Exhibit A
AGREEMENT AND PLAN OF MERGER

by and between

MERRILL LYNCH & CO., INC.

and

BANK OF AMERICA CORPORATION

DATED AS OF SEPTEMBER 15, 2008
## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>ARTICLE I</th>
<th>THE MERGER</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1</td>
<td>The Merger</td>
<td>1</td>
</tr>
<tr>
<td>1.2</td>
<td>Effective Time</td>
<td>2</td>
</tr>
<tr>
<td>1.3</td>
<td>Effects of the Merger</td>
<td>2</td>
</tr>
<tr>
<td>1.4</td>
<td>Conversion of Stock</td>
<td>2</td>
</tr>
<tr>
<td>1.5</td>
<td>Stock Options and Other Stock-Based Awards, ESPP</td>
<td>3</td>
</tr>
<tr>
<td>1.6</td>
<td>Certificate of Incorporation and Bylaws of the Surviving Company</td>
<td>6</td>
</tr>
<tr>
<td>1.7</td>
<td>Directors and Officers</td>
<td>6</td>
</tr>
<tr>
<td>1.8</td>
<td>Tax Consequences</td>
<td>6</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ARTICLE II</th>
<th>DELIVERY OF MERGER CONSIDERATION</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1</td>
<td>Exchange Agent</td>
<td>6</td>
</tr>
<tr>
<td>2.2</td>
<td>Deposit of Merger Consideration</td>
<td>7</td>
</tr>
<tr>
<td>2.3</td>
<td>Delivery of Merger Consideration</td>
<td>7</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ARTICLE III</th>
<th>REPRESENTATIONS AND WARRANTIES OF COMPANY</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.1</td>
<td>Corporate Organization</td>
<td>10</td>
</tr>
<tr>
<td>3.2</td>
<td>Capitalization</td>
<td>11</td>
</tr>
<tr>
<td>3.3</td>
<td>Authority; No Violation</td>
<td>13</td>
</tr>
<tr>
<td>3.4</td>
<td>Consents and Approvals</td>
<td>14</td>
</tr>
<tr>
<td>3.5</td>
<td>Reports; Regulatory Matters</td>
<td>14</td>
</tr>
<tr>
<td>3.6</td>
<td>Financial Statements</td>
<td>16</td>
</tr>
<tr>
<td>3.7</td>
<td>Broker’s Fees</td>
<td>17</td>
</tr>
<tr>
<td>3.8</td>
<td>Absence of Certain Changes or Events</td>
<td>17</td>
</tr>
<tr>
<td>3.9</td>
<td>Legal Proceedings</td>
<td>19</td>
</tr>
<tr>
<td>3.10</td>
<td>Taxes and Tax Returns</td>
<td>19</td>
</tr>
<tr>
<td>3.11</td>
<td>Employee Matters</td>
<td>20</td>
</tr>
<tr>
<td>3.12</td>
<td>Compliance with Applicable Law</td>
<td>23</td>
</tr>
<tr>
<td>3.13</td>
<td>Certain Contracts</td>
<td>23</td>
</tr>
<tr>
<td>3.14</td>
<td>Risk Management Instruments</td>
<td>24</td>
</tr>
<tr>
<td>3.15</td>
<td>Investment Securities and Commodities</td>
<td>24</td>
</tr>
<tr>
<td>3.16</td>
<td>Property</td>
<td>24</td>
</tr>
<tr>
<td>3.17</td>
<td>Intellectual Property</td>
<td>25</td>
</tr>
<tr>
<td>3.18</td>
<td>Environmental Liability</td>
<td>26</td>
</tr>
<tr>
<td>3.19</td>
<td>Broker-Dealer and Investment Advisory Matters</td>
<td>27</td>
</tr>
<tr>
<td>3.20</td>
<td>Securitization Matters</td>
<td>29</td>
</tr>
<tr>
<td>3.21</td>
<td>State Takeover Laws</td>
<td>32</td>
</tr>
<tr>
<td>3.22</td>
<td>Interested Party Transactions</td>
<td>32</td>
</tr>
<tr>
<td>3.23</td>
<td>Reorganization</td>
<td>32</td>
</tr>
<tr>
<td>3.24</td>
<td>Opinion</td>
<td>32</td>
</tr>
<tr>
<td>3.25</td>
<td>Company Information</td>
<td>32</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

(continued)

<table>
<thead>
<tr>
<th>ARTICLE IV</th>
<th>REPRESENTATIONS AND WARRANTIES OF PARENT</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.1</td>
<td>Corporate Organization</td>
<td>33</td>
</tr>
<tr>
<td>4.2</td>
<td>Capitalization</td>
<td>33</td>
</tr>
<tr>
<td>4.3</td>
<td>Authority; No Violation</td>
<td>34</td>
</tr>
<tr>
<td>4.4</td>
<td>Consents and Approvals</td>
<td>35</td>
</tr>
<tr>
<td>4.5</td>
<td>Reports; Regulatory Matters</td>
<td>35</td>
</tr>
<tr>
<td>4.6</td>
<td>Financial Statements</td>
<td>37</td>
</tr>
<tr>
<td>4.7</td>
<td>Broker’s Fees</td>
<td>38</td>
</tr>
<tr>
<td>4.8</td>
<td>Absence of Certain Changes or Events</td>
<td>38</td>
</tr>
<tr>
<td>4.9</td>
<td>Legal Proceedings</td>
<td>38</td>
</tr>
<tr>
<td>4.10</td>
<td>Taxes and Tax Returns</td>
<td>38</td>
</tr>
<tr>
<td>4.11</td>
<td>Compliance with Applicable Law</td>
<td>39</td>
</tr>
<tr>
<td>4.12</td>
<td>Reorganization, Approvals</td>
<td>39</td>
</tr>
<tr>
<td>4.13</td>
<td>Opinion</td>
<td>39</td>
</tr>
<tr>
<td>4.14</td>
<td>Certain Contracts</td>
<td>39</td>
</tr>
<tr>
<td>4.15</td>
<td>Risk Management Instruments</td>
<td>39</td>
</tr>
<tr>
<td>4.16</td>
<td>Intellectual Property</td>
<td>40</td>
</tr>
<tr>
<td>4.17</td>
<td>Parent Information</td>
<td>40</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ARTICLE V</th>
<th>COVENANTS RELATING TO CONDUCT OF BUSINESS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.1</td>
<td>Conduct of Businesses Prior to the Effective Time</td>
<td>41</td>
</tr>
<tr>
<td>5.2</td>
<td>Company Forbearances</td>
<td>41</td>
</tr>
<tr>
<td>5.3</td>
<td>Parent Forbearances</td>
<td>44</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ARTICLE VI</th>
<th>ADDITIONAL AGREEMENTS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.1</td>
<td>Regulatory Matters</td>
<td>44</td>
</tr>
<tr>
<td>6.2</td>
<td>Access to Information</td>
<td>45</td>
</tr>
<tr>
<td>6.3</td>
<td>Stockholder Approval</td>
<td>46</td>
</tr>
<tr>
<td>6.4</td>
<td>NYSE Listing</td>
<td>46</td>
</tr>
<tr>
<td>6.5</td>
<td>Employee Matters</td>
<td>46</td>
</tr>
<tr>
<td>6.6</td>
<td>Indemnification, Directors’ and Officers’ Insurance</td>
<td>47</td>
</tr>
<tr>
<td>6.7</td>
<td>Additional Agreements</td>
<td>48</td>
</tr>
<tr>
<td>6.8</td>
<td>Advice of Changes</td>
<td>49</td>
</tr>
<tr>
<td>6.9</td>
<td>Exemption from Liability Under Section 16(b)</td>
<td>49</td>
</tr>
<tr>
<td>6.10</td>
<td>No Solicitation</td>
<td>49</td>
</tr>
<tr>
<td>6.11</td>
<td>Dividends</td>
<td>52</td>
</tr>
<tr>
<td>6.12</td>
<td>Redemption of Exchangeable Shares</td>
<td>52</td>
</tr>
<tr>
<td>6.13</td>
<td>Tax Matters</td>
<td>52</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ARTICLE VII</th>
<th>CONDITIONS PRECEDENT</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.1</td>
<td>Conditions to Each Party’s Obligation to Effect the Merger</td>
<td>53</td>
</tr>
<tr>
<td>7.2</td>
<td>Conditions to Obligations of Parent</td>
<td>53</td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS
(continued)

7.3 Conditions to Obligations of Company ................................................................. 54

ARTICLE VIII TERMINATION AND AMENDMENT .......................................................... 55
  8.1 Termination ............................................................................................................. 55
  8.2 Effect of Termination ........................................................................................... 56
  8.3 Fees and Expenses ............................................................................................... 56
  8.4 Amendment ........................................................................................................... 56
  8.5 Extension; Waiver ............................................................................................... 56

ARTICLE IX GENERAL PROVISIONS ........................................................................... 57
  9.1 Closing .................................................................................................................. 57
  9.2 Standard ............................................................................................................... 57
  9.3 Nonsurvival of Representations, Warranties and Agreements ......................... 57
  9.4 Notices .................................................................................................................. 57
  9.5 Interpretation ........................................................................................................ 58
  9.6 Counterparts .......................................................................................................... 59
  9.7 Entire Agreement ................................................................................................. 59
  9.8 Governing Law; Jurisdiction ............................................................................... 59
  9.9 Publicity ............................................................................................................... 59
  9.10 Assignment; Third Party Beneficiaries .............................................................. 59

Exhibit A—Stock Option Agreement
Exhibit B—Amendment to Surviving Company Certificate of Incorporation
# INDEX OF DEFINED TERMS

<table>
<thead>
<tr>
<th>Term</th>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>1940 Act</td>
<td>3.19(h)(i)</td>
</tr>
<tr>
<td>Adjusted Option</td>
<td>1.5(a)</td>
</tr>
<tr>
<td>Adverse Development</td>
<td>3.20(h)</td>
</tr>
<tr>
<td>Advisers Act</td>
<td>3.19(h)(ii)</td>
</tr>
<tr>
<td>Agreement</td>
<td>Preamble</td>
</tr>
<tr>
<td>Alternative Proposal</td>
<td>6.10(a)</td>
</tr>
<tr>
<td>Alternative Transaction</td>
<td>6.10(a)</td>
</tr>
<tr>
<td>Bankruptcy and Equity Exception</td>
<td>3.3(a)</td>
</tr>
<tr>
<td>BHC Act</td>
<td>3.4</td>
</tr>
<tr>
<td>BHCA Application</td>
<td>3.4</td>
</tr>
<tr>
<td>Certificate</td>
<td>1.4(d)</td>
</tr>
<tr>
<td>Certificate Amendment</td>
<td>1.6</td>
</tr>
<tr>
<td>Certificate of Merger</td>
<td>1.2</td>
</tr>
<tr>
<td>CFTC</td>
<td>3.4</td>
</tr>
<tr>
<td>Change of Recommendation</td>
<td>6.10(d)</td>
</tr>
<tr>
<td>Change of Recommendation Notice</td>
<td>6.10(d)(iv)</td>
</tr>
<tr>
<td>Claim</td>
<td>6.6(a)</td>
</tr>
<tr>
<td>Client</td>
<td>3.19(h)(iii)</td>
</tr>
<tr>
<td>Closing</td>
<td>9.1</td>
</tr>
<tr>
<td>Closing Date</td>
<td>9.1</td>
</tr>
<tr>
<td>Code</td>
<td>Recitals</td>
</tr>
<tr>
<td>Company</td>
<td>Preamble</td>
</tr>
<tr>
<td>Company Benefit Plans</td>
<td>3.11(a)</td>
</tr>
<tr>
<td>Company Bylaws</td>
<td>3.1(b)</td>
</tr>
<tr>
<td>Company Cap Plan</td>
<td>1.5(a)</td>
</tr>
<tr>
<td>Company Cap Units</td>
<td>1.5(d)</td>
</tr>
<tr>
<td>Company Capitalization Date</td>
<td>3.2(a)</td>
</tr>
<tr>
<td>Company Certificate</td>
<td>3.1(b)</td>
</tr>
<tr>
<td>Company Common Stock</td>
<td>1.4(b)</td>
</tr>
<tr>
<td>Company Contract</td>
<td>3.13(a)</td>
</tr>
<tr>
<td>Company Deferred Equity Units</td>
<td>1.5(e)</td>
</tr>
<tr>
<td>Company Deferred Equity Unit Plans</td>
<td>1.5(e)</td>
</tr>
<tr>
<td>Company Disclosure Schedule</td>
<td>Art III</td>
</tr>
<tr>
<td>Company ESPP</td>
<td>1.5(g)</td>
</tr>
<tr>
<td>Company IP</td>
<td>3.17(a)</td>
</tr>
<tr>
<td>Company Options</td>
<td>1.5(a)</td>
</tr>
<tr>
<td>Company Preferred Stock</td>
<td>3.2(a)</td>
</tr>
<tr>
<td>Company Regulatory Agreement</td>
<td>3.5(b)</td>
</tr>
<tr>
<td>Company Requisite Regulatory Approvals</td>
<td>7.3(d)</td>
</tr>
<tr>
<td>Company Restricted Shares</td>
<td>1.5(b)</td>
</tr>
<tr>
<td>Company RSU's</td>
<td>1.5(c)</td>
</tr>
</tbody>
</table>
Company SEC Reports ............................................. 3.5(c)
Company Securitization Documents .................................. 3.20(h)
Company Securitization Interests .................................... 3.20(h)
Company Securitization Trust ........................................ 3.20(h)
Company Sponsored Asset Securitization Transaction ............... 3.20(t)
Company Stock Plans .................................................. 1.5(a)
Confidentiality Agreement ............................................. 6.2(b)
Convertible Note Agreement ........................................... 4.2
Convertible Series ...................................................... 3.2(a)
Controlled Group Liability ............................................. 3.11(g)
Copyrights ............................................................... 3.17(a)
Covered Employees ..................................................... 6.5(a)
Derivative Transactions ................................................. 3.14(a)
DGCL ............................................................... 1.1(a)
DPC Common Shares ................................................... 3.18
Effective Time ......................................................... 1.4(b)
Employees ............................................................... 1.2
Environmental Laws ..................................................... 5.2(c)
ERISA ............................................................... 3.11(a)
ERISA Affiliate ........................................................ 3.11(h)
Excess Shares ........................................................... 2.3(f)
Exchange Act ............................................................ 3.14(a)
Exchange Agent ........................................................ 2.1
Exchange Agent Agreement ........................................... 2.1
Exchange Fund .......................................................... 2.2
Exchange Ratio .......................................................... 1.4(c)
FDIC ............................................................... 3.14(a)
Federal Reserve Board ................................................. 3.4
FERC ............................................................... 3.17(a)
FINRA ............................................................... 3.17(a)
Form S-4 ............................................................... 3.17(a)
FSA ............................................................... 3.17(a)
Fund ............................................................... 3.17(a)
GAAP ............................................................... 3.17(a)
Governmental Entity .................................................... 3.1(h)
HSR Act ............................................................... 3.1(h)
Indemnified Parties .................................................... 3.1(a)
Insurance Amount ...................................................... 3.1(a)
Intellectual Property ................................................... 3.1(a)
Investment Advisory Agreement ...................................... 3.1(a)
IRS ............................................................... 3.1(a)
Joint Proxy Statement ................................................. 3.1(a)
Leased Properties ...................................................... 3.1(b)
Letter of Transmittal ................................................... 3.1(b)
License Agreement ..................................................... 3.1(b)
Licensed Company IP ................................................... 3.1(b)
<table>
<thead>
<tr>
<th>Term</th>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>Licensed Parent IP</td>
<td>4.16(a)</td>
</tr>
<tr>
<td>Liens</td>
<td>3.2(b)</td>
</tr>
<tr>
<td>Loans</td>
<td>3.20(d)</td>
</tr>
<tr>
<td>Material Adverse Effect</td>
<td>3.8(a)</td>
</tr>
<tr>
<td>Merger</td>
<td>1.4(c)</td>
</tr>
<tr>
<td>Merger Consideration</td>
<td>1.4(c)</td>
</tr>
<tr>
<td>Merger Sub. Recitals</td>
<td></td>
</tr>
<tr>
<td>Nonqualified Deferred Compensation Plan</td>
<td>3.11(c)</td>
</tr>
<tr>
<td>Non-Sponsored Fund</td>
<td>3.19(e)</td>
</tr>
<tr>
<td>NYSE</td>
<td>2.3(f)</td>
</tr>
<tr>
<td>Owned Company IP</td>
<td>3.17(a)</td>
</tr>
<tr>
<td>OTS</td>
<td>3.5(a)</td>
</tr>
<tr>
<td>Owned Parent IP</td>
<td>4.16(a)</td>
</tr>
<tr>
<td>Owned Properties</td>
<td>3.16</td>
</tr>
<tr>
<td>Permitted Encumbrances</td>
<td>3.16</td>
</tr>
<tr>
<td>Parent Preamble</td>
<td></td>
</tr>
<tr>
<td>Parent Bylaws</td>
<td>4.1(a)</td>
</tr>
<tr>
<td>Parent Cap Unit</td>
<td>1.5(d)</td>
</tr>
<tr>
<td>Parent Capitalization Date</td>
<td>4.2</td>
</tr>
<tr>
<td>Parent Certificate</td>
<td>4.1(a)</td>
</tr>
<tr>
<td>Parent Common Stock</td>
<td>1.4(c)</td>
</tr>
<tr>
<td>Parent Contract</td>
<td>4.14(a)</td>
</tr>
<tr>
<td>Parent Deferral Equity Unit</td>
<td>1.5(c)</td>
</tr>
<tr>
<td>Parent Disclosure Schedule</td>
<td>Art IV</td>
</tr>
<tr>
<td>Parent IP</td>
<td>4.16(a)</td>
</tr>
<tr>
<td>Parent Preferred Stock</td>
<td>4.2</td>
</tr>
<tr>
<td>Parent Regulatory Agreement</td>
<td>4.5(b)</td>
</tr>
<tr>
<td>Parent Requisite Regulatory Approvals</td>
<td>7.2(d)</td>
</tr>
<tr>
<td>Parent Restricted Share</td>
<td>1.5(b)</td>
</tr>
<tr>
<td>Parent RSU</td>
<td>1.5(c)</td>
</tr>
<tr>
<td>Parent SEC Reports</td>
<td>4.5(c)</td>
</tr>
<tr>
<td>Parent Stock Plans</td>
<td>4.2</td>
</tr>
<tr>
<td>Patents</td>
<td>3.17(a)</td>
</tr>
<tr>
<td>Real Property</td>
<td>3.16</td>
</tr>
<tr>
<td>Regulatory Agencies</td>
<td>3.5(a)</td>
</tr>
<tr>
<td>Regulatory Approvals</td>
<td>3.4</td>
</tr>
<tr>
<td>Retained Interest</td>
<td>3.20(h)</td>
</tr>
<tr>
<td>Sarbanes-Oxley Act</td>
<td>3.5(c)</td>
</tr>
<tr>
<td>SBA</td>
<td>3.4</td>
</tr>
<tr>
<td>SEC</td>
<td>3.4</td>
</tr>
<tr>
<td>Securities Act</td>
<td>3.2(a)</td>
</tr>
<tr>
<td>Servicer Default</td>
<td>3.20(h)</td>
</tr>
<tr>
<td>Servicer Default or Termination</td>
<td>3.20(g)</td>
</tr>
<tr>
<td>Software</td>
<td>3.17(a)</td>
</tr>
<tr>
<td>Specified Series</td>
<td>3.2(a)</td>
</tr>
<tr>
<td>SRO</td>
<td>3.4</td>
</tr>
</tbody>
</table>
Stock Option Agreement .......................................................................................... Recitals
Subsidiary ........................................................................................................... 3.1(c)
Superior Proposal ............................................................................................... 6.10(d)
Surviving Company ........................................................................................... Recitals
Takeover Statutes ................................................................................................. 3.21
Tax(es) ............................................................................................................... 3.10(b)
Tax Return ........................................................................................................... 3.10(c)
Trademarks ......................................................................................................... 3.17(a)
Trade Secrets ..................................................................................................... 3.17(a)
Trust Account Common Shares ........................................................................ 1.4(b)
Voting Debt ......................................................................................................... 3.2(a)
AGREEMENT AND PLAN OF MERGER

AGREEMENT AND PLAN OF MERGER, dated as of September 15, 2008 (this "Agreement"), by and between Merrill Lynch & Co., Inc., a Delaware corporation ("Company"), and Bank of America Corporation, a Delaware corporation ("Parent").

WITNESSETH:

WHEREAS, promptly following the execution of this Agreement, Parent shall form a new wholly owned subsidiary ("Merger Sub") as a Delaware corporation, and Parent shall cause Merger Sub to, and Merger Sub shall, sign a joinder agreement to this Agreement and be bound hereunder;

WHEREAS, the Boards of Directors of Company, Parent and Merger Sub have determined that it is in the best interests of their respective companies and their stockholders to consummate the strategic business combination transaction provided for in this Agreement in which Merger Sub will, on the terms and subject to the conditions set forth in this Agreement, merge with and into Company (the "Merger"), with Company as the surviving company in the Merger (sometimes referred to in such capacity as the "Surviving Company");

WHEREAS, for federal income Tax purposes, it is the intent of the parties hereto that the Merger shall qualify as a "reorganization" within the meaning of Section 368(a) of the Internal Revenue Code of 1986, as amended (the "Code"), and this Agreement is intended to be and is adopted as a "plan of reorganization" for purposes of Sections 354 and 361 of the Code;

WHEREAS, as an inducement and condition to the entrance of Bank of America into this Agreement, Company is granting to Bank of America an option pursuant to a stock option agreement in the form set forth in Exhibit A (the "Stock Option Agreement"); and

WHEREAS, the parties desire to make certain representations, warranties and agreements in connection with the Merger and also to prescribe certain conditions to the Merger.

NOW, THEREFORE, in consideration of the mutual covenants, representations, warranties and agreements contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, the parties agree as follows:

ARTICLE I

THE MERGER

1. The Merger (a) Subject to the terms and conditions of this Agreement, in accordance with the Delaware General Corporation Law (the "DGCL"), at the Effective Time, Merger Sub shall merge with and into Company. Company shall be the Surviving Company in the Merger and shall continue its existence as a corporation under the laws of the State of Delaware. As of the Effective Time, the separate corporate existence of Merger Sub shall cease.
(b) Parent may at any time change the method of effecting the combination (including by providing for the merger of Company and a wholly-owned subsidiary of Parent other than Merger Sub) if and to the extent requested by Parent, provided, however, that no such change shall (i) alter or change the amount or kind of the Merger Consideration provided for in this Agreement, (ii) adversely affect the Tax treatment of Company's stockholders as a result of receiving the Merger Consideration or the Tax treatment of either party pursuant to this Agreement or (iii) impede or delay consummation of the transactions contemplated by this Agreement.

1.2 Effective Time. The Merger shall become effective as set forth in the certificate of merger (the "Certificate of Merger") that shall be filed with the Secretary of State of the State of Delaware on the Closing Date. The term "Effective Time" shall be the date and time when the Merger becomes effective as set forth in the Certificate of Merger.

1.3 Effects of the Merger. At and after the Effective Time, the Merger shall have the effects set forth in the DGCL.

1.4 Conversion of Stock. At the Effective Time, by virtue of the Merger and without any action on the part of Parent, Merger Sub, Company or the holder of any of the following securities:

(a) Each share of common stock, par value $1.00 per share, of Merger Sub issued and outstanding immediately prior to the Effective Time shall be converted into and become one validly issued, fully paid and nonassessable share of common stock, par value $1.33 1/3 per share, of the Surviving Company. From and after the Effective Time, all certificates representing the common stock of Merger Sub shall be deemed for all purposes to represent the number of shares of common stock of the Surviving Company into which they were converted in accordance with the immediately preceding sentence.

(b) All shares of common stock, par value $1.33 1/3 per share, of Company issued and outstanding immediately prior to the Effective Time (the "Company Common Stock") that are owned by Company or Parent (other than shares of Company Common Stock held in trust accounts, managed accounts, mutual funds and the like, or otherwise held in a fiduciary or agency capacity, that are beneficially owned by third parties (any such shares, "Trust Account Common Shares") and other than shares of Company Common Stock held, directly or indirectly, by Company or Parent in respect of a debt previously contracted (any such shares, "DPC Common Shares") shall be cancelled and shall cease to exist and no stock of Parent or other consideration shall be delivered in exchange therefor. All shares of Company Common Stock held by any wholly-owned subsidiary of Company or Parent shall be converted into such number of shares of stock of the Surviving Company such that each such subsidiary owns the same percentage of the outstanding common stock of the Surviving Company immediately following the Effective Time as such subsidiary owned in Company immediately prior to the Effective Time.

(c) Subject to Section 1.4(f), each share of Company Common Stock, except for shares of Company Common Stock owned by Company or Parent (other than Trust Account Common Shares and DPC Common Shares), shall be converted, in accordance with the
procedures set forth in Article II, into the right to receive 0.8595 (the “Exchange Ratio”) of a share of common stock, par value $0.01 per share, of Parent (“Parent Common Stock”) (the “Merger Consideration”).

(d) All of the shares of Company Common Stock converted into the right to receive the Merger Consideration pursuant to this Article I shall no longer be outstanding and shall automatically be cancelled and shall cease to exist as of the Effective Time, and each certificate previously representing any such shares of Company Common Stock (each, a “Certificate”) shall thereafter represent only the right to receive the Merger Consideration and/or cash in lieu of fractional shares into which the shares of Company Common Stock represented by such Certificate have been converted pursuant to this Section 1.4 and Section 2.3(f), as well as any dividends to which holders of Company Common Stock become entitled in accordance with Section 2.3(c).

(e) (i) Each share of the Specified Series (as hereinafter defined) of Company Preferred Stock outstanding immediately prior to the Effective Time shall automatically be converted into a share of preferred stock of Parent having rights, privileges, powers and preferences substantially identical to those of the relevant Specified Series. (ii) Each share of the Convertible Series (as hereinafter defined) of Company Preferred Stock outstanding immediately prior to the Effective Time shall remain issued and outstanding and shall have the rights, privileges, powers and preferences as set forth in the Surviving Company’s certificate of incorporation, as amended as provided in Section 1.6.

(f) If, between the date of this Agreement and the Effective Time, the outstanding shares of Parent Common Stock shall have been increased, decreased, changed into or exchanged for a different number or kind of shares or securities as a result of a reorganization, recapitalization, reclassification, stock dividend, stock split, reverse stock split, or other similar change in capitalization, an appropriate and proportionate adjustment shall be made to the Merger Consideration.

1.5 Stock Options and Other Stock-Based Awards; ESPP

(a) As of the Effective Time, by virtue of the Merger and without any action on the part of the holders thereof, each option to purchase shares of Company Common Stock granted under the Long-Term Incentive Compensation Plan for Managers and Producers, as amended through October 22, 2007, the Long-Term Incentive Compensation Plan, as amended through October 22, 2007, the Employee Stock Compensation Plan, as amended through October 22, 2007, the Equity Capital Accumulation Plan, the Deferred Restricted Unit Plan for Executive Officers, the First Republic Employee Stock Option Plan, as amended and restated, the First Republic 1998 Stock Option Plan, as amended and restated, and the Deferred Stock Unit Plan for Non-Employee Directors (collectively, the “Company Stock Plans”) that is outstanding immediately prior to the Effective Time (collectively, the “Company Options”) shall be converted into an option (an “Adjusted Option”) to purchase, the number of whole shares of Parent Common Stock that is equal to the number of shares of Company Common Stock subject to such Company Option immediately prior to the Effective Time multiplied by the Exchange Ratio (rounded down to the nearest whole share), at an exercise price per share of Parent Common Stock (rounded up to the nearest whole penny) equal to the exercise price for each such
share of Company Common Stock subject to such Company Option immediately prior to the Effective Time divided by the Exchange Ratio, and otherwise on the same terms and conditions (including applicable vesting requirements and any accelerated vesting thereof) as applied to each such Company Option immediately prior to the Effective Time provided, that, in the case of any Company Option to which Section 421 of the Code applies as of the Effective Time by reason of its qualification under Section 422 of the Code, the exercise price, the number of shares of Parent Common Stock subject to such option and the terms and conditions of exercise of such option shall be determined in a manner consistent with the requirements of Section 424(a) of the Code.

(b) As of the Effective Time, each restricted share of Company Common Stock granted under a Company Stock Plan that is outstanding immediately prior to the Effective Time (collectively, the “Company Restricted Shares”) shall, by virtue of the Merger and without any action on the part of the holder thereof, be converted into a restricted share with respect to the number of shares of Parent Common Stock that is equal to the number of shares of Company Common Stock subject to the Company Restricted Share immediately prior to the Effective Time multiplied by the Exchange Ratio (rounded to the nearest whole share) (a “Parent Restricted Share”), and otherwise on the same terms and conditions (including applicable vesting requirements and any accelerated vesting thereof) as applied to each such Company Restricted Share immediately prior to the Effective Time.

(c) As of the Effective Time, each restricted share unit with respect to shares of Company Common Stock granted under a Company Stock Plan that is outstanding immediately prior to the Effective Time (collectively, the “Company RSUs”) shall, by virtue of the Merger and without any action on the part of the holder thereof, be converted into a restricted share unit with respect to the number of shares of Parent Common Stock that is equal to the number of shares of Company Common Stock subject to the Company RSU immediately prior to the Effective Time multiplied by the Exchange Ratio (rounded to the nearest whole share) (a “Parent RSU”), and otherwise on the same terms and conditions (including applicable vesting requirements, any accelerated vesting thereof and deferral provisions) as applied to each such Company RSU immediately prior to the Effective Time. The obligations in respect of the Parent RSUs shall be payable or distributable in accordance with the terms of the agreement, plan or arrangement relating to such Parent RSUs.

(d) As of the Effective Time, each share unit with respect to shares of Company Common Stock granted under the Financial Advisor Capital Accumulation Award Plan, as amended through October 22, 2007 (the “Company Cap Plan”) that is outstanding immediately prior to the Effective Time (collectively, the “Company Cap Units”) shall, by virtue of the Merger and without any action on the part of the holder thereof, be converted into a share unit with respect to the number of shares of Parent Common Stock that is equal to the number of shares of Company Common Stock subject to the Company Cap Unit immediately prior to the Effective Time multiplied by the Exchange Ratio (rounded to the nearest whole share) (a “Parent Cap Unit”), and otherwise on the same terms and conditions (including applicable vesting requirements, accelerated vesting thereof and deferral provisions) as applied to such Company Cap Units immediately prior to the Effective Time. The obligations in respect of the Parent Cap Units shall be payable or distributable in accordance with the terms of the agreement, plan or arrangement relating to such Parent Cap Units.
(e) As of the Effective Time, all amounts denominated in Company Common Stock and held in participant accounts (other than Company RSUs and Company Cap Units) (collectively, the “Company Deferred Equity Units”) either pursuant to (i) the Company Stock Plans or (ii) any nonqualified deferred compensation program or any individual deferred compensation agreements (the “Company Deferred Equity Unit Plans”) shall, by virtue of the Merger and without any action on the part of the holder thereof, be converted into deferred equity units with respect to the number of shares of Parent Common Stock that is equal to the number of shares of Company Common Stock in which such Company Deferred Equity Units are denominated immediately prior to the Effective Time multiplied by the Exchange Ratio (rounded to the nearest whole share) (a “Parent Deferred Equity Unit”), and otherwise on the same terms and conditions (including applicable vesting requirements, accelerated vesting thereof and deferral provisions) as applied to such Company Deferred Equity Units immediately prior to the Effective Time. The obligations in respect of the Parent Deferred Equity Units shall be payable or distributable in accordance with the terms of the Company Stock Plan or Company Deferred Equity Unit Plan relating to such Parent Deferred Equity Units.

(f) As of the Effective Time, Parent shall assume the obligations and succeed to the rights of Company under the Company Stock Plans, the Company Cap Plan and the Company Deferred Equity Unit Plans with respect to the Company Options (as converted into Adjusted Options), the Company Restricted Shares (as converted into Parent Restricted Shares), the Company RSUs (as converted into Parent RSUs), the Company Deferred Equity Units (as converted into Parent Deferred Equity Units) and the Company Cap Units (as converted into Parent Cap Units). Company and Parent agree that prior to the Effective Time each of the Company Stock Plans, the Company Cap Plan and the Company Deferred Equity Unit Plans shall be amended (i) to reflect the transactions contemplated by this Agreement, including the conversion of the Company Options, Company Restricted Shares, Company RSUs, Company Cap Units and Company Deferred Equity Units pursuant to paragraphs (a), (b), (c), (d) and (e) above and the substitution of Parent for Company thereunder to the extent appropriate to effectuate the assumption of such Company Stock Plans, the Company Cap Plan and the Company Deferred Equity Unit Plans by Parent, (ii) to preclude any automatic or formulaic grant of options, restricted shares or other awards thereunder on or after the Effective Time, and (iii) to the extent requested by Parent and subject to compliance with applicable law and the terms of the plan, to terminate any or all Company Stock Plans, the Company Cap Plan and the Company Deferred Equity Unit Plans effective immediately prior to the Effective Time (other than with respect to outstanding awards thereunder). From and after the Effective Time, all references to Company (other than any references relating to a “Change in Control” of Company) in each Company Stock Plan, the Company Cap Plan and each Company Deferred Equity Unit Plan and in each agreement evidencing any award of Company Options, Company Restricted Shares, Company RSUs, Company Cap Units or Company Deferred Equity Units shall be deemed to refer to Parent, unless Parent in good faith determines otherwise.

(g) Company shall, prior to the Effective Time, take all actions necessary to terminate the 1986 Employee Stock Purchase Plan (the “Company ESPP”) effective as of the Effective Time and all outstanding rights thereunder at the Effective Time. The offering period in effect as of immediately prior to the Effective Time shall end and each participant in the Company ESPP will be credited with the number of share(s) of Company Common Stock
purchased for his or her account(s) under the Company ESPP in respect of the applicable offering period in accordance with the terms of the Company ESPP.

(h) Prior to the Effective Time, the Company, the Board of Directors of the Company and the Compensation Committee of the Board of Directors of the Company, as applicable, shall adopt resolutions and take all other actions necessary to effectuate the provisions of this Section 1.5 and to ensure that, notwithstanding anything to the contrary, following the Effective Time, no service provider of the Company and its Subsidiaries shall have any right to acquire any securities of the Company, the Surviving Company or any Subsidiary thereof or to receive any payment, right or benefit with respect to any award previously granted under the Company Stock Plans (whether hereunder, under any Company Stock Plan or individual award agreement or otherwise) except the right to receive an Adjusted Option, Parent RSU, Parent Restricted Share, Parent Cap Unit or Parent Deferred Equity Unit or a payment, right or benefit with respect thereto as provided in this Section 1.5.

1.6 Certificate of Incorporation and Bylaws of the Surviving Company. At the Effective Time, the certificate of incorporation of the Company in effect immediately prior to the Effective Time (as amended effective immediately prior to the Effective Time to give effect to the modifications set forth on Exhibit B hereto (such modifications the “Certificate Amendment”)) shall be the certificate of incorporation of the Surviving Company until thereafter amended in accordance with applicable law. The bylaws of Merger Sub, as in effect immediately prior to the Effective Time, shall be the bylaws of the Surviving Company until thereafter amended in accordance with applicable law and the terms of such bylaws.

1.7 Directors and Officers. The directors of Company and its Subsidiaries immediately prior to the Effective Time shall submit their resignations to be effective as of the Effective Time. The directors, if any, and officers of Merger Sub shall, from and after the Effective Time, become the directors and officers, respectively, of the Surviving Company until their successors shall have been duly elected, appointed or qualified or until their earlier death, resignation or removal in accordance with the certificate of incorporation of the Surviving Company. At the Effective Time, the number of directors constituting the whole board of directors of Parent shall be increased by three (3) and the board of directors of Parent shall consist of (a) those directors of Parent who are serving thereon immediately prior to the Effective Time, and (b) three (3) directors as mutually agreed to by Parent and Company from among those individuals serving as directors of Company immediately prior to the Effective Time.

1.8 Tax Consequences. It is intended that the Merger shall constitute a “reorganization” within the meaning of Section 368(a) of the Code, and that this Agreement shall constitute, and is adopted as, a “plan of reorganization” for purposes of Sections 354 and 361 of the Code.

ARTICLE II

DELIVERY OF MERGER CONSIDERATION

2.1 Exchange Agent. Prior to the Effective Time, Parent shall appoint a bank or trust company Subsidiary of Parent or another bank or trust company reasonably acceptable to
Company, or Parent's transfer agent, pursuant to an agreement (the "Exchange Agent Agreement") to act as exchange agent (the "Exchange Agent") hereunder.

2.2 Deposit of Merger Consideration. At or prior to the Effective Time, Parent shall (i) authorize the Exchange Agent to issue an aggregate number of shares of Parent Common Stock equal to the aggregate Merger Consideration, and (ii) deposit, or cause to be deposited with, the Exchange Agent, to the extent then determinable, any cash payable in lieu of fractional shares pursuant to Section 2.3(f) (the "Exchange Fund").

2.3 Delivery of Merger Consideration.

(a) As soon as reasonably practicable after the Effective Time, the Exchange Agent shall mail to each holder of record of Certificate(s) which immediately prior to the Effective Time represented outstanding shares of Company Common Stock whose shares were converted into the right to receive the Merger Consideration pursuant to Section 1.4 and any cash in lieu of fractional shares of Parent Common Stock to be issued or paid in consideration therefor (i) a letter of transmittal (which shall specify that delivery shall be effected, and risk of loss and title to Certificate(s) shall pass, only upon delivery of Certificate(s) (or affidavits of loss in lieu of such Certificates) to the Exchange Agent and shall be substantially in such form and have such other provisions as shall be prescribed by the Exchange Agent Agreement (the "Letter of Transmittal")) and (ii) instructions for use in surrendering Certificate(s) in exchange for the Merger Consideration, any cash in lieu of fractional shares of Parent Common Stock to be issued or paid in consideration therefor and any dividends or distributions to which such holder is entitled pursuant to Section 2.3(c).

(b) Upon surrender to the Exchange Agent of its Certificate or Certificates, accompanied by a properly completed Letter of Transmittal, a holder of Company Common Stock will be entitled to receive promptly after the Effective Time the Merger Consideration and any cash in lieu of fractional shares of Parent Common Stock to be issued or paid in consideration therefor in respect of the shares of Company Common Stock represented by its Certificate or Certificates. Until so surrendered, each such Certificate shall represent after the Effective Time, for all purposes, only the right to receive, without interest, the Merger Consideration and any cash in lieu of fractional shares of Parent Common Stock to be issued or paid in consideration therefor upon surrender of such Certificate in accordance with this Article II.

(c) No dividends or other distributions with respect to Parent Common Stock shall be paid to the holder of any unsurrendered Certificate with respect to the shares of Parent Common Stock represented thereby, in each case unless and until the surrender of such Certificate in accordance with this Article II. Subject to the effect of applicable abandoned property, escheat or similar laws, following surrender of any such Certificate in accordance with this Article II, the record holder thereof shall be entitled to receive, without interest, (i) the amount of dividends or other distributions with a record date after the Effective Time theretofore payable with respect to the whole shares of Parent Common Stock represented by such Certificate and not paid and (ii) at the appropriate payment date, the amount of dividends or other distributions payable with respect to shares of Parent Common Stock represented by such Certificate with a record date after the Effective Time (but before such surrender date) and with a
payment date subsequent to the issuance of the Parent Common Stock issuable with respect to such Certificate.

(d) In the event of a transfer of ownership of a Certificate representing Company Common Stock that is not registered in the stock transfer records of Company, the fractional shares of Parent Common Stock and cash in lieu of fractional shares of Parent Common Stock comprising the Merger Consideration shall be issued or paid in exchange therefor to a person other than the person in whose name the Certificate so surrendered is registered if the Certificate formerly representing such Company Common Stock shall be properly endorsed or otherwise be in proper form for transfer and the person requesting such payment or issuance shall pay any transfer or other similar Taxes required by reason of the payment or issuance to a person other than the registered holder of the Certificate or establish to the satisfaction of Parent that the Tax has been paid or is not applicable. The Exchange Agent (or, subsequent to the earlier of (x) the one-year anniversary of the Effective Time and (y) the expiration or termination of the Exchange Agent Agreement, Parent) shall be entitled to deduct and withhold from any cash in lieu of fractional shares of Parent Common Stock otherwise payable pursuant to this Agreement to any holder of Company Common Stock such amounts as the Exchange Agent or Parent, as the case may be, is required to deduct and withhold under the Code, or any provision of state, local or foreign Tax law, with respect to the making of such payment. To the extent the amounts are so withheld by the Exchange Agent or Parent, as the case may be, and timely paid over to the appropriate Governmental Entity, such withheld amounts shall be treated for all purposes of this Agreement as having been paid to the holder of shares of Company Common Stock in respect of whom such deduction and withholding was made by the Exchange Agent or Parent, as the case may be.

(e) After the Effective Time, there shall be no transfers on the stock transfer books of Company of the shares of Company Common Stock that were issued and outstanding immediately prior to the Effective Time other than to settle transfers of Company Common Stock that occurred prior to the Effective Time. If, after the Effective Time, Certificates representing such shares are presented for transfer to the Exchange Agent, they shall be cancelled and exchanged for the Merger Consideration and any cash in lieu of fractional shares of Parent Common Stock to be issued or paid in consideration therefor in accordance with the procedures set forth in this Article II.

(f) Notwithstanding anything to the contrary contained in this Agreement, no fractional shares of Parent Common Stock shall be issued upon the surrender of Certificates for exchange, no dividend or distribution with respect to Parent Common Stock shall be payable on or with respect to any fractional share, and such fractional share interests shall not entitle the owner thereof to vote or to any other rights of a stockholder of Parent. In lieu of the issuance of any such fractional share, each former stockholder of Company who otherwise would be entitled to receive such fractional share shall be paid an amount in cash (rounded to the nearest cent) equal to such holder’s proportionate interest in the net proceeds from the sale or sales in the open market by the Exchange Agent, on behalf of all such holders, of the aggregate fractional shares of Parent Common Stock that would otherwise have been issued pursuant to this Article II. As soon as practicable following the Closing Date, the Exchange Agent shall determine the excess of (i) the number of full shares of Parent Common Stock delivered to the Exchange Agent by Parent over (ii) the aggregate number of full shares of Parent Common Stock to be distributed to
holders of shares of Company Common Stock (such excess, the “Excess Shares”), and the Exchange Agent, as agent for the former holders of Company Common Stock, shall sell the Excess Shares at the prevailing prices on the New York Stock Exchange (the “NYSE”). The sale of the Excess Shares by the Exchange Agent shall be executed on the NYSE through one or more member firms of the NYSE and shall be executed in round lots to the extent practicable. All commissions, transfer taxes and other out-of-pocket transaction costs, including the expenses and compensation of the Exchange Agent, incurred in connection with such sale of Excess Shares shall reduce, but not below zero, the amount of cash paid to former stockholders of Company in respect of fractional shares. The Exchange Agent shall determine the portion of the proceeds of such sale to which each former holder of Company Common Stock shall be entitled, if any, by multiplying the amount of the proceeds of such sale by a fraction the numerator of which is the amount of fractional share interests to which such holder of Company Common Stock is entitled (after taking into account all shares of Company Common Stock held at the Effective Time by such holder) and the denominator of which is the aggregate amount of fractional share interests to which all holders of Company Common Stock are entitled. Until the proceeds of such sale have been distributed to the former holders of shares of Company Common Stock, the Exchange Agent will hold such proceeds in trust for such former holders. As soon as practicable after the determination of the amount of cash to be paid to such former holders of shares of Company Common Stock in lieu of any fractional interests, the Exchange Agent shall make available in accordance with this Agreement such amounts to such former holders of shares of Company Common Stock.

(g) Any portion of the Exchange Fund that remains unclaimed by the stockholders of Company as of the first anniversary of the Effective Time may be paid to Parent. In such event, any former stockholders of Company who have not theretofore complied with this Article II shall thereafter look only to Parent with respect to the Merger Consideration, any cash in lieu of any fractional shares and any unpaid dividends and distributions on the Parent Common Stock deliverable in respect of each share of Company Common Stock held as determined pursuant to this Agreement, in each case, without any interest thereon. Notwithstanding the foregoing, none of Parent, the Surviving Company, the Exchange Agent or any other person shall be liable to any former holder of shares of Company Common Stock for any amount delivered in good faith to a public official pursuant to applicable abandoned property, escheat or similar laws.

(h) In the event any Certificate shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the person claiming such Certificate to be lost, stolen or destroyed and, if reasonably required by Parent or the Exchange Agent, the posting by such person of a bond in such amount as Parent may determine is reasonably necessary as indemnity against any claim that may be made against it with respect to such Certificate, the Exchange Agent will issue in exchange for such lost, stolen or destroyed Certificate the Merger Consideration deliverable in respect thereof pursuant to this Agreement.
ARTICLE III

REPRESENTATIONS AND WARRANTIES OF COMPANY

Except (i) as disclosed in any report, schedule, form or other document filed with, or furnished to, the SEC by Company and publicly available prior to the date of this Agreement (excluding, in each case, any disclosures set forth in any risk factor section and in any section relating to forward-looking statements to the extent that they are cautionary, predictive or forward-looking in nature), or (ii) as disclosed in the disclosure schedule (the "Company Disclosure Schedule") delivered by Company to Parent prior to the execution of this Agreement (which schedule sets forth, among other things, items the disclosure of which is necessary or appropriate either in response to an express disclosure requirement contained in a provision hereof or as an exception to one or more representations or warranties contained in this Article III, or to one or more of Company's covenants contained herein, provided, however, that disclosure in any section of such schedule shall apply only to the indicated Section of this Agreement except to the extent that it is reasonably apparent on the face of such disclosure that such disclosure is relevant to another Section of this Agreement, provided, further, that notwithstanding anything in this Agreement to the contrary, (i) no such item is required to be set forth in such schedule as an exception to a representation or warranty if its absence would not result in the related representation or warranty being deemed untrue or incorrect under the standard established by Section 9.2 and (ii) the mere inclusion of an item in such schedule as an exception to a representation or warranty shall not be deemed an admission that such item represents a material exception or material fact, event or circumstance or that such item has had or would be reasonably likely to have a Material Adverse Effect (as defined in Section 3.8) on Company), Company hereby represents and warrants to Parent as follows:

3.1 Corporate Organization.

(a) Company is a corporation duly incorporated, validly existing and in good standing under the laws of the State of Delaware. Company has the requisite corporate power and authority to own or lease all of its properties and assets and to carry on its business as it is now being conducted, and is duly licensed or qualified to do business in each jurisdiction in which the nature of the business conducted by it or the character or location of the properties and assets owned or leased by it makes such licensing or qualification necessary.

(b) True, complete and correct copies of the Restated Certificate of Incorporation of Company (the "Company Certificate"), and the Amended and Restated Bylaws of Company (the "Company Bylaws"), as in effect as of the date of this Agreement, have previously been made available to Parent.

(c) Each Subsidiary of Company (i) is duly incorporated or duly formed, as applicable to each such Subsidiary, and validly existing and in good standing under the laws of its jurisdiction of organization, (ii) has the requisite corporate power and authority or other power and authority to own or lease all of its properties and assets and to carry on its business as it is now being conducted and (iii) is duly licensed or qualified to do business in each jurisdiction in which the nature of the business conducted by it or the character or location of the properties and assets owned or leased by it makes such licensing or qualification necessary. As used in this
Agreement, the word "Subsidiary", when used with respect to either party, means any bank, corporation, partnership, limited liability company or other organization, whether incorporated or unincorporated, with respect to which such party owns, directly or indirectly, 50 percent or more of the equity interests or such party has the power to elect 50 percent or more of the directors or equivalent governing persons.

(d) The minute books of Company previously made available to Parent contain true, complete and correct records of all meetings and other corporate actions held or taken since January 1, 2007 of its stockholders and Board of Directors and the audit committee of its Board of Directors.

3.2 Capitalization. (a) The authorized capital stock of Company consists of 3,000,000,000 shares of common stock, par value $1.33 1/3 per share, of which, as of August 29, 2008 (the “Company Capitalization Date”), 1,529,754,261 shares were issued and outstanding, and 25,000,000 shares of preferred stock, par value $1.00 per share (the “Company Preferred Stock”), of which, as of the Company Capitalization Date, (i) 50,000 shares are designated as “Floating Rate Non-Cumulative Preferred Stock, Series 1”, 21,000 of which were outstanding, (ii) 50,000 shares are designated as “Floating Rate Non-Cumulative Preferred Stock, Series 2”, 37,000 of which were outstanding, (iii) 43,333 shares are designated as “6.375% Non-Cumulative Preferred Stock, Series 3”, 27,000 of which were outstanding, (iv) 23,333 shares are designated as “Floating Rate Non-Cumulative Preferred Stock, Series 4”, 20,000 of which were outstanding; (v) 50,000 shares of Preferred Stock are designated as “Floating Rate Non-Cumulative Preferred Stock, Series 5”, 50,000 of which were outstanding, (vi) 65,000 shares are designated as “6.70% Non-Cumulative Perpetual Preferred Stock, Series 6”, 65,000 of which were outstanding, (vii) 50,000 shares are designated as “6.25% Non-Cumulative Perpetual Preferred Stock, Series 7”, 50,000 of which were outstanding, (viii) 97,750 shares are designated as “8.625% Non-Cumulative Preferred Stock, Series 8”, 89,100 of which were outstanding (clauses (i) through (viii) collectively, the “Specified Series”), (ix) 66,000 shares are designated as “9.00% Non-Voting Mandatory Convertible Non-Cumulative Preferred Stock, Series 1”, none of which were outstanding, (x) 12,000 shares are designated as “9.00% Non-Voting Mandatory Convertible Non-Cumulative Preferred Stock, Series 2”, 12,000 of which were outstanding and (xi) 5,000 shares are designated as “9.00% Non-Voting Mandatory Convertible Non-Cumulative Preferred Stock, Series 3”, 5,000 of which were outstanding (clauses (x) and (xi) collectively, the “Convertible Series”). As of the Company Capitalization Date, the Company held 432,087,182 shares of Company Common Stock in its treasury. As of the Company Capitalization Date, no shares of Company Common Stock or Company Preferred Stock were reserved for issuance except for (i) 214,909,111 shares of Company Common Stock reserved for issuance in connection with existing awards under employee benefit, stock option and dividend reinvestment and stock purchase plans and 83,849,895 shares of Company Common Stock reserved for issuance in connection with future awards that have not yet been made under employee benefit, stock option and dividend reinvestment and stock purchase plans, (ii) 1,778,120 shares of Company Common Stock reserved for issuance in connection with Exchangeable Shares issued by Merrill Lynch & Co. Canada Ltd, (iii) 31,788,990 shares of Company Common Stock reserved for issuance upon the conversion of the Company’s zero-coupon contingent convertible debt (Liquid Yield Option Notes), and (iv) an aggregate of 58,585,859 shares of Company Common Stock reserved for issuance upon conversion of the series of Company Preferred Stock listed in clauses (ix), (x) and (xi) of the first sentence of this paragraph. As of the date of this
Agreement, 304,421,097 shares of Company Common Stock were reserved for issuance pursuant to the Stock Option Agreement. All of the issued and outstanding shares of Company Common Stock have been duly authorized and validly issued and are fully paid, nonassessable and free of preemptive rights, with no personal liability attaching to the ownership thereof. As of the date of this Agreement, no bonds, debentures, notes or other indebtedness having the right to vote on any matters on which shareholders of Company may vote ("Voting Debt") are issued or outstanding. As of the date of this Agreement, except pursuant to this Agreement, and other than as set forth in Section 3.2(a) of the Company Disclosure Schedule, the Company does not have and is not bound by any outstanding subscriptions, options, warrants, calls, rights, commitments or agreements of any character calling for the purchase or issuance of, or the payment of any amount based on, any shares of Company Common Stock, Company Preferred Stock, Voting Debt or any other equity securities of Company or any securities representing the right to purchase or otherwise receive any shares of Company Common Stock, Company Preferred Stock, Voting Debt or other equity securities of Company. As of the date of this Agreement, except pursuant to this Agreement, and other than as set forth in Section 3.2(a) of the Company Disclosure Schedule, there are no contractual obligations of Company or any of its Subsidiaries (I) to repurchase, redeem or otherwise acquire any shares of capital stock of Company or any equity security of Company or its Subsidiaries or any securities representing the right to purchase or otherwise receive any shares of capital stock or any other equity security of Company or its Subsidiaries or (II) pursuant to which Company or any of its Subsidiaries is or could be required to register shares of Company capital stock or other securities under the Securities Act of 1933, as amended (the "Securities Act").

(b) Within five business days following the date hereof, Company shall have provided Parent with a true, complete and correct list of the aggregate number of shares of Company Common Stock issuable upon the exercise of each Company Option and settlement of each Company RSU, Company Cap Unit and Company Deferred Equity Unit granted under the Company Stock Plans, Company Cap Plan or Company Deferred Equity Unit Plans that were outstanding as of the Company Capitalization Date and the weighted average exercise price for the Company Options. Other than the Company Options, Company Restricted Shares, Company RSUs, Company Cap Units and Company Deferred Equity Units that are outstanding as of the Company Capitalization Date, no other equity-based awards are outstanding as of the Company Capitalization Date. Since the Company Capitalization Date through the date hereof, the Company has not (i) issued or repurchased any shares of Company Common Stock, Company Preferred Stock, Voting Debt or other equity securities of Company, other than the issuance of shares of Company Common Stock in connection with the exercise of Company Options or settlement of the Company RSUs, Company Cap Units or Company Deferred Equity Units granted under the Company Stock Plans, Company Cap Plan or Company Deferred Equity Unit Plans that were outstanding on the Company Capitalization Date or (ii) issued or awarded any options, stock appreciation rights, restricted shares, restricted stock units, deferred equity units, awards based on the value of Company capital stock or any other equity-based awards under any of the Company Stock Plans.

(c) Except for any director qualifying shares, all of the issued and outstanding shares of capital stock or other equity ownership interests of each Subsidiary of Company are owned by Company, directly or indirectly, free and clear of any liens, pledges, charges, claims and security interests and similar encumbrances ("Liens"), and all of such shares or equity
ownership interests are duly authorized and validly issued and are fully paid, nonassessable and free of preemptive rights. No Subsidiary of Company has or is bound by any outstanding subscriptions, options, warrants, calls, commitments or agreements of any character calling for the purchase or issuance of any shares of capital stock or any other equity security of such Subsidiary or any securities representing the right to purchase or otherwise receive any shares of capital stock or any other equity security of such Subsidiary.

3.3 Authority; No Violation. (a) Company has full corporate power and authority to execute and deliver this Agreement and the Stock Option Agreement and to consummate the transactions contemplated hereby and thereby. The execution and delivery of this Agreement and the Stock Option Agreement and the consummation of the transactions contemplated hereby and thereby (including the Certificate Amendment) have been duly, validly and unanimously approved by the Board of Directors of Company. Such unanimous approval by the Board of Directors is sufficient to render inapplicable the provisions of Section 3 of Article VII of the Company Certificate. The Board of Directors of Company has determined unanimously that this Agreement is advisable and in the best interests of Company and its stockholders and has directed that this Agreement be submitted to Company's stockholders for approval and adoption at a duly held meeting of such stockholders and has adopted a resolution to the foregoing effect. Except for the approval and adoption of this Agreement by the affirmative vote of the holders of a majority of the outstanding shares of Company Common Stock entitled to vote at such meeting, no other corporate proceedings on the part of Company are necessary to approve this Agreement or the Stock Option Agreement or to consummate the transactions contemplated hereby or thereby. This Agreement and the Stock Option Agreement have been duly and validly executed and delivered by Company and (assuming due authorization, execution and delivery by Parent and Merger Sub) constitute the valid and binding obligations of Company, enforceable against Company in accordance with their terms (except as may be limited by bankruptcy, insolvency, fraudulent transfer, moratorium, reorganization or similar laws of general applicability relating to or affecting the rights of creditors generally and subject to general principles of equity (the "Bankruptcy and Equity Exception").

(b) Neither the execution and delivery of this Agreement or the Stock Option Agreement by Company nor the consummation by Company of the transactions contemplated hereby or thereby, nor compliance by Company with any of the terms or provisions of this Agreement or the Stock Option Agreement, will (i) violate any provision of the Company Certificate or Company Bylaws or (ii) assuming that the consents, approvals and filings referred to in Section 3.4 are duly obtained and/or made, (A) violate any law, judgment, order, injunction or decree applicable to Company, any of its Subsidiaries or any of their respective properties or assets or (B) violate, conflict with, result in a breach of any provision of or the loss of any benefit under, constitute a default (or an event which, with notice or lapse of time, or both, would constitute a default) under, result in the termination of or a right of termination or cancellation under, accelerate the performance required by, or result in the creation of any Lien upon any of the respective properties or assets of Company or any of its Subsidiaries under, any of the terms, conditions or provisions of any note, bond, mortgage, indenture, deed of trust, license, lease, franchise, permit, Company Securitization Document, agreement, bylaw or other instrument or obligation to which Company or any of its Subsidiaries is a party or by which any of them or any of their respective properties or assets is bound.
3.4 Consents and Approvals. Except for (i) filings of applications and notices with, and receipt of consents, authorizations, approvals, exemptions or nonobjections from, the Securities and Exchange Commission (the "SEC"), NYSE, non-U.S. and state securities authorities, the Financial Industry Regulatory Authority ("FINRA"), the Commodities and Futures Trading Commission ("CFTC"), the Federal Energy Regulatory Commission ("FERC"), applicable securities, commodities and futures exchanges, the United Kingdom Financial Services Authority ("FSA"), and other industry self-regulatory organizations ("SRO"), (ii) the filing of an application (the "BHCA Application") with the Board of Governors of the Federal Reserve System (the "Federal Reserve Board") under Section 4 of the Bank Holding Company Act of 1956, as amended (the "BHCA") and approval of such application, (iii) the filing of any required applications with the Federal Deposit Insurance Corporation (the "FDIC"), the Utah Department of Financial Institutions, the New York State Banking Division and any other non-U.S., federal or state banking, consumer finance, mortgage banking, insurance or other regulatory, self-regulatory or enforcement authorities or any courts, administrative agencies or commissions or other governmental authorities or instrumentalities (each a "Governmental Entity") and approval of or non-objection to such applications, filings and notices (taken together with the items listed in clauses (i) and (ii), the "Regulatory Approvals"); (iv) the filing with the SEC of a Proxy Statement in definitive form relating to the respective meetings of Company's and Parent's stockholders to be held in connection with this Agreement and the transactions contemplated by this Agreement (the "Joint Proxy Statement") and of a registration statement on Form S-4 (the "Form S-4") in which the Joint Proxy Statement will be included as a prospectus, and declaration of effectiveness of the Form S-4, (v) the filing of the Certificate of Merger with the Secretary of State of the State of Delaware pursuant to the DGCL, (vi) any notices to or filings with the Small Business Administration (the "SBA"), (vii) any notices or filings required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act") and the antitrust laws and regulations of any non-U.S. jurisdiction and (viii) such filings and approvals as are required to be made or obtained under the securities or "Blue Sky" laws of various states in connection with the issuance of the shares of Parent Common Stock pursuant to this Agreement and approval of listing of such Parent Common Stock on the NYSE, no consents or approvals of or filings or registrations with any Governmental Entity are necessary in connection with the consummation by Company of the Merger and the other transactions contemplated by this Agreement or the Stock Option Agreement. No consents or approvals of or filings or registrations with any Governmental Entity are necessary in connection with the execution and delivery by Company of this Agreement or the Stock Option Agreement.

3.5 Reports; Regulatory Matters.

(a) Company and each of its Subsidiaries have timely filed all reports, registrations, statements and certifications, together with any amendments required to be made with respect thereto, that they were required to file since January 1, 2006 with (i) FINRA, (ii) the SEC, (iii) the Office of Thrift Supervision (the "OTS"), (iv) the FDIC, (v) the NYSE, (vi) any state consumer finance, mortgage banking or insurance regulatory authority or agency, (vii) any non-U.S. regulatory authority and (viii) any SRO (collectively, "Regulatory Agencies") and with each other applicable Governmental Entity, and all other reports and statements required to be filed by them since January 1, 2006, including any report or statement required to be filed pursuant to the laws, rules or regulations of the United States, any state, any non-U.S. entity, or any Regulatory Agency or other Governmental Entity, and have paid all fees and assessments.
due and payable in connection therewith. Except for normal examinations conducted by a Regulatory Agency or other Governmental Entity in the ordinary course of the business of Company and its Subsidiaries, no Regulatory Agency or other Governmental Entity has initiated since January 1, 2006 or has pending any proceeding, enforcement action or, to the knowledge of Company, investigation into the business, disclosures or operations of Company or any of its Subsidiaries. Since January 1, 2006, no Regulatory Agency or other Governmental Entity has resolved any proceeding, enforcement action or, to the knowledge of Company, investigation into the business, disclosures or operations of Company or any of its Subsidiaries. There is no unresolved, or, to Company’s knowledge, threatened criticism, comment, exception or stop order by any Regulatory Agency or other Governmental Entity with respect to any report or statement relating to any examinations or inspections of Company or any of its Subsidiaries. Since January 1, 2006, there have been no formal or informal inquiries by, or disagreements or disputes with, any Regulatory Agency or other Governmental Entity with respect to the business, operations, policies or procedures of Company or any of its Subsidiaries (other than normal examinations conducted by a Regulatory Agency or other Governmental Entity in Company’s ordinary course of business).

(b) Neither Company nor any of its Subsidiaries is subject to any cease-and-desist or other order or formal or informal enforcement action issued by, or is a party to any written agreement, consent agreement or memorandum of understanding with, or is a party to any commitment letter or similar undertaking to, or is subject to any order or directive by, or has been ordered to pay any civil money penalty by, or has been since January 1, 2006 a recipient of any supervisory letter from, or since January 1, 2006 has adopted any policies, procedures or board resolutions at the request or suggestion of, any Regulatory Agency or other Governmental Entity that currently restricts or affects in any material respect the conduct of its business (or to Company’s knowledge that, upon consummation of the Merger, would restrict in any material respect the conduct of the business of Parent or any of its Subsidiaries), or that in any material manner relates to its capital adequacy, its ability to pay dividends, its credit, risk management or compliance policies, its internal controls, its management or its business, other than those of general application that apply to similarly situated companies or their Subsidiaries (each item in this sentence, a “Company Regulatory Agreement”), nor has Company or any of its Subsidiaries been advised since January 1, 2006 by any Regulatory Agency or other Governmental Entity that it is considering issuing, initiating, ordering, or requesting any such Company Regulatory Agreement. The Company and each of its subsidiaries are currently in compliance with all applicable laws and regulations relating to capital adequacy and, to the knowledge of Company, there has not been any event or occurrence since January 1, 2006 that would result in a determination that Merrill Lynch Bank & Trust Co., FSB or Merrill Lynch Bank USA is not “well capitalized” as a matter of applicable banking law.

(c) Company has previously made available to Parent an accurate and complete copy of each (i) final registration statement, prospectus, report, schedule and definitive proxy statement filed with or furnished to the SEC by Company or any of its Subsidiaries pursuant to the Securities Act or the Securities Exchange Act of 1934, as amended (the “Exchange Act”) since January 1, 2006 (the “Company SEC Reports”) and prior to the date of this Agreement and (ii) communication mailed by Company to its stockholders since January 1, 2006 and prior to the date of this Agreement. No such Company SEC Report or communication, at the time filed, furnished or communicated (and, in the case of registration statements and proxy statements, on
the dates of effectiveness and the dates of the relevant meetings, respectively), contained any untrue statement of a material fact or omitted to state any material fact required to be stated therein or necessary in order to make the statements made therein, in light of the circumstances in which they were made, not misleading, except that information as of a later date (but before the date of this Agreement) shall be deemed to modify information as of an earlier date. As of their respective dates, all Company SEC Reports complied as to form in all material respects with the published rules and regulations of the SEC with respect thereto. Each current Subsidiary of Company that has filed since January 1, 2006 a Form S-3 registration statement with the SEC meets the requirements for the use of Form S-3, and no event has occurred that would reasonably be expected to result in Form S-3 eligibility requirements no longer being satisfied by any such Subsidiary. No executive officer of Company has failed in any respect to make the certifications required of him or her under Section 302 or 906 of the Sarbanes-Oxley Act of 2002 (the “Sarbanes-Oxley Act”).

3.6 Financial Statements.

(a) The financial statements of Company and its Subsidiaries included (or incorporated by reference) in the Company SEC Reports (including the related notes, where applicable) (i) have been prepared from, and are in accordance with, the books and records of Company and its Subsidiaries, (ii) fairly present in all material respects the consolidated results of operations, cash flows, changes in stockholders’ equity and consolidated financial position of Company and its Subsidiaries for the respective fiscal periods or as of the respective dates therein set forth (subject in the case of unaudited statements to recurring year-end audit adjustments normal in nature and amount), (iii) complied as to form, as of their respective dates of filing with the SEC, in all material respects with applicable accounting requirements and with the published rules and regulations of the SEC with respect thereto, and (iv) have been prepared in accordance with U.S. generally accepted accounting principles (“GAAP”) consistently applied during the periods involved, except, in each case, as indicated in such statements or in the notes thereto. The books and records of Company and its Subsidiaries have been, and are being, maintained in all material respects in accordance with GAAP and any other applicable legal and accounting requirements. Deloitte & Touche LLP has not resigned or been dismissed as independent public accountants of Company as a result of or in connection with any disagreements with Company on a matter of accounting principles or practices, financial statement disclosure or auditing scope or procedure.

(b) Neither Company nor any of its Subsidiaries has any material liability or obligation of any nature whatsoever (whether absolute, accrued, contingent, determined, determinable or otherwise and whether due or to become due), except for (i) those liabilities that are reflected or reserved against on the consolidated balance sheet of Company included in its Quarterly Report on Form 10-Q for the fiscal quarter ended June 27, 2008 (including any notes thereto) and (ii) liabilities incurred in the ordinary course of business consistent with past practice since June 27, 2008 or in connection with this Agreement and the transactions contemplated hereby.

(c) The records, systems, controls, data and information of Company and its Subsidiaries are recorded, stored, maintained and operated under means (including any electronic, mechanical or photographic process, whether computerized or not) that are under the
exclusive ownership and direct control of Company or its Subsidiaries or accountants (including all means of access thereto and therefrom), except for any non-exclusive ownership and non-direct control that would not reasonably be expected to have a material adverse effect on the system of internal accounting controls described below in this Section 3.6(c). Company (x) has implemented and maintains disclosure controls and procedures (as defined in Rule 13a-15(e) of the Exchange Act) to ensure that material information relating to Company, including its consolidated Subsidiaries, is made known to the chief executive officer and the chief financial officer of Company by others within those entities, and (y) has disclosed, based on its most recent evaluation prior to the date hereof, to Company’s outside auditors and the audit committee of Company’s Board of Directors (i) any significant deficiencies and material weaknesses in the design or operation of internal controls over financial reporting (as defined in Rule 13a-15(f) of the Exchange Act) which are reasonably likely to adversely affect Company’s ability to record, process, summarize and report financial information and (ii) any fraud, whether or not material, that involves management or other employees who have a significant role in Company’s internal controls over financial reporting. These disclosures were made in writing by management to Company’s auditors and audit committee, a copy of which has previously been made available to Parent. As of the date hereof, there is no reason to believe that Company’s outside auditors, chief executive officer and chief financial officer will not be able to give the certifications and attestations required pursuant to the rules and regulations adopted pursuant to Section 404 of the Sarbanes-Oxley Act, without qualification, when next due.

(d) Since December 28, 2007, (i) neither Company nor any of its Subsidiaries nor, to the knowledge of Company, any director, officer, employee, auditor, accountant or representative of Company or any of its Subsidiaries has received or otherwise had or obtained knowledge of any material complaint, allegation, assertion or claim, whether written or oral, regarding the accounting or auditing practices, procedures, methodologies or methods of Company or any of its Subsidiaries or their respective internal accounting controls, including any material complaint, allegation, assertion or claim that Company or any of its Subsidiaries has engaged in questionable accounting or auditing practices, and (ii) no attorney representing Company or any of its Subsidiaries, whether or not employed by Company or any of its Subsidiaries, has reported evidence of a material violation of securities laws, breach of fiduciary duty or similar violation by Company or any of its officers, directors, employees or agents to the Board of Directors of Company or any committee thereof or to any director or officer of Company.

3.7 Broker’s Fees. Neither Company nor any of its Subsidiaries nor any of their respective officers, directors, employees or agents has utilized any broker, finder or financial advisor or incurred any liability for any broker’s fees, commissions or finder’s fees in connection with the Merger or any other transactions contemplated by this Agreement, other than as set forth in Section 3.7 of the Company Disclosure Schedule and pursuant to letter agreements, true, complete and correct copies of which have been previously delivered to Parent.

3.8 Absence of Certain Changes or Events. (a) Since June 27, 2008, no event or events have occurred that have had or would reasonably be expected to have, either individually or in the aggregate, a Material Adverse Effect on Company. As used in this Agreement, the term “Material Adverse Effect” means, with respect to Parent or Company, as the case may be, a material adverse effect on (i) the financial condition, results of operations or business of such
party and its Subsidiaries taken as a whole (provided, however, that, with respect to clause (i), a “Material Adverse Effect” shall not be deemed to include effects to the extent resulting from (A) changes, after the date hereof, in GAAP or regulatory accounting requirements applicable generally to companies in the industries in which such party and its Subsidiaries operate, (B) changes, after the date hereof, in laws, rules, regulations or the interpretation of laws, rules or regulations by Governmental Authorities of general applicability to companies in the industries in which such party and its Subsidiaries operate, (C) actions or omissions taken with the prior written consent of the other party or expressly required by this Agreement, (D) changes in global, national or regional political conditions (including acts of terrorism or war) or general business, economic or market conditions, including changes generally in prevailing interest rates, currency exchange rates, credit markets and price levels or trading volumes in the United States or foreign securities markets, in each case generally affecting the industries in which such party or its Subsidiaries operate and including changes to any previously correctly applied asset marks resulting therefrom, (E) the execution of this Agreement or the public disclosure of this Agreement or the transactions contemplated hereby, including acts of competitors or losses of employees to the extent resulting therefrom, (F) failure, in and of itself, to meet earnings projections, but not including any underlying causes thereof or (G) changes in the trading price of a party’s common stock, in and of itself, but not including any underlying causes, except, with respect to clauses (A), (B) and (D), to the extent that the effects of such change are disproportionately adverse to the financial condition, results of operations or business of such party and its Subsidiaries, taken as a whole, as compared to other companies in the industry in which such party and its Subsidiaries operate) or (ii) the ability of such party to timely consummate the transactions contemplated by this Agreement.

(b) Since June 27, 2008 through and including the date of this Agreement, Company and its Subsidiaries have carried on their respective businesses in all material respects in the ordinary course of business consistent with their past practice.

(c) Since June 27, 2008 through and including the date of this Agreement, neither Company nor any of its Subsidiaries has (i) except for (A) normal increases for or payments to employees (other than officers subject to the reporting requirements of Section 16(a) of the Exchange Act (the “Executive Officers”)) made in the ordinary course of business consistent with past practice or (B) as required by applicable law or contractual obligations existing as of the date hereof, increased the wages, salaries, compensation, pension, or other fringe benefits or perquisites payable to any Executive Officer or other employee or director from the amount thereof in effect as of June 27, 2008, granted any severance or termination pay, entered into any contract to make or grant any severance or termination pay (in each case, except as required under the terms of agreements or severance plans listed on Section 3.11 of the Company Disclosure Schedule, as in effect as of the date hereof), or paid any cash bonus in excess of $1,000,000 other than the customary year-end bonuses in amounts consistent with past practice and other than the monthly incentive payments made to financial advisors under current Company programs, (ii) granted any options to purchase shares of Company Common Stock, any restricted shares of Company Common Stock or any right to acquire any shares of its capital stock, or any right to payment based on the value of Company’s capital stock, to any Executive Officer or other employee or director other than grants to employees (other than Executive Officers) made in the ordinary course of business consistent with past practice under the Company Stock Plans or grants relating to shares of Company Common Stock with an aggregate
value for all such grants of less than $1 million for any individual, (iii) changed any financial accounting methods, principles or practices of Company or its Subsidiaries affecting its assets, liabilities or businesses, including any reserving, renewal or residual method, practice or policy, (iv) suffered any strike, work stoppage, slow-down, or other labor disturbance, or (v) except for publicly disclosed ordinary dividends on the Company Common Stock or Company Preferred Stock and except for distributions by wholly-owned Subsidiaries of Company to Company or another wholly-owned Subsidiary of Company, made or declared any distribution in cash or kind to its stockholder or repurchased any shares of its capital stock or other equity interests.

3.9 Legal Proceedings. (a) Neither Company nor any of its Subsidiaries is a party to any, and there are no pending or, to Company’s knowledge, threatened, legal, administrative, arbitral or other proceedings, claims, actions, suits or governmental or regulatory investigations of any nature against Company or any of its Subsidiaries or to which any of their assets are subject.

(b) There is no judgment, settlement agreement, order, injunction, decree or regulatory restriction (other than those of general application that apply to similarly situated savings and loan holding companies or their Subsidiaries) imposed upon Company, any of its Subsidiaries or the assets of Company or any of its Subsidiaries (or that, upon consummation of the Merger, would apply to Parent or any of its Subsidiaries).

3.10 Taxes and Tax Returns.

(a) Each of Company and its Subsidiaries has duly and timely filed (including all applicable extensions) all material Tax Returns required to be filed by it on or prior to the date of this Agreement (all such Tax Returns being accurate and complete in all material respects), has paid all Taxes shown thereon as arising and has duly paid or made provision for the payment of all material Taxes that have been incurred or are due or claimed to be due from it by federal, state, foreign or local taxing authorities other than Taxes that are not yet delinquent or are being contested in good faith, have not been finally determined and have been adequately reserved against under GAAP. The federal, state and local income Tax Returns of Company and its Subsidiaries have been examined by the Internal Revenue Service (the “IRS”) or other relevant taxing authority for all years to and including 2001, and any liability with respect thereto has been satisfied or any liability with respect to deficiencies asserted as a result of such examination is covered by reserves that are adequate under GAAP. There are no material disputes pending, or written claims asserted, for Taxes or assessments upon Company or any of its Subsidiaries for which Company does not have reserves that are adequate under GAAP. Neither Company nor any of its Subsidiaries is a party to or is bound by any Tax sharing agreement or arrangement (other than such an agreement or arrangement exclusively between or among Company and its Subsidiaries). Within the past five years (or otherwise as part of a “plan (or series of related transactions)” within the meaning of Section 355(e) of the Code of which the Merger is also a part), neither Company nor any of its Subsidiaries has been a “distributing corporation” or a “controlled corporation” in a distribution intended to qualify under Section 355(a) of the Code. Neither Company nor any of its Subsidiaries is required to include in income any adjustment pursuant to Section 481(a) of the Code. no such adjustment has been proposed by the IRS and no pending request for permission to change any accounting method has been submitted by Company or any of its Subsidiaries. Neither Company nor any of its Subsidiaries has
participated in a "listed transaction" within the meaning of Treasury Regulation Section 1.6011-4(b)(2) subsequent to such transaction becoming listed.

(b) As used in this Agreement, the term "Tax" or "Taxes" means (i) all federal, state, local, and foreign income, excise, gross receipts, gross income, ad valorem, profits, gains, property, capital, sales, transfer, use, payroll, employment, severance, withholding, duties, intangibles, franchise, backup withholding, value added and other taxes, charges, levies or like assessments together with all penalties and additions to tax and interest thereon and (ii) any liability for Taxes described in clause (i) above under Treasury Regulation Section 1.1502-6 (or any similar provision of state, local or foreign law), as a transferee or successor or by contract.

(c) As used in this Agreement, the term "Tax Return" means a report, return or other information (including any amendments) required to be supplied to a governmental entity with respect to Taxes including, where permitted or required, combined or consolidated returns for any group of entities that includes Company or any of its Subsidiaries.

(d) Without regard to this Agreement or the Stock Option Agreement, Company has not undergone any "ownership change" within the meaning of Section 382 of the Code and, other than as a result of an acquisition by Company or any of its Subsidiaries, the availability of any net operating loss and other carryovers available to Company or its Subsidiaries has not been affected by Sections 382, 383 or 384 of the Code or by the SRLY limitations of Treasury Regulation Sections 1.1502-21, 1.1502-21T or 1.1502-22.

(e) Company and its Subsidiaries have complied in all material respects with all applicable laws relating to the payment and withholding of Taxes (including withholding of Taxes pursuant to Sections 1441, 1442 and 3402 of the Code or any comparable provision of any state, local or foreign laws) and have, within the time and in the manner prescribed by applicable law, withheld from and paid over all amounts required to be so withheld and paid over under applicable laws.

3.11 Employee Matters.

(a) Section 3.11 of the Company Disclosure Schedule (which shall be delivered by Company to Parent within five business days following the date hereof), sets forth a true, complete and correct list of each material "employee benefit plan" as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), whether or not subject to ERISA, and each material employment, consulting, bonus, incentive or deferred compensation, vacation, stock option or other equity-based, severance, termination, retention, change of control, profit-sharing, fringe benefit or other similar plan, program, agreement or commitment, whether written or unwritten, for the benefit of any employee, former employee, director or former director of Company or any of its Subsidiaries entered into, maintained or contributed to by Company or any of its Subsidiaries or to which Company or any of its Subsidiaries is obligated to contribute, or with respect to which Company or any of its Subsidiaries has any liability, direct or indirect, contingent or otherwise (including any liability arising out of an indemnification, guarantee, hold harmless or similar agreement) or otherwise providing benefits to any current, former or future employee, officer or director of Company or its Subsidiaries.
any of its Subsidiaries or to any beneficiary or dependent thereof (such plans, programs, agreements and commitments, herein referred to as the “Company Benefit Plans”).

(b) Except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect, (i) each of the Company Benefit Plans has been operated and administered in all material respects with applicable law, including, but not limited to, ERISA, the Code and in each case the regulations thereunder; (ii) each Company Benefit Plan intended to be "qualified" within the meaning of Section 401(a) of the Code has received a favorable determination letter from the Internal Revenue Service, or has pending an application for such determination from the Internal Revenue Service with respect to those provisions for which the remedial amendment period under Section 401(b) of the Code has not expired, and, to the knowledge of the Company, there is not any reason why any such determination letter should be revoked; (iii) with respect to each Company Benefit Plan that is subject to Title IV or Section 302 of ERISA or Section 412 or 4971 of the Code, as of the last day of the most recent plan year ended prior to the date hereof, the actuarially determined present value of all “benefit liabilities” within the meaning of Section 4001(a)(16) of ERISA did not exceed the then current value of assets of such Company Benefit Plan or, if such liabilities did exceed such assets, the amount thereof was properly reflected on the financial statements of Company or its applicable Subsidiary previously filed with the SEC; (iv) no Company Benefit Plan provides benefits, including, without limitation, death or medical benefits (whether or not insured), with respect to current or former employees or directors of the Company or any Company Subsidiary beyond their retirement or other termination of service, other than (1) coverage mandated by applicable law or (2) death benefits or retirement benefits under any "employee pension plan" (as such term is defined in Section 3(2) of ERISA); (v) no Controlled Group Liability has been incurred by the Company, a Company Subsidiary or any of their respective ERISA Affiliates that has not been satisfied in full, and no condition exists that presents a risk to the Company, a Company Subsidiary or any of their respective ERISA Affiliates of incurring any such liability; (vi) neither the Company nor any Company Subsidiary contributes on behalf of employees of the Company or any Company Subsidiary to a "multiemployer pension plan" (as such term is defined in Section 3(37) of ERISA) or a plan that has two or more contributing sponsors at least two of whom are not under common control, within the meaning of Section 4063 of ERISA; (vii) all contributions or other amounts payable by the Company or a Company Subsidiary with respect to each Company Benefit Plan in respect of current or prior plan years have been paid or accrued in accordance with generally accepted accounting principles; (viii) neither the Company nor a Company Subsidiary has engaged in a transaction in connection with which the Company or a Company Subsidiary reasonably could be subject to either a civil penalty assessed pursuant to Section 409 or 502(i) of ERISA or a material tax imposed pursuant to Section 4975 or 4976 of the Code; and (ix) there are no pending, threatened or anticipated claims (other than routine claims for benefits) by, on behalf of or against any of the Company Benefit Plans or any trusts related thereto which could reasonably be expected to result in any liability of the Company or any Company Subsidiary.

(c) Each Company Benefit Plan that is a "nonqualified deferred compensation plan" within the meaning of Section 409A(d)(1) of the Code (a "Nonqualified Deferred Compensation Plan") and any award thereunder, in each case that is subject to Section 409A of the Code has been operated in compliance in all material respects with Section 409A of the Code since January 1, 2006, based upon a good faith, reasonable interpretation of (A) Section 409A of
the Code and (B)(1) the proposed and final Treasury Regulations issued thereunder and (2) Internal Revenue Service Notice 2005-1, all subsequent Internal Revenue Service Notices and other interim guidance on Section 409A of the Code.

(d) Except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect, all Company Options have been granted in compliance with the terms of the applicable Company Benefit Plans, with applicable law, and with the applicable provisions of the Company Certificate and Company Bylaws as in effect at the applicable time, and all such Company Options are accurately disclosed as required under applicable law in the Company SEC Reports, including the financial statements contained therein or attached thereto (if amended or superseded by a filing with the SEC made prior to the date of this Agreement, as so amended or superseded).

(e) Neither the execution or delivery of this Agreement nor the consummation of the transactions contemplated by this Agreement will, either alone or in conjunction with any other event, (i) result in any material payment or benefit becoming due or payable, or required to be provided, to any director, employee or independent contractor of Company or any of its Subsidiaries or to such individuals in the aggregate, (ii) materially increase the amount or value of any benefit or compensation otherwise payable or required to be provided to any such director, employee or independent contractor, (iii) result in the acceleration of the time of payment, vesting or funding of any such benefit or compensation or (iv) result in any material limitation on the right of Company or any of its Subsidiaries to amend, merge or, terminate any Company Benefit Plan or related trust. No Company Benefit Plan provides for the reimbursement of excise Taxes under Section 4999 of the Code or any income Taxes under the Code.

(f) No labor organization or group of employees of the Company or any of its subsidiaries has made a pending demand for recognition or certification, and there are no representation or certification proceedings or petitions seeking a representation proceeding presently pending or threatened to be brought or filed, with the National Labor Relations Board or any other labor relations tribunal or authority. There are no organizing activities, strikes, work stoppages, slowdowns, lockouts, material arbitrations or material grievances, or other material labor disputes pending or threatened against or involving the Company or any of its subsidiaries. Except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect, each of the Company and its Subsidiaries is in compliance in all material respects with all applicable laws and collective bargaining agreements respecting employment and employment practices, terms and conditions of employment, wages and hours and occupational safety and health.

(g) "Controlled Group Liability" means any and all liabilities (i) under Title IV of ERISA, (ii) under Section 302 of ERISA, (iii) under Sections 412 and 4971 of the Code, and (iv) as a result of a failure to comply with the continuation coverage requirements of Section 601 et seq. of ERISA and section 4980B of the Code.

(h) "ERISA Affiliate" means any entity if it would have ever been considered a single employer with the Company under ERISA Section 4001(b) or part of the same "controlled
group” as the Company for purposes of ERISA Section 302(d)(8)(C) or Code Sections 414(b) or (c) or a Member of an affiliated service group for purposes of Code Section 414(m).

3.12 Compliance with Applicable Law. (a) Company and each of its Subsidiaries hold all licenses, franchises, permits and authorizations necessary for the lawful conduct of their respective businesses under and pursuant to each, and have complied in all respects with and are not in default in any respect under any, law, rule, regulation or legal requirement applicable to Company or any of its Subsidiaries.

(b) Company and each of its Subsidiaries has properly administered all accounts for which it acts as a fiduciary, including accounts for which it serves as a trustee, agent, custodian, personal representative, guardian, conservator or investment advisor, in accordance with the terms of the governing documents and applicable law. None of Company, any of its Subsidiaries, or any director, officer or employee of Company or of any of its Subsidiaries has committed any breach of trust or fiduciary duty with respect to any such fiduciary account and the accountings for each such fiduciary account are true and correct and accurately reflect the assets of such fiduciary account.

3.13 Certain Contracts. (a) Neither Company nor any of its Subsidiaries is a party to or bound by any contract, arrangement, commitment or understanding (whether written or oral) (i) that is a “material contract” (as such term is defined in Item 601(b)(10) of Regulation S-K of the SEC) to be performed after the date of this Agreement that has not been filed or incorporated by reference in the Company SEC Reports filed prior to the date hereof, (ii) that contains a non-compete or client or customer non-solicit requirement or other provision that materially restricts the conduct of, or the manner of conducting, any line of business material to the Company and its Subsidiaries, taken as a whole, or, to the knowledge of Company, upon consummation of the Merger could materially restrict the ability of Parent, the Surviving Company or any of their respective Subsidiaries to engage in any material line of business, (iii) that obligates Company or any of its Subsidiaries to conduct business on an exclusive or preferential basis with any third party or upon consummation of the Merger will obligate Parent, the Surviving Company or any of their respective Subsidiaries to conduct business with any third party on an exclusive or preferential basis, in any case of the preceding which is material, (iv) with or to a labor union or guild (including any collective bargaining agreement). Each contract, arrangement, commitment or understanding of the type described in this Section 3.13(a), whether or not set forth in the Company Disclosure Schedule, is referred to as an “Company Contract”.

(b) (i) Each Company Contract is valid and binding on Company or its applicable Subsidiary, enforceable against it in accordance with its terms (subject to the Bankruptcy and Equity Exception), and is in full force and effect, (ii) Company and each of its Subsidiaries and, to Company’s knowledge, each other party thereto has duly performed all obligations required to be performed by it to date under each Company Contract and (iii) no event or condition exists that constitutes or, after notice or lapse of time or both, will constitute, a breach, violation or default on the part of Company or any of its Subsidiaries or, to Company’s knowledge, any other party thereto under any such Company Contract. There are no disputes pending or, to Company’s knowledge, threatened with respect to any Company Contract.
3.14 Risk Management Instruments. (a) “Derivative Transactions” means any swap transaction, option, warrant, forward purchase or sale transaction, futures transaction, cap transaction, floor transaction or collar transaction relating to one or more currencies, commodities, bonds, equity securities, loans, servicing rights, interest rates, prices, values, or other financial or non-financial assets, credit-related events or conditions or any indexes, or any other similar transaction or combination of any of these transactions, including collateralized mortgage obligations or other similar instruments or any debt or equity instruments evidencing or embedding any such types of transactions, and any related credit support, collateral or other similar arrangements related to such transactions; provided that, for the avoidance of doubt, the term “Derivative Transactions” shall not include any Company Option.

(b) All Derivative Transactions, whether entered into for the account of Company or any of its Subsidiaries or for the account of a customer of Company or any of its Subsidiaries, were entered into in the ordinary course of business consistent with past practice and in accordance with prudent banking practice and applicable laws, rules, regulations and policies of any Regulatory Authority and in accordance with the investment, securities, commodities, risk management and other policies, practices and procedures employed by Company and its Subsidiaries, and with counterparties believed at the time to be financially responsible and able to understand (either alone or in consultation with their advisers) and to bear the risks of such Derivative Transactions. All of such Derivative Transactions are valid and binding obligations of Company or one of its Subsidiaries enforceable against it in accordance with their terms (subject to the Bankruptcy and Equity Exception), and are in full force and effect. Company and its Subsidiaries and, to Company’s knowledge, all other parties thereto have duly performed their obligations under the Derivative Transactions to the extent that such obligations to perform have accrued and, to Company’s knowledge, there are no breaches, violations or defaults or allegations or assertions of such by any party thereunder.

3.15 Investment Securities and Commodities. (a) Except as would not reasonably be expected to have a Material Adverse Effect on Company, each of Company and its Subsidiaries has good title to all securities and commodities owned by it (except those sold under repurchase agreements or held in any fiduciary or agency capacity), free and clear of any Liens, except to the extent such securities or commodities are pledged in the ordinary course of business to secure obligations of Company or its Subsidiaries. Such securities and commodities are valued on the books of Company in accordance with GAAP in all material respects.

(b) Company and its Subsidiaries and their respective businesses employ investment, securities, commodities, risk management and other policies, practices and procedures which Company believes are prudent and reasonable in the context of such businesses.

3.16 Property. Company or one of its Subsidiaries (a) has good and marketable title to all the properties and assets reflected in the latest audited balance sheet included in such Company SEC Reports as being owned by Company or one of its Subsidiaries or acquired after the date thereof (except properties sold or otherwise disposed of since the date thereof in the ordinary course of business) (the “Owned Properties”), free and clear of all Liens of any nature whatsoever, except (i) statutory Liens securing payments not yet due, (ii) Liens for real property Taxes not yet due and payable, (iii) easements, rights of way, and other similar encumbrances
that do not materially affect the use of the properties or assets subject thereto or affected thereby or otherwise materially impair business operations at such properties and (iv) such imperfections or irregularities of title or Liens as do not materially affect the use of the properties or assets subject thereto or affected thereby or otherwise materially impair business operations at such properties (collectively, “Permitted Encumbrances”), and (b) is the lessee of all leasehold estates reflected in the latest audited financial statements included in such Company SEC Reports or acquired after the date thereof (except for leases that have expired by their terms since the date thereof) (the “Leased Properties” and, collectively with the Owned Properties, the “Real Property”), free and clear of all Liens of any nature whatsoever, except for Permitted Encumbrances, and is in possession of the properties purported to be leased thereunder, and each such lease is valid without default thereunder by the lessee or, to Company’s knowledge, the lessor. The Real Property is in material compliance with all applicable zoning laws and building codes, and the buildings and improvements located on the Real Property are in good operating condition and in a state of good working order, ordinary wear and tear excepted. There are no pending or, to the knowledge of Company, threatened condemnation proceedings against the Real Property. Company and its Subsidiaries are in compliance with all applicable health and safety related requirements for the Real Property, including those under the Americans with Disabilities Act of 1990 and the Occupational Health and Safety Act of 1970. Company and its Subsidiaries own and have good and valid title to, or have valid rights to use, all material tangible personal property used by them in connection with the conduct of their businesses, in each case, free and clear of all Liens, other than Permitted Encumbrances.

3.17 Intellectual Property.

(a) Definitions. For purposes of this Agreement, the following terms shall have the meanings assigned below:

“Company IP” means all Intellectual Property owned, used, held for use or exploited by Company or any of its Subsidiaries.

“Intellectual Property” means collectively, all intellectual property and other similar proprietary rights in any jurisdiction throughout the world, whether owned, used or held for use under license, whether registered or unregistered, including such rights in and to: (i) trademarks, service marks, brand names, certification marks, trade dress, logos, trade names and corporate names and other indications of origin, and the goodwill associated with any of the foregoing (collectively, “Trademarks”); (ii) patents and patent applications, and any and all divisions, continuations, continuations-in-part, reissues, continuing patent applications, provisional patent applications, re-examinations, and extensions thereof, any counterparts claiming priority therefrom, utility models, patents of importation/confirmation, certificates of invention, certificates of registration and like rights (collectively, “Patents”), and inventions, invention disclosures, discoveries and improvements, whether or not patentable; (iii) trade secrets (including, those trade secrets defined in the Uniform Trade Secrets Act and under corresponding foreign statutory law and common law), business, technical and know-how information, non-public information, and confidential information and rights to limit the use or disclosure thereof by any person (collectively, “Trade Secrets”); (iv) all works of authorship (whether copyrightable or not), copyrights and proprietary rights in copyrighted works including writings, other works of authorship, and databases (or other collections of information, data.
works or other materials) (collectively, "Copyrights"); (v) software, including data files, source code, object code, firmware, mask works, application programming interfaces, computerized databases and other software-related specifications and documentation (collectively, "Software"); (vi) designs and industrial designs; (vii) Internet domain names; (viii) rights of publicity and other rights to use the names and likeness of individuals; (ix) moral rights; and (x) claims, causes of action and defenses relating to the past, present and future enforcement of any of the foregoing; in each case of (i) to (ix) above, including any registrations of, applications to register, and renewals and extensions of, any of the foregoing with or by any Governmental Entity in any jurisdiction.

"License Agreement" means any legally binding contract, whether written or oral, and any amendments thereto (including license agreements, sub-license agreements, research agreements, development agreements, distribution agreements, consent to use agreements, customer or client contracts, coexistence, non assertion or settlement agreements), pursuant to which any interest in, or any right to use or exploit any Intellectual Property has been granted.

"Licensed Company IP" means the Intellectual Property owned by a third party that Company or any of its Subsidiaries has a right to use or exploit by virtue of a License Agreement.

"Owned Company IP" means the Intellectual Property that is owned by Company or any of its Subsidiaries.

(b) Company and its Subsidiaries collectively own all right, title and interest in, or have the valid right to use, all of the Company IP, free and clear of any Liens, and there are no obligations to, covenants to or restrictions from third parties affecting Company's or its applicable Subsidiary's use, enforcement, transfer or licensing of the Owned Company IP.

(c) The Owned Company IP and Licensed Company IP constitute all the Intellectual Property necessary and sufficient to conduct the businesses of Company and its Subsidiaries as they are currently conducted, as they have been conducted since December 28, 2007.

(d) The Owned Company IP and, to the knowledge of Company, Licensed Company IP, are valid, subsisting and enforceable.

(e) Neither Company nor any of its Subsidiaries has infringed, misappropriated or otherwise violated any Intellectual Property of any third party.

(f) No Owned Company IP or Licensed Company IP is being used or enforced in a manner that would result in the abandonment, cancellation or unenforceability of such Intellectual Property. To the knowledge of Company, no third party has infringed, misappropriated or otherwise violated any Owned Company IP.

3.18 Environmental Liability. There are no legal, administrative, arbitral or other proceedings, claims, actions, causes of action or notices with respect to any environmental, health or safety matters or any private or governmental environmental, health or safety investigations or remediation activities of any nature, whether relating to the Real Property or
otherwise, seeking to impose, or that are reasonably likely to result in, any liability or obligation of Company or any of its Subsidiaries arising under common law or under any local, state or federal environmental, health or safety statute, regulation, ordinance, or other requirement of any Governmental Entity, including the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, and any similar state laws ("Environmental Laws"), pending or threatened against Company or any of its Subsidiaries. To the knowledge of Company, there is no reasonable basis for, or circumstances that are reasonably likely to give rise to, any such proceeding, claim, action, cause of action, notice, investigation, or remediation activities that would result in any such liability or obligation of Company or any of its Subsidiaries. Neither Company nor any of its Subsidiaries is subject to any agreement, order, judgment, decree, letter or memorandum by or with any Governmental Entity or third party imposing any liability or obligation with respect to any of the foregoing. Company, its Subsidiaries, and the activities, operations and conditions on the Real Property have complied with all applicable Environmental Laws.

3.19 Broker-Dealer, Fund and Investment Advisory Matters

(a) Each of Company and its Subsidiaries and each of their respective officers and employees who are required to be registered, licensed or qualified as (i) a broker-dealer, investment adviser, futures commission merchant, commodity trading advisor or commodity pool operator or (ii) a registered principal, registered representative, investment adviser representative, insurance agent, salesperson, or in any other capacity, with the SEC or any securities or insurance commission or other Governmental Entity are duly registered as such and such registrations are in full force and effect, or are in the process of being registered as such within the time periods required by applicable law. Each of Company and its Subsidiaries and each of their respective officers and employees are in compliance with all applicable federal, state and foreign laws requiring any such registration, licensing or qualification, and are not subject to any liability or disability by reason of the failure to be so registered, licensed or qualified. There is no action, suit, proceeding or investigation pending or, to the knowledge of Company, threatened which would reasonably be expected to lead to the revocation, amendment, failure to renew, limitation, suspension or restriction of any such registration, license or qualification.

(b) With respect to Company and each Subsidiary that serves in a capacity described in Section 9(a) or 9(b) of the 1940 Act with respect to a Fund, (i) such person is not (taking into account any applicable exemption) ineligible under such Section 9(a) or 9(b) to serve in such capacity, (ii) no “affiliated person” (as defined in Section 2(a)(3) of the 1940 Act) of such person is (taking into account any applicable exemption) ineligible under such Section 9(b) to serve as an “affiliated person” of such person and (iii) there is no proceeding or investigation pending or served on Company or any Company Subsidiary or, to Company’s knowledge, pending and not so served or threatened by any Governmental Entity, which would result in (A) the ineligibility of such person to serve in such capacity under such Section 9(a) or 9(b) or (B) the ineligibility under such Section 9(b) of such “affiliated person” to serve as an “affiliated person” of such person.

(c) With respect to Company and each Subsidiary that acts as an investment adviser within the meaning of the Advisers Act, (i) such person is not (taking into account any
applicable exemption) ineligible pursuant to Section 203(e) of the Advisers Act to act as an investment adviser, (ii) no "person associated" (as defined in Section 202(a)(17) of the Advisers Act) with such person is (taking into account any applicable exemption) ineligible under Section 203(f) of the Advisers Act to serve as a "person associated" with an investment adviser and (iii) there is no proceeding or investigation pending and served on Company or any Company Subsidiary or, to Company's knowledge, pending and not so served or threatened by any Governmental Entity, which would result in (A) the ineligibility under such Section 203(e) of such person to act as an investment adviser or (B) the ineligibility under such Section 203(f) of such "person associated" with such person to serve as a "person associated" with an investment adviser.

(d) With respect to Company and each Subsidiary that acts as a broker or dealer within the meaning of the Exchange Act, (i) such person is not (taking into account any applicable exemption) ineligible pursuant to Section 15(b)(4) of the Exchange Act to act as a broker or dealer, (ii) no "person associated" (as defined in Section 3(a)(18) of the Exchange Act) with such person is (taking into account any applicable exemption) ineligible under Section 15(b)(6) of the Exchange Act to serve as a "person associated" with a broker or dealer and (iii) there is no proceeding or investigation pending and served on Company or any Subsidiary or, to Company's knowledge, pending and not so served or threatened by any Governmental Entity, which would result in (A) the ineligibility under such Section 15(b)(4) of such person to act as a broker or dealer or (B) the ineligibility under such Section 15(b)(6) of such "person associated" with such person to serve as a "person associated" with a broker or dealer.

(e) Each Fund sponsored by Company or any Subsidiary and, to Company's knowledge, each other Fund ("Non-Sponsored Fund") has filed all registrations, reports, prospectuses, proxy statements, statements of additional information, financial statements, sales literature, statements, notices and other filings required to be filed by it with any Governmental Entity (other than Tax Returns), including all amendments or supplements to any of the above for the past two years, in each case to the extent related to its business. Each Fund sponsored by Company or any Subsidiary and, to Company's knowledge, each Non-Sponsored Fund, holds all legally required licenses, registrations, franchises, permits and authorizations and are in compliance with, and are not in violation of, under any applicable law, statute, order, rule, regulation, policy and/or guideline of any Governmental Entity of competent jurisdiction, and neither Company nor any of its Subsidiaries knows of, or has received notice of, any violations of any of the above.

(f) Each of Company and its Subsidiaries, and, to Company's knowledge, its solicitors, third party administrators, managers, brokers and distributors, have marketed, sold and issued investment products and securities in compliance with all applicable laws governing sales processes and practices and in compliance with all advisory or other agreements under which such products and securities are sold or under which such investment management, investment advisory and sub-advisory services are provided. Company and each Subsidiary has at all times since January 1, 2003 rendered investment advisory services to Clients and Funds sponsored by Company or any Subsidiary and, to Company's knowledge, Non-Sponsored Funds, with whom they are or were a party to an Investment Advisory Agreement, in compliance with all requirements, if any, as to investment objectives, portfolio composition and portfolio management, the terms of the applicable Investment Advisory Agreement, written instructions
from such Clients and Funds, prospectuses, registration statements, offering memorandums, board of director or trustee directives, applicable law and, to Company's knowledge, the organizational documents of such Clients and Funds.

(g) Each Fund sponsored by Company or its Subsidiaries that is a juridical entity is duly organized, validly existing and, with respect to jurisdictions that recognize the concept of "good standing," in good standing under the laws of the jurisdiction of its organization and has the requisite corporate, trust, company or partnership power and authority to own its properties and to carry on its business conducted as of the date of this Agreement, and is qualified to do business in each jurisdiction where it is required to be so qualified under applicable law. The shares or units of each Fund sponsored by Company or its Subsidiaries (i) have been issued and sold by such Fund in compliance with applicable law, (ii) are, in the case of such public Funds only, qualified for public offering and sale by such Funds in each jurisdiction where offers are made to the extent required under applicable law and (iii) to the extent applicable, have been duly authorized and validly issued and are fully paid and non-assessable.

(h) For purposes of this Agreement, the following terms shall have the meanings assigned below:

(i) "1940 Act" shall mean the Investment Company Act of 1940, as amended.

(ii) "Advisers Act" shall mean the Investment Advisers Act of 1940, as amended.

(iii) "Client" means any person to which Company or any of its Subsidiaries provides investment management or investment advisory services, including any sub-advisory services, pursuant to an Investment Advisory Agreement.

(iv) "Fund" means any pooled investment vehicle (including each portfolio or series thereof, if any) for which Company or any of its Subsidiaries acts as investment adviser, investment sub-adviser, manager, general partner or sponsor, whether or not registered or qualified for offer and sale to members of the public generally with any Governmental Entity.

(v) "Investment Advisory Agreement" means an agreement under which Company or any of its Subsidiaries acts as an investment adviser or sub-adviser to, or manages any investment or trading account of, any Client.

3.20 Securitization Matters. In each case except as would not reasonably be expected to have a Material Adverse Effect on Company:

(a) Each of Company and its applicable Subsidiaries and, to the knowledge of Company, each other party thereto has performed in all material respects the obligations to be performed by it under each of the Company Securitization Documents, including any required filing of any financing statements, continuation statements or amendments under the Uniform Commercial Code of each applicable jurisdiction with the appropriate filing offices.
(b) Each of the Company Securitization Interests, each series of certificates or other securities issued by any Company Securitization Trust and each of the Company Securitization Documents to which Company, any of its Subsidiaries, or any Company Securitization Trust, as the case may be, is a party, is in full force and effect and is a valid, binding and enforceable obligation of Company, such Subsidiary or any Company Securitization Trust, as the case may be, and, to the knowledge of Company, of the other parties thereto, subject to the Bankruptcy and Equity Exception. Each Company Securitization Interest (including, without limitation, each Retained Interest) is fully paid and subject to no further assessment or obligation, other than required servicing or master servicing advances in transactions for which Company or any of its Subsidiaries serves as servicer or master servicer.

(c) All Company Securitization Documents required to be qualified under the Trust Indenture Act of 1939, as amended, have been so qualified and no Company Securitization Trust is required to be registered under the 1940 Act. The sale of all securities issued by any Company Securitization Trust was either duly registered under, or exempt from the registration requirements of, the Securities Act.

(d) Since January 1, 2006, on a consolidated basis, Company has properly accounted for the sale of all loan agreements, notes or borrowing arrangements (including leases, credit enhancements, commitments, guarantees and interest-bearing assets) payable to the Company or its Subsidiaries (collectively, “Loans”) under GAAP, including Statement of Financial Accounting Standards No. 140, and including in respect of the reporting of income arising from the sale of such Loans.

(e) On a consolidated basis, Company consolidates any variable interest entity as required under GAAP, including FIN 46 and FIN 46R, as in effect as of the date hereof in connection with any transaction related to a Company Securitization Trust.

(f) All reports required to be filed since January 1, 2006 with the SEC or any other Governmental Entity in connection with any offering of securities in any loan or other asset securitization transaction in which Company or any of its Subsidiaries was an issuer, sponsor or depositor (a “Company Sponsored Asset Securitization Transaction”) complied as to form in all material respects with the published rules and regulations of the SEC or such other Governmental Entity with respect thereto. No person has failed in any respect to make the certifications required of him or her under Section 302 of the Sarbanes-Oxley Act with respect to such reports. All assessments and attestations regarding servicing compliance required to be delivered or filed by Company or any of its Subsidiaries have been timely and accurately filed, and no material instances of noncompliance have been identified in such assessments or attestations. Since December 28, 2007, neither Company nor any of its Subsidiaries nor, to the knowledge of Company, any director, officer, employee, auditor, accountant or representative of Company or any of its Subsidiaries has received or otherwise had or obtained knowledge of any material complaint, allegation, assertion or claim, whether written or oral, regarding the accounting or auditing practices, procedures, methodologies or methods of any Company Securitization Trust or their respective internal accounting controls.

(g) No event or condition exists which does now or with either notice or the passage of time would constitute a default, event of default, early redemption event, payout
event, early amortization event or other similar event under any Company Securitization Document. No Adverse Development has occurred and is continuing in connection with any Company Sponsored Asset Securitization Transaction. No event or condition exists which constitutes a Servicer Default or other similar event permitting the termination of the servicer under any of the Company Securitization Documents (a “Servicer Default or Termination”). The consummation of the transactions contemplated hereby (including the Merger) shall not cause the occurrence of any Adverse Development or Servicer Default or Termination.

(h) For purposes of this Agreement, the following terms shall have the meanings assigned below:

“Adverse Development” means any event or condition which is or with either notice or the passage of time would (i) constitute a breach, default, event of default, early redemption event, payout event, early amortization event or other similar event under any Company Securitization Document or (ii) trigger any requirement under any Company Securitization Document to (x) fund an increase in any form of internal credit enhancement, external credit enhancement, spread account or similar account (other than with respect to spread accounts that have already been funded), (y) draw on any such internal or external credit enhancement or account under the terms of any Company Securitization Document or (z) otherwise increase any otherwise required credit enhancement required under the Company Securitization Documents.

“Company Securitization Documents” includes each security issued by any Company Securitization Trust, and each loan sale agreement, pooling and servicing agreement, indenture, bond insurance agreement (and related policy), pool insurance agreement (and related policy), guarantee, swap or derivative contract, prospectus, offering circular, underwriting agreement, purchase agreement and each other material agreement related to any such security and each supplement, terms or pricing agreement or other agreement relating to the foregoing and each document required to be delivered in connection therewith.

“Company Securitization Interests” means any securities, any Retained Interest, any reserve account, cash collateral account, other residual or servicing interest or other ongoing obligations (in each case whether or not certificated) owned by Company or any of its Subsidiaries created pursuant to or associated with any Company Securitization Document.

“Company Securitization Trust” means any trust or other special purpose vehicle created by Company.

“Retained Interest” means any interest retained by Company or any of its Subsidiaries pursuant to the Company Securitization Documents.

“Servicer Default” means a servicer or master servicer default or similar event, as specified in the relevant pooling and servicing agreement, indenture or other Company Securitization Document, as the case may be.

(i) For purposes of this Section 3.20 and Section 3.5(c), “Subsidiary” shall include any Subsidiary of Company and, if and to the extent not otherwise included, also include
each issuer, sponsor and/or depositor in each Company Sponsored Asset Securitization Transaction.

3.21 State Takeover Laws. The Board of Directors of Company has unanimously approved this Agreement and the transactions contemplated hereby as required to render inapplicable to this Agreement and such transactions the restrictions on "business combinations" set forth in Section 203 of the DGCL or any other "moratorium," "control share," "fair price," "takeover" or "interested stockholder" law (any such laws, "Takeover Statutes").

3.22 Interested Party Transactions. Except as set forth in the Company SEC Documents or Section 3.22 of the Company Disclosure Schedule, no event has occurred since December 28, 2007 that would be required to be reported by Company pursuant to Item 404(a) of Regulation S-K promulgated by the SEC.

3.23 Reorganization. As of the date of this Agreement, Company is not aware of any fact or circumstance that could reasonably be expected to prevent the Merger from qualifying as a "reorganization" within the meaning of Section 368(a) of the Code.

3.24 Opinion. The Board of Directors of Company has received the opinion of Merrill Lynch, Pierce, Fenner & Smith, Incorporated, to the effect that, as of the date hereof, and based upon and subject to the factors and assumptions set forth therein, the Exchange Ratio is fair from a financial point of view to the holders of Company Common Stock. Such opinion has not been amended or rescinded as of the date of this Agreement.

3.25 Company Information. The information relating to Company and its Subsidiaries that is provided by Company or its representatives for inclusion in the Proxy Statement and Form S-4, or in any application, notification or other document filed with any other Regulatory Agency or other Governmental Entity in connection with the transactions contemplated by this Agreement, will not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements therein, in light of the circumstances in which they are made, not misleading. The portions of the Proxy Statement relating to Company and its Subsidiaries and other portions within the reasonable control of Company and its Subsidiaries will comply in all material respects with the provisions of the Exchange Act and the rules and regulations thereunder.

ARTICLE IV

REPRESENTATIONS AND WARRANTIES OF PARENT

Except (i) as disclosed in any report, schedule, form or other document filed with, or furnished to, the SEC by Parent and publicly available prior to the date of this Agreement (excluding, in each case, any disclosures set forth in any risk factor section and in any section relating to forward-looking statements to the extent that they are cautionary, predictive or forward-looking in nature), or (ii) as disclosed in the disclosure schedule (the "Parent Disclosure Schedule") delivered by Parent to Company prior to the execution of this Agreement (which schedule sets forth, among other things, items the disclosure of which is necessary or appropriate either in response to an express disclosure requirement contained in a provision hereof or as an
exception to one or more representations or warranties contained in this Article IV, or to one or more of Parent’s covenants contained herein, provided, however, that disclosure in any section of such schedule shall apply only to the indicated Section of this Agreement except to the extent that it is reasonably apparent on the face of such disclosure that such disclosure is relevant to another Section of this Agreement, provided, further, that notwithstanding anything in this Agreement to the contrary, (i) no such item is required to be set forth in such schedule as an exception to a representation or warranty if its absence would not result in the related representation or warranty being deemed untrue or incorrect under the standard established by Section 9.2, and (ii) the mere inclusion of an item in such schedule as an exception to a representation or warranty shall not be deemed an admission that such item represents a material exception or material fact, event or circumstance or that such item has had or would be reasonably likely to have a Material Adverse Effect on Parent), Parent hereby represents and warrants to Company as follows:

4.1 Corporate Organization. (a) Parent is, and Merger Sub will be, a corporation duly incorporated, validly existing and in good standing under the laws of the State of Delaware. Parent has and Merger Sub will have the requisite corporate power and authority to own or lease all of its properties and assets and to carry on its business as it is now being conducted, and is duly licensed or qualified to do business in each jurisdiction in which the nature of the business conducted by it or the character or location of the properties and assets owned or leased by it makes such licensing or qualification necessary. Parent is duly registered as a bank holding company under the BHC Act and is a financial holding company pursuant to Section 4(1) of the BHC Act and meets the applicable requirements for qualification as such. True, complete and correct copies of the Amended and Restated Certificate of Incorporation, as amended (the “Parent Certificate”), and Bylaws of Parent (the “Parent Bylaws”), as in effect as of the date of this Agreement, have previously been made available to Company.

(b) Each Subsidiary of Parent (i) is duly incorporated or duly formed, as applicable to each such Subsidiary, and validly existing and in good standing under the laws of its jurisdiction of organization, (ii) has the requisite corporate power and authority or other power and authority to own or lease all of its properties and assets and to carry on its business as it is now being conducted and (iii) is duly qualified to do business in each jurisdiction in which the nature of the business conducted by it or the character or location of the properties and assets owned or leased by it makes such licensing or qualification necessary.

4.2 Capitalization. The authorized capital stock of Parent consists of 7,500,000,000 shares of Parent Common Stock, of which, as of July 31, 2008 (the “Parent Capitalization Date”), 4,560,112,687 shares were issued and outstanding, and 100,000,000 shares of preferred stock, $0.01 par value (the “Parent Preferred Stock”), of which, as of the Parent Capitalization Date, (i) 3,000,000 shares were authorized as ESOP Convertible Preferred Stock, Series C, none of which were issued and outstanding, (ii) 35,045 shares were authorized as Cumulative Redeemable Preferred Stock, Series B, 7,001 of which were issued and outstanding, (iii) 20,000,000 shares were authorized as $2.50 Cumulative Convertible Preferred Stock, Series BB, none of which were issued and outstanding, (iv) 85,100 shares were authorized as Floating Rate Non-Cumulative Preferred Stock, Series E, of which and issued 81,000 shares were issued and outstanding, (v) 34,500 shares were authorized as 6.204% Non-Cumulative Series D Preferred Stock, of which 33,900 were issued and outstanding, (vi) 7,001 were
authorized as Floating Rate Non-Cumulative Preferred Stock, Series F, none of which were
issued and outstanding, (vii) 8,501 were authorized as Adjustable Rate Non-Cumulative
Preferred Stock, Series G, none of which were issued and outstanding, (viii) 25,300 were
authorized as 6.625% Non-Cumulative Preferred Stock, Series I, 22,000 of which were issued
and outstanding, (ix) 41,400 were authorized as 7.25% Non-Cumulative Preferred Stock, Series
J, 41,400 of which were issued and outstanding, (x) 6,900,000 were authorized as 7.25% Non-
Cumulative Perpetual Convertible Preferred Stock, Series L, 6,900,000 of which were issued and
outstanding, (xi) 240,000 were authorized as Fixed-to-Floating Rate Non-Cumulative Preferred
Stock, Series K, 240,000 of which were issued and outstanding, (xii) 160,000 were authorized as
Fixed-to-Floating Rate Non-Cumulative Preferred Stock, Series M, 160,000 of which were
issued and outstanding, and (xiii) 124,200 were authorized as 8.20% Non-Cumulative Preferred
Stock, Series H, 117,000 of which were issued and outstanding. As of the Parent Capitalization
Date, no shares of Parent Common Stock were held in Parent’s treasury. As of the Parent
Capitalization Date, no shares of Parent Common Stock or Parent Preferred Stock were reserved
for issuance, except for (i) 373,427,609 shares of Parent Common Stock reserved for issuance
upon exercise of options issued pursuant to employee and director stock plans of Parent or a
Subsidiary of Parent in effect as of the date of this Agreement (the “Parent Stock Plans”), (ii)
159,954 shares of Parent Common Stock reserved for issuance pursuant to a convertible note
agreement (the “Convertible Note Agreement”) and (iii) 138,000,000 shares of Parent Common
Stock reserved for issuance upon conversion of the 7.25% Non-Cumulative Perpetual
Convertible Preferred Stock, Series L and (iv) 13,181,696 shares of Parent Common Stock
reserved for the conversion of Countrywide Financial Corporation Series A and Series B
Convertible Debentures Due 2037. All of the issued and outstanding shares of Parent Common
Stock have been duly authorized and validly issued and are fully paid, nonassessable and free of
preemptive rights, with no personal liability attaching to the ownership thereof. As of the date of
this Agreement, no Voting Debt of Parent is issued or outstanding. As of the Parent
Capitalization Date, except pursuant to this Agreement, the Parent Stock Plans, theConvertible
Note Agreement, Parent’s dividend reinvestment plan and stock repurchase plans entered into by
Parent from time to time, Parent does not have and is not bound by any outstanding
subscriptions, options, warrants, calls, rights, commitments or agreements of any character
calling for the purchase or issuance of any shares of Parent Common Stock, Parent Preferred
Stock, Voting Debt of Parent or any other equity securities of Parent or any securities
representing the right to purchase or otherwise receive any shares of Parent Common Stock,
Parent Preferred Stock, Voting Debt of Parent or other equity securities of Parent. The shares of
Parent Common Stock to be issued pursuant to the Merger will be duly authorized and validly
issued and, at the Effective Time, all such shares will be fully paid, nonassessable and free of
preemptive rights, with no personal liability attaching to the ownership thereof.

4.3 Authority; No Violation. (a) Parent has and Merger Sub will have full
corporate power and authority to execute and deliver this Agreement and to consummate the
transactions contemplated hereby. The execution and delivery of this Agreement and the
consummation of the transactions contemplated hereby have been duly and validly approved by
the Board of Directors of Parent, and will be so approved in the case of Merger Sub. The Board
of Directors of Parent has determined that this Agreement and the transactions contemplated
hereby are in the best interests of Parent and its stockholders and has directed that the issuance of
Parent Common Stock in connection with the Merger be submitted to Parent’s stockholders for
approval and adoption at a duly held meeting of such stockholders and has adopted a resolution
to the foregoing effect. Except for the approval and adoption of this Agreement by the affirmative vote of the holders of a majority of the outstanding shares of Parent Common Stock present or represented and entitled to vote at such meeting, no other corporate proceedings on the part of Parent are necessary to approve this Agreement or to consummate the transactions contemplated hereby. This Agreement has been duly and validly executed and delivered by Parent and (assuming due authorization, execution and delivery by Company) constitutes the valid and binding obligation of Parent, enforceable against each of Parent in accordance with its terms (subject to the Bankruptcy and Equity Exception).

(b) Neither the execution and delivery of this Agreement by Parent or Merger Sub, nor the consummation by Parent or Merger Sub of the transactions contemplated hereby, nor compliance by Parent or Merger Sub with any of the terms or provisions of this Agreement, will (i) violate any provision of the Parent Certificate or the Parent Bylaws or the certificate of incorporation or bylaws of Merger Sub, or (ii) assuming that the consents, approvals and filings referred to in Section 4.4 are duly obtained and/or made, (A) violate any law, judgment, order, injunction or decree applicable to Parent, any of its Subsidiaries or any of their respective properties or assets or (B) violate, conflict with, result in a breach of any provision of or the loss of any benefit under, constitute a default (or an event which, with notice or lapse of time, or both, would constitute a default) under, result in the termination of or a right of termination or cancellation under, accelerate the performance required by, or result in the creation of any Lien upon any of the respective properties or assets of Parent or any of its Subsidiaries under, any of the terms, conditions or provisions of any note, bond, mortgage, indenture, deed of trust, license, lease, agreement or other instrument or obligation to which Parent or any of its Subsidiaries is a party or by which any of them or any of their respective properties or assets is bound.

4.4 Consents and Approvals. Except for (i) the Regulatory Approvals, (ii) the filing with the SEC of the Joint Proxy Statement and the filing and declaration of effectiveness of the Form S-4, (iii) the filing of the Certificate of Merger with the Secretary of State of the State of Delaware pursuant to the DGCL, (iv) any notices to or filings with the SBA, (v) any notices or filings required under the HSR Act and the antitrust laws and regulations of any foreign jurisdiction, and (vi) such filings and approvals as are required to be made or obtained under the securities or "Blue Sky" laws of various states in connection with the issuance of the shares of Parent Common Stock pursuant to this Agreement and approval of listing of such Parent Common Stock on the NYSE, no consents or approvals of or filings or registrations with any Governmental Entity are necessary in connection with the consummation by Parent or Merger Sub of the Merger and the other transactions contemplated by this Agreement. No consents or approvals of or filings or registrations with any Governmental Entity are necessary in connection with the execution and delivery by Parent or Merger Sub of this Agreement.

4.5 Reports, Regulatory Matters

(a) Parent and each of its Subsidiaries have timely filed all reports, registration statements, proxy statements and other materials, together with any amendments required to be made with respect thereto, that they were required to file since January 1, 2006 with the Regulatory Agencies and each other applicable Governmental Entity, and all other reports and statements required to be filed by them since January 1, 2006, including any report or statement required to be filed pursuant to the laws, rules or regulations of the United States, any state, any
foreign entity, or any Regulatory Agency or other Governmental Entity, and have paid all fees and assessments due and payable in connection therewith. Except for normal examinations conducted by a Regulatory Agency or other Governmental Entity in the ordinary course of the business of Parent and its Subsidiaries, no Regulatory Agency or other Governmental Entity has initiated since January 1, 2006 or has pending any proceeding, enforcement action or, to the knowledge of Parent, investigation into the business, disclosures or operations of Parent or any of its Subsidiaries. Since January 1, 2006, no Regulatory Agency or other Governmental Entity has resolved any proceeding, enforcement action or, to the knowledge of Parent, investigation into the business, disclosures or operations of Parent or any of its Subsidiaries. There is no unresolved violation, criticism, comment or exception by any Regulatory Agency or other Governmental Entity with respect to any report or statement relating to any examinations or inspections of Parent or any of its Subsidiaries. Since January 1, 2006 there has been no formal or informal inquiries by, or disagreements or disputes with, any Regulatory Agency or other Governmental Entity with respect to the business, operations, policies or procedures of Parent or any of its Subsidiaries (other than normal examinations conducted by a Regulatory Agency or other Governmental Entity in Parent’s ordinary course of business).

(b) Neither Parent nor any of its Subsidiaries is subject to any cease-and-desist or other order or formal or informal enforcement action issued by, or is a party to any written agreement, consent agreement or memorandum of understanding with, or is a party to any commitment letter or similar undertaking to, or is subject to any order or directive by, or has been since January 1, 2006 a recipient of any supervisory letter from, or has been ordered to pay any civil money penalty by, or since January 1, 2006 has adopted any policies, procedures or board resolutions at the request or suggestion of, any Regulatory Agency or other Governmental Entity that currently restricts or affects in any material respect the conduct of its business or that in any material manner relates to its capital adequacy, its ability to pay dividends, its credit, risk management or compliance policies, its internal controls, its management or its business, other than those of general application that apply to bank holding companies or their Subsidiaries (each, a “Parent Regulatory Agreement”), nor has Parent or any of its Subsidiaries been advised since January 1, 2006 by any Regulatory Agency or other Governmental Entity that it is considering issuing, initiating, ordering or requesting any such Parent Regulatory Agreement.

(c) Parent has previously made available to Company an accurate and complete copy of each (i) final registration statement, prospectus, report, schedule and definitive proxy statement filed with or furnished to the SEC by Parent pursuant to the Securities Act or the Exchange Act since January 1, 2006 (the “Parent SEC Reports”) and prior to the date of this Agreement and (ii) communication mailed by Parent to its stockholders since January 1, 2006 and prior to the date of this Agreement. No such Parent SEC Report or communication, at the time filed, furnished or communicated (and, in the case of registration statements and proxy statements, on the dates of effectiveness and the dates of the relevant meetings, respectively), contained any untrue statement of a material fact or omitted to state any material fact required to be stated therein or necessary in order to make the statements made therein, in light of the circumstances in which they were made, not misleading, except that information as of a later date (but before the date of this Agreement) shall be deemed to modify information as of an earlier date. As of their respective dates, all Parent SEC Reports complied as to form in all material respects with the published rules and regulations of the SEC with respect thereto. No
executive officer of Parent has failed in any respect to make the certifications required of him or her under Section 302 or 906 of the Sarbanes-Oxley Act.

46 Financial Statements.

(a) The financial statements of Parent and its Subsidiaries included (or incorporated by reference) in the Parent SEC Reports (including the related notes, where applicable) (i) have been prepared from, and are in accordance with, the books and records of Parent and its Subsidiaries, (ii) fairly present in all material respects the consolidated results of operations, cash flows, changes in stockholders’ equity and consolidated financial position of Parent and its Subsidiaries for the respective fiscal periods or as of the respective dates therein set forth (subject in the case of unaudited statements to recurring year-end audit adjustments normal in nature and amount); (iii) complied as to form, as of their respective dates of filing with the SEC, in all material respects with applicable accounting requirements and with the published rules and regulations of the SEC with respect thereto; and (iv) have been prepared in accordance with GAAP consistently applied during the periods involved, except, in each case, as indicated in such statements or in the notes thereto. The books and records of Parent and its Subsidiaries have been, and are being, maintained in all material respects in accordance with GAAP and any other applicable legal and accounting requirements. PricewaterhouseCoopers LLP has not resigned or been dismissed as independent public accountants of Parent as a result of or in connection with any disagreements with Parent on a matter of accounting principles or practices, financial statement disclosure or auditing scope or procedure.

(b) Neither Parent nor any of its Subsidiaries has any material liability or obligation of any nature whatsoever (whether absolute, accrued, contingent or otherwise and whether due or to become due), except for those liabilities that are reflected or reserved against on the consolidated balance sheet of Parent included in its Quarterly Report on Form 10-Q for the quarterly period ended June 30, 2008 (including any notes thereto) and for liabilities incurred in the ordinary course of business consistent with past practice since June 30, 2008 or in connection with this Agreement and the transactions contemplated hereby.

(c) The records, systems, controls, data and information of Parent and its Subsidiaries are recorded, stored, maintained and operated under means (including any electronic, mechanical or photographic process, whether computerized or not) that are under the exclusive ownership and direct control of Parent or its Subsidiaries or accountants (including all means of access thereto and therefrom), except for any non-exclusive ownership and non-direct control that would not reasonably be expected to have a material adverse effect on the system of internal accounting controls described below in this Section 46(c). Parent (x) has implemented and maintains disclosure controls and procedures (as defined in Rule 13a-15(e) of the Exchange Act) to ensure that material information relating to Parent, including its consolidated Subsidiaries, is made known to the chief executive officer and the chief financial officer of Parent by others within those entities, and (v) has disclosed, based on its most recent evaluation prior to the date hereof, to Parent’s outside auditors and the audit committee of Parent’s Board of Directors (i) any significant deficiencies and material weaknesses in the design or operation of internal controls over financial reporting (as defined in Rule 13a-15(f) of the Exchange Act) which are reasonably likely to adversely affect Parent’s ability to record, process, summarize and report financial information and (ii) any fraud, whether or not material, that involves
management or other employees who have a significant role in Parent’s internal controls over financial reporting. These disclosures were made in writing by management to Parent’s auditors and audit committee, a copy of which has previously been made available to Company. As of the date hereof, there is no reason to believe that Parent’s outside auditors, chief executive officer and chief financial officer will not be able to give the certifications and attestations required pursuant to the rules and regulations adopted pursuant to Section 404 of the Sarbanes-Oxley Act, without qualification, when next due.

(d) Since December 31, 2007, (x) neither Parent nor any of its Subsidiaries nor, to the knowledge of the officers of Parent, any director, officer, employee, auditor, accountant or representative of Parent or any of its Subsidiaries has received or otherwise had or obtained knowledge of any material complaint, allegation, assertion or claim, whether written or oral, regarding the accounting or auditing practices, procedures, methodologies or methods of Parent or any of its Subsidiaries or their respective internal accounting controls, including any material complaint, allegation, assertion or claim that Parent or any of its Subsidiaries has engaged in questionable accounting or auditing practices, and (y) no attorney representing Parent or any of its Subsidiaries, whether or not employed by Parent or any of its Subsidiaries, has reported evidence of a material violation of securities laws, breach of fiduciary duty or similar violation by Parent or any of its officers, directors, employees or agents to the Board of Directors of Parent or any committee thereof or to any director or officer of Parent.

4.7 Broker’s Fees. Neither Parent nor any of its Subsidiaries nor any of their respective officers or directors has employed any broker or finder or incurred any liability for any broker’s fees, commissions or finder’s fees in connection with the Merger or related transactions contemplated by this Agreement, other than as set forth on Section 4.7 of the Parent Disclosure Schedule.

4.8 Absence of Certain Changes or Events.

(a) Since June 30, 2008, no event or events have occurred that have had or would reasonably be expected to have a Material Adverse Effect on Parent.

(b) Since June 30, 2008 through and including the date of this Agreement, Parent and its Subsidiaries have carried on their respective businesses in all material respects in the ordinary course of business consistent with their past practice.

4.9 Legal Proceedings. (a) Neither Parent nor any of its Subsidiaries is a party to any, and there are no pending or, to Parent’s knowledge, threatened, legal, administrative, arbitral or other proceedings, claims, actions or governmental or regulatory investigations of any nature against Parent or any of its Subsidiaries or to which any of their assets are subject.

(b) There is no judgment, order, injunction, decree or regulatory restriction (other than those of general application that apply to similarly situated bank holding companies or their Subsidiaries) imposed upon Parent, any of its Subsidiaries or the assets of Parent or any of its Subsidiaries.

4.10 Taxes and Tax Returns. Each of Parent and its Subsidiaries has duly and timely filed (including all applicable extensions) all material Tax Returns required to be filed by
it on or prior to the date of this Agreement (all such returns being accurate and complete in all material respects), has paid all Taxes shown thereon as arising and has duly paid or made provision for the payment of all material Taxes that have been incurred or are due or claimed to be due from it by federal, state, foreign or local taxing authorities other than Taxes that are not yet delinquent or are being contested in good faith, have not been finally determined and have been adequately reserved against. There are no material disputes pending, or claims asserted, for Taxes or assessments upon Parent or any of its Subsidiaries for which Parent does not have reserves that are adequate under GAAP.

4.11 Compliance with Applicable Law. Parent and each of its Subsidiaries hold all licenses, franchises, permits and authorizations necessary for the lawful conduct of their respective businesses under and pursuant to each, and have complied in all respects with and are not in default in any respect under any, law applicable to Parent or any of its Subsidiaries.

4.12 Reorganization; Approvals. As of the date of this Agreement, Parent is not aware of any fact or circumstance that could reasonably be expected to prevent the Merger from qualifying as a “reorganization” within the meaning of Section 368(a) of the Code.

4.13 Opinion. The Board of Directors of Parent has received the opinions of Fox-Pitt Kelton, Cochran Caronia Waller (USA) LLC and J.C. Flowers & Co. LLC, to the effect that, as of the date hereof, and based upon and subject to the factors and assumptions set forth therein, the Merger Consideration is fair from a financial point of view to Parent. Such opinions have not been amended or rescinded as of the date of this Agreement.

4.14 Certain Contracts. (a) Neither Company nor any of its Subsidiaries is a party to or bound by any contract, arrangement, commitment or understanding (whether written or oral) that is a “material contract” (as such term is defined in Item 601(b)(10) of Regulation S-K of the SEC) to be performed after the date of this Agreement that has not been filed or incorporated by reference in the Company SEC Reports filed prior to the date hereof (any such contract, arrangement, commitment or understanding, whether or not set forth in the Parent Disclosure Schedule, is referred to as a “Parent Contract.”

(b) (i) Each Company Contract is valid and binding on Parent or its applicable Subsidiary, enforceable against it in accordance with its terms (subject to the Bankruptcy and Equity Exception), and is in full force and effect, (ii) Parent and each of its Subsidiaries and, to Parent’s knowledge, each other party thereto has duly performed all obligations required to be performed by it to date under each Parent Contract and (iii) no event or condition exists that constitutes or, after notice or lapse of time or both, will constitute, a breach, violation or default on the part of Parent or any of its Subsidiaries or, to Parent’s knowledge, any other party thereto under any such Parent Contract. There are no disputes pending or, to Parent’s knowledge, threatened with respect to any Parent Contract.

4.15 Risk Management Instruments. All Derivative Transactions, whether entered into for the account of Parent or any of its Subsidiaries or for the account of a customer of Parent or any of its Subsidiaries, were entered into in the ordinary course of business consistent with past practice and in accordance with prudent banking practice and applicable laws, rules, regulations and policies of any Regulatory Authority and in accordance with the
investment, securities, commodities, risk management and other policies, practices and procedures employed by Parent and its Subsidiaries, and with counterparties believed at the time to be financially responsible and able to understand (either alone or in consultation with their advisers) and to bear the risks of such Derivative Transactions. All of such Derivative Transactions are valid and binding obligations of Parent or one of its Subsidiaries enforceable against it in accordance with their terms (subject to the Bankruptcy and Equity Exception), and are in full force and effect. Parent and its Subsidiaries and, to Parent’s knowledge, all other parties thereto have duly performed their obligations under the Derivative Transactions to the extent that such obligations to perform have accrued and, to Parent’s knowledge, there are no breaches, violations or defaults or allegations or assertions of such by any party thereunder.

4.16 Intellectual Property.

(a) Definitions. For purposes of this Agreement, the following terms shall have the meanings assigned below:

"Parent IP" means all Intellectual Property owned, used, held for use or exploited by Parent or any of its Subsidiaries.

"Licensed Parent IP" means the Intellectual Property owned by a third party that Parent or any of its Subsidiaries has a right to use or exploit by virtue of a License Agreement.

"Owned Parent IP" means the Intellectual Property that is owned by Parent or any of its Subsidiaries.

(b) Parent and its Subsidiaries collectively own all right, title and interest in, or have the valid right to use, all of the Parent IP, free and clear of any Liens, and there are no obligations to, covenants to or restrictions from third parties affecting Parent’s or its applicable Subsidiary’s use, enforcement, transfer or licensing of the Owned Parent IP.

(c) The Owned Parent IP and Licensed Parent IP constitute all the Intellectual Property necessary and sufficient to conduct the businesses of Parent and its Subsidiaries as they are currently conducted, as they have been conducted since December 31, 2007.

(d) The Owned Parent IP and, to the knowledge of Parent, Licensed Parent IP, are valid, subsisting and enforceable.

(e) Neither Parent nor any of its Subsidiaries has infringed, misappropriated or otherwise violated any Intellectual Property of any third party.

(f) No Owned Parent IP or Licensed Parent IP is being used or enforced in a manner that would result in the abandonment, cancellation or unenforceability of such Intellectual Property. To the knowledge of Parent, no third party has infringed, misappropriated or otherwise violated any Owned Parent IP.

4.17 Parent Information. The information relating to Parent and its Subsidiaries that is provided by Parent or its representatives for inclusion in the Joint Proxy Statement and the Form S-4, or in any application, notification or other document filed with any other Regulatory
Agency or other Governmental Entity in connection with the transactions contemplated by this Agreement, will not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements therein, in light of the circumstances in which they are made, not misleading. The portions of the Joint Proxy Statement relating to Parent and its Subsidiaries and other portions within the reasonable control of Parent and its Subsidiaries will comply in all material respects with the provisions of the Exchange Act and the rules and regulations thereunder. The Form S-4 will comply in all material respects with the provisions of the Securities Act and the rules and regulations thereunder.

ARTICLE V

COVENANTS RELATING TO CONDUCT OF BUSINESS

5.1 Conduct of Businesses Prior to the Effective Time. Except as expressly contemplated by or permitted by this Agreement or with the prior written consent of the other party, during the period from the date of this Agreement to the Effective Time, each of Company and Parent shall, and shall cause each of its respective Subsidiaries to, (a) conduct its business in the ordinary course in all material respects, (b) use reasonable best efforts to maintain and preserve intact its business organization and advantageous business relationships and retain the services of its key officers and key employees and (c) take no action that would reasonably be expected to adversely affect or materially delay the ability of Company, Parent or Merger Sub to obtain any necessary approvals of any Regulatory Agency or other Governmental Entity required for the transactions contemplated hereby or to perform its covenants and agreements under this Agreement or to consummate the transactions contemplated hereby or thereby.

5.2 Company Forbearances. During the period from the date of this Agreement to the Effective Time, except as set forth in this Section 5.2 of the Company Disclosure Schedule or expressly contemplated or permitted by this Agreement, Company shall not, and shall not permit any of its Subsidiaries to, without the prior written consent of Parent:

(a) other than in the ordinary course of business consistent with past practice, incur any indebtedness for borrowed money, or assume, guarantee, endorse or otherwise as an accommodation become responsible for the obligations of any other individual, corporation or other entity (it being understood and agreed that incurrence of indebtedness in the ordinary course of business consistent with past practice shall include the creation of deposit liabilities, securitizations, sales of certificates of deposit and entering into repurchase agreements, participation in structured note programs and the rollover of indebtedness for borrowed money outstanding as of the date hereof from time to time as such indebtedness becomes due and payable, in each case in the ordinary course of business consistent with past practice);

(b) (i) adjust, split, combine or reclassify any of its capital stock;

(ii) make, declare or pay any dividend, or make any other distribution on, or directly or indirectly redeem, purchase or otherwise acquire, any shares of its capital stock or any securities or obligations convertible (whether currently convertible or convertible only after the passage of time or the occurrence of certain events) into or exchangeable for any shares of its capital stock (except (A) for regular quarterly cash dividends on the Company Common Stock at
a rate not in excess of $0.35 per share with record dates and payment dates consistent with the pri
or year, (B) dividends on the Company Preferred Stock, (C) dividends paid by any of the Subsidiaries of Company to Company or to any of its wholly-owned Subsidiaries, and (D) the acceptance of shares of Company Common Stock in payment of the exercise price or withholding Taxes incurred by any employee or director in connection with the exercise of stock options or stock appreciation rights or the vesting of restricted shares of (or settlement of other equity-based awards in respect of) Company Common Stock granted under a Company Stock Plan, the Company Cap Plan or a Company Deferred Equity Unit Plan, in each case in accordance with past practice and the terms of the applicable the Company Stock Plan, Company Cap Plan and related award agreements or a Company Deferred Equity Unit Plan);

(iii) grant any stock options, stock appreciation rights, restricted shares, restricted stock units, deferred equity units, awards based on the value of Company's capital stock or other equity-based award with respect to shares of Company Common Stock under any of the Company Stock Plans, the Company Cap Plan or any of the Company Deferred Equity Unit Plans or otherwise, or grant any individual, corporation or other entity any right to acquire any shares of its capital stock; or

(iv) issue any additional shares of capital stock or other securities, except pursuant to the exercise of stock options or stock appreciation rights or the settlement of other equity-based awards granted under a Company Stock Plan, the Company Cap Plan or a Company Deferred Equity Unit Plan that are outstanding as of the date of this Agreement;

(c) except as required under applicable law or the terms of any Company Benefit Plan existing as of the date hereof, (i) increase in any manner the compensation or benefits of any of the current or former directors, officers or employees of Company or its Subsidiaries (collectively, “Employees”), (ii) pay any amounts to Employees not required by any current plan or agreement (other than base salary in the ordinary course of business), (iii) become a party to, establish, amend, commence participation in, make any adjustment, terminate or commit itself to the adoption of any stock option plan or other stock-based compensation plan, compensation (including any employee co-investment fund), severance, pension, retirement, profit-sharing, welfare benefit, or other employee benefit plan or agreement or employment agreement with or for the benefit of any Employee (or newly hired employees), (iv) accelerate the vesting of any stock-based compensation or other long-term incentive compensation under any Company Benefit Plans, (v) (x) hire employees in the position of Vice President or above or (y) terminate the employment of any employee in the position of Vice President or above (other than due to terminations for cause) or (vi) take any action which could reasonably be expected to give rise to a “good reason” (or any term of similar import) claim;

(d) sell, transfer, pledge, lease, license, mortgage, encumber or otherwise dispose of any material amount of its properties or assets (including pursuant to securitizations) to any individual, corporation or other entity other than a Subsidiary or cancel, release or assign any material amount of indebtedness to any such person or any material claims held by any such person, in each case other than in the ordinary course of business consistent with past practice or pursuant to contracts in force at the date of this Agreement;
(e) enter into any new line of business or change in any material respect its lending, investment, underwriting, risk and asset liability management and other banking, operating, securitization and servicing policies, except as required by applicable law, regulation or policies imposed by any Governmental Entity;

(f) transfer ownership, or grant any license or other rights, to any person or entity of or in respect of any material Company IP, other than grants of non-exclusive licenses pursuant to License Agreements entered into in the ordinary course of business consistent with past practice;

(g) other than in the ordinary course of business consistent with past practice, make any material investment either by purchase of stock or securities, contributions to capital, property transfers, or purchase of any property or assets of any other individual, corporation or other entity;

(h) take any action, or knowingly fail to take any action, which action or failure to act is reasonably likely to prevent the Merger from qualifying as a reorganization within the meaning of Section 368(a) of the Code;

(i) amend its charter or bylaws, or otherwise take any action to exempt any person or entity (other than Parent or its Subsidiaries) or any action taken by any person or entity from any Takeover Statute or similarly restrictive provisions of its organizational documents or terminate, amend or waive any provisions of any confidentiality or standstill agreements in place with any third parties;

(j) (i) amend or otherwise modify, except in the ordinary course of business, or knowingly violate, in each case in any material respect, the terms of, any Company Contract, or (ii) create, renew or amend any agreement or contract or, except as may be required by applicable law, other binding obligation of Company or its Subsidiaries containing (A) any material restriction on the ability of Company or its Subsidiaries to conduct its business as it is presently being conducted or (B) any material restriction on the ability of Company or its affiliates to engage in any type of activity or business;

(k) commence or settle any material claim, action or proceeding;

(l) take any action or fail to take any action that is intended or may reasonably be expected to result in any of the conditions to the Merger set forth in Article VII not being satisfied;

(m) implement or adopt any material change in its Tax accounting or financial accounting principles, practices or methods, other than as may be required by applicable law, GAAP or regulatory guidelines,

(n) file or amend any material Tax Return, make or change any material Tax election, or settle or compromise any material Tax liability, in each case, other than in the ordinary course of business or as required by law, or
(o) agree to take, make any commitment to take, or adopt any resolutions of its board of directors in support of, any of the actions prohibited by this Section 5.2.

5.3 Parent Forbearances. Except as expressly permitted by this Agreement or with the prior written consent of Company, during the period from the date of this Agreement to the Effective Time, Parent shall not, and shall not permit any of its Subsidiaries to, (a) amend, repeal or otherwise modify any provision of the Parent Certificate or the Parent Bylaws in a manner that would adversely affect Company, the stockholders of Company or the transactions contemplated by this Agreement; (b) take any action, or knowingly fail to take any action, which action or failure to act is reasonably likely to prevent the Merger from qualifying as a "reorganization" within the meaning of Section 368(a) of the Code, (c) take any action or willfully fail to take any action that is intended or may reasonably be expected to result in any of the conditions to the Merger set forth in Article VII not being satisfied; (d) take any action that would be reasonably expected to prevent, materially impede or materially delay the consummation of the transactions contemplated by this Agreement; or (e) agree to take, make any commitment to take, or adopt any resolutions of its board of directors in support of, any of the actions prohibited by this Section 5.3.

ARTICLE VI
ADDITIONAL AGREEMENTS

6.1 Regulatory Matters. (a) Parent and Company shall promptly prepare and file with the SEC the Form S-4, in which the Joint Proxy Statement will be included as a prospectus. Each of Parent and Company shall use its reasonable best efforts to have the Form S-4 declared effective under the Securities Act as promptly as practicable after such filing, and Company shall thereafter mail or deliver the Joint Proxy Statement to its stockholders. Parent shall also use its reasonable best efforts to obtain all necessary state securities law or "Blue Sky" permits and approvals required to carry out the transactions contemplated by this Agreement, and Company shall furnish all information concerning Company and the holders of Company Common Stock as may be reasonably requested in connection with any such action.

(b) The parties shall cooperate with each other and use their respective reasonable best efforts to promptly prepare and file all necessary documentation, to effect all applications, notices, petitions and filings, to obtain as promptly as practicable all permits, consents, approvals and authorizations of all third parties (including any unions, works councils or other labor organizations) and Governmental Entities that are necessary or advisable to consummate the transactions contemplated by this Agreement (including the Merger), and to comply with the terms and conditions of all such permits, consents, approvals and authorizations of all such third parties or Governmental Entities. Company and Parent shall have the right to review in advance, and, to the extent practicable, each will consult the other on, in each case subject to applicable laws relating to the confidentiality of information, all the information relating to Company or Parent, as the case may be, and any of their respective Subsidiaries, that appear in any filing, or written materials submitted to, any third party or any Governmental Entity in connection with the transactions contemplated by this Agreement. In exercising the foregoing right, each of the parties shall act reasonably and as promptly as practicable. The parties shall consult with each other with respect to the obtaining of all permits, consents, approvals and
authorizations of all third parties and Governmental Entities necessary or advisable to consummate the transactions contemplated by this Agreement and each party will keep the other apprised of the status of matters relating to completion of the transactions contemplated by this Agreement.

(c) Each of Parent and Company shall, upon request, furnish to the other all information concerning itself, its Subsidiaries, directors, officers and stockholders and such other matters as may be reasonably necessary or advisable in connection with the Joint Proxy Statement, the Form S-4 or any other statement, filing, notice or application made by or on behalf of Parent, Company or any of their respective Subsidiaries to any Governmental Entity in connection with the Merger and the other transactions contemplated by this Agreement.

(d) Each of Parent and Company shall promptly advise the other upon receiving any communication from any Governmental Entity the consent or approval of which is required for consummation of the transactions contemplated by this Agreement that causes such party to believe that there is a reasonable likelihood that any Parent Requisite Regulatory Approval or Company Requisite Regulatory Approval, respectively, will not be obtained or that the receipt of any such approval may be materially delayed.

6.2 Access to Information. (a) Upon reasonable notice and subject to applicable laws relating to the confidentiality of information, each of Company and Parent shall, and shall cause each of its Subsidiaries to, afford to the officers, employees, accountants, counsel, advisors, agents and other representatives of the other party, reasonable access, during normal business hours during the period prior to the Effective Time, to all its properties, books, contracts, commitments and records, and, during such period, such party shall, and shall cause its Subsidiaries to, make available to the other party (i) a copy of each report, schedule, registration statement and other document filed or received by it during such period pursuant to the requirements of federal securities laws or federal or state banking or insurance laws (other than reports or documents that such party is not permitted to disclose under applicable law) and (ii) all other information concerning its business, properties and personnel as the other party may reasonably request (in the case of access or a request by Company, the foregoing rights provided by this Section 6.2(a) shall be limited to information concerning Parent that is reasonably related to the prospective value of Parent Common Stock or to Parent's ability to consummate the transactions contemplated hereby). Neither Company nor Parent, nor any of their Subsidiaries, shall be required to provide access to or to disclose information where such access or disclosure would jeopardize the attorney-client privilege of such party or its Subsidiaries or contravene any law, rule, regulation, order, judgment, decree, fiduciary duty or binding agreement entered into prior to the date of this Agreement. The parties shall make appropriate substitute disclosure arrangements under circumstances in which the restrictions of the preceding sentence apply.

(b) All information and materials provided pursuant to this Agreement shall be subject to the provisions of the Confidentiality Agreement entered into between the parties as of September 14, 2008 (the "Confidentiality Agreement").

(c) No investigation by a party hereto or its representatives shall affect the representations and warranties of the other party set forth in this Agreement.
6.3 **Stockholder Approval.** Each of Company and Parent shall call a meeting of its stockholders to be held as soon as reasonably practicable for the purpose of obtaining the requisite stockholder approval required in connection with the Merger, on substantially the terms and conditions set forth in this Agreement, and shall use its reasonable best efforts to cause such meeting to occur as soon as reasonably practicable. The Board of Directors of Company shall use its reasonable best efforts to obtain from its stockholders the stockholder vote approving the Merger, on substantially the terms and conditions set forth in this Agreement, required to consummate the transactions contemplated by this Agreement, and shall recommend such approval except to the extent expressly permitted under Section 6.10(d). Company shall submit this Agreement to its stockholders at the stockholder meeting even if its Board of Directors shall have withdrawn, modified or qualified its recommendation. The Board of Directors of Company has adopted resolutions approving the Merger, on substantially the terms and conditions set forth in this Agreement, and directing that the Merger, on such terms and conditions, be submitted to Company’s stockholders for their consideration. The Board of Directors of Parent shall use its reasonable best efforts to obtain from its stockholders the stockholder vote approving the issuance of Parent Common Stock in the Merger, on substantially the terms and conditions set forth in this Agreement, required to consummate the issuance of Parent Common Stock contemplated by this Agreement, and shall recommend such approval except to the extent making such recommendation would cause the Board of Directors of Parent to violate its fiduciary duties to Parent stockholders under applicable law. Parent shall submit the stock issuance proposal to its stockholders at the stockholder meeting even if its Board of Directors shall have withdrawn, modified or qualified its recommendation. The Board of Directors of Parent has adopted resolutions approving the Merger, on substantially the terms and conditions set forth in this Agreement, and directing that the issuance of Parent Common Stock in the Merger, on such terms and conditions, be submitted to Parent’s stockholders for their consideration.

6.4 **NYSE Listing.** Parent shall cause the shares of Parent Common Stock to be issued in the Merger to be approved for listing on the NYSE, subject to official notice of issuance, prior to the Effective Time.

6.5 **Employee Matters.** (a) For the period from the Effective Time through December 31, 2009, Parent shall maintain or cause to be maintained employee benefit plans and compensation opportunities for the benefit of employees (as a group) who are actively employed by Company and its Subsidiaries on the Closing Date ("Covered Employees") that provide employee benefits and compensation opportunities which, in the aggregate, are substantially comparable to the employee benefits and compensation opportunities that were provided to such Covered Employees immediately prior to the Effective Time.

(b) To the extent that a Covered Employee becomes eligible to participate in an employee benefit plan maintained by Parent or any of its Subsidiaries, Parent shall (i) cause such employee benefit plan to recognize the service of such Covered Employee with Company or its Subsidiaries (or their predecessor entities) for purposes of eligibility, participation, vesting, and, except under defined benefit pension plans, benefit accrual under such employee benefit plan of Parent or any of its Subsidiaries (including, without limitation, for purposes of the Company Stock Plans, the Company Cap Plan and the Company Deferred Equity Unit Plans as assumed by Parent pursuant to Section 1.5), to the same extent such service was recognized immediately
prior to the Effective Time under a comparable Company Benefit Plan in which such Covered Employee was eligible to participate immediately prior to the Effective Time, provided that such recognition of service shall not operate to duplicate any benefits of a Covered Employee with respect to the same period of service, and (ii) with respect to any health, dental, vision or other welfare plan of Parent or any of its Subsidiaries (other than Company and its Subsidiaries) in which any Covered Employee is eligible to participate for the plan year in which such Covered Employee is first eligible to participate, use its reasonable best efforts to (x) cause any pre-existing condition limitations or eligibility waiting periods under such Parent or Subsidiary plan to be waived with respect to such Covered Employee, to the extent such limitation would have been waived or satisfied under the Company Benefit Plan in which such Covered Employee participated immediately prior to the Effective Time, and (y) recognize any health, dental or vision expenses incurred by such Covered Employee in the year that includes the Closing Date (or, if later, the year in which such Covered Employee is first eligible to participate) for purposes of any applicable deductible and annual out-of-pocket expense requirements under any such health, dental or vision plan of Parent or any of its Subsidiaries.

(c) From and after the Effective Time, Parent shall, or shall cause its Subsidiaries to, honor, in accordance with the terms thereof as in effect as of the date hereof or as may be amended after the date hereof (i) with the prior written consent of Parent or (ii) as permitted pursuant to Section 5.2(c) of this Agreement, each Company Benefit Plan.

(d) Nothing in this Section 6.5 shall be construed to limit the right of Parent or any of its Subsidiaries (including, following the Closing Date, Company and its Subsidiaries) to amend or terminate any Company Benefit Plan or other employee benefit plan, to the extent such amendment or termination is permitted by the terms of the applicable plan, nor shall anything in this Section 6.5 be construed to prohibit the Parent or any of its Subsidiaries (including, following the Closing Date, Company and its Subsidiaries) from terminating the employment of any particular Covered Employee following the Closing Date.

(e) Without limiting the generality of Section 9.10, the provisions of this Section 6.5 are solely for the benefit of the parties to this Agreement, and no current or former employee, director or independent contractor or any other individual associated therewith shall be regarded for any purpose as a third-party beneficiary of the Agreement, and nothing herein shall be construed as an amendment to any Company Benefit Plan or other employee benefit plan for any purpose.

6.6 Indemnification, Directors' and Officers' Insurance

(a) In the event of any threatened or actual claim, action, suit, proceeding or investigation, whether civil, criminal or administrative (a "Claim"), including any such Claim in which any individual who is now, or has been at any time prior to the date of this Agreement, or who becomes prior to the Effective Time, a director or officer of Company or any of its Subsidiaries or who is or was serving at the request of Company or any of its Subsidiaries as a director or officer of another person (the "Indemnified Parties"), is or is threatened to be, made a party based in whole or in part on, or arising in whole or in part out of, or pertaining to (i) the fact that he or she is or was a director or officer of Company or any of its Subsidiaries prior to the Effective Time or (ii) this Agreement or any of the transactions contemplated by this
Agreement, whether asserted or arising before or after the Effective Time, the parties shall cooperate and use their reasonable best efforts to defend against and respond thereto. All rights to indemnification and exculpation from liabilities for acts or omissions occurring at or prior to the Effective Time now existing in favor of any Indemnified Party as provided in their respective certificates or articles of incorporation or bylaws (or comparable organizational documents), and any indemnification agreements which are existing as of the date hereof, shall survive the Merger and shall continue in full force and effect in accordance with their terms, and shall not be amended, repealed or otherwise modified for a period of six years after the Effective Time in any manner that would adversely affect the rights thereunder of such individuals for acts or omissions occurring at or prior to the Effective Time or taken at the request of Parent pursuant to Section 6.7, it being understood that nothing in this sentence shall require any amendment to the certificate of incorporation or bylaws of the Surviving Company.

(b) From and after the Effective Time, Parent shall or shall cause the Surviving Company to, to the fullest extent permitted by applicable law, indemnify, defend and hold harmless, and provide advancement of expenses to, each Indemnified Party against all losses, claims, damages, costs, expenses, liabilities or judgments or amounts that are paid in settlement of or in connection with any Claim based in whole or in part on or arising in whole or in part out of the fact that such person is or was a director or officer of Company or any of its Subsidiaries, and pertaining to any matter existing or occurring, or any acts or omissions occurring, at or prior to the Effective Time, whether asserted or claimed prior to, or at or after, the Effective Time (including matters, acts or omissions occurring in connection with the approval of this Agreement and the consummation of the transactions contemplated hereby) or taken at the request of Parent pursuant to Section 6.7.

(c) Parent shall cause the individuals serving as officers and directors of Company or any of its Subsidiaries immediately prior to the Effective Time to be covered for a period of six years from the Effective Time by the directors’ and officers’ liability insurance policy maintained by Company (provided that Parent may substitute therefor policies of at least the same coverage and amounts containing terms and conditions that are not less advantageous than such policy) with respect to acts or omissions occurring prior to the Effective Time that were committed by such officers and directors in their capacity as such; provided that in no event shall Parent be required to expend annually in the aggregate an amount in excess of 250% of the annual premiums currently paid by Company (which current amount is set forth in Section 6.6 of the Company Disclosure Schedule) for such insurance (the “Insurance Amount”), and provided further that if Parent is unable to maintain such policy (or such substitute policy) as a result of the preceding proviso, Parent shall obtain as much comparable insurance as is available for the Insurance Amount.

(d) The provisions of this Section 6.6 shall survive the Effective Time and are intended to be for the benefit of, and shall be enforceable by, each Indemnified Party and his or her heirs and representatives.

6.7 Additional Agreements. In case at any time after the Effective Time any further action is necessary or desirable to carry out the purposes of this Agreement (including any merger between a Subsidiary of Parent, on the one hand, and a Subsidiary of Company, on the other) or to vest the Surviving Company with full title to all properties, assets, rights,
approvals, immunities and franchises of either party to the Merger, the proper officers and directors of each party and their respective Subsidiaries shall, at Parent's sole expense, take all such necessary action as may be reasonably requested by Parent.

6.8 Advice of Changes. Each of Parent and Company shall promptly advise the other of any change or event (i) having or reasonably likely to have a Material Adverse Effect on it or (ii) that it believes would or would be reasonably likely to cause or constitute a material breach of any of its representations, warranties or covenants contained in this Agreement; provided, however, that no such notification shall affect the representations, warranties, covenants or agreements of the parties (or remedies with respect thereto) or the conditions to the obligations of the parties under this Agreement; and provided further that a failure to comply with this Section 6.8 shall not constitute a breach of this Agreement or the failure of any condition set forth in Article VII to be satisfied unless the underlying Material Adverse Effect or material breach would independently result in the failure of a condition set forth in Article VII to be satisfied.

6.9 Exemption from Liability Under Section 16(b). Prior to the Effective Time, Parent and Company shall each take all such steps as may be reasonably necessary or appropriate, and the parties shall cooperate with each other as necessary, to cause any deemed disposition of shares of Company Common Stock or conversion of any derivative securities in respect of such shares of Company Common Stock or any deemed acquisition of shares of Parent Common Stock by an individual who after the Merger is expected to be subject to Section 16(b) of the Exchange Act with respect to Parent, in each case in connection with the consummation of the transactions contemplated by this Agreement to be exempt under Rule 16b-3 promulgated under the Exchange Act.

6.10 No Solicitation.

(a) None of Company, its Subsidiaries or any officer, director, employee, agent or representative (including any investment banker, financial advisor, attorney, accountant or other representative) of Company or any of its Subsidiaries shall directly or indirectly (i) solicit, initiate, encourage, facilitate (including by way of furnishing information) or take any other action designed to facilitate any inquiries or proposals regarding any merger, share exchange, consolidation, sale of assets, sale of shares of capital stock (including by way of a tender offer) or similar transactions involving Company or any of its Subsidiaries that, if consummated, would constitute an Alternative Transaction (any of the foregoing inquiries or proposals, including the indication of any intention to propose any of the foregoing, being referred to herein as an "Alternative Proposal"), (ii) participate in any discussions or negotiations regarding an Alternative Transaction or (iii) enter into any agreement regarding any Alternative Transaction. Notwithstanding the foregoing, the Board of Directors of Company shall be permitted, prior to the meeting of Company stockholders to be held pursuant to Section 6.3, and subject to compliance with the other terms of this Section 6.10 and to first entering into a confidentiality agreement with the person proposing such Alternative Proposal on terms substantially similar to, and no less favorable to Company than, those contained in the Confidentiality Agreement, to consider and participate in discussions and negotiations with respect to a bona fide Alternative Proposal received by Company, and furnish information in connection therewith (provided that the Company shall simultaneously provide to Parent any such information that was not
previously provided to Parent) if and only to the extent that and so long as the Board of Directors of Company determines in good faith (after consultation with outside legal counsel) that failure to do so would cause it to violate its fiduciary duties to Company stockholders under applicable law.

As used in this Agreement, "Alternative Transaction" means any of (i) a transaction pursuant to which any person (or group of persons) (other than Parent or its affiliates), directly or indirectly, acquires or would acquire more than 15% of the outstanding shares of Company or any of its Subsidiaries or outstanding voting power or of any new series or new class of preferred stock that would be entitled to a class or series vote with respect to a merger with Company or any of its Subsidiaries, whether from Company or pursuant to a tender offer or exchange offer or otherwise, (ii) a merger, share exchange, consolidation or other business combination involving Company or any of its Subsidiaries (other than the Merger), (iii) any transaction pursuant to which any person (or group of persons) (other than Parent or its affiliates) acquires or would acquire control of assets (including for this purpose the outstanding equity securities of subsidiaries of Company and securities of the entity surviving any merger or business combination including any of Company’s Subsidiaries) of Company or any of its Subsidiaries representing more than 15% of the fair market value of all the assets, net revenues or net income of Company and its Subsidiaries, taken as a whole, immediately prior to such transaction, or (iv) any other consolidation, business combination, recapitalization or similar transaction involving Company or any of its Subsidiaries other than the transactions contemplated by this Agreement.

(b) Company shall notify Parent promptly (but in no event later than 24 hours) after receipt of any Alternative Proposal, or any material modification of or material amendment to any Alternative Proposal, or any request for nonpublic information relating to Company or any of its Subsidiaries or for access to the properties, books or records of Company or any of its Subsidiaries, other than any such request that does not relate to and would not reasonably be expected to lead to, an Alternative Proposal. Such notice to Parent shall be made orally and in writing, and shall indicate the identity of the person making the Alternative Proposal or intending to make or considering making an Alternative Proposal or requesting non-public information or access to the books and records of Company or any of its Subsidiaries, and a copy (if in writing) and summary of the material terms of any such Alternative Proposal or modification or amendment to an Alternative Proposal. Company shall use its best efforts to keep Parent fully informed, on a current basis, of any material changes in the status and any material changes or modifications in the terms of any such Alternative Proposal, indication or request. Company shall also provide Parent 24 hours written notice before it enters into any discussions or negotiations concerning any Alternative Proposal in accordance with Section 6.10(a). The Company shall not enter into any confidentiality or other agreement that would impede its ability to comply with its obligations under this Section 6.10(b).

(c) Company and its Subsidiaries shall immediately cease and cause to be terminated any existing discussions or negotiations with any persons (other than Parent) conducted heretofore with respect to any of the foregoing, and shall use reasonable best efforts to cause all persons other than Parent who have been furnished confidential information regarding Company in connection with the solicitation of or discussions regarding an Alternative Proposal within the 12 months prior to the date hereof promptly to return or destroy such information.
Company agrees not to, and to cause its Subsidiaries not to, release any third party from the confidentiality and standstill provisions of any agreement to which Company or its Subsidiaries is or may become a party, and shall immediately take all steps necessary to terminate any approval that may have been heretofore given under any such provisions authorizing any person to make an Alternative Proposal. Neither Company nor the Board of Directors of Company shall approve or take any action to render inapplicable to any Alternative Proposal or Alternative Transaction Section 203 of the DGCL or any similar Takeover Statutes.

(d) Except as expressly permitted by this Section 6.10(d), neither the Board of Directors of Company nor any committee thereof shall (i) withdraw, modify or qualify, or propose publicly to withdraw, modify or qualify, the recommendation by the Board of Directors of Company of this Agreement and/or the Merger to Company's stockholders, (ii) take any public action or make any public statement in connection with the meeting of Company stockholder to be held pursuant to Section 6.3 substantively inconsistent with such recommendation or (iii) approve or recommend, or publicly propose to approve or recommend, or fail to recommend against, any Alternative Proposal (any of the actions described in clauses (i), (ii) or (iii), a “Change of Recommendation”). Notwithstanding the foregoing, the Board of Directors of Company may make a Change of Recommendation, if, and only if, each of the following conditions is satisfied:

(i) it receives an Alternative Proposal not solicited in breach of this Section 6.10 that constitutes a Superior Proposal and such Superior Proposal has not been withdrawn;

(ii) it determines in good faith (after consultation with outside legal counsel), that in light of a Superior Proposal the failure to effect such Change of Recommendation would cause it to violate its fiduciary duties to Company stockholders under applicable law;

(iii) Parent has received written notice from Company (a “Change of Recommendation Notice”) at least three business days prior to such Change of Recommendation, which notice shall (1) state expressly that Company has received an Alternative Proposal which the Board of Directors of Company has determined is a Superior Proposal and that Company intends to effect a Change of Recommendation and the manner in which it intends or may intend to do so and (2) include the identity of the person making such Alternative Proposal and a copy (if in writing) and summary of material terms of such Alternative Proposal; provided that any material amendment to the terms of such Alternative Proposal shall require a new Change of Recommendation Notice and at least two business days prior to such Change of Recommendation; and

(iv) during any such notice period, Company and its advisors have negotiated in good faith with Parent (provided that Parent desires to negotiate) to make adjustments in the terms and conditions of this Agreement such that such Alternative Proposal would no longer constitute a Superior Proposal.

As used in this Agreement, “Superior Proposal” means any proposal made by a third party (A) to acquire, directly or indirectly, for consideration consisting of cash and/or securities, 100% of the outstanding shares of Company Common Stock or 100% of the assets, net revenues or net income of Company and its Subsidiaries, taken as a whole and (B) which is
otherwise on terms which the Board of Directors of Company determines in its reasonable good faith judgment (after consultation with its financial advisor and outside legal counsel), taking into account, among other things, all legal, financial, regulatory and other aspects of the proposal and the person making the proposal, that the proposal, (i) if consummated would result in a transaction that is more favorable, from a financial point of view, to Company's stockholders than the Merger and the other transactions contemplated hereby and (ii) is reasonably capable of being completed, including to the extent required, financing which is then committed or which, in the good faith judgment of the Board of Directors of Company, is reasonably capable of being obtained by such third party.

(e) Company shall ensure that the officers, directors and all employees, agents and representatives (including any investment bankers, financial advisors, attorneys, accountants or other representatives) of Company or its Subsidiaries are aware of the restrictions described in this Section 6.10 as reasonably necessary to avoid violations thereof. It is understood that any violation of the restrictions set forth in this Section 6.10 by any officer, director, employee, agent or representative (including any investment banker, financial advisor, attorney, accountant or other representative) of Company or its Subsidiaries shall be deemed to be a breach of this Section 6.10 by Company.

(f) Nothing contained in this Section 6.10 shall prohibit Company or its Subsidiaries from taking and disclosing to its stockholders a position required by Rule 14e-2(a) or Rule 14d-9 promulgated under the Exchange Act.

6.11 Dividends. After the date of this Agreement, each of Parent and Company shall coordinate with the other regarding the declaration of any dividends in respect of Parent Common Stock and Company Common Stock and the record dates and payment dates relating thereto, it being the intention of the parties that holders of Company Common Stock shall not receive two dividends, or fail to receive one dividend, for any quarter with respect to their shares of Company Common Stock and any shares of Parent Common Stock any such holder receives in exchange therefor in the Merger.

6.12 Redemption of Exchangeable Shares. Prior to the Effective Time, the Company shall take all actions necessary to redeem, and shall redeem, the Exchangeable Shares of Merrill Lynch & Co. Canada Ltd. in accordance with the terms of such securities.

6.13 Tax Matters. Company shall consult with Parent regarding any significant transactions or Tax Return positions reasonably expected to materially increase or affect the Company's net operating losses or capital losses for any taxable year or period and shall, in Company's reasonable discretion, take account of Parent's views on such matters to the extent reasonably feasible.
ARTICLE VII

CONDITIONS PRECEDENT

7.1 Conditions to Each Party’s Obligation to Effect the Merger. The respective obligations of the parties to effect the Merger shall be subject to the satisfaction at or prior to the Effective Time of the following conditions:

(a) Stockholder Approvals. (i) This Agreement, on substantially the terms and conditions set forth in this Agreement, shall have been adopted by the requisite affirmative vote of the holders of Company Common Stock entitled to vote thereon, and (ii) the issuance of Parent Common Stock in the Merger, on substantially the terms and conditions set forth in this Agreement, shall have been approved by the requisite affirmative vote of the holders of Parent Common Stock entitled to vote thereon.

(b) NYSE Listing. The shares of Parent Common Stock to be issued to the holders of Company Common Stock upon consummation of the Merger shall have been authorized for listing on the NYSE, subject to official notice of issuance.

(c) Form S-4. The Form S-4 shall have become effective under the Securities Act and no stop order suspending the effectiveness of the Form S-4 shall have been issued and no proceedings for that purpose shall have been initiated or threatened by the SEC.

(d) No Injunctions or Restraints; Illegality. No order, injunction or decree issued by any court or agency of competent jurisdiction or other law preventing or making illegal the consummation of the Merger or any of the other transactions contemplated by this Agreement shall be in effect.

7.2 Conditions to Obligations of Parent. The obligation of Parent and Merger Sub to effect the Merger is also subject to the satisfaction, or waiver by Parent, at or prior to the Effective Time, of the following conditions:

(a) Representations and Warranties. Subject to the standard set forth in Section 9.2, the representations and warranties of Company set forth in this Agreement shall be true and correct as of the date of this Agreement and as of the Effective Time as though made on and as of the Effective Time (except that representations and warranties that by their terms speak specifically as of the date of this Agreement or another date shall be true and correct as of such date), and Parent shall have received a certificate signed on behalf of Company by the Chief Executive Officer or the Chief Financial Officer of Company to the foregoing effect.

(b) Performance of Obligations of Company. Company shall have performed in all material respects all obligations required to be performed by it under this Agreement at or prior to the Effective Time, and Parent shall have received a certificate signed on behalf of Company by the Chief Executive Officer or the Chief Financial Officer of Company to such effect.

(c) Federal Tax Opinion. Parent shall have received the opinion of its counsel, Wachtell, Lipton, Rosen & Katz, in form and substance reasonably satisfactory to Parent, dated
the Closing Date, substantially to the effect that, on the basis of facts, representations and assumptions set forth in such opinion that are consistent with the state of facts existing at the Effective Time, the Merger will qualify as a “reorganization” within the meaning of Section 368(a) of the Code. In rendering such opinion, counsel may require and rely upon customary representations contained in certificates of officers of Company and Parent.

(d) **Regulatory Approvals.** All approvals set forth in Section 4.4 required to consummate the transactions contemplated by this Agreement, including the Merger, shall have been obtained and shall remain in full force and effect and all statutory waiting periods in respect thereof shall have expired (all such approvals and the expiration of all such waiting periods being referred as the “Parent Requisite Regulatory Approvals”).

7.3 **Conditions to Obligations of Company.** The obligation of Company to effect the Merger is also subject to the satisfaction or waiver by Company at or prior to the Effective Time of the following conditions:

(a) **Representations and Warranties.** Subject to the standard set forth in Section 9.2, the representations and warranties of Parent set forth in this Agreement shall be true and correct as of the date of this Agreement and as of the Effective Time as though made on and as of the Effective Time (except that representations and warranties that by their terms speak specifically as of the date of this Agreement or another date shall be true and correct as of such date), and Company shall have received a certificate signed on behalf of Parent by the Chief Executive Officer or the Chief Financial Officer of Parent to the foregoing effect.

(b) **Performance of Obligations of Parent.** Parent shall have performed in all material respects all obligations required to be performed by it under this Agreement at or prior to the Effective Time, and Company shall have received a certificate signed on behalf of Parent by the Chief Executive Officer or the Chief Financial Officer of Parent to such effect.

(c) **Federal Tax Opinion.** Company shall have received the opinion of its counsel, Shearman & Sterling LLP, in form and substance reasonably satisfactory to Company, dated the Closing Date, substantially to the effect that, on the basis of facts, representations and assumptions set forth in such opinion that are consistent with the state of facts existing at the Effective Time, the Merger will qualify as a “reorganization” within the meaning of Section 368(a) of the Code. In rendering such opinion, counsel may require and rely upon customary representations contained in certificates of officers of Company and Parent.

(d) **Regulatory Approvals.** All approvals set forth in Section 3.4 required to consummate the transactions contemplated by this Agreement, including the Merger, shall have been obtained and shall remain in full force and effect and all statutory waiting periods in respect thereof shall have expired (all such approvals and the expiration of all such waiting periods being referred as the “Company Requisite Regulatory Approvals”).

54
ARTICLE VIII

TERMINATION AND AMENDMENT

8.1 Termination. This Agreement may be terminated at any time prior to the Effective Time, whether before or after approval of the matters presented in connection with the Merger by the stockholders of Company:

(a) by mutual consent of Company and Parent in a written instrument authorized by the Boards of Directors of Company and Parent;

(b) by either Company or Parent, if any Governmental Entity that must grant a Parent Requisite Regulatory Approval or a Company Requisite Regulatory Approval has denied approval of the Merger and such denial has become final and nonappealable or any Governmental Entity of competent jurisdiction shall have issued a final and nonappealable order, injunction or decree permanently enjoining or otherwise prohibiting or making illegal the consummation of the transactions contemplated by this Agreement;

(c) by either Company or Parent, if the Merger shall not have been consummated on or before the first anniversary of the date of this Agreement unless the failure of the Closing to occur by such date shall be due to the failure of the party seeking to terminate this Agreement to perform or observe the covenants and agreements of such party set forth in this Agreement;

(d) by either Company or Parent (provided that the terminating party is not then in material breach of any representation, warranty, covenant or other agreement contained herein), if there shall have been a breach of any of the covenants or agreements or any of the representations or warranties set forth in this Agreement on the part of Company, in the case of a termination by Parent, or Parent or Merger Sub, in the case of a termination by Company, which breach, either individually or in the aggregate, would result in, if occurring or continuing on the Closing Date, the failure of the conditions set forth in Section 7.2 or 7.3, as the case may be, and which is not cured within 30 days following written notice to the party committing such breach or by its nature or timing cannot be cured within such time period;

(e) by Parent, if (i) the Board of Directors of Company shall have (A) failed to recommend in the Joint Proxy Statement the approval and adoption of this Agreement, (B) made any Change of Recommendation, (C) approved or recommended, or publicly proposed to approve or recommend, any Alternative Proposal, whether or not permitted by the terms hereof or (D) failed to recommend to Company's stockholders that they reject any tender offer or exchange offer that constitutes an Alternative Transaction within the ten business day period specified in Rule 14e-2(a) of the Exchange Act, or (ii) Company shall have breached its obligations under Section 6.3 in any material respect;

(f) by Company, if Parent shall have breached its obligations under Section 6.3 in any material respect;

(g) by either Company or Parent, if the approval of Company stockholders required by Section 7.1(a) shall not have been obtained at a meeting of Company stockholders convened for purposes of approving and adopting this Agreement, or
(h) by either Company or Parent, if the approval of Parent stockholders required by Section 7.1(a) shall not have been obtained at a meeting of Parent stockholders convened for purposes of approving the issuance of Parent Common Stock in the Merger.

The party desiring to terminate this Agreement pursuant to clause (b), (c), (d), (e), (f), (g) or (h) of this Section 8.1 shall give written notice of such termination to the other party in accordance with Section 9.4, specifying the provision or provisions hereof pursuant to which such termination is effected.

8.2 Effect of Termination. In the event of termination of this Agreement by either Company or Parent as provided in Section 8.1, this Agreement shall forthwith become void and have no effect, and none of Company, Parent, any of their respective Subsidiaries or any of the officers or directors of any of them shall have any liability of any nature whatsoever under this Agreement, or in connection with the transactions contemplated by this Agreement, except that (i) Sections 6.2(b), 8.2, 8.3, 9.3, 9.4, 9.5, 9.6, 9.7, 9.8 and 9.10 shall survive any termination of this Agreement, and (ii) neither Company nor Parent shall be relieved or released from any liabilities or damages arising out of its knowing breach of any provision of this Agreement. Notwithstanding the foregoing, in the event of any termination of this Agreement, the Stock Option Agreement shall remain in full force and effect in accordance with its terms.

8.3 Fees and Expenses. Except with respect to costs and expenses of printing and mailing the Joint Proxy Statement and all filing and other fees paid to the SEC in connection with the Merger, which shall be borne equally by Company and Parent, all fees and expenses incurred in connection with the Merger, this Agreement, and the transactions contemplated by this Agreement shall be paid by the party incurring such fees or expenses, whether or not the Merger is consummated.

8.4 Amendment. This Agreement may be amended by the parties, by action taken or authorized by their respective Boards of Directors, at any time before or after approval of the matters presented in connection with Merger by the respective stockholders of Company and Parent, provided, however, that after any approval of the transactions contemplated by this Agreement by the stockholders of Company or Parent, there may not be, without further approval of such stockholders, any amendment of this Agreement that requires further approval under applicable law. This Agreement may not be amended except by an instrument in writing signed on behalf of each of the parties.

8.5 Extension, Waiver. At any time prior to the Effective Time, the parties, by action taken or authorized by their respective Board of Directors, may, to the extent legally allowed, (a) extend the time for the performance of any of the obligations or other acts of the other party, (b) waive any inaccuracies in the representations and warranties contained in this Agreement or (c) waive compliance with any of the agreements or conditions contained in this Agreement. Any agreement on the part of a party to any such extension or waiver shall be valid only if set forth in a written instrument signed on behalf of such party. But such extension or waiver or failure to insist on strict compliance with an obligation, covenant, agreement or condition shall not operate as a waiver of, or estoppel with respect to, any subsequent or other failure.
ARTICLE IX

GENERAL PROVISIONS

9.1 Closing. On the terms and subject to the conditions set forth in this Agreement, the closing of the Merger (the “Closing”) shall take place at 10:00 a.m. on a date and at a place to be specified by the parties, which date shall be no later than five business days after the satisfaction or waiver (subject to applicable law) of the latest to occur of the conditions set forth in Article VII (other than those conditions that by their nature are to be satisfied or waived at the Closing), unless extended by mutual agreement of the parties (the “Closing Date”). If the conditions set forth in Article VII are satisfied or waived during the two weeks immediately prior to the end of a fiscal quarter of Parent, then Parent may postpone the Closing until the first full week after the end of that fiscal quarter.

9.2 Standard. No representation or warranty of Company contained in Article III or of Parent contained in Article IV shall be deemed untrue, inaccurate or incorrect for any purpose under this Agreement, and no party hereto shall be deemed to have breached a representation or warranty for any purpose under this Agreement, in any case as a consequence of the existence or absence of any fact, circumstance or event unless such fact, circumstance or event, individually or when taken together with all other facts, circumstances or events inconsistent with any representations or warranties contained in Article III, in the case of Company, or Article IV, in the case of Parent, has had or would reasonably be expected to have a Material Adverse Effect with respect to Company or Parent, respectively (disregarding for purposes of this Section 9.2 all qualifications or limitations set forth in any representations or warranties as to “materiality,” “Material Adverse Effect” and words of similar import). Notwithstanding the immediately preceding sentence, the representations and warranties contained in (x) Section 3.2(a) shall be deemed untrue and incorrect if not true and correct except to a de minimis extent, (y) Sections 3.2(b), 3.3(a), 3.3(b)(i), 3.7 and 3.25, in the case of Company, and Sections 4.2, 4.3(a), 4.3(b)(i) and 4.7, in the case of Parent, shall be deemed untrue and incorrect if not true and correct in all material respects and (z) Section 3.8(a), in the case of Company, and Section 4.8(a), in the case of Parent, shall be deemed untrue and incorrect if not true and correct in all respects.

9.3 Nonsurvival of Representations, Warranties and Agreements. None of the representations, warranties, covenants and agreements set forth in this Agreement or in any instrument delivered pursuant to this Agreement shall survive the Effective Time, except for Section 6.7 and for those other covenants and agreements contained in this Agreement that by their terms apply or are to be performed in whole or in part after the Effective Time.

9.4 Notices. All notices and other communications in connection with this Agreement shall be in writing and shall be deemed given if delivered personally, sent via facsimile (with confirmation), mailed by registered or certified mail (return receipt requested) or delivered by an express courier (with confirmation) to the parties at the following addresses (or at such other address for a party as shall be specified by like notice):

(a) if to Company, to:
9.5 Interpretation. When a reference is made in this Agreement to Articles, Sections, Exhibits or Schedules, such reference shall be to an Article or Section of or Exhibit or Schedule to this Agreement unless otherwise indicated. The table of contents and headings contained in this Agreement are for reference purposes only and shall not affect in any way the
meaning or interpretation of this Agreement. Whenever the words "include," "includes" or "including" are used in this Agreement, they shall be deemed to be followed by the words "without limitation." The Company Disclosure Schedule and the Parent Disclosure Schedule, as well as all other schedules and all exhibits hereto, shall be deemed part of this Agreement and included in any reference to this Agreement. This Agreement shall not be interpreted or construed to require any person to take any action, or fail to take any action, if to do so would violate any applicable law.

9.6 Counterparts. This Agreement may be executed in two or more counterparts, all of which shall be considered one and the same agreement and shall become effective when counterparts have been signed by each of the parties and delivered to the other party, it being understood that each party need not sign the same counterpart.

9.7 Entire Agreement. This Agreement (including the documents and the instruments referred to in this Agreement), together with the Confidentiality Agreement and the Stock Option Agreement, constitutes the entire agreement and supersedes all prior agreements and understandings, both written and oral, between the parties with respect to the subject matter of this Agreement, other than the Confidentiality Agreement and the Stock Option Agreement.

9.8 Governing Law; Jurisdiction. This Agreement shall be governed and construed in accordance with the internal laws of the State of Delaware applicable to contracts made and wholly-performed within such state, without regard to any applicable conflicts of law principles. The parties hereto agree that any suit, action or proceeding brought by either party to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby shall be brought in any federal or state court located in the State of Delaware. Each of the parties hereto submits to the jurisdiction of any such court in any suit, action or proceeding seeking to enforce any provision of, or based on any matter arising out of, or in connection with, this Agreement or the transactions contemplated hereby and hereby irrevocably waives the benefit of jurisdiction derived from present or future domicile or otherwise in such action or proceeding. Each party hereto irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of the venue of any such suit, action or proceeding in any such court or that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.

9.9 Publicity. Neither Company nor Parent shall, and neither Company nor Parent shall permit any of its Subsidiaries to, issue or cause the publication of any press release or other public announcement with respect to, or otherwise make any public statement concerning, the transactions contemplated by this Agreement without the prior consent (which consent shall not be unreasonably withheld) of Parent, in the case of a proposed announcement or statement by Company, or Company, in the case of a proposed announcement or statement by Parent, provided, however, that either party may, without the prior consent of the other party (but after prior consultation with the other party to the extent practicable under the circumstances) issue or cause the publication of any press release or other public announcement to the extent required by law or by the rules and regulations of the NYSE.

9.10 Assignment; Third Party Beneficiaries. Neither this Agreement nor any of the rights, interests or obligations under this Agreement shall be assigned by either of the parties
(whether by operation of law or otherwise) without the prior written consent of the other party. Subject to the preceding sentence, this Agreement shall be binding upon, inure to the benefit of and be enforceable by each of the parties and their respective successors and assigns. Except as otherwise specifically provided in Section 6.6, this Agreement (including the documents and instruments referred to in this Agreement) is not intended to and does not confer upon any person other than the parties hereto any rights or remedies under this Agreement.

Remainder of Page Intentionally Left Blank
IN WITNESS WHEREOF, Company and Parent have caused this Agreement to be executed by their respective officers thereunto duly authorized as of the date first above written.

MERRILL LYNCH & CO., INC.

By: [Signature]
Name: John A. Thain
Title: Chairman and Chief Executive Officer

BANK OF AMERICA CORPORATION

By: [Signature]
Name: Kenneth D. Lewis
Title: Chairman, Chief Executive Officer and President

Signature Page to Agreement and Plan of Merger
Exhibit B
DISCLOSURE SCHEDULES\(^1\)

to

AGREEMENT AND PLAN OF MERGER

by and between

MERRILL LYNCH & CO., INC.

and

BANK OF AMERICA CORPORATION

Dated September 15, 2008

\(^1\) This Company Disclosure Schedule has been prepared and delivered pursuant to the Agreement and Plan of Merger, dated as of September 15, 2008 (the "Agreement"), by and between Merrill Lynch & Co., Inc., a Delaware corporation (the "Company"), and Bank of America Corporation, a Delaware corporation ("Parent").

This Company Disclosure Schedule and the information and disclosures contained herein are intended to qualify and limit the representations and warranties of the Company contained in the Agreement. Inclusion of any item in this Company Disclosure Schedule (i) shall not be deemed an admission that such item represents a material exception or material fact, event or circumstance or that such item has had or would have a Material Adverse Effect and (ii) shall not constitute, nor be deemed to be, an admission of liability concerning such item by the Company. Nor in such cases where a representation or warranty is qualified by or otherwise modified or qualified by a reference to materiality or Material Adverse Effect shall the disclosure of any matter in this Company Disclosure Schedule imply that any other undisclosed matter that has a greater value or could otherwise be deemed more significant (i) is or is reasonably likely to be material or (ii) has had or is reasonably likely to result in a Material Adverse Effect. Matters reflected in this Company Disclosure Schedule are not necessarily limited to matters required by the Agreement to be reflected in this Company Disclosure Schedule. Such additional matters are set forth for information purposes and do not necessarily include other matters of a similar nature. The headings contained in this Company Disclosure Schedule are for convenience of reference only and shall not be deemed to modify or influence the interpretation of the information contained in this Company Disclosure Schedule or the Agreement.

Terms defined in the Agreement and not otherwise defined in this Company Disclosure Schedule are used herein as defined in the Agreement. This information is disclosed in confidence for the purpose contemplated in the Agreement and is subject to the confidentiality provisions of the Agreement and any confidentiality agreement or non-disclosure agreement executed by the parties related to the transactions contemplated by the Agreement.

FOIL Confidential Treatment Requested By Bank Of America Corporation
Company Disclosure Schedule

Section 3.2(a)
Capitalization

- The Company entered into share subscription agreement, dated July 28, 2008 (the “Temasek Agreement”), with Temasek Capital (Private) Limited (“Temasek”). Pursuant to the Temasek Agreement, certain subsidiaries of Temasek committed to purchase $3.4 billion of Company Common Stock. The closing for a portion of the shares of Company Common Stock to be purchased by Temasek and/or its affiliates pursuant to the Temasek Agreement is subject to receipt of regulatory approvals, which remain outstanding. Once the regulatory approvals have been received, the Company will issue such remaining shares of Company Common Stock to Temasek and/or its subsidiaries.

- The Company registers Company Common Stock paid to employees as part of employees’ compensation agreements.

- As part of its ordinary course of business, Merrill Lynch, Pierce, Fenner & Smith, Incorporated is a market maker in the preferred stock of the Company (shares of the preferred stock of the Company held in treasury in connection with such Merrill Lynch, Pierce, Fenner & Smith, Incorporated business were 12,478 as of August 29, 2008).

- Issued and Outstanding Shares – “Book Value” shares: The outstanding share amount as of the Company Capitalization Date includes 606,400 “book value” shares issued under the Company’s 1978 Incentive Equity Purchase Plan (the “Book Value Share Plan”). Of this amount, the Company has received requests to repurchase 96,800 shares between the Company Capitalization Date and the date of the Agreement for $21.91 per share (a price equal to the book value per share of the Company as at June 27, 2008, as reported in the Company’s Quarterly Report on Form 10-Q for the quarterly period ended June 27, 2008, $21.43, plus $0.48 adjusted due to a restructuring charge in the Company’s Statement of Consolidated Earnings for 1989). The remaining 509,600 “book value” shares will be converted into a maximum of 470,092 shares of Company Common Stock prior to the Effective Date. This amount will be reduced by any shares that are repurchased at the request of the holder prior to such date for a price equal to the book value per share of the Company as of the end of the most recently completed fiscal quarter immediately preceding the request to repurchase.

- Reserved Shares – ESPP shares: The shares of Company Common Stock reserved for issuance in connection with existing awards under employee benefit, stock option and dividend reinvestment and stock purchase plans includes 336,607 shares reserved under the Company’s Employee Stock Purchase Plan (“ESPP”). Under the ESPP, the amount contributed by plan participants each fiscal quarter is used to purchase Company Common Stock on a date following the end of such quarter. The Company Common Stock is purchased on the relevant investment date at a price equal to 95% of the average of the high and low NYSE price of the Company Common Stock on the relevant investment date. The amount of shares above is the amount that would be purchasable based on the amount
contributed by participants during the Company’s quarter through Company Capitalization Date at a price equal to 95% of the average of the high and low NYSE price for the Company Common Stock as of such date.

Section 3.2(b)

See the disclosures set forth above under Section 3.2(a), which are hereby incorporated by reference herein.

Between the Company Capitalization Date and the date of the Agreement, the Company has granted 619,989 restricted stock units and 1,397,503 options and reinstated 1,540 previously forfeited restricted shares and 2,883 previously forfeited restricted units.

List of Company equity awards to be provided within five business days pursuant to Section 3.2(b) of the Agreement.

Section 3.3(b)

No Violation

See the disclosure under Section 3.13(a) below, which is hereby incorporated by reference herein.

Section 3.4

Consents and Approvals

• The Office of Thrift Supervision.

• The Company agrees to act reasonably and in good faith in respect of the closing condition set forth in Section 7.3(d).

Section 3.5

Regulatory Matters

• Merrill Lynch Bank and Trust Company (Cayman) failed to make a timely filing of its audited financial statement with the Cayman Island Monetary Authority on March 31, 2006, the required filing date. This deficiency was corrected with a filing on September 4, 2006.

• See the disclosure under Sections 3.9 and 3.20 below, which are hereby incorporated by reference herein.
Section 3.6
Financial Statements

- See the disclosure set forth below under Sections 3.8 and 3.9, which are hereby incorporated by reference herein.

Section 3.7
Broker's Fees

None.

Section 3.8
Absence of Certain Changes

See the disclosure set forth above under Section 3.4, Section 3.5 and below under Section 3.9, which are hereby incorporated by reference herein.

The Company reported a net loss from continuing operations for the second quarter of 2008 of $4.6 billion as a result of losses and writedowns attributable to subprime, Collateralized Debt Obligations ("CDOs") and other asset classes, including monoline exposure.


The Company has completed the sale of its 20% ownership stake in Bloomberg, L.P. to Bloomberg Inc. for $4.425 billion, and as part of that transaction has entered into a long-term service agreement. The Company has provided financing in connection with this transaction. The Company is also in negotiations and has signed a non-binding letter of intent, dated July 17, 2008, among the Company, Madison Dearborn Partners, LLC and TPG Capital, L.P., to sell a controlling interest in Financial Data Services, Inc. ("FDS"). As contemplated by such letter of intent, the Company would provide debt financing for this transaction on a commercially reasonable basis.

The Company also engaged in preliminary discussions and negotiations with other Persons regarding asset sales and other capital raising strategies, including the sale of assets such as all or a portion of the Company's interests in BlackRock, Inc., but has not entered into any binding commitments or arrangements relating thereto.

On July 28, 2008, the Company announced a public offering of 380,000,000 shares of Company Common Stock (the “Public Offering”), priced at $22.50 per share, for a total value of $8.55 billion.
billion, as well as the purchase of approximately 750,000 shares of Company Common Stock in the Public Offering by the Company’s executive management.

In connection with the Public Offering, the Company also entered into the Temasek Agreement, pursuant to which certain subsidiaries of Temasek committed to purchase $3.4 billion of Company’s Common Stock. In satisfaction of the Company’s obligations under the reset provisions contained in the investment agreement with Temasek, the Company agreed to pay Temasek $2.5 billion, 100% of which was invested in the Public Offering at the public offering price. The closing for a portion of the shares of Common Stock of the Company to be purchased by Temasek and/or its affiliates pursuant to the Temasek Agreement is subject to receipt of regulatory approvals, which remain outstanding.

In addition, on July 28, 2008, the Company announced the exchange of all outstanding mandatory convertible preferred securities of the Company for Company Common Stock or new mandatory convertible preferred securities, the effect of which was to eliminate the reset features in all of the original securities.

On July 28, 2008, the Company announced the sale of the substantial majority of its CDO portfolio, its entry into an agreement to terminate its hedges with monoline guarantor XL Capital Assurance Inc. (“XL”) and its engagement in settlement negotiations with other monoline counterparties. Collectively, as announced by the Company on July 28, 2008, these transactions are expected to result in a write-down in the third quarter of 2008 of approximately $5.7 billion. Under the agreement with XL, the Company agreed to provide financing in connection with these transactions.

See Exhibit A to this Company Disclosure Schedule, which is hereby incorporated herein by reference.

Employee compensation levels (including annual bonuses prospectively paid in January 2009) could be materially lower than in respect of fiscal year 2007.

During the third quarter of 2007, the Company repurchased shares of its Company Common Stock in accordance with its stock repurchase program. This program is currently suspended as part of the Company’s capital management efforts.

On September 14, 2008, Company, along with nine other banks committed to establish a $70 billion credit facility. The Company has committed to fund up to $7 billion of the facility. Any one of the ten banks making commitments to the facility would be entitled to borrow up to 1.3 of the total committed amount of the facility.

REDACTED

[CONTINUES TO NEXT PAGE]
The Company granted the following awards of restricted units and restricted stock to employees with a value to the individual in excess of $1 million since June 27, 2008.

<table>
<thead>
<tr>
<th>Last Name</th>
<th>First Name</th>
<th>Middle Name</th>
<th>Form of Award</th>
<th>Plan</th>
<th>Shares Outstanding</th>
<th>Grant Price</th>
<th>Grant Date</th>
<th>Vest Date</th>
<th>Release Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>RU</td>
<td>LMP</td>
<td>41212</td>
<td>24.265</td>
<td>7/29/2008</td>
<td>1/31/2012</td>
<td>1/31/2012</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>RU</td>
<td>LTICP</td>
<td>16139</td>
<td>24.265</td>
<td>7/29/2008</td>
<td>7/7/2012</td>
<td>7/7/2012</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

REDACTED
The Company granted the following option awards to employees since June 27, 2008.

<table>
<thead>
<tr>
<th>Last Name</th>
<th>First Name</th>
<th>Middle Name</th>
<th>Grant Date</th>
<th>OP Granted</th>
<th>OP Exercised</th>
<th>Outstanding</th>
<th>Vested</th>
<th>Exercise Price</th>
<th>Expiration Date</th>
<th>Plan Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>REDACTED</td>
<td></td>
<td></td>
<td>9/4/2008</td>
<td>475151</td>
<td>0</td>
<td>475151</td>
<td>0</td>
<td>27.215</td>
<td>9/4/2018</td>
<td>LTICP</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>9/4/2008</td>
<td>461176</td>
<td>0</td>
<td>461176</td>
<td>0</td>
<td>27.215</td>
<td>9/4/2018</td>
<td>LTICP</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>7/29/2008</td>
<td>61818</td>
<td>0</td>
<td>61818</td>
<td>0</td>
<td>24.265</td>
<td>7/29/2013</td>
<td>LTICP</td>
</tr>
</tbody>
</table>

The Company paid the following bonuses to employees since June 27, 2008.

<table>
<thead>
<tr>
<th>Last Name</th>
<th>First Name</th>
<th>Cash Bonus</th>
<th>Date</th>
<th>Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td>REDACTED</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>$ 27,714.663</td>
<td>8.20/2008</td>
<td>Buyout of forfeited stock</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$ 16,872.995</td>
<td>9.10/2008</td>
<td>Buyout of forfeited stock</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$ 2,892,308</td>
<td>7.24/2008</td>
<td>Term exception</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$ 2,798,794</td>
<td>9.16/2008</td>
<td>Buyout of forfeited stock</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$ 2,240,000</td>
<td>6.30/2008</td>
<td>Term exception</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$ 1,825,000</td>
<td>5.24/2008</td>
<td>Term exception</td>
</tr>
</tbody>
</table>
Section 3.9
Legal Proceedings

REDACTED

REDACTED
Section 3.10  
**Tax Returns**

- Merrill Lynch Group, Inc. and Financial Data Services, Inc. have each been a “distributing corporation” and Merrill Lynch Bank & Trust FSB, Financial Data Services Inc. and Merrill Lynch Mortgage and Investment Company have been “controlled corporations.”
• Business Financial Services, Inc. and Merrill Lynch Capital Corporation are excluded from the Subsidiaries of the Company for purposes of the representations contained in Sections 3.10(a) and 3.10(e) with respect to the issues referred to in Section 3.10(e).

Section 3.11
Employee Matters

3.11(a)

To be provided within five business days pursuant to Section 3.11(a) of the Agreement.

Section 3.11(b)(iv)

The Company provides retiree medical and life insurance to certain employees in the United States as part of the Company medical plans. The Company also provides retiree medical for certain employees in Canada, the United Kingdom and in South Africa.

Section 3.11(b)(ix)

1. In re Merrill Lynch & Co., Inc. ERISA Litigation, No. 07 Civ. 10268 (LBS).


Section 3.11(e)

1. ML & Co. Deferred Stock Unit and Stock Option Plan for Non-Employee Directors
2. ML & Co. Deferred Stock Unit Plan for Non-Employee Directors.
3. ML & Co. Fee Deferral Plan for Non-Employee Directors, as amended.
5. ML & Co. Long-Term Incentive Compensation Plan for Managers and Producers, as amended.
6. ML & Co. Long-Term Incentive Compensation Plan for Executive Officers, as amended.
8. Form of Grant Document for Executive Officers under the ML & Co. Long-Term Incentive Compensation Plan.

9. Form of Grant Document under Managing Partner Incentive Program under the ML & Co. Long-Term Incentive Compensation Plan.

10. Form of Grant Documentation for Participation Units under the GMIPP under the ML & Co. Long-Term Incentive Compensation Plan.

11. Form of Grant Document for Replacement Restricted Stock Units and Nonqualified Stock Options.

12. Form of Grant Document for Sign-on Restricted Stock Units and Nonqualified Stock Options.


15. Agreement with Thomas K. Montag, dated May 1, 2008 (grants already made under agreement contain similar terms).

16. Agreement with Peter S. Kraus, dated May 4, 2008 (grants already made under program contain similar terms).

17. Wealthbuilder Account Plan for a Select Group of Eligible Employees.


19. Advest WealthBuilder Plan

Section 3.11(f)

The Company has been involved in audits and litigation relating to whether employees should be classified as exempt or non-exempt. The Company recently settled a Department of Labor audit for a group of employees that had allegedly been misclassified as exempt. Under the terms of the settlement, the Company paid approximately $500,000 and agreed to reclassify the employees in question as non-exempt. The Company intends to finish reclassifying these and other band five employees as non-exempt during the fourth quarter of 2008.

The Company currently has a pending putative class action in U S. District Court for the Southern District of New York challenging the classification of a small number of employees (approximately 20) as being exempt.

The Company is in the process of considering the appropriate steps to address any potential mischaracterization by the Company and some of its outside vendors of certain contingent workers as independent contractors.

Subject to court approval, the Company has settled ten putative class and collective actions alleging that the Company’s Financial Advisors and trainees are entitled to overtime and that various costs incurred by Financial Advisors are illegal deductions from wages in violation
of various state statutes (excluding California, where a settlement has already been paid out), for which the Company has fully reserved.

The payment by Financial Advisors of supplemental compensation to sales assistants may not have been in compliance with Section 2802 of the California Labor Code.

**Section 3.12**

**Compliance with Applicable Law**

- See the disclosures set forth under Section 3.9 above and Section 3.20 below, which are hereby incorporated by reference herein.

**Section 3.13(a)**

**Certain Contracts**

- The Company and/or its affiliates are parties to certain definitive agreements, all of which have been provided to Parent, relating to BlackRock, Aegon, ML Capital, Bloomberg and a joint venture with Mitsubishi UFJ Financial Group.

- Joint Marketing Agreement, dated as of September 5, 2003, by and between Merrill Lynch, Pierce, Fenner & Smith Incorporated and MBNA America Bank, N.A.

**Section 3.20**

**Securitization Matters**

- The Regulation AB Item 1105 “Static Pool Information” with respect to publicly offered residential mortgage-backed securities published on the Company web site and part of the Company Securitization Documents was not accurate and complete for the period Fall 2006 through mid-year 2007. The information was subsequently corrected, and the website advises users that the information has been “revised as of [date]” and is available “as of the date of the prospectus” upon calling a toll-free number. The web site is used frequently by investors. No investor has made a request for the originally posted data.

- Merrill Lynch Depositor (“MLD”) acts as the depositor for the trusts issuing asset-backed securities under the PublicSTEERS, PreferredPLUS, PPLUS and INDEXPLUS corporate bond repackaging programs. During 2007, MLD inadvertently failed to file six current reports on Form 8-K within the required time periods (i) in five of the six cases, because it had no notice of certain late disbursements from Bank of New York (“BNY”), the trustee for the affected series of asset-backed securities, and therefore had no notice of a triggering event requiring the filing of a current report on Form 8-K, until BNY informed it of the late distributions and (ii) in the remaining case, because of human error on the part of personnel at BNY. MLD and BNY have in principle developed and agreed on various procedures to prevent similar late filings from occurring again in the future, and MLD and its counsel,
Shearman and Sterling LLP, have applied to the staff of the Securities and Exchange Commission requesting a waiver with respect to MLD's failure to file current reports on Form 8-K during 2007.

Section 3.22
Interested Party Transactions

None.

Section 5.1
Conduct of Business

See the disclosures set forth under Section 3.8 above relating to FDS, the Temasek closing and the $70 billion facility, which are hereby incorporated by reference herein.

Section 5.2
Company Forbearances

- 5.2 (a) and 5.2(d) - The Company may incur indebtedness (including the posting of appropriate collateral), even if outside the ordinary course of business, pursuant to the Primary Dealer Credit Facility and the Term Securities Lending Facility or any other facility established by a U.S. governmental entity.

- 5.2 (b)(ii) - Merrill Lynch & Co. Canada Ltd. may pay cash dividends on the Exchangeable Shares consistent with past practice (provided that such dividends may not be increased over the amount of the prior dividend) including record dates and payment dates consistent with the prior year, and may issue shares of Company Common Stock in connection with Exchangeable Shares as required pursuant to the terms of such Exchangeable Shares.

- 5.2(b)(iii) - The Company previously committed to make grants of equity awards (as previously disclosed in writing to Parent) to individuals who received offers of employment prior to the date of the Agreement from the Company or its Subsidiaries in an aggregate number of shares not in excess of (i) \(3,721,521\) with respect to individuals other than REDACTED (ii) shares with a value of not in REDACTED (iii)

- 5.2(c) - Employees of the Company and its Subsidiaries may be provided the opportunity to amend their deferral elections under the deferred compensation plans of the Company and its
Subsidiaries previously identified by the Company to Parent in writing, in accordance with the transition election program previously described to Parent in writing and otherwise in accordance with Section 409A of the Code provided that such transition election program (i) does not increase the Company’s costs, in other than an immaterial respect and (ii) is not applicable to any director or executive officer of the Company or any other member of the Company’s Executive Management Team.

- 5.2(b)(iii), 5.2(c)(i) and 5.2(c)(ii) - Variable Incentive Compensation Program ("VICP") in respect of 2008 (including without limitation any guaranteed VICP awards for 2008 or any other pro rata or other 2008 VICP awards payable, paid or provided to terminating or former employees) may be awarded at levels that (i) do not exceed $5.8 billion in aggregate value (inclusive of cash bonuses and the grant date value of long-term incentive awards) less any 2008 incentive compensation value (other than any value in respect of any replacement cash or long-term incentive awards) in respect of the New Hire Cash Compensation Pool, and (ii) do not result in 2008 VICP-related expense exceeding $4.5 billion, less any 2008 incentive compensation expense (other than any expense in respect of any replacement cash or long-term incentive awards) in respect of the New Hire Cash Compensation Pool. Sixty percent of the overall 2008 VICP shall be awarded as a current cash bonus and forty percent of the overall 2008 VICP shall be awarded as a long-term incentive award either in the form of equity or long-term cash awards. The form (i.e., equity v. long-term cash) and terms and conditions of the long-term incentive awards shall be determined by the Company in consultation with Parent, provided that in no event shall such long-term incentive awards contain acceleration or vesting rights (whether single or double trigger and including the rights provided in the applicable Company equity incentive plan) in connection with the Merger (except for any such rights applicable to equity awards granted in satisfaction of a 2008 VICP guarantee to the extent specifically required by the terms of an offer letter entered into prior to September 14, 2008) or any “good reason” termination feature (including vesting in connection with a “good reason” termination, except any good reason termination feature applicable to equity awards granted in satisfaction of a 2008 VICP guarantee to the extent specifically required by the terms of an offer letter entered into prior to September 14, 2008). The allocation of the 2008 VICP among eligible employees shall be determined by the Company in consultation with Parent.

- 5.2(c)(ii), 5.2(c)(iii) and 5.2(c)(v) - The Company has extended offer letters which have not yet been accepted to the following individuals: REDACTED

- 5.2(c)(ii), 5.2(c)(iii) and 5.2(c)(v) - The Company and its Subsidiaries may: (i) hire employees whose individual annual cash compensation does not exceed $3 million, subject to an annualized cash compensation limit for all such hired employees of up to $100 million in the aggregate (the “New Hire Cash Compensation Pool”); and (ii) hire an unrestricted number of financial advisors in the ordinary course of business consistent with past practice and on terms that are consistent with past practice.

REDACTED
• 5.2 (c)(v) - The Company and its Subsidiaries may implement employee terminations (i) pursuant to reductions in force relating to non-financial advisor global wealth management or global technology headcount, as previously discussed with Parent, (ii) as may be required by law or in connection with a violation of Company policies, or (iii) otherwise in consultation with Parent.

• 5.2 (c)(vi) - The Company and its Subsidiaries may take actions for valid business purposes in the ordinary course of business with respect to employees in the position of Vice President or below (other than with respect to financial advisors) (and not systemic changes or changes impacting groups or categories of employees) that could constitute “good reason” with respect to the “good reason” triggers in the Company Benefit Plans relating to (x) positions and responsibilities and (y) relocation.

• 5.2(d) - Execution and delivery of definitive agreements by the Company and/or its affiliates, and consummation of the sale of a controlling interest in FDS.

• 5.2(n) - Subject to consultation in accordance with Section 6.13 of the Agreement, the proposed liquidation of a Subsidiary, pursuant to an election under Treasury Regulation Section 301.7701-3 (following its conversion from a public limited company (plc) to a limited company), as previously discussed between the Company and Parent, shall not require the prior written consent of Parent.

In the event the Company requests the consent of Parent required to take any action described in Section 5.2(a), 5.2(b)(iii) (provided that any such grants shall be made in consultation with Parent and shall not contain acceleration or vesting rights (whether single or double trigger and including the rights provided in the applicable Company equity incentive plan) in connection with the Merger or any “good reason” termination feature (including vesting in connection with a “good reason” termination), 5.2(d), 5.2(j)(i) (so long as there is no change of control provision that would be triggered by the Merger), 5.2(j)(ii) (but only to the extent that any such agreement or contract is in connection with an action contemplated by Section 5.2(d) of the Agreement) or 5.2(k) (so long as with respect to any proposed settlement for a single action or proceeding (or threatened action or proceeding), such settlement includes only monetary relief, does not involve an admission of guilt or wrongdoing and does not involve aggregate cash payments in excess of $20 million) of the Agreement, Parent’s consent shall not be unreasonably withheld or delayed.

Section 6.6
Annual Premiums

• $12,163,258 for D&O insurance (including a broker service fee).
AMENDMENT NO. 1
TO THE
AGREEMENT AND PLAN OF MERGER

AMENDMENT NO. 1 (this "Amendment"), dated as of October 21, 2008, to the Agreement and Plan of Merger, dated as of September 15, 2008 (the "Merger Agreement"), by and between Merrill Lynch & Co., Inc. and Bank of America Corporation.

WHEREAS, Section 8.4 of the Merger Agreement provides for the amendment of the Merger Agreement in accordance with the terms set forth therein; and

WHEREAS, the parties hereto desire to amend the Merger Agreement as set forth below;

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements set forth herein and for good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, and intending to be legally bound hereby, the parties hereto do hereby agree as follows:

ARTICLE I
DEFINITIONS

Section 1.1 Definitions; References. Unless otherwise specifically defined herein, each term used herein shall have the meaning assigned to such term in the Merger Agreement. Each reference to “hereof,” “herein,” “hereunder,” “hereby” and “this Agreement” shall, from and after the date hereof, refer to the Merger Agreement as amended by this Amendment.

ARTICLE II
AMENDMENTS TO MERGER AGREEMENT

Section 2.1 Amendment to Section 1.5(g). Section 1.5(g) of the Merger Agreement is hereby amended and restated in its entirety to read as follows:

(g) As of the Effective Time, Parent shall assume the obligations and succeed to the rights of Company under the 1986 Employee Stock Purchase Plan (the "Company ESPP") and all outstanding rights thereunder at the Effective Time. Company and Parent agree that prior to the Effective Time, the Company ESPP shall be amended to reflect the transactions contemplated by this Agreement, including the substitution of Parent for Company thereunder to the extent appropriate to effectuate the assumption of the Company ESPP. As of immediately after the Effective Time, a maximum of up to
16,449,696 shares of Parent Common Stock (less the number of shares of Company Common Stock issued under the ESPP with respect to any purchase periods ending prior to the Effective Time, multiplied by the Exchange Ratio) will be authorized for issuance to employees of the Surviving Company and its Subsidiaries under the Company ESPP, as assumed by Parent. Nothing herein shall limit Parent's right to amend or terminate the Company ESPP following the Effective Time in accordance with its terms.

ARTICLE III
MISCELLANEOUS

Section 3.1  No Further Amendment. Except as expressly amended hereby, the Merger Agreement is in all respects ratified and confirmed and all the terms, conditions, and provisions thereof shall remain in full force and effect. This Amendment is limited precisely as written and shall not be deemed to be an amendment to any other term or condition of the Merger Agreement or any of the documents referred to therein.

Section 3.2  Effect of Amendment. This Amendment shall form a part of the Merger Agreement for all purposes, and each party thereto and hereto shall be bound hereby. From and after the execution of this Amendment by the parties hereto, any reference to the Merger Agreement shall be deemed a reference to the Merger Agreement as amended hereby.

Section 3.3  Governing Law. This Amendment shall be governed and construed in accordance with the laws of the State of Delaware applicable to contracts made and performed entirely within such state, without regard to any applicable conflicts of law principles.

Section 3.4  Separability Clause. In case any one or more of the provisions contained in this Amendment should be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected, impaired, prejudiced or disturbed thereby.

Section 3.5  Counterparts. This Amendment may be simultaneously executed in several counterparts, and all such counterparts executed and delivered, each as an original, shall constitute one and the same instrument.

Section 3.6  Headings. The descriptive headings of the several Sections of this Amendment were formulated, used and inserted in this Amendment for convenience only and shall not be deemed to affect the meaning or construction of any of the provisions hereof.
IN WITNESS WHEREOF, Company and Parent have caused this Amendment to be executed by their respective officers thereunto duly authorized as of the date first above written.

MERRILL LYNCH & CO., INC.
By:
Name:
Title:

BANK OF AMERICA CORPORATION
By:
Name:
Title:
IN WITNESS WHEREOF, Company and Parent have caused this Amendment to be executed by their respective officers thereunto duly authorized as of the date first above written.

MERRILL LYNCH & CO., INC.

By: 

Name: 
Title: 

BANK OF AMERICA CORPORATION

By: 

Name: David M. Belk
Title: Senior Vice President
IN RE: EXECUTIVE COMPENSATION INVESTIGATION

BANK OF AMERICA - MERRILL LYNCH

EXAMINATION of JOHN ALEXANDER THAIN,
taken at the Office of the New York State Attorney
General, 120 Broadway, New York, New York, on
February 19, 2009 at 10:10 a.m., pursuant to a
Subpoena, before SARA FREUND, a Shorthand Reporter
and a Notary Public of the State of New York.
billion and $25 billion. The structures that we're being talked about in terms of the potential rescue of Lehman posed significant difficulties, and we were aware that Lehman was talking to at least two potential acquirers, Bank of America and Barclays.

Mid-morning on Saturday, I became very concerned that the combination of the potential loss in the commercial mortgage portfolio, and the complications of putting any type of rescue together without any form of government assistance made it likely that Lehman would not, in fact, be rescued; that it would fail. And I was very concerned about the impact a Lehman failure would have on the market generally upon all the financial institutions, but, in particular, on Merrill Lynch.

Q. That would be a good place just to ask you to focus a little more on what occurred on Saturday morning that heightened your concern then that led you to think that Lehman might fail.

A. It was a combination of the fact that the size of the loss was of a magnitude that it was going to be difficult to put together a rescue package, and the structures that could possibly do that were very difficult to put together with that...
group. If you go back to long-term capital -- and I was part of the group that put that rescue package together -- that was $4 billion, and that was difficult enough. The idea of putting together, whether it's $15 billion or $25 billion, and making that actually happen in a relatively short period of time, it was my personal assessment that that was very unlikely. And the combination of Tim Geithner, Hank Paulson and Chris Cox, continued to maintain that the government was not going to provide any form of assistance, so I felt that I needed to give Merrill Lynch alternatives in the event of a Lehman bankruptcy. So mid-morning I placed a phone call to Ken Lewis saying that we would like to engage in a conversation about a strategic transaction, and he said "Fine" -- he was, I believe, at his home in Charlotte -- and he said, "I can be there mid-afternoon," and we agreed to meet at 2:30 on Saturday afternoon at their corporate apartment in Time Warner.

Q. Before we go into the conversation with Mr. Lewis, could you just go through a little bit on what your thinking was, at the time, about the impact a Lehman failure would have on Merrill?
A. It's always a little bit difficult to remember exactly what your thinking was on a particular day because many things had transpired since then, and, of course, I now know what the real impact was of the Lehman failure, but my best recollection of Saturday was that because of the problem assets on Merrill's balance sheet and because of the funding requirements on Merrill's balance sheet, that the likely impact of a Lehman bankruptcy would focus on Merrill next as opposed to Morgan Stanley or Goldman Sachs, and that we would likely have very serious funding problems beginning Monday morning.

Q. And if you could flush that out a little bit. What would the funding problems be, and what would they lead to?

A. The types of funding problems come from the financing of the balance sheet, in particular, the financing of less liquid assets through REPO, through unsecured funding, and also the financing that's provided through the prime brokerage businesses. Although we were continually building up our liquidity positions, the size of liquidity drains that were possible, and the inability to
finance positions in the REPO market, and the
potential withdrawal of cash out of the prime
broker, all of which had a significant risk of
causing a liquidity problem at Merrill --

MR. CORNGOLD: In light of what happened
to Lehman, why was that a premise -- that
is, if Lehman would come up with a structure
to preserve Lehman, wouldn't you have the
same problems on Monday morning?

THE WITNESS: The problems would still
have been there, my best guess, but to a much
lesser extent. So the bankruptcy at Lehman,
in my view, caused a complete shutdown in the
credit markets. And so if Lehman had been
rescued, yes, we would have had funding
issues, and, yes, we would have had continued
to focus a lot on our liquidity position --
which we have been really over the course of
the entire year -- but the failure of Lehman
really caused a complete unwillingness of
financial institutions to lend money to each
other, to provide financing for each other,
and, so whatever might have happened --

MR. CORNGOLD: And you anticipated -- I
mean, you're now doing the what happened as opposed to what you were anticipating -- you anticipated that the failure of Lehman would have caused a shutdown.

THE WITNESS: No. I anticipated that the failure of Lehman would have caused very severe problems for Merrill Lynch.

Q. By the way, did you have any kind of task force or similar groups set up to, in fact, game out the position Merrill Lynch would have been in if Lehman failed?

A. We were constantly focused on our own liquidity position and constantly focused on the difficulties in the marketplace. We had not, prior to that weekend, specifically gamed out what would happen if Lehman would have failed.

MR. CORNGOLD: Did you know when you called Bank of America that their transaction with Lehman was dead -- or was it dead at that time?

THE WITNESS: I did not know.

MR. CORNGOLD: So wasn't your call to Bank of America, wouldn't that have contributed to the problem that you
J. A. Thain

MR. CORNGOLD: But you didn't know that when you called.

THE WITNESS: That's true. I did not.

Q. Did you have an assessment of how long Merrill would have if it didn't do a quick marriage with someone else in the event --

A. In the event of a Lehman bankruptcy? Well, you're asking me to predict what might have happened -- which, of course, I can't necessarily do -- but these type of liquidity problems become critical within days. And, in fact, Lehman, as an example, Lehman's liquidity problems accelerated very, very quickly.

Q. So, at this point, finding a partner for Merrill became a priority?

A. Correct.

MR. CORNGOLD: And -- I'm sorry -- that was true whether Lehman was going to do a transaction that preserved it or not, I take it.

THE WITNESS: No. I don't agree with that.

MR. CORNGOLD: It's sort of a game theory thing. You make this call on Saturday
J. A. Thain

last were, the chronology was that you had spoken
with Ken Lewis and set up a 2:30 meeting at the
Time Warner building.

A.  Yes.

Q.  Did that occur?

A.  Yes.

Q.  Why don't you pick up the time line
there?

A.  So we got together; we talked about the
logic of the business fit and the strategy of the
businesses of Bank of America and the businesses of
Merrill Lynch. I said to him that I was interested
in selling a 9.9 percent stake and getting a large
credit facility. He said to me that he really
wasn't interested in buying a minority stake, but
he would be interested in buying the whole company.
I said to him, "Well, I didn't come here to sell
the company," and we jointly agreed to pursue both
paths, a hundred percent and 9.9 percent, and we
set our various teams off on a due diligence and
structure process.

Q.  And what happened after the meeting?

A.  I mobilized our team and he mobilized
his team, and they began a process of due diligence
and structure. That continued really all through Saturday afternoon, Saturday evening, Sunday.

Q. That sort of is a very condensed due diligence cycle. Can you speak to that, how the due diligence was accomplished in those two days?

A. I was not party to that. That was conducted on our side by people who work for me, and I can't say on Bank of America's side.

Q. On your side, who reported to you on that issue?

A. Primarily Greg Fleming.

Q. Did you have discussions with Greg Fleming about how the due diligence for a deal with Bank of America would be accomplished in, basically, a Saturday/Sunday time frame?

A. Greg Fleming is a very experienced financial institution investment banker -- that's where he came from. I don't recall a specific conversation about the due diligence process, but I was quite comfortable that he was capable of conducting that.

Q. How about from the side of Bank of America? Meaning, what was your understanding of what Merrill did to give Bank of America
attention to is page 293 of the document, which is towards the back. There is a bullet point called "Section 5.2B."

A. Is this part of the schedule?
Q. Yes.

So you now have page 293 in front of you?
A. I do.
Q. Did you participate in the negotiation of this provision?
A. I did not.
Q. Were you aware of this provision? When I'm saying "this provision" I'm talking about Section 5.2B on page 293 regarding the "Variable Incentive Compensation Program."
A. I was aware that it was being negotiated.
Q. If you could tell me what your understanding was of what was being negotiated here.
A. My understanding of what was being negotiated, was to provide for us, Merrill Lynch, to be able to pay bonuses to our employees prior to the deal closing, and that this provision set a cap
J. A. Thain

on the amount that we could pay out in those bonuses. The main operative cap is the expense number, the $4.5 billion number, and it also specified the mix of cash and stock that we would use. And the expectation was that these bonuses would be paid out prior to the deal closing, and that deal closing was expected to be on or around December 31.

MR. LAWSKY: You said you were aware that this was being negotiated. How did you know?

THE WITNESS: Through discussions with, primarily, Greg Fleming.

MR. LAWSKY: Can you talk about those discussions?

THE WITNESS: I was aware that they were negotiating the ability to pay our employees for 2008 -- I was aware that they were negotiating.

MR. LAWSKY: Do you remember the meeting with Fleming about this topic in particular?

THE WITNESS: I do not.

MR. LAWSKY: You didn't have a separate meeting about it; it just came up as one of
say, is that the number in the merger agreement was a cap?

A. Yes.

Q. And you could go lower, but you couldn't go higher.

A. Correct.

Q. And with respect --

MR. LEVANDER: You could always vary a provision with the consent of the other side, but without Bank of America's consent you couldn't go over cap.

Q. I don't see anything in here particularly about the timing issue, but you also -- is it fair to say that you also had the right to have bonuses paid after December 31?

Let me put that question in a slightly different way. There was nothing in the merger agreement that required you to pay out bonuses by December 31, 2008; is that right?

A. My understanding of the way this works -- I'm obviously not a lawyer -- is that this was providing for bonus payments prior to the deal closing -- whenever that might be -- and so the timing of the bonus payments would be tied to the
transactions closing, which was expected to be on or about the 31st, but the 31st itself isn't the operative date.

Q. The last sentence of Section 5.2 says "The allocation of the 2008 VICP among eligible employees shall be determined by the company in consultation with parent." Is the concept of consultation one that you were familiar with prior to entering into this agreement?

MR. LEVANDER: I'm not sure what you mean by that.

A. I don't know how to answer that. I understand the meaning of the word "consultation."

Q. Had you experienced other deals where you had a right to consult on an issue prior to a merger?

A. I don't really remember. I have only been involved in a relatively small number of mergers. In the case of the merger of the New York Stock Exchange and Euronext, I don't remember if there was a particular provision in which we had the right of consultation or not.

Q. What was your understanding of what Bank of America was entitled to do pursuant to its right
of consultation?

A. I don't think that was the way we worked with them. We were not operating under what their technical rights were. They were acquiring us. Our behavior with them was complete transparency. They 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. Now, technically, of course, our Compensation Committee ultimately approved the bonus pool, but they had complete access to the information and could provide input on it.

MR. LEWIS: When you say they had "access," can you be more specific? Was it Andrea Smith, Steele Alphin; was it other people?

THE WITNESS: It was primarily Andrea Smith and Steele Alphin because that was their jobs, but any of the other Bank of America people, if they asked for information, would get it. And so Neil
Cotty, who was the acting CFO, and Joe Price, who was Bank of America's CFO -- we were in the mode of anything they wanted to see we would provide to them.

MR. LAWSKY: Do you know whether Neil Cotty and Joe Price, in addition to Andrea Smith and Steele Alphin, were getting that kind of individual data?

THE WITNESS: Andrea Smith had name-by-name bonus information.

MR. LAWSKY: Did you talk to her directly about that?

THE WITNESS: Yes. For certain individuals.

Q. And we'll get back to that. One thing I want to understand. I understand that if someone
J. A. Thain

reached out to you and asked you a question, you
would answer the question. Were there any
employees at Bank of America that affirmatively
said, This is what we're doing with comp bonus
payments?

A. I had an explicit conversation with
Steele Alphin on the aggregate bonus pool and on
the cash/stock mix, and Andrea Smith was provided
with name-by-name numbers at least for some subset
of the employee base.

Q. I want to step away from the merger
agreement for a second and get some general
understanding of the way Merrill Lynch had
historically allocated bonuses prior to 2008.

MR. LEVANDER: You understand he comes

MR. MARKOWITZ: Yes, I do.

Q. I'm assuming that you spoke to people
about how things were done historically, and if you
have no idea you can answer so.

Do you have an understanding of how
bonuses were paid historically?

A. Not to any significant degree.

Q. Well, how about, do you have an
internally what we expect the quarter to be, but that also gets constantly refined. So whatever happens every single day changes what the expectation is for the quarter.

Q. As you mentioned, there were a series of Comp Committee meetings in the fall and December of 2008 where the number gradually came down a few times. Do you have a recollection of any of those meetings in particular?

A. Not specifics so that I can say on such-and-such a day we had the following such-and-such discussion.

Q. As the number was coming down during the fall and December of 2008, what was the reason for the constant takedown, so to speak?

A. Two primary drivers: One was the continued decline in the expectation for what the industry was going to do, and the second was the continued decline in Merrill's performance.

Q. And is there a third -- and by that, is there a third, in that is Bank of America, through any of its employees, asking you to lower the bonus pool?

A. The answer is, they are providing input
to us on the size of the bonus pool and on the cash/stock mix. So I had a specific conversation with Steele Alphin where he expressed the view that they would like the bonus pool to be less than the expense number, less than $3.5 billion, which I agreed with.

Q. Where was Merrill at the time that you had this conversation with Mr. Alphin?

A. My recollection is that we were already moving there, so there was no real difference between where we were moving anyway and where he had expressed their desire for us to be. The specific change that they asked us to do on the cash/stock mix was at their request. We would not have changed the 60/40 to 70/30 other than they asked us to.

Q. Why did they ask you to do that?

A. Again, you're asking me to speculate. You should really ask them that.

Q. Did Mr. Alphin tell you why?

A. I don't recall a specific conversation with him. However, the two reasons that I generally recall are: One is that moving to a higher percentage of cash moves more of the expense
that took place on November 11, 2008?

A. Not specifically because these materials were prepared and revised numerous times.

Q. If you could just turn your attention to page 55, which is the year-end calendar, I see here it says on December 31 "cash awards distributed." Do you see that entry?

A. I do.

Q. What does that make reference to?

A. I believe that is the payment of the cash portion of the VICP pool.

Q. So by this time, had it been decided that Merrill Lynch would pay out the cash components of its bonus before the year end?

A. When you say "decided," the expectation was that the bonuses would be paid prior to the deal closing; the expectation was that the deal would close on or about December 31, and this document is consistent with that.

Q. When did you first have the expectation that payments would be made before the deal closing?

A. When we signed the merger agreement and the schedule to the merger agreement.
look. Ultimately, the mortgage area was run by Mike Nierenberg, but he was not there for the full year.

Q. The mortgage area, was it called "mortgage"?

A. Yes. But there are other places that are mortgage-related assets, so there is commercial mortgages and there are -- historically, there were a couple of proprietary groups that held mortgage-related assets. Then there is also a credit area that had credit-related assets, and there are also historically a couple of proprietary groups that have credit-related assets. So that's why it's easier to think about it as mortgage and mortgage-related assets and credit and credit-related assets rather than each of the individual groups.

Q. We were trying to go through earlier this morning the progression of coming up with the bonus pool. When did Merrill Lynch come up with its bonus pool for 2008 bonuses?

A. The bonus pool was finalized at the Comp Committee meeting on December 8 and ratified by the board.
J. A. Thain

Q. Did you participate in that meeting?
A. I did.

Q. And with respect to the December 8 meeting, what was the final pool that was decided upon?
A. The final pool was approximately $3.2 billion.

Q. And you're speaking in terms of expense?
A. Right. With a 70/30 cash/stock split.

Q. And I have, from information provided by Bank of America, something that says $2.5 billion in cash and $3.62 billion total pool. Does that sound about right to you?
A. That sounds about right.

Q. As of December 8, where was Merrill Lynch with respect to its year-to-date losses?
A. I don't know the number off the top of my head because I don't happen to know exactly what that number was. We would have had October-November results and a couple of days in December.

Q. Would you have projected results to date?
A. I don't think you meant to ask it that
estimate losses were going to be?

A. First of all, the bonus recommendations are the responsibility of the Comp Committee. But to the best of my recollection, I would have known where we stood as of that point in time when we were making those recommendations.

MR. LAWSKY: Is there a projection on here for what the end of the year will be? Is that what that is, or is that where you are as of November 8 -- the 19 and the 32 number.

THE WITNESS: It appears to me to be the year-to-date estimate.

MR. LAWSKY: To November 8th.

THE WITNESS: Correct.

MR. LAWSKY: Is there a projection in here for the year where you're going to end up?

THE WITNESS: Not unless I page through this, I'm not going to know that.

MR. LAWSKY: Do you recall when you went into the November 8 meeting, had your team worked out an estimate of what you thought things would look like at the end of the
J. A. Thain

year?

THE WITNESS: As of this date, December 8th, we were estimating the quarter to be approximately -- to the best of my recollection, as of this date, we were estimating the quarter to be approximately $14 billion loss pretax, approximately $9 billion loss after tax.

MR. LAWSKY: So then you would have had a yearly estimate in your head, as well, since you already know the first three quarters. You add the 14 to the three quarters previous, which I think -- were you down 5 after the first three?

THE WITNESS: No.

MR. LAWSKY: Were you around 26 for the year then?

THE WITNESS: I don't want to guess.

MR. LAWSKY: Do you remember?

THE WITNESS: I don't remember the number. I remember the quarter number. But you're correct; you could just add them up.

Q. So the actual fourth quarter loss was about $15 billion?
J. A. Thain

A. After tax.

Q. So it actually went down a little bit -- strike that.

You didn't have the number yet as of December 8; you had just year-to-date through November in terms of $19 billion here?

A. No. You're mixing up the numbers. This number appears to me to be the quarter to date. You then asked me a question about what the estimate for the fourth quarter was as of this date, which I told you my recollection is $14 billion pretax, $9 billion after tax. The final number for the fourth quarter was ultimately, approximately $21 billion pretax, $15 billion after tax.

Q. Understood.

MR. LAWSKY: Let's stop there for a second because I missed this. So the estimate on December 8 was 14 pretax; it ends up at 21 pretax. So the $7 billion delta, how do you explain that difference? Or you just couldn't predict what was going to happen with the rest of December.

THE WITNESS: Right, right.
J. A. Thain

is determined to reward performance and to retain people, and those numbers would have no impact either on individual performance or on retention.

Q. Did you, at any time between December 8 and December 31, say, "Wait a minute, we have billions of dollars in losses more than we thought. We need to rethink our bonus determination"?

A. We did not change our bonus determination substantially -- in any significant way -- after December 8.

Q. Did you consider changing the bonus determinations after December 8 as a result of worsening earnings?

A. Again, I'm going to repeat what I said before. Because of the $2.3 billion and the $650 million that were not related to any individual performance or any retention element, the answer is no.

Q. So you didn't even consider it?

A. We did not consider changing the bonus pools after December 8th.

Q. Did you advise anyone from Bank of America of the deteriorating financial condition of Merrill Lynch between December 8 and December 31?
J. A. Thain

A. Bank of America had daily access to the exact same financial information that I had.

MR. LAWSKY: Access is different -- and I understand your answer; I just want to draw down on it a little bit -- access is different than sort of having conversations with you or your guys. Was that also happening in terms of you updating them on how things were going?

A. The acting chief financial officer, Neil Cotty, sat in meetings and discussions and was totally up-to-speed as to what was happening.

MR. LEVANDER: That impairment of good will, is that a cash item or a non-cash item?

THE WITNESS: Non-cash item.

Q. Did anyone from Bank of America between December 8 and December 31, either to you directly or to your knowledge, suggest that Merrill Lynch should further reduce its bonus pool from where it had been established?

A. Not to my recollection or knowledge.

Q. Did you have any discussions about that topic with anyone from Bank of America even if they didn't say that you should lower it?
J. A. Thain

carrying -- I don't know what the exact number was -- $50 billion, $60 billion, $70 billion worth of cash. The availability of cash was never an issue.

Q. Were the bonus awards that was determined on December 8 at all impacted by your understanding that Merrill would be taken over by Bank of America?

A. I can't answer that because the bonuses and the ability to pay the bonuses were tied to the transaction. If we hadn't done the transaction with Bank of America, we would have done something else. And the bonus levels were determined based upon what was necessary to both reward and retain the franchise.

Q. I just want to go back. With respect to the timing issue, who at Bank of America did you have conversations with about the timing?

A. The timing --

Q. Meaning, the December 31 payout as opposed to the following year.

A. The timing, as we talked about before, was determined when we signed the merger agreement. The timing was contemplated then, in September, to be prior to the close, and the expectation was
always that the close would be on or around December 31.

MR. LAWSKY: Why? I'm still not clear on why it was important to go in December rather than January with the bonuses.

THE WITNESS: When you say December or January, whether it was December 31 or January 1 or 2, that isn't particularly relevant. It was relevant that the bonuses be paid prior to the closing, so that the bonuses would be determined by the business people who were running the businesses for the entire year.

MR. LAWSKY: But Bank of America could have figured out with your help, I assume, bonuses in January for the prior year. They had access to the books, as you said.

THE WITNESS: This was part of the deal that they and we negotiated.

MR. LEVANDER: He's already testified that by their requesting that it go from 60/40 to 70/30, they were trying to get more expense in Merrill's fourth quarter than their first quarter.
J. A. Thain

if we do this at the same time; we're going to be one company, and this way all of our combined employees get their payments at the same time?

A. I don't recall any such discussion.

Q. Did you have any discussion that there might be some integration issues if some employees were getting paid ahead of other employees?

A. No. We really didn't have that discussion -- to the best I can recollect. We did have discussions along the lines of lining up levels of compensation to not create those integration problems. As a matter of fact, Andrea Smith suggested some specific changes to accomplish exactly that, to line up compensation levels, but there was never a discussion as to the timing.

MR. LAWSKY: I'm getting lost on the time line a little with Andrea Smith. When you're saying she's making suggestions to particular people's numbers and aligning things, is that pre to the December 8 Comp Committee meeting where the board gives thumbs-up to the numbers?

THE WITNESS: To the best of my recollection, no, it's after. The pool gets
J. A. Thain

set on December 8, and then the individual
numbers get set after that over the course of
the next week or so.

MR. LAWSKY: And it was in that process
where she had a look-see at everyone's
number, and she was having input into them?

THE WITNESS: Correct. She didn't
necessarily have a look at everyone's number,
but she had access to everyone's number.

MR. LEVANDER: Did she have input before
December 8?

THE WITNESS: She was part of the
discussions of the bonus levels. I don't
remember her specific input.

MR. LAWSKY: This is news to me. I
didn't realize -- I thought everything was
set; as of the December 8 meeting the board
votes. But you're saying now there is a week
lag where the pool is set, but the individual
numbers are still getting worked out.

THE WITNESS: Yes. That's actually one
of the reasons why the numbers turn out to be
slightly different than the numbers that get
approved on December 8 because when you do
J. A. Thain

the individuals it doesn't come out exactly right.

MR. LAWSKY: And then you have to go
back to the board with those individual
numbers or back to the Comp Committee?

THE WITNESS: Certain individual numbers
get approved at a final Comp Committee
meeting, which was sometime in December.

Q. Did Andrea Smith ever sit down with you
before the end of 2008 and indicate to you what
certain types of employees make at Bank of America
in certain types of positions?

A. Yes.

Q. For example, a Bank of America equity
analyst would make about this kind of money -- that
type of a thing.

A. Yes. It wasn't equity analyst -- but
Bank of America HR person, Bank of America Risk
person. Yes.

Q. Which categories did she go through with
you?

A. I don't recall specifically, but it was
things like REDACTED.

Q. And did you then compare that in your
own mind with what -- strike that.

Did you share with Andrea Smith what the comparable people at Merrill made in those positions?

A. Yes.

Q. And how did it shake out?

A. This discussion is what led to certain changes in the comp numbers where we typically brought the Merrill number down to be more in line with the Bank of America number -- I'm sorry, one other area which I just remembered is the Communications and PR area.

Q. But in each of the areas, as a general matter, the Merrill employees in the same positions were earning more than the Bank of America people in the same positions?

A. You can't make that blanket statement, but in the infrastructure parts of the business that was generally true.

MR. LAWSKY: Did Andrea Smith focus in on any particular people, do you recall, whose numbers she thought were too big?

THE WITNESS: She did --

MR. LAWSKY: Or too small?
THE WITNESS: I don't recall any of them being too small. Yes. She did have some individuals who she thought were high, who we changed and brought down.

MR. LAWSKY: Who do you remember of those people?

MR. LEVANDER: I've been directed not to disclose, by the company, individual names other than the names of the top people who are under Section 16. We were directed by Bank of America counsel. If you want to get on the phone with Mr. Liman --

MR. LAWSKY: If you don't want to tell us the names, you can just say "I don't want to tell you the names."

MR. LEVANDER: He has no problem telling the names. We were directed by counsel for Bank of America, and I'm following that direction.

MR. LAWSKY: I'm asking, Do you want to give us the names?

MR. LEVANDER: He's given you the category --

MR. LAWSKY: I'm not asking you for the
J. A. Thain

numbers that people got. I'm asking who
Andrea Smith asked numbers to come down for.
Are you telling me Bank of America doesn't
want you to disclose that?

MR. LEVANDER: That's my understanding,
but I'll tell you what. At the next break
I'll try to find out if that's what the
direction was.

MR. LAWSKY: Let the record reflect the
witness is refusing to answer.

MR. LEVANDER: At direction of counsel
-- at the direction of Bank of America's
counsel.

MR. LAWSKY: I'm not calling Mr. Liman
because it's your deal with him, but if you
can work that out it would be great.

(Exhibit 4 was marked for
identification.)

Q. I'm handing you what's been marked as

MR. LAWSKY: Let me follow up with one
thing: Was it your understanding that Miss
Smith was speaking with, if you know, with
Mr. Alphin regularly based on your
J. A. Thain

Liman's objections are. All I know is, he's
given me a direction. Mr. Thain has
confidentiality obligations even though he's
an ex-employee; those exist. Therefore,
let's go on.

MR. LAWSKY: Let me try to understand a
few things. Have you entered into any type
of severance agreement with Bank of America?

THE WITNESS: I have not.

MR. LAWSKY: So with respect to -- and
earlier, were you, in fact, asked to leave?

Is that the correct characterization?

THE WITNESS: Yes.

MR. LAWSKY: Post departure, has there
been any -- even if not in writing -- any
sort of agreements or joint agreements or any
kind of cooperation agreement with Bank of
America?

THE WITNESS: Not with me.

Q. I want to switch gears a little bit and
go back to the fourth quarter losses. Did you ever
consider whether Merrill Lynch should disclose its
losses to its investors?

MR. LEVANDER: In what period of time?
MR. MARKOWITZ: The fourth quarter of 2008.

A. Merrill Lynch, as a policy, doesn't make projections, doesn't give guidance and doesn't disclose interim results.

Q. And a lot of firms have that and depart from that policy in times when there's a serious deviation, and given the deviation that was occurring in the fourth quarter of 2008, did you consider whether or not it was appropriate to make a disclosure?

A. The market conditions were generally known, and we would not have disclosed interim results in that fourth quarter.

Q. So you did not consider doing that?

A. That discussion topic of interim results was one that comes up periodically, but we maintained that since we don't give guidance, and since we don't give projections, and since we don't disclose interim results, that it would not have been appropriate to do so then.

Q. Did the issue come up in the fourth quarter of 2008 of whether or not it was appropriate to disclose the losses that were
J. A. Thain

accumulating on the books?

A. I don't recall any specific discussion about that topic.

Q. How about a general recollection?

A. There was some discussion about the results, and there is a discussion every Monday about the results, which include our general counsel. So there are always ongoing discussions about our results, but I don't recall any specific discussion about do we need to disclose.

Q. Did anyone approach you and say, "I think we've got to make an announcement about where we were given the quarter"?

A. No. Not to my recollection.

Q. Did anyone discuss whether -- strike that.

Did you consider whether Merrill Lynch should disclose its departure from prior practice in issuing bonuses before the end of the calendar year?

MR. LEVANDER: I'm not sure what the departure of prior practice was. If you want to ask the question whether they considered disclosing the payments of bonuses in
J. A. Thain

December on or about December 31, that's fine.

A. I don't recall any discussion about disclosing the timing of payments of the bonuses.

Q. Did you consider disclosing that you'd issue the bonuses -- made compensation bonus awards, and several billions in additional losses had accrued after setting those bonuses?

A. Ask the question again, please?

Q. Did you consider disclosing after December 8, and you had set bonus awards, that bonus awards had been set, and since that time there had been several billion dollars in losses?

A. I don't recall that discussion at that time.

Q. Is that something that you think an investor would want to know?

A. Investors were aware that we were accruing bonuses, and, as I said before, we don't make projections, we don't give guidance, and we don't release interim results.

Q. Do you think investors would want to know that you set bonuses based on a number even though you knew there were multiple billions of
dollars in losses that incurred after you set the number?

A. I'm going to answer the same way. Investors were aware that we were accruing bonuses, and we don't disclose interim losses as a matter of policy.

Q. Investors knew that you were accruing money for bonuses, but they didn't know that you were going to pay them out early, did they?

A. The concept of paying it out early, as I said before, we never contemplated disclosing the timing of the payment of the bonuses.

Q. Let me ask the question in a more neutral way: Would an investor in Merrill Lynch have an understanding that Merrill Lynch would be paying bonuses before the end of calendar year 2008?

A. Since the investors were aware that we were accruing bonuses, and the investors would be aware of the P and L impact of those payments, I don't see that the specific timing is relevant.

MR. LAWSKY: Let's draw a little simple line. If that's what's going on in the economy in general, wouldn't an investor want
J. A. Thain

and Bob McCann.

Q. And what was the thinking behind awarding that group of people a strategic transition payment?

A. The discussion of that as an option, which, as I said before, was ultimately rejected, was compensating the senior executives for executing a transaction that was in the best interest of Merrill shareholders.

Q. And you supported the payments?

A. No. It was a discussion we had, and in the end, I recommended to the board that I receive no bonus. We then had a discussion about the other four members, and in the end, I and they also recommended that they receive no bonus.

MR. LAWSKY: Do I have this right? So the five people you're willing to talk about today all got no bonuses?

THE WITNESS: Correct.

Q. The conversation of these strategic transition payments started in November; is that right?

A. I don't recall exactly but sometime in that time frame.
EXAMINATION of KENNETH LEE LEWIS,
taken at the State of New York, Office of the
Attorney General, 120 Broadway, New York, New
York, on February 26, 2009 at 4:30 p.m., before
SARA FREUND, a Shorthand Reporter and a Notary
Public of the State of New York.
Q. Do you have any questions at this time?
A. No.

MR. MARKOWITZ: Counsel, please identify your appearance.

MR. LIMAN: Lewis Liman, James Wyatt, Trisha Lawson and Catharine Slack for the witness.

MR. MARKOWITZ: Thank you, Counsel.

Q. Could you please state your Social Security number for the record?
A. REDACTED.

MR. MARKOWITZ: Counsel, I know we've been having a discussion about if Bank of America will provide a list of the top 200 bonus recipients of Merrill Lynch, and I just want to be clear that Bank of America is refusing to do that.

MR. LIMAN: Let me do something on the record. We had reached an agreement with the office of the attorney general to produce information in redacted form, which we did.

MR. LAWSKY: Which information did you produce?

MR. LIMAN: Some bonus information in
redacted form, which we did several weeks ago following a conversations with the attorney general's office. We did receive a request the other day. We have refused to produce it. We will produce information if the attorney general's office agrees to keep it private and confidential and agrees to the court order that is currently in place.

Q. With respect to the court order that's in place, I believe yesterday several attorneys -- or at least an attorney from the New York attorney general's office, I think it was Ben -- offered that any production of specific information would be maintained subject to the temporary confidentiality order put in place by Judge Fried on Tuesday.

MR. LIMAN: If you're agreeing that that could be made permanent then we should discuss it.

MR. LAWSKY: What do you mean "made permanent"?

MR. LIMAN: Meaning that you will propose the order staying in place, and we will have authority to enforce the order.
MR. LAWSKY: Do you mean staying in place regardless of what the court does?

MR. LIMAN: Correct. I understand you're challenging the order. If you decide not to challenge the order and to agree to what the judge has put in place, then we will take it back and confer with the legal staff at Bank of America, and I believe we will be able to produce the information.

MR. MARKOWITZ: Just to be clear, we're not challenging anything right now. The order was a temporary order that was put in place to allow you to make an application regarding confidentiality, and what we are doing is saying subject to the time when you can seek a court order of confidentiality order we would agree to keep it confidential to preserve your rights.

MR. LIMAN: That's what I understand. To those circumstances we are not agreeing to produce the document, the unredacted information.

MR. LAWSKY: On what grounds?

MR. LIMAN: Do we need to waste the
K.L. Lewis

witness's time?

MR. LAWSKY: No. But let's just do this. Frankly, if you lose in court, you're going to have to give it to us anyway.

MR. LIMAN: So I'll address it in court.

MR. LAWSKY: Fair enough. I don't want to waste your time. We're going to serve you with a subpoena now.

MR. LIMAN: That's fine.

THE WITNESS: We got off to a great start.

MR. LAWSKY: We're asking for this information from your lawyers for a long time, Mr. Lewis. It's surprising it hasn't been provided.

MR. LIMAN: That, actually, is not true at all.

MR. LAWSKY: The letter was 2 1/2 weeks ago.

Q. Mr. Lewis, I have some questions about the Bank of America merger with Merrill Lynch. Did there come a time when you considered undoing the merger between Bank of America and Merrill Lynch?

A. Yes.
K.L. Lewis

Q. When did you first consider doing that?

A. I want to make sure I get the date right. I'm pretty sure it was December the 13th -- if that's a Sunday because I was in New York, and I was about to go home -- and what triggered that was that the losses, the projected losses, at Merrill Lynch had accelerated pretty dramatically over a short period of time, as I recall, about a week or so.

Q. How did you come to learn of that?

A. Joe Price, our CFO, called me.

Q. Take me through what Mr. Price communicated to you on that call.

A. He basically said what I just said: The projected losses have accelerated pretty dramatically. We earlier on had more days in the month, so that it was a possibility that at least some of the marks could come back, but now we had not very many business days because Christmas was coming and all of that. So we became concerned just of the acceleration of the losses.

Q. What did Mr. Price tell you about the extent of the losses, basically?

A. He just talked about the amounts.
K.L. Lewis

Q. And what were they as of the time you spoke to Mr. Price?

MR. LIMAN: To the extent that you remember.

A. To the extent that I remember, the losses had accumulated to about $12 billion after tax.

Q. Anything else?

A. That was the whole focus.

MR. LAWSKY: Were you getting a daily P and L at the time?

THE WITNESS: We were getting projections. I was getting a P and L at Bank of America, but we were getting projections. I don't recall getting them every day, but I was either hearing about them and in some cases I saw them.

MR. LAWSKY: Can you explain, when you say a conversation with Price is what got you thinking this way, if you were getting these P and L's over time, what was it about the Price conversation which put you over the edge?

THE WITNESS: Just that that amount --
K.L. Lewis

I'm not sure I was getting them every day. I don't recall getting them every day because they were projections, not daily P and L's. So the concern was, we had had a forecast on December 5th, as I recall, of $9 billion, but $3 billion pretax was a plod (phonetic) just for conservative reasons; so what you saw was basically a 7 to 12 if you could go through the plod, and then you get to the $12 billion. So a staggering large percentage of the original amount in a very short period of time.

MR. LAWSKY: Just so the record is clear, I have your calendar in front of you, although you don't -- Counsel produced it. December 14 was on a Sunday. It says "depart to arrive 3:30." You're in New York leaving that day?

THE WITNESS: Yes.

MR. LAWSKY: So is that the day you have the meeting with Price?

THE WITNESS: Not a meeting, a phone call.

MR. LAWSKY: So Sunday, December the
Q. As of this time -- we spoke a little earlier about the Merrill Lynch 2008 bonus pool. When was the first time that you learned that Merrill Lynch decided to pay out its 2008 bonuses before 2009?

A. I don't remember the exact time.

Q. About?

A. I don't remember.

MR. LAWSKY: How did you learn that?

THE WITNESS: Steele Alphin told me.

MR. LAWSKY: And what do you recall about that conversation?

THE WITNESS: I recall that he said that he attempted to get them not to do that, but
that the board and John and the Compensation Committee had done it.

MR. CORNGOLD: So it had happened already.

THE WITNESS: Yes.

MR. CORNGOLD: So we're talking after Thanksgiving, do you believe?

THE WITNESS: I don't remember the exact date. Again, we were in the midst of issues with the economy and with the breakdowns.

MR. LAWSKY: Are you saying you wanted Merrill Lynch to pay out the bonus pool after the quarter ended end of December and pay it out in January?

THE WITNESS: First of all, that's our practice, and, secondly, to the best of my recollection, there were conversations by Steele, and, I was told, by Andrea, to get them to do it like we do it.

MR. LAWSKY: Andrea Smith, you mean?

THE WITNESS: Yes.

MR. LAWSKY: And those conversations, to your knowledge, predated their doing it on December 8th?
THE WITNESS: To the best of my knowledge. Yes.

MR. LAWSKY: Prior to December 8th did you have an expectation that Merrill Lynch would be paying bonuses in January?

THE WITNESS: It wasn't a focused, conscious assumption that they would, but I would have expected them to until they made their decision.

MR. CORNGOLD: Was it a practice in the industry to pay bonuses after the end of the year?

THE WITNESS: Actually, I don't know what others do. I just know what we do, and we pay them on February 15.

MR. CORNGOLD: You don't know whether other financial entities pay them before?

THE WITNESS: I do not.

MR. CORNGOLD: Have you ever heard of paying out bonuses before you know what your year end actually looks like?

THE WITNESS: I've heard it, but not investment banks. I've heard about commercial banks doing that.
K.L. Lewis

MR. CORNGOLD: They didn't stop him.

THE WITNESS: The way I've had our ability is described as this: In the first negotiations there was a ceiling set on how much they could pay. Then I was told that we could advise or consult -- I forgot the right word -- but we could not actually make a decision for them. That's reinforced -- what I've been told -- that as long as a company is a public company with a separate board and separate committees, that you cannot be perceived as running the company; therefore, you cannot be making decisions on their behalf.

MR. CORNGOLD: What would happen if you were perceived as running the company?

THE WITNESS: I was told -- I don't know if it's not legal or it's against some security law. I've always been instructed that you cannot be perceived to --

MR. LIMAN: I'm asking not to get into conversations you had with counsel.

MR. LAWSKY: But isn't it true that you sent a message to Thain that he was not to
K.L. Lewis

take a bonus higher than yours?

THE WITNESS: No. I did not send that message. All that I remember about that is, Steele related to me that there was a first conversation about -- please give me license on the number -- but a conversation about a $40 million bonus not tied to the company's loss, but tied to the deal getting done. I don't know all that happened, but I was told that -- I don't know if Steele did it or Andrea -- he was told very strongly that you should not do that; that you would damage yourself with the Bank of America board if you do that, and if you ever wanted a chance to be in the running for my job then that would eliminate it.

MR. CORNGOLD: Did you have an understanding that he was told that about when the bonuses would be determined, when the total bonus would be determined?

THE WITNESS: I don't know that. Then sometime after that -- I don't know how the progress was made or whatever -- I was told that there was an agreement that he should
K.L. Lewis

make something less than me, and then,
subsequently, as things got worse and worse,
I told our board that nobody in our team
would get anything. I think that was like
nine people, I think. I think he did it with
maybe two, three or three, four.

MR. CORNGOLD: You understood
specifically what the threat was to Mr. Thain
expressed about his bonus; is that correct?

THE WITNESS: The threat --

MR. CORNGOLD: The threat if you take
the 40 it's going to look bad for the board.

THE WITNESS: That's what Steele related
to me -- I don't know if he or Andrea related
-- that was relayed to him that that would
not be acceptable to our board. He would not
have a chance to succeed me if he did.

MR. CORNGOLD: But you don't know if
that threat was made with respect -- and
"threat" may be a bad word.

MR. LIMAN: You could say "if that
message would be conveyed" or something.

MR. CORNGOLD: If those consequences
were told to Mr. Thain about when the bonuses
K.L. Lewis

would be set and delivered.

THE WITNESS: I don't know. All I remember is that -- again, I don't remember if it was Steele or Andrea -- but they were pushing him to follow a methodology where he would pay them after.

MR. CORNGOLD: Did you say to either of them in words or substance, Tell him that if he pays the bonuses before January 1st, that's going to adversely affect his position with Bank of America's board?

THE WITNESS: I did not tell them that, and I don't know how strongly they said it, but I was told they were saying it pretty strongly.

MR. CORNGOLD: With respect to his bonus, you knew what they were saying with respect to his bonus, correct?

THE WITNESS: Correct.

MR. CORNGOLD: But you didn't know what they were saying with respect to the over $3 billion in bonuses that were being set for everybody else at Merrill Lynch?

THE WITNESS: No. I was told that
Andrea was helping John look at those bonuses, but I don't know anything more.

MR. CORNGOLD: And you knew that the expression of the consequences to Mr. Thain was successful in getting him to change his decision about his own bonus, correct?

MR. LIMAN: Would you mind asking him an open-ended question?

MR. CORNGOLD: I though I was asking an open-ended question. I guess I don't know what an open-ended question is.

MR. LIMAN: "Did you know" --

THE WITNESS: I don't know -- the $40 million bonus to one person when you had a loss clearly would have destroyed with our board. And so that's pretty severe.

MR. CORNGOLD: But you didn't think that $3-plus billion bonuses set before the company knew what the results were going to be for the company would have the same impact with your board?

THE WITNESS: I don't know what they said. I don't know how strongly they said -- all I know is, I was told that they urged him
very strongly not to pay them early. I don't know if they gave consequences like that.

MR. CORNGOLD: You didn't tell them to give consequences like that?

THE WITNESS: No.

MR. LAWSKY: We had other testimony that the early payment of the Merrill bonuses was contemplated back in September when the deal was struck. Is that false?

THE WITNESS: I have no recollection of time of payment.

MR. LAWSKY: Being an issue in the initial negotiations.

THE WITNESS: Right.

MR. LAWSKY: Were you involved in those negotiations?

THE WITNESS: No.

MR. LAWSKY: Were you involved in the September negotiations in general?

THE WITNESS: Yes.

MR. LAWSKY: Were you involved at all in the negotiations over the bonus provision with regard to the $5.8 billion?

THE WITNESS: I was not.
K.L. Lewis

THE WITNESS: First of all, you start with a portion of it that's predate because you have guarantees and signing bonuses, etc. I don't know enough about their individual contracts to know how many of those there were --

MR. CORNGOLD: It wasn't relevant --

MR. LIMAN: Let him finish.

MR. CORNGOLD: If I ever interrupt you before you finish an answer, please make sure that you finish the answer.

THE WITNESS: -- so you have guarantees, signing bonuses, and then there are individuals that you would be vulnerable to losing that would cause your revenue projections for the following year to be diminished.

(Recess was taken.)

Q. Staying on the topic of the Merrill Lynch bonus payments, after you learned -- you have the Joe Price conversation that we started talking about in the beginning of today's testimony where you learned about the fourth-quarter deterioration at Merrill, do you revisit the issue at all, or do
K.L. Lewis

you visit the issue of Merrill Lynch bonuses?

A. No. Again, put it in context of that issue, again, seeing the market deteriorating within our own company, seeing losses going up rising pretty rapidly, and beginning to wonder if we needed to cut our dividend. That's the context in which I was operating.

Q. That's why I don't understand. The question being, given year-end bonuses, bonuses are supposed to be based on -- to my understanding -- year's performance. You were learning that the year performance was going to be significantly worse than it had been before. Did you reach out, or have your people reach out to the Merrill people saying, You got to knock the number down?

A. I don't know if we did or we didn't, but I was concerned about some pretty big things going on.

REDACTED
K.L. Lewis

Q. I'm talking -- the bonuses weren't paid until December 31st.

A. Right. My point is, if you could think about the context in which I was operating, I was not thinking about when bonuses were paid.

Q. How about the amount of bonuses that were going to be paid?

A. I wasn't thinking about bonuses.

Q. Were you thinking about the integration of Merrill Lynch and Bank of America?

A. Some, but more about these other things.

MR. CORNGOLD: Even in December of 2008 wasn't $3.5 billion a material number?

THE WITNESS: I'm not saying it wasn't material. I'm saying I had people that I trusted and had great confidence in handling the issue -- and who I know are very conservative people.

Q. And they were working with John Thain to bring those numbers down? Is that your understanding?

A. It was my understanding that Andrea was making a lot of progress in getting the numbers to him.
K.L. Lewis

THE WITNESS: No. But I couldn't tell you for a fact that it is.

Q. Do you recognize Miss Morrow's signature?

A. I don't remember seeing a full signature of Randall. I do recognize these law firms.

MR. LAWSKY: I want to switch to the Merrill bonuses, the individual names. You were saying you don't know anyone on here. I believe your testimony is -- correct me if I'm wrong -- the only bonuses you would personally be aware of for 2008 would be direct reports to you, and they all got zero.

THE WITNESS: I may know somebody on there.

MR. LAWSKY: You can't match them up -- you can't match their bonus. If I named your top investment banker, could you tell me what bonus he got?

THE WITNESS: I couldn't tell you where he was on that.

MR. CORNGOLD: Does Bank of America have a policy with its employees that the employees are required to keep their
K.L. Lewis

compensation confidential?

THE WITNESS: I don't know if we do or we don't.

MR. CORNGOLD: You've been an employee of Bank of America at various banks for --

THE WITNESS: Almost 40 years.

MR. CORNGOLD: Are you aware of any policy ever that you were instructed to keep your compensation confidential?

THE WITNESS: That I was?

MR. CORNGOLD: Yes. As an employee.

MR. LIMAN: His is publicly recorded.

MR. CORNGOLD: I mean previous to when it was publicly recorded. I'm asking have you ever signed a confidentiality agreement?

THE WITNESS: No. I would think I was supposed to keep my compensation confidential.

MR. CORNGOLD: Have you ever given anyone instruction to keep their compensation confidential?

THE WITNESS: No.

MR. CORNGOLD: In the 40 years that you have been at Bank of America?
1 K.L. Lewis

2 THE WITNESS: Not that I recall.

3 MR. CORNGOLD: Have you ever

4 participated in negotiating bringing in

5 people from another bank to Bank of America?

6 THE WITNESS: Yes.

7 MR. CORNGOLD: And have you ever

8 negotiated compensation with the person that

9 you were bringing in from another bank?

10 THE WITNESS: Yes. But it was a long
time ago.

12 MR. CORNGOLD: Today, in the last three
years, you don't participate in bringing in
high-level people to Bank of America for
negotiations?

16 THE WITNESS: Yes. But I wouldn't be
talking about compensation.

18 MR. CORNGOLD: You would discuss with
other people at Bank of America what
compensation you should offer?

21 THE WITNESS: Yes.

22 MR. CORNGOLD: And when you make those
discussions, are you generally aware of
compensation that they are receiving at other
banks?
MR. LIMAN: Why don't you wait and see?

MR. LAWSKY: I just want to put one thing on the record. I just want to tell Mr. Lewis, I think you're making a big mistake by not turning over the list to us. I want to be direct about it. For what my opinion is worth, we have agreed to accept that list under the terms of the judge's temporary order, which means it will be held confidential. It's important to us, and we see no valid basis for not turning it over to us. That's why we went to the next step of giving you a subpoena. We prefer to do this not that way, so I would ask you maybe on your flight home or whenever, to reconsider and think about that because I think it would be a much better route to go down.

THE WITNESS: The only thing that I'm concerned about is our associates. Wouldn't it be a pretty big violation of trust to invade somebody's privacy like that?

MR. CORNGOLD: Either a court is going to rule finally that the materials should be kept confidential or it shouldn't. If the
K.L. Lewis

court rules that they should be kept confidential, we're just delaying it. If the court rules not, we're also just delaying it.

MISS LAWSON: Why don't you just agree to a confidentiality agreement?

MR. CORNGOLD: Because we think it doesn't need to be kept confidential.

MISS LAWSON: You think it would be appropriate to publish those names and incomes in The Wall Street journal?

MR. LAWSKY: I didn't want to invite a debate on this right now. I appreciate your opinion. I just want to urge Mr. Lewis directly to think about it.

THE WITNESS: That's my only issue.

(Page break for jurat.)
Exhibit E
IN RE: EXECUTIVE COMPENSATION INVESTIGATION
BANK OF AMERICA - MERRILL LYNCH

EXAMINATION of ANDREA SMITH,
taken at State of New York, Office of the Attorney
General, 120 Broadway, New York, New York, on
February 12, 2009 at 2:10 p.m., pursuant to a
Subpoena, before SARA FREUND, a Shorthand Reporter
and a Notary Public of the State of New York.
MISS ANDREADIS: Or whether she was aware that that was a consideration.

A. That was not a deciding factor when Mr. Thain and I were looking at the organizational alignment. It was focused around the businesses, so, Here's commercial banking that will now be a division reporting to you, Mr. Thain. David Darnell was the man that ran that. Here is the skill set that he has. Are there other people with that particular skill set that we should evaluate, or should David Darnell be the person running that business?

Q. In addition to this working with Mr. Thain, did you have any role with respect to the allocation of Merrill Lynch's 2008 incentive compensation?

A. I did not have a role in the allocation process.

Q. Were you updated frequently, or were you made aware of the process at all? Did you have any knowledge of the process?

A. I did have knowledge of the process.

Q. Okay. Let's start with your first knowledge of the process.
A. Smith

A. The first knowledge I had about the process that they were going to use was in the first half of November, which was when I discovered that they were going to be paying out prior to the 1st of the year.

Q. So prior to November 2008, describe even in general any type of knowledge that you had. Did you have any type of knowledge at all other than they were Merrill Lynch bonuses going to be paid out?

A. I believe that the end of October or the 1st of November I had a conversation with Mr. Thain around how much the incentive accrual was in their financial plan, and at that time he told me roughly $750 million dollars a quarter, and so I said, "Okay, then $3 billion would be the starting point of your incentive accrual," and he said, "We'll need more than that." And then I was talking to Mr. Alphin, and that's when I learned that there was an amount that had been talked about in the merger deal.

Q. So going back to when Mr. Thain told you about the approximately $3 billion and he said he needed more, could you please describe that
A. Smith

intimated that it would. At that point, we still didn't know there had been a meeting prior to Mr. Alphin and Mr. Thain speaking.

MR. MARKOWITZ: By the time of your debriefing -- let me ask it in a different way. Did Mr. Thain tell Mr. Alphin when they met that he just had this call?

THE WITNESS: He did not.

MR. MARKOWITZ: And did Mr. Alphin express -- when did Mr. Alphin come to learn about the call?

THE WITNESS: When I found out about it the next day and shared that fact with Mr. Alphin.

MR. MARKOWITZ: Did you get debriefed, find out and call again? What was the sequence of events?

THE WITNESS: Mr. Alphin debriefed me on his conversation with Mr. Thain. The next day, in Charlotte, as I thought how are we going to -- it's November 11th or 12th, and based on the debriefing that Mr. Alphin gave me on paying out in December, how in the world are the Merrill Lynch people going to
A. Smith

do that? So I'm going to call Mr. Thain's current direct reports. I called Greg Fleming, "How are you all going to pay at the end of December when you haven't even started the process." He said, "Did you not know that we had a meeting?" I said, "I did not know." He said, "Have you seen the minutes?" And I said, "I haven't seen anything." At that time, Michael Ross, their Compensation head, e-mailed that document, which then I shared with our head of compensation, Mark Behnke, and Steele Alphin.

MR. MARKOWITZ: What was Mr. Alphin's reaction when you let him know this call had taken place?

THE WITNESS: Surprise, I think.

MR. MARKOWITZ: What did he say?

THE WITNESS: I don't recall exactly what he said, but I do recall giving him the document.

MR. MARKOWITZ: Was he upset? Was it the kind of thing he would have wanted to know about before it happened?

THE WITNESS: I don't know.
A. Smith

MR. MARKOWITZ: Was there anything along the lines of, We discussed all these things, and Mr. Thain or John -- however you referred to him -- didn't even mention that?

THE WITNESS: I don't recall that specific conversation with Mr. Alphin when I gave him the document, but I do recall with Mr. Behnke, we had been been planning and assuming a January time line for payout and working quite closely with the Merrill Lynch Compensation team; so this was big news for us. And the fact that the Compensation team at Merrill Lynch hadn't shared that with Mr. Behnke was annoying for all of us, quite frankly.

MR. MARKOWITZ: You have been through, I take it, several of these processes of allocating year-end bonuses before all of this occurred; is that right?

THE WITNESS: Yes.

MR. MARKOWITZ: And how long have you been with Bank of America?

THE WITNESS: Almost 21 years.

MR. MARKOWITZ: So you should have a
A. Smith

financial performance of the company.

Q. Did you ever discuss a specific number with Mr. Thain or Mr. Alphin?

A. I did not discuss a specific number with Mr. Thain, other than to say that I thought it should be lower. With Mr. Alphin, prior to his meeting with Mr. Thain, I don't recall that we landed on a specific number, but I had shared the $750 million a quarter accrual that Mr. Thain had told me.

Q. When you told Mr. Thain that you wanted to get the number lower -- I know that you said you didn't have a specific number in mind -- but was there a range? Did you want to take it down a couple of million? What were you thinking at the time?

A. I just thought that, again, based on the financial performance, that we should continue to look for opportunities to bring that number down. I did not have a firm number in my head or even give him one. But as we talked about that, one of the things I said is, comparable positions at Bank of America will be getting paid much less, and without going into name specific or anything, just
A. Smith
to say I think it would be wise to use this process as a way to get Merrill Lynch pay more aligned to Bank of America.

Q. What was his reaction to that?
A. He generally thought that was a good idea, and at the same time wanted to be fair to the Merrill Lynch associates.

Q. Can you expand on that little bit?
A. For example, I recall using an example of someone in a role at Merrill Lynch that got paid three dollars, and that same role in Bank of America would have gotten paid one dollar. So that in order to -- as part of our going forward integration, that I thought it would be wise to begin to bring pay down, so that ongoing expectation could be more in line when we reset what pay levels would be than having a giant gap between what they had been paid and what I thought the new pay schedule could look like in Bank of America.

Q. Were those conversations ongoing after the November 11 and 12 time frame?
A. Yes. That's really when they started in earnest.
A. Smith

attended the shareholder meeting on December 5th.

MR. MARKOWITZ: Again, could you explain a little more what these particular meetings were that week?

THE WITNESS: That week, as I recall, the Merrill Lynch team was going through their final recommendations of year-end incentives, and I had told John that I thought it would be a good idea -- because I did the examples that I just gave you, different roles and potential price points, and he agreed that that would be a good idea. So that week I met with Greg Fleming, and, again, I didn't know the Merrill Lynch people, but I just used illustrative positions and pay to say you know these people; you've been running this business. Let me try to give you some context of what similar roles would be paid at Bank of America. I did that with Greg Fleming. I sat down with Peter Kraus who showed me sort of -- with Michael Ross -- here were the pools. And during that week, Mr. Thain asked
A. Smith

Mr. Fleming to take down his pool under $100 million.

Q. Did you learn that from Mr. Thain or through Mr. Fleming?

A. I learned that from Mr. Kraus who told me Mr. Thain was trying to get in touch with Mr. Fleming, and I, in fact, was going to Mr. Fleming's office to do the review I just described. So Mr. Kraus told me Mr. Thain had not connected with Mr. Fleming. He said, "Would you mind just telling him Mr. Thain is calling?" I did, in fact, tell Mr. Fleming Mr. Thain is calling, "and the reason he's calling you is to actually bring your pool down under $100 million."

MR. MARKOWITZ: Did you have any understanding as to why Mr. Thain did that?

THE WITNESS: No. Because I did not talk to Mr. Thain at that point.

MR. MARKOWITZ: When you were meeting with these various executives and giving them the feel for different types of people, different types of positions at Bank of America, were they reciprocating and saying, Okay, if this type of banker at Bank of
A. Smith

specific day.

MR. MARKOWITZ: Did you come to learn that anyone at Bank of America considered or contemplated that the Merrill Lynch bonus pool should be further reduced in light of the fourth quarter losses at Merrill?

THE WITNESS: I don't know.

MR. MARKOWITZ: Would there be anyone besides yourself and Mr. Alphin who would have been the people to have those conversations?

THE WITNESS: Not to my knowledge.

MR. MARKOWITZ: Was anything put in place with respect to the bonuses -- well, let's see how the quarter is going, so we can appropriately set the year-end bonuses?

THE WITNESS: I'm sorry. At Merrill Lynch.

MR. MARKOWITZ: Well, with respect to your role in the Merrill Lynch bonus allocation, did you ever say, Hey, we should set up something so we can take a look at what Q4 looks like to make sure we got the year bonuses right?
Exhibit F
December 11, 2008

Merrill Lynch & Co., Inc.
4 World Financial Center
250 Vesey Street
New York, NY 10080
Attention: Rosemary T. Berkery

Ladies and Gentlemen:

Reference is hereby made to the Agreement and Plan of Merger (the "Agreement") dated as of September 15, 2008 by and between Merrill Lynch & Co., Inc. ("Company") and Bank of America Corporation ("Parent"). Capitalized terms used but not defined herein shall have the meanings ascribed thereto in the Agreement.

Our understanding is that VICP awards in respect to performance year 2008 (including without limitation any guaranteed VICP awards for 2008 or any other pro rata or other 2008 VICP awards payable, paid or provided to terminating or former employees) will not exceed $3.57 billion in aggregate value (inclusive of cash bonuses and the grant date value of long-term incentive awards) less any 2008 incentive compensation value (other than any value in respect of any replacement cash or long-term incentive awards) in respect of the New Hire Cash Compensation Pool. We further understand that the 2008 expense associated with these awards will not exceed $3.27 billion less any 2008 incentive compensation expense (other than any expense in respect of any replacement cash or long-term incentive awards) in respect of the New Hire Cash Compensation Pool. Assuming our understanding is correct, Parent hereby consents to the allocation of such awards between cash and stock at a ratio of 70% cash and 30% stock, provided that the awards shall conform with all other terms and conditions provided for in the Disclosure Schedules to Sections 5.2(b)(iii), 5.2(c)(i) and 5.2(c)(ii) of the Merger Agreement.

Very truly yours,

BANK OF AMERICA CORPORATION

By: __________________________
    E. Randall Morrow
    Senior Vice President

cc: Shearman & Sterling LLP
    569 Lexington Avenue
    New York, NY 10022
    Attention: John J. Madden
              John A. Marzilli, Jr.
              Scott D. Petereit

    Wachtell, Lipton, Rosen & Katz
    51 West 52nd Street
    New York, NY 10019
    Attention: Edward D. Herlihy
              Lawrence S. Makow
              Nicholas G. Demmo
              Jeannemarie O'Brien

FOIL Confidential Treatment Requested By Bank Of America Corporation
Exhibit G
IN RE: EXECUTIVE COMPENSATION INVESTIGATION
BANK OF AMERICA - MERRILL LYNCH

EXAMINATION OF JOHN D. FINNIGAN, taken at the State of New York, Office of the Attorney General, 120 Broadway, New York, New York, on March 3, 2009 at 10:00 a.m., before SARA FREUND, a Shorthand Reporter and a Notary Public of the State of New York.
determination at a board meeting in the middle of January and pay out sometime thereafter.

Q. Why would it be in January? Why wouldn't it be in the previous year?

A. Because Merrill traditionally determined bonuses and paid them out after their calendar year results were available.

Q. Is that to get a better understanding of the firm's financial performance?

A. It seemed consistent with the fact that bonuses are based on calendar year performance.

Q. You mentioned a few seconds ago some sleuthing around in trying to get compensation. Can you just elaborate on what --

A. Our HR people would see what they could find out from other HR people and see what they can find out from their executive compensation consultants. They would take a look at what the stock award was and come up with some estimate of where they thought the people would come out. It wasn't 100 percent precise. You also knew what the performance of the firm was versus the prior year. There were always rumors on the Street about --

Q. Rumors on the Street about what?
J.D. Finnigan

Q. So when did John Thain come to you and ask you to move up the bonus payments?

A. We had a meeting of the management Compensation Committee on November 11. He set out a timetable of how we would pay bonuses for the year in view of what he anticipated to be a year-end merger.

Q. And what was your reaction to Mr. Thain's proposal?

A. As a practical matter, if we were going to close at year end and the committee was going to make the determinations, then the committee had to make the determinations in December.

Q. Was there any resistance by you or any other members of the committee paying out before the end of the year?

A. No. I don't remember any.

MR. MARKOWITZ: Was it your understanding that Merrill Lynch had an obligation to finalize its bonus payments before the merger was completed?

THE WITNESS: My understanding was the merger agreement provided for Merrill Lynch to award bonuses in 2008, so it was Merrill
J.D. Finnigan

company.

Q. What else happened on this November 11th -- was it a call with the Compensation Committee and with Mr. Thain?

A. Yes, it was.

Q. Was it a scheduled meeting?

A. No. I think the original intent of the meeting was for Rosemary Berkery, general counsel, to bring the committee up to speed on the request from your office and Congressman Waxman on what had occurred, and John then suggested while we're having the meeting that he'd like to add to the meeting an agenda or two. One was the timetable, and two was he brought us up to date on the proposed bonus accruals for the year.

Q. Do you recall what the proposed accruals were at that time?

A. From reading the document it looks like they were about what they were on December 8, the final accrual numbers.

Q. Who's Rosemary Berkery again?

A. General counsel.

Q. And what do you recall that she mentioned regarding --
Q. Mr. Finnigan, a few minutes ago you referenced in regard to TARP money a line of credit. Could you elaborate on that for a moment?

A. I'm not an expert on this. We reserved the right to access $10 billion of TARP money in case the deal didn't go through. We never received any money, and we never took it. I think Bank of America ultimately took our allocation. I'm not an expert on TARP. We didn't get any money in the end.

Q. But you had access to it; is that correct?

A. I think it was provided to us in terms of the commitment. I think that we never intended to take it, but we did reserve the right to $10 billion in case -- I don't think we caveated the reservation this way, but in case something happened to the deal we didn't want to give it up. Again, that's an exact recollection of what happened.

Q. Were there any discussions or board meetings about accessing the line of credit between October to the end of the year?

A. No. I think every intention was, I
IN RE: EXECUTIVE COMPENSATION INVESTIGATION
BANK OF AMERICA - MERRILL LYNCH

CONTINUING EXAMINATION of STEELE ALPHIN, taken at the State of New York, Office of the Attorney General, 120 Broadway, New York, New York, on March 4, 2009 at 11:00 a.m., before SARA FREUND, a Shorthand Reporter and a Notary Public of the State of New York.
S. Alphin

compny, and then we would look at how we retain those people through compensation or other ways, and that's going to be compensation to even guarantees -- which we didn't do, but that's done in the industry.

Q. Just discussing for a moment with regard to the aggregate bonus pool, let's talk about the segment of the discretionary portion of that pool. What was your understanding of what you and Andrea Smith could do in that regard in your discussions with Merrill Lynch?

A. Zero. They could spend all of it.

Q. That was your understanding, that you were not permitted to make any suggestions or recommendations?

A. We can't.

Q. What was your understanding of the right to confer coming out of the merger agreement?

A. That I can consult, advise and discuss, but, ultimately, John Thain and his directors had full authority to pay any monies that would be paid for the performance.

MR. MARKOWITZ: Could you tell Mr. Thain -- did you think you were able to tell Mr.
S. Alphin

leader would. I think that's a normal leadership trait. I think that would be very normal for a person to think that in that manner.

MR. LAWSKY: Since you raised it, let's talk about Mr. Thain's own bonus for himself. I know, and we think you'll agree, it's an evolving process over several months. So maybe you tell us, as you recall that evolution, the first time you have a discussion with him. At one point it was REDACTED, then it's REDACTED, then it's REDACTED. Why don't you take us, your best recollection, from the beginning of your hearing about his desire for a bonus for himself.

THE WITNESS: If you give me latitude about specific dates because, as I mentioned before, this was an ongoing dialogue that I would have with John about this issue.

MR. LAWSKY: And to the extent you can, if you can even ballpark it for us, it would be helpful.

THE WITNESS: That's fair. The first time I ever met with John, we talked about
S. Alphin

compensation -- which would have been very soon after the actual deal -- and the conversation then was around no one has a change of control agreement; that's good. What are your expectations; what are your thoughts on Greg Fleming, Bob McCann and others?

MR. LAWSKY: Who was saying that, you or Thain?

THE WITNESS: I'm asking John that. If these are key people, how do we keep them here? And then, during that dialogue, we talked about Fleming, McCann, and then John said, And myself, I would expect to be paid -- the exact comment was this: "My board is going to pay me somewhere around REDACTED this year," and my comment was " and then it was REDACTED

That led into the conversation of, "John, going forward in our company, that's not the type of pay you should expect if you want to consider a role, that's not what it's going to be; that's not
MR. LAWSKY: Was this all in the first conversation?

THE WITNESS: Yes. This was a long conversation in his office. I'll try to change when I go to the next conversation. I said, "That's not our philosophy, and we won't do that." The comment to me was, "Well, I really think I'm worth that; I think I've done exactly what my board asked me to do. I tried to clean up problems there, and I have delivered a $29-or-so stock price to the shareholder. I've done my job." I firmly believe that John believes that; in his mind he believes that's what he did. I said, "I can't make that decision; that's not my decision to make. But I can tell you, going forward that's not the type of compensation your going to see if you want to be part of Bank of America, particularly next year which is probably going to be a very difficult year." I said,  REDACTED  REDACTED  -- just as a
S. Alphin

Andrea Smith communicate to you that she had been telling John Thain about the timing?

THE WITNESS: She really didn't because she communicated to me she and John were continuing to have dialogue about taking the gross amount down, but we did not talk anymore about the changing of the timing. We considered that a decision made; the decision was not ours; it was within the boundaries of the agreement, and our only approach there was let's make sure we try to get the amount paid looked at critically or as hard as we could. That's what we did.

MR. MARKOWITZ: Did you ever let Mr. Thain know that you're unhappy with this decision with respect to timing?

THE WITNESS: I expressed my concern of what was going on, and I said, "I think these things, if we do this, this will force us to deal with some of these issues."

MR. MARKOWITZ: I want to switch back gears a little bit and ask about some of the conversations we had earlier about Mr. Thain seeking a bonus for himself. Did there come
S. Alphin

a time when you told Mr. Thain that if he were to seek a bonus for himself then he wouldn't be in line or be considered to succeed Ken Lewis?

THE WITNESS: I told John that if he were paid more than Ken, that our board would clearly look at it as an aberration, and that he should be aware of that and have a sense of -- I told him, I said, "John, you have public problems -- you already see that -- and this could potentially create a problem with our board."

MR. MARKOWITZ: Understood. But did you go the next step and say, If you do this there would be no chance of you to be able to succeed Ken Lewis at Bank of America?

THE WITNESS: I don't recall telling him that.

MR. MARKOWITZ: How about some other kind of consequence, like there wouldn't be a future for you at Bank of America?

THE WITNESS: No. Because, at that point, I still thought there was a future for John in the bank. What I expressed to John
S. Alphin

was that our board would view that he had a bigger divide to go over to become more of a commercial -- having a commercial view on compensation. Because I told John, "In our company we don't pay people for the merger. Ken's never been paid for a merger the year it's done or in advance. So in our company you would be paid when this is successful, when the shareholder benefits from it."

MR. MARKOWITZ: Is this the strongest on any of these issues that you pushed back, sort of the statement along the lines if you end up getting paid more than Lewis it's going to be viewed as an aberration by the board?

THE WITNESS: Yes.

MR. MARKOWITZ: Did you ever consider kind of taking that approach with respect to the timing issue?

THE WITNESS: I didn't because that was a decision that was made by the board within the legal parameters of the agreement. This was more simply advice that I was trying to offer him as his HR executive.
S. Alphin

some point prior to October 31.

MR. LAWSKY: Right around there.

THE WITNESS: Yes.

MR. LAWSKY: That's the conversation

where you bring the retention?

THE WITNESS: That's correct. That's

just a retention conversation at that point.

MR. LIMAN: That's the conversation

where it's off the table.

THE WITNESS: Yes.

MR. LIMAN: Prior to October 31, at some

point proximate to but prior to.

Q. Did you ever discuss with John Thain

incentive compensation with regard to individual

employees?

A. He did dialogue with me about what he

was thinking about REDACTED and REDACTED.

They were the only two -- oh, excuse me, and

REDACTED.

Q. And when was the initial discussion with

Mr. Thain in this regard?

A. That would have been in November.

Q. And those discussions continued through

the early part of December, as well?
S. Alphin

A. They did until there were some form of recommendations, or until their board decided not to pay John and the other executives.

Q. And if you can take us through those discussions. In terms of the initial discussion, was it at that point that Mr. Thain raised

REDACTED

A. What John expressed to me was what they had been paid in previous years, and they were important; we needed to retain both of them at that point, and that we had to be somewhere close to that, he felt like, to keep them on the team going forward.

Q. When you're saying

REDACTED

Q. Do you recall -- strike that.
S. Alphin

What were the figures that Mr. Thain was discussing with regard to Mr. Fleming an Mr. McCann?

A. In the REDACTED -- REDACTED to REDACTED -- we never talked about a specific number.

Q. Did you discuss any other individual employees in terms of their bonuses with Mr. Thain?

A. I didn't.

Q. Do you know if Andrea Smith did?

A. I do not know as a fact if she did or she didn't.

Q. When you say "as a fact," do you generally have a sense of whether or not Andrea Smith did have that discussion?

A. I believe that in the role I asked her to fulfill, yes, they would have had dialogue about that.

Q. Did you ever ask Andrea Smith whether or not she had dialogue --

A. No.

MR. LAWSKY: When you talk about the REDACTED, did you know it then and you don't recall it, or you never
S. Alphin

at. I looked at monthly and quarterly forecasts. At Merrill Lynch I only saw what the forecast for the fourth quarter was supposed to be. So really the only information I have would have been a general dialogue from Andrea or from people in the business. But looking at a document and going what the marks were and what the trade losses were, I don't receive those documents; I don't look at them.

MR. LAWSKY: Did you ever hear in December of any particular positions that Merrill had that created particular problems within Merrill's financial health in mid-December?

THE WITNESS: I did not hear of a specific mark or a specific trade or a specific piece of business. No, I did not.

MR. MARKOWITZ: Did you ever learn during the fourth quarter in December that things started to worsen?

THE WITNESS: I did. A few days before our December discussion with our board about the REDACTED, Ken expressed to me
that the numbers were deteriorating faster than he'd ever seen, and he said they've gone much past the $8 billion to $9 billion in losses. At that point, they were in the mid-teens.

MR. MARKOWITZ: So you learned about it from Ken Lewis?

THE WITNESS: Yes.

MR. MARKOWITZ: REDACTED

THE WITNESS: Yes.

MR. MARKOWITZ: REDACTED

THE WITNESS: A day or two before we had that phone call, that fourth phone call. Part of the challenge is, we have a board call every Friday -- we had for several months -- what are the conditions of the market place. That's the challenge. But it would have been in the December -- soon after it. It would have been -- deterioration really started after the second week.

MR. MARKOWITZ: How did you learn about the MAC?
S. Alphín

MR. MARKOWITZ: But the Comp function, if I understand, reports to you.

THE WITNESS: That's correct.

MR. MARKOWITZ: Is there a particular person in HR whose role that would be?

THE WITNESS: Mark Behnke runs that for us.

MR. MARKOWITZ: Do you have an understanding of how or whether when bringing over talent from a competitor firm if Bank of America gets information about what they were making at the competitor firm?

THE WITNESS: Yes, we do. We ask -- sometimes we ask for the last year's W-2 -- and we have some sense of the market because in this role, like all financial services, there is some sense of what MDs would make; associates would make; VPs would make; bankers would make. We try to get much more specific than that -- and, typically, we ask.

MR. MARKOWITZ: And do people typically give it when you ask?

THE WITNESS: Interestingly enough, most of them do.
MR. MARKOWITZ: With respect to your sense of the market, how do you get a sense of what the market is worth?

THE WITNESS: From people we lose who go to a competitor at certain rate of pay and whatever instruments to hook or retain them, and also the intelligence we get just from the various comp analysis we do on an annual basis. Those are the two primary. You get a lot from head hunters also. The head-hunting firms can tell you that these are the things that are occurring.

MR. MARKOWITZ: And do you have direct contact with those?

THE WITNESS: Personally, I do not.

MR. MARKOWITZ: Would that be Mark, as well?

THE WITNESS: Most of that would be Mark Behnke and Rick Parsons, who runs our recruiting function for the company.

MR. MARKOWITZ: When people leave and they decide to go elsewhere, do they share with you what their new comp structure is?

THE WITNESS: Some do. We like to have
S. Alphin

judgment that he thought was the best way to uphold.

MR. MARKOWITZ: How much in losses would it cause you to decide to lower the pool?

THE WITNESS: I don't know how to answer that question because my overriding the position would always be this: If you lose all the people the losses will be even greater. No matter what they are at least they're being managed, but if you lose the people the losses would be greater. Then you have to turn around and hire people and probably hire them with a guarantee, so the costs to the company would have been even greater.

MR. MARKOWITZ: So you would have gone with the Merrill Lynch I bank offer over the Bank of America model after post merger.

THE WITNESS: I would have used that to get to one company, yes. But after one company and managing the company the way we manage it, we would ultimately end up with a Bank of America approach as transition, as I mentioned earlier today.
S. Alphin

MR. MARKOWITZ: Would that have occurred in 2008 numbers or the next year?


MR. MARKOWITZ: Is there a threshold of when that crosses, when the numbers have to be reflected regardless of the desire to keep people?

THE WITNESS: Even in our company we missed our numbers, but we still paid our best performers in key roles; we still paid them. I think in the marketplace, and I think in this industry, you always have to pay people to retain them as long as there are options to do other things. And that's what we're seeing today.

MR. MARKOWITZ: It sounds to me like there's a difference between zero, which is what the top five execs took and whatever bonuses people were doled out, and a number between zero or somewhere between zero and what they got. The question is, would the numbers have caused you post close would additional losses to try to further reduce
Exhibit I
IN RE: EXECUTIVE COMPENSATION INVESTIGATION
BANK OF AMERICA - MERRILL LYNCH

GREG FLEMING, taken at
the State of New York, Office of the Attorney
General, 120 Broadway, New York, New York, on
March 5, 2009 at 12:00 p.m., before SARA FREUND,
a Shorthand Reporter and a Notary Public of the
State of New York.
there was that it would be no bigger than 2007, and that would be the ceiling, and Bank of America would have -- we would run the process, and they would consult with us but would be actively involved, and the color was they were going to be a significant part of this, but we would run it.

Q. This is you and Curl?
A. Me and Curl.

Q. Who else is in the room for that discussion?
A. I think the only people in the room for price, retention payments for FA's and for bonuses are Curl and me.

MR. POLKES: It's reflected in the deal docs.

Q. On this point, when you discussed the pool over this weekend was there a discussion of the timing of either setting the bonuses or paying out the bonuses?
A. No. Dave, you have to remember, Sunday afternoon I was on fumes. We were dealing with major issues only. So I recall no discussion on timing.

Q. Are those the three points: Price,
Exhibit J

Please Refer to Bank of America’s Exhibit G, filed separately with the Court.
Exhibit K
By Hand Delivery

The Honorable Henry A. Waxman, Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515-6143.

Dear Chairman Waxman:

I write on behalf of our client, Merrill Lynch & Co., Inc. ("Merrill Lynch" or the "Firm") in response to your letter of October 28, 2008. Merrill Lynch appreciates the nature of your stated concerns and has asked me to convey to you that the Firm’s anticipated incentive compensation pools have not increased in any way as a result of its participation in the Troubled Asset Relief Program ("TARP"). Accordingly, and to address the salient concern of your letter, government funds will not be the basis for any Merrill Lynch incentive compensation awards.

Merrill Lynch signed definitive documentation under the Capital Purchase Program of TARP on October 28, 2008. Although the documentation has been signed, Merrill Lynch’s participation in the program has been deferred in light of the pending merger with Bank of America. Merrill Lynch has received no funds to date under TARP and, assuming the merger closes prior to year-end, does not expect to receive any funds under TARP. The Firm’s shareholders will vote on the merger on December 5, 2008 and, if their approval is obtained (and Bank of America’s shareholders’ approval is also obtained), Merrill Lynch expects the merger will occur before the end of the year. A more complete discussion is available in the Firm’s Current Report on Form 8-K dated October 30, 2008, which is enclosed.

Merrill Lynch operates on a calendar-year basis. The Management Development and Compensation Committee of the Board of Directors makes incentive compensation decisions at year-end. Consistent with this calendar year-end process, incentive compensation decisions for 2008 have not yet been made.
To assist the Committee’s investigation, set forth below are responses to the Committee’s four information requests:

1. For each year from 2006 to 2008, the total compensation and average compensation per employee, paid or projected to be paid to all personnel, broken down by salaries, bonuses (cash and equity), and benefits; and a description of the reasons for the year-to-year changes in these amounts.

Attached to this letter at Tab A is a chart setting forth the total compensation and average compensation for Merrill Lynch employees for the years 2006 and 2007. This information is broken down by salary, cash and equity components of incentive compensation, and benefits.

The year-to-year changes in total compensation result from changes in the Firm’s financial performance and in the number of Firm employees. In 2006, Merrill Lynch had a strong performance year-on-year, with net revenue having increased by 33% and after tax earnings having increased by 47%. The 2006 total incentive compensation pool and 2006 average total compensation reflect that strong performance, as well as Merrill Lynch’s need to provide competitive compensation packages to its employees (compensation benchmark data indicated that Merrill Lynch compensation was below its peer market).

In 2007, the Firm’s financial performance was disproportionately affected by significant losses in one area of its business, while performance in most other areas of the Firm remained strong. The 2007 average total compensation is consistent with this reduced financial performance while also reflecting efforts to reward high performing employees in successful business groups, including a number of whom received offers from competitors. The 2007 average equity incentive compensation also indicates an increased use of equity for retention purposes. The 2007 total incentive compensation pool was affected by higher headcount (about 50% of which resulted from acquisitions) resulting in increased pool size notwithstanding reduced averages.

2. For each year from 2006 to 2008, the number of employees who were paid, or are projected to be paid, more than $500,000 in total compensation; the total compensation paid or projected to be paid to these employees, broken down by salaries, bonuses (cash and equity), and benefits; and a description of the reasons for the year-to-year changes in these amounts.

Attached to this letter at Tab A is a chart setting forth the number of employees who were paid an amount more than $500,000 in total compensation for the years 2006 and 2007 and the total compensation paid to these employees. This information is broken down by salary, cash and equity components of incentive compensation, and benefits. The reasons for year-to-year changes in compensation are the same as those described above in response to Information Request No. 1.
3. For each year from 2006 to 2008, the total compensation paid or projected to be paid to the ten highest paid employees, broken down by salaries, bonuses (cash and equity), and benefits; and a description of the reasons for the year-to-year changes in these amounts.

Attached to this letter at Tab A is a chart setting forth the total compensation paid to the ten highest paid employees during the years 2006 and 2007. This information is broken down by salary, cash and equity components of incentive compensation, and benefits. The reasons for year-to-year changes in compensation are the same as those described above in response to Information Request No. 1.

4. Documents sufficient to show all policies governing the granting of the bonuses to the groups of employees referenced in items (1) to (3).

Enclosed with this letter are documents responsive to the Committee’s Information Request No. 4. These documents have been, for purposes of identification and reference, consecutively numbered ML 000001 – ML 000027. These documents consist of: (i) the Firm’s Current Report on Form 8K, dated October 30, 2008; (ii) the Management Development and Compensation Committee Corporate Charter; (iii) an article entitled Compensation Advisor, dated January 2007; (iv) policies concerning Section 162(m) of the Internal Revenue Code; and (v) Merrill Lynch Stock Grant Guidelines.

* * *

Certain materials we are producing today are confidential and proprietary in value, and have been marked accordingly. We ask that these materials be kept confidential by the Committee and its staff. Moreover, these materials contain material non-public information concerning Merrill Lynch that should be kept confidential. We therefore ask that the Committee staff provide us with notice and an opportunity to be heard before the Committee, notwithstanding our request that the materials be kept confidential, discloses any non-public information to third parties.

Very truly yours,

The Honorable Tom Davis
Ranking Minority Member

cc: The Honorable Tom Davis

Ranking Minority Member
Exhibit L
Bank of America Shareholders Approve Merrill Lynch Purchase

CHARLOTTE, N.C., Dec. 5 /PRNewswire/ -- Bank of America Corporation shareholders during a special meeting today approved the acquisition of Merrill Lynch & Co., Inc. by authorizing the shares of common stock to be issued in the merger.

"When this transaction closes, Bank of America will have the premier financial services franchise anchored by the cornerstone relationship products and services of deposits, credit and debit cards, mortgages and wealth management," said Bank of America Chairman and Chief Executive Officer Kenneth D. Lewis. "With Merrill Lynch, we also will significantly add to our global footprint in several businesses, including investment banking and sales and trading, enabling us to deepen existing client relationships and create greater opportunity to establish new ones."

Bank of America will have the largest wealth management business in the world with nearly 20,000 financial advisors and approximately $2.5 trillion in client assets. Global investment management capabilities will include approximately 50 percent ownership in BlackRock Inc., which had $1.26 trillion in assets under management at September 30. Bank of America had $564 billion in assets under management at September 30.

The combination also adds strengths in global debt underwriting, global equities and global merger and acquisition advice. After the acquisition, Bank of America would be the number one global debt underwriter, the top underwriter of global equity and the fourth-largest adviser on announced global mergers and acquisitions based on pro forma 2008 results through November 30.

Proposals to approve the issuance of shares of Bank of America common stock for the purposes of the transaction; to approve an amendment to the 2003 Key Associate Stock Plan, as amended and restated; to adopt an amendment to the Bank of America amended and restated certificate of incorporation to increase the number of authorized shares of Bank of America common stock; and to adjourn the meeting, were approved at the special meeting. The acquisition is expected to close by the end of the year, pending the satisfaction of customary approvals and closing conditions.

Bank of America

Bank of America is one of the world's largest financial institutions, serving individual consumers, small and middle market businesses and large corporations with a full range of banking, investing, asset management and other financial and risk-management products and services. The company provides unmatched convenience in the United States, serving more than 59 million consumer and small business relationships with more than 6,100 retail banking offices, more than 18,000 ATMs and award-winning online banking with more than 25 million active users. Bank of America offers industry leading support to more than 4 million small business owners through a suite of innovative, easy-to-use online products and services. The company serves clients in more than 150 countries.
and has relationships with 99 percent of the U.S. Fortune 500 companies and 83 percent of the Fortune Global 500. Bank of America Corporation stock (NYSE:BAC) is a component of the Dow Jones Industrial Average and is listed on the New York Stock Exchange.

http://www.bankofamerica.com/

Photo: NewsCom: http://www.newscom.com/cgi-bin/prnh/20050720/CLW086LOGO-b
AP Archive: http://photoarchive.ap.org/
PRN Photo Desk, photodesk@prnewswire.com

Source: Bank of America

CONTACT: Investors: Kevin Stitt, Bank of America, +1-704-386-5667, Lee McEntire, Bank of America, +1-704-388-6780; Reporters: Scott Silvestri, Bank of America, +1-980-388-9921, scott.silvestri@bankofamerica.com

Web site: http://www.bankofamerica.com/
Exhibit M
Bank of America Earns $4 Billion in 2008

Fourth-Quarter Net Loss of $1.79 Billion

CHARLOTTE, N.C., Jan. 16 /PRNewswire-FirstCall/ -- Bank of America Corporation today reported full-year 2008 profit of $4.01 billion compared with net income of $14.98 billion a year earlier.

(Logo: http://www.newscom.com/cgi-bin/prnh/20050720/CLW086LOGO-b )

Earnings after preferred dividends and available to common shareholders were $2.56 billion, or $0.55 per diluted share, down from $14.80 billion, or $3.30 per share.

In the fourth quarter of 2008, the company had a net loss of $1.79 billion compared with net income of $268 million a year earlier. The net loss applicable to common shareholders was $2.39 billion, or $0.48 per diluted share, down from net income of $215 million, or $0.05 per share, in the same period in 2007. Results include Countrywide Financial, which Bank of America purchased on July 1, but not Merrill Lynch & Co., Inc., which was acquired on January 1, 2009.

Fourth quarter results were driven by escalating credit costs, including additions to reserves, and significant writedowns and trading losses in the capital markets businesses. These actions reflect the deepening economic recession and extremely challenging financial environment, both of which significantly intensified in the last three months of 2008.

Global Consumer and Small Business Banking and Global Wealth and Investment Management were profitable, paced by Bank of America's successful and expanding deposit business. Negative results in Capital Markets and Advisory Services masked the profitability in Business Lending and Treasury Services within Global Corporate and Investment Banking.

Bank of America ended 2008 with a Tier 1 capital ratio of 9.15 percent.

Merrill Lynch preliminary results indicate a fourth-quarter net loss of $15.31 billion, or $9.62 per diluted share, driven by severe capital markets dislocations. (See the Transition Update section of this news release and supplemental earnings information provided on http://investor.bankofamerica.com for further details.)

In view of the continuing severe conditions in the markets and economy, the U.S. government agreed to assist in the Merrill acquisition by making a further investment in Bank of America of $20 billion in preferred stock carrying an 8 percent dividend rate. In addition, the government has agreed to provide protection against further losses on $118 billion in selected capital markets exposure, primarily from the former Merrill Lynch portfolio. Under the agreement, Bank of America would cover the first $10 billion in losses and the government would cover 90 percent of any subsequent losses. Bank of America would pay a premium of 3.4 percent of those assets for this program.

On a pro forma basis, this additional capital would boost the company's Tier 1 capital ratio to approximately 10.70 percent.

In addition, the government has agreed to provide protection against further losses on $118 billion in selected capital markets exposure, primarily from the former Merrill Lynch portfolio. Under the agreement, Bank of America would cover the first $10 billion in losses and the government would cover 90 percent of any subsequent losses. Bank of America would pay a premium of 3.4 percent of those assets for this program.

On a pro forma basis, this additional capital would boost the company’s Tier 1 capital ratio to approximately 10.70 percent.

In light of continuing severe economic and financial market conditions, the Bank of America Board of Directors has declared a first-quarter dividend of $.01 per share payable March 27, 2009 to shareholders of record as of March 6, 2009.

Combined, these actions strengthen Bank of America and will allow the company to continue business levels that both support the U.S. economy and create future value for shareholders.

Bank of America extended more than $115 billion in new credit in the fourth quarter. It is increasing staff in its mortgage unit to meet a surge in demand that began late in December as mortgage rates fell. The company continues to prudently extend credit to commercial and consumer borrowers throughout its product line.

Customer Highlights
-- Of the more than $115 billion in new credit extended during the quarter, about $49 billion was in commercial non-real estate; $45 billion was in mortgages; nearly $8 billion was in domestic card and unsecured consumer loans; nearly $7 billion was in commercial real estate; more than $5 billion was in home equity products; and approximately $2 billion was in consumer Dealer Financial Services.

-- During the fourth quarter, Small Business Banking extended nearly $1 billion in new credit to over 47,000 new customers.

-- Mortgages made to low- and moderate-income borrowers and areas totaled $11.3 billion in the fourth quarter, serving more than 77,000 borrowers.

-- To help homeowners avoid foreclosure, Bank of America and Countrywide modified approximately 230,000 home loans during 2008. This year the company embarked on a loan modification program projected to modify over $100 billion in loans to help keep up to 630,000 borrowers in their homes. The centerpiece of the program is a proactive loan modification process to provide relief to eligible borrowers who are seriously delinquent or are likely to become seriously delinquent as a result of loan features, such as rate resets or payment recasts. In some instances, innovative new approaches will be employed to include automatic streamlined loan modifications across certain classes of borrowers. The program utilizes an affordability equation to qualify borrowers for loan modifications at a targeted first year mortgage debt to income ratio of 34 percent.

-- The company established a lending initiative group: senior officers meeting with the chief executive every week to evaluate how much Bank of America is lending, to whom, and what more can be done while remaining prudent and responsible. The company will report findings monthly.

Fourth Quarter 2008 Financial Summary

Revenue and Expense

Revenue net of interest expense on a fully taxable-equivalent basis rose 19 percent to $15.98 billion from $13.45 billion a year earlier.

Net interest income on a fully taxable-equivalent basis rose 37 percent to $13.41 billion from $9.82 billion in the fourth quarter of 2007 on higher market-based income, the favorable rate environment, loan growth and the acquisition of Countrywide. The net interest yield improved 70 basis points to 3.31 percent.

Noninterest income declined 29 percent to $2.57 billion from $3.64 billion a year earlier. Mortgage banking income, gains on sales of debt securities, insurance premiums and service charges increased. The increases were more than offset by sales and trading losses in the Capital Markets and Advisory Services business.

Noninterest expense rose 5 percent to $10.95 billion from a year earlier mainly because of the addition of Countrywide, which was partially offset by lower personnel costs. Pretax merger and restructuring charges related to acquisitions were $306 million compared with $140 million a year earlier. Given the capital markets disruptions, the company's efficiency ratio remains above normal levels.

Credit Quality

Credit quality deteriorated further during the quarter as the recession worsened. Consumers continued to experience high levels of stress from declining home prices, rising unemployment and tighter credit conditions. These factors led to higher losses and an increase in delinquencies in all consumer portfolios.

Declining home values, a slowdown in consumer spending and continued turmoil in the global financial markets negatively impacted the commercial portfolios. Commercial losses increased during the quarter driven by higher broad-based losses in the non-real estate domestic portfolios, the homebuilder portfolio, and several large defaults by foreign financial services borrowers.

Nonperforming assets were $18.23 billion or 1.96 percent of total loans, leases and foreclosed properties, compared with $13.58 billion, or 1.45 percent, at September 30 and $5.95 billion, or 0.68 percent, at December 31, 2007.

Total managed net losses were $7.40 billion, or 2.84 percent, of total average managed loans and leases compared with $6.11 billion, or 2.32 percent, in the third quarter and $3.28 billion, or 1.34 percent, in the fourth quarter of 2007.

Net charge-offs were $5.54 billion, or 2.36 percent of total average loans and leases compared with $4.36 billion, or 1.84 percent, in the third quarter and $1.99 billion, or 0.91 percent, in the fourth quarter of 2007.

The provision for credit losses was $8.54 billion, up from $6.45 billion in the third
quarter and $3.31 billion in the fourth quarter of 2007. The company added $2.99 billion to the allowance for loan and lease losses during the quarter. The additions were across most consumer portfolios reflecting economic stress on consumers. Reserves were also increased on commercial portfolios.

Capital Management

Total shareholders’ equity was $177.05 billion at December 31. Period-end assets were $1.82 trillion. The Tier 1 capital ratio was 9.15 percent, up from 7.55 percent at September 30, 2008. The Tier 1 ratio was 6.87 percent a year earlier.

Bank of America issued 455 million common shares for $9.88 billion, $15 billion of preferred stock issued to the U.S. Department of the Treasury and did not repurchase any shares in the period. Period-end common shares issued and outstanding were 5.02 billion for the fourth quarter of 2008, 4.56 billion for the third quarter of 2008 and 4.44 billion in the year-ago quarter. The company paid a cash dividend of $0.32 per common share and recorded $472 million in preferred dividends during the quarter. An additional $131 million of preferred dividends were deducted in the calculation of net income applicable to common shareholders.

In January 2009, an additional $10 billion of preferred stock (part of the original $25 billion assigned to Bank of America and Merrill Lynch) was issued to the U.S. Department of the Treasury as part of the Troubled Asset Relief Program (TARP). The company also issued approximately 1.4 billion shares of common stock associated with the acquisition of Merrill Lynch.

Full-Year 2008 Financial Summary

Revenue and Expense

Revenue on a fully taxable-equivalent basis increased 8 percent to $73.98 billion from $68.58 billion a year earlier.

Net interest income on a fully taxable-equivalent basis increased to $46.55 billion from $36.19 billion in 2007 on higher market-based income, consumer and commercial loan growth, the favorable rate environment and the addition of Countrywide and LaSalle. The net interest yield widened 38 basis points to 2.98 percent reflecting the more favorable interest rate environment and product mix.

Noninterest income fell 15 percent to $27.42 billion from $32.39 billion in 2007. Writedowns in the wake of market disruptions of $10.47 billion reduced results. Higher mortgage banking income, service charges and insurance premiums along with an increase in gains on sales of debt securities partially offset the decline.

Noninterest expense increased 11 percent to $41.53 billion from $37.52 billion a year ago mainly due to the addition of Countrywide. The increase was partially offset by lower incentive compensation. Given the capital markets disruptions, the company’s efficiency ratio remains above normal levels.

Credit Quality

Provision expense increased $18.44 billion to $26.83 billion in 2008 because of higher net charge-offs and additions to the reserve. The majority of the reserve additions were in the consumer and small business portfolios as the housing markets weakened and the economy slowed. Reserves on commercial portfolios were increased as the homebuilder and commercial domestic portfolios within Global Corporate and Investment Banking deteriorated.

Total managed net losses were $22.90 billion during 2008, or 2.27 percent of total average managed loans and leases, compared with $11.25 billion or 1.29 percent during the prior year. Net charge-offs totaled $16.23 billion, or 1.79 percent of average loans and leases, compared with $6.48 billion, or 0.84 percent in 2007. Portfolios directly tied to housing, including home equity, residential mortgage and homebuilders drove a significant portion of the increase. The weaker economy also drove higher levels of net losses across the Card Services portfolios as well as the commercial portfolios.

Capital Management

For 2008, Bank of America recorded $10.26 billion in dividends to common shareholders and $1.32 billion to preferred shareholders. The company also issued approximately 580 million common shares, including 455 million during the fourth quarter and 107 million related to the Countrywide acquisition. In addition, Bank of America obtained nearly $35 billion in additional capital in connection with preferred stock issuances throughout the year.

2008 Business Segment Results

Global Consumer and Small Business Banking(1)
Global Consumer and Small Business Banking net income declined from a year ago as credit costs more than doubled. Expenses rose mostly on the addition of Countrywide.

Managed net revenue rose 22 percent due to the Countrywide acquisition and organic loan and deposit growth.

The provision for credit losses increased by $13.92 billion to $26.84 billion. Net losses increased $8.38 billion to $19.18 billion as housing market deterioration and weak economic conditions impacted most consumer portfolios. Loan loss reserve additions related to deterioration and increased delinquencies contributed to higher credit costs.

-- Deposits and Student Lending net income increased by 9 percent to $6.21 billion, while net revenue increased 10 percent to $20.65 billion as net interest income, service charges and debit card income all showed strong growth.

-- Card Services net income fell 85 percent to $521 million as credit costs rose. Managed net revenue grew 12 percent to $28.43 billion as higher average loan balances increased net interest income.

-- Mortgage, Home Equity and Insurance Services reported a net loss of $2.50 billion as home equity credit costs rose. Higher noninterest expense was offset by increases in mortgage banking income, net interest income and insurance premiums. Expense and revenue increases are due to the addition of Countrywide.

Fourth-quarter net income for Global Consumer and Small Business Banking declined 56 percent to $835 million from a year earlier. The provision for credit losses rose 77 percent as the economy weakened, and expenses rose 28 percent due to the addition of Countrywide. Net revenue increased 26 percent to $15.91 billion on higher net interest income, mortgage banking income and insurance premiums related to the addition of Countrywide and organic loan and deposit growth.

Global Corporate and Investment Banking

(Dollars in millions)                  2008                         2007
Total revenue, net of interest expense(1)                $13,440                      $13,651
Provision for credit losses(1)                      3,080                        658
Noninterest expense                                    10,381                       12,198
Net income (loss)                                     (14)                          510
Efficiency ratio(1)                                    77.24%                      89.36%
Return on average equity                                (0.02)                     1.12
Global Corporate and Investment Banking had a net loss of $14 million on significant writedowns, higher credit costs and lower net revenue. A 48 percent increase in net interest income and higher service charges and investment banking income were more than offset by market disruption charges of $10.47 billion, which were $6.45 billion a year earlier. Included in those charges were CDO-related writedowns of $4.78 billion, down from $5.65 billion during 2007, and leveraged loan writedowns of $1.08 billion, compared with $196 million a year earlier.

The provision for credit losses increased $2.42 billion to $3.08 billion. Net charge-offs rose from low 2007 levels and with the exception of homebuilders were across a broad range of borrowers and industries. Reserves were increased due to deterioration in the homebuilder, commercial domestic and dealer-related portfolios.

-- Business Lending net income decreased 14 percent to $1.72 billion as strong revenue growth and lower expenses were offset by higher credit costs. Net revenue increased 29 percent to $7.82 billion on organic and merger-related average loan growth of more than $62 billion.

-- Capital Markets and Advisory Services recorded a net loss of $4.95 billion compared with a net loss of $3.39 billion a year earlier. Net revenue losses of $3.02 billion were lower compared with net revenue of $549 million a year earlier, driven by writedowns associated with credit-related positions including CDO-related investments and auction rate securities.

-- Treasury Services net income increased 28 percent to $2.73 billion as net revenue grew 10 percent to $7.78 billion. Net revenue increased as favorable pricing and increased volume drove deposits and service charges higher. Both revenue and expenses were favorably impacted by the Visa IPO.

Global Corporate and Investment Banking reported a net loss of $2.44 billion for the quarter, compared with a net loss of $2.77 billion last year. The net loss narrowed on lower market disruption losses, higher net interest income due to lower short term rates, wider spreads and increased customer balances, and investment banking income, offset by higher credit costs.

Capital Markets and Advisory Services had negative net revenue of $4.64 billion in the period.

Market disruption-related impacts of $4.61 billion in the quarter include:

-- Total CDO-related losses of $1.72 billion.

-- Writedowns of commercial mortgage-backed securities and related transactions of $853 million.

-- Leveraged lending-related writedowns of $429 million.

-- Writedowns on auction rate securities of $353 million.

Global Wealth and Investment Management

<table>
<thead>
<tr>
<th>(Dollars in millions)</th>
<th>2008</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total revenue, net of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>interest expense(1)</td>
<td>7,785</td>
<td>7,553</td>
</tr>
<tr>
<td>Provision for credit</td>
<td>664</td>
<td>14</td>
</tr>
<tr>
<td>losses</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Noninterest expense</td>
<td>4,904</td>
<td>4,480</td>
</tr>
<tr>
<td>Net income</td>
<td>1,416</td>
<td>1,960</td>
</tr>
<tr>
<td>Efficiency ratio(1)</td>
<td>62.99%</td>
<td>59.31%</td>
</tr>
<tr>
<td>Return on average equity</td>
<td>12.11</td>
<td>19.83</td>
</tr>
<tr>
<td>Loans(2)</td>
<td>87,591</td>
<td>73,473</td>
</tr>
<tr>
<td>Deposits(2)</td>
<td>159,525</td>
<td>124,871</td>
</tr>
</tbody>
</table>
Net income declined 28 percent to $1.42 billion as support for certain cash funds increased and credit costs rose.

Net revenue increased 3 percent from the 2007 addition of U.S. Trust and LaSalle and organic loan and deposit growth. The increase was offset by support to certain cash funds, writedowns related to auction rate securities and weaker equity markets.

The provision for credit losses increased $650 million to $664 million as a result of additions to the reserve and higher net charge-offs reflecting housing market deterioration and the slowing economy.

-- U.S. Trust, Bank of America Private Wealth Management net income declined 2 percent to $460 million. Net revenue rose 14 percent to $2.65 billion due to the addition of U.S. Trust and LaSalle, partially offset by the weaker equity markets.

-- Columbia Management reported a net loss of $459 million compared with net income of $21 million a year ago mainly due to an additional $725 million in support provided to certain cash funds and weaker equity markets.

-- Premier Banking and Investments net income fell 54 percent to $584 million as credit costs increased by $534 million on higher home equity loan losses. Net revenue decreased 15 percent to $3.20 billion on lower net interest income as spread compression driven by deposit mix and competitive deposit pricing more than offset deposit growth.

Fourth-quarter net income for Global Wealth and Investment Management increased 65 percent to $511 million compared with a year earlier due to higher net revenue and lower expenses. Net revenue increased 12 percent to $1.98 billion as higher net interest income driven by growth in loans and deposits was partially offset by weaker equity markets. Expenses declined 2 percent on lower incentive compensation.

All Other(1)

<table>
<thead>
<tr>
<th>(Dollars in millions)</th>
<th>2008</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total revenue net of interest expense(2)</td>
<td>$(5,593)</td>
<td>$(477)</td>
</tr>
<tr>
<td>Provision for credit losses(3)</td>
<td>(3,760)</td>
<td>(5,207)</td>
</tr>
<tr>
<td>Merger and restructuring charges</td>
<td>935</td>
<td>410</td>
</tr>
<tr>
<td>All other noninterest expense</td>
<td>372</td>
<td>87</td>
</tr>
<tr>
<td>Net income (loss)</td>
<td>(1,628)</td>
<td>3,150</td>
</tr>
<tr>
<td>Loans and leases(4)</td>
<td>$135,671</td>
<td>$133,926</td>
</tr>
</tbody>
</table>

1 All Other consists primarily of equity investments, the residential mortgage portfolio associated with asset and liability management activities, the residual impact of the cost allocation processes, merger and restructuring charges, intersegment eliminations, and the results of certain consumer finance, investment management and commercial lending businesses that are being liquidated. All Other also includes the offsetting securitization impact to present Card Services on a managed basis. Our view of Global Consumer and Small Business Banking operations are also shown on a managed basis. For more information and detailed reconciliation, please refer to the data pages supplied with this Press Release.

2 Fully taxable-equivalent basis

3 Represents the provision for credit losses in All Other combined with the GCSBB securitization offset.

4 Balances averaged for period

All Other had a net loss of $1.63 billion for 2008 compared with net income of $3.15 billion a year earlier. For the fourth quarter, the net loss of $693 million compared with net income of $830 million a year earlier. The declines are attributable to lower equity investment income, higher credit costs and increased merger and restructuring charges,
which more than offset gains on the sales of debt securities. Results were also adversely impacted by the absence of earnings due to the sale of certain businesses and foreign operations during 2007. Credit costs rose, primarily in the residential mortgage portfolio due to deterioration in the housing markets and the impacts of a slowing economy.

Transition Update

(Merrill Lynch results are not part of Bank of America fourth-quarter or full-year 2008 results)

Merrill Lynch was acquired on January 1, 2009 creating a premier financial services franchise with significantly enhanced wealth management, investment banking and international capabilities.

Merrill Lynch preliminary results indicate a fourth-quarter net loss of $15.31 billion, or $9.62 per diluted share, driven by severe capital markets dislocations.

Merrill Lynch's Global Wealth Management division generated $2.6 billion in net revenue in the period as fees held up well in the declining markets. The strongest performance came from the U.S. Advisory portion of the business. Retention of financial advisors remains consistent with historical trends.

Significant negative fourth-quarter items for Merrill Lynch include:

-- Credit valuation adjustments related to monoline financial guarantor exposures of $3.22 billion.
-- Goodwill impairments of $2.31 billion.
-- Leveraged loan writedowns of $1.92 billion.
-- $1.16 billion in the U.S. Bank Investment Securities Portfolio writedowns.
-- Commercial real estate writedowns of $1.13 billion.

The LaSalle transition reached a significant milestone in the quarter with successful systems conversions, marking the completion of the integration. In addition, cost savings exceeded original projections.

The integration of Countrywide is on track and expected to reach targeted cost savings, which are currently expected to be around $900 million after-tax and are expected to be fully realized by 2011.

Note: Chief Executive Officer Kenneth D. Lewis and Chief Financial Officer Joe L. Price will discuss fourth-quarter 2008 results in a conference call at 7 a.m. (Eastern Time) today. The presentation and supporting materials can be accessed on the Bank of America Investor Relations Web site at http://investor.bankofamerica.com. For a listen-only connection to the conference call, dial 877.585.6241 (domestic) or 785.424.1732 (international) and the conference ID: 79795.

Forward-Looking Statements

Bank of America may make forward-looking statements, including, for example, statements about management expectations and intentions regarding our future financial results, integration plans and cost savings, growth opportunities, business outlook, loan and deposit growth, mortgage production, credit losses, and other similar matters. These forward-looking statements are not historical facts, but instead represent Bank of America's current expectations, intentions or forecasts of future events, circumstances or results. These statements are not guarantees of future results or performance and involve certain risks, uncertainties and assumptions that are difficult to
predict and often are beyond Bank of America's control. Actual outcomes and results may differ materially from those expressed in, or implied by, any of these forward-looking statements.

You should not place undue reliance on any forward-looking statement and should consider the following possible events or factors that could cause results or performance to differ materially from those expressed in the forward-looking statements: negative economic conditions; changes in interest rates and market liquidity; changes in foreign exchange rates; adverse movements and volatility in debt and equity capital markets; changes in market rates and prices, which may adversely impact the value of financial products and instruments; estimates of fair value of assets and liabilities; legislative and regulatory actions in the United States and internationally; liabilities resulting from litigation and regulatory investigations; changes in domestic or foreign tax laws, rules and regulations and governmental interpretations thereof; monetary and fiscal policies and regulations; changes in accounting standards, rules and interpretations; increased competition; the ability to grow Bank of America's core businesses; the ability to develop and introduce new banking-related products, services and enhancements; mergers and acquisitions and their integration; decisions to downsize, sell or close units or otherwise change Bank of America's business mix; management's ability to identify and manage these and other risks; and the other risk factors discussed in Bank of America's Annual Report on Form 10-K for 2007, Quarterly Report on Form 10-Q for the quarter ended September 30, 2008, and in any of Bank of America's other subsequent SEC filings.

Forward-looking statements speak only as of the date they are made, and Bank of America undertakes no obligation to update any forward-looking statement to reflect the impact of circumstances or events that arise after the date the forward-looking statement was made.

http://www.bankofamerica.com

Investors May Contact:
Kevin Stitt, Bank of America, 1.704.386.5667
Lee McEntire, Bank of America, 1.704.388.6780
Grace Yoon, Bank of America, 1.212.449.7323

Reporters May Contact:
Scott Silvestri, Bank of America, 1.980.388.9921
scott.silvestri@bankofamerica.com

Bank of America Corporation and Subsidiaries
Selected Financial Data
(Dollars in millions, except per share data; shares in thousands)

<table>
<thead>
<tr>
<th>Summary Income Statement</th>
<th>Three Months Ended</th>
<th>Year Ended December 31</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>December 31</td>
<td></td>
</tr>
<tr>
<td>Net interest income</td>
<td>$13,106</td>
<td>$9,165</td>
</tr>
<tr>
<td>Total noninterest income</td>
<td>2,574</td>
<td>3,639</td>
</tr>
<tr>
<td>Total revenue, net of interest expense</td>
<td>15,680</td>
<td>12,804</td>
</tr>
<tr>
<td>Provision for credit losses</td>
<td>8,535</td>
<td>3,310</td>
</tr>
<tr>
<td>Noninterest expense, before merger and restructuring charges</td>
<td>10,641</td>
<td>10,269</td>
</tr>
<tr>
<td>Merger and restructuring charges</td>
<td>306</td>
<td>140</td>
</tr>
<tr>
<td>Income (loss) before income taxes</td>
<td>(3,802)</td>
<td>(915)</td>
</tr>
<tr>
<td>Income tax expense (benefit)</td>
<td>(2,013)</td>
<td>(1,183)</td>
</tr>
<tr>
<td>Net income (loss)</td>
<td>$(1,789)</td>
<td>$268</td>
</tr>
<tr>
<td>Preferred stock dividends</td>
<td>603</td>
<td>53</td>
</tr>
<tr>
<td>Net income (loss) applicable to common shareholders</td>
<td>$(2,392)</td>
<td>$215</td>
</tr>
<tr>
<td>Earnings (loss) per common share</td>
<td>$(0.48)</td>
<td>$0.05</td>
</tr>
<tr>
<td>Diluted earnings (loss) per common share (1)</td>
<td>(0.48)</td>
<td>0.05</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Summary Average Balance Sheet</th>
<th>Three Months Ended</th>
<th>Year Ended December 31</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>December 31</td>
<td></td>
</tr>
<tr>
<td>Total loans and leases</td>
<td>$941,563</td>
<td>$868,119</td>
</tr>
</tbody>
</table>
### Performance Ratios

<table>
<thead>
<tr>
<th></th>
<th>Three Months Ended</th>
<th>Year Ended December 31</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>December 31 2008</td>
<td>2007</td>
</tr>
<tr>
<td>Return on average assets</td>
<td>(0.37)%</td>
<td>0.06%</td>
</tr>
<tr>
<td>Return on average common shareholders' equity</td>
<td>(6.68)%</td>
<td>0.60%</td>
</tr>
</tbody>
</table>

### Credit Quality

<table>
<thead>
<tr>
<th></th>
<th>Three Months Ended</th>
<th>Year Ended December 31</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>December 31 2008</td>
<td>2007</td>
</tr>
<tr>
<td>Total net charge-offs</td>
<td>$5,541</td>
<td>$1,985</td>
</tr>
<tr>
<td>Annualized net charge-offs as a % of average loans and leases outstanding (2)</td>
<td>2.36%</td>
<td>0.91%</td>
</tr>
<tr>
<td>Provision for credit losses</td>
<td>$8,535</td>
<td>$3,310</td>
</tr>
<tr>
<td>Total consumer credit card managed net losses</td>
<td>$3,263</td>
<td>$2,138</td>
</tr>
<tr>
<td>Total consumer credit card managed net losses as a % of average managed credit card receivables</td>
<td>7.16%</td>
<td>4.75%</td>
</tr>
</tbody>
</table>

### Capital Management

<table>
<thead>
<tr>
<th></th>
<th>December 31 2008</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Risk-based capital ratios:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tier 1</td>
<td>9.15%</td>
<td>6.87%</td>
</tr>
<tr>
<td>Total</td>
<td>13.00%</td>
<td>11.02%</td>
</tr>
<tr>
<td>Tangible equity ratio (3)</td>
<td>5.01%</td>
<td>3.62%</td>
</tr>
<tr>
<td>Tangible common equity ratio (4)</td>
<td>2.83%</td>
<td>3.35%</td>
</tr>
</tbody>
</table>

### Period-end common shares issued and outstanding

<table>
<thead>
<tr>
<th></th>
<th>Three Months Ended</th>
<th>Year Ended December 31</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shares issued</td>
<td>455,381</td>
<td>373,700</td>
</tr>
<tr>
<td>Shares repurchased</td>
<td></td>
<td>(2,700)</td>
</tr>
<tr>
<td>Average common shares issued and outstanding</td>
<td>4,957,049</td>
<td>4,421,554</td>
</tr>
<tr>
<td>Average diluted common shares issued and outstanding (1)</td>
<td>4,957,049</td>
<td>4,470,108</td>
</tr>
<tr>
<td>Dividends paid per common share</td>
<td>$0.32</td>
<td>$0.64</td>
</tr>
</tbody>
</table>

### Summary Ending Balance
### Bank of America Corporation and Subsidiaries

#### Business Segment Results

(Dollars in millions)

<table>
<thead>
<tr>
<th>Segment</th>
<th>Three Months Ended</th>
<th>Year Ended December 31</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>December 31</td>
<td></td>
</tr>
<tr>
<td>Total revenue, net of interest expense (2)</td>
<td>$15,911</td>
<td>$12,621</td>
</tr>
<tr>
<td>Provision for credit losses (3)</td>
<td>7,584</td>
<td>4,287</td>
</tr>
<tr>
<td>Noninterest expense</td>
<td>7,145</td>
<td>5,572</td>
</tr>
<tr>
<td>Net income</td>
<td>835</td>
<td>1,899</td>
</tr>
<tr>
<td>Efficiency ratio (2)</td>
<td>44.91 %</td>
<td>44.15 %</td>
</tr>
<tr>
<td>Return on average equity</td>
<td>4.13</td>
<td>11.23</td>
</tr>
<tr>
<td>Average - total loans and leases</td>
<td>$364,114</td>
<td>$317,629</td>
</tr>
<tr>
<td>Average - total deposits</td>
<td>396,497</td>
<td>342,926</td>
</tr>
</tbody>
</table>

#### Deposits and Student Lending

<table>
<thead>
<tr>
<th>Segment</th>
<th>Three Months Ended</th>
<th>Year Ended December 31</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>December 31</td>
<td></td>
</tr>
<tr>
<td>Total revenue, net of interest expense (2)</td>
<td>$5,364</td>
<td>$4,843</td>
</tr>
<tr>
<td>Net income</td>
<td>1,753</td>
<td>1,536</td>
</tr>
<tr>
<td>Card Services (1)</td>
<td>1,753</td>
<td>1,536</td>
</tr>
<tr>
<td>Total revenue, net of interest expense (2)</td>
<td>7,316</td>
<td>6,590</td>
</tr>
<tr>
<td>Net income (loss)</td>
<td>(204)</td>
<td>408</td>
</tr>
<tr>
<td>Mortgage, Home Equity and Insurance Services</td>
<td>3,231</td>
<td>1,188</td>
</tr>
<tr>
<td>Net income (loss)</td>
<td>(14)</td>
<td>(135)</td>
</tr>
</tbody>
</table>

#### Global Corporate and Investment Banking

<table>
<thead>
<tr>
<th>Segment</th>
<th>Three Months Ended</th>
<th>Year Ended December 31</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>December 31</td>
<td></td>
</tr>
<tr>
<td>Total revenue, net of interest expense (2)</td>
<td>$(265)</td>
<td>$(695)</td>
</tr>
<tr>
<td>Provision for credit losses</td>
<td>1,415</td>
<td>274</td>
</tr>
<tr>
<td>Noninterest expense</td>
<td>2,229</td>
<td>3,453</td>
</tr>
<tr>
<td>Net income (loss)</td>
<td>(2,442)</td>
<td>(7,771)</td>
</tr>
<tr>
<td>Efficiency ratio (2)</td>
<td>n/m</td>
<td>n/m</td>
</tr>
<tr>
<td></td>
<td>Return on average equity</td>
<td>Average - total loans and leases</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>--------------------------</td>
<td>----------------------------------</td>
</tr>
<tr>
<td></td>
<td>(14.24) %</td>
<td>$343,379</td>
</tr>
<tr>
<td></td>
<td>(20.53) %</td>
<td>$327,622</td>
</tr>
<tr>
<td></td>
<td>(0.02) %</td>
<td>$337,352</td>
</tr>
<tr>
<td></td>
<td>1.12</td>
<td>$274,725</td>
</tr>
</tbody>
</table>

**Business Lending**

<table>
<thead>
<tr>
<th></th>
<th>Total revenue, net of interest expense (2)</th>
<th>Net income</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$2,226</td>
<td>301</td>
</tr>
<tr>
<td></td>
<td>$1,901</td>
<td>608</td>
</tr>
<tr>
<td></td>
<td>$7,823</td>
<td>1,722</td>
</tr>
<tr>
<td></td>
<td>$6,085</td>
<td>2,000</td>
</tr>
</tbody>
</table>

**Capital Markets and Advisory Services**

<table>
<thead>
<tr>
<th></th>
<th>Total revenue, net of interest expense (2)</th>
<th>Net income (loss)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(4,639)</td>
<td>(3,615)</td>
</tr>
<tr>
<td></td>
<td>(4,489)</td>
<td>(4,489)</td>
</tr>
<tr>
<td></td>
<td>(549)</td>
<td>(3,385)</td>
</tr>
</tbody>
</table>

**Treasury Services**

<table>
<thead>
<tr>
<th></th>
<th>Total revenue, net of interest expense (2)</th>
<th>Net income</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1,916</td>
<td>756</td>
</tr>
<tr>
<td></td>
<td>1,890</td>
<td>488</td>
</tr>
<tr>
<td></td>
<td>7,784</td>
<td>2,732</td>
</tr>
<tr>
<td></td>
<td>7,104</td>
<td>2,136</td>
</tr>
</tbody>
</table>

**Global Wealth and Investment Management**

<table>
<thead>
<tr>
<th></th>
<th>Three Months Ended</th>
<th>Year Ended December 31</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>December 31</td>
<td>Year Ended December 31</td>
</tr>
<tr>
<td>Total revenue, net of interest expense (2)</td>
<td>$1,984</td>
<td>$7,785</td>
</tr>
<tr>
<td>Provision for credit losses</td>
<td>152</td>
<td>664</td>
</tr>
<tr>
<td>Noninterest expense</td>
<td>1,068</td>
<td>4,904</td>
</tr>
<tr>
<td>Net income</td>
<td>511</td>
<td>1,416</td>
</tr>
<tr>
<td>Efficiency ratio (2)</td>
<td>53.77 %</td>
<td>62.99 %</td>
</tr>
<tr>
<td>Return on average equity</td>
<td>17.32 %</td>
<td>19.83 %</td>
</tr>
<tr>
<td>Average - total loans and leases</td>
<td>$88,874</td>
<td>$87,591</td>
</tr>
<tr>
<td>Average - total deposits</td>
<td>171,340</td>
<td>159,525</td>
</tr>
</tbody>
</table>

**U.S. Trust (4)**

<table>
<thead>
<tr>
<th></th>
<th>Total revenue, net of interest expense (2)</th>
<th>Net income</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$640</td>
<td>121</td>
</tr>
<tr>
<td></td>
<td>$700</td>
<td>124</td>
</tr>
<tr>
<td></td>
<td>$2,650</td>
<td>460</td>
</tr>
<tr>
<td></td>
<td>$2,320</td>
<td>470</td>
</tr>
</tbody>
</table>

**Columbia Management**

<table>
<thead>
<tr>
<th></th>
<th>Total revenue, net of interest expense (2)</th>
<th>Net income (loss)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>88</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>391</td>
<td>1,076</td>
</tr>
<tr>
<td></td>
<td>21</td>
<td>1</td>
</tr>
</tbody>
</table>

**Premier Banking and Investments**

<table>
<thead>
<tr>
<th></th>
<th>Total revenue, net of interest expense (2)</th>
<th>Net income</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>776</td>
<td>201</td>
</tr>
<tr>
<td></td>
<td>932</td>
<td>292</td>
</tr>
<tr>
<td></td>
<td>3,201</td>
<td>584</td>
</tr>
<tr>
<td></td>
<td>3,749</td>
<td>1,267</td>
</tr>
</tbody>
</table>

**All Other (1)**

<table>
<thead>
<tr>
<th></th>
<th>Three Months Ended</th>
<th>Year Ended December 31</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>December 31</td>
<td>Year Ended December 31</td>
</tr>
<tr>
<td>Total revenue, net of interest expense (2)</td>
<td>$(1,650)</td>
<td>$(5,593)</td>
</tr>
<tr>
<td>Provision for credit losses</td>
<td>$(616)</td>
<td>$(3,760)</td>
</tr>
<tr>
<td>Noninterest expense</td>
<td>505</td>
<td>1,307</td>
</tr>
<tr>
<td>Net income</td>
<td>(693)</td>
<td>497</td>
</tr>
<tr>
<td>Average - total loans and leases</td>
<td>145,196</td>
<td>135,671</td>
</tr>
<tr>
<td>Average - total deposits</td>
<td>75,003</td>
<td>61,561</td>
</tr>
</tbody>
</table>

(1) Global Consumer and Small Business Banking is presented on a managed basis, specifically Card Services, with a corresponding offset recorded in All Other.

(2) Fully taxable-equivalent (FTE) basis. FTE basis is a performance measure used by management in operating the business that management believes provides investors with a more accurate picture of the interest margin for comparative purposes.

(3) Represents provision for credit losses on held loans combined with realized credit losses associated with the securitized loan portfolio.

(4) In July 2007, the operations of the acquired U.S. Trust Corporation were combined with the former Private Bank to create U.S. Trust, Bank of America Private Wealth Management. The results of the combined business were reported for periods beginning on July 1, 2007. Prior to July 1, 2007, the results solely reflect that of the former Private Bank.

(5) Represents provision for credit losses in All Other combined with the Global Consumer and Small Business Banking securitization offset.
Certain prior period amounts have been reclassified to conform to current period presentation.

Information for periods beginning July 1, 2008 includes the Countrywide acquisition; prior periods have not been restated. This information is preliminary and based on company data available at the time of the presentation.

<table>
<thead>
<tr>
<th>Bank of America Corporation and Subsidiaries Supplemental Financial Data (Dollars in millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fully taxable-equivalent basis data</td>
</tr>
<tr>
<td>Three Months Ended</td>
</tr>
<tr>
<td>December 31</td>
</tr>
<tr>
<td>Net interest income</td>
</tr>
<tr>
<td>Total revenue, net of interest expense</td>
</tr>
<tr>
<td>Net interest yield</td>
</tr>
<tr>
<td>Efficiency ratio</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Other Data December 31</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full-time equivalent employees</td>
</tr>
<tr>
<td>Number of banking centers - domestic</td>
</tr>
<tr>
<td>Number of branded ATMs - domestic</td>
</tr>
</tbody>
</table>

Certain prior period amounts have been reclassified to conform to current period presentation.

Information for periods beginning July 1, 2008 includes the Countrywide acquisition; prior periods have not been restated. This information is preliminary and based on company data available at the time of the presentation.

<table>
<thead>
<tr>
<th>Bank of America Corporation and Subsidiaries Reconciliation - Managed to GAAP (Dollars in millions)</th>
</tr>
</thead>
</table>
| The Corporation reports Global Consumer and Small Business Banking's results, specifically Card Services, on a managed basis. This basis of presentation excludes the Corporation's securitized mortgage and home equity portfolios for which the Corporation retains servicing. Reporting on a managed basis is consistent with the way that management evaluates the results of Global Consumer and Small Business Banking. Managed basis assumes that securitized loans were not sold and presents earnings on these loans in a manner similar to the way loans that have not been sold (i.e., held loans) are presented. Loan securitization is an alternative funding process that is used by the Corporation to diversify funding sources. Loan securitization removes loans from the Consolidated Balance Sheet through the sale of loans to an off-balance sheet qualified special purpose entity which is excluded from the Corporation's Consolidated Financial Statements in accordance with accounting principles generally accepted in the United States (GAAP). The performance of the managed portfolio is important in understanding Global Consumer and Small Business Banking's and Card Services' results as it demonstrates the results of the entire portfolio serviced by the business. Securitized loans continue to be serviced by the business and are subject to the same underwriting standards and ongoing monitoring as held loans. In addition, retained excess servicing income is exposed to similar credit risk and repricing of interest rates as held loans. Global Consumer and Small Business Banking's managed income statement line items differ from a held basis reported as follows:

-- Managed net interest income includes Global Consumer and Small Business Banking's net interest income on held loans and interest income on the securitized loans less the internal funds transfer pricing allocation related to securitized loans.

-- Managed noninterest income includes Global Consumer and Small Business Banking's noninterest income on a held basis less the reclassification of certain components of card income (e.g., excess servicing income) to record managed net interest income and provision for credit losses. Noninterest income, both on a held and managed basis, also includes the impact of adjustments to the interest-only strip that are recorded in card income as management continues to manage this impact within Global Consumer and Small Business Banking.

-- Provision for credit losses represents the provision for credit losses on held loans.
combined with realized credit losses associated with the securitized loan portfolio.

### Global Consumer and Small Business Banking

#### Year Ended December 31, 2008

<table>
<thead>
<tr>
<th>Managed Securitization</th>
<th>Year Ended December 31, 2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basis (1)</td>
<td>Impact (2)</td>
</tr>
<tr>
<td>Net interest income (3)</td>
<td>$33,851</td>
</tr>
<tr>
<td>Noninterest income:</td>
<td></td>
</tr>
<tr>
<td>Card income</td>
<td>10,057</td>
</tr>
<tr>
<td>Service charges</td>
<td>6,807</td>
</tr>
<tr>
<td>Mortgage banking income</td>
<td>4,422</td>
</tr>
<tr>
<td>Insurance premiums</td>
<td>1,968</td>
</tr>
<tr>
<td>All other income</td>
<td>1,239</td>
</tr>
<tr>
<td>Total noninterest income</td>
<td>24,493</td>
</tr>
<tr>
<td>Net revenue, net of interest expense</td>
<td>58,344</td>
</tr>
<tr>
<td>Provision for credit losses</td>
<td>26,841</td>
</tr>
<tr>
<td>Noninterest expense</td>
<td>24,937</td>
</tr>
<tr>
<td>Income before income taxes</td>
<td>6,566</td>
</tr>
<tr>
<td>Income tax expense (3)</td>
<td>2,332</td>
</tr>
<tr>
<td>Net income</td>
<td>$4,234</td>
</tr>
<tr>
<td>Average - total loans and leases</td>
<td>$350,264</td>
</tr>
</tbody>
</table>

### All Other

<table>
<thead>
<tr>
<th>Reported Securitization</th>
<th>Year Ended December 31, 2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basis (4)</td>
<td>Offset (2)</td>
</tr>
<tr>
<td>Net interest income (3)</td>
<td>$(8,610)</td>
</tr>
<tr>
<td>Noninterest income:</td>
<td></td>
</tr>
<tr>
<td>Card income</td>
<td>2,164</td>
</tr>
<tr>
<td>Equity investment income</td>
<td>265</td>
</tr>
<tr>
<td>Gains on sales of debt securities</td>
<td>1,133</td>
</tr>
<tr>
<td>All other income (loss)</td>
<td>(545)</td>
</tr>
<tr>
<td>Total noninterest income</td>
<td>3,017</td>
</tr>
<tr>
<td>Total revenue, net of interest expense</td>
<td>(5,593)</td>
</tr>
<tr>
<td>Provision for credit losses</td>
<td>(3,760)</td>
</tr>
<tr>
<td>Merger and restructuring charges</td>
<td>935</td>
</tr>
<tr>
<td>All other noninterest expense</td>
<td>372</td>
</tr>
<tr>
<td>Income (loss) before income taxes</td>
<td>(3,140)</td>
</tr>
<tr>
<td>Income tax expense (benefit) (3)</td>
<td>(1,512)</td>
</tr>
<tr>
<td>Net income (loss)</td>
<td>$(1,628)</td>
</tr>
<tr>
<td>Average - total loans and leases</td>
<td>$135,671</td>
</tr>
</tbody>
</table>

### Bank of America Corporation and Subsidiaries

#### Reconciliation - Managed to GAAP

(Dollars in millions)

<table>
<thead>
<tr>
<th>Global Consumer and Small Business Banking</th>
<th>Year Ended December 31, 2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Managed Securitization</td>
<td>Basis (1)</td>
</tr>
<tr>
<td>Net interest income (3)</td>
<td>$28,712</td>
</tr>
<tr>
<td>Noninterest income:</td>
<td></td>
</tr>
<tr>
<td>Card income</td>
<td>10,194</td>
</tr>
<tr>
<td>Service charges</td>
<td>6,007</td>
</tr>
<tr>
<td>Mortgage banking income</td>
<td>1,332</td>
</tr>
<tr>
<td>Insurance premiums</td>
<td>912</td>
</tr>
<tr>
<td>All other income</td>
<td>698</td>
</tr>
<tr>
<td>Total noninterest income</td>
<td>19,143</td>
</tr>
<tr>
<td>Total revenue, net of interest expense</td>
<td>47,855</td>
</tr>
<tr>
<td>Provision for credit losses</td>
<td>12,920</td>
</tr>
<tr>
<td>Noninterest expense</td>
<td>20,349</td>
</tr>
<tr>
<td>Income before income taxes</td>
<td>14,586</td>
</tr>
<tr>
<td>Income tax expense (3)</td>
<td>5,224</td>
</tr>
<tr>
<td>Net income</td>
<td>$9,362</td>
</tr>
<tr>
<td>Average - total loans and leases</td>
<td>$294,030</td>
</tr>
</tbody>
</table>

### All Other

<table>
<thead>
<tr>
<th>Reported Securitization</th>
<th>Year Ended December 31, 2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basis (4)</td>
<td>Offset (2)</td>
</tr>
<tr>
<td>Net interest income (3)</td>
<td>$(7,645)</td>
</tr>
</tbody>
</table>
Noninterest income:

<table>
<thead>
<tr>
<th></th>
<th>2008 Q1</th>
<th>2007 Q1</th>
<th>2007 Q2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Card income</td>
<td>2,817</td>
<td>(3,356)</td>
<td>(539)</td>
</tr>
<tr>
<td>Equity investment income</td>
<td>3,745</td>
<td>-</td>
<td>3,745</td>
</tr>
<tr>
<td>Gains on sales of debt securities</td>
<td>180</td>
<td>-</td>
<td>180</td>
</tr>
<tr>
<td>All other income (loss)</td>
<td>426</td>
<td>288</td>
<td>714</td>
</tr>
<tr>
<td>Total noninterest income</td>
<td>7,168</td>
<td>(3,068)</td>
<td>4,100</td>
</tr>
</tbody>
</table>

Total revenue, net of interest expense:

<table>
<thead>
<tr>
<th></th>
<th>2008 Q1</th>
<th>2007 Q1</th>
<th>2007 Q2</th>
</tr>
</thead>
<tbody>
<tr>
<td>(477)</td>
<td>4,959</td>
<td>4,482</td>
<td></td>
</tr>
</tbody>
</table>

Provision for credit losses:

<table>
<thead>
<tr>
<th></th>
<th>2008 Q1</th>
<th>2007 Q1</th>
<th>2007 Q2</th>
</tr>
</thead>
<tbody>
<tr>
<td>(5,207)</td>
<td>4,959</td>
<td>(248)</td>
<td></td>
</tr>
</tbody>
</table>

Merger and restructuring charges:

<table>
<thead>
<tr>
<th></th>
<th>2008 Q1</th>
<th>2007 Q1</th>
<th>2007 Q2</th>
</tr>
</thead>
<tbody>
<tr>
<td>410</td>
<td>-</td>
<td>410</td>
<td></td>
</tr>
</tbody>
</table>

All other noninterest expense:

<table>
<thead>
<tr>
<th></th>
<th>2008 Q1</th>
<th>2007 Q1</th>
<th>2007 Q2</th>
</tr>
</thead>
<tbody>
<tr>
<td>87</td>
<td>-</td>
<td>87</td>
<td></td>
</tr>
</tbody>
</table>

Income (loss) before income taxes:

<table>
<thead>
<tr>
<th></th>
<th>2008 Q1</th>
<th>2007 Q1</th>
<th>2007 Q2</th>
</tr>
</thead>
<tbody>
<tr>
<td>4,233</td>
<td>4,233</td>
<td>-</td>
<td>4,233</td>
</tr>
</tbody>
</table>

Income tax expense (benefit) (3):

<table>
<thead>
<tr>
<th></th>
<th>2008 Q1</th>
<th>2007 Q1</th>
<th>2007 Q2</th>
</tr>
</thead>
<tbody>
<tr>
<td>1,083</td>
<td>-</td>
<td>1,083</td>
<td></td>
</tr>
</tbody>
</table>

Net income (loss):

<table>
<thead>
<tr>
<th></th>
<th>2008 Q1</th>
<th>2007 Q1</th>
<th>2007 Q2</th>
</tr>
</thead>
<tbody>
<tr>
<td>$3,150</td>
<td>$-</td>
<td>$3,150</td>
<td></td>
</tr>
</tbody>
</table>

Average - total loans and leases:

<table>
<thead>
<tr>
<th></th>
<th>2008 Q1</th>
<th>2007 Q1</th>
<th>2007 Q2</th>
</tr>
</thead>
<tbody>
<tr>
<td>$133,926</td>
<td>$103,284</td>
<td>$237,210</td>
<td></td>
</tr>
</tbody>
</table>
Exhibit N
IN RE: EXECUTIVE COMPENSATION INVESTIGATION
BANK OF AMERICA - MERRILL LYNCH

CONTINUING EXAMINATION of JOHN ALEXANDER THAIN,
taken at the State of New York, Office of the
Attorney General, 120 Broadway, New York, New York,
on February 24, 2009 at 4:30 p.m., before SARA
FREUND, a Shorthand Reporter and a Notary Public of
the State of New York.
J. A. Thain

A. Morgan Stanley.

Q. Who initiated the recruitment of REDACTED

A. I don't remember who made the first contact.

Q. At what point did it sort of get to your level?

A. When she was seriously considering coming.

Q. At the point it got to your level, had there been a salary offer made to REDACTED

A. I don't remember.

Q. Did you participate in the negotiation of the salary for REDACTED

A. I don't recall specifically.

Q. In those conversations, did REDACTED disclose what she had been making?

A. She would have disclosed that to our HR area prior to making an offer.

Q. And what is the purpose of that? Why would she tell your HR what she was making?

A. So that we can gauge how our offer compared to what she was currently being paid.

Q. Is there any aspect of that with respect
Q. So if Morgan Stanley recruited -- before we used the example of you recruiting someone from Morgan Stanley. Let's say Morgan Stanley, while you were there, was trying to recruit one of your guys, and they say "How much are you making?" And they say, "I was making ten dollars." Would that be a problem with Merrill Lynch?
A. I said I don't remember. I don't know if that's part of the policy or not.
Q. But you have an understanding that that's what happens in the industry routinely, correct, that people do disclose that?
A. Yes.
Q. I guess I'm curious, if it's such proprietary information, why wouldn't there be policies set in place at Merrill Lynch prohibiting employees from disclosing information?
A. There might be. I just said I don't know.
Q. Who would know?
A. Either the Legal Department or the HR Department.
Q. But even if there was one, it sounds like no one would be enforcing it; is that right?
J. A. Thain

A. I don't think that's necessarily true.

Q. Are you aware of any time when someone left, and there was a discussion of "Oh, they told our Competitor X what they made, so we're going to sue them under some provision"?

A. I'm not aware of any such circumstances.

MR. CORNGOLD: You've been in the industry at various levels for many years. Are you aware of ever being under any rule or any instruction at any of your employers where you were not allowed to disclose your compensation?

THE WITNESS: I believe -- although I'm not certain in the case of Merrill -- I believe that many firms have provisions that are intended to keep compensation confidential.

MR. CORNGOLD: I'm not asking a hypothetical question; I'm asking a specific question. When you were -- we haven't gone through your resume, but at any time when you were not a Section 16 employee, are you aware of being under any rules where you were not allowed to disclose your compensation?
J. A. Thain

someone got such a high payout, shows up and
then goes off to Hawaii?

THE WITNESS: No one said that to me
specifically.

MR. LAWSKY: But you're saying there was
chatter somehow about this.

THE WITNESS: I believe it was reported
in the press, but no one said this
specifically to me.

MR. CORNGOLD: Just to clarify. In your
recruiting of REDACTED, the information
about his pay and stock, that came from
REDACTED, to your knowledge, correct, his
REDACTED?

THE WITNESS: Yes. But he would have
documentation that he could produce to verify
that.

MR. CORNGOLD: And your information
about what comparable people were making came
from Towers Perrin; is that correct?

THE WITNESS: I don't recall if they
specifically provided. I also had general
information about what the top trading talent
make on Wall Street.
MR. CORNGOLD: Was there other information about his compensation at Goldman that would have been useful to you that you didn't have available?

THE WITNESS: I don't know how to answer that question. Not that I know of.

(Recess was taken.)

Q. Could you describe the circumstances that led to Mr. Kraus coming onboard?

A. Mr. Kraus is also a very senior, very experienced person on Wall Street. He has experience both in investment banking and in wealth management, and he was brought onboard in a strategy role with the expectation that he would be very valuable in the wealth management and asset management side of the business.

Q. Did you participate in setting or discussing his salary?

A. I was part of discussing his compensation package, but it was also eventually approved by the Compensation Committee and the board.

Q. Where was he before Merrill?

A. He was at Goldman Sachs.
J. A. Thain

Q. What was the comp that was set for him?
A. His total compensation package for 2008 was approximately REDACTED.

Q. And how did you go about setting his comp?
A. It was a function of his prior compensation levels and compensation levels for comparable senior people of his experience and ability.

Q. As to his REDACTED, did he provide that to Merrill?
A. I'm not aware of what specific documentation he provided.

Q. But did he let Merrill know, regardless of what specific documentation, what he was making at REDACTED
A. Yes.

MR. LAWSKY: Do you recall when he came onboard?
THE WITNESS: I believe he started in September.

MR. LAWSKY: And do you know why so late in the year?
THE WITNESS: He also had a garden leave
Exhibit O
EXECUTIVE COMPENSATION INVESTIGATION,

120 Broadway
New York, New York 10005

March 5, 2009
10:00 a.m.

EXAMINATION BEFORE TRIAL

OF STEVE GOODMAN, the Witness herein,
taken by the office of the Attorney General, pursuant to a Subpoena and held before Kimberly Dean, a Notary Public of the State of New York at the above-stated time and place.
Steve Goodman

A. There are compensation surveys in which data is collected for a variety of companies and a variety of industries and geographies. The survey date that she would be doing would be getting survey data regarding HR functions at other companies.

Q. Do you know who that data is collected from?

A. The data itself is collected directly from the companies. So, the third party vendor or whoever that might be, they send surveys of their own confidential to individual companies and they collect the data that they get from individual companies and then they compile the overall data for those companies to use.

Q. If I understand this correctly, Bank of America uses a third party who collects data from other companies?

A. That's my understanding. Again, I am not a compensation expert. That's my understanding of how it works.

MS. ANDREADIS: Do you know if Bank of America supplies these third party vendors with information on Bank of America's
compensation as well?

A. Yes, I would say so. Again but because I have never done the process myself, I don't know for sure but I think that's part of the price for admission so to speak. It's two prices for admission, you pay for surveys. I think part of it the expectation is you will participate as well.

Q. Do you know the name of any companies that Bank of America has used to collect this data?

A. I know of companies we used in the past but I would not want to guess the companies we are using in the last year or two or three because it may have changed.

Q. The companies that you know of, when were they last used?

A. That's what I'm saying. I don't know exactly when.

Q. What are the names of the companies you are aware of?

A. If I think of a traditional compensation companies, they are companies like McLoggin, Mercer Consulting. Again, to be honest, I don't know if those were who we were using. If you asked me to name the top accounting firms I could give you the
Steve Goodman

range or how is it presented?

A. Generally, by the time I have been provided with information for my compensation partner they have taken all sorts of data and boiled it down into a summary that I can understand.

In terms of the exact format that they get it in, I am not familiar. In terms of in general, how it could be boiled down for me? It usually would be on job levels and ranges, yes.

Q. When you say job levels, is that just a title or is it more with a description of the job?

A. It's pretty generic and that's the hard part of using surveys, matching your job to the survey. No survey will have data that's exactly specific to your kind of job code system. We have to say, okay, if this company provides this survey data for this job function, which of our jobs apply to that. So it's pretty generic what you get from these companies.

CONT'D EXAMINATION BY PAMELA MAHON, ESQ.

Q. With regard to compensation, is compensation included in this survey date that you describe d?
1 PENN PLAZA, NEW YORK, NY 10119  Tel: 212-759-6014

Page 30

Steve Goodman

A. Yes.

Q. In terms of compensation what level of details is provided in these surveys?

A. Usually, in surveys, again, I'm seeing it after the survey, so, at some point a compensation expert will do a much better job of explaining the output that's coming from the consulting company. By the time I look at it, generally what I am looking at is what is the median pay for a set of jobs. What is the 25% percentile and the 75th percentile. Those sorts of aspects.

Q. Have you ever received in it's original form or based on the summary or analysis by compensation experts at Bank of America, have you ever received a survey data?

A. I have reviewed survey data after it's been boiled down to put into my terms. I remember once someone tried to show me something they got from a consulting firm and because I'm not an expert in statistics and regressions, it was too much for me. In all honesty, it always has to be boiled down into something that's usable.

Q. Who does the boiling down?
Steve Goodman

1 policies?

2 A. In a general level that there are too many policies to remember them all. Certainly I refer to experts if I want to specificity around a policy.

3 Q. For example, this is a hypothetical, you were considering terminating someone's employment and you wanted to look up a specific provision, how would you go about doing that?

4 A. I would call one of the centers of expertise which specialize in employee relations type of issues and I seek advise from that area.

5 Q. Do you know if Bank of America has a policy that requires it's employees to keep it's compensation confidential?

6 A. I can't site the specific policy. I would say that customer information and associate information are considered sacred, literally. There's significant instruction around both customer and associate data privacy.

7 Q. What is that significant information?

8 A. That it can not be shared.

9 Q. What documents are you referring to?

10 MR.CHEN: You mean what kind
Steve Goodman

information is kept confidential or what
document is the policy contained in?

Q.    Both, well, my understanding from your
testimony is that associate information is sacred
as you said and I'm asking you were where in the
Bank of America policy is that a policy?
A.    It's laid out and there are compliance
training that we are required to take periodically
and as part of that compliance training there are
specific instructions around not providing
confidential data of any sort, customer or
associate.

Q.    The compliance training centers around
Bank of America policies, is that fair to say, you
are not going to have compliance training for not a
non-enforceable event. Is there somewhere where it
specifically states that employee information
relating to compensation has to be confidential?
A.    I'm confident it's somewhere. I can't
tell you exactly where.

CONT'D EXAMINATION BY PAMELA MAHON, ESQ.

Q.    The compliance training that you just
referred to, that's training for Bank of America
employees to not divulge another employees
Q. Do you know if Bank of America requires its employees to sign a confidentiality agreement or any type of agreement with respect to keeping their own compensation information confidential?
A. I don't recall.

Q. Have you ever instructed anyone at Bank of America to keep their compensation information confidential?
A. In 23 years?
Q. Sure?
A. I don't recall that I ever specifically told an individual they could not share their own information with someone else.

Q. Do you know if Bank of America has ever terminated anyone for disclosing their own confidential compensation information?
A. I don't know the answer to that.
Q. Have you ever had to terminate someone on that basis for disclosing their own?
A. I never terminated anybody for that reason, personally.

MS. MAHON: In terms of not being aware someone has been terminated for
revealing their own compensation
information, have you been made aware that
anybody has been terminated for that reason?
A. No. No one made me aware of that.
Q. Mr. Goodman, do you participate in
recruiting people, HR executives?
A. Yes.
Q. Tell us a little bit about that process, what goes into the recruitment process?
A. A lot. First we identify what our need is and we identify what skills and capabilities we are looking for and then we will generally look internally first to see if there is anyone capable of moving. If not, we go externally in the market to fill those roles.
Q. Let's talk about going externally, how is that search done?
A. Many different ways. Sometimes we do searches through the Internet using various web sites where people put resumes on the Internet. Sometimes we will do different advertisements into trade publications and we do a lot of networking and talk to people who know people in various companies and know people highly thought of and we
Q. Have you ever had an employee advice you that the reason they are leaving is to go make more money somewhere else?
A. Yes.

Q. Have you asked that employee how much money they are going to be making at other companies or firms?
A. I don't recall asking that question.

Q. Have you ever had a discussion about the compensation in hopes to perhaps match that compensation?
A. Going through 23 years here. I don't recall a specific conversation one way or the other. I don't recall a specific conversation.

Q. Do you recall any conversation when an employee told you they were leaving to make more money someplace else?
A. I don't recall a specific conversation but if I'm sure there was some dialogue after that.

Q. I will give you a hypothetical, tomorrow you are conducting an exit interview for an employee that has just resigned, during that interview the employee tells you I'm leaving to go to firm X to make more money, would you feel
comfortable during that discussion to ask the employee what are you going to be making at firm X or perhaps you want to see if you can match that compensation and that is an employee you wanted to keep?

A. Asking me my particular practice for that I would generally not ask that question.

Q. Why would that be?

A. People generally stay at companies where they feel they can get the greatest amount of growth and development in their career. If somebody chooses to leave a company at that time I'm assuming they believe they can have a better career somewhere else.

Q. Your hesitation to ask such a question is not based on Bank of America's policy that you are not permitted to ask but it's your own personal belief as to reason this person is leaving?

A. I had not thought of it in terms of a policy.

Q. Have you ever been advised you can't ask an employee during an exit interview or discussion?

A. No.

MS. ANDREADIS: Mr. Goodman thank you
Exhibit P
Via Email & First Class U.S. Mail

Bank of America Corporation
c/o Lewis Liman, Esq.
Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, NY 10006

Dear Mr. Liman,

In connection with the respective investigations of the State of New York Office of the Attorney General and the Special Inspector General for the Troubled Asset Relief Program concerning the use of TARP funds and executive compensation, we request that you produce documents and information related to bonus payments and the Bank of America - Merrill Lynch merger as set forth in the attached schedule.

We ask that the documents be produced by February 11, 2009. Please contact us to discuss coordination of your production at your earliest convenience.

Sincerely,

NEIL M. BAROFSKY
Special Inspector General

By: [Signature]

By:

ANDREW M. CUOMO
Attorney General

[Signature]

By:

David A. Markowitz
Chief, Investor Protection Bureau
120 Broadway, 3rd Floor
New York, New York 10271
212-416-8198

January 27, 2009
SCHEDULE

A. Definitions

1. "Documents" is used herein in the broadest sense of the term and shall mean all records and other tangible media of expression of whatever nature including, without limitation, originals, drafts or finished versions, or annotated or nonconforming or other copies however created, produced or stored (manually, mechanically, electronically or otherwise), including electronic mail ("e-mail"), instant messages, Blackberry or other wireless device messages, voicemail, books, papers, files, notes, confirmations, accounts statements, correspondence, memoranda, reports, records, journals, registers, analyses, plans, manuals, policies, telegrams, faxes, telexes, wires, telephone logs, telephone messages, message slips, minutes, notes or records or transcriptions of conversations or communications or meetings, tape recordings, videotapes, disks, and other electronic media, microfilm, microfiche, storage devices, press releases, contracts, agreements, calendars, date books, appointment books, diaries, notices and summaries. A draft or non-identical copy is a separate document within the meaning of this term. Under this definition, documents existing in electronic form shall include all items that may have been removed from the e-mail accounts or the directories in which they are ordinarily stored to any other server, folder, file, archive, or backup device, whether or not deleted.

2. "Communication" as used herein shall include all means of conveying information, written, oral, or otherwise.

3. The terms "concerning" or "relating to" as used herein shall mean, directly or indirectly, in whole or in part, relating to, referring to, describing, evidencing or constituting.

4. The terms "sent" or "received" as used herein shall mean, in addition to their usual meanings, the transmittal or reception of a Document by mail, hand, email or other electronic delivery, and facsimile transmission or reception, whether by direct or indirect means.

5. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the information request or demand for production all responses or production of documents that might otherwise be construed to be outside of its scope.

6. "All" shall be construed as each and every.

7. "Any" shall be construed as "any and all."

8. The use of the singular form of any word used herein shall include the plural and vice versa.

9. "Person" shall mean any natural person or entity including without limitation any corporation, company, limited liability company or corporation, partnership, limited partnership, association, or firm.
10. "Identity" or "Identity," as applied to any natural person, shall mean their name, title(s), alias(es), screen name(s), email address(es), telephone number(s) and business unit, department or division; and with respect to any entity, shall mean its full name(s) and d/b/a names, corporate form, physical address(es), and telephone and other electronic contact information to a specific management employee, not a voice mail system.

11. "Bank of America" "You" or "Your" shall mean Bank of America Corporation, Merrill Lynch & Co., Inc. ("Merrill"), and any of their present or former parents, subsidiaries, or affiliates, whether direct or indirect, directors, officers, partners, employees, agents, contractors, representatives, attorneys or other persons associated with or acting on behalf of Your company, their respective predecessors or successors or any affiliates of the foregoing.

12. "Bonus(es) shall mean bonuses, retention payments, severance payments, loans or any type of compensation to employees or former employees, other than fixed salaries and benefits.

B. Requests for Information

1. Provide information concerning Merrill's payments of Bonuses in December 2008 or January 2009, including:

   a. the total amount paid in Bonuses;
   b. the total amounts paid on each day of December 2008 and January 2009;
   c. the Bonuses paid to each recipient and the dates of each payment;
   d. a description of the process by which the total amount of Bonuses was determined;
   e. all reasons and considerations for paying the total amount of Bonuses paid in December 2008 and January 2009;
   f. a description of the process by which the decision was made to pay Bonuses in December 2008 and January 2009, rather than at a later date;
   g. all reasons and considerations for paying Merrill Bonuses in December 2008 and January 2009, rather than at a later date;
   h. the total Bonuses paid in December 2008 and January 2009 as a percentage of Merrill's: (i) 2008 net revenue; (ii) December 2008 total stockholders' equity; and (iii) cash and cash equivalents;
   i. the total amount paid in Bonuses for 2007, and the Bonuses paid to each recipient, and the dates of each payment in 2007 or 2008 as the case may be;
   j. a description of the process by which the total amount of Bonuses for 2007 was determined;
   k. all reasons and considerations for paying the total amount of Bonuses paid for 2007;
   l. all reasons and considerations for the timing of when fiscal year 2007 Merrill Bonuses were paid, regardless of when they were paid;
   m. the total Bonuses paid for 2007 as a percentage of Merrill's: (i) 2007 net revenue; (ii) December 2007 total stockholders' equity; and (iii) cash and cash equivalents; and
   n. Any and all corporate resolutions, bylaws, shareholder resolutions or other corporate document concerning the timing and payment of Bonuses for the fiscal years 2007
and 2008 regardless of when they occurred.

2. Identify all recipients of a Bonus in December 2008 or January 2009 whose employment Bank of America has terminated or has current plans to terminate.

3. Provide information concerning Merrill’s financial condition as of each day of December 2008, including:
   a. the total amount of assets;
   b. the total amount of liabilities;
   c. the aggregate value of Level I assets;
   d. the aggregate value of Level II assets and a description of the process and formulas used to set that value;
   e. the aggregate value of Level III assets and a description of the process and formulas used to set that value;
   f. The value of each asset included in the over $110 billion in assets concerning which the Bank of America reached an agreement with the United States Department of the Treasury in December 2008 or January 2009, and a description of the process, formulas and information used in determining those values;
   g. the value of each credit default swap, and a description of the process and formulas used to set that value;
   h. the value of each contract with a financial guarantor, and a description of the process and formulas used to set that value;
   i. the value of each leveraged loan, and a description of the process and formulas used to set that value;
   j. the value of each collateralized debt obligation backed directly or indirectly by mortgage backed securities, and a description of the process and formulas used to set that value; and
   k. for each asset where the mark-to-market valuation process was changed or revised, identify the asset, the changes in the process and formulas, and the reasons for such changes.

4. Concerning all Your Communications with any Person concerning funding, investments, loans or guarantees obtained by Merrill or Bank of America under the Emergency Economic Stabilization Act of 2008 and any related United States Department of Treasury program or initiative, including, without limitation, the Troubled Asset Recovery Program, Identify:
   a. the individuals involved;
   b. the dates of each Communication;
   c. a summary of each Communication;
   d. the relationship or impact of any Communication on Bank of America’s decision to go forward with the merger with Merrill;
   e. the relationship or impact of any Communication on Bank of America’s approval of Merrill Bonuses;
   f. the relationship or impact of any Communication on Merrill’s decision to pay
Bonuses in December 2008 and January 2009, rather than at a later date; and
g. the relationship or impact of any Communication on Merrill’s decision to pay the
total amount of Bonuses paid in December 2008 and January 2009.

5. Concerning Merrill’s decision to pay Bonuses in December 2008 and January 2009,
rather than at a later date, and to pay the aggregate amount of Bonuses paid. Identify:

a. the individuals involved in making that decision, whether at Merrill or Bank of
   America;

b. all individuals consulted or who provided information for that decision; and

c. all information that was used, considered or reviewed in making that decision.

6. Provide organizational charts Identifying all persons listed in response to Information
   Request 4 above.

7. Identify and describe all Your Communications with any Person concerning the Merrill
   December 2008 and January 2009 Bonuses, including, without limitation, all
   Communications between Merrill senior executives and Bank of America senior
   executives, including:

   a. the individuals involved;

   b. the dates of each Communication; and

   c. a summary of each Communication.

8. Identify and describe all Your Communications with any Person, from December 1, 2008
   to January 22, 2009, concerning Merrill’s financial condition and mark-to-market
   revisions, including, without limitation, all communications between Merrill senior
   executives and Bank of America senior executives, including:

   a. the individuals involved;

   b. the dates of each Communication;

   c. a summary of each Communication; and

   d. a description of the impact of each such Communication on Merrill’s December 2008
      and January 2009 Bonuses.

9. Identify all Persons involved in planning or preparing Merrill’s merger with Bank of
   America.

10. Identify and describe all Your Communications with any Person concerning Bank of
    America’s consideration of terminating or revising the merger agreement with Merrill as
    a result of Merrill’s financial condition or mark-to-market revisions, including, without
    limitation, all Communications between Merrill senior executives and Bank of America
    senior executives, including:

    a. the individuals involved;

    b. the dates of each Communication; and
c. a summary of each Communication.

11. Identify all clauses, terms or provisions in the Bank of America – Merrill merger agreement documents concerning Bank of America’s ability to terminate the merger with Merrill.

12. For the first eleven months of 2008, for Bonuses paid by Merrill to any individual who received greater than $250,000 in total Bonuses, provide a list: (a) Identifying the employee, and stating: (b) the Bonus amounts; and (c) the date(s) payments were made.

C. Documents to be Produced

1. All Documents concerning the Information Requests.

2. All Bank of America – Merrill merger agreement documents.

3. All documents You reviewed concerning Merrill’s financial deterioration or condition.

4. All documents reviewed by Kenneth Lewis concerning Merrill’s financial deterioration or condition.

5. All documents concerning Merrill’s financial deterioration or condition reviewed by any Bank of America employee, agent, or consultant for the purpose of communicating or presenting information to Kenneth Lewis.

6. All documents You reviewed concerning Bank of America’s ability to terminate the merger agreement with Merrill.

7. All documents reviewed by Kenneth Lewis concerning Bank of America’s ability to terminate the merger agreement with Merrill.

8. All documents concerning Bank of America’s ability to terminate the merger agreement with Merrill reviewed by any Bank of America employee, agent, or consultant for the purpose of communicating or presenting information to Kenneth Lewis.

9. All documents provided to the House Committee on Oversight and Government Reform and in response to other governmental requests or Communications regarding executive compensation, including information about December 2008 and January 2009 Bonuses.
Exhibit Q
SUBPOENA AD TESTIFICANDUM

THE PEOPLE OF THE STATE OF NEW YORK

GREETINGS

TO: John A. Thain
   c/o Andrew J. Levander, Esq.
   Dechert LLP
   1095 Avenue of the Americas
   New York, NY 10036-6797

WE HEREBY COMMAND YOU, pursuant to § 352 of the General Business Law of New York and § 63(12) of the Executive Law of New York, that, all business and excuses being laid aside, John A. Thain appear and attend before the Attorney General of the State of New York, or a designated Assistant Attorney General, on the 4th day of February, 2009 at 10:00 a.m. or any agreed upon adjourned date or time, at 120 Broadway, 23rd Floor, New York, New York 10271, to testify in connection with an investigation concerning executive compensation or any matter which the Attorney General’s Office deems pertinent thereto.

PLEASE TAKE NOTICE that the Attorney General deems the testimony requested by this subpoena to be relevant and material to an investigation and inquiry undertaken in the public interest.

PLEASE TAKE FURTHER NOTICE that your failure to attend or testify on the date, time and place stated above or on any agreed upon adjourned date or time may subject you to prosecution for a misdemeanor or civil remedies pursuant to General Business Law § 352(4) and/or other statutes.

WITNESS, Honorable Andrew M. Cuomo, Attorney General of the State of New York, this 27th day of January, 2009.

By:

David A. Markowitz
Chief, Investor Protection Bureau
120 Broadway, 23rd Floor
New York, New York 10271
Exhibit R
In the Matter of the Petition by:

ANDREW M. CUOMO, Attorney General of the State of New York,

Petitioner,

For an order pursuant to CPLR 2308(b) compelling compliance with a certain subpoena dated January 27, 2009, issued by the Attorney General

-- against --

JOHN A. THAIN,

Respondent.

PETITION TO COMPEL COMPLIANCE WITH THE SUBPOENA DATED JANUARY 27, 2009, ISSUED BY THE ATTORNEY GENERAL OF NEW YORK, ANDREW M. CUOMO, TO JOHN A. THAIN

Pursuant to N.Y.C.P.L.R. 403 (d) and 2308 (b), the Attorney General of the State of New York, Andrew M. Cuomo ("Attorney General’s Office" or "Petitioner"), hereby petitions the Court for an order compelling John A. Thain ("Mr. Thain" or "Respondent") to respond to a lawful subpoena issued by the Attorney General’s Office on January 27, 2009, together with the costs of this motion and that of the investigative testimony that took place on February 19, 2009, as follows:

Background

1. This is an application for an order compelling John A. Thain to comply with a Martin Act subpoena and answer questions that are central to an investigation being conducted by the Attorney General’s Office. In particular, during subpoenaed testimony,
Mr. Thain refused to answer questions about the determination and amount of individual bonus awards for all but five employees at Merrill Lynch. (Zlotchew Aff. ¶ 9.) Mr. Thain claimed that his refusal to answer these relevant questions was based on an instruction from Bank of America; however, Bank of America, Mr. Thain's former employer, has no authority to issue such an instruction. (Id. ¶ 10.) Mr. Thain played a central role in the awarding of over $3.6 billion in bonuses just prior to Merrill Lynch's merger with Bank of America. (Id. ¶ 4.) Mr. Thain failed to provide a valid legal basis for his failure to comply with the subpoena, and Mr. Thain's unjustified refusal is interfering with the Attorney General's Office's investigation. (Id. ¶¶ 10, 12.) Accordingly, the Attorney General's Office seeks an order compelling Mr. Thain to comply with the subpoena and answer all questions, including questions concerning individual bonus determinations.

2. The Attorney General's Office is investigating, among other things, disclosures related to the timing and nature of more than $3.6 billion in bonus payments made by Merrill Lynch on the eve of the Merrill Lynch/Bank of America merger. (Zlotchew Aff. ¶ 3.) Whereas bonus payments at Merrill Lynch were typically set and paid after the end of a calendar year, the bonus process was accelerated to ensure that bonuses were paid before Merrill Lynch merged with Bank of America. (Id. ¶ 4.) In a departure from prior practice (and logic), Merrill Lynch's 2008 bonus pool was set by December 8, 2008, before Merrill knew its year-end results. (Id.) The bonus pool did not materially change after December 8, 2008. However, the Attorney General's Office believes that Merrill Lynch's pre-tax losses turned out to be approximately $7 billion more than it anticipated when it set its bonus pool on December 8, 2008, and after-tax losses turned out to be at
least $5 billion more than anticipated as of that same date. (Id.) Merrill Lynch’s bonus pool was not altered to reflect these multi-billion-dollar losses, even though results are supposed to be a key component in setting bonus pools. (Id.) Merrill Lynch awarded the bonuses in a year when it lost approximately $27 billion, and during a fourth quarter 2008 that saw over $15 billion in pre-tax losses. (Id.)

3. Moreover, Merrill Lynch did not disclose that it was accelerating bonus payments. To the contrary, Merrill Lynch represented to The Attorney General’s Office and to the United State House Committee on Oversight and Government Reform in November 2008 that it planned to make incentive compensation decisions at year-end. (Zlotchew Aff. ¶ 4.) The Attorney General’s Office believes that these representations were inaccurate, as Merrill Lynch had already planned on awarding bonuses before the year-end when it made them. (Id.)

4. As the Chief Executive Officer of Merrill Lynch, Mr. Thain played a central role in the decision to accelerate the timing of bonus payments, as well as in determinations about individual bonus awards. (Zlotchew Aff. ¶ 4.) Accordingly, the Attorney General’s Office seeks to compel his testimony about the facts central to its investigation. (Id.)

The Subpoena

5. The Attorney General’s Office determined to issue a subpoena to Mr. Thain (the “Subpoena”). The Subpoena commanded Mr. Thain’s testimony related to this investigation. (Zlotchew Aff. ¶¶ 5-6.) Counsel for Mr. Thain accepted service of the subpoena on January 27, 2009. (Id. ¶ 7.)
6. On February 19, 2009, pursuant to mutual arrangement between the Attorney General’s Office and counsel for Mr. Thain, Mr. Thain appeared for testimony at the offices of the Attorney General’s Office. (Id. ¶ 8.)

**Refusal to Comply With Subpoena**

7. In the course of testimony, Mr. Thain refused to answer all questions concerning the determination and amount of bonuses for all but the five individuals whose bonuses are publicly disclosed. (Id. ¶ 9.) The five individuals that Bank of America permitted Mr. Thain to discuss were among the few executives that did not receive a bonus, thus being a meaningless gesture. (Id.)

8. Mr. Thain offered no legitimate basis for his refusal. Mr. Thain’s attorney stated that the refusal to answer was based on an instruction from counsel to Bank of America, which does not employ or represent Mr. Thain. (Id. ¶ 10.) In addition, Mr. Thain testified that he had not entered into any agreement with Bank of America, his former employer, that might purport to preclude his ability to answer questions about bonus payments. (Id.)

9. The questions that Mr. Thain refused to answer are of obvious and central relevance to the Attorney General’s Office’s investigation into Merrill Lynch’s bonus payments. (Id. ¶ 11.) Bank of America’s instruction to a former employee without basis to refuse to answer questions about the determination and payment of particular bonus awards has no legitimate basis and obstructs the Attorney General’s Office’s ability to exercise its obligations to investigate and enforce violations of New York’s Martin act. Accordingly, the Court should compel Mr. Thain to answer the questions.
10. The Attorney General's Office was authorized to issue the Subpoena. The Attorney General's Office is empowered to conduct investigations in the public interest pursuant, among other laws, to New York General Business Law §§ 352 et seq. (the "Martin Act") and New York Executive Law § 63(12). In particular, the Martin Act authorizes the Attorney General's Office to "subpoena witnesses, compel their attendance, [and] examine them under oath before him...." N.Y. Gen. Bus. Law § 352 (2) (McKinney 2008). Further, § 63(12) of the Executive Law authorizes the Attorney General's Office "to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules" in any case where "any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business." N.Y. Exec. Law § 63(12) (McKinney 2008).

11. Further, the Martin Act states that "if a person in attendance upon such inquiry shall without reasonable cause refuse ... to answer a question ... when ordered so to do by the officer conducting such inquiry ... he shall be guilty of a misdemeanor." N.Y. Gen. Bus. Law § 352 (2) (McKinney 2008). The Executive Law likewise authorizes the Attorney General "to take proof ... and to issue subpoenas in accordance with the Civil Practice Law and Rules." N.Y. Exec. Law § 63(12) (McKinney 2008). The foregoing provisions explicitly authorize the Attorney General's Office to issue the Subpoena and obtain answers to the questions at issue.

12. Moreover, the investigation possesses an adequate factual basis, and the questions asked of Mr. Thain pursuant to the Subpoena were reasonably related to the matter under
investigation. In the course of its inquiry into the recent, calamitous collapse of numerous financial services companies, the Attorney General’s Office determined that it is in the public interest to investigate executive compensation at certain financial firms and in particular whether adequate disclosures were made in connection with Merrill Lynch’s 2008 bonus awards. The investigation is of particular significance because the combined entities have received approximately $45 billion in taxpayer money in connection with the federal government’s Troubled Asset Relief Plan (“TARP”).

13. In this connection the Attorney General’s Office determined that it was appropriate to take testimony from Mr. Thain because he was the executive most closely involved in the payment of an immense sum in bonuses to Merrill Lynch employees prior to the effective date of Merrill Lynch’s merger with Bank of America. The appropriateness of these determinations is self-evident. Moreover, determinations by the Attorney General are entitled to a presumption of good faith. (Matter of Abrams v Thruway Food Market & Shopping Ctr., Inc., 147 AD2d 143, 147 [1989]).

14. The questions Mr. Thain refused to answer go to the heart of the Attorney General’s Office’s investigation. Under direction from Bank of America, Mr. Thain refused to answer questions about the determination and amount of individual bonus awards. Mr. Thain discussed some of these individual awards with at least one Bank of America executive. (See Zlotchew Aff. ¶ 9.) Thus, Bank of America’s direction to Thain is interfering with the Attorney General’s Office’s examination into the extent of Bank of America’s involvement, at the highest levels, to award enormous bonuses to Merrill Lynch employees where billions in taxpayer money would be supporting the combined entity. Knowledge of the identities of these employees is crucial to a further inquiry into
the investigation of how more than $3.6 billion in bonuses were paid on the eve of the
Bank of America merger. The answers Mr. Thain has refused to give thus directly relate
to the subject of the Attorney General’s Office’s investigation.

15. As demonstrated above, Mr. Thain has refused to answer questions asked of him
pursuant to a subpoena lawfully issued, appropriately framed, and properly served.
Accordingly, the Attorney General’s Office seeks an order compelling his answers to
those questions.

Conclusion

WHEREFORE, the Attorney General’s Office respectfully requests that the Court
issue an order compelling Mr. Thain to provide full and complete answers to the
questions which he has refused to answer to date, together with costs of this motion and
that of the investigative testimony that took place on February 19, 2009 and such other
relief as the Court deems proper.

Dated: New York, New York
February 23, 2009

Respectfully submitted,

ANDREW M. CUOMO,
Attorney General of the State of New York

By: ___________________________

David A. Markowitz
Chief, Investor Protection Bureau
Office of the New York State Attorney General
120 Broadway, 23rd Floor
New York, New York 10271
212.416-8222
Exhibit S
IT IS HEREBY STIPULATED AND AGREED by and between the below-named attorney(s) as follows:

John Thein ("Thein") will appear to complete his deposition at 4:00 on Tuesday, February 24, 2009. All parties will keep this testimony confidential until the Court has an opportunity to rule on the intervention motion of Bank of America ("BofA"). BofA agrees to file its intervention motion on or before March 4, 2009, regarding the confidentiality of the completed Thein testimony, and the People will submit its opposition on or before March 11, 2009. Thein may respond to such papers on a timely basis. Alternatively, the People may submit an application to remove the confidentiality regarding Thein's testimony. Nothing herein shall modify any confidentiality agreement between BofA and SIG/TARF, which is participating in these proceedings or participating in testimony before the NYAA.

Date: 2/23/09

So Ordered.

ENTER:

HON. BERNARD J. FRIED

J.S.C.
Exhibit T
TO: Bank of America Corporation  
c/o Lewis Liman, Esq.  
Cleary Gottlieb Steen & Hamilton LLP  
One Liberty Plaza  
New York, NY 10006

WE HEREBY COMMAND YOU, pursuant to § 352 of the General Business Law of New York and § 63(12) of the Executive Law of New York, that, all business and excuses being laid aside, You deliver and turn over to the Attorney General of the State of New York, or a designated Deputy or an Assistant Attorney General, on the 2nd day of March, 2009, at 10:00 am or any agreed upon adjourned date or time, at 120 Broadway, 23rd Floor, New York, New York 10271, all documents and information requested in the attached Schedule in accordance with the instructions and definitions contained therein.

PLEASE TAKE NOTICE that the Attorney General deems the documents and information requested by this Subpoena to be relevant and material to an investigation and inquiry undertaken in the public interest.

PLEASE TAKE FURTHER NOTICE that Your disobedience of this Subpoena by failing to deliver the documents and information requested in the attached Schedule on the date, time and place stated above or on any agreed upon adjourned date or time, may be subject you to prosecution for a misdemeanor or civil remedies under § 352(4) of the General Business Law, and/or other statutes.


By: David A. Markowitz  
Chief, Investor Protection Bureau  
120 Broadway, 23rd Floor  
New York, New York 10271  
(212) 416-8741
SCHEDULE

A. Definitions and Instructions

1. "Documents" is used herein in the broadest sense of the term and shall mean all records and other tangible media of expression of whatever nature including, without limitation, originals, drafts or finished versions, or annotated or nonconforming or other copies however created, produced or stored (manually, mechanically, electronically or otherwise), including electronic mail ("e-mail"), instant messages, Blackberry or other wireless device messages, voicemail, books, papers, files, notes, confirmations, accounts statements, correspondence, memoranda, reports, records, journals, registers, analyses, plans, manuals, policies, telegrams, faxes, telexes, wires, telephone logs, telephone messages, message slips, minutes, notes or records or transcriptions of conversations or communications or meetings, tape recordings, videotapes, disks, and other electronic media, microfilm, microfiche, storage devices, press releases, contracts, agreements, calendars, date books, appointment books, diaries, notices and summaries. A draft or non-identical copy is a separate document within the meaning of this term. Under this definition, documents existing in electronic form shall include all items that may have been removed from the e-mail accounts or the directories in which they are ordinarily stored to any other server, folder, file, archive, or backup device, whether or not deleted.

2. "Communication" as used herein shall include all means of conveying information, written, oral, or otherwise.

3. The terms "concerning" or "relating to" as used herein shall mean, directly or indirectly, in whole or in part, relating to, referring to, describing, evidencing or constituting.

4. The terms "sent" or "received" as used herein shall mean, in addition to their usual meanings, the transmittal or reception of a Document by mail, hand, email or other electronic delivery, and facsimile transmission or reception, whether by direct or indirect means.

5. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the information request or demand for production all responses or production of documents that might otherwise be construed to be outside of its scope.

6. "All" shall be construed as each and every.

7. "Any" shall be construed as "any and all."

8. The use of the singular form of any word used herein shall include the plural and vice versa.
9. "Person" shall mean any human being or entity including without limitation any corporation, company, limited liability company or corporation, partnership, limited partnership, association, or firm.

10. "Identify" or "Identity," as applied to any natural person, shall mean to provide their name, title(s), aliases, screen names, and Contact Information, and with respect to any entity, shall mean to provide the name, d/b/a names, if any, and the entity's Contact Information.

11. "Contact Information," as applied to any natural person, shall mean to provide the person's most current physical address(es), e-mail address(es), and telephone number(s). With respect to an entity, Contact Information shall include the full name(s), corporate form and physical address(es) of the entity and the Identity of any parent, subsidiary, officers, employees, or agents thereof.

12. "Bank of America" "You" or "Your" shall mean Bank of America Corporation, Merrill Lynch & Co., Inc. ("Merrill"), and any of their present or former parents, subsidiaries, or affiliates, whether direct or indirect, directors, officers, partners, employees, agents, contractors, representatives, attorneys or other persons associated with or acting on behalf of Your company, their respective predecessors or successors or any affiliates of the foregoing.

13. "Bonus(es) shall mean bonuses, retention payments, severance payments, loans or any type of compensation to employees or former employees, other than fixed salaries and benefits.

B. Instructions

1. Unless otherwise specified and agreed to by Office of Attorney General staff, Documents are to be produced on computer disk or drive media, in electronic, native file format and also converted into Concordance load files in accordance with these instructions:

(a) The Concordance load file shall contain a hyperlink field that points to each produced native file.

(b) The Concordance load file shall also include all extracted metadata and bibliographical data in text delimited format (.DAT file).

(c) The .DAT file must include field headers. Note: Once metadata fields have been established, the field names and field order should be maintained throughout the course of production, unless they are being changed to solve a problem.

(d) The production must include searchable text for each document. The searchable text shall be extracted directly from the electronic document when an electronic document is available.
(e) The text shall be produced as either the last field in the concordance .DAT file or as separate document based text (.TXT) files.

(f) If the searchable text is being produced as .TXT files, it shall be named based on its associated document Bates number.

(g) The production shall include single page, Tagged Image File Format (TIFF, black and white, Fax IV compressed, 300x300dpi) image files. The image files shall be Bates stamped as described in Instruction No. 5 below, and the files shall be named based on their associated Bates stamp.

(h) The production shall also include an Opticon (.OPT) image base file. This file shall have one record for each image file. The image base shall be produced in sequential order with appropriate document break information.

(i) Deduplication software shall be used to eliminate duplicate documents.

(j) If it is determined that encryption should be applied to the data, the encryption software used must be one of the following software products: WinZip 9.0 set at 256-bit AES, or WinRAR, trucrypt. The password must be sent in a communication separate from the data, but must be sent the same day. Encryption should be set at 256 bit.

2. All Documents, including e-mails and attachments, must be provided with all original metadata and bibliographical data intact, rendered in text-delimited format with field headers. All attachments must be linked to their parent Document. All Documents requested, including e-mails and attachments, shall include all items that may have been removed from the e-mail accounts or the directories in which they are ordinarily stored to any other server, folder, file, archive, or backup device, and shall include all items that have been deleted. You shall retrieve (which shall include, but not be limited to, restoring backup media and archives) all deleted Documents and include them in Your production.

3. Documents that exist in hard copy form only must be scanned and accompanied by a searchable text file created by optical character recognition (OCR), and otherwise be produced as specified above.

4. If creation of Concordance load files is estimated to require more than 48 hours, electronic documents shall also be produced in their native format only on computer disk or drive media. For this production, .PST files shall be converted to and produced as .RTF files.

5. Each page produced is to be marked in the lower right corner with the producing entity's name or an abbreviation thereof, followed by a unique, sequential, identifying document control number.

6. Any document produced in hard copy is to be produced in its original file folder, file
jacket or cover (you may, in the alternative, designate in writing the titles of such folder, jacket or cover with respect to each such document) along with the identity of the individual from whose files the document is being produced or, if it is not in an individual's file, the department or area where the document was retained. In the event there is a titled folder that contains no document, a copy of said empty folder showing its title shall be provided.

7. All hard copy documents that are attached to each other in Your files shall be left so attached in Your production.

8. Where different or multiple versions or drafts of a Document exist, all versions and/or drafts shall be identified, even if the differences between the versions and/or drafts may appear to be minor or immaterial.

9. You shall identify the number of the request to which the Documents purport to be responsive. If there are no documents responsive to any particular request, You shall so state in writing.

10. If any Document requested herein was formerly in Your possession, custody or control but is no longer available, or no longer exists, You shall submit a statement in writing under oath that: (a) describes in detail the nature of the Document and its contents; (b) Identifies the person who prepared the Document and its contents; (c) Identifies all persons who have seen or had possession of the document; (d) specifies the dates on which the Document was prepared, transmitted or received; (e) specifies the date on which the Document became unavailable; (f) specifies the reason why the Document is unavailable, including without limitation whether it has been misplaced, lost, destroyed or transferred, and if the Document has been destroyed or transferred, the conditions of and reasons for such destruction or transfer and the identity of the persons requesting and performing the destruction or transfer; and (g) Identifies all persons with knowledge of any portion of the contents of the Document.

11. If any Document requested is withheld on ground of privilege or other legal doctrine, submit with the Documents produced a statement in writing under oath, stating: (a) the document control number range of the Document withheld; (b) the type of the document; (c) the date of the Document; (d) the author and recipient of the Document; (e) the general subject matter of the Document; (f) the document control number(s); and (g) the legal ground for withholding the Document. If the legal ground for withholding is attorney-client privilege, also indicate the name of the attorney involved on the document. Such statement or privilege log shall accompany each production.

12. Placeholder pages equivalent in number to the page-length of a withheld Document shall be substituted in the production in place of any document withheld pursuant to the preceding paragraph, with each such placeholder page assigned the same sequential document control number as it would have borne had the document been produced.
13. Each cover letter accompanying documents produced shall include an index that provides a description of the types of documents, their contents, and the corresponding document control number(s).

14. You shall Identify the person(s) who personally supervised the preparation and assembly of responses to this Subpoena, who could testify that the responses are complete and correct to the best of his or her knowledge and belief, and that any Documents produced are authentic, genuine and what they purport to be. You shall also Identify the custodian(s) of records for the Documents produced pursuant hereto, and submit a copy of all instructions prepared by You relating to the steps taken to respond to this Subpoena. Where the instructions given were oral, You shall provide a written statement under oath from the person who gave such instructions, detailing the content of the instructions and the person(s) to whom the instructions were given.

15. In order for Your response to this Subpoena to be complete, the attached Verification must be completed and executed on Your behalf by the person supervising compliance with the Subpoena and submitted with the responsive documents.

16. Unless otherwise specified, the time period covered by this Subpoena shall be September 1, 2008 to the present.

17. The obligation to produce pursuant to this Subpoena is a continuing one. Documents located at any time after a response is due shall be promptly produced at the place specified in the Subpoena.

C. Requests for Information

1. Provide information concerning Merrill’s payments of Bonuses in December 2008 or January 2009, including:
   a. the total amount paid in Bonuses;
   b. the total amounts paid on each day of December 2008 and January 2009;
   c. the Bonuses paid to each recipient and the dates of each payment;
   d. a description of the process by which the total amount of Bonuses was determined;
   e. all reasons and considerations for paying the total amount of Bonuses paid in December 2008 and January 2009;
   f. a description of the process by which the decision was made to pay Bonuses in December 2008 and January 2009, rather than at a later date;
   g. all reasons and considerations for paying Merrill Bonuses in December 2008 and January 2009, rather than at a later date;
   h. the total Bonuses paid in December 2008 and January 2009 as a percentage of Merrill’s: (i) 2008 net revenue; (ii) December 2008 total stockholders’ equity; and (iii) cash and cash equivalents;
   i. the total amount paid in Bonuses for 2007, and the Bonuses paid to each recipient, and the dates of each payment in 2007 or 2008 as the case may be;
   j. a description of the process by which the total amount of Bonuses for 2007 was determined;
k. all reasons and considerations for paying the total amount of Bonuses paid for 2007;
l. all reasons and considerations for the timing of when fiscal year 2007 Merrill Bonuses were paid, regardless of when they were paid;
m. the total Bonuses paid for 2007 as a percentage of Merrill’s: (i) 2007 net revenue; (ii) December 2007 total stockholders’ equity; and (iii) cash and cash equivalents; and
n. Any and all corporate resolutions, bylaws, shareholder resolutions or other corporate document concerning the timing and payment of Bonuses for the fiscal years 2007 and 2008 regardless of when they occurred.

2. Identify all recipients of a Bonus in December 2008 or January 2009 whose employment Bank of America has terminated or has current plans to terminate.

3. Provide information concerning Merrill’s financial condition as of each day of December 2008, including:

a. the total amount of assets;
b. the total amount of liabilities;
c. the aggregate value of Level I assets;
d. the aggregate value of Level II assets and a description of the process and formulas used to set that value;
e. the aggregate value of Level III assets and a description of the process and formulas used to set that value;
f. The value of each asset included in the over $110 billion in assets concerning which the Bank of America reached an agreement with the United States Department of the Treasury in December 2008 or January 2009, and a description of the process, formulas and information used in determining those values;
g. the value of each credit default swap, and a description of the process and formulas used to set that value;
h. the value of each contract with a financial guarantor, and a description of the process and formulas used to set that value;
i. the value of each leveraged loan, and a description of the process and formulas used to set that value;
j. the value of each collateralized debt obligation backed directly or indirectly by mortgage backed securities, and a description of the process and formulas used to set that value; and
k. for each asset where the mark-to-market valuation process was changed or revised, identify the asset, the changes in the process and formulas, and the reasons for such changes.

4. Concerning all Your Communications with any Person concerning funding, investments, loans or guarantees obtained by Merrill or Bank of America under the Emergency Economic Stabilization Act of 2008 and any related United States Department of Treasury program or initiative, including, without limitation, the Troubled Asset Recovery Program, Identify:

a. the individuals involved;
b. the dates of each Communication;
c. a summary of each Communication;
d. the relationship or impact of any Communication on Bank of America’s decision to go forward with the merger with Merrill;
e. the relationship or impact of any Communication on Bank of America’s approval of Merrill Bonuses;
f. the relationship or impact of any Communication on Merrill’s decision to pay Bonuses in December 2008 and January 2009, rather than at a later date; and
g. the relationship or impact of any Communication on Merrill’s decision to pay the total amount of Bonuses paid in December 2008 and January 2009.

5. Concerning Merrill’s decision to pay Bonuses in December 2008 and January 2009, rather than at a later date, and to pay the aggregate amount of Bonuses paid, Identify:

a. the individuals involved in making that decision, whether at Merrill or Bank of America;
b. all individuals consulted or who provided information for that decision; and
c. all information that was used, considered or reviewed in making that decision.

6. Provide organizational charts identifying all persons listed in response to Information Request 4 above.

7. Identify and describe all Your Communications with any Person concerning the Merrill December 2008 and January 2009 Bonuses, including, without limitation, all Communications between Merrill senior executives and Bank of America senior executives, including:

a. the individuals involved;
b. the dates of each Communication; and
c. a summary of each Communication.

8. Identify and describe all Your Communications with any Person, from December 1, 2008 to January 22, 2009, concerning Merrill’s financial condition and mark-to-market revisions, including, without limitation, all communications between Merrill senior executives and Bank of America senior executives, including:

a. the individuals involved;
b. the dates of each Communication;
c. a summary of each Communication; and
d. a description of the impact of each such Communication on Merrill’s December 2008 and January 2009 Bonuses.

9. Identify all Persons involved in planning or preparing Merrill’s merger with Bank of America.

10. Identify and describe all Your Communications with any Person concerning Bank of
America's consideration of terminating or revising the merger agreement with Merrill as a result of Merrill's financial condition or mark-to-market revisions, including, without limitation, all Communications between Merrill senior executives and Bank of America senior executives, including:

a. the individuals involved;
b. the dates of each Communication; and
c. a summary of each Communication.

11. Identify all clauses, terms or provisions in the Bank of America – Merrill merger agreement documents concerning Bank of America’s ability to terminate the merger with Merrill.

12. For the first eleven months of 2008, for Bonuses paid by Merrill to any individual who received greater than $250,000 in total Bonuses, provide a list: (a) Identifying the employee, and stating: (b) the Bonus amounts; and (c) the date(s) payments were made.

13. Identify all public statements made by Merrill Lynch and Bank of America employees concerning the Bank of America/Merrill Lynch merger and/or the financial condition of each entity or the combined entity.

D. Documents to be Produced

1. All Documents concerning the Information Requests.

2. All documents concerning the Bank of America/Merrill Lynch merger agreement.

3. All documents You reviewed concerning Merrill's financial deterioration or condition.

4. All documents reviewed by Kenneth Lewis concerning Merrill's financial deterioration or condition.

5. All documents concerning Merrill’s financial deterioration or condition reviewed by any Bank of America employee, agent, or consultant for the purpose of communicating or presenting information to Kenneth Lewis.

6. All documents You reviewed concerning Bank of America’s ability to terminate the merger agreement with Merrill.

7. All documents reviewed by Kenneth Lewis concerning Bank of America’s ability to terminate the merger agreement with Merrill.

8. All documents concerning Bank of America’s ability to terminate the merger agreement with Merrill reviewed by any Bank of America employee, agent, or consultant for the purpose of communicating or presenting information to
9. All documents provided to the House Committee on Oversight and Government Reform and in response to other governmental requests or Communications regarding executive compensation, including information about December 2008 and January 2009 Bonuses.

10. The document described by Andrea Smith in her testimony before this Office on February 12, 2009, which she forwarded to Steven Goodman, concerning her recommendation about Merrill Lynch’s executive compensation.

11. The email described by Andrea Smith in her testimony before this Office on February 12, 2009, from Neil Cotty to Andrea Smith at or around December 8, 2008 concerning Merrill Lynch’s fourth quarter losses.

12. The email described by Andrea Smith in her testimony before this Office on February 12, 2009, sent to Ms. Smith by either Peter Stingi or Michael Ross, on or about November 11 or 12, 2008, including any attachments, concerning the timeline of Merrill Lynch’s bonus payments.

13. All electronic mail and instant messages (Bloomberg or otherwise), Blackberry, text, or other wireless device messages sent to or received by:
   a. Kenneth Lewis;
   b. Joseph Price;
   c. Andrea Smith;
   d. John Thain;
   e. John Finnegan;
   f. Neil Cotty;
   g. Mark Behnke;
   h. J. Steel Alphin;
   i. Peter Stingi;
   j. Steven Goodman; and
   k. Gregory Fleming.

14. Provide (a) the individual names and (b) the bonus amounts that were paid for year 2008, to those individuals who were subject to Merrill Lynch’s policy described in the third paragraph of Your document production at bates-numbered page BAC-ML-NYAG00000327, which describes a "performance formula to govern amounts to be paid to executive officers ..." with the titles set forth therein.
Exhibit U
March 2, 2009

VIA E-MAIL & FIRST CLASS MAIL

David A. Markowitz, Esq.
Chief - Investor Protection Bureau
Office of the Attorney General - New York
120 Broadway
23rd Floor
New York, NY 10271

Dear David:

We are writing this letter to ask that you withdraw or modify your subpoena dated February 26, 2009 (the "Subpoena"). We make this request for several reasons.

First, as you are aware, the document requests in the Subpoena are identical to those set forth in a joint letter from the Office of the New York Attorney General and the Office of the TARP Special Inspector General. Bank of America has been producing documents voluntarily pursuant to the joint letter and, with the exception of highly sensitive competitive information regarding bonuses discussed below, has not refused to produce a single document. There is no need for the subpoena.

Second, the Subpoena was served on the evening of February 26, 2009 during the testimony of Mr. Lewis (which did not end until approximately 8:30 p.m.) and was made returnable on Monday March 2, 2009. It is unreasonable to require Bank of America to produce all of the documents set forth in the Subpoena in what amounts to a single business day. I understand that you have been in touch with my partner Shawn Chen with respect to this issue and that you have agreed that we may produce documents on a rolling basis subsequent to March 2. Please inform me promptly if I have misstated your position.
Third, to the extent that the Subpoena calls for individual bonus amounts, including the names or positions of people who received bonuses from Merrill Lynch and the bonuses they received, we have already provided to you voluntarily the individual amounts of the 200 highest bonuses. Providing you also with the names of those recipients would not seem to bear either a reasonable or a relevant relationship to any subject matter that is properly under investigation. In addition, as we have explained, such information is generally treated as extremely confidential and sensitive information in the industry. Bank of America has already experienced poaching of important employees by competitors, including foreign banks. Disclosure of this information would cause further grave harm to Bank of America, including the departure or poaching of key employees responsible for the generation of significant revenue and jobs for Bank of America and its shareholders and employees. We respectfully ask you to modify or withdraw that portion of the Subpoena. To the extent that you are able to articulate a reasonable or relevant relationship to a law enforcement purpose for certain of such information, we would be prepared to produce it subject to an appropriate binding confidentiality order or agreement.

Fourth, as we have discussed, certain of the Subpoena's requests are unduly burdensome and oppressive as drafted. We have spoken to you to prioritize your requests and priorities and expect to continue to do so in the future.

Finally, the Subpoena calls for information that is protected by the attorney-client privilege, attorney-work product doctrine, or other applicable privilege. We will produce to you a privilege log. We understand, however, that it is your desire that we focus on getting you non-privileged documents first and not hold up a production so that we may produce a privilege log with it. Please inform us if that is not the case.

We are prepared to meet and confer with you regarding the Subpoena.

Sincerely,

[Signature]

Lewis J. Liman
Exhibit V
Non-Disclosure Agreement

1. This Non-Disclosure Agreement is made by and between the Office of the New York State Attorney General (the “OAG”) and ____________ (the “Company”) and applies to all documents and information provided to the OAG by the Company in connection with the OAG’s subpoena dated ______________.

2. Documents, or information provided by the Company designated “Confidential” shall be deemed “Confidential Material” for purposes of this Agreement, subject to the following provisions:

   a. The Company shall designate material as “Confidential” only if that material reflects:

      i. Information that if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of New York Public Officers Law Sec. 89; or

      ii. Trade secrets or other confidential information that if disclosed would cause substantial injury to the competitive position of the Company, as these terms are used in New York Public Officers Law Sec 87(2)(d).

   b. The Company will not designate material as “Confidential” unless it has a good faith belief that the material falls within one of the two categories set forth in Paragraph 2(a) above.

   c. No material shall be designated as “Confidential” if the material was:

      i. disclosed or otherwise made available, to any third party; or

      ii. obtained by any third party through lawful means.

3. Except as provided in this Agreement or as otherwise required by New York’s Freedom of Information Law or any other law, the OAG shall maintain the confidentiality of any Confidential Material and will not disclose such information to any third party.

4. The OAG may disclose Confidential Material:

   (i) in any judicial, legislative or administrative proceeding; or

   (ii) to any governmental body within the State of New York, any other State or the United States, if the information relates to matters within the body’s jurisdiction; or
(iii) to any other person if the OAG determines in good faith that such disclosure:

(a) is required by law, judicial order, decree or ruling; or

(b) is in the interests of public health or safety; or

(c) is in furtherance of the OAG’s discharge of its duties and responsibilities.

5. When the documents furnished by the Company pursuant to this agreement are no longer needed, the OAG agrees to return the originals to the Company, if requested by the Company.

6. Nothing in this Agreement shall preclude the OAG from disclosing material that was obtained independently of the Company even if the material was also provided by the Company.

7. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Agreement has been made or relied upon by any party to this Agreement.

8. This Agreement may not be amended except by an instrument in writing signed on behalf of all the parties to this Agreement.

9. This Agreement may be executed in counterparts, each of which shall be considered the same as if a single document shall have been executed, but shall become effective when such counterparts have been signed by each of the parties hereto.

Dated: March __, 2008

By:_____________________________

Attorney General of the State of New York

State of New York Office of the Attorney General
120 Broadway
New York, NY 10271
Exhibit W
March 6, 2009

Undisclosed Losses at Merrill Lynch Lead to a Trading Inquiry

By LOUISE STORY and ERIC DASH

CHARLOTTE, N.C. — One Merrill Lynch trader apparently gambled away more than $120 million in the currency markets. Others seemingly lost hundreds of millions on tricky credit derivatives.

But somehow all this red ink did not spill into plain view until after Merrill earmarked billions for bonuses and staggered into the arms of Bank of America.

Inside Bank of America headquarters here, executives are asking why. The bank is investigating how Merrill accounted for wayward trades in the final, frantic months of 2008 — and why at least one big loss was slow to appear on Merrill’s books.

Of particular concern are the activities of a Merrill currency trader in London, Alexis Stenfors, whose trading has come under scrutiny by British regulators, according to people briefed on the investigation. The loss Mr. Stenfors is believed to have incurred so alarmed Bank of America that this week the bank examined the books of other traders who were on vacation.

Bank of America’s embattled chief executive, Kenneth D. Lewis, is trying to bridle Merrill’s traders, whose rush into risky investments nearly brought down the brokerage firm. But questions over the Merrill losses — in particular, who knew about them, and when — keep swirling. Merrill hemorrhaged $13.8 billion during the final three months of 2008 alone.

Bank of America’s shareholders did not learn of that gaping hole until after they approved the merger of the two companies on Dec. 5. Nor was the extent of the loss fully known when Merrill paid out $3.6 billion in bonuses, which were based on estimates of the firm’s performance as of Dec. 8. When the problems became clear, Bank of America was forced to seek a second, multibillion-dollar rescue from Washington.

The epicenter of the trouble is Merrill’s markets operation, headed by Thomas K. Montag. Mr. Montag, a former Goldman Sachs trader who was brought in by John A. Thain, Merrill’s fallen chief executive, has become a divisive figure inside Bank of America. He is trying to retain his top producers amid the furor over Merrill’s bonuses. He flew to Charlotte this week to strategize with deputies from around the world.

“There is a massive cultural disconnect in the trading area,” said Brad Hintz, an analyst with Sanford C. Bernstein & Company. “You have Bank of America, where it would seem foreign to ride a motorcycle without wearing a helmet, and at Merrill, the legacy is still there, from the C.D.O.’s and the risks they took on.”
For Mr. Stenfors, 38, 2008 looked like a very good year. He recorded a trading profit of about $120 million, and his reward was a handsome bonus, according to people familiar with the matter.

But three weeks ago, while Mr. Stenfors was on vacation, Bank of America risk officers discovered irregularities in his trading account. He appears to have lost a substantial amount on his currency bets, according to a Bank of America executive who was briefed on the matter and spoke on the condition that he not be named because of the delicate nature of the inquiry.

Reached in London on Thursday, Mr. Stenfors characterized the matter as a “misunderstanding” and declined to elaborate. He remains a Merrill employee, and his lawyer, Ian Ryan, said Mr. Stenfors was cooperating in the investigation.

When the discrepancy came to light a few weeks ago, Bank of America dispatched risk-management executives to investigate. David Gu, the bank’s chief of interest rates and currencies, who does not directly oversee Mr. Stenfors, initially dismissed Bank of America’s concerns, according to a person briefed on the conversations. Mr. Gu argued that the taxpayer dollars that Bank of America had received more than filled the hole, according to this person.

A Bank of America spokesman said that Mr. Gu and his management team discovered the problem and were not dismissive of it. The spokesman added that Mr. Gu had not made the comment about the taxpayer dollar. Mr. Gu declined to comment.

But Mr. Gu and Mr. Montag are coming under intense scrutiny. They and five other executives were subpoenaed on Wednesday by the attorney general of New York as part of his investigation into the merger and the bonuses paid to Merrill workers. Mr. Montag was paid a bonus of $39 million, while Mr. Gu’s bonus was close to $15 million.

Even before the merger closed, several red flags arose at Merrill, mostly related to controls and procedures used to monitor and record trades. Some shareholders say Bank of America should have taken a closer look at Merrill. On Thursday, the CtW Investment Group, which represents unions, called for Mr. Lewis to be fired.

Questions also surround the way Merrill Lynch traders marked down trades on an index of credit-default swaps, instruments that have played a crucial role in the financial collapse. The index, which represented bets on 30 volatile corporate bonds, was marked down by several hundred million dollars at the end of the fourth quarter, according to two people familiar with Merrill’s trading strategy.

While one Merrill insider said the brokerage had effectively hedged its position, others said the trade contributed to Merrill’s fourth-quarter losses.

A former Merrill executive said executives discussed how to value such illiquid investments, but the discussion dragged on through late 2008. Merrill traders argued that the investments traded so infrequently that it was difficult to place an accurate value on them. Merrill risk managers pushed them to use the underlying corporate bonds as a benchmark. In any case, the losses were delayed until after shareholders approved the merger and bonuses were paid.
Even now, Merrill seems to be struggling to manage risk effectively in its trading operation, where some traders seem to flout the rules. In January, for instance, a Merrill mortgage trader set off alarms when he broke the bank’s rules on bulk purchases for the second time. In February, Mr. Montag called traders in Europe to question them on the way they had hedged their trades.

“It would be a tragedy if Bank of America shuts down much of the institutional trading business of Merrill Lynch, but on the other hand, it was trading that brought Merrill down,” Mr. Hintz said.

Louise Story reported from Charlotte, N.C., and Eric Dash from New York. Landon Thomas Jr. contributed reporting from London.
Exhibit X
IN RE: EXECUTIVE COMPENSATION INVESTIGATION
BANK OF AMERICA - MERRILL LYNCH

NEIL COTTY, taken at the State of New York, Office of the Attorney General, 120 Broadway, New York, New York, on March 4, 2009 at 5:00 p.m., before SARA FREUND, a Shorthand Reporter and a Notary Public of the State of New York.
N. Cotty

get." That's it.

Q. And did she have any further response?
A. Other than that's the decision that was made by Merrill Lynch.

Q. What's the implication about the fact that they're going to get paid?
A. Bank of America awards bonuses in January, and, therefore, you get people working 150 percent during the holiday season when a lot of people want to go skiing and take off. So if the bonuses in the envelope was in hand, a lot of them might have said, Jeez, I don't need this stuff any more. I'm out of here. So they were awarded their bonus when I needed them at the most critical time. So I was outraged.

Q. Did you talk to anyone at Bank of America about your outrage?
A. I might have mentioned it to Bob Qutob, who was on the transition team, to know what he heard, and he confirmed it. Did I talk to Joe about it? No.

Q. Did you express your concern about this to anyone?
A. Bob, Wendy. That's it. No one else