CtW Investment Group

March 26, 2009

Dear fellow Bank of America Shareholder:

We urge you to vote "Against" directors Kenneth Lewis, Thomas Ryan and O. Temple Sloan at the Bank of America ("BAC") Annual Meeting of Stockholders on April 29th. As Chairman and CEO, Mr. Lewis is responsible for an ill-advised acquisition of Merrill Lynch that transformed a bank well positioned to weather the financial crisis into one of its most costly casualties. Subsequent missteps have further compromised his credibility with investors and regulators.

With BAC's share price down 79% in six months and financial markets still unstable, BAC's board of directors urgently needs to recruit a CEO who can restore investor and regulatory confidence. Removing directors Lewis, Ryan and Sloan is the first step in this process. Mr. Sloan is Lead Director and Mr. Ryan is chair of the board committee responsible for CEO succession and director nominations. Together they bear primary responsibility for the board's failure to oversee and, when it became necessary given his costly missteps, replace Mr. Lewis. These missteps include:

- negotiating a precipitous, risky and ultimately disastrous acquisition of Merrill at a moment of acute financial uncertainty based on minimal due diligence;
- failing to either monitor or disclose Merrill's rapidly deteriorating financial condition prior to the merger vote, and to disclose this deterioration and BAC's resulting need for additional federal assistance in the period between the merger vote and closing; and
- allowing Merrill to prematurely pay $3.6 billion in 2008 bonuses under a secret agreement and then denying BAC had legal authority over the bonuses in testimony to Congress.

The Merrill acquisition and bonus fiascos are ultimately failures of the board to oversee risk management, disclosure, compensation and compliance, and they demonstrate the need to substantially restructure and strengthen BAC's 18-member board. In the event that shareholders vote to remove directors Lewis, Ryan and Sloan, we expect the board to name independent chairmen of both the board and its Corporate Governance Committee to recruit a new CEO and begin a process to reconstitute the board itself.

The CtW Investment Group works with pension funds sponsored by unions affiliated with Change to Win, a coalition of unions representing six million members. These funds are substantial long-term BAC shareholders. For more than a year we have expressed concerns to BAC directors—in multiple letters and in a March 2008 meeting with Temple Sloan—with risk oversight, 2008 bonus payments and, most recently, the need for CEO succession. We detail our concerns below.

1. CEO Ken Kewis negotiated a precipitous, risky and ultimately disastrous acquisition of Merrill at a moment of acute financial uncertainty based on minimal due diligence.

Unlike most banks, whose current financial problems are the result of irresponsible risks taken prior to the present financial crisis, BAC was financially sound upon entering the crisis. Its troubles are largely the result of its ill-conceived and poorly executed acquisition of Merrill after the severity of the crisis had become painfully apparent.

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While no bank stocks have escaped the consequences of the banking meltdown, the below table shows that BAC substantially outperformed the S&P 500 Banks Index (-32% vs. -47%) in the 12 months preceding its September 15, 2008 Merrill merger announcement, a period that captures the beginning of the meltdown. Since the merger announcement, however, BAC's shares have tumbled 79 percent, while the Banks Index is down 59 percent.

BAC's Relative Share Price Performance: Pre- and Post-Merger Agreement

	9/14/07 - 9/14/08	9/14/08 - 3/24/09
Bank of America	-32%	-79%
S&P 500 Banks Index	-47%	-59%
S&P 500 Index	-16%	-36%

Source: Capital IQ

In assessing Ken Lewis's decision to acquire Merrill, it's important to recognize that the deal differed dramatically from BAC's past acquisitions in at least three important ways. First, BAC had little experience with Merrill's core businesses—investment banking and retail brokerage. BAC is predominantly a commercial bank and it has mainly acquired other banks or mortgage lenders, businesses with which its board and management are familiar. Second, the acquisition occurred during severely distressed market conditions. While it was a deal born of necessity for Merrill Chairman and CEO John Thain, it was one of perceived opportunity for Ken Lewis. Although the federal government encouraged the deal, Ken Lewis said in September that he felt "no pressure" from federal regulators to conclude the deal with Merrill.

Finally, the deal was negotiated in only two days. As the BAC-Merrill merger proxy discloses, John Thain contacted Ken Lewis on Saturday morning, September 13, 2008, to discuss a possible transaction. Mr. Lewis agreed to meet with Mr. Thain later that day in New York City. Mr. Thain initially proposed that BAC acquire a 9.9% equity stake in Merrill, an approach that would have allowed BAC time to study Merrill's portfolio and consider the wisdom of a full-on merger. But Lewis rejected the proposal, saying he was only interested in the entire company. The companies spent much of Sunday in discussions and by midnight the deal was approved by both boards.

This was simply too little time to perform meaningful due diligence, especially given Merrill's unfamiliar businesses and its illiquid securities and derivatives. Significantly, when BAC merged with FleetBoston in 2003, discussions between the companies had been taking place for at least a month, and four days elapsed between the signing of confidentiality agreements on October 22, 2003, and final approval by both boards on October 26th. Similarly, when BAC merged with MBNA in 2005, there were at least nine days between the first discussions of a merger in earnest and the approval of both boards.

2. **BAC's management and board failed either to monitor or disclose Merrill's deteriorating financial condition prior to the merger vote, and to disclose this deterioration and BAC's resulting need for additional federal aid in the period between the merger vote and closing.**

The consequences of the Merrill acquisition became clearer two weeks after its January 1, 2009 closing, when a series of disclosures sent BAC's shares tumbling 50 percent in three consecutive trading days – from a closing price of $10.20 on January 14th to $5.10 on January 20th.

First, on Thursday January 15th, the *Wall Street Journal* reported that the Treasury Department was finalizing a deal to give billions in additional TARP funds to BAC to help it close the Merrill deal "because of Merrill's larger-than-expected losses in the fourth quarter." BAC confirmed this the next day when it announced that Merrill had lost $15 billion in fourth quarter 2008 and that Treasury had agreed to assist in the Merrill acquisition by investing an additional $20 billion in BAC—on top of $25 billion it had already invested--and providing protection against further losses on $118 billion in exposure from Merrill's portfolio. On Monday January 20th, Friedman Billings Ramsey Group analyst estimated that BAC needed at least $80 billion of additional capital.

BAC shareholders could have avoided these devastating losses had BAC disclosed Merrill's rapid decline, either before the December 5, 2008 merger vote or the January 1, 2009 closing. Although there is some dispute whether BAC knew of Merrill's deterioration prior to the merger vote, the *WSJ* has reported that, "By the end of November …Merrill had accumulated $13.34 billion in pretax quarterly losses" and "some [BAC] executives expressed concern about proceeding with the takeover." At minimum, BAC *should* have known: former Merrill CEO John Thain has testified that BAC had "daily access to the exact same financial information that I had."

There is no question that Ken Lewis was aware of Merrill's decline well before the merger's January 1, 2009 closing. According to New York State Attorney General Andrew Cuomo, BAC's CFO advised Lewis on December 14th that Merrill was deteriorating at an alarming rate and had increased its fourth quarter loss to $12 billion. In response, Ken Lewis met with federal regulators to discuss BAC's possible invocation of the material adverse effect clause of the Merger Agreement to withdraw from the transaction. As noted above, federal regulators eventually agreed to provide BAC with additional federal assistance to complete the transaction.

Whether Ken Lewis was aware of Merrill's deteriorating condition before the merger vote and failed to inform shareholders or whether he was negligent in monitoring the assets that he had contracted to acquire, he is culpable. Had BAC at least disclosed these circumstances prior to the January 1, 2009 closing, instead of two weeks afterward, shareholders could have sued to enjoin the closing subject to a revote or sought other remedies. BAC's failure to provide timely disclosure of Merrill's rapid decline has prompted shareholder litigation alleging breach of fiduciary duty.

3. **Ken Lewis allowed Merrill to prematurely pay $3.6B in bonuses under a secret agreement and then denied that BAC had legal authority over the bonuses in testimony to Congress.**

In the most egregious pay-for-performance failure of the financial crisis, the Merrill board voted on December 8, 2008 to award $3.6 billion in 2008 bonuses, including $121 million to four top executives, despite Merrill's virtual collapse. Within a week, Merrill determined that it would incur an unexpected additional $3 billion in fourth quarter losses, beyond the $9 billion it had projected on December 8th, and Merrill's accelerating fourth quarter losses ultimately reached $15 billion. Merrill subsequently paid the bonuses on December 29th, prior to the closing of its acquisition by BAC and the disclosure of its $15 billion loss. This premature payment was unprecedented at Merrill, which typically pays bonuses in January, and came at the expense of BAC shareholders.

Responding to inquiries regarding BAC's role in the Merrill bonus fiasco, BAC released a statement in January stating: "John Thain and the Merrill Lynch compensation committee made the decision on the amount and timing of year-end compensation at Merrill Lynch. We had no legal right to challenge it." And on February 11th, Ken Lewis testified to Congress that "[Merrill] had a separate board, separate compensation committee, and we had no authority to tell them what to do."

These claims are not credible in light of an undisclosed bonus Agreement between BAC and Merrill uncovered as part of an ongoing investigation into the Merrill bonus payouts by Attorney General Cuomo. According to this September 15, 2008 Agreement, which established a pool of up to $5.8 billion for Merrill's 2008 incentive pay, 2008 bonus awards were to be arrived at "by [Merrill] in consultation with [BAC]." As Attorney General Cuomo wrote in a March 11, 2009 memorandum to a New York court, "Despite its representations to the contrary, Bank of America clearly could have influenced, if not controlled, the timing of Merrill's bonuses."

According to John Thain, BAC did influence Merrill's original bonus determinations. Mr. Thain testified that "[BAC] provided input to what the ultimate number was; they changed the mix of cash and stock -- we changed it at their request -- and they had access to name-by-name compensation figures. So they were an integral part of the process of determining both what the ultimate pool size was and what individuals got."

Having agreed to the original bonus amounts, neither Mr. Lewis nor the BAC board's compensation chaired by Temple Sloan requested or demanded that Merrill reduce its bonus pool given Merrill's rapid decline. Mr. Lewis further damaged his credibility, as well as antagonized government officials, by both denying responsibility for the bonuses in testimony to Congress and refusing to provide bonus information subpoenaed by the New York Attorney General with the support of the Chairman of the House Financial Services Committee until compelled by a New York Court.

Conclusion: Vote "Against" Directors Lewis, Ryan and Sloan

Chairman and CEO Ken Lewis chose to do the risky Merrill deal and to do so based on minimal due diligence. He therefore bears responsibility for transforming a bank well positioned to weather the financial crisis into one of its most costly casualties requiring a federal bailout totaling $163 billion in capital and asset protection. Having entered into the deal, he committed missteps that further compromised his credibility with investors and regulators. These include failing to provide timely disclosure of Merrill's rapid deterioration and allowing Merrill to prematurely pay $3.6 billion in 2008 bonuses under an undisclosed agreement.

As Lead Director and Governance Committee chair, directors Ryan and Sloan are most responsible for the board's failures to oversee and ultimately replace Mr. Lewis as Chairman and CEO.

Please contact Michael Garland at 212-471-1317 for additional information.

Sincerely,

William Patterson
Executive Director

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