Opening Statement
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Chairman
Domestic Policy Subcommittee

Joint Full Committee –Subcommittee Hearing on the Bank of America-Merrill merger

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Contrary to a popularly held belief that the Government went too far in the Bank of America-Merrill deal, our investigation reveals that what is remarkable is what the Government did NOT do.

In two meetings in December, 2008, Bank of America's Ken Lewis asserted that he had only recently become aware of the deteriorating situation at Merrill. He asserted that he believed he could justify invoking the material adverse effect (MAC) clause to back out of the deal, and he asserted that he needed considerable help from the government, including $13 billion more in new cash, as well as protection from Merrill Lynch losses. Staff and officials at the Fed looked more closely at the basis for Lewis's assertions and determined that they were "somewhat suspect."

The Fed found, in contradiction to Ken Lewis's representations, that Bank of America failed to do adequate due diligence in acquiring Merrill Lynch. The Fed found that Bank of America had known about accelerating losses at Merrill since mid-November, when shareholders could have used that information to decide on ratification of the merger. . And senior officials at the Fed believed that Bank of America could be in violation of securities laws for failing to inform shareholders about the Merrill losses known in mid-November. Furthermore, they believed that Ken Lewis's threat of invoking a MAC was a "bargaining chip" and was not credible, that Bank of America was experiencing its own losses independent of Merrill Lynch and needed to be bailed out itself, and that there were serious doubts about the competence of Bank of America's top management.

Yet, in spite of the Fed's doubts felt about Ken Lewis's management of Bank of America, the Fed's leadership orchestrated an aid package that attached no meaningful conditions to the money. The Fed required no changes whatsoever in Bank of America's deficient corporate leadership. The Fed even gave Bank of America more money than Ken Lewis had originally asked for.

The disconnection between the Fed's analysis of what went wrong at Bank of America, and what the Fed was willing to do about it, is significant for all of us, and is the subject of today's hearing.

If the Bank of America-Merrill Lynch merger posed a systemic risk in December 2008, the post-rescue merged entity continues to pose a potential systemic risk in 2009. If bad decisions by corporate management can have systemic consequences, then the Fed's remedy in the Bank of America-Merrill case amplifies the risk posed by poor corporate leadership, because it signals that incompetence practiced by the management of very large financial institutions will be subsidized, not punished, by government regulators.

The Fed's decision-making process in the Bank of America-Merrill merger makes the case for a significant increase in accountability at the Fed. Its regulation of systemic risk needs to be subject to Congressional oversight. Its interventions in markets to recover from the current financial crisis need to be audited by the Government Accountability Office, as I have proposed in a bill and in an amendment adopted unanimously by this committee. We can't afford to make the Fed a Super-Regulator, as some have proposed, without also increasing its transparency in meaningful ways, as this Committee has proposed through the Kucinich amendment.