

April 6, 2009

Mary Schapiro
Chairman
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Dear Chairman Schapiro:

Several weeks ago, the Attorney General of New York State made a number of troubling assertions about Bank of America (“BOA”) in a brief he filed on March 11, 2009. Namely, that BOA omitted from disclosures to its shareholders certain materials in its possession detailing very large discretionary bonuses that would be offered by Merrill Lynch prior to closing of the merger deal between Merrill and Bank of America.^[1] As a result, BOA shareholders did not know, when they voted on the merger agreement, that BOA had agreed to allow Merrill to award up to \$5.8 billion in performance bonuses under its “Variable Incentive Compensation Program,” because BOA did not disclose to its shareholders an attachment to the merger agreement containing those details^[2] (referred to herein as the “Bonus Attachment”).

When my staff asked BOA about those assertions and its decision not to disclose the Bonus Attachment to BOA shareholders prior to their vote on the merger, BOA replied, in part, “Bank of America disclosed everything it was required to disclose prior to the December 5, 2008 shareholder vote on the merger. Bank of America did not disclose and was not required to disclose to its shareholders prior to December 5, the details it then possessed about the potential size of the Merrill bonuses or the expected timing of their payment to Merrill’s employees.”^[3]

BOA’s response raises significant questions about the SEC’s interpretation of the fiduciary duty to disclose all “material” information to shareholders when requesting shareholder action, and what constitutes “material” information for proxy rules designed to protect investors under the Securities Exchange Act of 1934.

Background

As you may know, the Merrill bonuses were substantial, and the condition of Merrill at the time it offered the bonuses was close to terminal. Merrill bonuses were 22 times larger than those paid by AIG.^[4] The bonuses Merrill was allowed to award represented more than 10% of the merger deal at signing; its proportion increased relative to the value of the deal at closing. They were also very large relative to the monies allocated to Merrill through the Troubled Assets Relief Program (TARP). The Merrill bonuses were

^[1] Attorney General’s Memorandum in Opposition to Motion to Intervene and Petition to Quash or Modify Subpoena (“AG Opp. Mem.”) at 6, *Cuomo v. Thain*, No. 400381/09, (N.Y. Sup. Ct. Mar. 11, 2009).

^[2] Disclosure Schedules to Agreement and Plan of Merger by and between Merrill Lynch & Co., Inc. and Bank of America Corporations (Sep. 14, 2008) at 14.

^[3] Email correspondence from John Collingwood, Bank of America, to Majority Staff (Mar. 29, 2009).

^[4] Merrill awarded \$3.62 billion in bonuses. The Merrill bonuses were many times the size of the AIG bonuses that caused so much public furor (\$3,620 million versus \$165 million).

the equivalent of 36.2% of TARP monies Treasury allocated to Merrill and awarded to BOA after their merger.

The Merrill bonuses were awarded in a manner that departed significantly from Merrill company policy. The Merrill bonuses were determined by Merrill's Compensation Committee at its meeting of December 8, 2008, shortly after BOA shareholders approved the merger but before financial results for the Fourth Quarter had been determined.^[5] According to company policy, Variable Incentive Compensation Program bonuses were supposed to reflect all four quarters of performance and were to be paid in January or later.^[6] In this case, however, the bonuses were awarded in December before Fourth Quarter performance had been determined.

BOA had knowledge of and influence over Merrill's intent to pay out bonuses even before BOA took control of Merrill. According to the merger agreement of September 15, 2008, Merrill's bonus awards were to be made "in consultation with [Bank of America]."^[7] BOA also decided not to disclose details of the Merrill bonus intention, including its size and its unusual sequencing (to precede 4Q results). As BOA has informed this committee, they were not required to do so.

However, BOA was sufficiently concerned after the fact about the size of the Fourth Quarter losses at Merrill (of which the bonuses represented the equivalent of over 20%) that BOA CEO Ken Lewis met on two occasions with then-Secretary Henry M. Paulson and Chairman Ben Bernanke to explore withdrawing from the deal to acquire Merrill.^[8]

Issue before the SEC

Before the fiscal year was closed, and before the disastrous earnings results of the Fourth Quarter had been tallied, Merrill awarded \$3.62 billion in bonuses, mostly as cash, to top management at Merrill. To be eligible for the bonuses, Merrill employees had to have a salary of at least \$300,000 and attained the title of Vice President or higher.^[9] In the context of a company that was simultaneously recording losses large enough to threaten the existence of the business itself, it is difficult to see what consideration Merrill received in exchange for the bonuses. The bonuses do not correlate with performance, nor were they retention bonuses. Clearly, those bonuses were little more than a farewell gift from senior management to themselves.

^[5] AG Opp. Mem. at 6.

^[6] See Merrill Lynch & Co., Inc. 2007 Deferred Compensation Plan For A Select Group of Eligible Employees, Form 10-K (2006) at 4. The Merrill bonuses were awarded pursuant to its Variable Incentive Compensation Program. Merrill defined the program thus: "Variable Incentive Compensation" means the variable incentive compensation or office manager incentive compensation that is paid in cash to certain employees of the Company generally in January or February of the Plan Year with respect to the prior Fiscal Year."

^[7] AG Opp. Mem. at 6: "When it learned that Merrill's CEO John Thain was persistently seeking an eight-figure bonus, Bank of America informed Thain that its Board of Directors would strongly disapprove of that bonus. Following that threat, Thain withdrew his request for a bonus. In contrast, no similar threats were made when Bank of America learned about Merrill's intention to accelerate its bonus payments for other top executives."

^[8] Dan Fitzpatrick, Susanne Craig and Deborah Solomon, *In Merrill Deal, U.S. Played Hardball*, WALL STREET JOURNAL, (Feb. 5, 2009).

^[9] See Merrill Lynch *supra* note 7 at 5.

The SEC is tasked with enforcing the federal securities laws, which generally prohibit fraudulent statements and omissions in communications to shareholders. The BOA proxy was subject to the general antifraud and proxy rules under the '34 Act. Those rules prohibit, respectively, the omission of "a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading,"^[10] and the making of "any solicitation... by means of a proxy statement... which at the time and in the light of the circumstances under which it is made... omits to state any material fact."^[11] The Supreme Court has held in the context of a proxy solicitation that: "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."^[12]

There is no question that any reasonable BOA shareholder would have considered the Merrill bonuses to be material to their decision on whether to approve the merger. The federal securities laws were designed to protect shareholders against precisely such omissions of material information. It is the SEC's responsibility to investigate and prosecute such abuses. Therefore, I request that the SEC provide the Subcommittee with greater insight into its enforcement of the materiality standard as it applies to company disclosures to shareholders. Please provide answers to the following questions:

- 1) Does the SEC believe that Bank of America's omission of the Bonus Attachment constitutes a material omission? If not, please explain why not.
- 2) If so, what steps will the SEC consider to redress the material omission? For instance, BOA is holding a shareholder meeting later in April at which directors will be elected. Under what circumstances would the SEC order BOA to provide the Bonus Attachment to all shareholders in advance of that meeting?

I request that you provide your reply as soon as possible, but in no case later than **5:00 p.m. on Friday, April 10, 2009**.

The Oversight and Government Reform Committee is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X.

Sincerely,

Dennis J. Kucinich
Chairman
Domestic Policy Subcommittee

Enclosure

^[10] See 17 CFR Sec. 240.10b-5(b).

^[11] See 17 CFR Sec. 240.14a-9.

^[12] See *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

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cc: Jim Jordan
Ranking Minority Member