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You Can Come under the Tarp, but First... The Bank of America-Merrill Lynch Merger Was a Failure of Corporate Governance

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ABSTRACT

In response to the financial credit crisis in the fall of 2008, Congress, the U.S. Treasury, and the Federal Reserve Board of Governors took unprecedented action to prevent both large and small financial institutions from insolvency. Ultimately, the Troubled Asset Relief Program was created to inject various banks with the cash necessary to prevent the banks' insolvency and the threat that bank failures posed to the nation's economy.

In the midst of that crisis, Bank of America agreed to acquire Merrill Lynch. Each institution, in their individual capacity, received TARP funds from the Treasury several weeks after entering into the merger agreement. But, as Merrill Lynch suffered drastic losses in the fourth quarter of 2008, Bank of America eventually received even more money from the Treasury after consummating the merger in January 2009.

What subsequent SEC filings, news reports, and state and congressional investigations reveal is that the Government pressured Bank of America management and directors to close the deal despite Bank of America's reluctance to do so and Bank of America having a strong legal argument in support of its desire to walk away from the deal. Bank of America's submission to the Government demonstrates that corporate governance, short of best

practices, in a time of crisis can and will significantly destroy shareholder wealth.

I. INTRODUCTION

In December 2008, Bank of America's ("BofA") Chairman and Chief Executive Officer Ken Lewis ("Lewis") met with then Treasury Secretary Henry Paulson ("Paulson") and Chairman of the Federal Reserve Board of Governors Ben Bernanke ("Bernanke"). BofA realized that its merger with Merrill Lynch & Co. ("Merrill") had developed into a catastrophic economic loss, and BofA sought to unwind the deal. However, Paulson and Bernanke pressured BofA to complete the merger for the benefit of the nation and to the detriment of BofA's shareholders. This paper examines what the BofA Board of Directors (the "Board") did and did not do during BofA's acquisition of Merrill and how the Board ought to have acted differently when faced with pressure from the Government to close the deal. While the Board's inadequate process did not rise to the level of legal liability, the Board's inaction constituted a failure of corporate governance and fell short of best practices. When BofA and the Board realized that Merrill's losses were greater than anticipated but still closed the transaction with Merrill, the Board was acting at the behest of the Government not BofA's shareholders.

The Board failed to consider fully the ramifications of Merrill's losses on BofA's shareholders' wealth. BofA's share price dropped from approximately $32 in early September 2008 to a low of just above $3 in March 2009.[1] On July 20, 2009, the first full day of trading after BofA released its second-quarter 2009 results, BofA shares closed at $12.24 per share.[2] Based on the value of outstanding BofA common stock, as of July 31, 2008 when compared to July 20, 2009, approximately $44 billion in shareholder wealth was lost, despite over 4 billion newly issued shares of common stock.[3] One dollar invested in BofA at the close

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[1] Yahoo! Finance, Bank of America Corporation (BAC), September 2008 to March 2009, http://finance.yahoo.com/echarts?s=BAC#symbol=BAC;range=1d (last visited Apr. 16, 2009).

[2] Yahoo! Finance, Bank of America Corporation (BAC), *supra* note 1, at July 20, 2009 (last visited July 26, 2009).

[3] BofA's quarterly report for the second quarter of 2008 indicated that as of July 31, 2008, 4.56 billion shares of BofA common stock were outstanding. Bank of Am. Corp., Quarterly Report (Form 10-Q), 1 (Aug. 7, 2008), *available at* http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-sec (All citations to BofA SEC filings can be found at BofA Investor Relations web-site at the date that the Report or Statement was filed with the SEC). At the

of the third quarter 2008 would be worth only thirty-nine cents at the close of the second quarter of 2009, during that time, a market-weighted index and an equal-weighted index of eleven comparable firms receiving TARP funds would have dropped from one dollar to only sixty-six cents and seventy five cents, respectively.[4] The Board's poor process and its submission to the Government led to this destruction of shareholder wealth. If the Board had practiced flawless governance, then it would have demanded that BofA not back down to the Government and walked away from the deal. This option, though, was not without risk, in particular lawsuits initiated by Merrill against BofA. But, the adverse consequences of litigation would have paled in comparison to the eventual pummeling that BofA shareholders took *after* BofA acquired Merrill. Going forward with the merger was the wrong decision because of the toll it took on BofA shareholders' wealth – decision that, through great governance, BofA could have avoided.

This paper progresses in Section II by presenting the chronological facts surrounding the Government's allocation of U.S. Treasury funds to various companies in the financial sector as well as the facts surrounding BofA's acquisition of Merrill. Section III presents information on the Board and the policies drafted by BofA that guided the Board. Section IV analyzes the Board's actions from two perspectives: (1) the legal implications of the Board's failure to invoke the Merger Agreement's Material Adverse Effect ("MAE") clause; and (2) best practices of corporate governance that the Board ought to have observed. Section V concludes by covering recent developments at BofA in the wake of

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close of trading on July 31, 2008, BofA common stock traded at $32.90 per share. Yahoo! Finance, Bank of America Corporation (BAC), *supra* note 1, at July 31, 2008 (last visited Apr. 23, 2009). $32.90 multiplied by 4.56 billion shares equals approximately $150 billion. As of Friday, July 17, 2009, after the issuance of shares in connection with the Merrill acquisition and other issuances, approximately 8.65 billion shares of BofA common stock were outstanding. Bank of Am. Corp., Current Report (Form 8-K) July 17, 2009, 6. At the close of trading on Monday, July 20, 2009, BofA common stock traded at $12.24 per share. Yahoo! Finance, Bank of America Corporation (BAC), *supra* note 1, at July 20, 2009 (last visited July 26, 2009). $12.24 per share multiplied by 8.65 billion equals approximately $105.876 billion. Thus, $150 billion minus $105.76 billion equals approximately $44.124 billion.

[4] *See* Attachment A, *Value of $1 Invested in Bank of America v. Indexes of Selected Financial Firms*, ANALYSIS GROUP, INC., Aug. 12, 2009. Attachment A compares BofA with the seven other firms (Bank of New York Mellon, Citigroup, Goldman Sachs, JPMorgan Chase, Morgan Stanley, State Street, and Wells Fargo) that received TARP funds on October 28, 2008; these firms received between $2 and $25 billion from the Treasury. SunTrust, U.S. Bancorp, BB&T, and Key Corp all received Treasury funds on November 14, 2008, ranging from $2.5 to $6.5 billion. FinancialStability.gov, Reports and Documents, TARP Transactions Report 04/17/09, at 1, *available at* http://financialstability.gov/docs/transaction-reports/transaction_report_04-17-2009.pdf

the annual shareholders' meeting, quarterly earnings releases, director and officer resignations, and state and congressional investigations. Ironically, the Government has mandated that BofA address and improve upon its management and governance strategies, most notably through the reconstitution of the Board. Yet, had the Board stood up to the Government the Board would not have faced a Government mandate. The strings that accompanied the TARP funding to compensate BofA for absorbing Merrill would not exist.

II. CHRONOLOGY: BOFA & THE GOVERNMENT WERE ON A COLLISION COURSE

A. September 2008: Merger-Related Events

On September 15, 2008, BofA announced it would acquire Merrill for approximately $50 billion.[5] BofA conducted due diligence of Merrill in forty-eight hours.[6] Just over one month earlier, in August 2008, Merrill's 10-Q for the second quarter of 2008 showed revenues of *negative* $4.083 billion and a net loss of $4.634 billion.[7] Merrill agreed to the merger in order to stay alive, unlike Lehman Brothers.[8] And, Lewis sought to satisfy his own "personal ambitions and penchant for empire building."[9] Lewis and BofA have stood behind the decision to purchase Merrill based on the forty-eight hours of due diligence.[10]

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[5] Bank of Am. Corp., Current Report (Form 8-K) Sept. 15, 2008, 4. Merrill is valued at $29.1 billion, down from $50 billion. Bank of Am. Corp., Annual Report (Form 10-K) Feb. 27, 2009, 17.

[6] Dan Fitzpatrick et al., *Thain Ousted in Clash at Bank of America*, WALL ST. J., Jan. 23, 2009, at A1, A2.

[7] Merrill Lynch & Co., Inc., Quarterly Report (Form 10-Q), at 4 (Aug. 5, 2008) *available at* http://www.sec.gov/Archives/edgar/data/65100/000095012308008850/y64172e10vq.htm (for the fiscal quarter ending June 27, 2008).

[8] *See* Louise Story & Julie Creswell, *Love was Blind*, N.Y. TIMES, Feb. 8, 2009, at BU, *available at* http://www.nytimes.com/2009/02/08/business/08split.html?_r=1&pagewanted=2.

[9] Story & Creswell, *supra* note 8, at BU. *See generally* Joe Nocera, *Incompetent? No, Just a Leader*, N.Y. TIMES, Oct. 3, 2009, at B1 (noting that Lewis was "an empire builder himself, largely continuing [former a CEO's] strategy of growing through acquisitions").

[10] *See* Fitzpatrick et al., *supra* note 6, at A1, A2. BofA never asked that the investment banking firms it hired update their due diligence after September 15, 2008. *See also* Heidi Moore, *Did Flowers Miss the Signs?*, WALL ST. J., Jan. 20, 2009, at C3. In fact, members of the Federal Reserve were surprised with how Lewis and BofA claimed to be caught off guard by Merrill's December deterioration.

> General consensus . . . is that given market performance over past several months and the clear signs in the date we have that the deterioration at [Merrill] has been observably under way over the entire quarter – albeit picking up significant around

B. September 2008: Government Funding Events

On September 19, Paulson issued a press release addressing the financial system of the country.[11] Despite aid directed at Fannie Mae, Freddie Mac, and AIG, as well as entities hurt directly by the Lehman Brothers bankruptcy, Paulson, Bernanke, and SEC Chairman Christopher Cox took "decisive action to fundamentally and comprehensively address the root cause of our financial system's stresses."[12] Citing bad mortgage assets as the cause of the nation's credit-freeze ,[13] Paulson vowed to work with Congress to pass legislation to address the problem.[14]

C. October 2008: Merger-Related Events

On October 2, BofA announced that Merrill CEO John Thain ("Thain") would become president of global banking, securities, and wealth management at the combined BofA.[15] Both Thain and Lewis touted the resulting corporation as the "premier financial services company in the world."[16] BofA announced the prospective financial condition of the combined entity.[17] BofA

> mid-November and carrying into December – Ken Lewis' claim that they were surprised by the rapid growth of the losses seems somewhat suspect. *At a minimum it calls into question the adequacy of the due diligence process [BofA] has been doing in preparation for the takeover.*"

E-mail from Tim Clark, Senior Adviser, Federal Reserve Board of Governors, to Rita Proctor, Federal Reserve Staff, et al., (Dec. 19, 2008, 2:29:00 EST) Bates Range BOG-BAC-ML-COGR-00009, *available at*: http://oversight.house.gov/images/stories/documents/20090625093832.pdf (emphasis added).

[11] Press Release, U.S. Treasury Department, Statement by Secretary Henry M. Paulson, Jr. on Comprehensive Approach to Market Developments (Sept. 19, 2008), *available at* http://www.financialstability.gov /latest/hp1149.html.

[12] *Id.*

[13] *Id.*

> The federal government must implement a program to remove these illiquid assets that are weighing down our financial institutions and threatening our economy. This troubled asset relief program must be properly designed and sufficiently large to have maximum impact, while including features that protect the taxpayer to the maximum extent possible. The ultimate taxpayer protection will be the stability this troubled asset relief program provides to our financial system, even as it will involve a significant investment of taxpayer dollars.

Id.

[14] *Id. See also* Press Release, U.S. Treasury Department, Statement by Secretary Henry M. Paulson, Jr. on Emergency Economic Stabilization Act (Sept. 28, 2008), *available at* http://www.financialstability.gov/ latest/hp1162.html.

[15] Bank of Am. Corp., Current Report (Form 8-K), Oct. 7, 2008, 4.

[16] Michael de la Merced, *Thain to Take a Role at Bank of America*, N.Y. TIMES, Oct. 3, 2008, at C8.

[17] Bank of Am. Corp., Current Report (Form 8-K) Oct. 3, 2008, 2.

presented a backward-looking income statement assuming that the merger closed January 1, 2007.[18] The income statement showed a \$2.167 billion net *loss* from continuing operations.[19]

D. October 2008: Government Funding Events

On October 3, Congress passed the Emergency Economic Stabilization Act[20] ("EESA"), which gave the Government the power to provide emergency funding to financial institutions via several programs, including the Troubled Asset Relief Program ("TARP") and the Targeted Investment Program ("TIP").[21] BofA received \$15 billion on October 26, 2008 through an agreement to issue preferred stock to the U.S. Treasury ("Treasury").[22]

E. November 2008: Merger-Related Events

On November 3, 2008, BofA filed its Proxy Statement for the Merger Agreement (the "Merger" or the "Agreement") with the SEC.[23] The Board unanimously recommended that shareholders approve the Merger.[24] The Proxy Statement provided BofA and Merrill shareholders with the terms of the Merger,[25] named financial advisors, presented their fairness opinions as given to the Board,[26] and provided valuations of each company's common stock.[27]

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[18] *Id.*

[19] *Id.*

[20] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

[21] *See* Press Release, U.S. Treasury Department, Paulson Statement on Emergency Economic Stabilization Act (Oct. 3, 2008), *available at* http://www.financialstability.gov/latest/hp1175.html.

[22] Bank. of Am. Corp., Current Report (Form 8-K) Oct. 30, 2008, 4 (BofA entered into a Letter Agreement with the Treasury under which it "agreed to issue and sell (i) 600,000 shares of [BofA's] Fixed Rate Cumulative Perpetual Preferred Stock . . . and (ii) a warrant to . . . purchase 73,075,674 shares of [BofA's] common stock . . . for an aggregate purchase price of \$15,000,000,000 in cash.").

[23] Bank of Am. Corp., Definitive Proxy Statement (Form DEFM-14A) at 3 (Nov. 3, 2008).

[24] *Id.* at 5.

[25] *Id.* at 76.

[26] *Id.* at 63-69. Each of the two advisors delivered an oral opinion to the Board on September 14, 2008, and each provided the Board a written report. Each opinion concluded that the Merger was "fair, from a financial point of view, to [BofA]." *Id.* at 63. "In arriving at their respective opinions, [the advisors] did not . . . make or obtain any independent valuations or appraisals of the assets, liabilities . . . or solvency of [BofA] or Merrill." *Id.* at 65.

[27] Bank of Am. Corp., Definitive Proxy Statement (Form DEFM-14A) Nov. 3, 2008, 5.

F. November 2008: Government Funding Events

On November 12, Paulson issued remarks that the EESA "[had] clearly helped stabilize our financial system."[28] Paulson cited the unlikely chance that a "broad systemic event" would have negative implications on the economy and saw "signs of improvement" in the economy.[29] BofA did not receive funds from the Treasury in November 2008.

G. December 2008: Merger-Related Events

On December 5, at a special meeting, BofA shareholders approved the Merger.[30] After the Merger, BofA would be "the largest wealth management business in the world."[31] The Agreement was "adopted by the requisite affirmative vote of the holders of [BofA] Common Stock,"[32] pursuant to the Delaware General Corporation Law[33] and the New York Stock Exchange.[34]

After the vote, Lewis stated that BofA would *not* need any further government assistance.[35] On December 5, BofA CFO Joe Price ("Price") represented to Lewis that the Merrill losses were estimated at $9 billion, and $3 billion of that figure was "conservative[ly]" added as a cushion for unknown and unexpected losses.[36] On December 9, Price gave a presentation to the Board about Merrill's losses.[37] On December 13, Price

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[28] Press Release, U.S. Treasury Department, Remarks by Secretary Henry M. Paulson, Jr. on Financial Rescue Package and Economic Update (Nov. 12, 2008), *available at* http://www.financialstability.gov/latest/hp1265.html.

[29] *Id.*

[30] Bank of Am. Corp., Current Report (Form 8-K) Dec. 5, 2008, 12.

[31] *Id.* ("nearly 20,000 financial advisors and approximately $2.5 trillion in client assets").

[32] Bank of Am. Corp., Proxy Statement (Form 14-A) Nov. 3, 2008, A-40 (relying on Section 7.1 of the Agreement).

[33] Broadly, Section 141(a) of the DGCL states that "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors." DEL. GEN. CORP. LAW § 141(a) (2008).

[34] The authorities that require a shareholder vote are discussed in Section IV.A.

[35] Deborah Solomon et al., *BofA's Latest Hit*, WALL ST. J., Jan. 16, 2009, at C1 ("In the news conference announcing the deal, Mr. Lewis boasted of not needing any government assistance.").

[36] Tr. of Lewis Deposition, New York State Attorney General, *In re* Executive Compensation Investigation – Bank of America – Merrill Lynch, Lewis Dep. 11:5-11, Feb. 26, 2009, *available at* http://www.oag.state.ny.us/media_center/2009/apr/pdfs/Exhibit%20A%20to%204.23.09 %20letter.pdf [Hereinafter, the *Lewis Dep. Tr.*].

[37] Dan Fitzpatrick et al., *In Merrill Deal, U.S. Played Hardball*, WALL ST. J., Feb. 5, 2009, at A1, A9. *See also* Dan Fitzpatrick & Susanne Craig, *Thain Fires Back at Bank of America*,

informed Lewis via telephone that Merrill's pre-tax losses had grown to an estimated $12 billion.[38] BofA's concern was that the "pace of the loss increased so dramatically."[39]

H. December 2008: Government Funding Events

On December 17, Lewis phoned Paulson to inform him that BofA was "strongly considering the [MAE]" – material adverse effect, which is a common clause in merger agreements that enables acquiring companies to avoid closing on an acquisition based on the economic health of the target company[40] – and walking away from the Merrill deal.[41] Paulson asked that Lewis travel to Washington, D.C. to meet with him and Bernanke.[42] Price and Brian Moynihan ("Moynihan"), then BofA General Counsel, accompanied Lewis at this meeting; no outside counsel or advisors accompanied the BofA officers.[43] Price presented Merrill's deteriorating financial condition to the Government.[44] The parties at that meeting discussed MAEs, and a member of Bernanke's staff suggested to Lewis that MAEs "are tough to qualify for."[45] Bernanke was concerned that triggering the MAE clause would negatively impact the entire financial system.[46] BofA obliged the Government's request that BofA, for the time being, "stand down" from using the MAE.[47]

On December 19, the Government spoke with Lewis via conference call. The Government now disagreed outright with

WALL ST. J., Jan. 27, 2009, at A1, A11 (Thain contended that he accurately represented Merrill's financial condition to BofA.). *See also Lewis Dep. Tr.*, *supra* note 36, at 12:16-18.

[38] *Lewis Dep. Tr.*, *supra* note 36, at 9:4-17, 10:7.

[39] *Lewis Dep. Tr.*, *supra* note 36, at 13:18-19.

[40] The MAE clause is discussed at length in Section IV.A.

[41] *Lewis Dep. Tr.*, *supra* note 36, at 34:3-4. *See also* Fitzpatrick et al., *supra* note 37, at A1, A9 ("By then, Merrill's losses had reached almost $21 billion on a pretax basis, roughly equivalent to about $15 billion in net losses, and some of [BofA's] lawyers felt there was sufficient grounds to invoke the legal clause to torpedo the deal.").

[42] *Lewis Dep. Tr.*, *supra* note 36, at 34:8-10.

[43] *Lewis Dep. Tr.*, *supra* note 36, at 38:3-6. *See also Lewis Dep. Tr.*, *supra* note 36, at 41:19-21 ("Q. By the way, was anyone from [BofA outside counsel] Wachtell at the meeting? [Lewis]. No.").

[44] *Lewis Dep. Tr.*, *supra* note 36, at 39:20-40:4.

[45] *Lewis Dep. Tr.*, *supra* note 36, at 41:10-13.

[46] Handwritten Notes from meeting between Lewis, Price, Moynihan, Paulson, & Bernanke (Dec. 17, 2008) Bates Range BOG-BAC-ML-COGR000174, *available at* http://oversight.house.gov/images/stories/documents/20090625160518.PDF ("BB: - exposes system to risk 2 ways – ML – BA . . . TARP pretty fully committed . . . best thing from system point of view to go forward . . . then can address next year if needed b/c no $ available.").

[47] *Lewis Dep. Tr.*, *supra* note 36, at 41:5.

Lewis – BofA had no legal grounds to walk away from Merrill.[48] If BofA walked away from the deal, then the Government would be less willing to provide more funding to BofA.[49] The Government threatened to oust management and directors at BofA.[50] When the Government asked Lewis what BofA would need to close the deal, Lewis requested additional cash and "protection against future losses on Merrill's assets."[51]

On December 22, the Board held a special, telephonic meeting where members of management also participated, but no outside counsel or advisors participated.[52] Lewis stated that the purpose of the meeting was "to insure that the Board is in accord with management's recommendation to complete the acquisition of Merrill [], as scheduled . . . after . . . admonitions of federal regulators."[53] "The Board agreed it would reach a decision that it deemed in the best interest of [BofA] and its shareholders without

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[48] Fitzpatrick et al., *supra* note 37, at A1, A9.

[49] Fitzpatrick et al., *supra* note 37, at A1, A9.

[50] *See* E-mail from Jeffrey Lacker, President, Federal Reserve Bank of Richmond, to Mac Alfriend, Sally Green, Jennifer Burns, & James McAfee, Federal Reserve Bank of Richmond employees, at BOG-BAC-ML-CCOGR-00020 (Dec. 20, 2008, 11:12:00 EST), *available at*: http://groc.edgeboss.net/download/groc/transfer/fed.e-mails.pdf ("Just had a long talk with Ben [Bernanke]. Says they think the [MAE] threat is irrelevant because it's not credible. Also intends to make it even more clear that if they play that card and then need assistance, *management is gone*."(emphasis added)). *See also* Minutes of Meeting of Board of Directors of Bank of America Corporation, December 22, 2008, New York State Attorney General, *In re* Executive Compensation Investigation – Bank of America – Merrill Lynch, Bates Range BAC-ML-NYAG00003873-76, at 2, *available at* http://www.ag.ny.gov/media_center/2009/apr/pdfs/Exhibit%20B%20to%204.23.09%20 letter.pdf (If BofA invoked the MAE, then the government "would remove the Board and management.") [Hereinafter, *Dec. 22 Board Minutes*]. *See also* Fitzpatrick et al., *supra* note 37, at A1, A9.

[51] Fitzpatrick et al., *supra* note 37, at A1, A9 (comparing BofA aid to that of what J.P. Morgan Chase & Co. received when it acquired Bear Stearns).

[52] Dec. 22 Board Minutes, *supra* note 50, at 1.

[53] *Dec. 22 Board Minutes*, *supra* note 50, at 2. Lewis reported on several phone calls with Paulson and Bernanke, the key points of which were:

> (i) first and foremost, the Treasury and Fed are unified in their view that the failure of [BofA] to complete the acquisition of Merrill [] would result in systemic risk to the financial services system in America and would have adverse consequences for [BofA]; (ii) second the Treasury and Fed stated that were [BofA] to invoke the material adverse change ("MAC") clause in the merger agreement with Merrill [] and fail to close the transaction, the *Treasury and Fed would remove the Board and management of [BofA]*; (iii) third, the Treasury and Fed have confirmed they will provide assistance to[BofA] to restore capital and protect [BofA] against the adverse impact of certain Merrill [] assets; and (iv) fourth, the Fed and Treasury stated that the investment and asset protection promised could not be provided by the scheduled closing date of the merger . . .

Dec. 22 Board Minutes, *supra* note 50, at 2 (emphasis added).

regard to this representation by the federal regulators."[54] The minutes show that the Board asked that management contact Paulson to determine how committed the Government was to providing future funding.[55] Later on the 22nd, Lewis e-mailed the Board to inform them that Paulson refused to reduce to writing the terms of the Government's preliminary agreement on future funding.[56] Paulson refused to provide a letter because doing so would require "public disclosure which, of course, [BofA did] not want."[57]

After the December 22 meeting, management participated in numerous telephone calls with Paulson and Bernanke.[58] On December 30, the Board held its next telephonic special meeting; again, members of management participated without outside counsel or advisors.[59] Lewis informed the Board that he told the Government BofA would have triggered the MAE "were it not for . . . the status of the [U.S.] financial services system and the adverse consequences of that situation to [BofA] . . . ."[60] Because the Government refused to provide written assurances to BofA, due to the requirement of subsequent disclosure to the public, BofA received only "detailed oral assurances."[61] Additionally, the Government mandated that BofA lower its dividends to five cents per share.[62] And, if BofA refused the stipulated funding from the Government at that time, only to seek funding later, then the terms of a future cash infusion would be "onerous" to BofA.[63] Paulson and Bernanke were in control, and Lewis and the Board knew that the consequences of standing up to the Government would risk their own jobs and the future of BofA if BofA needed more cash via TARP.

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54 Dec. 22 Board Minutes, *supra* note 50, at 3.

55 Dec. 22 Board Minutes, *supra* note 50, at 4.

56 Tom Ryan e-mail to Ken Lewis, December 22, 2008, New York State Attorney General, *In re* Executive Compensation Investigation – Bank of America – Merrill Lynch, Bates Range BC-ML-NYAG00005730, *available at* http://www.oag.state.ny.us/media_center/2009/apr/pdfs/Exhibit%20D%20to%204.23.09%20letter.pdf.

57 *Id.*

58 Minutes of Meeting of Board of Directors of Bank of America Corporation, December 30, 2008, New York State Attorney General, *In re* Executive Compensation Investigation – Bank of America – Merrill Lynch, Bates Range BAC-ML-NYAG00003877-82, *available at* http://www.ag.ny.gov/media_center/2009/apr/pdfs/Exhibit%20C%20to%204.23.09%20letter.pdf [Hereinafter, *Dec. 30 Board Minutes*].

59 Dec. 30 Board Minutes, *supra* note 58, at 2.

60 Dec. 30 Board Minutes, *supra* note 58, at 2.

61 Dec. 30 Board Minutes, *supra* note 58, at 2-3.

62 Dec. 30 Board Minutes, *supra* note 58, at 4.

63 Dec. 30 Board Minutes, *supra* note 58, at 4.

I. January 2009: Merger-Related Events

On January 2, 2009, BofA announced that it closed the Merger.[64] BofA cut dividends to one cent per share and announced its first quarterly loss since 1991.[65] On January 16, 2009, BofA announced earnings for the fourth quarter of 2008; it posted a $1.79 billion loss, excluding Merrill.[66] Merrill posted a fourth quarter net loss of nearly $15.85 billion.[67] John Thain, Merrill's CEO, resigned on January 22 amidst these losses and public debate over the benefits and perquisites he received while at Merrill.[68]

J. January 2009: Government Funding Events

On January 22, BofA completed an agreement with the Treasury where BofA issued preferred stock to the Treasury in exchange for $20 billion.[69] This agreement, to which BofA and the Government stipulated in December, compensated BofA for completing the Merger.[70] In total, BofA received $45 billion from the Treasury.[71]

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[64] Bank of Am. Corp., Current Report (Form 8-K) Jan. 2, 2009, 4.

[65] Dan Fitzpatrick & Susanne Craig, *Bank of America Goes on Offense*, WALL ST. J., Jan. 17, 2009, at B3.

[66] Bank of Am. Corp., Current Report (Form 8-K) Jan. 22, 2009, 4.

[67] Fitzpatrick & Craig, *supra* note 65, at B3.

[68] Bank of Am. Corp., Current Report (Form 8-K) Jan. 22, 2009, 3; *See also* Dan Fitzpatrick et al., *supra* note 6, at A1, A2.

[69] Bank of Am. Corp., Current Report (Form 8-K) Jan. 22, 2009, 3. In its February 2009 10-K Report for the 2008 fiscal year, BofA stated that "the U.S. [G]overnment agreed to assist in the Merrill [] acquisition by making a further investment in [BofA] of $20.0 billion in preferred stock." Bank of Am. Corp., Annual Report (Form 10-K) Feb. 27, 2009, 52.

[70] *See* Deborah Solomon et al., *U.S. New Plots New Phase in Banking Bailout*, WALL ST. J., Jan. 17, 2009, at A1, A2. Also, on January 9, BofA completed a transaction with the Treasury by which it received $10 billion. This transaction was originally negotiated and achieved by Merrill in October 2008; however, it was deferred pending completion of the Merger. Bank of Am. Corp., Current Report (Form 8-K) Jan. 13, 2009, 4; *See also* FinancialStability.gov, Reports and Documents, TARP Transactions Report 04/17/09, at 3, 7 n.1, *available at* http://financialstability.gov/docs/transaction-reports/transaction_report_04-17-2009.pdf

[71] $15 billion on October 26, 2008. *See supra* note 20 and accompanying text. $10 billion originally allocated to Merrill but delayed pending closing of the Merger and subsequently received by Merrill as a BofA subsidiary on January 9. *See supra* note 66. $20 billion on January 22. *See supra* text accompanying notes 66-68.

K. Events Since January 2009

In early February 2009, the Board reaffirmed its support of Lewis, announcing it would not seek his resignation.[72] But, speculation of an increased Government stake in BofA hurt its share price,[73] causing Lewis to publicly deny that BofA would need future bailout money.[74] Without a positive Government endorsement for BofA, Lewis's tack was to contrast BofA with Citigroup, which also received $45 billion in funds,[75] claiming that BofA was better positioned than Citigroup for a profitable 2009.[76]

Lewis's public statements did little to appease angry shareholders and institutional investors.[77] Change to Win Investment Group ("CtW"), which advises seven pension funds that control 33 million shares of BofA demanded that the Board ask Lewis to resign. CtW sought the resignation of the chair of BofA's corporate governance committee, Thomas Ryan ("Ryan), and the Lead Director, Temple Sloan, Jr. ("Sloan"), in addition to Lewis.[78]

BofA responded to the CtW campaign to remove Lewis, Sloan, and Ryan.[79] BofA defended its due diligence of Merrill

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[72] Dan Fitzpatrick & Susanne Craig, *Lewis Seems to have BofA Board Support*, WALL ST. J., Jan. 28, 2009, at C3.

[73] Dan Fitzpatrick & Susanne Craig, *BofA's Lewis Subpoenaed Over Merrill; Thain Talks*, WALL ST. J., Feb. 20, 2009, at C1.

[74] *See* Dan Fitzpatrick & Susanne Craig, *Merrill's Losses Rise By $500 Million*, WALL ST. J., Feb. 25, 2009, at C7. *See also* Dan Fitzpatrick & Matthias Rieker, *BofA Weighs Sale of Ex-Merrill Unit*, WALL ST. J., Feb. 26, 2009, at C3 ("[BofA] Chairman and Chief Executive Kenneth Lewis has said the company can ride out the financial crisis and doesn't need government aid beyond the $45 billion it already received.").

[75] Dan Fitzpatrick, *BofA's Mantra: We're Not Citigroup*, WALL ST. J., Mar. 10, 2009, at C3. *See also* Steven M. Davidoff, *Short-Term Solutions to Long-Term Problems*, N.Y. TIMES, Mar. 26, 2009, at F8 (noting that the Government can hold up to 36% of an ownership stake in Citigroup).

[76] Dan Fitzpatrick, *supra* note 72, at C3. *See also* Saskia Scholtes & Greg Farrell, *BofA Chief Admits Merrill Aid 'Mistake,'* FINANCIAL TIMES, Mar. 2, 2009 *available at* http://www.ft.com/cms/s/0/50000286-074f-11de-9294-000077b07658.html (BofA's request for government funding was a "'tactical mistake' that made the bank appear as weak as Citigroup . . .").

But, in late March, Moody's downgraded its credit rating of BofA preferred stock to "junk" territory due to concerns that more Government support will be needed. *See* Kerry Grace, *Wells, BofA Ratings Downgraded by Moody's*, WALL ST. J., Mar. 26, 2009, at C3.

[77] *See* Dan Fitzpatrick, *Mr. Finger Pokes at BofA's Lewis*, WALL ST. J., Mar. 13, 2009, at C3. Jerry Finger sued BofA, BofA executives, and BofA directors for violation of federal securities laws in the Southern District of New York. *See also* Complaint at 1, Finger Interests Number One Ltd. v. Bank of Am. Corp. et al., (S.D.N.Y. Jan. 21, 2009) (Case No. 09-CIV-00606). Finger, who owns 1.5 million shares of BofA, sought the resignation of Lewis and two Board members due to the losses from the Merrill acquisition.

[78] Staff, *Group Wants BofA CEO Out*, WALL ST. J., Mar. 6, 2009, at C3.

[79] Bank of Am. Corp., Proxy Statement (Form 14-A) Apr. 14, 2009, 1.

stating that "[a]lthough the process from agreeing on the deal to signing the deal was compressed due to the extraordinary conditions that existed last fall, the reality is that the [diligence] work had been ongoing for a long time."[80] When addressing specific questions regarding the Government's involvement in the transaction, BofA cited ongoing litigation in New York as reason not to respond.[81] However, documents show that Bernanke and Paulson advised Lewis not to disclose Merrill's losses to the public.[82] BofA responded that it "had no legal obligation to disclose ongoing negotiations with the government and disclosure of ongoing negotiations likely would have severely disrupted the financial markets and damaged [BofA]."[83] Lewis responded to frustrated shareholders, in early February, that "[w]e did think we were doing the right thing for the country."[84] However, the Board's explicit objective was not to act in the best interests of the nation. The Board's duty was to BofA and its shareholders.

III. THE BOFA BOARD OF DIRECTORS

A. Board Mission

On December 9, 2008, BofA revised its Corporate Governance Guidelines (the "Guidelines"), which provide:

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[80] *Id.* at 5.

[81] Bank of Am. Corp., Proxy Statement (Form 14-A) Apr. 14, 2009, 6 (Ed O'Keefe, BofA General Counsel, responded that "as to the specifics of those conversations [with the Government], I am not at liberty at this time to discuss them."). *But see* Scholtes & Farrell, *supra* note 76 (BofA's request for government funding was a "'tactical mistake' that made the bank appear as weak as Citigroup . . .").

[82] *See* Tom Ryan e-mail to Ken Lewis, December 22, 2008, New York State Attorney General, *In re* Executive Compensation Investigation – Bank of America – Merrill Lynch, Bates Range BC-ML-NYAG00005730, *available at* http://www.oag.state.ny.us/media_center/2009/apr/pdfs/Exhibit%20D%20to%204.23.09%20letter.pdf. *See also* Liz Rappaport, *Lewis Says U.S. Ordered Silence on Deal*, WALL ST. J., Apr. 23, 2009, at A1-A2.

[83] Rappaport, *supra* note 82, at A1-A2. In mid-December 2008, Merrill issued bonuses on an accelerated basis and allegedly did so without fully disclosing the decision to BofA or shareholders. The issue that triggered the investigation is whether Merrill improperly concealed bonus payouts; in early January 2009, Cuomo subpoenaed management at BofA and Merrill, including Lewis and Thain. *See* Dan Fitzpatrick & Susanne Craig, *Thain's Successor Grapples with Dissatisfaction at BofA*, WALL ST. J., Jan. 30, 2009, at C2.

[84] Dan Fitzpatrick et al., *supra* note 37, at A1, A9. Lewis stated that "the [G]overnment was firmly of the view that terminating or delaying the closing could result in serious systemic harm" to the nation. Dennis Berman, *BofA's Merrill Deal Exposes Myth of Transparency*, WALL ST. J., Jan. 20, 2009, at C3.

> The basic responsibility of the Board of Directors is to oversee the Company's businesses and affairs, exercising reasonable judgment on behalf of the Company. In discharging that obligation, the Board relies on the honesty, integrity, business acumen and experience of the Company's management, as well as its outside advisors[85] and the Company's independent registered public accounting firm.[86]

Directors must attend the Annual Meeting of Stockholders, board meetings, and committee meetings.[87] The Board must prepare adequately for each meeting, and BofA must provide the Board with necessary materials prior to each meeting.[88] The Guidelines provide for director access to management and access to outside legal counsel and advisors at BofA's expense.[89]

B. Board Organization

In addition to his CEO duties, Lewis is also Chairman of the Board.[90] The Guidelines provided for the election of a Lead Director, who must have been independent per New York Stock Exchange ("NYSE") and BofA standards.[91] Sloan[92] was chairperson of the executive committee and had the power to call special meetings of the independent directors at any time.[93] Sloan acted as a "liaison" between the Board and Lewis, a role which

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[85] With respect to the Merrill merger and the MAE issue, the law firm of Wachtell, Lipton, Rosen & Katz, Lipton, Rosen, & Katz acted as outside advisor to BofA. Dan Fitzpatrick et al., *supra* note 37, at A1, A9.

[86] Bank of America Corp., CORPORATE GOVERNANCE GUIDELINES (Dec. 9, 2008), http://media.corporate-ir.net/media_files/irol/71/71595/CorpGov/Corporate_Governance_Guidelines_Revised_12_9_08.pdf , [Hereinafter, *BofA Corporate Governance Guidelines*].

[87] *BofA Corporate Governance Guidelines*, *supra* note 86.

[88] *BofA Corporate Governance Guidelines*, *supra* note 86.

[89] *BofA Corporate Governance Guidelines*, *supra* note 86. The Board is also required to conduct an annual "self-evaluation to determine whether it and its committees are functioning effectively. *Id.*

[90] Bank of America Corp 2008 Annual Report at *see* 2; 192, *available at*: http://media.corporate-ir.net/media_files/irol/71/71595/reports/2008_AR.pdf (stating the Lewis was also CEO and Chairman of the Board).

[91] *BofA Corporate Governance Guidelines*, *supra* note 86.

[92] Bank of America Corp., 2008 Annual Report at 192, *supra* note 90; Bank of America Corp., INVESTOR RELATIONS, FINANCIAL RELEASES (2006), http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-newsArticle&ID=848723&highlight= (stating that Sloan is a director and chair of the executive committee).

[93] *BofA Corporate Governance Guidelines*, *supra* note 86.

crucially includes ensuring that the Board gets key information.[94] Also, the Corporate Governance Committee,[95] must "review and report to the [B]oard on matters of corporate governance[,] defined . . . as the relationships of the [B]oard, the stockholders, and management in determining the . . . performance of [BofA]."[96] With a foundation laid by the Board Guidelines and the Board's organizational structure and allocation of duties to certain members, the Board had the necessary tools and procedures in place to respond to the crisis that the Merrill deal created.

IV. BOFA'S RIGHTS UNDER THE MERGER AGREEMENT & THE BOARD'S DUTIES

A. The BofA & Merrill Merger Agreement: Material Adverse Effect

On September 15, 2008, BofA announced the Merger Agreement (the "Agreement" or the "Merger") with Merrill;[97] the Merger cost BofA approximately $50 billion, through an exchange of .8595 shares of BofA common stock for each share of Merrill common stock.[98] Via a November 3, 2008 Proxy Statement to shareholders, BofA solicited approval of the Merger.[99] The Board unanimously supported the Merger and asked that shareholders vote in its favor.[100]

Under Delaware General Corporation Law (the "DGCL"),[101] to increase the number of authorized shares of common stock, a corporation must amend its certificate of incorporation and submit the proposed amendment to its

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[94] *BofA Corporate Governance Guidelines*, *supra* note 86.

[95] Bank of Am. Corp., Proxy Statement (Form DEFM-14A) Apr. 14, 2009, 7. In addition to Ryan, the Corporate Governance Committee's other members are Gary Countryman, Patricia Mitchell, Charles Rossotti, Temple Sloan, and Meredith Spangler. Bank of America Corp., COMMITTEE COMPOSITION, http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-govcommcomp (last visited Apr. 25, 2009).

[96] Bank of America Corp., CORPORATE GOVERNANCE COMMITTEE CHARTER, *supra* note 95.

[97] Bank of Am. Corp., Current Report (Form 8-K) Sept. 15, 2008, 4.

[98] *Id.* at 7.

[99] Bank of Am. Corp., Proxy Statement (Form 14-A) Nov. 3, 2008, 4.

[100] *Id.* at 5.

[101] BofA is incorporated under the laws of the State of Delaware. *See, e.g.*, Bank of Am. Corp., Quarterly Report (Form 10-Q) Nov. 6, 2008, 1. Therefore, Delaware law controls with respect to the Board's fiduciary duties.

shareholders.[102] BofA's November 3 Proxy Statement announced its intention to amend its certificate of incorporation to increase its authorized shares of common stock from 7.5 billion to 10 billion shares in order to effect the Merger.[103]

In addition to the DGCL, the NYSE Listing Standards[104] required that BofA obtain shareholder approval because the voting power of the stock issued surpassed the threshold set by the NYSE; the NYSE requires a shareholder vote where an issuance of stock exceeds 20% of current, outstanding shares.[105] BofA issued approximately 1.3752 billion shares to effectuate the merger,[106] an increase in common stock of approximately 27%.[107] Thus, the NYSE rules required that BofA submit the proposal to a vote.[108]

1. Precise Language of the Merger Agreement

The crucial language of the Merger Agreement concerning BofA's rights to back out of the Merger appeared in Section 3.8 of Article III of the Agreement, titled "Representations and

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[102] DEL. GEN. CORP. LAW § 242(a)(5) (2008). *See also* DEL. GEN. CORP. LAW 242(b)(1) (2008) ("If the corporation has capital stock, its board of directors shall adopt a resolution setting forth the amendment proposed, declaring its advisability, and . . . a special meeting of the stockholders entitled to vote in respect thereof for the consideration of such amendment . . ."). Whether the Board is legally liable for its acts or failures to act arising of out of the Merger, the DGCL controls. DEL. GEN. CORP. LAW § 141(a) (2008).

[103] Bank of Am. Corp., Proxy Statement (Form 14-A) Nov. 3, 2008, 12. BofA adhered to the DGCL by submitting the proposed amendment for a shareholder vote.

[104] BofA's securities are listed and actively traded on the NYSE. *See* Bank of Am. Corp., Annual Report (Form 10-K) Feb. 27, 2009, 1-2.

[105] *See* NYSE, Inc., Listed Company Manual § 312.03 (c) (1) (May 22, 2007). "Shareholder approval is required prior to the issuance of common stock . . . in any transaction . . . if . . . the common stock has, or will have upon issuance, voting power equal to or in excess of *20 percent of the voting power outstanding before the issuance of such stock or of securities convertible into or exercisable for common stock . . . .*" *Id.* (emphasis added).

[106] BofA exchanged 1.6 billion shares of Merrill Lynch common stock at an exchange ratio of 0.8595; thus, .8595 of 1.6 billion represents of 1.3752 billion of newly issued BofA shares of common stock. Bank of Am. Corp., Annual Report (Form 10-K) Feb. 27, 2009, 124.

[107] Prior to the issuance of common stock to close the merger, at the close of the 2008 third-quarter, there were approximately 5.017 billion outstanding shares of BofA common stock. Bank of Am. Corp., Quarterly Report (Form 10-Q) Nov. 6, 2008, 1. 1,375,200,000 divided by 5,017,579,321 equals .27407, or 27.4 %. *See also* Bank of Am. Corp., Proxy Statement (Form 14-A) Nov. 3, 2008, 12.

[108] BofA issued stock in order to effectuate a triangular merger, wherein the acquiror, BofA, formed a wholly owned subsidiary into which Merrill would merge. BofA "propos[ed] the merger of [Merrill] with MER Merger Corporation, . . . which is a newly formed wholly owned subsidiary of [BofA]." Bank of Am. Corp., Proxy Statement (Form 14-A) Nov. 3, 2008, 5. *See also* Arthur R. Pinto & Douglas M. Branson, UNDERSTANDING CORPORATE LAW 135-36 (LexisNexis 2004) (describing basic framework of a triangular merger).

Warranties of Company."[109] To best understand Section 3.8, it must be read in the context of other provisions that defined key terms and obligations. Section 3.8, titled "Absence of Certain Changes or Events," stated:

> (a) Since June 27, 2008, no event or events have occurred that have had or would reasonably be expected to have, either individually or in the aggregate, a Material Adverse Effect on Company. As used in this Agreement, the term "Material Adverse Effect" means, with respect to [BofA] or [Merrill], as the case may be, ***a** material adverse effect on (i) the financial condition, results of operations or business of such party and its Subsidiaries taken as a whole* (provided, however, that, with respect to clause (i), a "Material Adverse Effect" shall not be deemed to include effects to the extent resulting from (A) changes, after the date hereof, in GAAP or regulatory accounting requirements . . . , (B) changes, after the date hereof, in laws, rules, regulations or the interpretation of laws, rules or regulations by Governmental Authorities . . . , (C) actions or omissions taken with the prior written consent of the other party or expressly required by this Agreement, (D) *changes in global*, national or regional political conditions (including acts of terrorism or war) or *general business, economic or market conditions*, including changes generally in . . . credit markets and price levels or trading volumes in the United States or foreign securities markets, in each case generally affecting the industries in which such party or its Subsidiaries operate . . .[110]

[109] Bank of Am. Corp., Proxy Statement (Form 14-A) Nov. 3, 2008, A-13.

[110] *Id.* (emphasis added). This last carve out, (D), is notable because it precludes either party from asserting cause for invoking the MAE due to industry-wide and economy-wide downturns. If BofA were solely to rely on the fact that the recession of late 2008 and 2009 were cause for invoking the MAE, BofA's argument would fail because such a downturn would be a "change[] in . . . general business, economic or market conditions . . . ." *Id.*

In Section 7.2(a), Merrill agreed that the "Representations and Warranties" would be true not only on the date of the Agreement – September 15 – but on the date that the Merger closed:

> Subject to the standard set forth in Section 9.2,[111] the representations and warranties of [Merrill] set forth in this Agreement shall be true and correct as of *the date of this Agreement and as of the Effective Time as though made on and as of the Effective Time* (except that representations and warranties that by their terms speak specifically as of the date of this Agreement or another date shall be true and correct as of such date); and [BofA] shall have received a certificate signed on behalf of [Merrill] by the Chief Executive Officer or the Chief Financial Officer of [Merrill] to the foregoing effect.[112]

Section 7.2(b), "Performance of Obligations of [Merrill]," mandated that Merrill's CEO or CFO certify the warranty that Merrill met its duties under the Agreement "at or prior to the Effective Time."[113] Section 1.2, "Effective Time," stated:

> The Merger shall become effective as set forth in the certificate of merger (the "Certificate of Merger") that shall be filed with the Secretary of State of the State of Delaware on the Closing Date.

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[111] Section 9.2 of the Agreement stated the applicable standard by which to evaluate Section 7.2(a):

> *No representation or warranty of [Merrill] contained in Article III . . . shall be deemed untrue, inaccurate or incorrect* for any purpose under this Agreement, and no party hereto shall be deemed to have breached a representation or warranty for any purpose under this Agreement, in any case as a consequence of the existence or absence of any fact, circumstance or event *unless such fact, circumstance or event, individually or when taken together with all other facts, circumstances or events inconsistent with any representations or warranties contained in Article III, in the case of [Merrill] . . . has had or would reasonably be expected to have a Material Adverse Effect* with respect to [Merrill] . . . .

Id. at A-43 (emphasis added).

[112] *Id.* at A-40 (emphasis added). Section 7.2(b), "Performance of Obligations of [Merrill]," mandated that Merrill's CEO or CFO certify the warranty that Merrill met its duties under the Agreement. *See Id.* at A-40.

[113] *Id.* at A-40 ("[BofA] shall have received a certificate signed on behalf of [Merrill] by the Chief Executive Officer or the Chief Financial Officer of [Merrill] to such effect.") .

> The term "Effective Time" shall be the date and time when the Merger becomes effective as set forth in the Certificate of Merger.[114]

BofA announced the Merger's completion as December 31, 2008; hence, that date is the "Effective Time" pursuant to Section 1.2.[115] Section 8.1 discussed "Termination" of the Agreement; it stated:

> This Agreement may be terminated at *any time prior* to the Effective Time, . . . (d) by either [Merrill] or [BofA] (provided that the terminating party is not then in material breach of any representation, warranty, covenant or other agreement contained herein), if there shall have been a breach of any of the covenants or agreements or any of the representations or warranties set forth in this Agreement on the part of [Merrill], in the case of a termination by [BofA] . . . which breach . . . would result in, if occurring or continuing on the Closing Date, *the failure of the conditions set forth in Section 7.2* or 7.3, as the case may be, and which is not cured within 30 days following written notice to the party committing such breach or by its nature or timing cannot be cured within such time period . . . .[116]

Together, these provisions meant that because Merrill represented that it had *not* experienced a MAE after June 27, 2008, BofA could have terminated the Agreement prior to December 31, 2008, the "Effective Time", if Merrill *did* experience a MAE. Section 3.8 set out the basic warranty that no MAE had occurred since June 27, 2008. Sub-sections 7.2(a) and (b) bolstered Section 3.8 because Merrill management certified that no MAE would occur through the effective time of the Merger. And, Section 1.2 described the effective time as the closing date of December 31, 2008, which was confirmed via a BofA 8-K filing. Finally, Section 8.1 held that

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[114] *Id.* A-1. The Certificate of Merger, under DGCL Section 252(c), which references Section 251, is to be filed with the Secretary of State of the State of Delaware on the date the merger is effective. *See* DEL. GEN. CORP. LAW §§ 251, 252(c) (2008).

[115] Bank of Am. Corp., Current Report (Form 8-K) Jan. 2, 2009.

[116] Bank of Am. Corp., Proxy Statement (Form 14-A) Nov. 3, 2008, A40-41 (emphasis added).

a breach of any warranty by Merrill, including the MAE clause, would allow for BofA to terminate the Merger Agreement.

2. Tyson v. IBP*: Delaware Case Law on MAEs Requires Prolonged Losses Where the Acquiring Company is a Strategic Buyer*

Any legal argument that BofA would have made in support of backing out of the Merger would have not only relied on the language of the Agreement but would have also relied the legal precedent set by *In re IBP, Inc. Shareholders Litigation* (the "*Tyson*" case).[117] In *Tyson*, the Delaware Court of Chancery addressed whether a strategic acquiror may terminate a merger agreement if the target company's financial results breached a MAE.[118] Tyson Foods ("Tyson") placed the winning bid to acquire IBP, Inc. ("IBP") in a heated auction. During the bidding process, Tyson ignored information that foreshadowed significant financial problems with an IBP subsidiary.[119] And, industry-wide forecasts suggested that all firms in Tyson's and IBP's sector – producers of beef, poultry, and pork – would experience losses due to severe winter weather.[120]

After the contentious auction process in fall 2000, Tyson and IBP signed the merger agreement in early January 2001. Two weeks later, Tyson shareholders ratified the acquisition.[121] On March 29, 2001, Tyson announced it was terminating its agreement to acquire IBP citing, among other reasons, financial restatements at both IBP and an IBP subsidiary as cause to invoke the MAE clause in the merger agreement.[122] IBP sued Tyson seeking specific performance of the merger agreement one day after Tyson's March 29th announcement.[123]

The Tyson-IBP agreement defined a MAE as "any event, occurrence or development of a state of circumstances or facts which has had or reasonably could be expected to have a Material

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[117] *In re* IBP S'holders Litig., 789 A.2d 14 (Del. Ch. 2001). This 2001 decision is the "seminal" authority with respect to analysis of MAEs. *See* Jonathan M. Grech, *"Opting Out" Defining Material Adverse Change Clause in a Volatile Economy,"* 52 EMORY L.J. 1483, 1506-07 (2003).

[118] Grech, *supra*, note 117.

[119] *In re* IBP S'holders Litig., 789 A.2d 14, 22 (Del. Ch. 2001).

[120] *Id.*

[121] *Id.* at 44.

[122] *Id.* at 50-51. *See also id.* at 65 ("Tyson claims that it is virtually indisputable that the combination of these factors amounts to a [MAE].").

[123] *Id.* at 51.

Adverse Effect . . . on the condition (financial or otherwise), business, assets, liabilities or results of operations of [IBP] and [its] Subsidiaries taken as whole."[124] There were no express exclusions from this broad language in the agreement.[125] IBP represented that its liabilities and financial risks were fully disclosed in pertinent SEC filings.[126]

Tyson argued that it ought to be permitted to terminate the merger with IBP "because IBP had breached . . . the [a]greement, which is a representation and warranty that IBP had not suffered a [MAE] since the 'Balance Sheet Date' of December 25, 1999."[127] The text of the merger agreement dictated that the court consider whether a MAE had occurred since, and in comparison to, the December 25, 1999 condition of IBP, as IBP had warranted its financial condition to be on that date.[128] The court stated that this approach – comparing IBP's representations in the agreement with its actual financial condition as of December 25, 1999 – made "commercial sense because it establishe[d] a baseline that roughly reflect[ed] the status of IBP as Tyson indisputably knew [IBP] at the time of signing the [m]erger [a]greement."[129]

The court settled on a standard of evaluation that examined the target's projected performance over a period of years, not months.[130] The court placed the burden on the acquiror that invoked the MAE seeking to unwind the merger agreement.[131]

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[124] *Id.* at 65.

[125] *Id.* at 66. This lack of exclusions is in contrast to the four types of exclusions in the BofA-Merrill Agreement.

[126] *Id.* at 40.

[127] *Id.* at 65.

[128] *Id.* at 66 (The merger agreement "require[d] the court to examine whether a MAE ha[d] occurred against the December 25, 1999 condition of IBP as adjusted by the specific by the specific disclosures of the Warranted Financials and the [a]greement itself.").

[129] *Id.*

[130] *Id.* at 67.

> To a short-term speculator, the failure of a company to meet analysts' projected earnings for a quarter could be highly material. Such a failure is less important to an acquiror who seeks to purchase the company as part of a long term strategy. To such an acquiror, the important thing is whether the company has suffered a [MAE] in its business or results of operations that is consequential to the company's earnings power over a commercially reasonable period, which one would think would be measured in years rather than months. *It is odd to think that a strategic buyer would view a short-term blip in earnings as material, so long as the target's earnings-generating potential is not materially affected by that blip or the blip's cause.*

Id. (internal citations omitted) (emphasis added).

[131] *Id.* at 67-68. That Tyson was a strategic buyer is significant because, as an acquiror, Tyson's focus ought to have been on long profits derived from IBP after the acquisition. *Id.* Delaware courts use "standard of the 'reasonable buyer' in the acquirer's actual shoes, in pursuit of

The court held that the acquiror must make a "strong showing" that the target company experienced events which rise to the level of a *material* adverse impact on the target's revenues for years, not months.[132]

Tyson failed to carry its burden to show that from the "perspective of a reasonable acquiror"[133] IBP suffered such a MAE.[134] Citing Tyson's own reliance on analyst projections for IBP – projections that eventually saw long term profits for IBP – the court rejected Tyson's claims.[135] Further, the court relied on IBP's historical financial figures. These figures represented "a company that is consistently profitable, but subject to strong swings in annual . . . net earnings."[136] These facts led to the court's conclusion that IBP, while damaged by short-term losses, had a positive long term financial prognosis.[137] After *Tyson*, Delaware courts consider the prolonged impact of the claimed MAE on the target company's revenues to determine whether a target company sustained a MAE.[138]

3. Tyson *Applied: BofA Should Have Walked Away*

In December 2008, BofA believed that Merrill's losses were severe and would extend indefinitely into the future, enough that BofA felt it could invoke the MAE clause of the Agreement. Lewis suggested to Bernanke and Paulson on December 17 that BofA might terminate the Agreement, but two days later, Bernanke and Paulson rebuffed this move and insisted that BofA consummate the Merger.[139] The Agreement defined MAE as "a material adverse effect on *(i) the financial condition, results of operations or business of such party and its Subsidiaries taken as a*

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the acquirer's actual goals as the court sees them . . . . Tyson . . . [was] pursuing a strategic move rather than a short-term opportunity. This informed the court's analysis of whether a sharp decline in IBP's earnings was material . . ." Yair Y. Galil, *MAC Clauses in a Materially Adversely Changed Economy*, 2002 COLUM. BUS. L. REV. 846, 853 (2002) (citing *In re* IBP S'holders Litig., 789 A.2d at 68).

[132] *In re* IBP S'holders Litig., 789 A.2d at 68 (Del. Ch. 2001).

[133] *Id.*

[134] *Id.* at 71.

[135] *Id.*

[136] *Id.* at 67.

[137] *Id.*

[138] Other courts and decisions have applied the legal framework and analysis from *Tyson*. *See, e.g.*, IBP, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 299 F. Supp. 2d 1024, 1025 (D. S.D. 2003); Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 738 (Del. Ch. 2008).

[139] Dan Fitzpatrick et al., *supra* note 37, at A1, A9.

whole."[140] This language was similar to the *Tyson* MAE.[141] In order for Merrill to have sustained a MAE, material and adverse impacts on its financial condition must have occurred since June 27, 2008, the baseline date established in Section 3.8(a) of the Agreement. *Tyson* also established a baseline date from which to begin analysis of the target's financial condition.[142] However, unlike *Tyson,* if Merrill's MAE resulted from four categorical exclusions, BofA was precluded from invoking the MAE. These exclusions barred BofA's reliance on certain circumstances as cause to invoke the MAE.[143]

Finally, the material and adverse effects on Merrill's financial results could not constitute a MAE if they amounted only to short-term "blip;"[144] instead, Merrill must have been expected to accrue severe losses years into the future.[145] In *Tyson,* the court's ruling ultimately rested on the fact that IBP would eventually return to profit, and thus Tyson could not rely on the MAE as a way out of the merger.[146] Only if BofA proved that Merrill's losses would rise over years would BofA have successfully relied on the MAE. Applying *Tyson* to BofA's predicament, a court might have found that BofA was justified to walk away; on the other hand, court might not have done so if the matter had ever gone to judgment.[147] Still, BofA might have settled Merrill lawsuits after BofA invoked the MAE;[148] any settlement would likely have been considered a victory for BofA and its shareholders.

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[140] Bank of Am. Corp., Definitive Proxy Statement (Form DEFM14-A), at A-13 (Nov. 3, 2008) (emphasis added). Notably, the IBP-Tyson agreement did not include categorical events, such as the global political climate or market conditions, as being expressly excluded as cause for termination. *See In re IBP, Inc.S'holders Litig.*, 789 A.2d at 65-66 ("Although many merger contracts contain specific exclusion from MAE clauses that cover declines in the overall economy or the relevant industry sector, or adverse weather or market conditions, § 5.10 [of the IBP-Tyson agreement] is unqualified by such express exclusions.") (footnote omitted).

[141] *See In re IBP, Inc. S'holders Litig.*, 789 A.2d at 44, 65.

[142] *See id.* and *supra* text accompanying notes 140-42.

[143] *See supra* text accompanying note 107.

[144] *In re IBP, Inc. S'holders Litig.*, 789 A.2d at 67.

[145] *Cf. id.*

[146] *Id.*

[147] *See* Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 738 (Del. Ch. 2008) ("Many commentators have noted that Delaware courts have never found a material adverse effect to have occurred in the context of a merger agreement.").

[148] BofA and its outside counsel expected Merrill to sue BofA should BofA back out of the deal. E-mail from Eric Roth, Partner at Wachtell, Lipton, Rosen & Katz, to Brian Moynihan, General Counsel at Bank of America, Bates Range BAC-ML-HOGR-00000917-921 (Dec. 19, 2008 1:48 AM GMT) (on file with author) ("But if we do terminate the Merger Agreement, we can expect [Merrill] to initiate litigation.").

a. Like Tyson, BofA Was a Strategic Buyer

Tyson was a "strategic buyer"[149] that sought to acquire IBP in hopes to "create the world's preeminent meat products company–a company that would dominate meat cases of supermarkets in the United States and eventually throughout the globe."[150] The threshold question in comparing Tyson with BofA is whether BofA was indeed the "strategic buyer."[151] That undoubtedly is the case with BofA. In September 2008, in its 8-K that announced the Merger, BofA led with the headline "Bank of America Buys Merrill Lynch Creating Unique Financial Services Firm."[152] Lewis remarked that "[a]cquiring one of the premier wealth management, capital markets, and advisory companies is a great opportunity for our shareholders . . . . *Together, our companies are more valuable because of the synergies in our business*."[153]

Tyson and IBP planned to achieve synergies by way of Tyson's dominance in the poultry business and IBP's dominance in the pork and beef businesses.[154] Similarly, BofA and Merrill planned to achieve synergies because BofA specialized in retail and commercial banking services,[155] while Merrill specialized in offering investment banking services and wealth management services.[156] These two financial institutions, combined under the BofA name, formed "the number one underwriter of global high yield debt, the third largest underwriter of global equity and the ninth largest adviser on global mergers and acquisitions based on first half of 2008 results."[157] BofA was to be a financial powerhouse after its acquisition of Merrill.

[149] *In re IBP, Inc. S'holders Litig.*, 789 A.2d at 67.

[150] *Id.*

[151] *Id.*

[152] Bank of Am. Corp., Current Report (Form 8-K) at 7 (Sept. 15, 2008).

[153] *Id.* (emphasis added).

[154] 789 A.2d at 22.

[155] Bank of Am. Corp., Current Report (Form 8-K) at 7 (Sept. 15, 2008).

[156] *Id.* (By adding Merrill Lynch's more than 16,000 financial advisers, [BofA] would have the largest brokerage in the world with more than 20,000 advisers and $2.5 trillion in client assets.").

[157] Bank of Am. Corp., Current Report (Form 8-K) at 8 (Sept. 15, 2008) (based on *pro forma* results).

b. Losses Were Long-Term: Merrill Would Fold Without BofA

In contrast to IBP, Merrill's catastrophic losses in late 2008 were long-term and not likely to rebound at any point after the fourth quarter of 2008. As of mid-December, BofA was aware that Merrill sustained approximately $12 to $13 billion in pre-tax losses in the fourth quarter of 2008.[158] That figure grew to $15.85 billion.[159] The *Tyson* requirement that the target firm's losses be of a prolonged duration would have been met – Merrill would have been forced to file for Chapter 11 bankruptcy protection had BofA not stepped in.[160]

In contrast, the *Tyson* court's conclusion that Tyson could not rely on the MAE clause to terminate the IBP merger rested on the fact that IBP's financial condition would soon improve. A more apt comparison to the BofA-Merrill situation is the Enron-Dynegy case. In November 2001, Dynegy Inc. agreed to purchase the Enron Corporation.[161] Dynegy walked away from the deal, claiming that Enron misrepresented its financial condition.[162] Enron alleged that, by walking away, Dynegy caused it to file for bankruptcy and sought $10 billion in damages in an adversary complaint filed concurrently with its Chapter 11 Petition.[163] In defense, Dynegy relied on "the material adverse change (MAC) provision of the agreement."[164] Dynegy cited an Enron debt obligation for approximately $690 million as the impetus to walk away from the acquisition.[165] Dynegy settled the adversary dispute with Enron for $88 million.[166]

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[158] Fitzpatrick et al., *supra* note 37, at A1, A9.

[159] Fitzpatrick & Craig, *supra* note 74, at C7.

[160] *See, e.g.*, Julie Creswell & Louise Story, *A Sudden End to Merrill Lynch Chief's Charmed Rise*, INTERNATIONAL HERALD TRIBUNE (New York), Jan. 24, 2009, at 13 (Merrill's former CEO, Thain, kept "'Mother Merrill' from following Lehman Brothers into bankruptcy."). *See also* Rich Schapiro, *Street Fears Lehman Tsunami*, N.Y. DAILY NEWS, Sept. 15, 2008, at 5 (noting that "Lehman Brothers' apparent bankruptcy made Merrill . . . especially vulnerable").

[161] Martin Sikora, *Dynegy / Enron Suit Hinges on MAC Clause*, MERGERS & ACQUISITIONS JOURNAL, Mar. 1, 2002.

[162] *Id.*

[163] *Id. See also In re* Enron Corp., 292 B.R. 507, 509-10 (Bankr. S.D.N.Y. 2002).

[164] Sikora, *supra* note 161. MACs and MAEs are intuitively similar provisions and protect companies in a similar fashion. *See, e.g.*, Alana Zerbe, *The Material Adverse Effect Provision: Multiple Interpretations & Surprising Remedies*, 22 J.L. & COM. 17, 19 (2002).

[165] Sikora, *supra* note 161.

[166] *In re* Enron Corp., Case No. 02-CIV-8489 (AKH), 2003 WL 230838, at *1-*3, (S.D.N.Y. Jan. 31, 2003) ("Pursuant to the Settlement Agreement, Dynegy was to pay Enron $88

Enron and Merrill were distressed target corporations when they reached agreements to be acquired by stable corporations. When Dynegy announced that it would terminate the merger with Enron on November 28, 2001, Enron filed for Chapter 11 protection, on December 2.[167] In the interim period of four days, credit ratings agencies downgraded Enron to "'junk' status."[168] Implicit in the Government's compulsion of BofA to close the deal was the fact that Merrill's losses were so severe that had it not been acquired by BofA it would collapse. Bernanke and Paulson warned BofA "that abandoning the deal would be a death sentence for Merrill."[169]

Like Dynegy and Enron, had BofA walked away from Merrill, Merrill's collapse and bankruptcy would have quickly materialized – much like Lehman Brothers in September 2008.[170] A target corporation, like Merrill, meets the *Tyson* requirement of an extended duration of a negative financial condition. Merrill teetered on the edge of failure due to its severe losses. Merrill would have been forced to file for Chapter 11 protection absent the Government's insistence that BofA acquire Merrill.[171] Merrill's

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million in settlement, and Dynegy and Enron released and discharged their respective claims against each other.").

[167] *In re* Enron Corp., 292 B.R. at 507.

[168] *Id.*

[169] Fitzpatrick et al., *supra* note 37, at A1, A9.

[170] Louise Story & Ben White, *The Road to Lehman's Failure was Littered with Lost Chances*, N.Y. TIMES, Oct. 6, 2008, at B1. *See also* Louise Story, *Merrill Reports Its Fifth Quarterly Loss*, N.Y. TIMES, Oct. 17, 2008, at A1 ("It was widely expected that Merrill would be the next investment bank to collapse after Lehman, and Merrill's stock and credit were under attack in the markets."). BofA was even contemplating acquiring Lehman, but when BofA shifted its focus to Merrill, Lewhman was left without a suitor. Story & White, *supra*, at B1 ("By the weekend of Sept. 14-15, most Lehman workers knew the firm's days as an independent bank were over. [The Lehman CEO] continued fevered deal talks with [BofA] and Barclays, but both banks dropped out by the end of the weekend. Meanwhile, Wall Street executives at the Federal Reserve Bank of New York quickly shifted conversations from preventing a bankruptcy of Lehman to dealing with its consequences."). And, like Enron, Lehman filed for Chapter 11 bankruptcy protection almost immediately after its potential acquirer walked. Yalman Onaran & Christopher Scinta, *Lehman Files Biggest Bankruptcy Case as Suitors Balk*, BLOOMBERG.COM, Sept. 15, 2008, http://www.bloomberg.com/apps/news?sid=awh5hRyXkvs4&pid=20601087. *See also In re* Lehman Bros. Holdings Inc., Case No. 08-13555 (JMP), 2008 WL 4902179, at *1 (Bankr. S.D.N.Y. Nov. 1, 2008) (order regarding workers compensation benefits).

[171] Fitzpatrick et al., *supra* note 37, at A1, A9. The Federal Reserve Board of Governors even compared Merrill to Lehman in December 2008. *See* Talking points for BankAmerica Discussion (Dec. 21, 2008), Bates Range BOG-BAC-ML-COGR-00027-00029, at 1, *available at* http://oversight.house.gov/images/stories/documents/20090625093832.pdf ("The public assertion of the [MAE], however, would likely cause the demise of [Merrill] in much the same fashion as the collapse of Lehman.").

problems were not a short-term "blip,"[172] rather, the grim reaper of banking had knocked on its door.

Given the significant and deteriorating condition of Merrill, had Lewis or the Board opposed the Government and moved forward with terminating the Merger, then *Tyson* would have supported BofA. Undoubtedly, Merrill would have sued BofA for damages, as Enron sued Dynegy. Yet, Enron and Dynegy settled for $88 million, only 8.8% the amount of damages that Enron claimed.[173] While a suit from Merrill was definite, given the relative success of Dynegy, BofA and the Board could have expected a better result for its share price and its shareholders had it walked away and ultimately settled a Merrill lawsuit rather than closing the merger.

c. Wrapping Up the Tyson Comparison: MAE Carve-Outs

While the carve-outs in the BofA-Merrill MAE counter an argument in support of the MAE, those exceptions ultimately would not defeat the MAE. Section 3.8(a) of the Agreement prevented BofA from relying on the MAE if such reliance was based on one of four excluded circumstances.[174] One of the four exclusions was "changes in . . . economic or market conditions, including changes generally in . . . credit markets and price levels or trading volumes in the United States."[175] For BofA and its Board to have succeeded with the MAE, they must have been able to demonstrate that Merrill's losses were not caused by systemic problems in the credit markets. Instead, Merrill's problems must have been unique to its business and portfolio of assets. If not, then BofA's reliance on the MAE would have failed in court.

In January 2009, BofA attributed the Merrill losses to "severe capital markets dislocations," potentially negating conjecture that BofA would have prevailed when relying on the

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172 *In re IBP, Inc. S'holders Litig.*, 789 A.2d at 67.

173 The losses that spurred Dynegy to walk away from Enron were only $690 million compared to the $15.85 billion dollar loss with which Merrill was saddled. That the magnitude of the Enron-Dynegy figures were considerably smaller than those at issue in BofA-Merrill supports the chances that BofA could have achieved a modest settlement mitigating its ultimate losses. However, this comparison is made with no weight or percentages available to determine the relative impact of each respective target company's losses.

174 Bank of Am. Corp., Proxy Statement (Form 14-A) Nov. 3, 2008, at A-13.

175 *Id.*

MAE.[176] This language mirrored one of the exclusions Section 3.8(a) set forth.[177] Yet, this provision of the Agreement was an exclusion. Affording too much strength to the change-in-credit-markets exclusion would nullify the MAE because credit markets were already tumultuous when BofA and Merrill entered into the Agreement.[178] The sophisticated parties that drafted the Agreement would not have allowed for an exclusion to negate the entire MAE.

BofA specifically attributed portions of the Merrill losses to "credit valuation adjustments . . . goodwill impairments . . . leveraged loan writedowns . . . [and] commercial real estate writedowns."[179] While some of these factors dealt with changes in the credit markets, not all did. The negative impact from goodwill impairments, leveraged loan writedowns, and commercial real estate writedowns added up to $5.84 billion.[180] Reports also suggest that the credit markets during December were relatively "calmer than they were in October and November."[181] That considerable losses were not caused by changes in the credit markets bolsters the conclusion that, had BofA relied on the MAE, it would not have been precluded by that exclusion. While the change-in-credit-markets exclusion gives pause when considering how successful BofA's use of the MAE would have been, that exclusion alone would not have defeated BofA in court. Still, while BofA had considerable support from *Tyson* and the facts of Merrill's losses, a court would not have granted a request by BofA that, based on *Tyson* and the MAE, it be granted a declaratory

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[176] Bank of Am. Corp., Current Report (Form 8-K) Jan. 16, 2009, Ex. 99.1. Further, that the merger already closed and the effective date had passed makes invocation of the MAE clause impossible.

[177] *See supra* text accompanying notes 170-71.

[178] *See* Paul Krugman, *Crisis Endgame*, N.Y. TIMES, Sept. 19, 2008, at A19 (noting that the "real shock after the feds failed to bailout Lehman Brothers wasn't the plunge in the Dow, it was the reaction in the credit markets"). *See generally,* David Leonhart, *Top Priority is Stabilizing the Patient*, N.Y. TIMES, Nov. 6, 2008, at B1. *See also* Keith Bradsher & Carter Dougherty, *Economic Uncertainty Spreads*, N.Y. TIMES, Oct. 11, 2008, at B1.

[179] Bank of Am. Corp., Current Report (Form 8-K) Jan. 16, 2009, at 13. BofA described these and one other factor, writedowns in the U.S. Bank Investment Securities Portfolio, as "negative fourth-quarter items for Merrill []." *Id.* In total, the sum of losses associated with these factors totaled $9.74 billion. *Id.*

[180] *Id.*

[181] Shawn Tully, *Divorce Bank of America Style*, FORTUNE, Feb. 16, 2009, at 70 (noting that $3.2 billion in Merrill losses were derived from "correlation trades" where bond prices fell greater than the credit default swaps insuring those bonds increased, causing investors to dump their swap investments rapidly). "[M]ystery still shrouds the epic write-downs . . ." *Id.*

judgment permitting it to back out of the Merger.[182] Like Enron and Dynegy, BofA and Merrill would have likely reached a settlement – the MAE, its provisions, and its exclusions would have influenced the terms of that settlement.[183]

4. *The Board Did Not Breach Its Duty of Care*

A publicly-traded corporation's directors, like BofA, owe distinct fiduciary duties to shareholders,[184] including care and loyalty, which implicate a corollary duty of good faith.[185] But, the business judgment rule ("BJR") protects directors with a presumption that "limits courts in questioning business decisions. The focus of any judicial inquiry will usually be on the decision making *process* not the decision,"[186] decisions including whether

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[182] *See Hexion*, 965 A.2d at 762-63 (denying strategic buyer's request that MAE prevent merger even where buyer's expert witnesses testified that the combined entity would be insolvent). BofA's own lawyers were well aware that "no Delaware court has ever found that a MAC occurred permitting an acquiror to terminate a merger agreement." E-mail from Eric Roth, Partner at Wachtell, Lipton, Rosen & Katz, to Brian Moynihan, General Counsel at Bank of America, Bates Range BAC-ML-HOGR-00000917-921 (Dec. 19, 2008 1:48 AM GMT) (on file with author).

[183] Documents released detail the discussions between Wachtell, Lipton, Rosen & Katz and BofA addressing the strength of BofA's MAE argument. *See*E-mail from Eric Roth, Partner at Wachtell, Lipton, Rosen & Katz, to Brian Moynihan, General Counsel at Bank of America, Bates Range BAC-ML-HOGR-00000917-921 (Dec. 19, 2008 1:48 AM GMT) (on file with author). Despite admitted flaws in the argument to back out, on December 21, when Lewis spoke to Paulson, Lewis still held "the view that there has been a MAC at Merrill – and every day their numbers get worse." E-mail from Nicholas Demmo, Partner at Wachtell, Lipton, Rosen & Katz, to Price and Brian Moynihan, BofA General Counsel, Bates Range BAC-ML-HOGR-00000940-942 (Dec. 21, 2008 12:06 AM GMT) (on file with author).

[184] *See, e.g.*, *In re* Citigroup S'holder Derivative Litig., 964 A.2d 106, 114-16, n.6 (Del. Ch. 2009); *In re* Transkaryotic Therapies Inc., 954 A.2d 346, 357 n.20 (Del. Ch. 2008) (quoting Malpiede v. Towson, 780 A.2d 1075, 1086 (Del. 2001)). *See also* Pinto & Branson, *supra* note 108, at 199 ("In the corporate context, directors and officers are in a fiduciary relationship to their corporation and to the shareholders.").

[185] Pinto & Branson, *supra* note 108, at 200. Delaware courts have held that "the obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty. Only the latter two duties, where violated, may directly result in liability . . . ." Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

[186] Pinto & Branson, *supra* note 108, at 200. *See also* D. Gordon Smith & Cynthia A. Williams, BUSINESS ORGANIZATIONS: CASE, PROBLEMS, & CASE STUDIES 502 (Aspen Publishers 2008) ("The fact is that liability is rarely imposed upon corporate directors or officers simply for bad judgment and this reluctance to impose liability for unsuccessful business decisions has been doctrinally labeled the business judgment rule.") (quoting Joy v. North, 692 F.2d 880, 885 (2d Cir. 1982)).

to acquire another corporation[187] and whether to approve an executive's compensation.[188]

a. The Presumption of the Business Judgment Rule Protects the Board

The BJR presumes that directors acted on informed basis, in good faith, and with the honest belief that their actions were in the best interest of the corporation.[189] If shareholder plaintiffs allege that a board violated the duty of care, plaintiffs must rebut the presumptions of the BJR.[190] Rarely do plaintiffs prevail with allegations that a board violated its duty of care.[191]

Delaware case law applying the BJR extensively protects the decisions of boards of directors faced with claims that they violated their fiduciary duty of care.[192] "In the absence of facts showing self-dealing or improper motive, a corporate officer or director is not legally responsible to the corporation for losses that may be suffered as a result of a decision that an officer made or that directors authorized in good faith."[193] In the rare instance that a Delaware court found a board liable, that board acted in a *grossly* negligent manner.[194] The BofA Board did not act grossly negligent regarding the Merger.

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[187] *See, e.g., In re* Wheelabrator Techs. Inc. S'holders Litig., Case No. 11495, 1992 WL 212595, at *1 (Del. Ch. June 1, 1992) (adjudicating shareholder complaint challenging proposed merger filed against board of directors).

[188] *See, e.g., In re* The Walt Disney Co. Deriv. Litig., 907 A.2d 693, 697 (Del. Ch. 2005) (adjudicating shareholder derivative complaint against director defendants arising out of hiring and firing of president of company).

[189] *See, e.g.,* Kahn v. Sullivan, 594 A.2d 48 (Del. 1992). *See also* Van Gorkum at 858 (Del. 1985) (*en banc*) (with respect to issue of "on an informed basis" a gross negligence standard applies to *actions* of board).

[190] *See generally Van Gorkum*, 488 A.2d 858.

[191] *See* Smith & Williams, *supra* note 186, at 502 ("The potential liability risk from a breach of this duty is near zero in the corporate context, however, because of a powerful effect of the 'business judgment rule.'").

[192] *See, e.g.,* Gagliardi v. Tri-Foods International Inc., 683 A.2d 1049, 1051 (Del. Ch. 1996).

[193] *Gagliardi*, 683 A.2d at 1051.

[194] *See Van Gorkum*, 488 A.2d at 868-69 (finding gross negligence where directors: (i) were uninformed as to role of owner of acquirer's holding company in sale of company, (ii) were uninformed as to proper intrinsic value of company, and (iii) were grossly negligent in approving sale of company after *only two hours of deliberations*).

b. The DGCL Further Protects the Board

In addition to the BJR, Section 141(e) of the DGCL protects board members from liability in a duty of care case when the board relies on officers or experts.[195]

> A member of the board of directors . . . shall . . . be *fully protected* in relying in good faith upon the records of the corporation and upon . . . opinions, reports or statements presented to the corporation by any . . . officers or employees . . . or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.[196]

So long as the Board, in good faith, relied on the diligence of outside investment bankers and the internal presentations by BofA management, the Board was shielded from liability. Assuming that BofA chose its investment bankers with reasonable care, reliance on those experts' presentations and the experts' conclusion that the merger was financially fair to BofA's shareholders protected the Board from liability for making a bad decision that turned out to harm shareholders. Reliance on the advice of Price and Lewis, as well as the fairness opinions resulting from hastily compiled due diligence in September, protected the Board from liability.[197]

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[195] *Cf.* Desimone v. Barrows, 924 A.2d 908, 936-37 (Del. Ch. 2007) (noting that DGCL §§ 102(b)(7) and 141(e) protect and insulate a board's "reliance on experts").

[196] DEL. GEN. CORP. LAW § 141(e) (2008) (emphasis added).

[197] But, the DGCL does not protect a board if and when it acts in a way that would place its responsibilities on the shoulders of the shareholders. Section 251(b) holds that directors must act in a deliberate manner and may *not* abdicate their decision-making power to shareholders in the merger context. DEL. GEN. CORP. LAW § 251(b) (2008) ("The board of directors of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation and declaring its advisability."). While a shareholder vote was required by the NYSE and the DGCL, the vote is not a mechanism for the Board to transfer responsibility to shareholders. Delaware case law holds that directors may be held liable for violations of the duty of care in the merger context but that the directors must have acted grossly negligent when acting uninformed and approving a merger that damages the interests of shareholders. *Van Gorkum*, 488 A.2d at 858.

B. Best Practices: The Board Should Have Held Itself to a Standard Above the Minimum Care That Would Avoid Liability

While the Board is not liable for a breach of the duty of care for proceeding with the deal, the standard of care required to escape civil liability under Delaware law is the *minimum standard* for board conduct – Delaware courts have stated that directors should aim higher.[198] A board's inherent and explicit duty to put the wealth shareholders ahead of any other obligation trumps any court order that set out a minimum standard of care for boards of directors.[199] To adhere to best practices of corporate governance a board must place all obligations other than shareholder wealth subordinate to its primary goal of maximizing shareholder wealth. The BofA Board of Directors failed in this regard.

1. Disney *Provides Best Practices Discussion*

With *In re The Walt Disney Co. Derivative Litig.*,[200] (the "*Disney* case") the Delaware Court of Chancery discussed the difference between bare compliance with statutory and case law and "[a]spirational ideals of good corporate governance practices."[201] After Walt Disney Co. hired and later fired President Michael Ovitz, it was required to pay Ovitz a large severance package.[202] Shareholders sued derivatively the compensation committee of the board for allegedly breaching its fiduciary duties when it approved Ovitz's severance package.[203] After trial, the court found in favor of the director defendants on all claims.[204]

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[198] *In re* The Walt Disney Co. Derivative Litig., 907 A.2d 693, 745 n.399 (Del. Ch. 2005) ("This Court strongly encourages directors and officers to employ best practices, as those practices are understood at the time a corporate decision is taken.").

[199] This is the shareholder primacy norm, which holds that a corporation is created and governed by the board for the benefit of the shareholders. *See, e.g.*, Lynn A. Stout, *Bad & Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1192-93 (2002) (discussing commentators' beliefs that the corporation exists to maximize profits) (citing Frank H. Easterbrook & Daniel R. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36-39 (Harvard Univ. Press 1991)). *See also* Dodge v. Ford Motor Co., 170 N.W. 668, 681-82 (Mich. 1919) (finding that board of Ford Motor Co.'s decision – motivated by Henry Ford's ambition to spread the "benefits of th[e] industrial system" – to halt distribution of special dividends to shareholders despite increased profits violated the law).

[200] 907 A.2d 693 (Del. Ch. 2005).

[201] *Id.* at 745 n.399 (citing Brehm v. Eisner, 746 A.2d 244, 266 (Del. 2000)).

[202] *Id.* at 697.

[203] *Id.* at 697, 734-736.

[204] *Id.* at 778.

Disney pointed out that Delaware law does not require that boards observe best practices and that courts will not find boards liable for failing to adhere to best practices.[205] Although the compensation committee of the Disney board avoided liability even though it met only twice with limited deliberation before approving Ovitz's contract, best practices would have dictated that a board should have met at length, each member should have received detailed documentation, and that the board should have heard detailed expert presentations on the structure of a large severance package.[206]

2. *The Board Faced Complex Problems That Demanded Great Governance*

Unlike the negotiation of a CEO's compensation package, as was the situation in *Disney*, the scope and depth of the issues the Board faced with the Merrill deal were extremely complex, and those complications were heightened due to the compressed time-frame. After the quick investigation into Merrill's books, BofA decided to acquire Merrill in mid-September 2008.[207] On December 5, BofA's CFO told Lewis that losses at Merrill had increased to $9 billion. That same day, the BofA shareholders voted in favor of the Merger. On December 9, the CFO presented the Board with detailed information about Merrill's losses. On December 13, the CFO told Lewis that the losses at Merrill had increased to $12 billion. On December 17, Lewis first contacted Paulson to tell him that BofA had considered invoking the MAE. On December 19, the Government asserted that BofA had no legal ground on which to stand regarding the MAE and asked what support BofA needed to close the deal with Merrill. On December 22, the Board held its first official meeting on the Merrill deal. After that meeting, BofA management further negotiated with the Government, and the next meeting of the Board occurred on December 30.

BofA and the Board were shocked by the losses at Merrill and how those losses increased so rapidly in the fourth quarter of

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[205] *Id.* at 697 ("Delaware law does not—indeed, the common law cannot—hold fiduciaries liable for a failure to comply with the aspirational ideal of best practices.").

[206] *Cf.* 907 A.2d at 762 ("The [CEO's] actions in connection with Ovitz' hiring should not serve as a model for fellow executives and fiduciaries to follow.").

[207] *See* Fitzpatrick et al., *supra* note 6, at A1. BofA never asked that the investment banking firms it hired update their due diligence after September 15, 2008. Moore, *supra* note 10, at C3. *See supra* text accompanying note 10.

2008. Contractually, the MAE offered a potential out for BofA. Invocation of the MAE would have resulted in a lawsuit, which would later be settled. But, there was a glimmer of hope for BofA that a court, via declaratory judgment, would have upheld the MAE, allowing BofA to walk away without paying damages. Coupled with having to decide whether or not to invoke the MAE, the Board had to consider the Government's threat that if BofA used the MAE, then the Government would oust management and deny future requests for TARP funds. Thus, the Board could have (1) decided to invoke the MAE and press forward in a recession without the guarantee of Government aid; or (2) decided to continue the deal with a commitment from the Government that BofA would receive aid. By not absorbing Merrill, the shareholders would not have lost voting power but would have suffered the effects that prolonged litigation stemming from invocation of the MAE would have on BofA's. But, BofA's share price would likely have not dropped as severely as it did. In acquiring Merrill, the shareholders faced dilution in two forms: (1) Merrill shareholders that became BofA shareholders, and (2) the possibility that shares issued to the Government would be shares of common stock. Each choice presented intricate questions of law, finance, and economics. In order to best evaluate these issues, the Board needed to execute flawless corporate governance; that did not happen.

3. The BofA Guidelines Demanded Better Process From the Board

The Guidelines present a basic framework by which the Board ought to have positioned itself to make an informed and deliberate decision on the Merger. As Lead Director, Sloan's duty was to ensure that significant information was transmitted from executive management to the Board.[208] The Guidelines also required that, before board meetings, BofA give the Board pertinent information to make fully informed decisions.[209] When board meetings were convened in December 2008, the Board ought to have received supporting documents well in advance of those meetings. Having received documents before a meeting, the Board

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[208] *See BofA Corporate Governance Guidelines*, *supra* note 86.

[209] *Id. See also* Bank of Am. Corp., Proxy Statement (Form 14-A), Apr. 14, 2009, at 3 ("[B]eginning in 2008, our directors began participating in weekly information meetings regarding [BofA's] financial condition, lines of business, and developing market conditions" led by Lewis.).

would have been able to pose meaningful and probing questions to Lewis. The best source of documentation and information would be internal and external financial experts. Yet, aside from Price's December 9 presentation, nothing in the Board Minutes indicated that expert presentations occurred at either the December 22 or December 30 meetings. More importantly, the Guidelines provided for access to outside legal counsel, which would have best enabled the Board to evaluate the case for terminating the merger and also enabled the Board to analyze the strength of the Government's commitment to provide future funding to BofA.[210]

These basic provisions—(1) Sloan acting as a liason, (2) pertinent documentation in advance of meetings, and (3) availability of outside counsel and advisors—provided the Board with ample opportunity to proceed according to best practices. When BofA was in the process of evaluating the completion of a major acquisition, while navigating a deteriorating economy and seeking Government assistance, Sloan ought to have been in frequent contact with Lewis and management. Nothing in the December 22 or December 30 Board Minutes indicated that Sloan accepted any more responsibility than other directors. The minutes made no mention of any special questions raised by Sloan or requests that Lewis have heightened contact with the Board. Sloan failed the Board by not soliciting further information from Lewis and management.

a. Counsel Should Have Had a Larger Role During the December Meetings

The Board participated in the December special meetings without outside counsel and did not even retain outside counsel to assist with its own review of the Merger.[211] Even without counsel present *at* the meetings, if the Board was unsatisfied with management's response to its questions, the Board ought to have exercised its right to outside counsel *after* the meetings. The Board ought to have sought outside advice immediately after the

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[210] *See BofA Corporate Governance Guidelines*, *supra* note 86.

[211] The December 22 and December 30 minutes do not indicate that the Board had retained its own counsel to aid in its evaluation of proceeding with the Merger. The December 22 minutes only mention that Lewis "discussed in detail the content of the previous conversations with federal regulators with the Board," not the Board *and* its counsel. *Dec. 22 Board Minutes*, *supra* note 55 at 2. Press articles also do not suggest that the Board had retained its own counsel. In fact, BofA's own counsel was not present at any Board meetings on the issue. *See infra* note 213 and accompanying text.

December 22 meeting because the Merger was set to close on January 1. The Board could have presented the facts and its concerns regarding the Merger to outside counsel shortly after that meeting.[212] The Board would then know its options going forward and the implications of closing the Merger as scheduled.

The Board participated in the December 22 and December 30 meetings not only without the presence of its own counsel but without BofA's retained securities lawyers, Wachtell, Lipton, Rosen & Katz ("Wachtell").[213] Consider one scenario in which counsel's presence would have helped Lewis to know his and BofA's rights: during a deposition, the New York Attorney General's office asked Lewis if he knew what authority the Government had to remove management and the Board. Lewis responded that he just knew that the Government could have done so.[214] Counsel could have fully evaluated the legal foundation on which the Government based its argument. Lewis failed by not seeking an opinion as to how the Government's threat would come to pass.

b. Outside Counsel Could Have Objectively Evaluated the Government's Commitment

By accepting the Government's oral promise to provide funding in January, Lewis jeopardized the future of BofA. If the Government had not followed through on its agreement to provide BofA with further support after the Merger closed, then BofA would have been severely weakened by having to independently shoulder Merrill's losses. When the New York Attorney General's office asked Lewis whether he obtained legal advice on the stipulated agreement for additional funds from the Government in January, Lewis responded that he relied on BofA's general

[212] Whether selected before or after the meeting, to be truly effective this counsel would not have been one of the firms already engaged by BofA but a newly-hired law firm.

[213] Present at the December 22 meeting were only members of the Board and BofA officers. *Dec. 22 Board Minutes*, *supra* note 50. Present at the December 30 meeting, again, were only members of the Board and even fewer BofA officers than were at the December 22 meeting. *Dec. 30 Board Minutes*, *supra* note 58. Wachtell, Lipton, Rosen & Katz was engaged in assisting BofA Officers with preparation prior to the meeting. *See* E-mail from Nicholas G. Demmo, Partner at Wachtell, Lipton, Rosen & Katz, to Brian T. Moynihan, BofA General Counsel, Bates Range BAC-ML-HOGR-502-00000961 (Dec. 22, 2008, 7:21 PM GMT) (on file with author).

[214] *Lewis Dep. Tr.*, *supra* note 36, at 54:7-55:5 ("You had an understanding that the Fed could remove the board and/or the management of a bank that it regulated if it found certain things. [Lewis]: Yes.").

counsel.[215] Lewis stated that he would not only rely on the general counsel for such advice but Lewis would expect for the general counsel to make the threshold point that he should *seek* advice on the agreement.[216] This is shocking. Lewis entered into a vague oral agreement of great magnitude and did not even realize on his own that there were potential legal issues with the proposed agreement and that he ought to seek legal counsel. Lewis acknowledged the risk that the Government may back out, but he was, nonetheless, "comfortable" with their assurances.[217]

In June 2009, Congressman Gerry Connolly questioned Lewis as to whether or not BofA had received a reliable commitment from the Government.[218] While the December 30 Minutes reveal that Lewis "obtained detailed *oral* assurances from the federal regulators with regard to their commitment and ha[d] documented those assurances with e-mails and detailed notes of management's conversations with the federal regulators,"[219] based on Lewis's June testimony, any such agreement was tentative at best.[220] Lewis did not even know the amount of funding to be

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[215] *Id.* at 84:23-85:19.

[216] *Id.* at 85:10-14 ("[Lewis]: I would rely on somebody bringing that question forth, and nobody did. Q. Did you ask anyone to look into whether the oral, verbal commitments from the Fed and Treasury were enforceable? [Lewis]: No. I was going on the word of two very respected individuals high up in the American government."). BofA general counsel, Brian Moynihan, was present at the December 17 meeting with Bernanke and Paulson; the Dec. 22 and 30 Board Minutes redacted portions of the meetings where Moynihan spoke.

[217] E-mail from Brian T. Moynihan, BofA General Counsel, to Lewis, Bates Range BAC-ML-HOGR-502-00000955-958 (Dec. 22, 2008, 3:40 AM GMT) (on file with author) ("We are subject to the risk of the verbal commitments and statements are somehow not followed through with by the Treasury and the Fed. I am comfortable after hearing the amount of reassurances, and from whom they come that we can rely on them.").

[218] *See Bank of America and Merrill Lynch: How Did a Private Deal Turn Into a Federal Bailout? Hearing Before the Comm. on Oversight and Government Reform*, 111th Cong. (2009), webcast of June 11, 2009 Lewis testimony at 2:37:59 – 2:42:29, *available at:* http://oversight.house.gov/index.php?option=com_content&task=view&id=3932&Itemid=2.

[219] *Dec. 30 Board Minutes*, *supra* note 58, at 3 (emphasis added).

[220] *Bank of America and Merrill Lynch: How Did a Private Deal Turn Into a Federal Bailout? Hearing Before the Comm. on Oversight and Government Reform*, 111th Cong. (2009), webcast of June 11, 2009 Lewis testimony at 2:37:59 – 2:42:29, *available at* http://oversight.house.gov/index.php?option=com_content&task=view&id=3932&Itemid=2.

> Lewis: We had an agreement that they would, that we would work toward a solution . . . there was back and forth in terms of amounts, in terms of structure, and in terms of securities to be. . . included . . . . We had an agreement for a solution but we did not have any kind of agreement, as I would . . . think of it as a business person.
>
> Connolly: Well what about commitment? What was your understanding of the commitment . . . ?
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> Lewis: Commitment to work toward a solution.
>
> Connolly: . . . You received, as part of that commitment, detailed oral assurances from the federal regulators with regard to their commitment?

provided by the Government or the form of securities BofA would issue in exchange for capital, common stock or preferred stock.[221] Without details, how could Lewis and the Board have felt comfortable that closing the Merger, when lacking a reliable safety net from the Government, was the best course of action? Outside counsel would have compelled the Board to either obtain documentation of specific terms of an agreement or convinced the Board that walking away remained the best option for BofA.

c. The Board Ought to Have Retained Counsel before the December Meetings

By retaining outside counsel[222] before the December 9 presentation by Price, outside counsel could have attended the meetings and received information firsthand. Then, counsel could have fully informed the Board of its own rights and duties going forward, as well as the rights and duties of BofA, especially whether or not BofA needed to disclose the Merrill losses to the shareholders. The presence of outside counsel on December 9, as well as on December 22 and December 30, would not only have emboldened the Board's resolve, but the presence of counsel would have imparted to Lewis, management, and the Government the seriousness with which the Board viewed the merger and its consummation or termination.

Lewis: Yes, sir. . .

Connolly: That sounds like more than a commitment to find a solution, that sounds like it's pretty detailed and [you've] already worked out the solution . . . ?

Lewis: No . . . there was a back and forth . . . but there was never a, a specific agreement uh, with specific numbers and uh, of that sort. It took several more weeks before we could actually come to terms as to exactly what it would look like.

. . .

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

Lewis: No, sir, because there was, there was not enough specifics to put into writing.

Connolly: But at some point there were?

Lewis: Yes, sir, that was later, that was in the first few weeks of January of the following year . . .

221 *Id.* Not only would the dollar amount and form of any capital funding be important, it would have been necessary for BofA to know what covenants the Government would have attached to any agreement. If those covenants were unfavorable, then, BofA, the Board, management, and shareholders could have avoided being unnecessarily constricted by Government mandates.

222 In order to have fully reaped the benefits of outside counsel and advisors, the Board should have examined itself in the light of inside and outside directors. Lewis held the joint position of CEO and Chairman of the Board. As Lewis was a member of management, in addition to being a Board member, he would have been biased with respect to any selection of outside counsel. Lewis, as CEO, and the other inside director, Charles K. Gifford, should have been removed from any potential session during which the Board discussed its selection of outside counsel.

The Board would have had independent opinions, not beholden to management, on which to rely.[223] If present at the meetings, then the Board's counsel would have been able to ask questions during the course of the meetings. But, the ability to ask precise questions depends upon the degree to which information was presented to the Board before the meetings. If management had *not* provided the Board with sufficient information before the meeting, as the Guidelines mandated , then the energy expended by the Board and its counsel during the meeting may have been spent trying to catch up on facts[224] before asking how, why, and what regarding the cause of Merrill's losses. The Board and counsel must have been fully engaged with the day-to-day events surrounding Merrill's activities. This tied into Sloan's duty as liaison between the Board and management—because Sloan failed in his duty to pass information to the Board, the Board's ability to understand and analyze Merrill was compromised.

That the Board's December 22 and December 30 meetings were telephonic meetings also indicates a poor commitment to best practices.[225] While the meetings were held on short notice, that such important meetings were conducted over the phone is troubling. Telephonic discussions make it difficult for directors to express their concerns, and directors may be more likely to succumb to management pressure.[226]. Further, the December 22 board meeting was not even one hour in length.[227] The brevity of

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[223] BofA Officers were in frequent contact with outside counsel at Wachtell, Lipton, Rosen & Katz in preparation for the December 22 Board meeting. *See* E-mail from Nicholas G. Demmo, Partner at Wachtell, Lipton, Rosen & Katz, to Brian T. Moynihan, BofA General Counsel, Bates Range BAC-ML-HOGR-502-00000961 (Dec. 22, 2008, 7:21 PM GMT) (on file with author). In fact, Wachtell, Lipton, Rosen & Katz advised BofA General Counsel, Brian Moynihan, that re-characterizing the decision to close the deal as a decision rooted in a national interest would be wise when speaking to the Board: "The point being that the decision to go forward is not motivated by a desire of the Board and management to save their positions . . . ." *Id.*

[224] There is also the remote possibility that outside counsel would feel embarrassed to ask simple questions for fear of appearing uninformed before its clients, and, as a result, outside counsel would have kept quiet when the situation called for someone to raise concerns.

[225] Even more troubling, internal BofA documents suggest that the December Board meetings were *voluntary*. *Cf.* E-mail from Brian T. Moynihan, BofA General Counsel, to Lewis, Bates Range BAC-ML-HOGR-502-00000955-958 (Dec. 22, 2008, 3:40 AM GMT) (on file with author) (". . . a call [Lewis] had with [] Paulson on Friday afternoon after our last *voluntary* board meeting") (emphasis added).

[226] Conference call participants may experience problems with background noise or muting issues. Also, call participants are able to direct their attention to other matters, i.e., checking e-mail or reading unrelated materials.

[227] The December 22 board meeting convened at 4:00 PM Eastern Standard Time. *Dec. 22 Board Minutes*, *supra* note 50 ("Pursuant to due notice, a special meeting . . . was held by telephone at 4:00 p.m. EST on Monday, December 22, 2008."). The meeting had concluded by 4:58

this meeting indicates that the Board did not comprehend the complex issues BofA faced; otherwise, the meeting would have lasted much longer. Lacking information, independent counsel, and face-to-face contact, the Board could not effectively question Lewis. The Board ceded to the Government without meaningfully debating the implications of closing the Merger on the shareholders' wealth.[228]

4. The Board Must Be More Transparent Regarding Government Involvement

The Guidelines and the DGCL do not suggest that a board may place the interests of the nation as a whole ahead of shareholders' interests. The Guidelines were revised on December 9, 2008, when the Government's bailout of financial institutions was in full swing and BofA was in the midst of evaluating Merrill. If at that time BofA and the Board had adopted a policy by which it was willing to submit to the wishes of the Government due to the nation's poor economy, then the Board ought to have publicized this policy, so as to give notice to the shareholders that their rights were trumped by a duty to the nation's economy. In the absence of an express policy, the Board ought not to have abrogated its duty to effectuate the shareholder primacy norm[229] in favor of a national interest.

During his deposition with the New York State Attorney General's staff, Lewis admitted that he acted adversely to the interest of short term shareholders of BofA—those planning to sell

PM Eastern Standard Time, because at that time Lewis sent an e-mail to the Board confirming a conversation Lewis had with Paulson *after* the board meeting concluded. *See* e-mail from Tom Ryan to Ken Lewis (Dec. 22, 2008) , *available at* http://www.oag.state.ny.us/media_center/2009/apr/pdfs/Exhibit%20D%20to%204.23.09%20letter.pdf.

[228] *See Lewis Dep. Tr.*, *supra* note 36, at 98:10-16:

> Q. Did any of the board members say, Hey, we need to do something about this?
> [Lewis]. Well, we were going to call the MAC.
> Q. Right. Did they say, In lieu of calling the MAC is there anything we should do?
> [Lewis]. No. It went from calling the MAC to strong admonition that we shouldn't.
> Q. And, at that point, is there any discussion about disclosure to the shareholders?
> [Lewis]. I don't recall it.

Lewis Dep. Tr., *supra* note 36, at 98:10-16.

[229] *See, e.g.*, *Dodge*, 204 Mich. at 507 ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.").

BofA stock in less than three years.[230] Lewis also admitted that the Board did not even discuss disclosing the decision *not* to invoke the MAE to shareholders, much less submit the decision to a vote.[231] In fact, some deals may call for a discreet point at which a CEO and board should decide when to disclose adverse situations to shareholders, such as exceeding a pre-set cap on prospective losses due to a transaction. But, with BofA, there is no need to point to a precise moment when a line was crossed. Lewis knew that moving forward with the Merger would be adverse to BofA shareholders over a course of years—that should have trigged disclosure.

Lewis, with Paulson and Bernanke, concealed from shareholders the state of the Merrill deal and the Government's promise to provide future funds to BofA.[232] Had the Board followed best practices and retained counsel between the December 9 presentation and the December 22 meeting, then the Board would have been advised that it must decide whether or not to disclose Merrill's losses to the shareholders. While the shareholder vote had already occurred on December 5, the Merger was not set to close until January 1. Disclosure during this interim time period would have afforded the shareholders with some recourse. They would have been able to voice their opinions and dissent. Perhaps, some activist shareholders would have quickly filed lawsuits seeking to prevent the Merger from closing. Lewis

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230 *Lewis Dep. Tr.*, *supra* note 36, at 96:15-25 ("[Q]: . . . [W]hat they were telling you to do was not in the one-to-three year interest of your shareholders. [Lewis]: I thought about in terms of it was in the best interest of long term, and it was the only way to go under the circumstances.").

231 *Lewis Dep. Tr.*, *supra* note 36, at 98:17-25. *But see Dec. 22 Board Minutes*, *supra* note 50, at 3 ("The Board concurred it would reach a decision that it deemed in the best interest of the Corporation and its shareholders without regard to this representation by the federal regulators."). "Mr. Lewis noted that no vote was required by the Board, but that he wished to open the recommendation for discussion among the Board and management." *Dec. 22 Board Minutes*, *supra* note 50, at 3.

232 *Dec. 30 Board Minutes*, *supra* note 58, at 2 ("[A]ny written assurances would require formal action by the Fed and Treasury, which formal action would require public disclosure."). In fact, exhibits produced to Congress in November 2009 show that BofA's internal counsel and outside lawyers were aware that disclosure of the Merrill losses was a problem. *See* Kucinich Exhibits, Joint Hearing of the Oversight & Government Reform Comm. and Domestic Policy Subcomm., Bank of America & Merrill Lynch: How Did a Private Deal Turn Into a Federal Bailout? Part IV, *available at* http://oversight.house.gov/images/stories/Hearings/Domestic_Policy/BofA_Documents.pdf. Then BofA general counsel Timothy Mayopoulos expressed worries to outside counsel, Wachtell, Lipton, Rosen & Katz, about not disclosing. *Id.* at Bates Range HOGR-WLRK-502-00000919. Ultimately, on November 12, 2008, Mayopoulos and Price concluded that "no pre meeting disclosures [were] necessary." *Id.* at Bates Range BAC-ML-HOGR-502-00001092.

and the Board owed a duty first and foremost to BofA and its shareholders, not the Government or the financial system.

V. THE AFTERMATH

The Merger has not been a success and the combined entity has failed to deliver on the promises made by Lewis and Thain. Despite posting a first quarter 2009 profit of $4.2 billion, critics were skeptical of the sustainability of BofA's gains.[233] Similar remarks were made in response to BofA's second quarter results: BofA relied on one-time sales to meet earnings expectations.[234] The synergies that were predicted have not come true.[235] Numerous Merrill bankers voluntarily left BofA.[236] In July, BofA announced that it would close 10% of its commercial banking

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[233] *See* Dan Fitzpatrick, *For BofA, a $4.2 Billion Profit Isn't a Fix*, WALL ST. J., Apr. 21, 2009, at C1, C3. *See also* Andrew Ross Sorkin, *Bank Profits Appear Out of Thin Air*, N.Y. TIMES, Apr. 21, 2009, at B1 (noting that BofA booked revenue via a one-time sale of its holdings in China Construction Bank and by increasing the valuation of Merrill assets by $2.2 billion compared to Merrill's valuation of the same assets).

[234] Dan Fitzpatrick & David Enrich, Citigroup, *BofA Results Shine Light on Failings*, WALL ST. J., July 18, 2009, at B1, B2 (BofA's "net income would have been $1.4 billion absent six one-time items. Some analysts said the bank would have posted a loss without the items."). In April 2009, BofA was forced to increase its cash reserves in order to defend against "future credit losses." Fitzpatrick, *supra* note 233, at C1, C3. "The bank's credit-card operations posted a loss of $1.7 billion, while mortgages and insurance suffered a loss of $498 million." *Id.*

[235] *See* Dan Fitzpatrick & Susanne Craig, *Moynihan's Power Play at BofA*, WALL ST. J., Apr. 8, 2009, at C1 (noting that former BofA General Counsel, Brian Moynihan, who succeeded Thain at Merrill, "clashed" with high-ranking Merrill executives, and "many unhappy bankers, brokers and traders at Merrill . . . have big doubts about Mr. Moynihan. "); *see also* Dana Cimilluca, *Bank of America Seeks Overseas Repair Job*, WALL ST. J., Sept. 1, 2009, at C3 (stating that Thomas Montag, BofA's new "corporate and investment banking chief...faces what may prove to be one of his biggest tests: steadying the turmoil-ridden overseas operations that BofA acquired in the Merrill Lynch deal").

[236] *See* Dennis Berman, *Merrill Lynch Loses More Bankers to a 'Boutique,'* WALL ST. J., Apr. 15, 2009, at C3. ; *see also* Susanne Craig, *Another Merrill Banker Quits*, WALL ST. J., Apr. 3, 2009, at C12 ("But in recent months, a number of bankers and top executives have fled [BofA] amid a growing culture clash."); Matthew Karnitsching, *Lazard Hires Telecom Head*, WALL ST. J., June 15, 2009, at C3 (The banker that ran Merrill's global technology, media, and telecom group, "Mr. [George] Young, 50 years old, left Bank of America Corp. in April . . . ."); Jeffrey McCracken, *Rifkin to J.P. Morgan*, WALL ST. J., June 19, 2009, at C2 ("Longtime Merrill Lynch banker William Rifkin has defected to rival J.P. Morgan Chase & Co. . . . "); Chad Bray, *Ex-Merrill Executive Settles Suit With BofA*, WALL ST. J., Oct. 2, 2009, at C4 ("[Robert] McCann sued [BofA] in New York State Supreme Court in August, seeking to prevent the bank from stopping him from taking another job right away."); *cf.* Dan Fitzpatrick & Matthew Karnitsching, *BofA Promotes Key Executives*, WALL ST. J., at C10 (BofA retained two veteran executives, who "are among several high-ranking bankers to be retained in recent months as the Charlotte, N.C., lender tries to win over key deal makers in the wake of multiple Merrill departures."); *cf.* Dan Fitzpatrick & Dana Cimilluca, *Merrill Veteran Orcel Is Staying With BofA*, WALL ST. J., Sept. 11, 2009, at C3; *see also* Susanne Craig, *UBS's Merrill Injection*, WALL ST. J., Nov. 10, 2009, at C3.

branches; Lewis said "that it would be 'much tougher' to make money in the second half of 2009."[237] BofA posted a $1.0 billion net loss for the third quarter of 2009.[238]

On April 23, 2009, the New York State Attorney General, Andrew Cuomo ("Cuomo"), wrote to members of Congress and the SEC, concerning the Merger.[239] Cuomo "uncovered facts that raise questions about the transparency of the TARP program, as well as about corporate governance and disclosure practices at [BofA]."[240] Cuomo commented that the SEC "appear[ed] to have been kept in the dark."[241] Cuomo's investigation into BofA has progressed and may result in "securities-fraud charges against [BofA] executives," stemming, in part, from BofA's failure to "disclose before a December shareholder vote [] ballooning losses at Merrill."[242]

On April 29, 2009, BofA shareholders stripped Lewis of his title of Chairman of the Board; he retained the position of CEO.[243] Walter Massey, an acting board member with longstanding ties to Lewis, was appointed to replace Lewis as

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[237] Dan Fitzpatrick, *BofA Plans to Cut 10% of Branches*, WALL ST. J., July 28, 2009, at C1 ("The retrenchment . . . comes as it continues its integrations of Merrill Lynch & Co. and Countrywide Financial Corp., reshuffles leadership at the behest of regulators and fends off rising credit losses.").

[238] Press Release, Bank of Am. Corp., Bank of America Announces Third-Quarter Net Loss of $1.0 Billion (Oct. 16, 2009), *available at* http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-newsArticle&ID= 1342796&highlight; *see also* Dan Fitzpatrick, *BofA Posts A Loss of $1 Billion, Discloses More on Merrill Deal*, WALL ST. J., Oct. 17, 2009, at B3.

[239] Letter from Andrew M. Cuomo, Attorney General, State of New York, to Hon. Christopher Dodd, Chairman, U.S. Senate Committee on Banking, Housing, and Urban Affairs, et al (Apr. 23, 2009) *available at* http://www.oag.state.ny.us/media_center/2009/apr/pdfs/BofAmergLetter.pdf.

[240] *Id.*

[241] *Id.*

[242] *See* Dan Fitzpatrick, *New York Nears Charges on Merrill Deal*, WALL ST. J., Sept. 9, 2009, at C1. Cuomo warned BofA of potential charges via an early September letter, "citing at least four 'failures' to tell shareholders material information related to the bank's takeover of [Merrill]." *id.; see also* Liz Rappaport, Dan Fitzpatrick, & Joann S. Lublin, *Cuomo Calls In 5 BofA Directors*, WALL ST. J., Sept. 17, 2009, at C3 ("Cuomo said he wonders broadly where the boards were in this financial crisis, and whether BofA directors 'protected the rights of shareholders, were they misled, or were they little more than rubber stamps for management's decision-making?'"). Ohio's Attorney General has already filed suit against BofA for concealing Merrill's losses before the December 2008 shareholder vote. Marshall Eckblad, *BofA Sued by Funds over Merrill*, WALL ST. J., Sept. 29, 2009, at C3. ; *see also* Consolidated Amended Class Action Complaint at 1, *In re* Bank of Am. Sec., Derivative, & ERISA Litig., (S.D.N.Y. Sept. 25, 2009) (No. 09-MDL-2058-DC).

[243] Dan Fitzpatrick & Marshall Eckblad, *Lewis Voted Out As BofA Chairman*, WALL ST. J., Apr. 30, 2009, at A1 ("The vote marked the first time that a company in Standard & Poor's 500-stock index has been forced by shareholders to strip a CEO of chairman duties, according to RiskMetrics Group.").

Chairman.[244] On September 30, Lewis announced that he would resign as CEO and President of BofA, effective December 31, 2009.[245] Reports indicated that Lewis's resignation was not at the request of the Government[246] but that Lewis was "fed up with the criticism that haunted him following the takeover of Merrill."[247] While the Board has narrowed its search of potential successors to Lewis,[248] the urgency of that search has been heightened due to the chance Lewis will be sued.[249]

As of early May 2009, BofA entered into a confidential agreement with the Government, committing to overhaul the Board, replace members of management, and address capital shortages.[250] This agreement, known as a "Memorandum of

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[244] *See* Dan Fitzpatrick & Joann Lublin, *Massey, A Physicist, Re-Engineers BofA*, WALL ST. J., June 8, 2009, at C1.

[245] Bank of America, Corp., Current Report (Form 8-K), Item 5.02 (Oct. 1, 2009) *available at* http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-sec2009&secCat01Enhanced.4_rs=251&sec Cat01Enhanced.4_rc=10.

[246] *But see* Dan Fitzpatrick & Michael Crittenden, *BofA to Select Emergency CEO*, WALL ST. J., Oct. 5, 2009, at C3 ("Regulators will be asked to sign off on the choice . . . . Government officials are expected to tell the bank if they don't approve of specific names . . . ."). The Government holds "informal veto power" over who BofA chooses to replace Lewis. Fitzpatrick & Crittenden, *supra*, at C3.

[247] Dan Fitzpatrick & Joann S. Lublin, *Bank of America Chief Resigns Under Fire*, WALL ST. J., Oct. 1, 2009, at A1; *see also* Dan Fitzpatrick, David Enrich, & Joann S. Lublin, *BofA Directors Scramble To Lay a Succession Plan*, WALL ST. J., Oct. 2, 2009, at C1. ; *see generally* Carrick Mollenkamp & Dan Fitzpatrick, *With Feds, BofA's Lewis Met His Match*, WALL ST. J., Nov. 9, 2009, at A1.

[248] *See* Dan Fitzpatrick & Joann S. Lublin, *BofA Narrows Internal CEO Candidates*, WALL ST. J., Oct. 7, 2009, at C1.

[249] *See* Fitzpatrick & Crittenden, *supra* note 246, at C3. *See also* Dan Fitzpatrick & Joann S. Lublin, *Bank of America Bumps Into Hurdles in CEO Hunt*, WALL ST. J., Oct. 28, 2009, at C3 (stating that BofA has had difficulty finding qualified outside candidates who are interested in the CEO position). The CEO of Bank of New York Mellon declined the BofA CEO position when offered. Dan Fitzpatrick & Robin Sidel, *BNY Mellon CEO Kelly Tells BofA: No, Thanks*, WALL ST. J., Nov. 2, 2009, at C1. An executive at PNC Financial Services Group Inc., also rebuked a potential offer of the CEO position from BofA due to the Government's control on executive pay through czar Kenneth Feinberg. Dan Fitzpatrick, *BofA Hits Pay Snag In Its CEO Hunt*, WALL ST. J., Nov. 14, 2009, at B1.

[250] *See* Dan Fitzpatrick, *U.S. Regulators to BofA: Obey or Else*, WALL ST. J., July 16, 2009, at C1; *see also* Mollenkamp & Fitzpatrick, *supra* note 247, at A1 ("Regulators, including those from the Fed, said they planned to file a confidential memorandum of understanding against the bank because of concerns about such things as governance and its ability to manage risk and fund operations in times of stress. ."); *see also* Dan Fitzpatrick & Joann Lublin, *BofA Gets New Blood for Board*, WALL ST. J., June 6, 2009, at B1; Dan Fitzpatrick, *BofA Is Planning to Add Holliday as a Director*, WALL ST. J., Sept. 21, 2009, at C3. Also, in early May, the Government's stress-test results mandated that BofA raise $33.9 billion of additional capital. Bank of America, Corp., Current Report (Form 8-K), Ex. 99.1 (May 9, 2009) *available at* http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-sec2009&secCat01Enhanced.4_rs=641&secCat01Enhanced.4_rc=10; *see also* Damian Paletta & Marshall Eckblad, *How the Stress Tests Stopped the Market Bleeding*, WALL ST. J., May 8, 2009, at C1 (BofA's "gap of $33.9 billion

Understanding" and contemplated by regulators as early as December 2008,[251] led to the resignations of six members of the Board, including Sloan,[252] and the departures of top executives, including BofA's Chief Risk Officer.[253] On June 5, BofA appointed four new members to the Board, each with banking experience. On August 21, BofA announced that a former president of Morgan Stanley had been appointed to the Board as well.[254] On July 31, three more members of the Board resigned.[255]

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is the largest of the 19 stress-tested banks. It expects to fill that hole without any additional government investment or ownership, meaning that the U.S. would not become a big shareholder via conversion of an existing $45 billion TARP investment into common stock or mandatory convertible preferred stock."). BofA avoided having to rely on Government funding to meet that figure, but it issued a considerable number of shares to raise those funds, further diluting shareholders. *See, e.g.*, Bank of America, Corp., Registration Statement (Form 424B5), at S-1 (May 8, 2009) *available at* http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-sec2009&secCat01Enhanced.4_rs=631&secCat01Enhanced.4_rc=10 (announcing registration of 1.25 billion shares of common stock to raise approximately $10.987 billion). BofA made significant one-time sales of assets. *See, e.g.*, Rick Carew & Costas Paris, *BofA Gets $7.3 Billion in CCB International Finance Sale*, WALL ST. J., May 13, 2009, at C2; *see also* Deborah Solomon & Dan Fitzpatrick, *BofA Repayment to TARP Hits Snag*, WALL ST. J., Oct. 26, 2009, at M12 (Future requirements to raise capital "create[] a dilemma for the bank, which would rather not raise more capital, since that could dilute existing shareholders and make their shares less valuable.").

251 In December 2008, federal regulators discussed aid that the Government would possibly provide BofA in January 2009. Such aid would be provided concurrent "with a series of actions including cutting drastically the dividend, some supervisory action (MOU) that covers management. . . . [a regulator] always had [her] doubts about the quality of the due diligence [BofA] did on the [Merrill] deal." E-mail from Deborah Bailey, Deputy Director of Banking Supervision and Regulation, Board of Governors of the Federal Reserve, to Mac Alfriend, Senior Vice President of Banking Supervision and Regulation, Federal Reserve Bank of Richmond, and Roger Cole, Director of Banking Supervision and Regulation, Board of Governors of the Federal Reserve (Dec. 20, 2008, 01:32:00 EST) (Bates Stamp BOG-BAC-ML-COGR000185, *available at*: http://oversight.house.gov/images/stories/documents/20090625093832.pdf; *see also* Solomon & Fitzpatrick, *supra* note 250, at M12 (stating that disagreements between the Government and BofA about BofA's ability to survive without federal funds have hampered BofA's hope to escape Government scrutiny).

252 *See* Bank of Am. Corp., Current Report (Form 8-K) May 29, 2009, at Ex. 99.1(Sloan resignation); Bank of Am. Corp., Current Report (Form 8-K) June 4, 2009, Item 5.02 (Brinkley resignation); Bank of Am. Corp., Current Report (Form 8-K) June 8, 2009, Item 5.02 (Jackie Ward and Patricia Mitchell resignations); Bank of Am. Corp., Current Report (Form 8-K) June 19, 2009, Item 5.02 (Admiral Joseph Prueher and General Tommy Franks resignations). Prior to May 2009, four directors resigned. *See* Fitzpatrick, *supra* note 250, at C3 ("A total of 10 directors have stepped down from [BofA's] board this year as regulators have demanded changes to governance, liquidity and risk management. Mr. Holliday would be the sixth new director . . . since June.").

253 Bank of Am. Corp., Current Report (Form 8-K) June 4, 2009, at Ex. 99.1.

254 *Id.*; *see also* Fitzpatrick & Lublin, *supra* note 250, at B1, B4 ("Four outside directors with experience in banking or financial oversight joined [BofA's] board Friday, a move aimed at satisfying strong suggestions from federal regulators that the Charlotte, N.C., lender improve its corporate governance."); Bank of Am. Corp., Current Report (Form 8-K) Aug. 21, 2009, at Item 5.02, Ex.99.1 ("While co-president at Morgan Stanley, [Robert] Scully was responsible for asset management, the Discover card business and merchant banking activities. Prior to that, he served as

On August 3, 2009, the SEC filed a civil complaint against BofA alleging that it misled investors about bonus payments to former Merrill executives.[256] BofA and the SEC settled this matter, wherein BofA, without admitting guilt, would pay $33 million to the SEC; however, Judge Jed Rakoff refused to approve the settlement.[257] Now, per court order, BofA must reveal even more information about advice received from counsel during the months leading up to the close of the Merger.[258] This information will shed even more light on how BofA, the Board, and counsel evaluated moving forward with the Merger.[259]

In August 2009, Congressman Dennis Kucinich asked that the SEC focus on what BofA knew about Merrill's losses and what ought to have been disclosed to shareholders.[260] Two BofA directors, BofA's former general counsel, and Moynihan recently testified before Congress.[261] Congress is awaiting the testimony of the SEC and the FDIC representatives.[262] But, Congress and

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chairman of global capital markets and was vice chairman of investment banking where he was responsible for talent development, senior client relationships and strategic initiatives.").

[255] Bank of Am. Corp., Current Report (Form 8-K), supra note 3, July 31, 2009, at Item 5.02 (John Collins, William Barnett, and Gary Countryman resignations).

[256] Complaint at 1, Securities. & Exch. Comm'N v. Bank of Am., 653 F. Supp 2d 507 (S.D.N.Y. Aug. 3, 2009) (No. 09-CIV-6829).

[257] Order, Securities. & Exch. Comm'n v. Bank of Am., 653 F. Supp 2d 507 (S.D.N.Y. Sept. 14, 2009) (Case No. 09-CIV-6829); *see also* Memorandum Order, Securities. & Exch. Comm'n v. Bank of Am., (S.D.N.Y. Sept. 14, 2009) (No. 09-CIV-6829).

[258] Nathan Koppel, Ashby Jones & Amir Efrati, *Law Firms Put in Unfamiliar Spot*, WALL ST. J., Sept. 16, 2009, at C3 ("The SEC stated in court filing that lawyers 'made the relevant decisions concerning the disclosure of the bonuses.'"). In fact, Congress, which had already begun investigating BofA, requested that SEC Chairperson Mary Schapiro testify as to the proposed SEC settlement. *See* Kara Scannell, *BofA Ruling Questions an SEC Weapon*, WALL ST. J., Sept. 16, 2009, at C1.

[259] *See* David Enrich et al, *BofA to Release Details of Merrill Advice*, WALL ST. J., Oct. 13, 2009, at C1 (detailing waiver of attorney-client privilege in the New York State Attorney General's investigation); Louise Story & Eric Dash, *Deal Advice on Merrill To Be Aired*, N. Y. TIMES, Oct. 13, 2009, at B1.

[260] Letter from Dennis Kucinich, Chairman, Domestic Policy Subcommittee, to Mary Schapiro, Chairwoman, Securities and Exchange Commission (Aug.. 4, 2009) *available at*: http://oversight.house.gov/index.php?option=com_content&task=view&id=4029&Itemid=39.

[261] *See* Michael Crittenden, *BofA Said It Would Drop Merrill Deal*, WALL ST. J., Nov. 17, 2009, at C3. On November 17, 2009, the House Committee on Oversight & Government Reform, in its fourth public hearing, questioned Moynihan, former BofA general counsel Timothy Mayopolos, and current directors Charles Gifford and Thomas May. *See* Bank of America and Merrill Lynch: How Did A Private Deal Turn Into A Federal Bailout? Part IV, . Hearing Before H. Comm. On Oversight and Government Reform and Subcomm. On Domestic Policy, 111th Congress (2009), *available at* http://oversight.house.gov/index.php?option=com_content&task=view&id=4678&Itemid=2.

[262] Testimony slated for October 22, 2009 was postponed, pending further investigations. Todd Wollack, *Mass. Banking Trio Face Queries*, BOSTON GLOBE, Oct. 21, 2009, *available at* .

shareholders may never learn all that happened in late 2008. The events since December are an ironic sequence. Government agencies pressured BofA to close the Merger. By closing the Merger, the Board's abdicated its duties to shareholders. In turn, BofA became beholden to the Government, instead of its shareholders. Now, the Government has demanded that BofA, the Board, and management practice better corporate governance.

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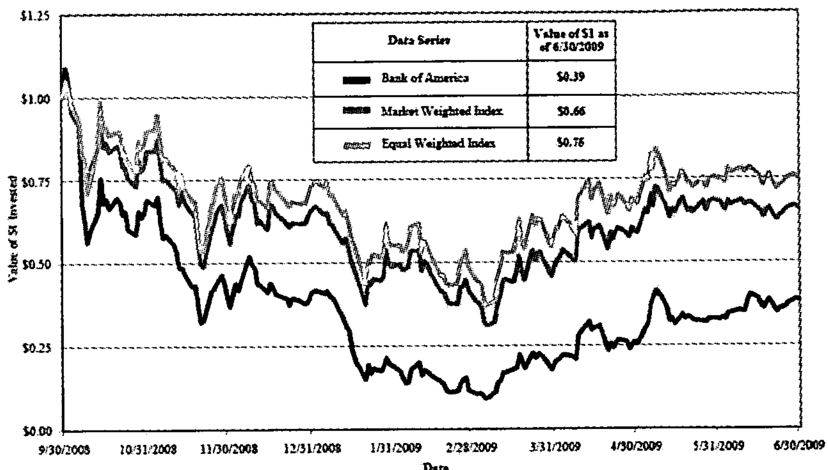
http://www.boston.com/business/articles/2009/10/21/mass_banking_trio_face_queries?mode=PF; *see also* Press Release, Congressional Committee on Oversight & Government Reform, Towns, Kucinich to Hold Fourth Bank of America – Merrill Lynch Hearing (Oct. 20, 2009) *available at* http://oversight.house.gov/index.php?option=com_content&view=article&id=3765:towns-kucinich-want-testimony-from-schapiro-bair-and-cox-on-bank-of-america-merrill-lynch-merger&catid=3:press-releases&Itemid=49 (scheduled witnesses include current SEC Chairperson Mary Schapiro, former SEC Chairperson Christopher Cox, FDIC Chairperson Sheila Bair, two BofA directors, and former BofA General Counsel Timothy Mayopolos).

ATTACHMENT A

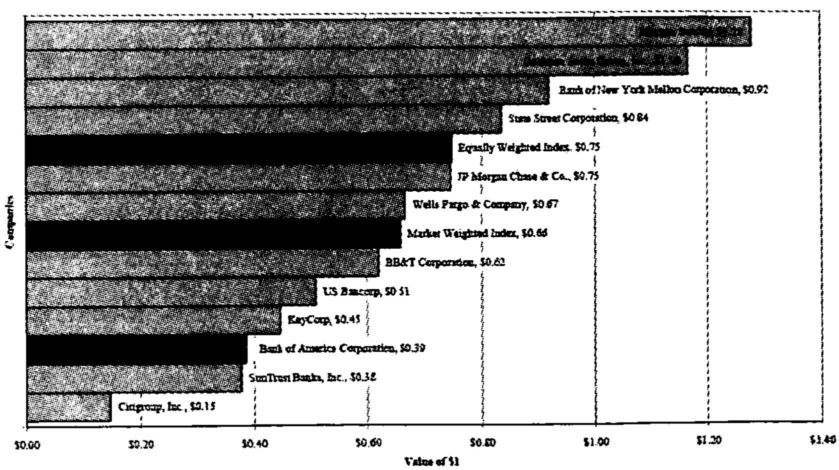
(COMPILED BY ANALYSIS GROUP – WWW.ANALYSISGROUP.COM - AUGUST 2009)

Value of $1 Invested in Bank of America v. Indexes of Selected Financial Firms
September 30, 2008 to June 30, 2009
(September 30, 2008 = $1)



Source: Bloomberg
Note: The Indexes of selected financial firms includes Bank of New York Mellon Corporation, BB&T Corporation, Citigroup, Inc., Goldman Sachs Group, Inc., JP Morgan Chase & Co., KeyCorp, Morgan Stanley, State Street Corporation, US Bancorp, SunTrust Banks, Inc., and Wells Fargo & Company.

Value of $1 Invested In Selected Financial Firms on 9/30/2008 as of 6/30/2009



Source: Bloomberg
Note: The Equally Weighted Index and Market Weighted Index include all firms listed on this chart except for Bank of America.