Judiciary Committee: Illegal Insider Trading: How Widespread is the Problem and is there Adequate Criminal Enforcement?

Questions for the Hearing Record
Questions from Senator Specter

1. In your supervisory statement concerning Mr. Aguirre, you wrote, "Gary has an unmatched dedication to this case (often working well beyond normal work hours) and his efforts have uncovered evidence of potential insider trading and possible manipulative trading by the fund and its principals. He has been able to overcome a number of obstacles opposing counsel put in his path on the investigation. . . . He has consistently gone the extra mile, and then some." (Kreitman 9/6/06 Tr. at 154-155, SEC 00037). Did you, indeed, believe those statements to be true when you signed the supervisory recommendation to the Compensation Committee?

Yes, I believe that the supervisory statement I signed, covering Mr. Aguirre's performance from January 18, 2005 through April 30, 2005, was accurate. I also believe that the statement was incomplete. Although I did write in the statement that Mr. Aguirre could work to enhance the effectiveness of his communications with his supervisors and co-workers, I could, and in retrospect perhaps should, have included that he had acted unprofessionally in dealing with other SEC attorneys.

Also, before I wrote the statement I did not solicit feedback from Mr. Aguirre's former supervisors about Mr. Aguirre's performance before he began working under my supervision. I subsequently spoke with one of Mr. Aguirre's former supervisors, and he informed me that he had significant problems in communicating with and supervising Mr. Aguirre. Had I solicited that information earlier, I would have included it in my statement.

2. Mr. Hanson, in an August 4, 2005 email to you, while referring to a conversation the previous evening, Mr. Aguirre claims to have "told you that the decision not to take Mack's testimony because of his powerful political connections was the event that triggered" Mr. Aguirre's decision to resign from the SEC. He goes on to paraphrase your conversation with him in which Mr. Aguirre claims "you told me that Mack was 'an industry captain,' that he had powerful contacts, that Mary Jo White, Gary Lynch, and others would be representing him, that Mary Jo White could contact a number of powerful individuals, any of whom could call Linda [Thomsen] about the examination."

- **a. Is there any truth to Mr. Aguirre's version of this conversation you had with him on August 3, 2005?**
- **b. What about Mr. Aguirre's characterization is false?**

By the time my August 3 meeting with Mr. Aguirre took place, Mr. Kreitman had decided it was not yet appropriate to subpoena Mr. Mack for testimony based on the lack of evidence that Mr. Mack possessed material non-public information about the Heller merger with General Electric. Mr. Kreitman decided further factual development was necessary before taking the testimony of Mr. Mack. I have no reason to believe the decision had anything to do with Mr. Mack's political connections. Until I read about them in the *New York Times* in June 2006, I did not know anything about Mr. Mack's political connections, nor had I discussed his political connections with anyone at the Commission.

I did know that Mr. Mack was a prominent Wall Street executive and I may well have used those or similar words to describe him (I have made similar statements about other individuals we have taken testimony from in my Enforcement group, including the head of Pequot, Arthur Samberg, whose testimony we took a number of times). I was confident Mr. Mack would retain experienced SEC counsel who could, as is not uncommon, attempt to communicate with my superiors (including Associate Director Paul Berger and Director of Enforcement Linda Thomsen). Accordingly, consistent with my general practice to have my superiors learn about issues in my cases from me rather than from outside sources, I had informed Mr. Kreitman that we were considering taking Mr. Mack's testimony.

I believe Mr. Kreitman's decision not to authorize Mr. Aguirre to take Mr. Mack's testimony was based solely on the merits. I expressed this belief to Mr. Aguirre more than once, including in emails that I sent to him.

Mr. Aguirre also claimed in his August 4 email that one reason for his decision to leave the Commission was that Mr. Kreitman was not accepting Mr. Aguirre's proposed steps in the Pequot investigation, which Mr. Aguirre believed was traceable to an EEO complaint that he had filed. I have no reason to believe this charge against Mr. Kreitman. I do know that Mr. Aguirre had told me in approximately July 2005 that he had expected to work as a partner with Mr. Kreitman at the Commission and had been disappointed when that did not occur. Mr. Aguirre also told me in July that he felt he could no longer speak with Mr. Kreitman, which I believed would make it very difficult for Mr. Aguirre to function effectively under Mr. Kreitman's supervision.

3. **Mr. Hanson, in response to Mr. Aguirre's August 4, 2005 email to you, you wrote, "Mack's counsel will have 'juice' as I described last night – meaning they may reach out to Paul [Berger] and Linda [Thompsen] (and possibly others)." Do you think the mere fact that Mr. Mack's counsel might have had 'juice' was sufficient reason not to subpoena his testimony? Does the SEC have a different standard for subpoenaing the testimony of prominent individuals?**

I do not, and did not, think the fact that Mr. Mack's counsel might have had "juice" was a reason not to subpoena his testimony. Moreover, in my experience, the SEC's Division of Enforcement has never considered the status of an individual's counsel in deciding whether to take an individual's testimony, nor has anyone ever asked or suggested that I refrain from taking a person's testimony because of his or her prominence, status, choice of counsel, political clout, political affiliation, or wealth.

I do believe that it is important in all investigations to take critical witness testimony at the appropriate stage of the investigation, after adequate preparation and careful planning. I attempt to follow this process in every situation.

As I tried to explain in my interviews with your staff, while it was Mr. Kreitman's decision not to subpoena Mr. Mack pending further factual development, it made sense to me to get our "ducks in a row" before taking that testimony, considering that we were assessing his personal culpability. This was particularly true after Mr. Aguirre made inaccurate or unsubstantiated assertions about Mr. Mack, had exhibited erratic behavior in the workplace, and, according to a staff attorney whose judgment I highly value and respect, had been disorganized and unprofessional in taking the testimony in June 2005 of Mr. Samberg. (Parenthetically, though I was asked during the Senate Hearing to respond to Hilton Foster's assessment of this testimony, Mr. Foster did not attend that testimony). I had become increasingly concerned that Mr. Aguirre was simply interested in attempting to make headlines without properly gathering and objectively evaluating all of the necessary information before taking Mr. Mack's testimony.

4. **On page 3 of your testimony for the December 5, 2006 Judiciary Committee hearing you state that "on at least one occasion the same idea [Mr. Aguirre] rejected dismissively when made by another attorney became an idea Mr. Aguirre later presented as his own." What was that investigative idea? Why did you not raise the issue of Mr. Aguirre's investigative plagiarism with my staff during your on-the-record interviews on September 5, 2006 and November 9, 2006?**

During the summer of 2005, Mr. Aguirre spent significant time on an issue regarding a subpoena he had sent requiring the production of emails from an entity formerly associated with Pequot. Mr. Aguirre addressed the issue with Pequot rather than the other entity. Another attorney suggested that it made sense not to try to sort out the legal obligations between the entity and Pequot, but just to require the entity to respond to the subpoena. I understood that Mr. Aguirre reacted angrily to this suggestion, arguing that it would hurt the staff's ability to get the related entity's cooperation later. Subsequently, Mr. Kreitman suggested requiring the related entity to respond to the subpoena to Mr. Aguirre and Mr. Aguirre responded that that had been his suggestion all along. As for my interviews with your staff, I did my best to answer the questions that were asked.

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Questions for the Hearing Record
Questions from Senator Grassley

(1) At the hearing before the Judiciary Committee, you testified that there were a number of problems surrounding Mr. Aguirre's ability, performance, and conduct while he was employed as a Senior Attorney at the SEC. One of the problems we have had with this matter is the lack of contemporaneous documentation that corroborates the negative performance of Mr. Aguirre. The only such documentation we have is the negative re-evaluation that was prepared by you and Mr. Kreitman (at the request of Mr. Berger).

(a) Why is there such little documentation regarding the negative performance traits of Mr. Aguirre?

(b) Please identify any documents that you feel corroborate the negative statements surround Mr. Aguirre's performance and conduct while employed at SEC.

(a) Mr. Aguirre was a probationary employee who could be discharged for any legally acceptable reason. I was not trying to create a paper trail to justify action against Mr. Aguirre. I was trying to do what was best for the Commission in dealing with an extremely difficult employee.

I understood that Mr. Berger and Mr. Kreitman both had conversations with Mr. Aguirre about his behavior and I too spoke with Mr. Aguirre about improvements I expected from him. Around the time that we were considering whether to terminate Mr. Aguirre in late August 2005, I spoke to one of Mr. Aguirre's former supervisors and found that he also had significant problems in communicating with and supervising Mr. Aguirre.

At that point, based on Mr. Aguirre's overall conduct and my belief it was unlikely to improve, I had no qualms about recommending that he be terminated during his probationary period.

(b) The following documents directly concern Mr. Aguirre's conduct and performance: (1) supplemental evaluation of Mr. Aguirre written on August 1, 2005; (2) email from Mr. Kreitman to Mr. Berger regarding workplace behavior problems of Mr. Aguirre dated August 24, 2005; (3) termination letter sent to Mr. Aguirre on September 1, 2005. Other documents that have been provided to your staff reflect Mr. Aguirre's difficulty or unwillingness to interact appropriately with his colleagues in the Division of Enforcement.

(2) What facts did the SEC learn following September 2, 2005 that led the SEC to believe that John Mack had gone "over the wall", in accordance with the perquisite required by Mr. Kreitman, that led the SEC to take the testimony of John Mack?

We did not learn any additional facts after September 2, 2005, that led us to believe that Mr. Mack had received non-public information about the merger between Heller Financial and General Electric (which Mr. Kreitman referred to as being "over the wall") before Pequot began purchasing Heller stock on July 2, 2001. In fact, the opposite occurred. We learned that Credit Suisse First Boston was not even engaged by Heller until July 17, 2001, approximately two weeks after Pequot began purchasing Heller stock. The staff also received documents from Credit Suisse, and the documents did not suggest that the individuals from Credit Suisse Mr. Mack met with before he joined Credit Suisse on July 12, 2001, had information regarding the merger between Heller and General Electric. Moreover, we learned that Arthur Samberg, who made the decisions to purchase Heller stock, and was a friend of Mr. Mack, did not even know about Mr. Mack joining Credit Suisse until after it was publicly announced. Collectively these facts, together with the representation Credit Suisse counsel made to Mr. Aguirre in August 2005, that the Credit Suisse CFO who met with Mr. Mack before Mr. Mack joined the firm did not have information on specific pending deals on which Credit Suisse was working, caused us to believe it was extremely unlikely that Mr. Mack had gone "over the wall."

The decision to take Mr. Mack's testimony was made by my superiors within the Division of Enforcement. As I described in my written testimony to the Committee, a consideration in taking Mr. Mack's testimony in Summer 2006 was the harm Mr. Aguirre had caused, by taking this confidential, non-public investigation public for his own purposes, and the need to maintain public and investor confidence in the work of the Division of Enforcement.

(3) Describe in detail what steps SEC took to investigate the facts surrounding Mr. Mack's investment in "Fresh Start" which later became Celiant Corporation. In complying with this request, include responses to the following:

a. Did SEC determine the amount and date of Mr. Mack's investment in Celiant Corporation? Please explain.

b. Did SEC determine the amount of cash Mr. Mack received in connection with Andrews Corporation's acquisition of Celiant and the date he received such cash? Please explain.

c. Did SEC determine the amount of stock Mr. Mack received in connection with Andrews Corporation's acquisition of Celiant? Please explain.

d. Did the SEC determine what legitimate benefit, if any, Pequot received in exchange for allowing John Mack to participate in the investment? Please explain.

e. Did the SEC determine whether John Mack's participation in the deal diluted Pequot's profit or caused any other detriment to Pequot? Please explain.

We were investigating potential insider trading by Pequot, including whether Mr. Mack had passed information to Pequot about a pending merger between Heller Financial and General Electric. During the investigation we learned that Mr. Mack and Mr. Samberg were friends, that Mr. Mack made at least two private company investments with Pequot during 2001, and that Mr. Mack had also invested in Pequot funds. But we were unable to establish that Mr. Mack had information about the Heller merger with GE before Pequot began purchasing Heller stock. After reviewing Pequot emails suggesting that Mr. Mack spoke with Pequot employees about investing in Celiant Corp. (also referred to as Freshstart) in the days before Pequot began purchasing Heller stock, we questioned Mr. Mack about his investment in Celiant during his testimony to the staff.

(a) Mr. Mack testified that he thought he had invested $5 million in Celiant when it was a private company and SEC filings reflect that he did in fact purchase $5 million worth of Celiant stock on October 15, 2001, when Celiant was a private company. SEC filings reflect that Lucent Technologies and Pequot both invested in Celiant and that Pequot funds purchased $50 million of Celiant stock. The filings reflect that Mr. Mack paid the same stock price per share in Celiant as Pequot did.

(b), (c), (d), (e) SEC filings reflect that Celiant was acquired by Andrew Corp., a publicly-traded company, in February 2002. Andrew Corp. issued stock and cash to Celiant shareholders. Mr. Mack testified to the staff that his investment in Celiant doubled, and that he still owned stock in Andrew Corp. Mr. Mack further testified that he was able to purchase shares in Celiant because Pequot's investment in Celiant was the maximum it could make in a private company. Mr. Mack testified that Celiant also needed more money. We did not verify the profit Mr. Mack realized or recognized on his Celiant purchase or the amount of stock or cash Mr. Mack received when Celiant was acquired by Andrew Corp. Nor did we verify the loss Mr. Mack claimed he incurred on the other private investment he made with Pequot in 2001. The staff did not find that Pequot or Lucent Technologies received any benefit because Mr. Mack was also able to invest in Celiant at the same price offered to Pequot, or that Mr. Mack's purchase of Celiant stock caused detriment to either Pequot or to Lucent. Devoting additional resources to these issues would have provided little assistance in proving an insider trading case against Pequot or Mr. Mack given that we found no evidence that Mr. Mack had any information about the merger between GE and Heller before Pequot began purchasing Heller.