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Three Top Former Merrill Lynch Executives Charged with Conspiracy, Obstruction Of Justice, Perjury in Enron Investigation

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Department of Justice - CRM
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Merrill Lynch Agrees to Cooperate with Enron Investigation, Implement Reforms, with Oversight by Monitor

WASHINGTON, D.C. – Assistant Attorney General Christopher Wray of the Criminal Division, Enron Task Force Director Leslie R. Caldwell, and Assistant Director Grant Ashley of the FBI's Criminal Investigative Division announced today that three leading former employees of Merrill Lynch & Co., Inc., have been indicted by a federal grand jury on charges of conspiracy to commit wire fraud and falsify books and records. One of the defendants was also charged with perjury and obstructing a federal investigation into the Enron Corporation's multibillion dollar collapse.

The three-count indictment, returned by a federal grand jury in Houston, Texas, yesterday and unsealed this morning, charges: Daniel Bayly, 56, of Darien, Connecticut, the former head of the Global Investment Banking division at Merrill Lynch; James A. Brown, 51, of Darien, Connecticut, the head of Merrill Lynch's Strategic Asset Lease and Finance group; and Robert S. Furst, 42, of Dallas, Texas, the Enron relationship manager for Merrill Lynch in the investment banking division.

In a separate agreement reached with the Department of Justice, announced today, Merrill Lynch accepted responsibility for the conduct of its employees. Merrill Lynch also agreed to cooperate fully with the continuing Enron investigation and to implement a series of sweeping reforms addressing the integrity of client and third-party transactions. An independent monitor, along with an outside auditing firm, will monitor Merrill Lynch's compliance with these new reforms.

Indictment

The indictment alleges that Enron and Merrill Lynch engaged in a year-end 1999 deal involving the "parking" of Enron assets with Merrill Lynch. That arrangement allowed Enron to enhance fraudulently the year-end 1999 financial position that it presented to the public and used to pay its executives unwarranted bonuses. The indictment alleges that Bayly, Brown and Furst knowingly participated in this illegal scheme, along with co-conspirators Andrew S. Fastow, Enron's then-chief financial officer, and Daniel Boyle, then-vice president of Global Finance at Enron. Fastow and Boyle were both charged in a May 2003 indictment, and Fastow's case is scheduled for trial in April 2004.

According to the indictment, Enron attempted unsuccessfully in 1999 to sell an interest in electricity-generating power barges moored off the coast of Nigeria. Enron, through Fastow, Boyle and others, then arranged for Merrill Lynch to serve as a temporary buyer so that Enron could record earnings and cash flow in 1999, making Enron appear more profitable than it was. Merrill Lynch's purchase of the Nigerian barges allowed Enron to improperly record \$12 million in earnings and \$28 million in funds flow in the fourth quarter of 1999. The indictment alleges that Enron promised Merrill Lynch that it would receive a return of its investment plus an agreed-upon profit within six months – an oral agreement that was not disclosed in the written contact used by Enron's internal and external accountants to determine the accounting treatment of the deal. Specifically, Enron promised in an oral "handshake" side deal that Merrill Lynch would receive a rate of return of approximately 22 percent, and that Enron would sell the barges to a third party or repurchase the barges within six months. That agreement meant that Merrill Lynch's supposed equity investment in the barges was not truly "at risk" and did not qualify as a sale from which earnings and cash flow could be recorded.

On June 29, 2000, having found no true third-party purchaser to buy Merrill Lynch's interest in the barges, Enron arranged for a special purpose entity known as LJM2, which was owned and operated by Andrew Fastow, to purchase Merrill Lynch's interest for \$7,525,000 – fulfilling the side agreement.

All three defendants were charged with conspiracy to commit wire fraud and falsify books and records, and Brown was also charged with perjury before the Enron Grand Jury and obstruction

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of the Enron Grand Jury investigation. Specifically, the indictment alleges that while testifying under oath before the grand jury in September 2002, Brown falsely stated he was "not aware of the promise" by Enron to Merrill Lynch regarding the Nigerian barge investment. The indictment further charges that Brown sought to obstruct and impede the grand jury by making false statements. The indictment also alleges that the defendants made false statements regarding the barge deal when questioned under oath before Congress, the Securities and Exchange Commission, and a court-appointed bankruptcy examiner.

"Investigations of this type are extremely difficult and complicated, and are made even more so when people deliberately seek to hide the truth from investigators," said Assistant Attorney General Christopher Wray. "The American public is entitled to a full accounting of the circumstances behind Enron's collapse, and the Department is committed to prosecuting those who lie or mislead in order to obstruct our investigation."

If convicted of the conspiracy charge, all three defendants face a maximum sentence of five years in prison. Brown also faces a maximum sentence of five years in prison on the perjury count, and 10 years maximum on the obstruction of justice charge.

An indictment contains allegations that a defendant has committed a crime. Every defendant is presumed innocent until and unless proven guilty.

Merrill Lynch & Co., Inc., Agreement

In its agreement with the Department of Justice, Merrill Lynch acknowledges that the Department has developed evidence during its investigation that one or more Merrill Lynch employees may have violated federal criminal law, and accepts responsibility for any such violations.

The reforms agreed to by Merrill Lynch include:

- The creation of a new committee, the Special and Structured Products Committee (SSPC), to review all complex structured finance transactions effected by a third party with Merrill Lynch. The committee will be comprised of senior representatives within the company, including representatives from Market Risk, Law and Compliance, and Accounting, Finance, Tax and Credit. The unanimous approval of the SSPC will be required to authorize a transaction.
- For a period of 18 months, Merrill Lynch will retain an independent auditing firm to undertake a review of the processes established by the committee. Merrill Lynch will also retain an attorney, selected by the Department of Justice, to review and oversee the work of the auditing firm and issue periodic reports as to Merrill Lynch's compliance.
- The creation of a written report that sets forth each transaction approved by the SSPC. The reports will be given to the third party's independent auditor, thereby assuring that a third party's outside auditor and Merrill Lynch are being provided the same information about the transactions. This will prevent a third party from misleading others.
- The development of a comprehensive training program for all personnel that highlights factors in a transaction that would warrant additional scrutiny. Merrill Lynch employees will be instructed to refer to the SSPC all transactions that would fall under its purview.

Based on Merrill Lynch's acceptance of responsibility, its full cooperation with the Enron investigation, its adoption of a series of significant reforms, and its acceptance of a monitor to oversee the implementation of those reforms, the Department of Justice has agreed not to prosecute Merrill Lynch.

"We are pleased that Merrill Lynch has accepted responsibility, is cooperating fully and has agreed to enact these important reforms," said Assistant Attorney General Wray. "This is the kind of corporate response that the Department of Justice encourages and, frankly, expects in the course of a criminal investigation."

The investigation into Enron's collapse is being conducted by the Enron Task Force, a team of federal prosecutors supervised by the Department's Criminal Division and agents from the FBI and the IRS Criminal Investigations Division. The Task Force also has coordinated with and received considerable assistance from the Securities and Exchange Commission. The Enron Task Force is part of President Bush's Corporate Fraud Task Force, created in July 2002 to investigate allegations of fraud and corruption at U.S. corporations.

Several individuals have been charged, in addition to Fastow and Boyle. Former Enron Treasurer Ben Glisan, charged in the indictment with Fastow and Boyle, pleaded guilty last week to conspiracy to commit wire and securities fraud and immediately was sent to prison to serve a five-year sentence. Fastow's wife, former Enron Assistant Treasurer Lea Fastow, was charged in May 2003 with conspiracy to commit wire fraud, money laundering conspiracy and filing false tax returns, and trial is set for January 2004. Another indictment charged seven former Enron Broadband Services executives with participating in a long-running scheme to defraud the investing public and others through a series of false statements and press releases about EBS's financial condition.

In August 2002, former Enron finance executive Michael J. Kopper pleaded guilty to conspiracy to commit wire fraud and money laundering, and is cooperating with the government's investigation. Former Enron energy traders Timothy N. Belden and Jeffrey Richter pleaded guilty in October 2002 and February 2003, respectively, to conspiracy to commit fraud by

manipulating energy prices in the California market. In September 2002, a federal grand jury in Houston returned an indictment charging three former British bankers with wire fraud in a scheme involving the Southampton special purpose entity. In November 2002, former Enron finance executive Larry Lawyer pleaded guilty to making and subscribing a false tax return. And Enron's former top outside auditor, Arthur Andersen partner David Duncan, pleaded guilty in 2002 to obstructing an SEC investigation into Enron. Andersen itself was convicted of obstruction of justice in June 2002.

The Task Force investigation is continuing.

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