

# THE WALL STREET JOURNAL.

TUESDAY, SEPTEMBER 15, 2009 - VOL. CCLIV NO. 64

## Judge Tosses Out Bonus Deal

*SEC Pact With BofA Over Merrill Is Slammed; New York Weighs Charges Against Lewis*

A federal judge threw out the Securities and Exchange Commission's proposed settlement with Bank of America over its disclo-

*By Kara Scannell,  
Liz Rappaport and  
Jess Bravin*

sure of controversial bonuses paid to Merrill Lynch employees, in an unusual ruling that casts doubts about how the agency handles

probes of major U.S. companies.

The order, by U.S. District Judge Jed Rakoff, came as the New York State attorney general was weighing civil-fraud charges against Bank of America Corp. executives. Charges could be brought against the bank's chief executive, Kenneth Lewis, and Chief Financial Officer Joseph Price, according to a person familiar with the investigation.

The Rakoff ruling under-

mines one of the most high-profile cases against alleged corporate wrongdoing conducted under SEC chief Mary Schapiro, who took the job in January. It puts new pressure on the agency to show it is fighting for investors in the wake of the controversies over its policing of the financial industry during the Wall Street boom and its failure to catch Bernard Madoff's massive fraud despite several red flags.

In a rare scuttling of an SEC settlement, Judge Rakoff said the \$33 million fine levied on Bank of America "does not comport with the most elementary notions of justice and morality" because the company's shareholders—the victims of the alleged misconduct—are the same people being asked to pay the fine. He set a trial date for Feb. 1.

The furor originated after

*Please turn to page A6*

*Continued from Page One*

\$3.6 billion in bonuses were paid to Merrill employees just before it was formally acquired by Bank of America in January. The bonuses stirred outrage among taxpayers and politicians, given Merrill's mammoth losses. The SEC found fault with Bank of America's disclosures, saying a November 2008 proxy misled shareholders into thinking no bonuses would be paid.

The SEC declined to sue bank executives, saying the banks' lawyers wrote the allegedly misleading language and it couldn't find evidence that bank executives intended to mislead shareholders. A Bank of America spokesman said Messrs. Lewis and Price weren't available to comment.

Securities lawyers said they couldn't recall such a high-profile case being forced into a trial after the government and a company agreed to a settlement.

In his ruling, Judge Rakoff often wrote that if bank executives in fact relied on legal counsel in crafting the proxy language, "why are the penalties not then sought from the lawyers?"

By denouncing the deal, the judge implicitly posed broader questions about the government's role in emergency steps last fall to rescue a U.S. financial system flirting with collapse. Some of Judge Rakoff's statements in this case have been cited by those who believe authorities should take a harder line in punishing executives at the center of the crisis.

The judge's move came on the anniversary of Lehman Brothers Holdings' bankruptcy-court filing and the unprecedented emer-

*page  
2*

gency government rescue of American International Group Inc.

Judge Rakoff has cited the \$40 billion taxpayer infusion into Bank of America as he weighed the settlement's fairness. Some of that money helped Bank of America complete its acquisition of Merrill Lynch.

Deciding to pay the bonuses was easy after the government gave BofA "a \$40 billion or so 'bail out,' of which \$20 billion came after the merger," he wrote. With so much taxpayer money at stake, the judge suggested his obligation to protect the public's interest was higher.

The SEC said proxy documents sent to investors in No-

vember 2008 showed Merrill wouldn't pay year-end bonuses without Bank of America's consent, while a separate document never distributed to shareholders had Bank of America approving billions of dollars in bonuses.

SEC spokesman John Nester said Monday the settlement, which imposed a \$33 million penalty on the bank, "properly balanced all of the relevant considerations." He said the agency will review the order. The SEC could appeal Judge Rakoff's decision, drop the case, take it to trial against the bank, or pursue charges against individuals.

In the settlement, Bank of America didn't admit or deny

wrongdoing.

Larry Di Rita, a Bank of America spokesman, said "we disagree" with Monday's order and "the facts demonstrate that proper disclosure was made to shareholders about Merrill bonuses."

In a letter to Bank of America last week, New York Attorney General Andrew Cuomo wrote that his office was considering whether to file charges against Bank of America executives, but he didn't name potential defendants. That letter outlined four alleged failures to disclose material information to shareholders relating to the merger and Merrill bonus payments. Mr. Cuomo's

office hasn't made any final decisions about individuals who may be charged, and on Monday it issued a statement saying there haven't been new developments since the letter.

Bank of America spokesman James Mahoney said that "based on conversations with the New York attorney general's office, we don't believe charges are imminent," and "we don't believe there is any basis for charges of fraud."

Wachtell, Lipton, Rosen & Katz, which represented Bank of America, declined to comment. A lawyer for Shearman & Sterling, which represented Merrill Lynch, declined to comment.

Judges rarely second-guess settlements proposed by government agencies, said former SEC lawyer Adam Pritchard, now a law professor at the University of Michigan.

On Capitol Hill, Rep. Dennis Kucinich, a Democratic member of the House Oversight Committee that is reviewing aspects of Bank of America's takeover of Merrill, said the judge "did the right thing."

The SEC has filed charges against individuals in high-profile cases, including the co-founder of Countrywide Financial Corp., Angelo Mozilo.

It is unusual for a state attorney general to charge the head of a corporation, although Mr. Cuomo's predecessor, Eliot Spitzer, had high-profile battles with executives such as AIG's Hank Greenberg and the New York Stock Exchange's Richard Grasso.

Mr. Lewis, who has told people close to him that he'd like to remain CEO for awhile, acknowledged the difficulties presented by the Merrill merger in a speech Tuesday in Japan to an investors' conference there: "it's been quite a year...to say the least." But he remained defiant, saying, "We are going to succeed."

—Dan Fitzpatrick  
contributed to this report.

Page 2