OPENING STATEMENT OF
CHAIRMAN EDOLPHUS TOWNS

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

November 17, 2009

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

Good morning and thank you all for being here.

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

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

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

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

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

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

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

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

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

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

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

Our investigation has also uncovered documents showing that on December 15, 2008, lawyers working for

Bank of America knew that to win a MAC, "*it is not enough to show a short-term earnings decline, no matter how severe. Must show decline in value over period of years, not months*."

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

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

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

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

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

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

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

After replacing Mr. Mayopoulos, Mr. Moynihan served as the general counsel for about 44 days. He stopped serving as the general counsel about 6 days after the bailout was a done deal. He is now President of Consumer and Small Business Lending at Bank of America.

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

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

Thank you.