Testimony of David M. Becker

Before The Oversight and Investigations Subcommittee of the House Committee on Financial Services and the TARP, Financial Services and Bailouts of Public and Private Programs Subcommittee of the House Committee on Oversight and Government Reform

September 22, 2011

Chairman Neugebauer, Ranking Member Capuano, Chairman McHenry and Ranking Member Quigley:

I appreciate the opportunity to testify before you, and I thank you for listening to me.

I will speak to you this afternoon about my service at the Securities and Exchange Commission, and in particular about my role in advising the Commission on an issue of statutory interpretation that arose in the bankruptcy of Bernard L. Madoff Investment Securities (BLMIS). My sole goal was to advise the Commission as to the course that provided the greatest benefit to investors and that was consistent with the law. I am confident that any fair review of my actions will demonstrate that this was the only animating principle behind them.

I have only recently seen the report of the SEC's Office of Inspector General (OIG). To the extent I am able, I will comment on that during my testimony.

In sum:

- I did precisely what I was supposed to do. I identified a matter that required legal advice from the SEC's Ethics Office. I sought that advice, received it, and followed it. The OIG report contains no finding to the contrary.

- The apparent recommendation of the Office of Government Ethics that this matter be referred to the Department of Justice stems from the fact that OGE "is precluded by law from making any determination that the criminal conflicts of interests laws may or may not have been violated." The most OGE was willing to say was that the information provided by the OIG is "relevant," and then only "to the extent" it shows elements of a violation.

- I was advised that I had no conflict of interest in providing legal advice to the SEC about the interpretation of the legal standard in the Securities Investment Protection Act (SIPA) that governed the net equity claims of holders of BLMIS securities accounts, which might permit these customers to obtain advances from the Securities Investors Protection Corporation (SIPC). For ease of reference I will refer to this matter as the "SIPC matter."

- I asked for and received legal advice from the SEC's Ethics Office before working on the SIPC matter. I discussed with the head of the Ethics Office the possibility that the SIPC matter could indirectly affect my financial interest because after my mother's death in 2004 my mother's estate had liquidated a BLMIS account, and I and my brothers had inherited money from my mother. I was told that there was neither a conflict of interest nor an appearance of a conflict within the meaning of the applicable ethics statutes and rules.

- I had no financial interest in the position that the Commission took regarding how to determine net equity claims in the SIPC matter. I had no such claim and never thought that I would have such a claim in the future. And it never occurred to me to look after my financial interest. If anything, on balance the positions the Commission took on its interpretation of SIPA were contrary to what others have characterized as my financial interest.

In the pages that follow, I describe some background about who I am and the circumstances of my return to the SEC in 2009. I then explain the nature of my rather tenuous connection to the BLMIS liquidation and provide a chronology of my involvement in the SIPC matter.

My Background

I am a lawyer. I came to Washington 38 years ago for judicial clerkships on the United States Court of Appeals for the District of Columbia Circuit and then the United States Supreme Court. Since 1975 I have held a variety of positions in private practice and in government. Approximately 25% of my career has been spent in government.

I served at the SEC twice. I was General Counsel under Chairmen Arthur Levitt and Harvey Pitt, as well as Acting Chair Laura Unger. From February 23, 2009, until February 25, 2011, I was General Counsel and Senior Policy Director under Chairman Mary Schapiro. In this capacity, I reported directly to Chairman Schapiro.

Throughout my career I have tried to bring honor to the legal profession. I have tried to exemplify the best traditions of the profession: scholarship, attention to detail, civility, an understanding of our common humanity, an absolute insistence on operating within the rules, and an abiding passion for justice.

My Decision To Rejoin the SEC in 2009

In January 2009, shortly after Mary Schapiro was nominated by the President to be Chairman of the SEC, I received a telephone call from SEC Commissioner Elisse Walter. I have known Ms. Walter for nearly 40 years. Ms. Walter called me to sound me out on returning to the SEC as its general counsel. I declined. I had done that job before, I was

enjoying my law practice, and returning to the Commission would involve considerable sacrifice, not the least of which was financial.

Mary Schapiro called me the next day. Ms. Schapiro and I were professional friends. We had had many interactions during my first tour of duty at the SEC, and I liked and admired her. We kept up our friendship after I left the SEC the first time. When, in 2008, I was interviewed by the President's Transition Team and asked who I thought the President should appoint as SEC Chairman, Ms. Schapiro was my first and only recommendation.

When Ms. Schapiro telephoned me, her first words -- which she knew I would find impossible to resist -- were "David, your country needs you." I told Ms. Schapiro that it was a terrible time for me to return to government service, but I agreed to talk to her about it. I accepted her offer a week later.

I came back to the SEC because I care deeply about the agency and its people, because my friend Mary Schapiro asked me to, and because I thought it was my duty. I knew the SEC was in crisis and in need of revitalization and reform. I was flattered that Ms. Schapiro thought I could help, and I thought so too. While I had enormous affection for the SEC, my years of SEC service and of representing clients before the agency had given me a clear-eyed view of its shortcomings and of the measures that might be taken to revitalize it.

For those who think I acted in my financial interest, I would point out that I took a pay cut of over 90% to return to the SEC; I was 62 years old; I returned to a job that I had already had; and I, like many others, forfeited millions of dollars to serve my country. I agreed to a two-year commitment and left after two years, despite Chairman Schapiro's repeated requests that I stay.

When I left, after I had been sued by the Madoff Trustee, and after the first waves of negative press, Chairman Schapiro said this:

> "I asked David to return to the agency because I knew that his wise counsel could help us do our jobs better. He came here at a tumultuous moment because he embraced our mission and he felt that he could help us achieve it -- and that's exactly what he did. He is a committed public servant -- someone willing to make sacrifices and take chances to make our country better. We are all fortunate to have had the opportunity to work with him, and he leaves this agency in better shape for the additional two years he gave to us. David, as you leave the SEC once again, you leave with the agency's appreciation and my own deep personal gratitude..."

Madoff

I have never met Bernard L. Madoff. I have never had any dealings with him or with BLMIS. My only "relationship" with him is that in 1995 he defrauded my then 85 year-old father into opening an account at BLMIS in my mother's name, just as he defrauded so many others over the years.

My "financial ties" with Madoff derive entirely from the fact that my mother died in 2004, some years before Madoff's fraud became known. Her estate did not have an account at BLMIS at the time of its bankruptcy in December 2008, since my brother had liquidated the account in 2005 to pay estate taxes. My brothers and I were each designated executors in my mother's will. Executors are the persons with the legal powers to wind up the affairs of a decedent. I did very little as an executor and absolutely nothing with respect to financial matters.

I was one of the beneficiaries of my mother's estate, along with charitable institutions and other family members. I "benefited" from her account at BLMIS, in the same sense that all the beneficiaries of the estate benefited from all activities during my parents' lifetimes that added to my mother's wealth at the time of her death.

It is simply incorrect to say that at any time I had an "interest in" a Madoff account.

What I Knew About My Mother's Madoff Account

After my return to the SEC was announced, but before I started work, I learned from my brother that my mother had had an account at BLMIS that he had liquidated several years earlier to pay estate taxes. While he knew that the gross proceeds in the account had been $2 million, he did not know when the account was opened or the size of the original investment. We both assumed that my father had made the investment, because my mother was an academic and a social worker, and she did no investing.

I did not learn any more facts about the account until I received the SIPC Trustee's "clawback" complaint two days before I left the SEC in 2011.

The Potential For Clawback Liability

While I never had any interest in a Madoff account, by the time I started work at the SEC I was aware of the possibility that the Madoff Trustee might try to "claw back" from me any funds that could be traced to my late mother's account, though as the OIG's report confirms, I regarded that possibility as unlikely. In a clawback case (what lawyers call an "avoidance action") a bankrupt estate seeks the return of assets that were wrongfully distributed by the bankrupt entity. People holding those assets must, under certain circumstances, return them, even if they were completely without fault in receiving them. The clawback action that the Madoff Trustee instituted against me and my brothers in February 2011 makes no allegation of wrongdoing by me or my brothers, nor could it. Again, we knew nothing about the account until after my mother died.

I certainly knew that I was no expert in bankruptcy law, but I thought it doubtful that the Trustee would institute a clawback action against me. That was because, I thought, that I plainly had nothing to do with the account, the event that occasioned the withdrawal (my mother's death) certainly did not suggest any complicity in the fraud, and all of the funds generated upon my brother's liquidation of my mother's Madoff account were used to pay estate taxes.

As noted, I did not know the amount, if any, of fictitious profits that were in my mother's account at her death, and I had doubts about whether that information was ascertainable. Initial reports were that the Madoff Ponzi scheme spanned several decades. I had no idea whether the records were available to reconstruct my father's initial transaction opening my mother's account, what money (if any) had been taken out, and the amount of any purported gain.

One reason I did not think much about clawback actions is that they were really beside the point to me. I was confident that the Trustee would never find it necessary to sue me. If it turned out that there were indeed fictitious profits in my mother's account, all the Trustee had to do was notify me and explain his calculations, and I would return any excess funds in my possession. I came to the SEC twice to help defend the victims of fraud, and I never, ever would have held on to money that came from fraud victims.

I have been asked why I did not contact the Trustee, to let him know that my mother had been a Madoff customer and to ask him to research the particulars of my mother's account. The short answer is that it never occurred to me, though I did know that the Trustee was aware of an account in the name of the Estate of Dorothy G. Becker. Nevertheless, I am not at all sure that it would have been appropriate for me to have contacted the Trustee. There are strict ethical prohibitions on using one's public office for private gain. Given the SEC's close involvement with SIPC in the Madoff liquidation, I am doubtful that any contact between me and the Trustee could have been perceived as totally divorced from my official responsibilities.

Disclosure of My Mother's Account

The OIG report confirms that I never made a secret of my late mother's Madoff account. To the contrary, I was the one who brought the matter to the attention of the Ethics Office. Indeed the OIG report counts seven people at the Commission to whom I spoke about it. There may have been more. Each time, I was the one who raised the subject for the attention of others. I told Chairman Schapiro everything I knew about my mother's Madoff account shortly before or immediately upon my arrival at the SEC. I do not remember the details of the conversation, but I am certain that I told her everything, both because there was not much to tell and because Chairman Schapiro and I had an extremely candid and broad-ranging professional relationship.

I also informed William Lenox, head of the SEC's Ethics Office, about my mother's Madoff account shortly before or after I arrived at the SEC. Again, I did not know very much, and I told him all that I knew. Mr. Lenox advised me that the mere fact that proceeds from the liquidation of a Madoff account might have been included in the

money I had inherited from my mother some years earlier did not require my recusal from any and all matters that touched upon Madoff. We agreed that we could consult again as particular matters came up.

I never asked Chairman Schapiro or Mr. Lenox not to share the information about my mother's account. I had every expectation that they would share the information to the extent that, in their judgment, their duties required it.

The SIPC matter

In May 2009, I became aware of a matter that I believed counseled consideration of whether I should participate. I received a letter from several law firms taking issue with the Madoff Trustee's stated view that, under SIPA, the amount of a defrauded investor's "net equity" in his account -- and therefore the amount of any entitlement to a payment for the loss by the Securities Investor Protection Corporation -- should be determined on a "money in, money out" basis -- that is, on the basis of the amount of money initially deposited by an investor less any amounts withdrawn. Some claimants believed that the legally appropriate measure of "net equity" is the amount of securities and cash shown on an investor's account statement on the date the bankruptcy proceeding was filed, a significantly larger amount. The law firms wanted the Commission to take the position in bankruptcy court that the Trustee was incorrect in his view of the law and asked for a meeting to explain their position.

The first thing I did was to consult with the Ethics Office about whether it would be appropriate for me to participate in responding to the letter. I did so out of what I believed to be an abundance of caution. The question as to the proper measure of SIPC advances had nothing to do with me. SIPC advances were available only to the customers of Madoff who had open accounts at the time of the bankruptcy. My mother had no such account at Madoff. Hers had been closed by operation of law at the time of her death, then transferred to her estate, and then liquidated in 2005. There was no way that I would share in any SIPC advances.

I raised the question of my participation in the SIPC matter because of the possibility that its resolution might have an impact on a possible clawback action, even though that seemed extremely remote at the time. I did not know how much, if any, fictitious gain was in my mother's account. I did not know whether these matters were knowable to the Trustee. I did not know the standards the Trustee would be using for determining when to bring avoidance actions. Mostly importantly, the determination whether to bring an avoidance action, the legal standards on which it would be based, and the factual circumstances that would warrant litigation were in the exclusive control of the Trustee, and he did not make his intentions clear on those matters until literally two days before I was to leave the SEC. I asked Mr. Lenox for advice even though I did not think the SIPC matter had anything to do with me. I did so because I avoid making professional judgments that involve my own conduct without consulting with a colleague. With respect to ethics matters in particular, I strongly believe that no one should be his own lawyer and that one has to seek advice of those more expert and detached and then follow it. I used to conduct ethics training for young lawyers at a Washington law firm in which I was a partner. I opened each session with the admonition that the three most important rules for avoiding ethics issues were "consult, consult, consult."

I did not ask Mr. Lenox for approval of my participation in the SIPC matter. I asked for his advice as to the appropriate course of action. My request for advice was open-ended. The reason for this is simple: it was in my best interest and the Commission's for me to follow the law wherever it led. I had neither desire nor reason to skate close to any line. Accordingly, my question to him was not "would you permit me to do this," but rather "let me know, please, what I should do."

I had known Mr. Lenox for years, from my previous tour of duty at the SEC and from asking for his approval (not advice) as to whether I could represent clients in certain matters before the Commission after I returned to private practice. I believed Mr. Lenox to be a person of complete integrity and that the quality of his ethics advice was high, if at times a bit conservative.

The OIG has suggested in his report that there was something inappropriate in my asking for legal advice from Mr. Lenox, since I made plain that I respected him and his professional judgment. The OIG notes that "just seven months" after Mr. Lenox gave me advice on the SIPA matter, I gave him an excellent work evaluation. I fail to see any evidence of impropriety. I did think Mr. Lenox was very capable. That is why I went to him. I continued to think he was very capable. That is why I gave him a good evaluation. The implication of the OIG's comments is that I should have spoken to an Ethics lawyer I regarded less highly or I should have not evaluated him in accordance with his just desserts. I do not comprehend his point.

Mr. Lenox advised me there was no conflict and that any interest I might have in the outcome of the "net equity" issue was too remote and too contingent to affect my judgment on the issue. Government officials are prohibited from participating in matters only if the impact on their financial interests is "direct and predictable." For the same reason, it appeared that my participation would not involve an appearance of impropriety -- namely, that a reasonable person with knowledge of all the relevant facts then available to me would conclude that I was capable of advising the Commission fairly and objectively on the proper resolution of the "net equity" issue and to present the Commission's position to the courts.

Mr. Lenox's advice seemed sensible to me. But I did not know the full extent of his rationale for his advice or the extent of the research and consultation he did in order to reach his conclusion.

<u>The "Brief Review"</u>

The Subcommittees have copies of an email that I sent to Mr. Lenox on May 4, 2009, and his response some 26 minutes later. From this, some have concluded, wrongly I believe, that this email reflects the number of minutes that it took Mr. Lenox to consider the matter. I cannot say for certain, because I do not remember having sent this email or any conversations surrounding it, but I would very surprised if it represented our only interchange. It probably does, however, provide the best evidence of my contemporaneous thinking about the matter.

Looking today at the email exchange between Mr. Lenox and me, my strong belief is that it reflects two lawyers memorializing the outcome of a consultation. In other words it

reflects the culmination of the consultative process rather than a blow-by-blow account of it. It is unlikely that I would have simply shot Mr. Lenox an email out of the blue asking for written guidance on a matter of this significance. More likely, I think, is that I would have called him up and met or talked with him about it; and then he would have done whatever research he thought necessary. He would have given me his advice orally and then confirmed it writing. While I caution that I remember none of this, it would be consistent with my practice and that of most lawyers, and it is certainly a more plausible reading of the email than one that suggests that this was our only communication on the matter and that it took only 26 minutes.

Mr. Lenox's Reporting Relationship To Me

Press reports have insinuated that Mr. Lenox's advice is suspect because he reported to me. The Ethics Office in fact was resident in the Office of General Counsel (OGC). But as to the content of Mr. Lenox's advice -- whether to me or to anyone else at the Commission -- Mr. Lenox reported only to the Commission and had the final say on any matter. In form and in fact, Mr. Lenox was the Designated Agency Ethics Official, and I was the Deputy Designated Agency Ethics Official.

Mr. Lenox and I had a working relationship of mutual respect: I would certainly explore with him matters of particular importance to the Commission or matters in which I did not initially understand his conclusions. But he had the final call. And where the matter concerned me, I never failed to follow his advice. And this included instances where I disagreed with his judgment.

Lawyers throughout the government and private sector give legal advice to their superiors about their conduct. Mr. Lenox was no more disabled from giving me good advice than the Attorney General is disabled from advising the President, or the General Counsel of our country's businesses are disabled from advising CEOs or boards of directors.

I Kept The Chairman Informed

Though I have no recollection of having discussed with the Chairman my consultation with Mr. Lenox, I am quite certain that I did so promptly. The Madoff matter was important to the Commission and, as a result, the Chairman. I had an extremely open and candid relationship with the Chairman. I usually saw the Chairman every day she was in town, most often in the morning before others arrived as well as in the evening before I left. Our conversations were by no means limited to matters coming within my responsibilities as General Counsel, but could cover any matter occurring at the Commission.

My Work On The SIPC Matter

This was a legal issue. It concerned the position the Commission should take in court on an issue of statutory construction of SIPA. Naturally, it fell to me to lead the team that formulated a recommendation to the five lawyers on the Commission as the legally appropriate position to take.

There were, sadly, many investors who were affected by the resolution of the "net equity" issue. As noted above, the Madoff Trustee, supported by SIPC, had taken the legal position that the only investors who were entitled to advances from SIPC were those investors who, at the time of the Madoff bankruptcy, had not taken out of their Madoff accounts more cash than they had put in. But there were many more investors who had maintained accounts with Madoff over an extended period. Many over that time had taken out more money than they had put in, but they had used the money to support themselves over the years and were counting on the money that they thought was in the Madoff accounts to support them in their retirement or, even more tragically, in their old age. The Trustee had taken the position that these people were entitled to no money from SIPC, no matter how desperate their circumstances.

Shortly after Chairman Schapiro arrived at the SEC in January 2009, and before I arrived at the Commission, the SEC's Division of Trading and Markets had informed the Trustee that it believed his interpretation of the statute was correct. On February 12, the Division of Trading and Markets briefed the Commission about this but did not seek and did not get approval of its view. The view it presented was its alone, and not that of any other SEC division. It was not the view of the Office of General Counsel, which would have to present the view of the Commission in court. Thus, contrary to the OIG's conclusion (pp.4,6), the SEC had taken no position on this matter.

As noted above, I got involved in this issue in May 2009, upon the request of several law firms that the Commission instruct the Trustee to change his position. I am quite certain that I told Chairman Schapiro of this request, and I kept her apprised of my progress.

I am certain that I kept her fully informed because I am clear what her direction was -- to do the best within the constraints of the law to make sure that as many Madoff victims as possible got the maximum SIPC advances possible. I agreed fully. Chairman Schapiro and I were horrified at the suffering of Madoff victims. We believed that the Commission had a deep and urgent obligation to these investors. And we wanted to do everything we could.

But we had to act within the constraints of the law. The Commission is charged with the responsibility of enforcing the statutes that Congress writes and the President signs. It is not free to re-write them. The law is capacious but it is not infinitely elastic. We had to do the best we could with SIPA as written.

With those goals in mind, OGC did its best to formulate a recommendation for the Commission that was well within the law and that was consistent with the remedial purposes of SIPA. We met with lawyers from all interested parties. We met with the

Trustee. My style with all of them was to question them aggressively and with civility about their views. In so doing, I hoped to learn the strengths and weaknesses of all arguments and arrive at the right view. I also hoped that by pushing hard, and by not tipping the Commission's hand (which I was not authorized to do in any event), the parties might see it in their interest to reach agreement on the "net equity" issue. Unfortunately, that did not happen.

Mostly, what we did within OGC was to research the law, its history, and the way it had been applied. This was a collaborative effort among several lawyers in OGC and myself. We tried out approaches and we tested them among ourselves. I was enormously impressed with the quality of lawyering within our office and the intellectual ruthlessness with which we tested and then modified all premises and all arguments. I thought then -- and I think now -- that we did a splendid job.

Towards the end of the process, we came to believe that there was no principled alternative to the "money in, money out" test for discerning who was entitled to SIPA advances and in what amounts. We did, however, come up with a slight modification. We believed that, in a Ponzi scheme in which the securities accounts were a total fiction and that had transpired over many years, "money in, money out" should be calculated on the basis of constant dollars. That is because "money" represents purchasing power. We believed that SIPC had not given enough consideration to the fact that over the duration of the Ponzi scheme, the purchasing power of the dollars invested by long-standing Madoff investors had eroded and that SIPC's advances should reflect what customers had lost in real terms, and not just in terms of unadjusted numbers. In simple terms, a defrauded investor who invested $10,000 in 1998 suffered a greater loss than one who invested $10,000 in 2007. The constant dollar approach addresses this inherent inequity.

Accordingly, in late October 2009 OGC recommended to the Commission that it urge the Bankruptcy Court to interpret "net equity" as meaning "money in, money out" and to require that "money in, money out" be calculated in constant dollars. Our recommendation as to constant dollars was neither opposed nor supported by the Division of Trading and Markets, which said that it "did not necessarily agree." It was supported enthusiastically by the Division of Risk, Strategy, and Financial Innovation, which is composed principally of economists.

OGC presented its recommendation to the Commission at two meetings. There was general support at the first meeting. Some Commissioners wanted more information about the impact of the constant dollar modification to "money in, money out." Chairman Schapiro and at least one other Commissioner made clear that they would not support "money in, money out" without the constant dollar modification. At a second meeting, the Commissioners approved OGC's recommendation.

The Commission's position on "money in, money out" recently has been approved by the Court of Appeals for the Second Circuit. The constant dollar modification has not yet been considered by the Bankruptcy Court.

Throughout the process of formulating OGC's recommendation, I do not remember giving any consideration to how the various proposed outcomes would affect me. As noted, I thought that any analysis of how the Commission's recommendation on the availability of SIPC advances would affect a possible clawback action against me was speculative at best. OGC did inform the Commission that our recommendation could have an impact on those making claims for SIPC advances who were also subject to a clawback action, but as I recall we neither considered nor made any comment to the Commission about how the position would affect clawback actions against persons who were not Madoff customers at the time of the bankruptcy.

I have read that my recommendation to the Commission was to my financial disadvantage, by rejecting the "last account statement" method of calculating "net equity" in favor of the "money in, money out" method. I also have read that OGC's recommendation was in my financial interest, by adding the much smaller constant dollar modification to the "money in, money out" method.

The truth is I deserve neither credit for selflessly recommending "money in, money out" nor condemnation for recommending the constant dollar modification. I did not think about myself at all. My only concerns were to serve investors and to follow the law. I would note, though, that if I had thought that I had a financial stake in our recommendation, the "last statement" method would have been many times more advantageous to me than the relatively minor constant dollar modification to "money in, money out."

Testimony Before the House Financial Services Committee

I have been asked why I did not testify before the House Financial Services Committee on December 9, 2009. Given the participation of OGC in formulating the Commission's position on the SIPA advances issue, it was natural that I testify on behalf of the Commission. Before preparing to do so, however, I sought guidance on the *political* wisdom of my doing so from the head of the Commission's Office of Legislative Affairs (OLA). Again, I believed that I was not in the best position to judge my own conduct. This was particularly so in making judgments about political matters.

I told OLA about my mother's Madoff account, just as I had previously told the Chairman and the Ethics Office. I told OLA that I had been cleared to work on this matter by the Ethics Office and was prepared to go forward with testimony about the Commission's position in the SIPC liquidation proceeding. The Trustee's position, which the Commission largely supported, was quite controversial. I was (and am) convinced that the position was legally compelled, but I was concerned that some might use the existence of my late mother's closed account as a means of attacking the Commission's position without dealing with it on the merits.

I made clear to OLA that if I testified I would mention my mother's account at the outset of my testimony. I had nothing to hide and did not want to open myself to accusations that I did.

OLA's initial reaction was that there was no reason I should not testify. Later, however, I was told that, subject to confirmation by Chairman Schapiro, it might be more prudent if I did not testify, to make it more likely that the focus of the Commission's testimony would be on the merits of the Commission's position. Shortly thereafter, I was told that the Chairman agreed with this judgment.

The next morning I discussed my participation in the hearing with the Chairman during one of our frequent informal conversations. She told me that she agreed with OLA's judgment. I made clear to her my willingness to testify and expressed concern that she might think I was avoiding what might become an intense hearing. She assured me that I had no reason to be concerned and laughed and teased me that I would get additional opportunities to testify.

Participation In SIPC Clawback Amendment

The OIG has suggested that I participated "personally and substantially" in a "matter" involving the SEC's position on an amendment to SIPA that someone apparently intended to introduce. Apparently, the amendment would have seriously curtailed the ability of a Trustee in a SIPA proceeding to institute clawback actions. By email sent at 11:30 pm on the night of October 27, 2009, I was asked by an OLA staff member whether the Commission should "weigh in" if the amendment was proposed.

I sent an email in response at 6:30 am the following morning. I expressed no view on the question asked (whether the Commission should "weigh in"). I said instead that I did not understand the amendment, if I understood it correctly it seemed unfair, and that I was forwarding the matter to the bankruptcy experts in OGC to see if I had read the amendment correctly.

That was it.

Reflections and Conclusion

This has been a dreadful experience for me, in ways that there is no need for me to detail. I fear that it also has been a dreadful experience for the public interest. The public needs a Securities and Exchange Commission that is encouraged to make hard decisions and to make the right decisions. I understand that there are different visions of the public interest and different views about matters of public policy.

But surely no vision of the public interest contemplates a Securities and Exchange Commission whose members and whose staff are afraid of making *any* decision, lest they be subject to intense personal attacks and investigations whose targets are random and whose outcomes are unpredictable. A Commission whose members and staff rightly fear for their professional lives is in no position to concentrate solely on the public.

I make these observations as someone who, as much as he cares for the Commission, is not the slightest bit sentimental about its shortcomings. The need for reform is urgent, but it will not succeed if unrelenting attacks take the place of constructive and civil engagement.

I spoke to Commission members and the staff about this very point when I took my leave last February:

> From the day I walked in the door two years ago until today I've been asked how this time around is different than the previous time. The answer is that it's a hell of a lot harder. In some ways we've made it harder on ourselves; in others, we live with constraints not of our own making; and in other ways, we just live in times that are much meaner than they were 10 years ago.
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> It's riskier to work here than it used to be. As you may know, I'm having some experience with this myself. Unfortunately, too many people have experienced those risks first hand. This time around I've had more than a few people in my office weeping with fear about what might happen to them because one person or another was looking into their behavior. I've been shocked by that. That shouldn't be. It is a symptom of the times and a political culture that is, quite frankly, seriously nuts. To some extent, this enrages me. But mostly it makes me very sad. I'm sad for the agency and for my friends, and I feel terrible that I haven't been able to help people more.
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> And it is the source of my biggest worry for the Commission as I leave. When I left here in 2002 I worried a bit that the agency might be too complacent. I have the opposite worry today. I worry that all the risk that people run will make the institution gun shy. It's only natural, but I hope I'm wrong. I hope people here have the capacity to listen to the agency's critics, be intensely self-critical, keep an open mind to a better way to do things, and in the end, never, ever back off from doing what we believe to be right. No one should take imprudent risks, and we shouldn't sugarcoat what may befall the best intentioned of us, but in the final analysis we can't live scared.
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> In the end, what has made this agency great is people who say, the hell with it, I'm going to do what's right, knowing that we are imperfect beings who often can't know what's right, and knowing that the risks are real that we will be called to account for our failures, or for our successes, or just for being here. It is so important that people here bring cases, drop cases, adopt rules, walk away from rules solely on the basis of what is best for the people we serve. The people in this room believe that, I know. That's why I love you all and why the privilege of having been with you for a time leaves me deeply in your debt.

I spoke from the heart when I said those words. I will speak from the heart today.

I welcome your questions.