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House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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December 10, 2009

SUPPLEMENTAL MEMORANDUM

TO: Democratic Members of the Oversight and Government Reform Committee

FROM: Majority Staff, Domestic Policy Subcommittee

RE: Findings of Possible Securities Law Violations in the Bank of America-Merrill Lynch investigation

Over the past nine months, the Domestic Policy Subcommittee, in conjunction with the Full Committee, has investigated possible securities laws violations in the Bank of America-Merrill Lynch merger. We have found evidence of possible violations in relation to Bank of America's failure to disclose mounting losses at Merrill Lynch, known or knowable in mid-November 2008, weeks before the shareholder vote to ratify the merger which occurred on December 5, 2008. This memorandum is intended to inform Members and staff about the nature and evidence of those potential violations.

Chronology

September 15, 2008 -- Bank of America and Merrill Lynch announced their merger.
November 3, 2008 -- Bank of America issued its proxy solicitation to shareholders.
November 12, 2008 -- Merrill Lynch produced an internal forecast of Fourth Quarter '08 results that projected a quarterly pre-tax loss of $8.9 billion. Bank of America was given a copy of this forecast document.
November 13, 2008 --Bank of America made a slight revision to the Merrill forecast, raising projected losses to $10.9 billion. Joe Price, Bank of America's CFO, met with the Timothy Mayopoulos, the company's General Counsel, to discuss shareholder disclosure obligations in light of the November 12 forecast.
November 13, 2008 -- Mayopoulos contacted Nicholas Demmo and Ed Herlihy, partners at Wachtell, Lipton, Rosen & Katz, a law firm working for Bank of America on shareholder disclosure and SEC filing issues, to consider the question of whether or not Bank of America owed shareholders additional disclosure, in light of the November 12 forecast, to supplement the November 3 proxy solicitation.

November 20, 2008 -- Mayopoulos and the Wachtell attorneys advised Joe Price that the company did not need to make additional shareholder disclosures.
December 5, 2008 -- Bank of America shareholders ratified the merger.
December 17, 2008 -- Bank of America CEO Ken Lewis called then-Secretary of Treasury Hank Paulson, initiating a series of events that resulted in a U.S. Government rescue of the merger. During the final two weeks of December, Federal Reserve officials and staff pored over Bank of America and Merrill Lynch internal financial documents.
January 1, 2009 -- the merger deal closed.
January 16, 2009 -- Treasury Department announced a $20 billion cash infusion for the combined entity Bank of America-Merrill Lynch and an asset loss insurance plan worth $118 billion.
January 20, 2009 -- Merrill Lynch reported an actual Fourth Quarter '08 loss of $21.5 billion.

Bank of America's legal duty

Publicly traded corporations are subject to antifraud and proxy rules under the Securities Act of 1933 and the Exchange Act of 1934.[1] Those rules prohibit, respectively, the omission of "a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading,"[2] and the making of "any solicitation... by means of a proxy statement...which at the time and in the light of the circumstances under which it is made...omits to state any material fact."[3] The Supreme Court has held, in the context of a proxy solicitation that: "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[4]

Investigation Findings

Over the course of this investigation, staff have reviewed over 400,000 pages of documents and interviewed the major players at Bank of America, Merrill Lynch and the law firm of Wachtell, Lipton, Rosen & Katz. We have found:

---

[1] Codified at 15 USC §77a et seq. and 15 USC §78a et seq.

[2] "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities, [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." 17 CFR Section 240.10b-5(b).

[3] 17 CFR Sec. 240.14a-9.

[4] *TSC Industries, Inc. v.Northway, Inc.*, 426 U.S. 438, 449 (1976).

- Top officials at the Federal Reserve concluded that Bank of America knew or should have known in mid-November about the mounting losses at Merrill Lynch that ultimately led the Bank to appeal to the U.S. Government for a rescue.

- The top lawyer at the Fed speculated in email to Chairman Bernanke that Bank of America could be liable for securities law violations as a result of not disclosing that information to the Bank's shareholders.

- The November 12 forecast, created by Merrill Lynch and used by Bank of America's lawyers as a basis to determine if there was something shareholders should know before they approved the merger, <u>omitted any forecast</u> of how the most troublesome investments – collateralized debt obligations, subprime mortgage backed securities, credit default swaps – would perform in the next two months, November and December.

- In an interview with subcommittee staff, the former Merrill CFO admitted that the November 12 forecast was not, in fact, a valid forecast.

- Bank of America recognized that the November 12 forecast was deficient on the most crucial aspect of the acquisition – the potential for huge losses at Merrill Lynch. In an interview with staff, Mr. Cotty conceded that the November 12 forecast was of "questionable validity."

- However Bank of America did not do any actual analysis to make up for the Merrill omissions. On the contrary, Bank of America pulled a number out of thin air on November 13, which was recorded on the forecast document as the "gut" feeling of Neil Cotty. Bank of America simply created an assumption that Merrill Lynch' illiquid assets would almost break even for November, thereby spreading October's bad results over two months.

- The attorneys at Bank of America and at Wachtell, Lipton did not question the financial information they were given, in spite of the glaring and obvious omission and the explicit reference to a "gut" feeling. They advised Bank of America not to make further disclosures to its shareholders in advance of the merger vote, based on a deficient forecast and a "gut" feeling.

- The November 12 forecast's omission of any projection for losses in CDOs and other illiquid investments, and the implication that Merrill Lynch would break even in those investments for the remainder of the quarter, was material to the advice Mayopoulos gave Bank of America.

- Bank of America's Ken Lewis, Joe Price and Neil Cotty and Merrill Lynch's John Thain further agreed to pull another number out of thin air to supplement Merrill's omission of CDO performance in their December 3 forecast as well. Mayopoulos was made familiar with the financial data contained in the December

3 revised forecast, and he decided there was still nothing to disclose to shareholders.

Possible Legal Violations

As a law enforcement matter, the Subcommittee's findings form the basis of three possible legal violations by Bank of America and its lawyers.

First, a violation of Section 11 of the 1933 Securities Act, which creates private civil liabilities for false registration statements. Here, the question is, did Ken Lewis, Joe Price, Tim Mayopoulous and the Wachtell, Lipton attorneys *reasonably* rely upon the Neil Cotty guesswork and the deficient Merrill Lynch forecast?

Second, a violation of Rule 14a-9 of the 1934 Exchange Act. Rule 14a-9 prohibits false or misleading proxy solicitations. Here the question is, were Lewis, Price, and Mayopoulos *negligent,* and were the attorneys at Wachtell, Lipton *reckless*, in relying upon Merrill Lynch's deficient forecast and Cotty's guesswork?

Third, a violation of Rule 10b-5 of the 1934 Act, which makes it unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." Here the question is, were Bank of America and their attorneys *reckless*, i.e., did their conduct constitute an extreme departure from, or disregard for ordinary care?

Documents

Attached are documents gathered in our investigation. They include an annotated version of the November 12 forecast used by Timothy Mayopoulos, the original version of that forecast, handwritten notes by Wachtell, Lipton attorneys, as well as confidential emails and analyses prepared by staff at the Federal Reserve.

November 12 Forecast with Subcommittee notation

Merrill Lynch & Co.
4Q'08 Forecast

Revenue ex Marks/FVA/One-Time	4Q07	3Q08	4Q08 Forecast: Oct Act (25 days)	Nov MTD (7 days)	QTD Estimate	BTG	4Q08F	4Q08F B/(W): B/(W) 3Q08	B/(W) 4Q07
FICC	854	628	(1,389)	160	(1,230)	249	(980)	(25[illegible].0%)	(214.8%)
Equity	1,653	1,368	1,037	58	1,095	555	1,650	20.6%	(0.2%)
IBK	1,080	571	102	41	143	509	652	14.1%	(39.6%)
GPID	298	(315)	(296)	(120)	(416)	(184)	(600)	(90.5%)	(301.6%)
GMI Other	(180)	136	67	(8)	58	(118)	(60)	(144.1%)	66.7%
GMI	3,704	2,389	(479)	130	(349)	1,011	662	(72.3%)	(82.1%)
GPC	3,414	2,933	1,094	329	1,423	1,574	2,997	2.2%	(12.2%)
GIM	151	88	(18)	15	(3)	49	46	(47.5%)	(69.4%)
GWM	3,564	3,021	1,076	344	1,421	1,622	3,043	0.7%	(14.6%)
Corporate	(72)	287	532	(13)	519	(644)	(125)	(143.[illegible]%)	(73.2%)
ML&Co ex Marks/FVA/One-Time	7,196	5,697	1,130	461	1,590	1,989	3,580	(37.2%)	(50.3%)
Significant Items (Non-Marks)	-	2,133	(2,619)	-	(2,619)	-	(2,619)		
Total Marks	(16,718)	(10,656)	(2,720)	-	(2,720)	-	(2,720)		
FVAs	1,331	2,842	(1,078)	(8)	(1,086)	-	(1,086)		
Total Marks/Significant Items	(15,387)	(5,681)	(6,417)	(8)	(6,424)	-	(6,424)		
Total Revenue	(8,192)	16	(5,287)	453	(4,834)	1,989	(2,844)	NM	65.3%
Comp	3,021	2,725	1,051	310	1,361	1,772	2,823	(3.6%)	6.6%
Non Comp	2,335	1,819	612	248	860	1,599	2,211	(21.6%)	5.3%
VICP	1,318	758	495	122	617	477	972	(28.2%)	26.3%
Total Expenses ex One-Time	6,675	5,302	2,158	680	2,838	3,848	6,006	(13.3%)	10.0%
Restructuring	-	40	(1)		(1)	1	-		
Temasek	-	2,500	-		-	-	-		
PTE	(14,920)	(8,251)	(7,536)	(227)	(7,763)	(1,859)	(8,942)	(8.4%)	40.1%
Taxes	(4,623)	(3,132)	(3,000)	(90)	(3,090)	(559)	(3,559)	13.7%	(23.0%)
ML Operating ATE	(10,297)	(5,119)	(4,536)	(137)	(4,673)	(1,300)	(5,383)	(5.2%)	47.7%
All In Results:									
EPS	$ (12.57)	$ (5.56)					$ (3.46)	$ 2.10	$ 9.11
Pre-Tax Margin	NM	NM					NM	NM	NM
Tax Rate	31.0%	38.0%	39.8%				39.8%	(1.8) pts	(8.8) pts
Ex Marks/FVA/One-Time Results									
Revenue	7,196	5,697	1,130			1,989	3,580	-37%	-50%
PTE	521	395	(1,028)			(1,859)	(2,426)	-714%	-566%
ATE	362	274	(714)			(1,290)	(1,684)	-714%	-566%
EPS	$ 0.28	$ 0.15					$ (1.97)	$ (2.12)	$ (2.26)
Average Common Equity	31,541	27,683							
Common Equity	27,549	29,750							
Preferred Stock	4,383	8,605							
Trust Preferred Securities	4,725	4,773							
Equity Capital	36,657	43,128							
Total Assets	1,020,050	875,780	862,100 est	864,199 est			TBD		
Adjusted Assets	647,343	572,395	574,900 est	561,143 est			TBD		

Page 1

October's one month actual loss is nearly as large as loss for entire Third Quarter and is half Fourth Quarter 2007

Merrill Lynch omitted projection for November and December losses in CDOs and illiquid assets

4Q Forecast for CDOs and other exotic investments only reflects actual October losses, assuming a zero value for omitted projection for two-thirds of the Quarter: All of November and December

4Q Projected Company Loss omits any projection of CDO losses in November and December

Adjustment made by Bank of America adds $2 Billion in projected losses to the omitted projection in Merrill document. Fully half of the adjustment is based solely on the "gut" feeling of BofA's CAO, rather than any actual analysis of Merrill holdings

Bank of America top management and attorneys used this number in making shareholder disclosure decision.

(10,942)

-675 Alt-A from OCI to P&L
-1000 neil gut
-300 structured note fva (oct reversed 900 m)

November 12 Forecast-- Tim Mayopoulos copy

Merrill Lynch & Co.
4Q'08 Forecast

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Total Expenses ex One-Time	6,675	5,302	2,158	680	2,838	3,848	6,006	(13.3%)	10.0%
FF/ARS	54	425	92		92	-	92		
Restructuring	-	48	(1)		(1)	1	-		
Temasek	-	2,500	-		-	-	-		
PTE	(14,920)	(8,251)	(7,536)	(227)	(7,763)	(1,859)	(8,942)	(8.4%)	40.1%
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(10,942)

-675 All-A from OCI to P&L
-1020 mll gut
-300 structured note fvo (est reversed 900m)

$5B loss
w/ $1B contingency

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

November, so far, is flat

ML lost $7 B in October

do we have to get the # out?

11/12/08

Demmo

all had a terrible October!

Nov. so far, is flat

ML lost $7 B in October!

do we have to get the # out?

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

11/13/08

Herlihy, Demmo, Shapiro, Wasserman

Q1 - 2B loss

Q2 - 4.6B loss

Q3 - 5.1B loss

Q4 consensus est. - .06 positive

Tim Mayopoulos -
assume Nov. better — worry about not discl.?

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

~~Herlihy~~ Stein

11/13/08

Nationsbank - BofA
stock for stock merger
ratio
subject of proxy statement issued in 7/98
for vote to take place 9/24/98

8/98 - markets faltering —
LTCM collapse

Q. arose -
BofA b/c of DE Shaw relat.
confronted poss. of very
major write off loan
loss to DE Shaw
$1 B-loss = DE Shaw's equity

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

[illegible] Tim Mayopoulos, Ed, Nick 11/13/08
Teresa B.

Tim – more info
consensus for ML = .06
must be keep in trend

if just B/A side –

given ML's # – rec. both co report week or so before

our results not fabulous

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

Ed – [illegible] write a trend discl?
what would we know about Nov.

Tim – [illegible] how much detail?

Ed – not much – like MD&A

Tim – if ML break even for Nov. – $7B loss for 2 mos.

Nick – refer to past trend of losses ? + say that dated!

TB – [illegible] not speaking @ Goldman conf.

↓ expect it to be no better than – might be worse

Tim – all agree must be some discl.
Ed – yes but behind
Tim – not [illegible]

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

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

— tax loss [illegible] - hedging [illegible] - [illegible] has gone down in value [illegible] on hedge - Bill/Bear - [illegible] the loss . unhedged losses - convert [illegible] [illegible] Forecast benefit on [illegible] FX gain [illegible] to spot - so. [illegible] it is in $. - so no currency losses. (hedged as [illegible])

— 700 '07 (less risk)

— 1000 '08 (Δ back to normal rules)

Merrill Lynch & Co

2008 4Q & FY Forecast

November 12, 2008

—Concluded c̄ Tim + Ed that no pre meeting disclosures necessary

— DTA haircut -> Q3 worse 6.9 to 9.1 haircut

-> EVERY incremental $ of DTA gets haircut

->

Email from a senior adviser at the Federal Reserve, December 12, 2008

From: Tim P Clark
To: Rita C Proctor; Donald L Kohn; Kevin Warsh; Deborah P Bailey; Roger Cole; Coryann Stefansson; William Rutledge; Arthur Angulo; Brian Peters; Jennifer Burns; Mac Alfriend; Randall S Kroszner; Scott Alvarez
Subject: Update on BAC_ML
Date: 12/19/2008 02:29 PM

The following is a quick update and some preliminary views in advance of the call at 3:30 today.

We (FRB Richmond, FRB NY and Board staff) are continuing to gather needed info for full assessment of ML through Bank of America (BAC) management, though much of what is needed for a good preliminary assessment on ML is in our possession and being analyzed. We also had a pretty good sense already of conditions at BAC, which have also deteriorated recently as evidenced by their own projection for Q4 having gotten significantly worse in the past week or two, and we are currently working to update are views on BAC as a stand alone entity. As they themselves noted the other night at our meeting, even on a stand alone basis, the firm is very thinly capitalized in terms of tangible common equity (TCE) relative to assets and exposures.

- It is notable that a quick analysis of the TCE/... on stand-alone basis and as a combined entit... decline in BAC's projected year-end 2008 star... be driving as much of the decline in the comb... losses at ML, even as they are portraying the... issue here. This is largely the result of declin... and the fact that most capital in the combined... BAC.

The preliminary assessment on the ML loss numbers is... be being overly aggressive in some of its larger markd... say that with certainty and for all positions -- so the si... may not be over-stating the problems at ML to a large extent in an attempt to 'kitchen sink' the losses in advance of the acquisition date. Details on the sources of the 'new' $4 billion of losses are being sought right now and that will be included in the analysis once we get a bit more clarity.

General consensus forming among many of us working on this is that given market performance over past several months and the clear signs in the data we have that the deterioration at ML has been observably under way over the entire quarter -- albeit picking up significant around 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 BAC has been doing in preparation for the takeover. [As an aside, BAC management told us they could not provide electronic versions of ML files, and one wonders how that is possible since they have been doing the due diligence for months and having e-files would have made that much simpler and more effective

clear signs in the data we have that the deterioration at ML has been observably under way over the entire quarter – albeit picking up the significant around mid-November

Ken Lewis' claim that they were surprised by the rapid growth of the Losses seems somewhat suspect

Restricted Federal Reserve Analysis of Bank of America & Merrill Lynch Merger, December 21, 2008

- MER's deterioration has been substantially worse than BAC's and all but ensures that the firm could not survive as a stand-alone entity without raising substantial new capital (and\or government support) that is unlikely to be available given the uncertainty about its prospects and further future losses.
- Management now projects Q4 after-tax losses of roughly $14 billion for MER, and approximately a $1.4 billion after-tax quarterly net loss for BAC, which for BAC represents more than four times management's projected losses from just two weeks ago. The losses at MER will erode over 50% of MER's tangible common equity.

While the extent of the market disruptions that have occurred since mid-September were not necessarily predictable, BAC management's contention that the severity of MER's losses only came to light in recent days is problematic and implies substantial deficiencies in the due diligence carried out in advance of and subsequent to the acquisition.

- In the merger proxy statement and investor presentations the firm explicitly asserts that it has an understanding of MER's business activities, financial condition and prospects as well as an understanding of the outlook for the firm based on prospective economic and market conditions.
- Staff at the Federal Reserve has been aware of the firm's potentially large losses stemming from exposures to financial guarantors, which is the single largest area of risk exposure and driver of recent losses that have been identified by management. **These were clearly shown in Merrill Lynch's internal risk management reports that BAC reviewed during their due diligence.**
    - The potential for losses from other risk exposures cited by management, including those coming from leveraged loans and trading in complex structured credit derivatives products ('correlation trading') should also have been reasonably well understood, particularly as BAC itself is also active in both these products.
    - Having done a quick analysis on the specific positions/exposures at MER that generated the largest losses for MER in Q4, FRS staff see no clear indication that they were driven by overly aggressive marking down of positions in advance of the acquisition. This general conclusion notwithstanding, some of the marks do appear somewhat conservative and the appropriateness of the timing of the impairment charge taken against goodwill is hard to assess. On the other hand, credit valuation adjustments against financial guarantors are not particularly aggressive relative to those staff has observed at other firms.

The combined firm remains vulnerable to a continuing downturn.

BAC management's contention that the severity of MER's losses only came to light is problematic and implies substantial deficiencies in the diligence carried out in advance of and subsequent to the acquisition.

These were clearly shown in Merrill Lynch's internal risk management reports that BAC reviewed during their due diligence

Restricted Federal Reserve Analysis of Bank of America & Merrill Lynch Merger, December 21, 2008

- MER's deterioration has been substantially worse than BAC's and all but ensures that the firm could not survive as a … capital (and\or government sup… uncertainty about its prospects …
- Management now projects Q4 … approximately a $1.4 billion af… represents more than four time… ago. The losses at MER will c…

While the extent of the market d… were not necessarily predictable, … MER's losses only came to light … deficiencies in the due diligence ca… acquisition.

- In the merger proxy stateme… asserts that it has an unders… condition and prospects … based on prospective econo…
- Staff at the Federal Reserve … stemming from exposures to financial guarantors, which is the single largest area of risk exposure and driver of recent losses that have been identified by management. These were clearly shown in Merrill Lynch's internal risk management reports that BAC reviewed during their due diligence.
    - The potential for losses from other risk exposures cited by management, including those coming from leveraged loans and trading in complex structured credit derivatives products ('correlation trading') should also have been reasonably well understood, particularly as BAC itself is also active in both these products.
    - Having done a quick analysis on the specific positions/exposures at MER that generated the largest losses for MER in Q4, FRS staff see no clear indication that they were driven by overly aggressive marking down of positions in advance of the acquisition. This general conclusion notwithstanding, some of the marks do appear somewhat conservative and the appropriateness of the timing of the impairment charge taken against goodwill is hard to assess. On the other hand, credit valuation adjustments against financial guarantors are not particularly aggressive relative to those staff has observed at other firms.

The potential for losses from other risk exposures cited by management, including those coming from leveraged loans and the trading in complex structured credit derivatives products ('correlation trading') should also have been reasonably well understood, particularly as BAC itself is also active in both these products.

Email from General Counsel to Chairman Bernanke on December 23, 2008

From: Scott Alvarez
To:
Subject: Re: Fw: BAC
Date: 12/23/2008 11:23 AM
Encrypted

I agree we and Treasury gave our views on what we thought the likely effects would be of not proceeding, but that's different than ordering Lewis to proceed. We didn't take the decision out of his hands or threaten punitive supervisory action if he didn't proceed. I want to avoid the Fed being the centerpiece of the litigation. Lewis needs to have every incentive to analyze the facts and document and justify his decision. If he thinks he can rely on us, he'll assert there was nothing he could do and he can be reckless--not the right incentive. Moreover, once we're in the litigation, all our documents become subject to discovery and, as you'll remember from Deborah's presentation, some of our analysis suggests that Lewis should have been aware of the problems at ML earlier (perhaps as early as mid-November) and not caught by surprise. That could cause other problems for him around the disclosures BA made for the shareholder vote. In any event, we can always decide at the time of litigation whether to help even if now we hold fast.

Scott

Lewis should have been aware of the problems at ML earlier (perhaps as early as mid-November) and not caught by surprise. That could cause other problems for him around the disclosures BA made for the shareholder vote.

Email from General Counsel to Chairman Bernanke, December 23, 2008

From:
To: Scott Alvarez
Subject: Re: Fw: BAC
Date: 12/23/2008 11:08 AM
Encrypted

Thanks, Scott. Just to be clear, though we did nc
did indicate that we believed that going forward w
(safety and soundness) of his company. I think th
may be just academic, but anyway: What would b
advance of a litigation but if requested by the defe
that our analysis supported the safety and soundn
merger and that we communicated that to Lewis?

A different question that doesn't seem to be the one Lewis is focused on is related to disclosure. Management may be exposed if it doesn't properly disclose information that is material to investors.

▼ Scott Alvarez address deleted

Scott Alvarez/ address deleted

address deleted

cc

12/23/2008 10:18 AM Subject Re: Fw: BAC

His potential liability here will be whether he knew (or reasonably should have known) the magnitude of the ML losses when BA made its disclosures to get the shareholder vote on the ML deal in early December.

Mr. chairman,

Shareholder suits against management for decisions like this are
than successful. Courts will apply a "business judgment" rule th
management wide discretion to make reasonable business judgm
holds management liable for decisions that go bad. Witness Bea
different question that doesn't seem to be the one Lewis is focu
disclosure. Management may be exposed if it doesn't properly d
that is material to investors. There are also Sarbanes-Oxley req
management certify the accuarcy of various financial reports. Le
to comply with all those reporting and certification requirements
completing this deal. His potential liability here will be whether
reasonably should have known) the magnitude of the ML losses
disclosures to get the shareholder vote on the ML deal in early D
his lawyers were much involved in that set of disclosures and Lewis was clear to us
that he didn't hear about the increase in losses till recently.

All that said, I don't think it's necessary or appropriate for us to give Lewis a letter along the lines he asked. First, we didn't order him to go forward--we simply explained our views on what the market reaction would be and left the decision to him. Second, making hard decisions is what he gets paid for and only he has the