STATEMENT OF TIMOTHY J. MAYOPOULOS

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
AND
SUBCOMMITTEE ON DOMESTIC POLICY

NOVEMBER 17, 2009

Chairman Towns, Ranking Member Issa, and Members of the Committee:

Thank you for the Committee's invitation to appear before you today. The Committee has asked me to describe the legal advice Bank of America received in connection with its merger with Merrill Lynch, as well as the reasons for my departure from Bank of America on December 10, 2008. Like all lawyers, I am bound by professional ethics rules not to reveal any confidential communications I have had with my clients. However, Bank of America has recently waived its attorney-client privilege as to various issues relating to the Merrill Lynch merger, and has instructed me that I am free to answer questions that the Committee or other authorities may have for me with regard to those issues. In the hope that it will aid the Committee in its important work, and to avoid continued speculation about these matters, I have set forth below in considerable detail the legal advice I and other attorneys gave to the Company, as well as the circumstances of my departure.[1]

I served as Executive Vice President and General Counsel of Bank of America for nearly five years, from January 2004 until December 10, 2008. I have practiced law for 25 years in a variety of settings: in private practice at a major Wall Street law firm, in government service

[1] This statement is based on my best recollection of events that took place approximately one year ago. When I left Bank of America, I was not allowed to take any of my files with me, and I have not had the opportunity to review all of the many relevant contemporaneous documents. It is certainly possible that the review of additional relevant documents and other materials might refresh or refine my recollections of the events discussed in this statement.

and in senior in-house legal roles at several major financial institutions. I have spent most of my career in financial services, representing major financial institutions. As the Committee requested, I have submitted a CV outlining my experience, a copy of which is attached.

During my tenure at Bank of America, I was involved in six significant mergers: FleetBoston, MBNA, U.S. Trust, LaSalle, Countrywide Financial, and Merrill Lynch. The Merrill Lynch merger was announced on September 15, 2008 and consummated on December 31, 2008. I was the General Counsel of Bank of America for only part of this period, until December 10, 2008.

In my role as General Counsel of Bank of America, I was the senior legal officer of the Company. My client was the Company, not the management team. I was responsible for the delivery of all legal services to the Company, one of the largest financial institutions in the world. This meant that I was responsible for overseeing a very large number and wide range of legal matters, from major litigation and regulatory matters, to corporate governance issues, to complex transactions, and a multitude of other issues. To handle this volume and range of work, the Company employed over 350 in-house lawyers in 40 cities around the world. We also employed hundreds of outside law firms to handle significant matters for the Company.

As a result of the thousands of diverse legal issues facing Bank of America at any given time, I necessarily delegated many responsibilities to in-house lawyers and outside lawyers, and instructed them to bring important issues to my attention. In the case of the Merrill Lynch merger, I relied heavily on Bank of America's outside counsel, Ed Herlihy and Nick Demmo, partners at the esteemed law firm of Wachtell Lipton Rosen & Katz. Messrs. Herlihy and Demmo, together with their colleagues at Wachtell Lipton, are among the most highly respected mergers and acquisitions and securities lawyers in the country. I also relied on certain

in-house lawyers for the transaction, primarily Teresa Brenner, a long-time Bank of America lawyer who also had substantial experience in M&A and securities law. Shearman & Sterling, another preeminent law firm, represented Merrill Lynch in the merger.

Merrill Lynch Compensation Issues

In the context of the pending Securities and Exchange Commission lawsuit against Bank of America, questions have been raised as to what legal advice the Company received as to whether to disclose to shareholders the amount of the potential year-end bonus pool for Merrill Lynch employees. To my recollection, I had no role in this issue. I had no role in negotiating or drafting those provisions of the merger agreement or the disclosure schedule relating to the bonus pool for Merrill Lynch employees. That was done by others. As far as disclosure was concerned, I had no role in drafting the proxy statement sent to shareholders to solicit their approval of the merger. To the best of my knowledge, the lawyers at Wachtell Lipton and Shearman & Sterling drafted all of these materials, with the involvement of Ms. Brenner and other Bank of America in-house lawyers.

As was my practice, I relied on Wachtell Lipton and our in-house Bank of America lawyers to prepare the proxy statement properly and accurately, although I did review a draft of the proxy statement before it was mailed to shareholders. To the best of my recollection, at no time did anyone raise or discuss with me whether the potential year-end bonus pool for Merrill Lynch employees should be disclosed to shareholders. To the best of my recollection, I gave no advice on that topic.

I do recall giving advice with regard to Merrill Lynch compensation to Steele Alphin, Bank of America's Chief Administrative Officer, in late November or early December 2008. I advised Mr. Alphin that Merrill Lynch, and not Bank of America, was the proper party

to determine year-end bonuses for Merrill Lynch employees, as Merrill Lynch remained a separate company until the merger closed. I also advised Mr. Alphin, however, that it was appropriate for him to make clear to the Chairman of the Merrill Lynch Board of Directors Compensation Committee (who I understood had reached out to Mr. Alphin) that if Bank of America had experienced the very poor financial results for 2008 that Merrill Lynch had, Bank of America would not pay year-end bonuses to its senior employees. I also advised Mr. Alphin that he should make clear to the Chair of Merrill's Compensation Committee that it would be inappropriate for John Thain, Merrill Lynch's CEO, to be paid a year-end bonus. My advice to Mr. Alphin was not legal advice that such a bonus would be illegal, but rather my business judgment as to what would be best for the combined company.

Discussion of "Material Adverse Change" Provisions

The Committee has asked what legal advice Bank of America received regarding the "material adverse change" provisions of the merger agreement. To the best of my knowledge, from the time the merger agreement was signed until the time I left the Company, the only advice I or other lawyers gave regarding these provisions was on December 1, 2008. On that day, Joe Price, Bank of America's Chief Financial Officer, and Greg Curl, then Bank of America's head of Corporate Strategy, asked me to review with them the terms of the material adverse change provisions of the merger agreement. I do not recall why they asked for this briefing (or whether they provided me with a reason at the time). Neither of them suggested to me that they thought a material adverse change had occurred.

I reviewed the provisions with Messrs. Price and Curl, and we discussed what they meant and how they should be interpreted. I advised Messrs. Price and Curl that, based on the facts of which I was aware, no material adverse change existed. I explained that, for Merrill

Lynch's poor financial performance to constitute a material adverse change under the terms of the merger agreement, it needed, among other things, to be disproportionate to that of other companies in the industry. I advised that a court would likely start such an analysis with a comparison of Merrill Lynch's performance during the period since the merger had been announced with Bank of America's performance during that same period. If the two companies had similar performance following the merger announcement, it would be difficult to contend successfully that there had been a material adverse change that had a disproportionate impact on Merrill Lynch.

To the best of my recollection, we discussed the fact that the stock prices of the two companies had declined by similar percentages since the merger was announced. To my recollection, we also discussed that, in the two-and-one-half months since the deal had been signed, Bank of America had substantially cut its dividend, undertaken a significant stock offering to raise new capital, substantially increased its credit provisions, reported substantially lower than expected earnings, and accepted a $15 billion TARP preferred stock investment from the federal government. For all of these reasons, I concluded that there was no basis to conclude that a material adverse change had occurred with regard to Merrill Lynch.

Projected Merrill Lynch Fourth Quarter Losses

The Committee has also asked what legal advice Bank of America received as to whether to disclose Merrill Lynch's projected losses for the fourth quarter of 2008. Ed Herlihy and Nick Demmo at Wachtell Lipton and I gave advice on that topic to Mr. Price.

To the best of my recollection, this issue first arose around November 12, 2008. On that date or shortly thereafter, I was provided with a written forecast projecting that Merrill Lynch would have a fourth-quarter after-tax loss of approximately $5 billion. I understood that

this forecast had been prepared by Merrill Lynch and reviewed and commented upon by executives in Bank of America's Finance department. Between November 12 and November 18, I had several conversations with Messrs. Herlihy and Demmo related to whether the $5 billion projected loss should be disclosed.[2] In addition, I asked Ms. Brenner and others to provide me with a significant amount of information to evaluate this question, including to the best of my recollection: Merrill Lynch's earnings results over the prior five quarters, the materials Bank of America and Merrill Lynch disseminated announcing the merger, the proxy statement, and the Merrill Lynch and Bank of America public disclosures that are incorporated by reference into the proxy statement. To my recollection, I personally reviewed relevant portions of these materials and discussed them with Ms. Brenner.

On November 20, Mr. Price, other senior Bank of America business executives, Messrs. Herlihy and Demmo, and Ms. Brenner and I had a conference call to address the disclosure issue. To my recollection, we discussed the materials that I had reviewed and the legal principles applicable to the question of whether to make a disclosure of projected losses. All of the lawyers and business executives involved concluded that disclosure of the projected loss was not warranted. We concluded that disclosure was not warranted for a number of reasons:

First, neither the materials announcing the merger nor the proxy statement contained any projections or estimates of Merrill Lynch's future performance. Accordingly,

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[2] I do not remember having detailed discussions about the component parts of the fourth quarter projection, apart from being informed that the projection contained a $1 billion contingency, which I understood to be an estimate of certain of the losses. In addition, although I do not remember such discussions, documents I have been shown recently suggest that, in seeking advice from Wachtell Lipton, I provided Wachtell Lipton with information about both the fourth quarter projection as a whole and losses incurred to date for the month of October.

Bank of America and Merrill Lynch had no legal duty to update past disclosures about future performance.

Second, based on information already disclosed to shareholders, a reasonable investor would have been on notice that Merrill Lynch might well suffer multi-billion dollar losses in the fourth quarter of 2008. Indeed, that had been Merrill Lynch's experience since the financial crisis began in 2007. Over the 12-month period beginning with the fourth quarter of 2007, Merrill Lynch had experienced after-tax losses of approximately $22 billion, for an average quarterly after-tax loss of more than $5 billion. Merrill's after-tax losses in those four quarters ranged from $2 billion to nearly $10 billion. The projected losses of which I was advised were no greater.

Third, the proxy statement and public documents incorporated into the proxy statement unambiguously disclosed to investors that adverse business and market conditions could continue to impact Merrill Lynch negatively. These disclosures made clear that the entire financial services industry, including both Merrill Lynch and Bank of America, was facing tremendous challenges, that markets were extremely volatile, and that financial results were highly uncertain. Among other things, disclosures described the prevailing market conditions as "unprecedented" and "unparalleled."

As an example of the disclosures already given to shareholders, I quote below selected statements made in Bank of America's 10-Q for the third quarter of 2008, which was incorporated into the proxy statement. As noted below, the Bank's disclosure specifically stated that the risks identified applied to Merrill Lynch:

> **Risk Factors**
>
> **Difficult market conditions have adversely affected our industry** . . . We do not expect that the difficult conditions in the financial markets are likely to improve in the near future. A worsening of these conditions would likely

exacerbate the adverse effects of these difficult market conditions on us and others in the financial institutions industry.

Current levels of market volatility are unprecedented . . . The capital and credit markets have been experiencing volatility and disruption for more than 12 months. In recent weeks, the volatility and disruption has reached unprecedented levels. In some cases, the markets have produced downward pressure on stock prices and credit availability for certain issuers without regard to those issuers' underlying financial strength. If current levels of market disruption and volatility continue or worsen, there can be no assurance that we will not experience an adverse effect, which may be material, on our ability to access capital and our business, financial condition, and results of operations.

The soundness of other financial institutions could adversely affect us . . . [D]efaults by, or even rumors or questions about, one or more financial services institutions, or the financial services industry generally, have led to market-wide liquidity problems and could lead to losses or defaults by us or by other institutions. Many of these transactions expose us to credit risk in the event of default of our counterparty or client. In addition, our credit risk may be exacerbated when the collateral held by us cannot be realized upon or is liquidated at prices not sufficient to recover the full amount of the loan or derivative exposure due us. There is no assurance that any such losses would not materially and adversely affect our results of operations.

Many of the difficult market conditions that we face have adversely impacted Merrill Lynch as well. Merrill Lynch and its business are subject to many of the same difficulties resulting from the market turmoil and tightening of credit as we are. Merrill Lynch has exposure to the mortgage market through securities, derivatives, loans and loan commitments, including CDOs and subprime mortgages or related securities, with respect to which Merrill Lynch has entered into credit derivatives with various counterparties, including financial guarantors. Like us, Merrill Lynch also faces counterparty risk. Valuation of these exposures will continue to be impacted by external market factors, including default rates, rating agency actions, and the prices at which observable market transactions occur and the continued availability of these transactions. Merrill Lynch's ability to mitigate its risk by selling or hedging its exposures is also limited by the market environment, and its future results may continue to be materially impacted by the valuation adjustments applied to these positions. Many of the risks discussed above relating to the financial institutions industry, the difficult market conditions that exist in our industry, the volatility of the capital and credit markets and our credit risks apply to Merrill Lynch as well. Certain of these risks may have a differing impact, which in certain cases may be, or may have been, more adverse with respect to Merrill Lynch than with respect to us. In addition, Merrill Lynch may face risks in addition to those that we face.

Finally, in addition to the factors outlined above, there were numerous highly publicized events throughout 2008 that served as warning signs to investors that financial institutions such as Merrill Lynch would remain under great stress and might continue to incur significant losses. These included:

- Bear Stearns' near failure and arranged distressed sale to JP Morgan Chase;
- the collapse and Chapter 11 bankruptcy filing of Lehman Brothers, reportedly the largest bankruptcy in history;
- the failure of Washington Mutual and its sale to JP Morgan Chase;
- the near failure of Wachovia and its distressed sale to Wells Fargo;
- the government's rescue of AIG to stave off a collapse of the financial system;
- the government's takeover of Fannie Mae and Freddie Mac, the giant mortgage companies; and
- the government's extraordinary actions to authorize the expenditure of $700 billion to try to save the financial system.

For all of these reasons, Wachtell Lipton and I concluded no disclosure of the projected $5 billion loss was legally required. No one on the November 20 conference call disagreed with that conclusion.

Sometime on December 3, 2008, I learned from Joe Price that Merrill Lynch's projected after-tax loss for the fourth quarter had increased to approximately $7 billion. Mr. Price told me about the new forecast; I do not recall ever receiving or reviewing a copy of this forecast. I reviewed with Mr. Price the relevant facts and the applicable legal principles that we had discussed in the November 20 conference call with Wachtell Lipton. Based on the new forecast Mr. Price described to me, we concluded that disclosure of the $7 billion projected loss was not warranted for the same reasons as the $5 billion projected loss.

I have read in the press that, late in the afternoon of December 3, Ken Lewis, the CEO of Bank of America, John Thain, the CEO of Merrill Lynch, Mr. Price, and Neil Cotty, the Chief Financial Officer for Bank of America's Corporate and Investment Banking division, discussed Merrill's potential losses. I did not participate in that discussion and was not aware of it at the time. Press reports indicate that a revised forecast was prepared that produced a $9 billion projected after-tax loss. I have no recollection of receiving or reviewing a copy of that forecast. I have read that the $9 billion projected loss included an additional $2 billion after-tax "plug" figure, referred to as "WAG" – which reportedly stood for "Wild Ass Guess." My recollection is that the first I learned of a $9 billion projected loss was at the Bank of America Board of Directors meeting the following week on December 9.

While I do not recall receiving or reviewing the $9 billion forecast, if in fact a big part of it was a "Wild Ass Guess," I believe my legal advice would have been that such a guess was not an appropriate basis for a public disclosure. The law is clear that public disclosures to shareholders must be based on information that is reasonably reliable.

With regard to the earlier $5 billion and $7 billion forecasts I had discussed with Mr. Price, I was concerned that they were also based in part on guesses that might not be sufficiently reliable for investors to make an investment decision. Indeed, it is obvious in hindsight that, if any of the estimates had been publicly disclosed to shareholders at the time, shareholders would have been misled. All of the estimates that were developed through December 3 turned out to be materially incorrect when compared against Merrill Lynch's actual reported fourth quarter after-tax loss of $15.31 billion. If we had made a disclosure of any of these forecasts, shareholders would have likely sued the Company for misleading them as to the extent of the fourth quarter losses.

On December 5, the shareholders of Bank of America and Merrill Lynch voted to approve the merger. On December 9, I attended a meeting of the Bank of America Board of Directors. At that meeting, Mr. Price gave a presentation in which he indicated that the projected fourth quarter after-tax loss for Merrill Lynch was $9 billion. As this figure was higher than what I recalled discussing with Mr. Price on December 3, I sought to meet with Mr. Price to understand the $9 billion projected loss figure.

To my recollection, I was advised that Mr. Price was not available to meet after the Board meeting on December 9, as he was in a meeting with Mr. Lewis and other senior business executives for the rest of the day. I decided to try to meet with him the next day, December 10. We never met.

<u>My Termination by the Bank</u>

A little before noon on December 10, while I was in a meeting with Legal department personnel planning the integration of the Bank of America and Merrill Lynch Legal departments, my assistant told me that Amy Brinkley, the Company's Chief Risk Officer, was in my office and wanted to see me. When I arrived in my office, Ms. Brinkley advised me that Ken Lewis had decided to replace me as General Counsel. She said that Mr. Lewis had made this decision quickly and recently. Ms. Brinkley said that Brian Moynihan, a Bank of America business executive, would be assuming the role of General Counsel immediately.

Ms. Brinkley said I was being terminated effective immediately and that I was to leave the premises immediately. She said I should take nothing with me, and that a representative from the Company's Human Resources department was waiting outside to give me my severance papers. The HR representative came in and gave me the severance papers and took my corporate ID card, company credit card, blackberry and office keys. He reiterated that I

could not take anything with me and that my personal effects would be sent to me. He then escorted me to the executive parking garage. I got in my car and drove home.

I was stunned. I had never been fired from any job, and I had never heard of the general counsel of a major company being summarily dismissed for no apparent reason and with no explanation.

I was surprised for many additional reasons, including the following:

First, Ms. Brinkley, to whom I had reported for much of my tenure at the Company, consistently advised me that I was regarded as a "top talent" in the Company and had been identified to the Board of Directors as such. Ms. Brinkley also repeatedly advised me that there was concern that the Company did not have a qualified succession candidate for my role should anything happen to me.

Second, throughout my years at Bank of America, I consistently received outstanding performance reviews. Indeed, in the days immediately preceding my dismissal, I had received outstanding year-end comments about my performance and the performance of the Company's Legal department from nearly every member of the executive management team, including Mr. Alphin, Ms. Brinkley, Mr. Price, Mr. Curl, Keith Banks (the head of the Wealth Management division), Liam McGee (the head of the Consumer and Small Business Banking division), Bruce Hammonds (the head of the Credit Card business), and Barbara Desoer (the head of the Mortgage business).

Third, Ken Lewis never expressed any dissatisfaction with my performance to me or, to my knowledge, to anyone else. In fact, Mr. Lewis himself informed me the night we began work on the Merrill Lynch merger that I would be the General Counsel of the combined company following the merger.

Fourth, Brian Moynihan confirmed that Mr. Lewis had confidence in me and that I would be the General Counsel of the combined company. After I began to report to Mr. Moynihan in late September or early October 2008, Mr. Moynihan also assured me that, even though he was once a practicing lawyer, I should continue to do my work as the General Counsel without regard to his legal background. Mr. Moynihan informed me that he had no interest in being the General Counsel. It had been at least 10 years since he had last practiced law.

Finally, I could not understand why I was dismissed so abruptly. I was surprised that I was given no opportunity to say goodbye to my colleagues and staff, and why there was no orderly transition of my work to Mr. Moynihan. No one, including Mr. Moynihan, ever contacted me to discuss what I had been working on.

Nearly a year later, I still do not know why I was terminated, who was involved in the decision to do so, or what their reasons or motivations were.

Events Following My Termination

After I left the Company on December 10, I was never consulted about any of the matters I had been working on. Accordingly, I cannot tell you what legal advice the Company received after I was fired.

I understand from media reports that, after my departure from the Company, Merrill Lynch's projected losses continued to increase to levels that were much higher than previous estimates, and much higher than the losses Merrill Lynch had experienced in the fourth quarter of 2007 and in the first three quarters of 2008. Ultimately, on January 16, 2009, Merrill Lynch reported a $15.31 billion after-tax loss for the fourth quarter of 2008. Any questions about what legal advice the Company received about whether to disclose these much larger

losses after my termination on December 10 would have to be answered by Mr. Moynihan and Wachtell Lipton.

I also understand that, after I left the Company, Bank of America considered declaring a “material adverse change” under the merger agreement and terminating the merger. Mr. Lewis has testified before this Committee that he had discussions with Treasury Secretary Paulson and Federal Reserve Chairman Bernanke about declaring a material adverse change. These discussions were after my termination. Again, any questions as to what legal advice Bank of America received as to whether there was a material adverse change, what should be said to government officials about that, or whether the Company should disclose to shareholders that it was considering invoking the material adverse change provisions, would have to be answered by Mr. Moynihan and Wachtell Lipton.

* * *

I have sought to provide in this statement a detailed description of the information the Committee has requested, that is, the legal advice Bank of America received in connection with the Merrill Lynch merger and the reasons for my departure from the Company on December 10, 2008. Throughout my 25-year career as a lawyer, and throughout my tenure at Bank of America, I have sought to conduct myself in accordance with the highest standards of my profession. At all times while I served as the General Counsel of Bank of America, I acted in good faith to provide legal advice that I believed was appropriate, considered and in the best interests of the Company and its shareholders. I did my best to be a good, careful and honest lawyer. I look forward to answering any questions that Members may have.

TIMOTHY J. MAYOPOULOS

WORK EXPERIENCE

FEDERAL NATIONAL MORTGAGE ASSOCIATION (known as FANNIE MAE)
Executive Vice President, General Counsel and Corporate Secretary: April 2009 to present

Chief legal officer of this government-sponsored enterprise chartered by Congress to provide liquidity, stability and affordability to the nation's housing and mortgage markets. Provide counsel to senior management and the board of directors, and oversee a legal department of more than 100 lawyers. Member of the Executive Committee.

BANK OF AMERICA CORPORATION
Executive Vice President and General Counsel: January 2004 to December 2008

Responsible for the delivery of all legal services to this NYSE-listed, global diversified financial services company, a leader in consumer and commercial banking, wealth management, corporate and investment banking, and capital markets. Managed a legal department of more than 350 lawyers globally and an annual outside counsel budget in excess of $500 million. Member of the Management Operating Committee.

DEUTSCHE BANK AG CORPORATE AND INVESTMENT BANK, AMERICAS
Managing Director and General Counsel: 2002 to 2003

Responsible for all legal matters for Deutsche Bank's Corporate and Investment Bank in the Americas, the seventh largest broker-dealer in the U.S. at the time. Managed a legal staff of approximately 100 persons in the U.S., Canada, Mexico, Brazil, Argentina and Chile.

CREDIT SUISSE FIRST BOSTON/ DONALDSON, LUFKIN & JENRETTE, INC.
Managing Director and Senior Deputy General Counsel – Americas: 2000 to 2001
Managing Director and Associate General Counsel: 1996 to 2000

Provided legal support for all business lines of these major investment banks and broker-dealers, including investment banking, merchant banking, fixed-income and equity sales and trading, derivatives, and retail brokerage.

OFFICE OF THE INDEPENDENT COUNSEL, IN RE MADISON GUARANTY SAVINGS & LOAN
Associate Independent Counsel: 1994 to 1996

Handled various prosecutorial matters, including conducting grand jury proceedings and litigating issues of first impression regarding the Independent Counsel Act.

DAVIS POLK & WARDWELL
Litigation Associate: 1986 to 1994

Conducted complex litigation on behalf of commercial banks, securities broker-dealers, investment banks, accounting firms, insurance companies and other clients in federal and state lawsuits, administrative proceedings, and SEC and federal grand jury investigations.

HONORABLE WILLIAM C. CONNER, U.S. District Judge, Southern District of New York
Law Clerk: 1984 to 1986

AWARDS AND RECOGNITION

2007 Burton Award for Legal Achievement
2008 Lawdragon Top 500 Leading Lawyers in America
2008 Thurgood Marshall Award of Excellence

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, J.D., cum laude, 1984

Articles Editor, *New York University Law Review*
Elected to Order of the Coif (legal academic honor society)

CORNELL UNIVERSITY, A.B. in English, with Distinction in All Subjects, 1980

BAR ADMISSIONS

State of New York, Appellate Division, First Department
State of North Carolina
District of Columbia (application pending)

U.S. Supreme Court
U.S. Courts of Appeals for the Second and Eighth Circuits
U.S. District Courts for the Southern and Eastern Districts of New York and the Eastern and Western Districts of Arkansas