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Ex-BofA Chief Sued for Fraud

By DAN FITZPATRICK And KARA SCANNELL

Former Bank of America Corp. Chief Executive Kenneth D. Lewis and the company's current consumer-banking chief were accused in a civil complaint of duping investors by failing to disclose mounting losses at Merrill Lynch & Co. before shareholders approved the securities firm's takeover by the giant bank.

WSJ's Rick Brooks discusses civil securities fraud charges filed by New York Attorney General Andrew Cuomo against former Bank of America CEO Kenneth Lewis and former Chief Financial Officer Joseph Price over their handling of the Merrill Lynch acquisition.

The New York attorney general's allegations Thursday came as the Securities and Exchange Commission said it reached a $150 million settlement of a federal suit alleging that the Charlotte, N.C., company misled investors about the Merrill deal.

The SEC agreement likely ends a legal quagmire that has snared Bank of America since August. The deal must be approved by the judge who rejected an earlier $33 million settlement between the agency and the bank.

But the civil-fraud allegations cast doubt on the future of Joseph Price, the senior Bank of America executive who was the bank's finance chief at the time of the Merrill acquisition and was named Thursday as a defendant in a complaint filed by New York Attorney General Andrew Cuomo.

According to several people familiar with the matter, Mr. Price could take a leave of absence from Bank of America to devote his attention to the legal turmoil. Mr. Price's lawyer, Bill Jeffress Jr., said the former finance chief followed the advice of legal counsel on disclosure. Mr. Cuomo has "misrepresented facts" and "has drawn conclusions that a fair-minded regulator could not responsibly draw," Mr. Jeffress said.

The accusations against Mr. Price represent a setback for the bank. On Feb. 1, he was put in charge of consumer, small-business and card banking, a huge swath of businesses previously run by Brian Moynihan, who succeeded Mr. Lewis as CEO on Jan. 1. Mr. Moynihan had shifted Mr. Price to the new post partly to appease the New York attorney general's office, people familiar with the situation said.

Thursday's announcement by Mr. Cuomo, who has been investigating the Merrill takeover for a year, surprised some officials at Bank of America, the nation's largest bank in assets. The bank's lawyers had been in talks with Mr. Cuomo's office for months, hoping to avoid civil suits against individuals and the bank, according to people familiar with the matter.

The view inside the bank was that it had done enough to avoid a high-profile legal mess, these people said: Mr. Lewis retired at the end of 2009 and Mr. Price moved to a different job that left him with a diminished role in communications with investors. As recently as Wednesday, executives thought they could reach a settlement with Mr. Cuomo, although a person close to Mr. Cuomo's office said the talks largely broke down more than a week ago.

Reuters

The Bank of America corporate center in Charlotte, N.C.

Still, there was relief inside the bank that Mr. Cuomo didn't bring allegations against the 50-year-old Mr. Moynihan. The New York attorney general's office said Thursday that Mr. Moynihan will not be a part of its continuing investigation.

The crux of Mr. Cuomo's case is that shareholders were intentionally not informed before a December 2008 shareholder vote that Merrill had piled up more than $16 billion in pretax losses during the fourth quarter. The public knew nothing until the U.S. government agreed in January 2009 to pump $20 billion into Bank of America to help it absorb the battered securities firm, Mr. Cuomo alleged.

The attorney general also said bank executives misled U.S. regulators in mid-December 2008 when they discussed backing away from the purchase because losses had ballooned beyond their expectations. The bank, according to the attorney general, knew it was not likely to walk away, and its losses had increased by a smaller amount than previously claimed.

"We believe bank management understated the Merrill Lynch losses to shareholders to get shareholders to approve the deal then overstated their ability to terminate the agreement to get $20 billion from federal government," Mr. Cuomo said. "That is just a fraud."

In a statement, Bank of America, which also was named in the suit by Mr. Cuomo, called the accusations "regrettable" and "disappointing," saying it would vigorously fight them. Bank of America and Messrs. Lewis and Price "at all times acted in good faith and consistent with their legal and fiduciary obligations," the company said.

Mary Jo White, Mr. Lewis's lawyer, said there "is not a shred of objective evidence to support the allegations by the attorney general," adding that Mr. Lewis "has been unfairly vilified by the political search for accountability for the financial meltdown."

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Messrs. Lewis and Price couldn't be reached.

The SEC never accused any individuals at Bank of America of wrongdoing. Previously, the SEC said it hadn't found any evidence that executives deliberately concealed information from lawyers or that internal or outside lawyers intentionally sought to mislead shareholders. To sue individuals for fraud, the agency would have to prove they intentionally sought to mislead investors.

One possible explanation for the difference of opinion between Mr. Cuomo and the SEC is that the Martin Act, the New York law used by Mr. Cuomo's office, doesn't require a finding that the executives acted intentionally. Federal securities fraud laws do have a requirement of intent. An SEC spokesman declined to comment beyond the court filing.

The deal between the bank and SEC requires federal Judge Jed S. Rakoff's approval. Last year, Judge Rakoff rejected a settlement offer and said it was "unfair," questioning why no individuals were held accountable and why shareholders should pay a fine. He set a trial date for March 1. A hearing on the latest settlement is set for Monday.

The SEC sought to address Judge Rakoff's previous concerns by setting up a fund to distribute the $150 million to shareholders, excluding bank executives with stock who were involved in the discussions.

It isn't clear whether that will satisfy Mr. Rakoff, because it is hard to distinguish which shareholders were harmed and it still requires current and possibly new shareholders to pay others.

"The judge may still use some harsh words, but I would expect that this time we'll see an approval," said Jacob S. Frenkel, a former SEC enforcement lawyer.

Jeffrey Brown, who was treasurer at Bank of America at the time of the Merrill deal, said in the complaint filed by Mr. Cuomo that he told Mr. Price the losses were large enough to reveal.

"I stated to Mr. Price that I didn't want to be talking through a glass wall over a telephone," Mr. Brown said, according to the complaint Mr. Cuomo filed in New York Supreme Court.

In the complaint, Mr. Cuomo said another top bank executive, General Counsel Timothy Mayopoulos, was misled about the size of the losses prior to the shareholder vote. He recommended to Mr. Price on Dec. 3, 2008, that Merrill's fourth-quarter losses were not high enough to reveal, not knowing that the bank would boost the loss estimate by another $2 billion that same day. The general counsel did not find out about the higher number until a board meeting on Dec. 9. He tried to find Mr. Price to discuss the figure but could not connect with him. Mr. Mayopoulos was let go the next day and replaced by Mr. Moynihan, the eventual CEO, according to the complaint.

"I still do not know why I was terminated, who was involved in the decision to do so, or what their reasons or motivations were," Mr. Mayopoulos said in the complaint.

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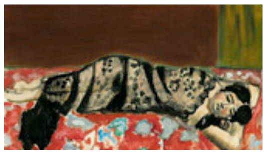

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