session later in the month, that the Government would provide financing. There was nothing in writing, but it was from a very senior official of the Government that one would believe would follow through. The details were not reviewed with the Board. I can tell you, as a member of the Board of Directors—and I can only speak as one person—the issue was relatively clear to me. In a perfect world, it would have been better to walk away.

Mr. ISSA. Sure. One last question for the two of you very quickly. As CEOs, as business leaders who have had generals counsel, don't you normally require two things: your general counsel give you honest statement, which you take his legal advice, but don't you need to have at all times a general counsel who is on board with your leadership decisions?

Mr. GIFFORD. A general counsel who is on board with our leadership decisions?

Mr. ISSA. In other words, would you keep a general counsel who is constantly telling you not to do what you have already decided to do from a business standpoint?

Mr. GIFFORD. Any member of the Board has to make up their own mind. You would like to be in a position to believe your general counsel is going to provide good counsel.

Mr. ISSA. Mr. May.

Mr. MAY. I agree with that totally.

Chairman TOWNS. The gentleman's time has expired.

I now yield 5 minutes to the gentleman from Ohio, Congressman Kucinich.

Mr. KUCINICH. Thank you, Mr. Chairman. I ask unanimous consent to enter into the record documents that will be part of this questioning.

Chairman TOWNS. Without objection, so ordered.

Mr. KUCINICH. Thank you.

[The information referred to follows:]

Kucinich Exhibits

**Joint Hearing of the
Oversight and Government Reform Committee and
Domestic Policy Subcommittee**

**“Bank of America and Merrill Lynch: How Did a Private Deal Turn into a Federal Bailout?”
(Part IV)**

November 17, 2009

[illegible]

Merrill Lynch & Co.
4Q'08 Forecast

	from OCI to P&L
AIA-A	
mfg gas	
structured note fwd (not reversed 800m)	
-775	
1050	
-300	
10,962)	

Wachtell Lipton attorney Nicholas Demmo relays substance of conversation with Tim Mayopoulos, November 12, 2008

November, so far, is flat
ML lost \$7 B in October
do we have to get the # out?

Demmo
we had a terrible October
Nov. so far, is flat
ML lost \$7 B in October
do we have to get the # out?

11/12/08

Meeting notes of Wachtell Lipton attorneys Ed Herlihy and Nicholas Demmo,
November 13, 2008, where Mayopoulos' comments mentioned

11/13/08

Herlihy, Demmo, Shapiro, Wasserman

Q1 - 2 B loss

Q2 - 4.6 B loss

Q3 - 5.1 B loss

Q4 - concludes est. - .06 points

Tim Mayopoulos -
assume November
better - worry about not
disclosing?

Tim Mayopoulos -

assume Nov. better - worry about not disclosing?

~~Herlihy~~ Stein

11/13/08

National - B/A

state for state merger

ratio

subject of proxy statement issued

in 7/98
for vote to take place
9/24/98

8/98 - markets tailspin -
LTCM collapsed

Q. arose -

By A. b/c of De Shaw relat.
confronted poor of very
slight write off for
loss to De Shaw

Q1 B-loss = De Shaw's loss

Meeting notes of Tim Mayopoulos, Theresa Brenner and Wachtell Lipton attorneys,
Ed Herlihy and Nicholas Demmo, November 13, 2008

Retire Tim Mayopoulos, Ed Nick 11/13/08
Pres B. 1

Tim - more info
consensus for ML = .06
just be keep in trend
if just BPA side -

again ML's # - rec. bdr is report with some before

our results not fabulous

Tim -- if ML breaks even
for Nov. -- \$7 B loss for 2
months

Ed - is there a trend line?
what would we know about Nov.

Tim - how much detail?

Ed - not much - like M+H

Tim - if we had each Nov. - \$75 loss for 2 months

Mike - after the past trend of losses 2 - say that detailed!

Ed - not speaking @ global conf.

✓ report it to be no details then - might be worse

Tim - colleague not be more detail.

Ed - just behind

Tim - not the way you would

November 12 Forecast cover sheet with Joe Price's notes
from November 20, 2008 meeting with attorneys on
shareholder disclosure question

Confidential Treatment Requested

"-Concluded [per Tim [Mayopoulos]
and Ed [Heithy]] that no pre meeting
disclosures necessary"

- for less at 2 - looking into ya - that ya. etc. - and has
give them in value thing by some on hedge -
Bill/Bar - August the less - intelligent ideas - answers
of into & amount. Forecast: benefits in form of... at gain.
of amount to spot - so long to change it is in it. - so.
no currency losses. (highlighted as above)

- 700 '02 (Up risk)
- 1000 '08 (down
+ and
1000)
Merrill Lynch & Co
2008 4Q & FY Forecast
November 12, 2008

Concluded = Tim + Ed
that no pre meeting
disclosures necessary

- DIA forecast -> Q3 worse 6.9 to 9.1. Interest
-> EY/BBY increased + of DIA gets better
->

Mr. KUCINICH. Mr. Mayopolous, as general counsel at Bank of America, you determined whether or not the Bank made additional disclosures to shareholders to update its proxy solicitation. What threshold of quarterly losses would have led you to recommend additional disclosure to shareholders before the vote? Wasn't that threshold anything above a \$10 billion forecast quarterly loss?

Mr. MAYOPOLOUS. Congressman, the historical experience at Merrill Lynch over the prior four quarters is it had quarterly losses ranging from \$2 billion to \$10 billion. Certainly, as you got to \$10 billion or higher in after-tax losses, I think the case for disclosure became much more compelling.

Mr. KUCINICH. You state in your testimony that you received a copy of a forecast dated November 12th and that the information in it played a role in your legal deliberation about making additional disclosure about the financial situation at Merrill Lynch. Let's look at the November 12th forecast you received. Staff has already provided the gentleman with a copy of what we are talking about here.

Merrill Lynch's most illiquid and volatile assets—the collateralized debt obligations, the credit default swaps, and subprime mortgage-backed securities—were tracked in the rows marked "significant items, total marks." Now, if you follow that across to the column entitled "BTG," which stands for "balance to go," or the estimate of performance for the remainder of the quarter, in that gray highlighted box they are blank. There are no numbers there, is that correct?

Mr. MAYOPOLOUS. I don't see any numbers there, sir.

Mr. KUCINICH. OK. So there is no projection for collateralized debt obligations and other illiquid assets that were losing a lot of money at that time. When my staff asked Merrill Lynch's CFO, whose team produced this spreadsheet, why a forecast would contain no projections for these assets, he told us that this document was not intended to be a valid forecast, despite its title.

Mr. Mayopolous, did you notice that omission and did you ever question whether or not the November 12th forecast document was a valid forecast?

Mr. MAYOPOLOUS. Representative, no one ever told me that this was not a valid forecast. I was informed—

Mr. KUCINICH. So that is a no?

Mr. MAYOPOLOUS. That is a no. I was never told it was not—

Mr. KUCINICH. OK, I need to move on here. I want you to look at the bottom margin of the page. Those notes were added, we understand, by Bank of America's Treasurer to the Merrill Lynch forecast document on the morning of November 13th. They were intended to help fill in the omission noted above. Can you read those lines aloud?

Mr. MAYOPOLOUS. There is a line that says minus the 675 Alt-A from OCI to P&L.

Mr. KUCINICH. OK, I am referring to the line that says "Neil, gut?" Was your understanding at the time—do you see that, first of all?

Mr. MAYOPOLOUS. Yes, sir, I do.

Mr. KUCINICH. OK. So what was your understanding at the time, was that a reference to Neil Cotty's gut feeling?

Mr. MAYOPOLOUS. I don't remember discussing that specifically. I do recall being informed that there was a \$1 billion contingency in this \$5 billion forecast, and that seems to correspond to the "Neil, gut?" line there.

Mr. KUCINICH. Well, when my staff interviewed Mr. Cotty, he said that the November 12th forecast was of "questionable validity." He also said that he did not have time to delve deeply into the details of the forecast. Did you know that Mr. Cotty had not delved deeply into the details of the forecast before a billion dollar guess called Neil's gut was added to it?

Mr. MAYOPOLOUS. No, sir.

Mr. KUCINICH. Did the words "Neil's gut" create any concern, any concern in your mind at all that it might be a number pulled out of the air, a gut feeling?

Mr. MAYOPOLOUS. I understood that this forecast was in part a guess, that it was an estimate.

Mr. KUCINICH. OK, so it was in part a guess. My understanding is you did not transmit the November 12th document to the attorneys at Wachtell Lipton. The record portrays you, sir, as the individual who relayed the relevant financial information to your outside counsel. Do you recall telling the Wachtell attorneys, on November 12th and 13th, that the October losses were \$7 billion and that Merrill Lynch could break even in November, allowing you to spread October's losses over 2 months?

Mr. MAYOPOLOUS. No, sir, I don't recall that.

Mr. KUCINICH. But if you look at the documents here, you are quoted—and to members of the committee—as saying, in a conversation with Nicholas Demo, that you said that "Merrill Lynch lost \$7 billion so far in October, how do we get the number out;" and that also, in the meeting notes, Wachtell Lipton attorneys, your comments are mentioned again relating to the \$7 billion number. Now, when you spoke with your attorneys at Wachtell Lipton, did you recall telling them that the fourth quarter forecast received from Merrill Lynch omitted November-December projections for CDOs, CDS, and subprime mortgage-backed securities, which alone lost \$6.4 billion in October?

Mr. MAYOPOLOUS. No, sir. I recall telling them that I had received a forecast from the Finance Department, and I described for them what the bottom line numbers were.

Mr. KUCINICH. Mr. Mayopolous, do you happen to know what the quarterly loss for Merrill Lynch turned out to be?

Mr. MAYOPOLOUS. For the fourth quarter? My understanding was approximately \$15.3 billion after taxes.

Mr. KUCINICH. Well, in conclusion, Mr. Chairman, in other words, the actual losses acknowledged just 2 weeks after the shareholder vote were well above the threshold that would have led you to recommend additional disclosure. In fact, if Bank of America had simply extrapolated October's losses into November and December, you would have come pretty close to the actual magnitude of losses for the quarter, but neither Merrill Lynch nor Bank of America did that or any financial analysis at all. Mr. Chairman, they relied on someone's gut feeling.

Yield back.

Chairman TOWNS. Thank you very much.

I yield 5 minutes—

Mr. JORDAN. Thank you, Mr. Chairman.

Let me just try to tell the story the way I see it unfolding. So last fall you make a decision, circumstances are such that you are going to acquire Merrill. In the midst of all that, the TARP bill passes. Through our testimony we got from Mr. Lewis earlier this year, he indicated 9 days after TARP passes, the biggest financial institutions are brought to Washington; they are told they need to accept TARP money. He makes a call to Board members and decides to do that.

In the midst of all this last fall, you look to exercise the MAC to, in my judgment, put more pressure on Merrill because you see they are losing more than you initially thought; you want to get a better deal, what two businesses do all the time. The Government said no to that.

In fact, based on testimony we have heard—even though Mr. Moynihan, in answering the chairman's question, said differently—based on what we have heard, there was some kind of at least subtle pressure placed on Bank of America to go through with the deal. In fact, we have the letter from Attorney General Cuomo which suggests that, says that Mr. Lewis and the Board would be gone if in fact they did not follow through on the Merrill deal.

You sought assurances, as Mr. Issa pointed out in his questioning, from the incoming players, likely players in an Obama administration. You actually sought that in writing; they said they wouldn't put anything in writing, but our assumption is you got some kind of verbal assurances to proceed further with this.

So let me just ask a couple questions. Is that in fact the case, that you received assurances in some form, other than writing, from the likely folks to be involved in the Obama administration at the Treasury Department that, if in fact things got worse, they would be there with additional TARP dollars to help Bank of America? And we can go right down the list. And I would like a yes or no to that, if we could. Mr. Moynihan, we will start with you.

Mr. MOYNIHAN. We received statements from the current Secretary Paulson and Chairman Bernanke that, as we work through from mid-December and the 2-weeks we had to work through it, that if we went forward we could receive some sort of assistance, which we finally negotiated and actually closed in January 2009.

As to the statements of the incoming administration, I think Mr. Lewis has testified to that, that in his conversations with those people he was told that they had heard about the transaction. I was not part of those discussions.

Mr. JORDAN. So I just want to be clear. Was there a promise made from the incoming Obama administration that they would be there to back you up if in fact that is what Bank of America needed?

Mr. MOYNIHAN. I don't know that, because I was only told what Mr. Lewis's conversation was, which I assume—

Mr. JORDAN. Mr. Gifford. Mr. May. Mr. Mayopolous.

Mr. GIFFORD. I was aware of no such promise.

Mr. JORDAN. OK.

Mr. MAY. Neither was I.

Mr. JORDAN. Were you aware of assurances? I mean, something short of the word promise, were you aware of that?

Mr. GIFFORD. As I understood it from our chief executive, he was told—there are a lot of he told, he told—that—

Mr. JORDAN. And he related that to you?

Mr. GIFFORD. He related that to us, that the new Members, the new administration, were aware of the discussions.

Mr. JORDAN. OK.

Mr. GIFFORD. Not implying—

Mr. JORDAN. Mr. May, would you agree with that?

Mr. MAY. We were being apprised pretty regularly of the progress that was being made from the mid-December meetings.

Mr. JORDAN. OK, let me move to the end of the story here, at least what we hope is the end; kind of cut to the chase of where we are today. How much TARP money has Bank of America received?

Mr. MOYNIHAN. We have received \$45 billion in total.

Mr. JORDAN. \$45 billion. And what is your cash position today? All of you said this was a good deal; it has worked out for the shareholders; wonderful apple pie, God bless America, the whole thing. So what is your cash position today?

Mr. MOYNIHAN. Our cash position is in excess of \$150 to \$200 billion.

Mr. JORDAN. Have you paid back to the TARP money?

Mr. MOYNIHAN. We have not paid it back yet. We have been clear that our goal is to pay it back as soon as possible.

Mr. JORDAN. And why haven't you paid it back, Mr. Moynihan?

Mr. MOYNIHAN. Last week they issued a series—the Federal Government issued a series of requirements to pay it back and we are looking at those and—

Mr. JORDAN. Have you asked the Federal Government to pay it back, yes or no?

Mr. MOYNIHAN. It is not—

Mr. JORDAN. Have you got permission—what is preventing you? You have a \$150 billion positive cash position and you owe the taxpayers of this country \$45 billion. Why isn't it paid back?

Mr. MOYNIHAN. You can look at the guidelines. It takes a series of steps and a series of requests and answers.

Mr. JORDAN. If you could, would you pay it back?

Mr. MOYNIHAN. If we could, yes, we would pay it back. We have been clear that our intention is to pay it back as soon as possible.

Mr. JORDAN. In your judgment, are there hindrances or obstacles that the Obama administration is putting in place that are preventing you from paying it back?

Mr. MOYNIHAN. I think the question that the Government is looking at this is to make sure we can all stabilize the economy, which was the intention, and I think, as I said earlier, we have done a pretty good job of doing that, as have our colleagues that received the money; and I think—

Mr. JORDAN. In your professional judgment, why the hindrances? Why can't you get that money back to the Federal Government to pay back the taxpayers?

Mr. MOYNIHAN. I think we just have to be assured that, if we do that, then the economy is in the kind of shape for a company like

ours, which supports America and around the world businesses, that we can—

Mr. JORDAN. Would you agree that, in fact, in October we ran the highest single month deficit in American history? Last fiscal year ran the highest single annual deficit in American history? Wouldn't you think that the new administration would want that money to get back into the Treasury and help with that situation?

Mr. MOYNIHAN. I think you would have to ask them that. Our intention is that we will pay it back as soon as we can.

Chairman TOWNS. The gentleman's time has expired.

Let me ask all of you to pull your mics closer. We have some senior citizens up here having trouble hearing.

Yes, I yield to the gentleman from Maryland, Mr. Cummings.

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

Mr. Moynihan, I find your testimony very troubling, and I don't know who you think we are, but I have to tell you I find some of the things that you have said not believable. First of all, the chairman asked you why Mr. Mayopolous was fired, a seasoned attorney was fired 9 days after he gave an opinion, and you basically said you all suddenly got into downsizing fever. Is that right, is that basically what you were saying, you were downsizing?

Mr. MOYNIHAN. I said I wasn't personally involved in the decision, but it was in the context of downsizing.

Mr. CUMMINGS. Well, you replaced him, didn't you?

Mr. MOYNIHAN. Yes, I did.

Mr. CUMMINGS. And what did they tell you—and I remind you that you are under oath—was the reason why he was fired?

Mr. MOYNIHAN. Ken asked me to take the job as general counsel and I said I would take that.

Mr. CUMMINGS. I am sorry, say that again.

Mr. MOYNIHAN. Mr. Lewis asked me to take the job as general counsel and I said I would take the job.

Mr. CUMMINGS. You didn't answer my question. I said were you told—you were replacing somebody; you hadn't practiced in years, and you are replacing somebody who is a seasoned attorney, who had just given an opinion that apparently Mr. Lewis did not like or others did not like, and you mean you are walking into a job and you didn't say, "well, what happened to the last guy?" That is a logical question.

Mr. MOYNIHAN. That is absolutely a logical question.

Mr. CUMMINGS. And what did you find out? Did you ask the question, first of all, or did you know?

Mr. MOYNIHAN. I didn't ask the question and I went about doing—

Mr. CUMMINGS. So you didn't care, right?

Mr. MOYNIHAN. I cared for Mr. Mayopolous as a person, obviously, but I met with the director and started my job.

Mr. CUMMINGS. And if you were advising a client the size of Bank of America, what would you say to the management if they told you they wanted to fire their in-house counsel and replace him with a senior business executive, who, while an experienced attorney, had not practiced law in 10 years and was not even licensed at the time? Would you advise them to make that move?

Mr. MOYNIHAN. I think if the decision was made for me to be general counsel, I think it was a wise move on behalf of the company and I was competent to do it.

Mr. CUMMINGS. That is very interesting. Now, let me ask you this. You had an opportunity to talk to our committee staff, did you not?

Mr. MOYNIHAN. Yes, I did, sir.

Mr. CUMMINGS. And you believed that there was a MAC, a MAC was appropriate, there was a case for a MAC, is that right?

Mr. MOYNIHAN. I believe we had a valid claim.

Mr. CUMMINGS. And at the time that you talked to the committee staff, you produced no evidence with regard to why you had that opinion. Do you have any evidence today?

Mr. MOYNIHAN. Representative, the evidence is that in the fourth quarter of 2008 Merrill Lynch lost \$21 billion pre-tax, and it was not clear that they would be able to use tax benefits. That was twice as much as they had ever made as a company and completely depleted their capital by 50 percent. So, therefore, that was a material change in their circumstances. Their ability to earn money at the level they were supposed to was impaired by their capital going down.

Mr. CUMMINGS. Now, that was inconsistent with the law firm Wachtell and what Mr. Mayopolous had said, is that right? Was that inconsistent?

Mr. MOYNIHAN. I think—

Mr. CUMMINGS. In other words, you all had hired a big law firm and you had a general counsel, and then you come in, you hadn't practiced law in 10 years, and you come along and say, "ahh, I think this is a good time, the MAC is fine." So I am trying to figure out how did you get there.

Mr. MOYNIHAN. I relied on Wachtell Lipton, who was of the same opinion, we had a valid claim for a MAC and informed as such. I also relied on my experience in dealing with MAC clauses and having taken apart deals for MAC clauses in my experience in the past, the hundreds of deals I have done as an attorney and a business person; and we were all of the same opinion that this was, at \$21 billion in losses, this was a material change in the circumstances of Merrill Lynch that we had to address—

Mr. CUMMINGS. Well, let me get to Mr. Mayopolous, because apparently he had a different opinion. Is that what Wachtell had said, Mr. Mayopolous? He says they were all in agreement. Is that right? That is not what they told you, is it?

Mr. MAYOPOLOUS. We didn't have any conversations. I didn't have any conversations with Wachtell about the material adverse change clause.

Mr. CUMMINGS. All right.

Now, Mr. Gifford, Mr. Moynihan is one of the people that you are considering to take Mr. Lewis's place, is that right?

Mr. GIFFORD. That is what I read in the newspapers, sir.

Mr. CUMMINGS. That is what you read in the newspapers? What do you mean?

Mr. GIFFORD. We have tried very hard, Congressman Cummings, not to be talking publicly about individuals.

Mr. CUMMINGS. Well, the fact is, the reason why I am talking about it is this the guy—I am just trying to figure out is this the guy that we have to face when we are trying to deal with Bank of America, when we have \$45 billion invested in a company? I am just trying to figure out is this the face that we are going to be facing.

Mr. GIFFORD. And I am responding, Congressman.

Mr. CUMMINGS. And I am not asking you for your decision; I am just asking is he one of your top candidates.

Mr. GIFFORD. He is a very talented executive at Bank of America.

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

Chairman TOWNS. Thank you very much.

I now yield to Mr. Luetkemeyer from Missouri.

Mr. LUETKEMEYER. Thank you, Mr. Chairman.

I would like to follow along this line of questioning. Mr. Mayopolous, in our documents here, it indicates that you informed Mr. Price that Bank of America did not have the basis for invoking a MAC. What was the basis of that decision?

Mr. MAYOPOLOUS. The basis of that decision was that, in order for there to be a material adverse change, there had to be an event that had occurred that had a disproportionate impact on Merrill Lynch in contrast to other companies in the industry, including Bank of America. And as I discussed with Mr. Price, the stock price of Bank of America had declined almost as much as Merrill Lynch's. Bank of America had gone out and raised substantial capital, had cut its dividend, its earnings had been reduced. So basically both companies had suffered significant downturns in their prospects in the time since the merger had been announced.

Mr. LUETKEMEYER. Was the information that you had, did you not have the information that Mr. Moynihan had with regards to the \$21 billion loss at the time that you made your advisory opinion to Mr. Price?

Mr. MAYOPOLOUS. That is correct, I did not have that information.

Mr. LUETKEMEYER. OK, if you had known that, what would your advice have been at that time?

Mr. MAYOPOLOUS. I believe my advice would have been—although I don't have all the information that the company had at that time since I was gone, but my view would have been that invoking material adverse change clause would be a dangerous and risky prospect. But I didn't have the information and I didn't study that question.

Mr. LUETKEMEYER. So what you are saying is you would have gone along with saying that the MAC would have been a very viable way of—go ahead and invoke MAC, then?

Mr. MAYOPOLOUS. No, sir, I am not saying that. I am saying that I think it would be a very difficult decision to invoke the material adverse change clause. I believe I would have suggested that the company sit down with Merrill Lynch and try to renegotiate price, but, if that didn't work, I don't know that I would have threatened to invoke the material adverse change clause.

Mr. LUETKEMEYER. Well, do you believe, then, that the reason that the MAC was eventually then used as a bargaining chip—or

was it used as a bargaining chip, in your judgment, to extract a better price from the Government?

Mr. MAYOPOLOUS. Congressman, I don't know what it was used for. I was never privy to any of the discussions; I was gone.

Mr. LUETKEMEYER. OK. Along this line, also, obviously, in a lot of our documentation here and in the testimony, there is the threat to fire Mr. Lewis, as well as the entire Board. Can you tell me, can any of you gentlemen tell me the circumstances under which they, No. 1 had the authority to do that and, No. 2, the circumstances under which they believed that you as a Board or as Mr. Lewis as chairman, were doing something wrong that they could fire you for?

Mr. MOYNIHAN. Well, I think the discussion about that is, I think, reflective of the very serious circumstances that we faced in December 2008. The economy was in a total disarray—

Mr. LUETKEMEYER. They were going to fire you for the economy?

Mr. MOYNIHAN. The economy was in disarray; the regulators were serious about us thinking about the pros and cons, and using our judgment around the MAC and what we would do as a company; and I think that I always took that as a view of how serious the situation and how serious they wanted to think about it. We were prepared, if it was the right interest for our shareholders, to exercise the MAC irrespective of what would happen to management, and I assume Mr. Gifford and Mr. May would say the Board.

Mr. LUETKEMEYER. Unfortunately, Mr. Moynihan, that answer does not fly with me. You cannot tell me that Bank of America is going to cause their entire economy go down if you don't do this and because of that they are going to replace your entire Board and the chairman. You expect me to believe that?

Mr. MOYNIHAN. The point, I think, was would we feel that if we had to be removed if the Government said that we had to be removed, that did not factor into our decision of what our course of action—

Mr. LUETKEMEYER. So basically they were extorting your decision to go along and accept Merrill Lynch as a business partner, is that what you are saying?

Mr. MOYNIHAN. What I said was that we did not let that factor into our decision of what the best interest to our shareholders was.

Mr. GIFFORD. If I may respond as a member of the Board, Congressman Luetkemeyer.

Mr. LUETKEMEYER. Yes.

Mr. GIFFORD. We heard on I believe it was December 22nd the CEO reporting to the Board that the Government, Secretary Paulson, had made it clear that the Government felt very strongly that this transaction should continue; it was in the best interest of the American financial system as well as Bank of America. And we also heard the comment and, if it doesn't happen, there is a risk to members of the Board and management keeping their jobs.

I can assure you, sir, as much as I care about the American financial system, our job is representing shareholders, and that did not, one iota, factor in the decision that I and I believe my cohorts made in proceeding with the transaction. To do so would be just directly dishonoring our fiduciary duty. And we made that clear in our discussions at the Board.

Mr. LUETKEMEYER. OK, I have one more quick question before my time expires.

Obviously, Mr. Moynihan, you testified that Merrill Lynch lost \$21 billion. Can you tell me what the problems were, why they lost that money, and have those problems been rectified now that Bank of America owns the company?

Mr. MOYNIHAN. The problems were due to the markdowns of securities and other things that were going on in December 2008 as the markets continued to deteriorate. They are rectified because Merrill Lynch makes money, but the context of that is Merrill Lynch, being owned by Bank of America, with a stable capital base and ability to keep its balance sheet, is now able to produce the kind of money and do the kinds of things for our customers which are strong. But in December 2008, those were not—

Mr. LUETKEMEYER. Do they still involve themselves in a lot of the investment derivative type activity that caused a lot of the problems?

Mr. MOYNIHAN. They continue to trade with their clients. I think a lot of their “legacy” positions that you hear people talk about are not being renewed, are running off as we speak. But I think it is a much more straightforward, clear, and less risky platform than it was as a standalone company due to the stability and capabilities that Bank of America and Merrill Lynch together have.

Chairman TOWNS. The gentleman’s time has expired.

Mr. LUETKEMEYER. OK. Thank you, Mr. Chairman.

Chairman TOWNS. I yield 5 minutes to the gentleman from Massachusetts, Congressman Tierney.

Mr. TIERNEY. Thank you, Mr. Towns.

Mr. Gifford, at what point in time did you become aware that Mr. Mayopolous was being relieved of his duties and that Mr. Moynihan was assuming the role of general counsel?

Mr. GIFFORD. I believe, Congress Tierney, it was the afternoon of December 9th, following a Board meeting.

Mr. TIERNEY. So that was the day before he actually had uncere-
monious firing incident.

Mr. GIFFORD. Having just heard the December 10th, yes.

Mr. TIERNEY. OK. Would you tell us what was discussed when you learned that he was being fired and that Mr. Moynihan was being hired?

Mr. GIFFORD. I and the rest of the Board, Congressman, was informed at the end of that December 9th Board meeting that Mr. Moynihan was leaving the company because he wasn’t able to take a job that the CEO wanted him to take. A number of Board members, within a couple minutes timeframe, expressed regret because, as I said earlier in testimony, Mr. Moynihan is one of the most talented executives I have ever worked with, and we expressed that regret to the chief executive officer.

At that point, I and a bunch of others who live in Boston got on a plane, went back to Boston. I, at that point, thought Mr.—I knew nothing about Tim; all I knew was that Brian was leaving the company. When I returned to Boston, I got, sometime in the late afternoon, an email, as did all members of the Board, from Ken Lewis, the chief executive officer, informing him that Brian was staying at Bank of America and becoming general counsel.

Mr. TIERNEY. Thank you.

Mr. MAY, were you privy to that same set of facts, the same conversations?

Mr. MAY. Yes, I was. That day, at the Board meeting, we found out that Brian was leaving the company. I did express to Ken Lewis a concern about that because of his versatility. I indicated he can play third base, he can catch, he can pitch; we have had him in almost every aspect of the business, whether it was wealth management, whether it was investment banking, or whether it was in legal, and we were happy to hear that he had found a solution. Again, you have to recall that this was at a time when a merger was going on, so we don't usually use the word fired during mergers, but positions are eliminated; you have two treasurers, you have two controllers, you have two presidents, and things were being eliminated and the top management of the organization was shrinking.

Mr. TIERNEY. You don't really think that this all happened in the context of the merger and you were shuffling positions around, just at that critical moment, instead of waiting until after the transaction was completed by the Board, then you are going to shake out? You want us to think that while that was going on you decided to do all that?

Mr. MAY. This absolutely was happening. Mr. Moynihan had been in investment banking, he was leading the Bank of America investment bank. The merger with Merrill Lynch eliminated his—not eliminated his position, but someone else was chosen to lead the investment bank and Brian was asked to go to the credit card business in Wilmington. That was a job that he turned down. We were going to potentially leave him. So, yes, sir, he was a victim of a merger synergy.

Mr. TIERNEY. How long did he hold his job of general counsel after it was decided that he had to have that job?

Mr. MAY. I am not sure of the exact—a couple months.

Mr. TIERNEY. Forty-four days?

Mr. MAY. Something like that, yes, sir.

Mr. TIERNEY. So it doesn't strike you as incongruous that you give a position for 44 days, that holds him on to the company, then you shuffle him off to supposedly where he didn't want to go to begin with?

Mr. MAY. Again, that is the fragility of an organization that is going through transition, and there was fallout. There were people that left Merrill that were former Merrill executives that left the combined company, and we were fortunate to have Brian to put him into some of these holes.

Mr. TIERNEY. Mr. Mayopolous, didn't Mr. Moynihan tell you that you were going to be the general counsel of the merged entities?

Mr. MAYOPOLOUS. Yes, sir, he did.

Mr. TIERNEY. Did you believe him when he told you that?

Mr. MAYOPOLOUS. Yes, I did.

Mr. TIERNEY. Mr. Moynihan, did you tell Mr. Mayopolous that he was going to be the general counsel of the combined units?

Mr. MOYNIHAN. Yes.

Mr. TIERNEY. And why did you lie to him?

Mr. MOYNIHAN. At the time, he was the general counsel, he was one of four or five different people I had working for me, 35,000, 40,000 associates, and he was the general counsel.

Mr. TIERNEY. And you believed that he was capable of doing the job?

Mr. MOYNIHAN. Absolutely.

Mr. TIERNEY. So then tell me why it was that a man that you believed to be capable of doing the job got bounced out in the fashion that he did? Why did he get fired?

Mr. MOYNIHAN. Congressman, I know this is difficult, but in the business world this happens. When I took the job to run the combined Bank of America-Merrill Lynch Global Banking Wealth Management, the person who had that job left that day also. We have to make decisions; it is very difficult economic times. The decision was made to eliminate 10 percent of the senior executives and one of the outcomes of that decision was a change between Tim and I. It is not great for people and I know it is hard to understand if you are outside business, but in these tough times those are the things that happen.

Mr. TIERNEY. And the fact that it happened just a matter of days after he told Mr. Lewis—Mr. Price, at least, that the MAC wasn't an option has nothing to do with it?

Mr. MOYNIHAN. I had no knowledge it had anything to do with it.

Mr. TIERNEY. My time is up.

Chairman TOWNS. Thank you very much.

I now yield 5 minutes to the gentleman from Louisiana, Mr. Cao.

Mr. CAO. Thank you, Mr. Chairman.

This is my question, I would assume, to the members of the Board, and maybe even to Mr. Moynihan. I have heard your statements saying how good the acquisition of Merrill Lynch is to Bank of America. My question to you here is if I were to ask you to compare Bank of America now without the purchase of Merrill Lynch with the Bank of America with the purchase of Merrill Lynch, which of the two would be a stronger institution today?

Mr. MOYNIHAN. I think from the ability to serve customers standpoint, there is no doubt we are a stronger institution today with the product capabilities we have not only in the United States, but around the world, to serve customers, whether they are an individual, a small business, a large business, investor across the world. The capabilities we have when you put these two companies together are better than the capabilities either one had before they came here.

Mr. CAO. And do you have, for example, any kind of profit studies with respect to Bank of America without Merrill Lynch and Bank of America with Merrill Lynch?

Mr. MOYNIHAN. I mean, the eggs are scrambled at this point in terms of decisions we have made, so it is hard to separate it, but just to give you a sense, the legacy Bank of America investing banking platform would have been maybe five, six in some businesses and two or three in other parts of that business. Now we have received the second highest amount of investment banking fees every quarter this year, second to J.P. Morgan and ahead of every other investment banking firm you can name. So that shows

you that the combination together is more than Bank of America had in that business.

I could do that and go through every one of the businesses, whether it is the 15,000 financial advisors, whether it is what we have in the sales trading investment banking capability. All that is true and it happens in every business. We are better now today than we were as two separate companies.

Mr. CAO. Now, knowing that a company were to face a loss of billions of dollars, was the \$45 billion in TARP money, was that one of the reasons why Bank of America purchased Merrill Lynch?

Mr. MOYNIHAN. I think you have to separate the TARP money that we received, for lack of a better term, irrespective of the transaction would have been 25, and then we got 20 in connection with the transaction to help handle the losses that Merrill Lynch in the fourth quarter of 2008, and particularly in the latter half of that. So I think the investment helped stabilize the economy, stabilize the financial system. If Merrill Lynch would have failed, it would have been a complete surprise at that point and would have wrecked damage on the whole system. It would have hurt our company just because we are a participant in the markets.

Mr. CAO. Is the answer yes or no, was it factored in the \$45 billion in TARP money?

Mr. MOYNIHAN. The \$20 billion relates to the Merrill Lynch transaction; the other stuff doesn't relate to anything, it was done before the Merrill Lynch transaction closed.

Mr. CAO. Now, did I hear correctly that you are one of the potential candidates to replace Mr. Ken Lewis, pursuant to the questions of Congressman Cummings?

Mr. GIFFORD. That is probably not a question for Mr. Moynihan, Congressman Cao.

Mr. CAO. Well, would that be a question to you, Mr. Gifford?

Mr. GIFFORD. OK, sir. We are trying, and it is very difficult with the visibility of Bank of America, to keep the selection process confidential, I think for obvious reasons. It is very difficult for us when presumed candidates appear in the press; it makes it difficult for their current jobs.

Mr. CAO. Let me ask you another question.

Mr. GIFFORD. I am trying to say, as I did as best I could to Congressman Cummings, that we are not disclosing publicly those that we are considering.

Mr. CAO. So based on what I have heard so far, you are saying that Mr. Ken Lewis is not doing a very good job?

Mr. GIFFORD. I hope I didn't imply that, sir.

Mr. CAO. If he is doing a good job, why would you want to replace him?

Mr. GIFFORD. Mr. Lewis announced 2 months ago that he wished to retire at the end of this year.

Mr. CAO. OK.

Mr. GIFFORD. That is what prompted this search.

Mr. CAO. That is all the questions I have.

Mr. ISSA. Would the gentleman yield?

Mr. CAO. Yes, please.

Mr. ISSA. Thank you.

Just following up on that, the question earlier from Mr. Jordan, you have \$100 billion-plus in the bank. If it were not for the regulatory rules of how much capital you have, would you, in the ordinary course of business, pay back the \$45 billion? And I am going to caveat it in a way Mr. Jordan didn't. If you could get it back tomorrow, would you pay it back today? In other words, is the only reason you are not paying it back that, if you pay it back, it can't come back out again? Mr. Moynihan.

Mr. MOYNIHAN. I don't think I meant to say that. What I am saying is—

Mr. ISSA. No, I want to try to get it straight. You have the money. You would pay the Government; you would happily pay the Government if you "were later deemed to need it," and it was a line of credit, you would pay it back. The only reason you are not paying it back today is the Government has put hurdles in your way to prove that you can not only pay it back, but you can still pass the stress test, isn't that right?

Mr. MOYNIHAN. Mr. Issa, our goal is to pay this back and return the money to the taxpayers.

Mr. ISSA. No, I appreciate that, but Mr. Jordan didn't get the answer from you that I have asked. The fact is you have the money. In the ordinary course, if it were just another creditor, you would pay it back. There are regulatory questions the Government has put up and there are questions about "capital provisions." But notwithstanding that, you are not putting that money to use today. For Mr. Cummings and others, you are not loaning that money out; it is cash. You would pay it back if there were not hurdles to cross, isn't that correct?

Mr. MOYNIHAN. I think you are talking about a cost of \$2.3 trillion balance sheet we have cash. You asked me what our cash balance was; I told you. The fact of the matter is money is fungible, so this capital provides our ability to lend and help support our balance sheet.

Mr. ISSA. So it is a balance sheet question. But the fact is, for the Board, you would pay this money back in the ordinary course if it were just normal—

Mr. GIFFORD. We stated, Ranking Member Issa, that we would like to pay back TARP. The Board—

Chairman TOWNS. The gentleman's time has expired.

I now yield 5 minutes to the gentlewoman from California, Ambassador Watson.

Ms. WATSON. I want to direct this question to Mr. Moynihan.

After Kenneth Lewis approached officials at the Fed and the Treasury Department about invoking the MAC, Fed Chairman Bernanke expressed skepticism about the truthfulness of Bank of America's claim stating, in an email, that he thought the threat to use the MAC is a bargaining chip and we do not see it as a very likely scenario.

Was the MAC, and do you know, used as a bargaining chip to get more Federal assistance and/or a lower purchase price?

Mr. MOYNIHAN. Congresswoman, the MAC was a right under the agreement to terminate the agreement if there had been a material adverse change. The \$21 billion loss in the fourth quarter constituted, gave us a valid claim for a MAC.

What immediately became clear is we had a very, very difficult situation in very difficult times that I think reasonable people tried to figure out a solution that necessarily didn't result in litigation, and in the aftermath of having a company that could have failed that we would have had to litigate against; and it was those judgments that led us to take the course of action we did, which we believe and was in the best interest of not only our shareholders, but the economy, and that is how it came down. So the MAC was a right we had the right to exercise, but the context of where we ended up was a discussion about what is the best course for our company.

Ms. WATSON. Mr. Mayopolous, before the issue of the MAC arose, had the Bank of America engaged in any discussions with representatives of the Federal Government about receiving additional TARP funds? Do you know?

Mr. MAYOPOLOUS. Not that I am aware of.

Ms. WATSON. OK. Had they not attempted to invoke a MAC and do you think Bank of America would have received the additional \$20 billion in TARP funds announced on January 16th?

Mr. MAYOPOLOUS. I don't know.

Ms. WATSON. OK, Mr. Gifford, in your testimony you stated that you had a number of tough decisions and questions about the reaction or transaction at the start. Could you please describe the problems you foresaw with the merger?

Mr. GIFFORD. Yes, Congresswoman Watson. Overwhelmingly, my issues back in September—this was in September—had to do with timing. We were at a time when the next day Lehman failed, the day after that there was an AIG bailout, if you will, and within 2 weeks after that, I think, WaMu failed and Wachovia was taken over by Wells Fargo.

So my point is, at a time like that, inevitably, your guard is up, and when we are looking at a transaction at a time like that, admittedly in a short time period, I was just in a, if you will, a very sensitized state. So it was much more along those lines than it was Merrill Lynch itself. Merrill Lynch, for a long time, we knew was a terrific addition to Bank of America.

As I said in my testimony, I believed and believe it is a terrific strategic combination. It was very difficult in December and January, as the markets became much worse than we or anybody had expected. So that is my background, ma'am.

Ms. WATSON. Well, do you think the shareholders were given adequate information about Merrill Lynch's economic condition and compensation practices prior to their vote to approve the merger?

Mr. GIFFORD. As a Board member, Congresswoman Watson, I felt, had felt continuously and do feel that management—and it really is a management issue to determine—working with inside and outside lawyers what should and shouldn't be disclosed. There was absolutely nothing in my mind that we were holding back information that we should. I can assure you that if I or any member of the Board felt that way, which, again, we did not, we would have raised the issue.

Ms. WATSON. Well, do you think the shareholders will ultimately benefit from the merger?

Mr. GIFFORD. I do indeed, ma'am. In fact, so far, year-to-date this year, which started out hard, it has been accretive to our earnings.

Ms. WATSON. Let me go back to Mr. Mayopolous. During your tenure as general counsel, you did not report directly to CEO Ken Lewis, but your successor, Mr. Moynihan, did?

Mr. MAYOPOLOUS. That is correct.

Ms. WATSON. OK. To whom did you report as general counsel?

Mr. MAYOPOLOUS. Congresswoman, at the beginning I reported to the vice chairman and CFO, Mr. Hance; then I reported to the chief risk officer, Ms. Brinkley; and finally I reported to Mr. Moynihan.

Ms. WATSON. Well, do you think reporting directly to the CEO would affect the general counsel position?

Mr. MAYOPOLOUS. I think that it can affect the general counsel position.

Ms. WATSON. Thank you.

Chairman TOWNS. The gentlewoman's time has expired.

I now yield 5 minutes to Mr. Chaffetz from Utah.

Mr. CHAFFETZ. Thank you, Mr. Chairman.

And thank you all for being here.

Mr. Gifford, my questions are directed at you, if I could, please, sir. Did you at any time feel pressure from the Federal Government to complete this transaction? Yes or no?

Mr. GIFFORD. It is hard to quibble with words, sir. I felt, again, getting it from the CEO, that the Government was very desirous of us completing the transaction.

Mr. CHAFFETZ. But then you also said, I think, if I heard you earlier in your testimony, "In a perfect world, it would have been better to walk away." Why? What was the pressure that was creating this imperfect world that led you to come to its conclusion?

Mr. GIFFORD. Because we had a contract to buy Merrill Lynch.

Mr. CHAFFETZ. But you could have stepped out of it, right?

Mr. GIFFORD. With due respect, sir, a material adverse change clause is not straightforward. There have been few material adverse change clauses—I am not a lawyer, so I could be getting over my head—

Mr. CHAFFETZ. Neither am I. I will take that to credit for both of us.

Mr. GIFFORD. That is helpful to me.

Mr. CHAFFETZ. Thank you.

Mr. GIFFORD [continuing]. Have been successful in Delaware courts.

Mr. CHAFFETZ. But the point I want to try to get to is was the Government applying pressure that affected your decision whether or not to move forward with this?

Mr. GIFFORD. And what I have said—and I am under oath for sure—that, for me, the key decision was not the Government threatening Board seats. Because if that were the key, then I would not be doing my fiduciary duty. The key was the uncertainty of the MAC, to litigate a MAC, to walk away and say we are not going to close. The uncertainty of whether we would win was a lose-lose for the Bank of America shareholders. If we lost—

Mr. CHAFFETZ. My time is short, and my apologies for cutting you off, but if we could pull up slide No. 7, if we could. Sir, this

is, my understanding, an email of Wednesday, January 21st. I hope you are familiar with this. Can you just go through who this is to?

Mr. GIFFORD. I can't see it.

Mr. CHAFFETZ. And I would like to know who these people are, their relationship to you, and what they do professionally, starting with Ramsay Trussell.

Mr. GIFFORD. Yes, sir. This is an email dated January 21st.

Mr. CHAFFETZ. Yes.

Mr. GIFFORD. It is addressed to my four children, Ramsay Trussell, Charlie Gifford, Rufus Gifford, Jessica Gifford, with a copy to my wife.

Mr. CHAFFETZ. Could you, real quickly, tell me what your children do professionally, and do they do anything politically?

Mr. GIFFORD. I can. Ramsay Trussell is a stay-at-home mom, hardest job of all. My son Charlie Gifford works in Boston in a private equity operation. My son Rufus Gifford works here in Washington as the Finance Director of the Democratic National Committee. My daughter Jessica works pro bono—not pro bono, in the pro bono area of a law firm in Boston. And my wife, Ann Gifford, takes care of me.

Mr. CHAFFETZ. Now, in this email that you sent out, it said—I am going down to point No. 3, which is midway through the first page, if we can pull that up. Part of it is highlighted. You are talking about Merrill Lynch: “This was a bad mistake.” “No,” it says “this was a bad mistake, and their assets became much worse than expected when presented in September. When the deal was announced, we were \$31 to \$32 a share and then, boom. This was a bad decision. And when realized same, the U.S. Government pressured us to stick with it. That is when they agreed to give us more capital and guarantee some of their bad assets.”

That seems to be in direct contradiction to what you have said time and time again in this committee, that, “well, it was important to them.” But here you are clearly directly saying it was a bad decision and a bad mistake. Who are you lying to? Which is accurate and which is inaccurate?

Mr. GIFFORD. What I have said, Congressman, is that I believe, and I voted for it in September, that is a fact, and I based it, notwithstanding words, that it was a good strategic decision. What happened since then, as we all know, the markets went phlooeey, to the point where—

Mr. CHAFFETZ. But you see the challenge—

Mr. GIFFORD. If you are going to ask me the question, I have to continue, sir. I realize you have 5 minutes.

It got so bad in December that we tried to figure out a way to exit the transaction. It was within that context that the fact that we eliminated our dividend, Merrill Lynch had lost \$21 billion. In this period of time, when the day was the darkest, and I am expressing to my children what is going on with the security of Bank of America, that is what it was.

Mr. CHAFFETZ. I am just confused by the inconsistency of the way you characterize the decision, but in what was at the time, I am sure, seemingly private, to your wife and your children, you are saying this was a bad decision, it was a bad mistake, essentially

that we shouldn't have done it; and yet, publicly, you are putting a real good face on it.

Let me go to the end of this email. "What do I worry about? A serious 12 percent-plus unemployment number that is prolonged, or really stupid politicians or extended panic in markets. I don't think that will happen . . . There is some stuff I am not saying vis-a-vis some of our management decisions; will do that in person. In the meantime, I am sleeping fine and so should you."

What is it that you told them in person that you haven't disclosed here today about the management decisions that would be pertinent to this decision?

Mr. GIFFORD. Congressman, I have no idea what I told them in person, absolutely no idea what I told them in person. And I was obviously wrong about stupid politicians.

Mr. CHAFFETZ. Now, that is the one thing I can agree with you on. [Laughter.]

That was the sense and credibility I saw in this document.

Chairman TOWNS. The gentleman's time has expired.

Mr. CHAFFETZ. Thank you, Mr. Chairman.

Mr. GIFFORD. Thank goodness.

Chairman TOWNS. I now yield to the gentleman from Massachusetts, Congressman Lynch, 5 minutes.

Mr. LYNCH. Thank you, Mr. Chairman.

I want to thank the witnesses for coming before the committee and helping us with our work. As a matter of disclosure, Mr. May was formerly with NSTAR, active in my district back in Boston; Mr. Gifford was formerly with the Bank of Boston; and Mr. Moynihan, I have familiarity with him as well. Bank of Boston and NSTAR, just as a matter of full disclosure, were supporters of mine when I was back in the State Senate. So that much out of the way.

Mr. Mayopolous, I want to ask you, I am a little confused on some dates here. My time line that I have—and it has been provided by the committee—indicates that you were fired on December 10, 2008. Is that right?

Mr. MAYOPOLOUS. That is correct.

Mr. LYNCH. OK. And it says 4 days later, December 14th, then Ken Lewis learned of a \$12 billion loss at Merrill. And, yet, your testimony indicates that you advised on the fact that the \$12 billion may or may not have been a material adverse change. My time line indicates that would be impossible because you were fired before the events giving rise to the MAC. And I am not questioning your veracity at all; I am just trying to get the facts straight here. Can you help me with that?

Mr. MAYOPOLOUS. Sure. Congressman Lynch, on December 1st I advised Mr. Price and Mr. Curl that I didn't believe that there was a material adverse change based on the information that I knew as of that time. I was not informed at that time that there was a loss at Merrill Lynch of \$12 billion.

Mr. LYNCH. OK.

Mr. MAYOPOLOUS. At that time, I understood there was an after-tax projected loss of approximately \$5 billion.

Mr. LYNCH. Right, right. And that is true, because the Bank of America shareholders were provided with information that there was a forecast, I believe at the time of the approval of the sale, of

about \$9 billion, and then later on there was an additional disclosure, apparently December 14th, when Ken Lewis learned of a \$12 billion loss at Merrill. So your testimony is consistent with that. I was just curious. We have been looking at this undisclosed addition of \$12 billion in losses as being the MAC and the subject of your letter, and that is not necessarily the case. OK.

In Ken Lewis's testimony, his deposition, at page 84, he indicated that in his conversations with Secretary Paulson, that Secretary Paulson promised to "fill the hole," he will fill the hole that the recent losses of \$12 billion had caused after the losses were disclosed. Later on he said he went back to the Board. I think at least a couple of witnesses might have been on that Board at the time, I am not sure. And then, subsequently, Bank of America received \$10 billion from the top in connection with its purchase of Merrill Lynch, on top of the \$15 billion that it says it didn't ask for; and that is also supported by Eric Roth's testimony that was raised by the ranking member and Mr. Jordan that you will "get additional investment." That was a statement that he recounted.

Tell me about that. Mr. Gifford, Mr. May, were you in the Board room at that time, when Ken Lewis told the Board that Paulson said he was going to fill the hole with, apparently, taxpayer money?

Mr. MAY. We were in the Board. We had just found out about the expanding losses, the accelerating losses. We did talk, first, about the MAC, and I was one that was very much in favor of pursuing that route because of the losses and because of the effects on capital that Mr. Moynihan mentioned earlier. And then we talked about the other issues, which were the Government's desire to have this go forward and the fact that financial help similar to the first tranche of TARP could be available to us that would plug that hole. So, yes, we were in those discussions and that continued for some time throughout the month of December and into January.

Mr. LYNCH. Thank you, Mr. May.

Mr. Gifford, were you there?

Mr. GIFFORD. Yes, sir, I was.

Mr. LYNCH. Is that pretty much—

Mr. GIFFORD. It is indeed, Congressman Lynch.

Mr. LYNCH. OK. So you are being reassured. I am trying to repaint the picture here. You are being reassured by the U.S. Secretary of the Treasury that, if you go forward with this purchase of a private company, that the U.S. taxpayer is going to fill the hole, is going to protect your losses from that purchase. Is that basically how it went down?

Mr. MAY. Ultimately, yes. There were two aspects, one which, again, was similar to a transaction that happened for JP Morgan, and that was a so-called fencing off of the bad assets. So there was an insurance policy, if you will, a wrap of the bad assets so that losses would not continue to escalate if we went forward with this transaction and cause further damage to the balance sheet. So those two elements were negotiated between the company and the Feds, and ultimately was the path we took instead of trying to pursue a MAC.

Mr. LYNCH. All right. Was there any discussion in that Board meeting or thereafter about the advisability of informing the share-

holders about—I mean, here you have events that cause you to consider a material adverse change in this huge purchase, which is fairly momentous, and then, on the other side of the scale, no one is talking to the shareholders. And I understand that they had been advised that there were some losses at Merrill, but here you are talking about something on a different magnitude, and I am just wondering if there were discussions at the Board about whether the shareholders should be informed.

Mr. MAY. I think we generally understood the rules of the SEC with respect to quality reporting and 8K or special events reporting, and we were not able to—if we disclosed something that didn't happen and wasn't closed, we could have misled them in the wrong way. So typically what you disclose is a transaction that you have, and we ultimately were able to get that term sheet signed around January 16th and that is when we disclosed it.

Chairman TOWNS. The gentleman's time has long expired.

Mr. LYNCH. OK. I thank the gentleman. I yield back.

Chairman TOWNS. Congressman Bilbray.

Mr. BILBRAY. Thank you.

Mr. Moynihan, did the Bank of America pressure its special outside counsel, Wachtell Lipton, to make a case that the firm didn't believe in on the MAC?

Mr. MOYNIHAN. Wachtell Lipton, this is what they do in life, and we rely on them as outside counsel. I believe that they were given the facts of the losses that we found out about, as Congressman Lynch talked about, in mid-December that had moved to \$14 billion or \$18 billion pretax and ultimately \$21 billion, and they came to the same judgment and advised us that they believed that we had a MAC clause, a valid right to claim under the MAC clause. I think the advice that people look at is these are difficult cases and they make it clear that, as you think about it, you have to balance the potential and success. But the reality was that they gave us the advice and they were consistent in their advice.

Mr. BILBRAY. So your outside counsel you hired specifically on this issue was not unduly pressured to come up with this answer.

Mr. MOYNIHAN. I had no knowledge of that or anywhere.

Mr. BILBRAY. To your knowledge, did anyone in this committee actually interview this outside counsel that was advising you on the MAC?

Mr. MOYNIHAN. I am aware that I think they talked to some of the staff of the committee, is what I was told today.

Mr. BILBRAY. You were told what?

Mr. MOYNIHAN. I think Wachtell Lipton has talked to committee staff, as far as I know. I am not positive, but I was told that. I think committee staff could probably—

Mr. BILBRAY. But, as far as we know, they haven't been interviewed specifically about their MAC advice?

Mr. MOYNIHAN. I think they—I would have to ask—I don't know, honestly, what was—

Mr. BILBRAY. OK. For the record, as far as I know, we haven't specifically—there has been a claim made that they have unduly influenced and they basically were being pressured by you or by the company to come up with a justification, when in fact, as far

as I know, we haven't sat down and gotten that testimony directly or allowed them to come here and explain their position.

Doesn't it seem a little interesting that here you had a special counsel directly advising that there is a question about what pressure was put on them, that they are not testifying before us today?

Mr. MOYNIHAN. I would leave that to you. I have no knowledge that they have been nothing but clear that we had a claim for a MAC.

Mr. BILBRAY. OK, I just think that—I appreciate all of you being here today. I just think when we leave out somebody as critical as the special counsel, that there is an issue here that we need to go in.

Mr. Chairman, I would really like to raise the issue again that special counsel on something this important should be considered.

Mr. Gifford, I understand your concerns as to this process. I will tell you, the testimony we heard from Paulson here in this committee was there wasn't specifically a "you either do this or we will fire," but there was a statement here that said "if you don't do this and it doesn't work out, there will be hell to be paid." And I think, in the jargon of grown individuals, that pretty well indicates that this was expected, the MAC was a very important issue to the Government and they did not want you to execute that MAC. Is that a fair observation? Is that testimony consistent with what you observed?

Mr. GIFFORD. It is, sir.

Mr. BILBRAY. OK.

Mr. Chairman, I just think that a lot of times nuance and words do matter, and all I have to say is if someone told me, "look, Congressman, if you don't do this and you get in trouble, there is going to be hell to be paid," I would take that very personal as being a fact that there was going to be action taken against me one way or the other, and I would expect any staffer who was given that direction by me would take that as a direct persuasive statement, if not a downright threat.

At this time, I would yield to the ranking member, Mr. Chairman.

Mr. ISSA. I thank the gentleman.

Mr. Gifford, in light of your email, your family personal email that has now come to light, if we asked a question that is a little different—and we danced here for quite a while with Mr. Lewis—the Government clearly asserted or intended to assert pressure. You were being pressured by the Government is what that says. So when we ask you did you feel pressured, that is always the ambiguous word. But was the Government clearly pressuring you, your own email says that, isn't that true?

Mr. GIFFORD. The pressure—

Mr. ISSA. No, no, no. This is one of those times in which you only get a yes or a no for a reason. You have said here, you have said they were pressuring.

Mr. GIFFORD. Yeah.

Mr. ISSA. You stand by your email as truthful?

Mr. GIFFORD. I believe the Government—I am sorry, sir, I have to use words that I am comfortable—I am telling—

Mr. ISSA. Were you telling—do you stand by your email as truthful, sir?

Mr. GIFFORD. I wrote an email to my children trying to explain a certain circumstance in the largest financial holding we have, and words in a private email to your children are probably—I didn't even proofread it, Congressman Issa, to be honest.

Mr. ISSA. I am giving you an opportunity—you weren't under oath. I am giving, this committee is giving you an opportunity to say that, upon reflection, you don't agree with the email you sent or you stand by it as truthful and, in fact, the Government was pressuring, that the words speak for themselves.

Mr. GIFFORD. I think it is fair to say, as I reflect, that the Government pushed us hard to do this deal. If that is interpreted as pressure, sir, then I would interpret that as pressure.

Mr. KUCINICH [presiding]. The gentleman's time has expired.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. KUCINICH. The Chair recognizes Ms. Norton from the District of Columbia.

Ms. NORTON. Thank you, Mr. Chairman.

Mr. Gifford, you used what for me, in all of these proceedings, is the seldom invoked word, fiduciary. Therefore, I am much more interested in the role of the boards here. And yet, generally, in newspapers and general discussion, the role of boards, it seems to me, has been given too little attention. Would you agree that in our system of corporate governance, the board is where the buck stops?

Mr. GIFFORD. I think the board is the ultimate decider of a corporation.

Ms. NORTON. Wouldn't you agree, Mr. May, to that as well?

Mr. MAY. I believe I would.

Ms. NORTON. I am fascinated by the role of the Board. I served on the board of three Fortune 500 companies before coming to Congress. I am trying to put myself in your position given the crisis context in which you were operating. Could I ask each of you how long were you on the Board here?

Mr. GIFFORD. I joined the Bank of America Board, Congresswoman Norton, in 2004.

Mr. MAY. I did also, at the same time.

Ms. NORTON. So you understood the business, you were experienced Board members. Could I ask you, prior to Mr. Mayopolous's termination, what was your opinion of the job he had done as general counsel?

Mr. MAY. I thought he did a fine job as general counsel.

Mr. GIFFORD. I would concur.

Ms. NORTON. How did you learn of his termination?

Mr. GIFFORD. As we testified earlier, Congresswoman, in an email from the chief executive officer on the afternoon of December—

Ms. NORTON. So there was no discussion about terminating the general counsel, whose reputation with you was solid, no discussion with the Board about his termination, but an email informing you of his termination?

Mr. MAY. That is correct.

Ms. NORTON. In light of the fact that you had seen no issue or problem with his work, would you ask for an explanation, as Board members, given the context of a deal going forward at that time?

Mr. MAY. I believe, as I said earlier, we had a context. We had shifting sands, as they say, at the time because of the Merrill merger and there was dislocation of many executives. This was not an issue about performance.

Ms. NORTON. Mr. May, I heard that explanation, and I can understand that if there is a merger, you don't need two of everything. The context in which my question is addressed is that in the middle of December there is a deal influx, in the middle of a crisis in the United States and a crisis in your company. Don't you think you could have made that change in the usual order of business rather than in the middle of—I mean, were you making other such changes in the middle of a deal that wasn't even consummated yet?

Mr. MAY. It was a chief executive officer making a decision on who he wanted on his team, and he was concerned about losing Mr. Moynihan at the time, as we said earlier. And that is the time he made and we supported it.

Ms. NORTON. Losing Mr. Moynihan, who wasn't even in the position, but had a position in the company.

Mr. MAY. He was in a higher position in the company, one of the key four or five executives.

Ms. NORTON. Had he threatened to leave?

Mr. MAY. We had been notified that afternoon that he was leaving the company, yes.

Ms. NORTON. So you believed it was important to change general counsel while you were in the midst of—as Board members, now—while you were in the midst of this deal because you might otherwise lose Mr. Moynihan, whom you didn't keep for very long.

Mr. MAY. This was Mr. Lewis's decision.

Ms. NORTON. I am asking whether or not, as Board members with a fiduciary responsibility to the shareholders, as Board members, where you yourselves have said the buck stops here, whether or not you inquired in detail as to this huge change in the middle of the deal or whether you simply accepted, as you said, Mr. May, it as somebody else's decision.

Mr. MAY. I supported the decision. I under—

Ms. NORTON. Based on what facts?

Mr. MAY. On the facts that Mr. Lewis was choosing a team, putting a team together, and he felt that the best qualified people for his management team included Brian.

Ms. NORTON. On reflection, if you were doing such a complicated deal in the middle of an economic crisis in our country—not only the deal within your company, would it not have been prudent to await the completion of the deal one way or the other before shifting chairs on top of the Titanic?

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

Ms. NORTON. Were you shifting other chairs?

Mr. KUCINICH. The gentlelady's time has expired—

Ms. NORTON. Were you shifting other chairs as well?

Mr. KUCINICH [continuing]. But the gentleman may answer the question.

Mr. MAY. Again, the actual transaction involved literally dozens of our executives, and Mr. Moynihan was more involved in the transaction of Merrill and putting it together, and all of the risks associated with that business platform, than Mr. Mayopolous was at the time. He was a more critical member of our management team at the time.

Mr. KUCINICH. The Chair recognizes the gentlelady from California, Ms. Chu. You may proceed.

Ms. CHU. Mr. Moynihan, you highlight the success of the merger, but can you tell us about Bank of America's initial rationale for consummating the deal with Merrill Lynch? Did this rationale change when Bank of America learned of the financial loss at Merrill Lynch? And if the transaction continued to be beneficial, why did Bank of America consider pulling out of the deal? Was this about leveraging the Merrill Lynch losses to renegotiate the purchase price?

Mr. MOYNIHAN. I think you have to separate. From an operating perspective, the logic that I think that led us to acquire Merrill Lynch in September, agree to acquire Merrill Lynch was about the brokerage firm capabilities it gave us, meaning the 15,000 financial advisors, was about the capabilities it gave us in investment banking, and the capabilities it gave us in sales trading. Those facts are the same facts that bear today that we are No. 1 in those businesses in the country and No. 2 in some around the world. Those facts, from an operating basis, were all true.

What we faced in late 2008 was from an earnings perspective, capital perspective, the situation changed dramatically in the markets in effects. In mid-December and out, when their losses came clear, the amount they were losing, there was a different set of decisions, even with the value of that business as an operating basis, we had to make to protect our shareholders, and that gave rise to the assertion of the claim for the MAC.

Ms. CHU. Well, again, let me go back to the fact that you focused so much on Bank of America's responsiveness to consumer needs. However, the real focus of this hearing is about the circumstances in which your bank received an additional \$20 billion in hard-earned taxpayers' dollars. Can you give specifics on how this additional \$20 billion has been disseminated and utilized? Is any of this money going to this year's executive bonuses?

Mr. MOYNIHAN. The money that was received as part of the Merrill Lynch transaction, which is the hard-earned taxpayer money, was meant to provide the capital that Merrill Lynch had lost in the fourth quarter and to stabilize that platform so it could be acquired. It sits there today as capital in our company; it allows us to provide business and consumer loans, as I stated earlier, so it is put to good use. It is put to good use to make loans, it is put to good use to provide commitments to business and governments in these tough economic times; it is not used to pay bonuses.

Ms. CHU. Will it go in any time in the future for executive bonuses?

Mr. MOYNIHAN. I think Mr. Lewis would have told you, I think when he was here, if I remember right, or we all agreed that the idea is that we will pay this TARP money back as soon as we can, and it will not be used to pay bonuses.

Ms. CHU. It is my understanding that when you were offered the general counsel position by Ken Lewis, you had not practiced law in over a decade. Why do you think the CEO, Mr. Lewis, gave you this position? And, also, why were you asked to report to him directly when the counsels before and after you were not required to report directly to the CEO?

Mr. MOYNIHAN. I had been reporting to Mr. Lewis continuously since I came in the company, so I think the reporting relationship remained that I had, it wasn't a change. It was a change to the general counsel position, but it was not a change for my reporting relationship.

Mr. Lewis asked me to be general counsel—and Mr. May talked a little bit about this, in terms of how we were changing the company's organizational structure in management in the context of the Merrill Lynch merger and in the context of changes being made. I accepted the position because it was what the company needed me to do.

Ms. CHU. Mr. Gifford, today we discussed your concerns about the merger with Merrill Lynch. We know you raised these concerns privately, but did you raise any objections about this with your colleagues on the Board?

Mr. GIFFORD. Yes, I did. And I might add, Congresswoman, it really was asking questions at the Board, and other Directors also raised questions about certain events and timing and so forth.

Ms. CHU. Thank you.

I yield back.

Mr. KUCINICH. The Chair recognizes the gentlelady from Ohio, Ms. Kaptur. You may proceed for 5 minutes.

Ms. KAPTUR. Thank you, Mr. Chairman.

Let me just state that as a citizen of our country and a representative from Ohio, the important question to me is, for the future, what quality of banker and banking system America should restore to regain prudence and confidence in our marketplace again in a banking system that is sound. And as I listen to you gentlemen testify, that is the thought that keeps running through my mind, what about the future.

The total TARP money that went into Bank of America was over \$45 billion, as best as I can tell, and, Mr. Gifford, you are one of the largest shareholders in Bank of America, is that true?

Mr. GIFFORD. I wish I were. I am for me. From my family I am a large shareholder, but it is hardly one of the largest.

Ms. KAPTUR. Who is the largest shareholder in Bank of America?

Mr. GIFFORD. I think it is—

Mr. MOYNIHAN. It would be a series of institutional shareholders.

Ms. KAPTUR. Institutional shareholders.

Mr. MOYNIHAN. Like a Barclays Global Investors.

Ms. KAPTUR. Who is the first one?

Mr. MOYNIHAN. Barclays Global Investors.

Ms. KAPTUR. I couldn't hear you.

Mr. MOYNIHAN. It would be a series of institutional shareholders like Fidelity, Barclays Global Investors, Wellington, John Paulson Hedge Fund; it is a whole series of people like that.

Ms. KAPTUR. Can you provide that for the record, the top 10, please?

Mr. MOYNIHAN. If we are allowed to do it under the law, we would be happy to.

Ms. KAPTUR. All right, thank you.

Mr. KUCINICH. Without objection.

Ms. KAPTUR. Mr. Gifford, how did you become a Board member for the Bank of America?

Mr. GIFFORD. I became a Board member, Congresswoman, when FleetBoston Financial, of which I was chairman and CEO, was purchased by Bank of America. At that time, for a short period of time, a year, I became chairman of Bank of America and since have stayed on the Board.

Ms. KAPTUR. All right. Was that a normal bank or was that a private equity fund? What kind of institution was that in Boston?

Mr. GIFFORD. I would like to think it was a normal and good bank.

Ms. KAPTUR. It was a normal, good bank. Did you do subprime loans out of that bank?

Mr. GIFFORD. Did we do what?

Ms. KAPTUR. Did you do subprime loans?

Mr. GIFFORD. Not to the best of my knowledge.

Ms. KAPTUR. You didn't enter into that market. All right. According to the Charlotte Observer this month, there is a story that is rather critical, Mr. Gifford, of your presence on the Board, stating that you may well be the highest paid executive associated with the Board, other than Mr. Lewis, though he is gone now, I guess.

It states in the article that just for your airplane flights the Bank of America spent \$947,682 on those flights on private jets, and another \$281,307 to help you pay the accompanying taxes on those. The story then goes on to state that does not include the Bank paying you more than \$225,000 in office and administrative support. And then it doesn't go into your restricted stock and other benefits that accrue to your present position.

Would you agree with the statement that they make in the article here that you are by far the most highly compensated member of the Board?

Mr. GIFFORD. I think—I believe I am as a result of my retirement agreement from Fleet 5 years ago. That was a contract, Congresswoman, that was agreed to 5 years ago as part of my retirement for the corporation, retiring early and so forth. It is not part, if you will, directly of my compensation as a Board member. My compensation as a Board member, excluding my retirement agreement, is the same as every other Board member.

Ms. KAPTUR. I looked at a poll yesterday and it was talking about what the American people think of the country and the direction we are headed, and they look at all these bills that have passed Congress and they are very angry because they feel that the bills that have been passed up here, such as the TARP, have benefited—two-thirds of the American people think they have benefited the big banks and their executives and so forth, and they don't feel anything we have done up here has really helped them. Ten percent of the people think anything we have done to date has really helped them.

And I just say you are a value setter in your industry; you have one of the largest institutions in the country. What people think is

pretty important in terms of confidence in our financial system, and the people are very angry, and I would just urge you to think about what you can do institutionally to reshape the value set that is operating inside these institutions, because something is fundamentally wrong. Nobody is against somebody making money, but when most of the public's incomes are going down and people are making extraordinary salaries and benefits, particularly when the public is supporting these institutions on life support, we have to behave differently.

Mr. GIFFORD. Congresswoman, I can appreciate the difficulty of that.

Ms. KAPTUR. Thank you. Thank you.

I want to say, Mr. Mayopolous, the timing of your termination was very, very curious. Could I ask you a question in the way the institution you used to work for functions? Why would the chief risk officer, whose name, I guess, is Amy Brinkley or was Amy Brinkley, be the person tasked to terminate you? What kind of organization—you were the general counsel. Were you the top lawyer?

Mr. MAYOPOLOUS. I was the top lawyer.

Chairman TOWNS [presiding]. The gentlewoman's time has expired, but we will allow him to answer. We will allow the witness to answer, yes. Go ahead.

Ms. KAPTUR. I was just curious. What kind of an organization—you are the top lawyer. I would want my lawyer right there. Why would you go to a Risk Officer, and is she still with the company?

Mr. MAYOPOLOUS. As I understand it, she is no longer with the company, and I don't know why she was sent to fire me.

Ms. KAPTUR. And who did she report to?

Mr. MAYOPOLOUS. She reported to Mr. Lewis.

Chairman TOWNS. The gentlewoman's time has definitely expired.

Ms. KAPTUR. Thank you, Mr. Chairman.

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

Mr. CONNOLLY. Thank you, Mr. Chairman.

Thank you all for being here today.

Mr. Gifford, when did you first learn, when did the Board first learn that there was a significant hole at Merrill Lynch?

Mr. GIFFORD. Congressman Connolly, we first learned at the December 9th Board meeting that the loss had increased to \$9 million—sorry, to \$9 billion.

Mr. CONNOLLY. \$9 billion.

Mr. GIFFORD. Billion dollars.

Mr. CONNOLLY. And was that information revealed to shareholders?

Mr. GIFFORD. Not, I don't believe, at that time.

Mr. CONNOLLY. Is there a reason for that, Mr. Gifford?

Mr. GIFFORD. In circumstances like that, Congressman, we on the board rely on management dealing with lawyers—as you can appreciate, it is pretty complex with SEC laws and so forth—as to what should and shouldn't be sent out to our shareholders. So—

Mr. CONNOLLY. OK.

Mr. May—

Mr. GIFFORD. Sorry.

Mr. CONNOLLY. I am sorry, Mr. Gifford. I wanted to go to the lawyer.

Mr. Mayopolous, did you advise Mr. Lewis or anybody in senior management that maybe that piece of information needed to be disclosed to shareholders?

Mr. MAYOPOLOUS. I also learned at the Bank of Directors Board meeting on December 9th that the projected loss had grown to \$9 billion. I sought to talk to Mr. Price, the CFO, after that meeting; he wasn't available and I decided I would talk with him the next day, and that day I got fired.

Mr. CONNOLLY. You first learned that the loss was about \$9 billion the same time Mr. Gifford did?

Mr. MAYOPOLOUS. Yes, sir.

Mr. CONNOLLY. When did you first have a conversation with Mr. Lewis or other senior officers of the corporation about possibly invoking the MAC?

Mr. MAYOPOLOUS. The only conversation I ever had with senior executives at the company about invoking the MAC or whether it should be invoked or could be invoked was on December 1st.

Mr. CONNOLLY. I can't hear you, sir, December what?

Mr. MAYOPOLOUS. On December 1st.

Mr. CONNOLLY. December 1st. Why would they be talking about invoking the MAC on December 1st if the information about the extent of the losses at Merrill Lynch was available only 8 days later?

Mr. MAYOPOLOUS. Mr. Price did not tell me why he was asking, he just asked me to review with him the terms of the material average change clause, how it would be interpreted, and we discussed whether—

Mr. CONNOLLY. In retrospect, Mr. Mayopolous, would a reasonable person perhaps deduct that the reason he initiated that conversation on or about December 1st was that, as a matter of fact, he was in possession of the extent of Merrill Lynch's material losses long before December 9th?

Mr. MAYOPOLOUS. I don't know what Mr. Price knew at that time.

Mr. CONNOLLY. Do you know when Mr. Lewis had conversations with Mr. Paulson, then the Secretary of Treasury in the Bush administration, about invoking the MAC?

Mr. MAYOPOLOUS. No, I don't.

Mr. CONNOLLY. Are you aware of the fact that documents have been provided to this committee that there were several conversations, one of which took place while Mr. Paulson was on his treadmill?

Mr. MAYOPOLOUS. No, Congressman, I am not aware of that.

Mr. CONNOLLY. When you were asked about the MAC, what was your legal opinion about the validity of invoking the MAC by BOA?

Mr. MAYOPOLOUS. My opinion and my advice at the time was that, based on what I knew, I did not see a basis to invoke the MAC.

Mr. CONNOLLY. And the nickel's worth, why not?

Mr. MAYOPOLOUS. Because there had not been a disproportionate impact on Merrill Lynch that was outsized to the impact on Bank of America and other companies.

Mr. CONNOLLY. Mr. Moynihan, I am going to ask you to move that microphone close to your mouth, because I cannot hear you. Thank you. Why did you have a differing legal opinion about that?

Mr. MOYNIHAN. I think there is some confusion about the timing from when Tim was general counsel to when I became general counsel, in the sense that when I became general counsel on December 14th or 15th, we became aware that the losses had now reached \$18 billion pretax. It was a different set of facts and circumstances than Tim has testified to here today. Faced with that \$18 billion pretax, which went to \$21 billion pretax, or basically half the capital of Merrill Lynch, twice the amount it had ever earned in its best year, that is when the question of the MAC that I had to address, was at \$18 billion that moved to \$21 billion loss; and that was in the week that began December 15th and took us through that.

Mr. CONNOLLY. So if I understand your testimony, you are saying the difference between you and your predecessor as general counsel was the extent of the loss.

Mr. MOYNIHAN. The losses had gotten much more dramatically different, and that has been the testimony that you have heard, during the course. In mid-to-late December, the losses kept getting worse and worse and worse.

Mr. CONNOLLY. Well, in your opinion, wouldn't a \$9 billion loss qualify for invoking the MAC? That is a pretty significant loss.

Mr. MOYNIHAN. Sir, when I came in the face of the facts, the loss was \$18 billion pretax. That gave rise for a valid claim of a MAC.

Mr. CONNOLLY. Yes, I understand, but you were certainly reviewing the opinion of your predecessor, were you not? Did you disagree with his judgment?

Mr. MOYNIHAN. The facts were different; I was looking at \$18 billion.

Mr. CONNOLLY. I understand that, Mr. Moynihan. I am asking you a different question. Did you in fact disagree with your predecessor in his judgment about the extent of the loss and whether it qualified for the MAC at the time of his opinion to senior management?

Mr. MOYNIHAN. I did not reflect on his opinion; I faced the facts—

Mr. CONNOLLY. You had no reflection whatsoever?

Mr. MOYNIHAN. I had no reflection on his opinion.

Mr. CONNOLLY. You only looked at the losses you started with when you became the general counsel?

Mr. MOYNIHAN. That was the situation we faced, was the \$18 billion of pretax losses that were disclosed.

Mr. CONNOLLY. I find that extraordinary, Mr. Chairman. My time is up.

Chairman TOWNS. The gentleman's time has expired.

I yield 5 minutes to the gentlewoman from California, Congresswoman Speier.

Ms. SPEIER. Thank you, Mr. Chairman.

Mr. Mayopolous, why do you think you were fired?

Mr. MAYOPOLOUS. Congresswoman, I don't know why I was fired.

Ms. SPEIER. Well, you must have an opinion. Why do you think you were fired?

Mr. MAYOPOLOUS. I have speculated about lots of things, but, in the end, I don't know why. I wasn't the decisionmaker. I don't know what considerations went into it and I don't know.

Ms. SPEIER. Do you think it was because you offered the opinion that the MAC could not be exercised effectively?

Mr. MAYOPOLOUS. I don't know; I wasn't given an explanation. I don't know.

Ms. SPEIER. All right.

Mr. Moynihan, you evidently indicated that you were about to leave the company, based on testimony we heard from Mr. May. So what was your conversation with Mr. Lewis?

Mr. MOYNIHAN. About what, ma'am, about leaving the company or about—

Ms. SPEIER. About leaving the company.

Mr. MOYNIHAN. Mr. Lewis had asked me to take a job to run the credit card business, which would have required a change in location. And having gone through this with our company and predecessor companies, I personally couldn't do it and it was decision that, because I personally couldn't do it, I made a decision about my potential future with the company. And I know that may sound different to people outside of a large business like ours, but when we make a decision you know the ramifications of that decision.

Ms. SPEIER. So at that point he said, "well, wait a minute, we will make you general counsel?" What did he say to you?

Mr. MOYNIHAN. No. That was in the days prior to this, and his statement was I understand your decision, and that was basically the discussion.

Ms. SPEIER. All right. You would, in hindsight now, reflect on the decision to buy Merrill and probably suggest that it was a good decision, is that true?

Mr. MOYNIHAN. As I said, the operating business that we have between Merrill Lynch and Bank of America, by putting these two companies together, is a business which is very good for our customers and can do many things that neither company could do prior.

Ms. SPEIER. So you made money in the first quarter, is that true?

Mr. MOYNIHAN. We made money at Bank of America in the first quarter after—

Ms. SPEIER. And the second quarter?

Mr. MOYNIHAN. Yes.

Ms. SPEIER. And in the third quarter?

Mr. MOYNIHAN. We did not make money in the third quarter.

Ms. SPEIER. OK, so two out of the last three quarters you have made money. You paid how much for Merrill Lynch?

Mr. MOYNIHAN. We issued about 25 to 30 percent of our stock. The value, I think, was in the \$20 billion range at the time.

Ms. SPEIER. About \$20 million.

Mr. MOYNIHAN. \$20 billion, I think.

Ms. SPEIER. \$20 billion. Excuse me, \$20 billion. All right. And then the taxpayers of this country have now given Bank of America about \$45 billion, correct?

Mr. MOYNIHAN. That is correct.

Ms. SPEIER. So we have almost paid for Merrill two times over.

Mr. MOYNIHAN. The TARP investments in Bank of America had three different pieces; the first piece was done back in October.

Ms. SPEIER. I understand. I am just talking in total. So, in total, you have received \$45 billion from the taxpayers of this country.

Mr. MOYNIHAN. We have received \$45 billion.

Ms. SPEIER. Merrill was purchased for about \$20 billion, and two of the last three quarters you have actually seen profits.

Mr. MOYNIHAN. Yes, that is right.

Ms. SPEIER. All right. Now, the taxpayers have seen the interest rate on their credit cards jump to 29 percent, in many cases. Many of your clients now are paying 29 percent interest on credit cards. You were in charge of the credit card division, so you are pretty familiar with that, correct?

Mr. MOYNIHAN. We continue to look at—the credit card is not a majority of our clients; it is clients that have the risk characteristics. And we have pulled back on the pricing and stopped all repricing for risk in advance of the Card Act, which none of our peer companies have done.

Ms. SPEIER. So you have actually reduced the actual interest rate you are charging?

Mr. MOYNIHAN. The pricing that you are talking about is pricing when people have delinquencies or repricing cars based on risk in the portfolio, and we have not done that, as the Card Act comes in, shortly here, would not allow you to do it. We actually stopped that early this fall.

Ms. SPEIER. So what is the interest rate that most credit card holders are paying, the range?

Mr. MOYNIHAN. I would have to get back to you. I could give you that. I don't know it off the top—

Ms. SPEIER. Are they paying as much as 29 percent?

Mr. MOYNIHAN. There could be a cardholder who has had significant risk and other things that can be paying that much, yes.

Ms. SPEIER. Are they paying 35 percent?

Mr. MOYNIHAN. I don't know what the cap is; I would have to get back to you on that.

Ms. SPEIER. Well, when you were at the head of the credit card division, how much were they paying?

Mr. MOYNIHAN. I am not the head of the credit card division; it is run by one of my teammates that works for me. But I would be happy to get back to you with all the information about that and give you the details about that.

Ms. SPEIER. OK, my only point in pursuing this line of questioning is that there has to be something in it for the taxpayers, and right now the taxpayers feel pretty burned. You have heard that from a number of Members who have testified. I don't want to focus on ex comp, I want to focus on what can we do to the taxpayers in this country.

So I guess my suggestion to you and to any bank that has received TARP funds is that, during the time in which you will have TARP funding and Federal support and taxpayer support, that you should reduce the interest rate you are charging the taxpayers of this country to something close to 12, 14, 16 percent. But show some good will to the people that are picking up the tab.

My time has expired.

Chairman TOWNS. Yes, the gentlewoman's time has expired.

Let me call from the gentleman from Illinois—I am sorry, from Missouri, Mr. Clay.

Mr. CLAY. Thank you, Mr. Chairman.

My questions are for Mr. May and Mr. Gifford. In your testimony you state that this acquisition is already bearing fruit. However, it seems that these results have come at the expense of the taxpayers and shareholders who were not fully aware of Merrill's losses. Do you feel that this deal was fair to both shareholders and American taxpayers? In other words, do you believe that the ends justify the means? Mr. Gifford, you start.

Mr. GIFFORD. Congressman Clay, the answer is yes, I do. In terms of the Bank of America shareholders, as both Mr. May, Mr. Moynihan and I have testified, we believe this is a good transaction for shareholders. There was a time in December and January when it looked very, very dicey, but, as I said earlier, it is accretive to date. So I think we are building an incredible platform for our customers.

As it relates to the taxpayers of this country, as I said earlier in response to a question from the ranking member, the Board of this Bank is determined to pay back the taxpayers in full with very significant dividend payments. The timing isn't exact, but we are very determined to do that. And by putting these two companies together, you made for a much stronger company who has the ability to repay the taxpayers in full, which we are determined to do.

Mr. CLAY. Mr. May, was it a seamless merger?

Mr. MAY. No, it wasn't. As the analogy has been discussed earlier, this marriage has had its ups and downs. We thought, in September, that it had great potential. In December, when the losses were piling up, we were concerned about its ability to execute on the mission that it had, and by that I mean Merrill. With the addition of that TARP capital, things have improved and, as a result, I do feel very good about the future.

Mr. CLAY. And I am not sure if this question has been asked yet, but how much does Bank of America plan to pay out in bonuses and similar awards this year?

Mr. MAY. There has been no decision. The year has not been completed yet, and that will be based on the performance of the company in January or February, when it is being looked at.

Mr. CLAY. Looking forward, what is the projected time line for Bank of America to return Federal bailout moneys?

Mr. GIFFORD. Sir, the Board continues to review the issue. We are discussing it with the Government. Those discussions are very sensitive, but we hope it is sooner than later, and that is all I can say at this time, sir.

Mr. CLAY. OK. Are you familiar with the process of liquidating the combined toxic assets of both Bank of America and Merrill Lynch? And, if so, can you give me some kind of sketch of how that will work?

Mr. GIFFORD. I think Mr. Moynihan is ideally capable.

Mr. CLAY. Mr. Moynihan, go ahead.

Mr. MOYNIHAN. We have continued to work down the assets that you would refer to as toxic assets; they continue to be worked off the balance sheet over time. The team that works on that works

every day to bring those balances down, and they are lower now than they were last week, and they will be lower next week than they were this week.

Mr. CLAY. Mr. Moynihan, were you familiar with the circumstances surrounding the departure of Mr. Mayopolous?

Mr. MOYNIHAN. Congressman, I was not involved in the decision, but what I talked about earlier was the context of where we were as a company and the context of downsizing both legacy Bank of America management and bringing the company together. These were very difficult times and continue to be difficult times in the economy, and we have been shaping our associates headcount down, and it was in the context of changes in senior management that went on at the time that affected not only Mr. Mayopolous, but about 10 percent of our senior executives.

Mr. CLAY. All right. I thank the panel for their responses.

Mr. Chairman, I yield back.

Chairman TOWNS. Thank you very much. I thank the gentleman from Missouri.

We now will have closing statements, so I will yield 5 minutes to the gentleman from Ohio, Mr. Kucinich, the chairman of the subcommittee that has jurisdiction.

Mr. KUCINICH. First of all, Mr. Chairman, I want to thank you for holding these hearings. It has given us a rare window into the management suite of the largest bank in the country. What we have seen is a story of how Bank of America's top executives allowed guesswork to masquerade as expert knowledge; how numbers were pulled out of thin air. They guessed at numbers; they guessed wrong. Their wrong guess hurt shareholders, involved the taxpayers of the United States, and created great consequences for markets not only in this country, but around the world.

And I don't think that the Bank of America scenario is unique. But the house of cards that was built—through collateralized debt obligations, credit default swaps, the subprime mortgage fiasco—has ended up burying our constituents under debts they can't pay, record rates of foreclosure and joblessness. And yet, frankly, it would be wrong to put this all on the Bank of America or to put it all on Wall Street, because in our economic system, if we have a true system of checks and balances, we would see some measure of discipline exacted on behalf of the people of the United States.

This investigation has also raised questions about Government oversight, about the agencies that are charged with protecting shareholders and protecting taxpayers. From what we have seen, it is not clear there has been any criminal conduct. But it is clear that there has been a lack of fidelity to shareholders and to taxpayers.

I appreciate that Mr. Moynihan, in his opening remarks, talked about where we are in terms of the economy. We need to start looking forward here. We are really at the end of this discussion about who did what to whom. But we really need to look forward with 15 million Americans unemployed, with another 10 million whose homes are at risk, with businesses failing all over the country. A report yesterday, 47 million Americans hungry.

We really have to start looking forward, and this is, within the context of our economic system, really going to be a matter of find-

ing a way for business to do its part in creating more liquidity; for the banks to do your part to create more liquidity so businesses can survive; for the Government to do its part; where the private sector is failing to create the jobs, for the Government to create the jobs. The President is having an economic summit in December about that. We really have to find a way of looking forward.

And I am hopeful, Mr. Chairman, that as this committee continues to do its work, we understand the responsibility for the collapse that spread pretty much across the boards. Where do we go from here? What do we do for the people who are worried about getting a job? They don't really care who is going to provide the job; they sure want a job. And that is where we have to find a way to work together to create that, because otherwise, a year from now, when we are being judged on our performances, people are going to ask not whose side were you on, not whether you were on the side of Wall Street or on the side of the administration or on the side of the taxpayers.

The question is going to be what did you do to help protect—not just protect, to help enhance the economic position of that average American, the person who is struggling to hold on to their homes, their jobs, their retirement security, their investments, their health care. What did you do? And that question and our response, both in Government and in the private sector, is going to determine whether or not people can have confidence in our system anymore, not unlike the questions, Mr. Chairman, that were posed in the 1930's.

I am hopeful that, on this side of the table and on that side, that we are going to have the right answers, because if we don't, this system is threatened at its core.

I yield back.

Chairman TOWNS. I thank the gentleman from Ohio for his comments.

I now yield 5 minutes to Mr. Jordan, the ranking member of the subcommittee, also from Ohio.

Mr. JORDAN. Thank you, Mr. Chairman. I want to thank our witnesses as well for being here. I know it is not easy to come here and take the abuse and questions you get from Members of Congress, but we appreciate it.

This whole escapade just highlights why we should have never traveled down this role. This unbelievable path we have put the country on with this unprecedented Government interference in the private sector, this just shows why it is bad.

But for the Merrill merger, which was done at the prompting of the phone call from Hank Paulson to John Thane, who said you need—but for that, Bank of America would have never needed TARP funds. Under any conventional analysis you wouldn't have, but the Government says you are going to take the TARP money. Then the Government says you have to complete the deal with Merrill Lynch. Then the Government, based on what we have here from Mr. Moynihan, basically prohibits you from giving the money back, now that you are in a position to return it to the taxpayers.

And now we have the amazing thing to me, particularly when you think about this institution, Mr. Chairman. We have a Federal Government pay czar telling private American citizens how much

money they can make in the United States of America. I mean, think about where we are at because we started down this trail. That is what troubles me as we go forward.

Mr. Kucinich is right, as we move forward, we need to make the right kind of policy decisions across the aisle. But they need to be decisions where we scale back this unbelievable move by the Federal Government to get involved in the private sector. It is making matters worse. Heck, if big government spending and big government regulation was going to get us out of this mess, we would have been out of it a long time ago.

That is all we have been doing for the last year and a half. It is wrong and it needs to stop, and this example and these hearings—and I appreciate the chairman having these hearings—these hearings highlight what is wrong with the path we chose to take.

Ranking Member Issa and I didn't support the TARP; we thought it was a terrible idea. But this is the move the Bush administration and the Obama administration have taken us down. It is wrong, and all you have to do is look at this example. And the American people, I think, more importantly, see where this has taken us and see that it is wrong, and they want us to turn and go the other direction.

With that, I would yield back, Mr. Chairman.

Chairman TOWNS. Thank you very much.

I now yield to the ranking member of the full committee from California, Congressman Issa, for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman. In closing, I want to ask unanimous consent that a page from the SIGTARP's report be included in the record.

Chairman TOWNS. Reserving the right to object.

Mr. ISSA. OK. No, that is only fair.

I want to thank you all for being here today. I want to thank the chairman for considering a document which shows that the only money that was given to Bank of America was the \$6.2 billion that Merrill Lynch got, most of which you would not have gotten if we hadn't bailed out AIG at 100 cents on the dollar, and the 0.8 or \$800 million—peanuts, really, by Washington standards—that BofA got directly. These were for the credit defaults, essentially the guarantees. Seven billion is what you got that you shouldn't have gotten, because AIG should not have been bailed out at 100 cents on the dollar. You should have taken your haircut there, and I am sure you would have in the ordinary course if the Government hadn't intervened.

Our hearings today have made it very clear that, one, Merrill Lynch was not worth what you paid for it. Had you been able to negotiate in December, instead of in September, you would have been able to negotiate a much lower price. I think Mr. Gifford made that very clear, that had you been able to do the deal with what you knew in December, you would have done it for a lower price.

We have had a series of hearings, starting with Stan O'Neal being brought up here to try to explain why he got tens of millions of dollars while bankrupting Merrill Lynch while the company was going the wrong way for a very long time. At the time, I wasn't sure that those hearings were really worthwhile. After all, we were

looking at public companies who paid large bonuses to their executives when in fact their stock was going down. Those executives explained to us that those were accruals from an earlier time.

Now, it seems interesting that we had the very man who set up the company for failure at Merrill Lynch in front of us and we never asked him what about the brokers, what about Merrill Lynch's future, what about the risks that are being taken in order to have any profits at all in the company, at least on paper? I wish we had an opportunity to know then what we know now.

But with what we know now, we know that you gentlemen were pressured by the Government. And depending upon how we define pressure, we can put it a lot of different ways, but it was very clear that Ken Lewis and Attorney General Cuomo made the record reasonably clear that, in fact, pressure was being applied.

We also know that, in the ordinary course of banking as we knew it before the meltdown, the \$45 billion that is currently owed would be repaid; that, in fact, our position of interest-bearing preferred stock would be repaid, America would have been made completely whole by Bank of America's investment, the stockholders of America would get a higher yield than we ordinarily get on money that goes out from the Government, far higher than the rate that T-bills pay on our debt. So to use a term out of the financial services industry, the arbitrage is positive; Bank of America will pay back all of the money that it borrowed during the bailout.

Having said that, the legacy of Government intervention—and, as Mr. Jordan said, one which he and I did not vote for—continues. Long after you are eventually allowed to pay back the \$45 billion, we will continue to have people in Egypt and other countries where we have been telling them to privatize their banks for generations and telling them about how government does not create meaningful jobs, and that they need to have a vibrant private sector, we will continue to have those countries ask us “did you really mean it when you said it, and what has changed?”

So, Mr. Chairman, I look forward to us continuing to look at the AIG bailout, one in which Secretary Geithner, then the head of the New York Fed, appears to have made a decision to pay far more in these guarantees than the current market value. And, in fact, the paper which was floating in some cases in the market at far less than 100 cents on the dollar went immediately to gains for those who held the paper. And, Mr. Chairman, I hope that and the administration that we would like to have in to complete this hearing will come in due course.

I thank the gentlemen for their time and for giving us a very effective half a hearing today.

I yield back, Mr. Chairman.

Chairman TOWNS. Thank you very much.

I also would like to thank the witnesses, would like to thank all the Members for their participation, of course, and the staff for their work as well.

Before I begin my final comments, I want to make an observation with regards to Mr. Mayopolous, who was abruptly fired in the middle of this transaction. He does not know why he was fired. His boss, Mr. Moynihan, says he does not know why he was fired. The Board members present don't know why he was fired. Either it was

divine intervention or someone didn't like his legal advice. Being I am from Brooklyn, I am leaning toward that last one. It looks to me like Ken Lewis and others at the company weren't about to tolerate someone who might get in the way of what they had planned to do at this shotgun wedding.

The central question of our investigation was how did Bank of America's acquisition of Merrill Lynch, which started out as a deal between two private sector companies, become a \$20 billion—"B" as in boy—Federal bailout. After 4 days of hearings, hours of testimony, and a review of half a million documents, it looks like the answer is pretty clear. The facts show that Bank of America, one of the largest banks in the United States, was able to manipulate Federal regulators to obtain billions of dollars in taxpayer money to help it go through with the deal that it intended to do in any event.

In a way, it was quite a feat. Bank of America will probably end up being heralded in the business schools across this country as a result of their innovative approach. While the financial world was crumbling around them, they saw an opportunity to snap up Merrill Lynch, a leading company in the field, and get the taxpayers to bear the risk. This has important implications for public policy and how we approach problems like this in the future.

Billions in taxpayers' money were committed in secret. No one outside a privileged few knew anything about it until weeks after it was over. That should never, never happen again. As Congress considers regulatory reform, I think we need to focus on the need to protect consumers and shareholders.

Thank you again for being here today. Without objection, the committee stands adjourned.

[The closing statement of Hon. Edolphus Towns follows:]



**CLOSING STATEMENT OF
CHAIRMAN EDOLPHUS TOWNS**

**COMMITTEE ON OVERSIGHT AND GOVERNMENT
REFORM**

November 17, 2009

**"Bank Of America And Merrill Lynch: How Did A Private
Deal Turn Into A Federal Bailout? Part IV"**

Before I begin my final comments, I want to make an observation with regard to Mr. Mayopoulos, who was abruptly fired in the middle of this transaction: He doesn't know why he was fired. His boss, Mr. Moynihan, says he doesn't know why he was fired. In fact, no one seems to know. Either it was divine intervention or someone didn't like his legal advice. I'm leaning toward that last one. It looks to me like Ken Lewis and others at the company weren't about to tolerate someone who might get in the way.

The central question of our investigation was, "How did Bank of America's acquisition of Merrill Lynch, which started out as a deal between two private sector companies, become a \$20 billion Federal bailout?"

After four days of hearings, hours of testimony, and a review of half a million documents, it looks like the answer is pretty clear. The facts show that Bank of America – one of the

largest banks in the United States – was able to manipulate Federal regulators to obtain billions of dollars in taxpayer money to help it go through with a deal that it intended to do in any event.

In a way, it was quite a feat. Bank of America will probably end up being hailed in the business schools for this innovative approach. While the financial world was crumbling around them, they saw an opportunity to snap up Merrill Lynch, a leading company in the field, and get the taxpayers to bear the risk.

This has important implications for public policy and how we approach problems like this in the future.

Billions in taxpayer money were committed in secret. No one outside a privileged few knew anything about it until weeks after it was over. That should never happen again.

Moreover, as Congress considers regulatory reform, I think we need to focus on the need to protect consumers and shareholders.

[Whereupon, at 12:41 p.m., the committee and subcommittee were adjourned.]

[The prepared statements of Hon. Elijah E. Cummings and Hon. Gerald E. Connolly follow:]

**COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM**

**“Bank of America and Merrill Lynch: How Did a Private Deal Turn Into a
Federal Bailout?” (Part IV)”**

November 17, 2009 – 10:00 a.m.

Room 2154 Rayburn House Office Building

Statement of Congressman Elijah E. Cummings

Thank you, Mr. Chairman for calling this hearing to continue our investigation into the events that surrounded Bank of America’s acquisition of Merrill Lynch.

The actions taken and the assistance provided by this Congress and the White House last fall were said to be absolutely necessary to provide some stability to a fragile domestic economy.

And I don’t think there’s any question that the conditions at that moment were unprecedented.

However, the lack of precedent is no excuse for a failure to protect taxpayers from the misconduct of the firms receiving these funds.

Bank of America has received some \$45 billion dollars in TARP funding, \$20 billion of which was to assuage its concerns about the acquisition of Merrill Lynch.

As the New York Times' Andrew Ross Sorkin writes in his new book, the firm's CEO, Ken Lewis, had designs on making America's largest bank decisively bigger.

The firm had acquired mortgage giant Countrywide in 2008, but still wanted to join the investment bank fraternity.

Bank of America also made overtures about purchasing Lehman Brothers before that firm failed.

Finally, Lewis and Bank of America turned their sights on Merrill Lynch, as far back as September 2007, when Bank of America offered to buy Merrill Lynch for \$70 per share – 40 percent above where Merrill was trading.

As we now, Lewis finally got his investment bank in September of 2008.

However, despite vying for Merrill Lynch for two years, facing Merrill's fourth quarter 2008 losses, Bank of America suddenly wanted out.

I don't buy it.

The MAC, despite claims to the contrary, wasn't a real threat. I don't think Mr. Lewis wanted out of this deal; Merrill Lynch was not just an acquisition – it was a trophy, a feather in his cap.

However, when the deal could be sweetened with government cash, what harm is there in an empty threat like a MAC? Heads - I win; tails – I win big.

While I already asked SEC Inspector General David Kotz to investigate Bank of America's ability to settle its SEC case with taxpayer funds, I am equally concerned about what is before us today - what seems to me to be a stick-up and not much more.

The taxpayers have given enough – isn't it time they stop having to foot the bill for greed and corporate malfeasance?

Mr. Chairman, I look forward to the testimony of all of our witnesses as we continue to uncover how this story really unfolded.

With that, I yield back.

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Opening Statement of Congressman Gerald E. Connolly

Committee on Oversight and Government Reform

Bank of America and Merrill Lynch, Part IV

November 17th, 2009

Thank you, Chairman Towns for holding this series of hearings on the Bank of America (BoA) and Merrill Lynch merger. Since Bank of America's CEO Ken Lewis testified before this Committee in June, we have heard from former Treasury Secretary Hank Paulson and Federal Reserve Chairman Ben Bernanke. Their statements, and the written records obtained by the Committee, make a few points painfully clear:

1. Bank of America's CEO, Ken Lewis, used a specious Material Adverse Conditions (MAC) threat to blackmail former Treasury Secretary Paulson into providing Bank of America \$20 billion in taxpayer subsidies during the waning days of the Bush Administration.
2. Testimony of former BoA General Counsel Tim Mayopoulos and written opinions of BoA's outside lawyers clearly demonstrate that Ken Lewis knew BoA did not have grounds to invoke the MAC clause before Lewis called Treasury Secretary Paulson in December of 2008 to ask for bailout money.
3. Bank of America officials were aware of the \$12 billion loss at Merrill Lynch no later than November, and hid this loss at a shareholders meeting on December 5th.

In sum, these facts represent a pattern of Bank of America's reckless disregard for the truth or for the rights of taxpayers. Because the former Administration failed to establish reasonable financial regulations, Ken Lewis and Bank of America were able to manipulate a weak regulatory structure to fleece taxpayers of at least \$20 billion to subsidize a deal that would have gone through anyway. Lewis exploited officials' reasonable fear of economic collapse to execute this theft of taxpayer money.

When Ken Lewis testified at the first BoA hearing on June 11th, members of the minority tried to portray him as a simple country lawyer who was oppressed by the jackbooted heel of government. Thanks to the persistence of this Committee, we now know that nothing could be further from the truth. BoA exploited a system designed to help banks at the expense of the taxpayer, a practice now defended by the minority party.

Never again should we let banks like Bank of America have such power over the national economy that their CEOs can call Treasury Secretaries and extract billion dollar taxpayer subsidies in just a few days. Never again should an Administration have the audacity to present Congress with a check from taxpayers to Wall Street, valued at nearly \$800 billion, without public transparency or a means for Congress to hold the Administration accountable and recover taxpayers' investment.

Today, we have an opportunity to advance substantive financial sector reform. Predictably, the industries that have profited from taxpayer largesse claim that such reforms will stifle "innovation." In this Committee, we have learned that the financial sector's recent innovations have come at taxpayers' expense, and that such innovations bear no economic benefits beyond enriching those few who receive our subsidies.