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

United States: Congressional Committee on Oversight and Government Reform

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

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JOINT HEARING

before the

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

and the

SUBCOMMITTEE ON DOMESTIC POLICY

HOUSE OF REPRESENTATIVES

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

On September 15, 2008, when the financial crisis was at its height, Bank of America announced that it was purchasing Merrill Lynch, creating one of the Nation's largest financial institutions. At the time, Bank of America's CEO, Mr. Lewis, called the merger a great opportunity for Bank of America shareholders.

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

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

The American people discovered that Merrill Lynch had experienced a $15 billion fourth quarter loss. Most importantly, we found out that the merger had taken place only after the Federal Government had committed to give Bank of America and Merrill Lynch: How Did a Private Deal Turn into a Federal Bailout?

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House of Representatives, Committee on Oversight and Government Reform, joint with the Domestic Policy Subcommittee, Washington, DC.

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


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

Chairman Towns. Good morning. Thank you all for being here today.
America billions in taxpayer money.

What happened in the interim?

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

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

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

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

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

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

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

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

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

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

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

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

[The prepared statement of Chairman Edolphus Towns follows:]

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[GRAPHIC] [TIFF OMITTED] 54877.003

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

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

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

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

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

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

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

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

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

Mr. Chairman, I thank you for holding this hearing. I appreciate the fact that this is clearly the first of two hearings that will be necessary. Today we have part of the story. When we have Mr. Bernanke and Mr. Paulson, then we will have the other half of it. I look forward to this first hearing and yield back.

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

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Chairman Towns. Thank you very much.
I now yield 5 minutes to Mr. Kucinich, who is the chair of the subcommittee.
Mr. Kucinich. Thank you very much, Mr. Chairman, members of
the committee.

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

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

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

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

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

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

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

Mr. Chairman, members of the committee, this committee has sifted through tens of thousands of pages of documents produced by Bank of America, the Department of Treasury, and the Federal Reserve. Our investigation will help set the record straight about Bank of America and Merrill Lynch. Furthermore, the story of Bank of America’s merger with Merrill Lynch and its huge taxpayer-provided subsidy helps to answer broader questions about how the corporate management of very large financial institutions operate with virtual impunity for their mistakes. The documents we will reveal today provide the public a rare look into the disconnection between the Fed’s ability to analyze financial problems, and its ability to remedy them, when they involve very large financial institutions.
Finally, Mr. Chairman, before Congress rushes to revise the banking regulatory framework, we would do well to incorporate the lessons of the Bank of America-Merrill Lynch episode that this committee's hearings over the coming weeks will draw.

I yield back. Thank you.

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

Chairman Towns. I thank the gentleman from Ohio.

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

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

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

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

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

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

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

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

Chairman Towns. Mr. McHenry.

Mr. McHenry. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

[Witness sworn.]

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

Let me explain the light situation here. First of all, you have 5 minutes to summarize your statement, and then the yellow light will come on. That means you have 1 minute. Then, after the yellow light comes on, then there is a red light; and, of course, that means stop. After that, we will allow the Members an opportunity to raise questions with you. So you may begin.

Turn your light on. Push that button.

STATEMENT OF KENNETH D. LEWIS, CHIEF EXECUTIVE OFFICER, BANK OF AMERICA
Mr. Lewis. Chairman Towns, Ranking Member Issa, Subcommittee Chairman Kucinich, and Ranking Member Jordan, as has been said, my name is Ken Lewis, and I am chief executive officer of Bank of America.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

With that, sir, I will conclude my remarks.

[The prepared statement of Mr. Lewis follows:]

Chairman Towns. Thank you very much for your statement. Let me begin the questions.

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

One of the key questions is when you discovered the massive losses at Merrill Lynch, Mr. Lewis, you have said that you learned of them late and they came as a big surprise. But the emails from the Fed tell a different story. Tim Clark from the Fed said that your claim to be surprised seemed somewhat suspect. The Federal Reserve Governor Kevin Warsh wrote that this claim is not credible, and there are more like this. It is clear that the Feds think you either knew or you should have known about these losses sooner.
I have to say that with everything that was happening in the financial markets last fall, your claim that you had no idea about Merrill’s losses until December is remarkable. The Fed seem to think that you are either not being forthcoming about that or you were completely clueless about the merger and the situation on Wall Street.

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

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

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

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

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

So as a result of that, that was a factor in our decisions, because here your regulators and the Federal Government was saying we don’t think calling the MAC is the best thing for you or the financial system.

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

Chairman Towns. So you were pressured?

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

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

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

Mr. Lewis, in our review of the Fed’s documents, it reveals that, in contrast to your representations to us today, Fed officials concluded that you must have known about the accelerating losses at Merrill much earlier, as early as mid-November, when your shareholders could have voted to disapprove the merger.
Now, an email from a senior advisor sent to assistant to Chairman Bernanke on December 13, 2008; and it is up there on the board for everyone to see. Writes of "clear signs in the data we have that the deterioration at Merrill Lynch has been observably underway over the entire quarter, albeit picking up significantly around mid-November. Ken Lewis's claim that they were surprised by the rapid growth of the losses seems somewhat suspect."

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

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

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

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

Mr. Lewis. That is true.

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

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

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

Chairman Towns. Without objection.

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

[The information referred to follows:]

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[GRAPHIC] [TIFF OMITTED] 54877.014

[GRAPHIC] [TIFF OMITTED] 54877.015

[GRAPHIC] [TIFF OMITTED] 54877.016

[GRAPHIC] [TIFF OMITTED] 54877.017
Mr. Kucinich. Now, Mr. Lewis, isn't it true that you understood the composition and performance of Merrill's portfolio because it was similar to your own in that it was a portfolio that contained complex structured derivative products? Isn't that true?

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

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

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

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

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

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

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

Chairman Towns. Without objection.

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

Chairman Towns. Without objection.

Mr. Issa. Thank you, Mr. Chairman.

[The information referred to follows:]
Mr. Issa. Mr. Lewis, in your 35 years, how many acquisitions, including stock trades, would you say you have been involved in, roughly? Including boards you sat on or were involved in in some tangential way.

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

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

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

Mr. Lewis. Yes, that is not uncommon.

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

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

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

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

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

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

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

Mr. Lewis. I was, sir.

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

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

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

Mr. Lewis. Yes, that was a factor.

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

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

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

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

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

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

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

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

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

Mr. Lewis. Yes.

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

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

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

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

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

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

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

Mr. McHenry. Thank you, Ranking Member Issa.

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

Mr. Lewis. September will be 40 years.

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

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

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

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

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

Mr. Lewis. We do.

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

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

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

Chairman Towns. Thank you very much.

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

Mr. Kucinich. Mr. Chairman, members of the committee, our investigation, Mr. Lewis, also finds that Fed officials believed that you were potentially liable for violating securities laws by withholding material information in your possession from shareholders before the vote to approve the merger with Merrill Lynch on December 5, 2008.
Mr. Lewis, please look at the following email from the Fed's General Counsel to Chairman Bernanke on December 23, 2008. "A different question that doesn't seem to be the one Lewis is focused on is related to disclosure. Management may be exposed if it doesn't properly disclose information that is material to investors. His potential liability here will be whether he knew or reasonably should have known the magnitude of Merrill Lynch losses when Bank of America made its disclosure to get the shareholder vote on the Merrill Lynch deal in early December.''

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

Mr. Lewis. Congressman, we take disclosure very, very seriously. If any----

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

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

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

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

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

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

Mr. Lewis. No, it was not.

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

Mr. Lewis. No, that was not what I asked for. Our board was concerned----

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

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

Mr. Kucinich. But you are referring to a different letter. I am talking about a letter. You requested a letter from the Government saying that the Government ordered you to close the deal to acquire Merrill. Wasn't there such a letter?

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

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

Mr. Lewis. I do not recall.

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

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

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

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

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

Mr. Kucinich. I yield back, Mr. Chairman.

Chairman Towns. Thank you very much.

Mr. Jordan. Thank you, Mr. Chairman.

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

Mr. Lewis. I just want to be clear. On December 17th, when you
called Mr. Paulson and Mr. Bernanke, I just want to know the
nature of your call. Did you say ``we are going to exercise the
MAC clause'" or did you say ``we are thinking about exercising
the MAC clause?'"

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Jordan. OK.

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

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

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

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

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

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

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

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

Chairman Towns. Thank you very much.

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

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

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

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

Mr. Kanjorski. Get home and check that.

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

Mr. Lewis. I do not.

Mr. Kanjorski. All right.

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Kanjorski. Now, I understood in your testimony you pointed out that the Merrill Lynch acquisition was responsible for 75 percent of your last quarter's profits. Are you aware of shareholders that are complaining about that acquisition as a result of that?
Mr. Lewis. No, sir, not now.
Mr. Kanjorski. OK. Thank you very much.
I yield back.
Chairman Towns. Thank you very much.
I now yield to Mr. Chaffetz, the gentleman from Utah, for 5 minutes.
Mr. Chaffetz. Thank you, Mr. Lewis. I appreciate your being here. I am looking at some notes here dated December 31st. These are your notes. Also looking at some notes taken by Joe Price, the CFO at Bank of America, that were taken on December 21, 2008, about the attempt to use the MAC clause and get out of the Merrill Lynch transaction. In those notes it says "fire board of directors if you do it, irresponsible for country. TG agrees.''
TG, I would assume, would be Timothy Geithner?
Mr. Lewis. Those are Joe Price's notes?
Mr. Chaffetz. Yes.
Mr. Lewis. I would have to assume with you, because they are his notes.
Mr. Chaffetz. Based on your recollection of what was going on and based on the notes that we see from the CFO that was there, "fire board of directors if you do it." Was that your understanding?
Mr. Lewis. That is probably a reference to the conversation I have mentioned that I had with Secretary Paulson. But again, those are his notes.
Mr. Chaffetz. But based on your personal recollection, is that your understanding, that the board of directors would be let go if this MAC clause was invoked?
Mr. Lewis. You know, I mentioned that I need a license with whether he said could or would, but basically the premise was that management and the board would be removed if in fact we did call the MAC.
Mr. Chaffetz. Including yourself.
Mr. Lewis. Correct.
Mr. Chaffetz. So if the suggestion from the Federal Government was to have your job removed, as well as the board of directors, can it be looked at any other way other than a threat?
Mr. Lewis. Well, actually, we didn't actually have much of a reaction to the comments themselves as it related to us being removed. Again, what impressed us was here was the Government telling a bank in good standing that they would do something like this. So it was the seriousness of it which caused us to believe that they really did believe that there was an issue here with the MAC and not calling it that did influence us. But it wasn't the threat to have us lose our jobs, it was the seriousness because they made it, not the threat itself.
Mr. Chaffetz. I am sorry, I didn't catch the last part of that.
Mr. Lewis. It was the seriousness with which they made it, not the threat itself.
Mr. Chaffetz. Tell me about your discussion. You call, at one point, as I am looking at the time line here, Mr. Paulson is taking a bike ride, I guess, on December 21st. Tell me specifically what was going on in that conversation.
Mr. Lewis. Well, I called him to get an update and I think that was the Sunday. I am pretty sure that was the Sunday that I called him. As I recall the conversation, he said "I want to give you some blunt language and I first want to start out by saying that we are very supportive of Bank of America," and then went one step further and said what I have already said. He said "but we feel very strongly that you should not call the MAC, and if in fact you do," and, again, I think he said would, but it was would or could, as I recall, "remove the
Mr. Chaffetz. Well, that certainly sounds like a threat to me and an amazing use of power there. Tell me about your interactions with Timothy Geithner. How early in this process was he involved and engaged in this process?

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

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

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

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

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

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

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

Chairman Towns. Without objection, so ordered.

Mr. Chaffetz. Thank you.

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

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

Mr. Chaffetz. Any interaction with the administration----Chairman Towns. May I say to the gentleman from Utah, your time has expired.

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

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

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

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

Mr. Lewis. Yes, sir, we do----

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

Mr. Lewis. Yes. Right.

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

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

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

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

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

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

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

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

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

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

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

Mr. Cummings. And when did he do that?

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

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

Mr. Lewis. Yes, sir.

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

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

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

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

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

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

Mr. Cummings. My time is up.

Chairman Towns. The gentleman's time is expired.

I now yield to Congressman Flake from Arizona. Congressman
Flake for 5 minutes.
Mr. Flake. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

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

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

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

Mr. Issa. Mr. Flake.

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

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

Yield back.

Chairman Towns. Thank you very much.

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

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

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

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

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

The other email sort of reinforces that, and that is from Jeffrey Lacker, who was a President, I believe, of the Federal Reserve Bank of Richmond at the time, and I think he is a member of the Federal Open Markets Committee now, a voting member. This email was also cc'd to the chairman, I believe, and it says "Just had a long talk with Ben.' Ben Bernanke, I presume. ''Says they think the MAC threat is irrelevant because it is not credible. Also intends to make it even more clear that if they'--meaning Bank of America--``play that card and then need assistance, management is gone.' Then, in parentheses, says ''Forgot to tell him that K.L.'''--I believe that is you, Ken Lewis--``is near retirement.''

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

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

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

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

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

Mr. Lynch. OK.

Mr. Chairman, I yield back.

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

Mr. McHenry. Thank you, Mr. Chairman.

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

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

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

Mr. Lewis. No.

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

Mr. Lewis, as I asked earlier, you have been involved in a number of mergers and acquisitions. Your institution has been involved in dozens upon dozens over your career with the bank. To your knowledge, have there been material adverse change clauses included in previous deals of this sort?

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

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

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

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

Mr. Lewis. I am sorry?

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

Mr. Lewis. I don’t know their backgrounds.

Mr. McHenry. OK. Well, I understand you are still a regulated institution, so no need to hit on the Federal Reserve and their staff there. To go to another subject matter, there have been reports about efforts of various banks to raise
Mr. Lewis. We were required to raise $33.9 billion, and I am pleased to say that we have raised that amount and we will raise more than that. That should be completed sometime toward the end of this month.

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

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

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

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

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

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

Mr. McHenry. Thank you, Mr. Chairman.

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

The Chair recognizes Mr. Quigley.

Mr. Quigley. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

Mr. Quigley. Sure.

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

Mr. Lewis. Yes, sir, 49.9 percent.

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

Mr. Lewis. Yes, they do. I think they do. We don't manage them, but----

Mr. Quigley. I am sorry?

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

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

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

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

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

Mr. Quigley. And cosmetics are becoming important.

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

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

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

Mr. Quigley. Very good. Thank you.

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

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

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

On August 20, 2007, the Federal Reserve replied to a Bank of America request to waive banking regulation that limited the amount that federally insured banks can lend to related brokerage companies to 10 percent of bank capital. Until that point, banking regulation was that banks with federally insured deposits should not be put at risk by brokerage activities. Four months after that waiver was provided to Bank of America, Bank of America bought Countrywide, which has proven to be the worst subprime lender in our Nation, and I would like to place in the record a report by the Center for Public Integrity that documents that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms. Kaptur. Well, I would sure appreciate, Mr. Lewis, if you could provide for the record what net effective tax your company paid in 2008, because, to me, it looks like you paid one-fiftieth of what you should, and I would like to compare what tax rate was paid and the amount that was paid versus what the average middle-class family in our country pays. I think the record will show you paid actually substantially less.

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

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

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

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

Chairman Towns. Thank you very much.

Ms. Kaptur. Thank you, Mr. Chairman.

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

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

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

Mr. Lewis. Yes, sir.

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

Mr. Lewis. Yes, that is correct.

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

Mr. Lewis. Yes, sir.

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

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

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

Mr. Lewis. Correct.

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

Mr. Lewis. Yes.

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

Mr. Lewis. Yes, sir.

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

Mr. Lewis. I don't know----

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

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

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

Mr. Lewis. Yes, sir.
Mr. Welch. So you wouldn’t even consider invoking the MAC clause unless there was something of enormous magnitude and consequence to the company and the shareholders, correct?

Mr. Lewis. That is correct.

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

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

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

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

Mr. Welch. It affected shareholder value, correct?

Mr. Lewis. Correct.

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

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

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

Mr. Lewis. Yes.

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

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

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

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

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

Mr. Lewis. I don’t know. I don’t know what this committee has.

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

Mr. Lewis. Our financial advisors are us.

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

Mr. Lewis. Yes, sir.

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

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

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

Mr. Lewis. No, I don’t think I am. I am trying to say that...
Mr. Welch. OK, I am going to interrupt. I don't understand that, because I think you have said those two things.

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

Mr. Lewis. Yes, it is.

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

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

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

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

Mr. Welch. If you have----

Chairman Towns. I must interrupt the gentleman.

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

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

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

Mr. Welch. You are not the CEO?

Mr. Lewis. I am not a securities lawyer.

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

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

Mr. Welch. OK. Thank you. Yield back.

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

Mr. Connolly. I thank the chairman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Connolly. I am sorry?

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

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

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

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

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

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

Mr. Lewis. Yes, they did.

Mr. Connolly. And yourself.

Mr. Lewis. Yes, they did.

Mr. Connolly. And the agreement was `let’s hold off until
January because we are not in agreement yet about what to
disclose and when to disclose it’’

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

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

Mr. Lewis. I am sorry? I couldn’t hear you.

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

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

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

Mr. Lewis. No, absolutely not.

Mr. Connolly. It never came up?

Mr. Lewis. No.

Mr. Connolly. Why did you accept TARP funds if you didn’t
think you needed them?

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

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

Mr. Lewis. $15 billion.

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

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

Mr. Connolly. My time is almost up. One final question.

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

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

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

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

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

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

[Recess.]

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

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

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

In your testimony, you stated that 9 days after the shareholders’ vote approving the merger, you became aware of significant accelerating losses, the MAC, at Merrill Lynch, raising concerns that the Bank of America might want to avoid finalizing the deal due to the revelation of MAC. However, it is difficult to understand how this came as a complete surprise, given reports by the New York Times that shortly after the deal was announced in September, B of A had quickly installed 200 people at Merrill Lynch to thoroughly review their books.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, Mr. Chairman.

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

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

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

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

Chairman Towns. So do you agree that the decision on whether to proceed with the merger was ultimately yours? Was it yours?
Mr. Lewis. Well, it was my recommendation to the board and it was mine and the board's decision to go forward, yes, sir.

Chairman Towns. Thank you very much.

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

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

Mr. Connolly. I thank my colleague.

Chairman Towns. Briefly, he says.

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

Mr. Lewis, if you look at the minutes of the Bank of America dated December 30, 2008, it says "special meeting.''

Starting at the top of page 3, it reads, "Mr. Lewis reported that management has obtained detailed oral assurances from the Federal regulators with regard to their commitment and has documented those assurances with emails and detailed notes of management's conversations with the Federal regulators.''

It goes on to say that you discussed in detail "the commitment of the Federal regulators to deliver assistance in the form of capital and asset protection to the corporation.''

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

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

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

Mr. Lewis. Commitment to work toward a solution.

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

Mr. Lewis. Yes, sir. And you can----

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

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

Mr. Connolly. Final question, if I may, Mr. Chairman.
Was there any intentional reason not to put the agreement in writing?
Mr. Lewis. No, sir, because there was not enough specifics to put into writing.
Mr. Connolly. But at some point there were.
Mr. Lewis. Yes, sir, and that was in the first few weeks of January of the following year.
Mr. Connolly. But I want to be very clear. Under oath, it is your testimony today there was no intentional evasion or reason to not put the agreement in writing. Nobody had a conversation with Treasury, the Federal Reserve, or at the Bank of America `let's not put this in writing right now.'
Mr. Lewis. I can only speak to what was happening at the time. I don't know what was said to everybody, but the two things that I would continue to say is, No. 1, the goal was to get this done comprehensively so it was one time and we would not shock the markets with something that was dangling that was needed; and, second, we had not come to a final conclusion and did not do so for several weeks.
Mr. Connolly. I yield back and I thank my colleagues for their indulgence.
Chairman Towns. Thank you very much.
I now yield to Mr. Jordan, gentleman from Ohio.
Mr. Jordan. Thank you, Mr. Chairman.
Mr. Lewis, thank you. I know sitting there for 3 hours and answering questions is not the greatest thing in the world to be able to have to do.
In my first round, I asked about whether you felt the Government, in connection with the TARP program, exercised any excessive influence in day-to-day operations, and your answer was no. But I want to go back to--and I am taking this from a May 13th Bloomberg News story, documents obtained by Judicial Watch relative to a meeting that you had with Mr. Paulson, Mr. Bernanke, Mr. Geithner, and Ms. Bair. Did you and eight other bank CEOs meet with those individuals here in Washington back in looks like October 13th?
Mr. Lewis. Yes, sir, we did.
Mr. Jordan. OK. Tell us what happened at that meeting, because what the documents indicate is that we had a lot of conversation, discussion about the threat that has been talked about here by just about everyone relative to the MAC clause, but it looks like there was maybe threats here or at least strong suggestions that you initially participate in the TARP program. So can you tell me about what took place at that meeting and walk me through that October 13th meeting?
Mr. Lewis. The nine chief executives were called by Hank Paulson, or at least I was----
Mr. Jordan. Let me interject, if I could, real quick. You said earlier, I believe, too--and I forget to which Member's questions--that you initially, your board and your bank and you felt your bank did not need any infusion of cash or TARP money from the Government. Is that right?
Mr. Lewis. Yes, sir, and it was----
Mr. Jordan. What was that date? When did you make that decision as a bank?
Mr. Lewis. Well, the first reaction that I had to the fact that we were being offered $15 billion was that we didn't need it; the prior week we had raised $10 billion in equity.
Mr. Jordan. OK.
Mr. Lewis. And that it could have been--I am speculating, but it could have been that is why we were offered $15, and not $25, like some of the other big banks were.
But, as you mentioned, the people that were there, they were on the other side of the table. There were nine of us, the nine bank CEOs, and each of those people spoke about the
possibility of deterioration in the economy. Finally, and I think it is a little grey with me, but I think it was Secretary Paulson then began to tell each bank what amount they should take.

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

Mr. Lewis. Yes.

Mr. Jordan. What did the form say?

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

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

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

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

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

Mr. Jordan. OK.

Mr. Lewis. So we talked about various things----

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

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

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

Mr. Lewis. Well, we ended up----

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

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

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

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

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

Mr. Jordan. Did you know--if I could, Mr. Chairman.

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

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

Chairman Towns. Without objection, so moved.

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

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

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

Mr. Jordan. You had no idea? You thought it was about just the general concern of the economy?
Mr. Lewis. I didn't know, but----

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

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

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

Mr. Lewis. Not to my knowledge. I think everyone signed. Mr. Jordan. Did anyone express reservations about not signing?

Mr. Lewis. One person expressed reservations, yes.

Mr. Jordan. Was that you?

Mr. Lewis. No, it was not I.

Mr. Jordan. OK.

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

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

Chairman Towns. Thank you very much.

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

Mr. Kucinich. Thank you, Mr. Chairman.

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

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

I am entering this into the record.

Chairman Towns. Without objection.

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

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

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

Mr. Lewis. Sir----

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

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

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

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

Mr. Lewis. Yes, we did.

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

Mr. Lewis. $20 billion.

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

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

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

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

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

Mr. Lewis, please look at the following email dated December 18, 2008, between officials at the New York Fed. One reports his findings saying that on the total of 30 basis points deterioration of the tangible common equity ratio of the combined Bank of America-Merrill Lynch entity, they go on to say that 16 basis points of deterioration is due to Bank of America, 14 basis points due to Merrill Lynch. The other official described this discovery as a "smoking gun.''

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

Mr. Lewis. Your apples and oranges. The securities----

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

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

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

Mr. Lewis. I think I have seen that in an email, but I don't----

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

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

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

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

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

Mr. Lewis. Not tangible.

Mr. Kucinich. Tier 1.

Mr. Lewis. Tier 1, yes.

Mr. Kucinich. Now, Mr. Lewis, the Government believed that you knew or should have known about the Merrill losses long before you said you did based on data that Bank of America possessed and had reasonably reviewed. The Government believed you could be in violation and breach of securities laws. The Government didn't believe you that Merrill was the primary cause of your problems, but thought that Merrill losses were less significant than the losses that Bank of America was experiencing as a standalone entity. The Government even thought that you were making the threat to use MAC as a bargaining chip and that it was not credible. The Government had already given you $25 billion before you approached it about Merrill Lynch.

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

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

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

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

Chairman Towns. Without objection.

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

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

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

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

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

Mr. Lewis. I can’t speculate on that, sir.

Mr. Kucinich. It is fair to say we have a large financial institution, Mr. Chairman, that doesn’t face the same consequences for management as small ones, and the Fed had an opinion that there was considerable evidence of mismanagement. There has been a misconception here that the Government put a gun to the head of Bank of America, when it is quite possible...
that it was the Bank of America that put a gun to the head of the Fed by threatening to invoke the MAC, and I think that this whole idea, Mr. Chairman, about Mr. Lewis somehow being a victim here flies in the face of the fact that you were CEO of the largest bank and that you are pretending that you didn't ask for help from the Government to take the burden off your back, that you didn't ask for a letter. You are going to have to excuse me, but this is not credible. You are trying to change the scenario from you as a victim to you as a powerful CEO who made a decision that denied your stockholders, your shareholders material information that they needed prior to a vote on a merger, and I think that is the central point of this hearing, and I am sorry that you haven't been forthcoming enough about that central point.

I yield back.

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

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

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

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

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

Chairman Towns. Sure.

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

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

Mr. Lewis. I apologize.

Chairman Towns. Congresswoman Kaptur from Ohio.

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

Mr. Lewis, I have been here since this morning and find your testimony a bit disquieting today for some of the following reasons: Bank of America owns 49.9 percent of BlackRock, but you seem not to know anything of its activities. No. 2, you are the person who was in charge when Bank of America acquired Countrywide over a year ago, but you apparently weren't aware of its books and the losses inherent in that purchase.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms. Kaptur. I beg your pardon?

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

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

I wanted to just, in my second question here, relating to Superior Bank, which had the largest settlement in American history at the FDIC in 2001, over $450 million as a result of their subprime activities in Chicago and beyond, including servicing by Merrill Lynch, which is how you would acquire the Superior troubled loans. Let me ask you, when Bank of America acquired those loans, did you audit them prior to reselling them to investors?

Mr. Lewis. I am not sure of that transaction, so I would have to get you somebody who was more familiar with the transaction.

Ms. Kaptur. Well, then explain to us, as head of this massive and important bank in our country, what is your plan for dealing with bad loans such as the Superior loans that came to you through the FDIC Merrill acquisition?

Mr. Lewis. Well, to the extent that you have loans you can rehabilitate, you do. To the extent that you can sell loans for discounts, you do. To the extent that you can't do either, you hold them on your books and at some point write them off.

Ms. Kaptur. But if you sell them to knowing investors and they were bad loans, what happens?

Mr. Lewis. Well, you would take a massive discount. The bank selling them would take a massive discount.

Ms. Kaptur. Well, I would certainly like the paper trail, the audit trail on those Superior loans that your bank has been handling.

I thank you, Mr. Chairman.

Chairman Towns. Thank you very much. I thank the gentlewoman from Ohio.

I now yield 5 minutes----

Ms. Kaptur. Mr. Chairman, may I ask the gentleman to yield just for a second? May I place in the record an article from the Atlantic Monthly, May 2009, on the financial crisis, please?

Chairman Towns. Without objection.

Mr. Kucinich. I ask unanimous consent to insert all the emails that I offered on the screen there for the record.

Chairman Towns. Without objection.

[The information referred to follows:]

Chairman Towns. The gentleman from Maryland.

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

Mr. Lewis, I am confused. Just picking up on some of the things that the chairman and Mr. Kucinich were just asking
about, I can kind of understand your reaction to discovering that there was a $12 billion loss suffered by Merrill Lynch, especially when it was coming after a shareholders’ vote to purchase Merrill Lynch. I can understand you telling the Fed and Secretary Paulson and Treasury you were thinking of backing out of the deal. I can understand that. I think that was based upon your expertise and your experience.

I cannot understand the agreement that you made with Treasury and the Fed, which they both deny, to disclose the $12 billion loss. If the loss made this a horrible business deal to acquire Merrill Lynch, why did you still do it? And I know you have told us over and over again, but let’s be frank. I mean, I am wondering how do you determine what it is you must disclose? I mean, we have shareholders here who are concerned.

You are about to go into a deal with a company that is worse off than is made to believe, and it just seems to me that a person with your experience, there are a lot of people in this situation—and I don’t care what Paulson may have said. I don’t care what Bernanke may have said. They would have said “to hell with you.” They would have said “I am going to stand on principle, and my principles tell me that there is a MAC here, and here is a real problem; and if I go down, I go down, but I am going down on principle.”

I just want to give you an opportunity to tell us, because I have to tell you I am kind of concerned, because I think there are some serious credibility issues, and I think Mr. Kucinich has raised some things that, if I were your lawyers, I would be concerned about. So help me.

Mr. Lewis. You are referring to the fact that, despite the fact we thought we could have a MAC, we relied on the----

Mr. Cummings. Yes. And I am also going to the point that I believe that when you said to—-you don’t just go and tell the Feds and you don’t tell Paulson that, “look, I smell a rat here.” Somebody of your stature. I can understand if you were some guy that just came off the street 6 months ago and the last thing you did was you were a bank teller—no offense to bank tellers, but that was all you did. You are a major player, and when you speak, people listen.

So I am trying to figure out. I mean, you said there is a problem here, but then you let these folks—and all due respect to Bernanke, all due respect to the Feds, all respect to Paulson. You are the head of this bank, you are the head of Bank of America; they are not. They may be on high, but you have to answer to the shareholders.

And I am trying to figure out why—and this is stuff that, seems to me, if I had this kind of information, I wouldn’t even want my shareholders to be voting on something and they did not have full disclosure, and I am trying to figure out where does the disclosure come in, why weren’t things disclosed. I get the impression that there was insufficient due diligence. I know you were dealing with a crunch time. I know it was only a matter of hours that you were trying to turn all of this over. I got that. But a man of your stature, I refuse to believe that you set integrity, honesty, and transparency to the side for expedience. I just don’t believe it. And I am trying to give you an opportunity to explain this to us. Now, if you don’t want to, that is up to you, but I am asking you to.

Mr. Lewis. Yes, sir. Well, if you ask, I will do my best. I don’t know what else I can say other than we were influenced by the strong nature of the wording from the Federal Reserve and the Treasury in the sense that they obviously felt very strongly that we did not have a MAC. I also still thought we had strategic reason to do Merrill Lynch, despite the fact it had a financial issue. And then, third, I thought the downside of calling the MAC and not winning was pretty severe. So all of
those factors were factors in me making that decision. But if I had thought that it was a MAC and all these other things didn't matter, I would have called a MAC, or we would have called a MAC.

Mr. Cummings. I see my time is up, Mr. Chairman.

Chairman Towns. Let me thank the gentleman from Maryland and let me say that, as we come to the conclusion of this hearing, it is important to remember that we have heard only one side of the story today. The committee needs to hear from Mr. Paulson and Mr. Bernanke before we draw any hard and fast conclusions. I do believe in fairness.

However, I do think it is fair to observe that a flawed financial regulatory process was at work in this case. We see closed door meetings, coded messages, motives, questions, and private emails. Basically, the regulators and financial institutions seemed to be making up the rules as they went along.

As Congress considers financial regulatory reform, one of the lessons from this case is that we need much more transparency and accountability in the financial regulatory and oversight process. The American taxpayers and corporate shareholders deserve no less. They need to know what is going on.

Let me again thank you, Mr. Lewis, for being here today. Before we adjourn, let me state that this committee has and will continue to protect the American taxpayers, and will continue to make sure the taxpayers' dollars are spent in a transparent and wise manner.

Without objection, I enter this binder into the committee record and, without objection, the committee stands adjourned.

[Whereupon, at 1:25 p.m., the committee was adjourned.]

[The prepared statements of Hon. Edolphus Towns, Hon. Diane E. Watson, Hon. Gerald E. Connolly, and additional information submitted for the hearing record follow:]

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