Senator Specter
Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity
December 5, 2006

I appreciate the opportunity to comment upon various contentions and accusations made by Linda Thomsen (Thomsen), Paul Berger (Berger), Mark Kreitman (Kreitman) and Robert Hanson (Hanson) during their testimony before your committee on December 5, 2006. I refer to them collectively below as the "Four."

1. Given your conflict with supervisors such as Mr. Kane, Mr. Hanson, Mr. Kreitman and Mr. Berger during your short tenure at the SEC, do you think it conceivable that the SEC terminated you out of concern that you would not take direction from your superiors?

Your question captures the essence of the Four's longest surviving explanation for terminating my employment. Some have surfaced only recently.[1] Other theories have come and gone.[2] But this one has been around awhile. Berger, Kreitman and Hanson christened the theory with their August 1 "reevaluation." It offered this example of Aguirre's resistance to supervision: "By failing to consult with his branch chef (sic), [Aguirre] inaccurately stated Commission policy in communication with defense counsel."[3] The Four also cited "resistance to supervision" in the September 1 termination notice.[4] Each of the Four touched on this theme during his or her testimony. Berger put it this way: "[T]he SEC decided not to extend Mr. Aguirre's employment beyond his probationary period because Mr. Aguirre could not or would not accept reasonable supervision and direction and arrogated to himself power that is not supposed to be exercised by any single member of the SEC staff."[5] Beyond any question, the Four have shown rare consistency in asserting this allegation. But a lie consistently told does not transform itself into truth. It is still a lie.

I respectfully submit there are at least four approaches to the evidence before your Committee in regard to this accusation. The most direct approach focuses on the concrete allegations which, according to the Four, demonstrate that I "resisted" their supervision. A second approach focuses on the causal link between my oral and email communications to Berger in late July questioning Mack's favored treatment, his abrupt decision a few days later to "reevaluate" my performance, and the Four's decision to fire me thirty days later. A third

[1] Many of the allegations made by Thomsen, Berger, Kreitman and Hanson in their oral and written testimonies were never mentioned at any time during my employment either verbally or in any evaluation, email or other document.

[2] For example, SEC's letter to the EEOC stated "Hanson's statement that I left for two weeks" in the March 21, 2006, letter from the SEC to the EEOC, previously provided to staff, which quoted Hanson's statement: that I "once left the job, saying only that [I] was resigning. [I] stayed away for two weeks."

[3] See August 1, 2005, "reevaluation", Ex. 95.

[4] See September 1, 2005, termination notice, Ex. 96.

[5] *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity:* Hearing Before the U.S. Senate Judiciary Committee, 109th Cong. (2006) (Statement of Paul Berger, Former Associate Director Division of Enforcement, U. S. Securities and Exchange Commission, Washington, DC). (Hereinafter, Berger's Written testimony).

approach could focus on the Four's credibility: the fact that their accusations about my performance are unsupported and indeed contradicted by contemporaneous documents which were generated when the events occurred. Why the need for these false attacks on my performance? Finally, a fourth approach could focus on how the SEC has handled the whole affair: its on-off-on Office of the Inspector General investigation and the on-off-on-off investigation of Mack. All this smacks of cover up. No cover up would be needed, of course, if the Four could speak the truth. In sum, it matters little which approach you take to the evidence. Each leads to the same conclusion: the Four fired me for questioning their decision to give Mack favored treatment.

I will briefly discuss the first two approaches below. The third approach—the Four's credibility—is laced into my responses to follow up questions from Senator Grassley. The last approach—the SEC's cover up—was addressed in my written testimony before your Committee.

The first approach focuses on three events which the Four cite as examples of my "resistance to supervision." The Four and their counsel had countless verbal and written exchanges between my supervisors and me from which they could select some incident to support their allegation. For example, there were more than a thousand email exchanges between my supervisors and me. Surely, if this allegation were true, the Four and their counsel would be able to find at least one incident where I had resisted "reasonable supervision" They could not.

The Four chose three encounters with my supervisors which they describe as follows: (1) I was "unhappy" with Charles Cain's "ministerial" edits to the Formal Order Memorandum in October 2004,[6] (2) my alleged "inaccurate" description of "Commission policy in communicating with defense counsel" caused by "failing to consult with [my] branch chief,"[7] and (3) my issuance of subpoenas without my supervisor's "review or approval" and "but for ... [my] supervisors' corrective actions ...would have been extremely damaging to the SEC."[8] Apparently, they thought it would be their word against mine. They were only half right; it is also their word against the contemporaneous emails which were generated when each event occurred.

Each of the three allegations was the subject of a specific question by Senator Grassley. To avoid unnecessary repetition, I respectfully refer you to those portions of my response that address the three allegations.[9] Beyond that, the emails to and from my supervisors establish that I

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[6] *Id.*

[7] See August 1, 2005, "reevaluation", Ex. 95.

[8] *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity:* Hearing Before the U.S. Senate Judiciary Committee, 109th Cong. (2006) (Statement of Linda Thomsen, Director of Enforcement, U. S. Securities and Exchange Commission, Washington, DC). (Hereinafter, Thomsen's Written testimony).

[9] I responded to these allegations as follows: to the allegation that "I was "unhappy" with Charles Cain's "ministerial" edits to the Formal Order Memorandum at pages 46-47 of my responses to Senator Grassley questions, to the allegation that I made an "inaccurate" statement of "Commission policy in communicating with defense counsel" by "failing to consult with [my] branch chief" at pages 40-42 of my responses to Senator Grassley questions, and that I issued subpoenas without my supervisor's "review or approval" and "but for ... [my] supervisors' corrective actions ...would have been extremely damaging to the SEC " at pages 48-50 of my responses to Senator Grassley questions.

sought their approval, and followed their guidance, on every significant aspect of the PCM investigation,[10] even on the occasion that I disagreed with them.[11]

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[10] For example, see the following emails: See September 22, 2004, email from Aguirre to Cain, Ex. 3; October 6, 2004, email from Aguirre to Cain, Ex. 4; October 8, 2004, email from Aguirre to Grime and Cain, Ex. 5; October 13, 2004, email from Aguirre to Cain, Ex. 6; October 14, 2004, email from Aguirre to Grime and Cain, Ex. 7; November 3, 2004, email from Aguirre to Grime, Cain and Foster, Ex. 8; December 6, 2004, from Aguirre to Foster, Ex. 9; December 8, 2004, email from Foster to Aguirre, Ex. 10; December 9, 2004, email from Aguirre to Foster, Ex. 11; December 10, 2004, email from Aguirre to Foster, Ex. 12; January 10, 2005, email from Aguirre to Grime and Cain, Ex. 13; January 10, 2005, email from Aguirre to Cain, Ex. 14; January 24, 2005, email from Aguirre to Kreitman, Ex. 15; January 25, 2005, email from Aguirre to Hanson, Ex. 16; February 3, 2005, email from Kreitman to Hanson and Aguirre, Ex. 18; February 4, 2005, email from Aguirre to Kreitman, Ex. 19; February 8, 2005, email from Aguirre to Kreitman and Hanson, Ex. 20; February 14, 2005, email from Kreitman to Hanson and Aguirre, Ex. 21; February 16, 2005, email from Hanson to Aguirre, Ex. 22; February 16, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, Ivarone, Plimpton, and Snively, Ex. 23; February 18, 2005, email from Aguirre to Hanson, Ex. 24; February 18, 2005, email from Aguirre to Hanson and Kreitman, Ex. 25; February 22, 2005, email from Aguirre to Hanson, Kreitman, Foster, and Ribelin, Ex. 26; February 23, 2005, email from Kreitman to Hanson, Foster, Ribelin and Aguirre, Ex. 27; February 25, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 28; March 1, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 29; March 9, 2005, email from Aguirre to Hanson and Kreitman, Ex. 30; March 10, 2005, email from Aguirre to Berger, Kreitman and Hanson, Ex. 31; March 15, 2005, email from Aguirre to Hanson, Kreitman, Ribelin, Conroy, Glascoe, and Foster, Ex. 32; March 16, 2005, email from Aguirre to Hanson, Foster, Ribelin, Conroy, Ivarone, and Plimpton, Ex. 33; March 16, 2005, email from Aguirre to Kreitman, Hanson, Plimpton, Ivartone, Foster, Conroy and Ribelin, Ex. 34; March 18, 2005, email from Aguirre to Hanson and Kreitman; Ex. 35; March 29, 2005, email from Aguirre to Hanson and Ribelin, Ex. 36; April 13, 2005, email from Aguirre to Hanson, Ex. 37; April 18, 2005, email from Aguirre to Hanson, Ex. 38; April 22, 2005, email from Aguirre to Hanson and Kreitman, Ex. 39; April 29, 2005, email from Aguirre to Hanson, Ex. 40; May 6, 2005, email from Aguirre to Hanson, Ex. 41; May 9, 2005, email from Aguirre to Florschutz, Kreitman and Hanson, Ex. 42; May 10, 2005, email from Aguirre to Kreitman and Hanson, Ex. 43; May 18, 2005, email from Aguirre to Hanson, Ex. 44; May 20, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, Eichner and Conroy, Ex. 45; May 24, 2005, email from Aguirre to Hanson, Foster, Ribelin, Eichner, O'Rourke, Ivarone and Kreitman, Ex. 46; May 24, 2005, email from Aguirre to Hanson, Ex. 47; May 25, 2005, email from Aguirre to Hanson, Ex. 48; June 3, 2005, email from Aguirre to Ribelin, Foster, Eichner, Conroy, Glascoe, Miller, Hanson and Kreitman, Ex. 49; June 2, 2005, email from Aguirre to Kreitman, Ex. 50; June 12, 2005, email from Aguirre to Hanson, Ex. 51; June 10, 2005, email from Aguirre to Ribelin, Hilton, Conroy, Glascoe, Eichner, Miller, Kreitman, Hanson, and O'Rourke, Ex. 52; June 12, 2005, email from Aguirre to Hanson, Ex. 53; June 20, 2005, email from Aguirre to Hanson, Ex. 54; June 27, 2005, email from Aguirre to Hanson, Kreitman and Ribelin, Ex. 55; June 28, 2005, email from Aguirre to Hanson, Kreitman, and Ribelin, Ex. 56; June 29, 2005, email from Aguirre to Kreitman, Ex. 57; July 29, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Eichner and Jama, Ex. 58; July 27, 2005, email from Aguirre to Berger and Kreitman, Ex. 59; August 24, 2005, email from Aguirre to Berger; August 4, 2005, email from Aguirre to Hanson, Ex. 60; February 9, 2005, email from Aguirre to Kreitman and Hanson, Ex. 64; Early May email chain between Kreitman, Hanson and Aguirre, Ex. 89; May 11, 2005, email from Hanson to Aguirre, Ex. 90; August 25, 2005, email from Aguirre to Hanson, Jama, Eichner and Ribelin, Ex. 101; June 3, 2005, email from Eichner, to Kreitman, Aguirre, and Hanson, Ex. 105; March 11, 2005, email from Kreitman to Aguirre and Hanson, Ex. 107; March 15, 2005, email from Hanson to Aguirre, Ex. 108; March 15, 2005, email from Kreitman to Hanson, and Aguirre, Ex. 109; August 4, 2005, email from Aguirre to Hanson, Eichner, Jama, Ribelin, and Miller, Ex. 118; August 26, 2005, email from Aguirre to Kreitman, Hanson, Eichner, Ribelin, and Jama, Ex. 119; May 26, 2005, email from Aguirre to Hanson, Ex. 121; May 24, 2005, email exchange between Aguirre and Hanson, Ex. 124; May 26, 2005, email from Thomas Sporkin to Aguirre, Ex. 125; and May 26, 2005, email from Sporkin to Aguirre, Ex. 126; Chain of emails in late August 2005, Ex. 133; June 2, 2005, email from Aguirre to Kreitman Ex. 140; June 3, 2005, email from Aguirre to Hanson, Ex. 141; June 3, 2005, email from Eichner to Kreitman, Hanson, and Aguirre, Ex. 142; June 6, 2005 email from Kreitman, to Eichner, Hanson and Aguirre, Ex. 143; and August 24, 2005, email from Kreitman, to Aguirre and Hanson, Ex. 145.

[11] See March 14, 2005, email from Aguirre to Kreitman and Hanson, Ex. A.

The second approach focuses on the Four's abrupt reversal of their positive evaluations of my performance. The timeline speaks for itself:

June 1, 2005	My supervisors find my performance acceptable
June 29, 2005	Hanson said my contributions were of high value
July18, 2005	Compensation committee with Berger give two step rating increase
After July 18	Thomsen approves merit step increases
July 22	I inform Berger of Hanson's statement when he blocked the Mack subpoena
July 27	My email to Berger again questions whether Mack received favored treatment
August 1	Berger, Kreitman and Hanson do "reevaluation"
September 1	The Four terminate my employment

As indicated in the above timeline, Berger, as a member of the compensation committee, approved my two-step merit increase on July 18. Less than two weeks later, he initiated the "reevaluation." No one has suggested that anything happened between July 18 and August 1 that would warrant the "reevaluation." In the absence of any real intervening event, Berger had to create one. He manufactured one that nobody would be able to contradict, since he was the only witness. The event took place only in Berger's mind. He testified: "I noted though, that the *draft* evaluation did not contain any constructive criticism. (Emphasis added)."[12] So Berger "noted"? When did he make this mental note? Hanson circulated his evaluation on June 29, which would have gone to Berger. Berger should have "noted" that my supervisors' evaluation needed some constructive criticism sometime before or during July 18, when he, as a member of the compensation committee, decided to approve my two-step rating increase. But Berger did not make his mental note for almost another two weeks. Then the need for "constructive criticism" in my evaluation just floated into his head sometime around August 1.

I submit that two concrete events, not Berger's delayed mental processes, triggered the "revaluation." Between the compensation committee meeting on July 18 and the August 1 "reevaluation," I had two communications with: my face-to-face meeting with him on July 22 and my email to him on July 27. Both communications questioned the decision to give Mack favored treatment.

To sum up, there are at least four ways to view the evidence. Each points to the same conclusion. Collectively, these four approaches conclusively establish that the Four terminated my employment for questioning their decision to give Mack favored treatment.

[12] Berger's written testimony.

2. **Mr. Aguirre you appear to allege in the New York Times article that Mr. Mack's campaign contributions to the President may have played a role in the SEC's reluctance to take his testimony. However, in Mr. Berger's testimony at page 11, he notes that during his tenure at the SEC "it was publicly reported that the Enforcement Division vigorously investigated cases involving the then Governor of Texas, the Vice President of the United States, and the Majority Leader of the Senate, all Republicans." How do you square your theory of political pressure impeding an SEC investigation with these examples of SEC vigor in investigations?**

I believe you are referring to a New York Times article on June 23, 2006, which reported on my May 30, 2006, letter to the Senate Subcommittee on Securities and Investment. My letter summarized the facts, as I experienced them, during the last week of June 2005, when the investigation of John Mack was effectively closed down.[13] That process began on approximately June 23, 2005, when Hanson blocked the issuance of a subpoena for Mack, stating only that Mack had powerful political connections. As explained in my May 30, 2006, letter, and in my testimony before your Committee, other facts corroborated Hanson's statement.

Berger's argument employs a faulty syllogism: the SEC has "vigorously" investigated a Republican Texas governor, a Republican Vice President, and a Republican Senate Majority Leader despite their political clout; Berger was a part of the same SEC leadership; therefore, Berger was not influenced by Mack's political clout with a Republican president. Only one aspect of this syllogism is valid: Berger was a part of the same SEC leadership. As discussed below, every other aspect of this syllogism is flawed. Those flaws include its primary premise: the SEC "vigorously" investigated a Republican Texas governor, a Republican Vice President, and a Republican Senate Majority Leader.

But there is a preliminary issue that should be addressed before turning to the flaws in Berger's logic. The point of Berger's faulty syllogism is to demonstrate that the Enforcement Division does not buckle under to political influence. Hanson has lent support to this theory. While Hanson concedes telling me about Mack's "political clout" as a reason for blocking the subpoena to Mack, he claims that he "inartfully" chose his words. "Political" did not really mean political. How could it? After all, Hanson knew nothing about Mack being a "Pioneer" or any of his other political connections.[14]

I submit that accepting Hanson's redefinition of "political" matters little in assessing whether the SEC has acted contrary to federal regulations and its mission. Nor does Berger's statement that the SEC has "vigorously" investigated those with political clout in the past. Assume *arguendo* that none of the Four had any knowledge that Mack, with one other, was at the top of the President's list for appointment as the next Secretary of the Treasury. How would these assumptions change the significance of the Four's decision to block the Mack subpoena? It would mean that Hanson blocked the subpoena of the suspected tipper, who he considered to be a "bad guy," because he was a member of the Wall Street elite. And the rest of the Four went

[13] I made no statement to The New York Times in connection with that article.

[14] *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity:* Hearing Before the U.S. Senate Judiciary Committee, 109th Cong. (2006) (Statement of Robert Hanson, Branch Chief Division of Enforcement, U. S. Securities and Exchange Commission, Washington, DC) (Hereinafter, Hanson's written testimony).

along with it. Giving favored treatment, whether to those with political influence or to Wall Street elite, violates federal regulations defining how the SEC must operate.[15]

Returning now to Berger's logic, his primary premise is faulty. He cites the SEC's "vigorous" investigations of a Texas Governor (George W. Bush),[16] a Vice President (Dick Cheney), and a Senate Majority Leader (Bill Frist). The obvious implication is that high level investigations such as these prove a broader principle—the SEC is above political influence and therefore so is Berger. It is hard to reconcile that notion with the recent public statements of a former SEC Chairman. In his January 2006 editorial, former SEC Chairman Arthur Levitt admitted to buckling under to political pressure. He wrote:

> Indeed, because many of the issues before the SEC were far from the front of the public's mind, the influence of high-priced lobbyists on the system was easy to detect and especially brazen. From battles over auditing reforms to the expensing of stock options, the concerns of ordinary investors often were subsumed to the interests of industry lobbyists by Republicans and Democrats alike ... In addition to making thousands of dollars in campaign donations, companies would concoct phony "grass-roots" coalitions—usually made up of executives and compliant employees—to rally for the cause and pressure lawmakers. And when all else failed, lobbyists would cash in their chits with members of relevant House and Senate committees to threaten the SEC—an independent regulatory agency—with budget cuts to get what they wanted. Regrettably, I occasionally found myself succumbing to this immense pressure in order to save the commission. Many of the reforms that were thwarted in this way could have saved investors some of the pain from the scandals of the past five years.[17]

Of course, the former chairman was discussing how political pressure had influenced the SEC's rule making authority, not its enforcement of existing securities laws. Still, he conceded that political pressure had caused the SEC to act to the detriment of the investors the SEC was created to protect. Further, federal regulations require the SEC rule-making procedures to be free of such influence,[18] just as other regulations require that its enforcement of the securities laws be free from such influence.

Similar concerns surfaced during Berger's tenure whether the Enforcement Division has also marched to the drum beat of those wielding political influence. In 2000, the SEC opened an investigation of Representative Lazio while he was running for the Senate against Hillary Clinton. According to The Washington Post, the letter from a "Clinton ally" to SEC Chairman Levitt, who admitted above to succumbing to political pressure, prompted the probe. President Clinton appointed Chairman Levitt. Two of the three examples given by Berger—the

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[15] 17 C.F.R. 200.55, 17 C.F.R. 200.58, 17 C.F.R. 200.61, 17 C.F.R. 200.64, 17 C.F.R. 200.67, 17 C.F.R. 200.69, 17 C.F.R. 200.735-2(a), (17 C.F.R. 200.735-2(b), and 17 C.F.R. 200.50; 17 C.F.R. 200.51).

[16] The only person who I have been able to identify who was the subject of an SEC investigation and also served at some time in his life as the Texas governor was George W. Bush.

[17] Arthur Levitt Jr., *Cutting the Corruption,* Was. Post, January 23, 2006, at A15.

[18] 17 C.F.R. 200.58: 17 C.F.R. 200.61 17 C.F.R. 200.67.

investigation of George W. Bush and the investigation of Dick Cheney—were also embroiled in the same type of controversy.

I am not suggesting that any of these political leaders violated the law. Nor am I suggesting political influence dictated the outcome of the SEC's investigation. Only the senior SEC officials who directed those investigations know the truth. My point is different. From what is known publicly, the SEC's handling of these three cases provides little proof that the SEC was above political pressure.

In citing the SEC investigation of a Texas governor, Berger must have in mind the investigation of George W. Bush (Bush), which the SEC opened in 1991 and closed in April 1993. To begin with, Bush was not the Texas governor at any time during the investigation. He became governor in 1995. Hence, the SEC never investigated a Texas governor. The SEC's handling of this investigation, however, has been the subject of widespread criticism. The SEC opened its investigation on April 5, 2001[19] the day *after* The Wall Street Journal reported that Bush, the President's son, had made a late filing of an SEC form.[20] The Journal's article (Bush's Son Misses Deadline for Reporting 'Inside' Sale) read in part: "George W. Bush, eldest son of the president, reported a large 1990 'insider' sale of stock last month, almost eight months after the federal deadline for disclosing such transactions." The timely sales avoided a loss of approximately $350,000. Under these circumstances, the SEC would have faced a firestorm had it not opened an investigation.

Many have speculated that political influence caused the SEC to close the insider trading investigation of Bush.[21] As in Mack's case, one factor contributing to that speculation was the SEC's failure to interview Bush, the subject of the insider trading investigation.[22] Another factor raising concern was the SEC's letter "to Mr. Bush's lawyer - *a rare action by the agency*— informing him that "no enforcement action [was] contemplated with respect to [Mr. Bush.] (emphasis added)." [23] The SEC of course did the same in the GE-Heller matter. I am not

[19] John Dunbar, A Brief History of Bush, Harken and the SEC, http://www.publicintegrity.org/report.aspx?aid=196.

[20] *Bush's Son Misses Deadline for Reporting "Inside" Sale*, Wall St. J., April 4, 1991 at A4. "George W. Bush, eldest son of the president, reported a large 1990 "insider" sale of stock last month, almost eight months after the federal deadline for disclosing such transactions."

[21] Wikipedia reports: "The investigation [by the SEC] was criticized on several grounds, including the fact that the subject of the inquiry, Bush, was never interviewed by the SEC. A pertinent point here is that the SEC Commissioner had been appointed by President George H. W. Bush Sr., and its counsel had worked for Bush Jr. negotiating the purchase of the Texas Rangers; Also, Paula Dwyer, *The Ghosts That Won't Go Away, Scandals in Corporate America,* BUS. WEEK, July 22, 2002, at 34.

[22] *Id.* Also,

> The president's self-contradictory defense of his past is to say he was "fully vetted" by the S.E.C. even though he still hasn't "figured it out completely" himself. But the S.E.C. never interviewed Mr. Bush during its investigation. The agency was then run by an appointee of his father, Richard Breeden, who recused himself from the case.

Frank Rich, *The Road to Perdition,* N.Y. TIMES July 20, 2002, at A1

[23] Charlotte-Anne Lucas, *Bush to Reveal Documents from SEC Inquiry; GOP Challenger Denies Insider Trading with Harken Energy Stock,* The Dallas Morning News, October 11, 1994, at 22D. Also, Michael Schroeder, *SEC Says Lazio Committed No Violations,* W. St. J. August 24, 2000, at A24.

suggesting that the SEC buckled to political pressure or that the subject of the investigation violated the law. But I do say this: the SEC's investigation of a "Texas governor" in 1993 raises questions, but provides no answers. Hence, it hardly proves that the SEC is beyond political influence.

Berger's reliance on the SEC's investigation of Halliburton and its staff interview of Vice President Cheney is equally misplaced. That investigation was again engulfed in criticism,[24] allegations, and denials,[25] mostly denials, that political influence had dictated its outcome. Before the SEC filed its action, several private securities fraud cases sued Halliburton and certain officers and directors. In the absence of any SEC proceeding, Judicial Watch sued the Vice President and Halliburton for fraud. Subsequently, after considerable public outcry, the SEC took Vice President Cheney's testimony.[26] The public concern that political influence might dictate the outcome led Chairman Donaldson to issue a statement: "Donaldson pledged to protect the independence of the SEC from political pressure from the White House or Congress, and to allow the agency's enforcement division to vigorously pursue investigations."[27] Why would it take the "pledge" of the SEC Chairman to protect the SEC from political influence if it was not susceptible to it?

Finally, Berger has alluded to the SEC's ongoing investigation of Senator Bill Frist. As with the investigations of George Bush and Dick Cheney, the facts triggering the investigation of Senator Frist were quite public. The Senator's SEC filings disclosed heavy trading shortly before a disappointing earnings announcement.[28] Once again, a public outcry pressed the SEC to look into the matter. As one industry journal put it: "Consumer groups are rattling the cage, demanding an investigation into the Tennessee lawmaker's sale of shares in the for-profit hospital chain HCA just before the release of a disappointing second-quarter report sent the stock price reeling."[29] One of those consumer groups began to publicly question Senator Frist's holdings in September 2005.[30] The SEC would again face a firestorm if it did not look into the matter.

In sum, none of the SEC investigations demonstrate the SEC is free of political influence. In each case, the facts requiring the investigation were public. How does the SEC not investigate a high political figure when public documents demonstrate that he may have violated the

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[24] "But the settlement [between the SEC and Halliburton] could stoke criticism. The accounting change was initiated while Mr. Cheney was at the company, and Mr. Morris was promoted to chief financial officer under Mr. Cheney's watch. Calls seeking comment from Mr. Cheney weren't returned." Russell Gold, *Halliburton Settles SEC Probe into an Accounting Disclosure, Company to Pay a $7.5 Million Penalty,* W. ST. J., August 3, 2004, at B2.

[25] James Toedtman and Mark Harrington, "'The SEC is completely unreactive to any effort to generate any kind of political pressure,'" said McLucas. 'It will not have any influence.'" NEWSDAY, May 30, 2002, at 2. Also, White *House Dismisses Cheney Suit as "Without Merit",* Agence France Presse—English, July 10, 2002.

[26] Christopher Bowe, SEC *Steps Up Halliburton Investigation Regulation Formal Probe Launched into Accounting and Disclosure Practices While Dick Cheney Was Chief Executive,* FIN. TIMES (London, England), December 21, 2002, at p. 18.

[27] Kathleen Day, *Audit Post Top Priority For SEC Pick; Two Key Senators Back Donaldson,* WAS. POST, February 6, 2003, at E1.

[28] *Frist: Sec Investigating Sale of HCA Stock,* AMERICAN HEALTH LINE, September 23, 2005.

[29] Bill Straub, *Frist's Stock Sale Places Him Under Ethical Cloud,* Scripps Howard News Service, September 28, 2005.

[30] *Id.*

securities laws? The SEC's handling of the Mack investigation demonstrates the same principle. The SEC blocked that investigation until two Senate committees opened their own investigations and, when that fact became public through the media, the SEC reopened both its SEC investigation and its OIG investigation. This does not prove the SEC is above political influence; it merely proves the SEC is politically astute.

But even if Berger's premises are accepted as fact, the logic is faulty. That other senior SEC officials vigorously prosecuted cases against those with political clout does not mean that Berger was ready to do the same. In effect, Berger has wrapped himself in the SEC flag. I submit he has done so because the facts of his involvement in blocking the Mack subpoena and the cover up are so damning. In my presence, and without knowing the evidence, he told Kreitman and Hanson on June 23 that the investigation of Mack was headed no where. From that point, Hanson and Kreitman reversed their support for the Mack investigation. Only Berger could follow up with the Morgan Stanley head of compliance. When I told Berger that Hanson had expressly blocked the Mack subpoena because of Mack's political influence, Berger did nothing to look into those allegations. He did, however, direct Hanson and Kreitman to create the "reevaluation." In September, it was Berger who told Kreitman to add the phony evaluation to my personnel files. Every charge Berger has made has been refuted with documentary evidence. Given these facts, Berger has one option left: wrap himself in the SEC's legacy and hope for the best.

3. **Mr. Aguirre, on page 13 of Mr. Berger's written testimony he describes a call you previously testified about in which Mr. Kreitman reports a call from in-house counsel at Morgan Stanley inquiring about Mr. Mack's exposure and writes, "To the extent Mr. Aguirre testified that I indicated a view on the merits, and that the view was that evidence indicated that Mr. Mack could not be complicit in any wrongdoing, that testimony is false." How do you respond to Mr. Berger's concern that telling Morgan Stanley anything about Mr. Mack's potential exposure would have violated SEC regulations and unlawfully impinged upon a business decision?**

I do not dispute Berger's contention that telling Morgan Stanley anything about Mack's potential exposure may have violated SEC policy or its regulations. For that reason, I told Morgan Stanley's head of compliance that I would refer his question—was the serious SEC about Mack?—to my supervisors. I also do not question Kreitman's initial response that we should say something to Morgan Stanley. Nor did Hanson question it. Berger's decision that nothing should be said was fine with me as well. To use a colloquialism, I had no dog in this fight.

But the discussion about SEC policy is collateral to two primary issues. What did Berger say to Morgan Stanley's representatives, Mack, or Mack's counsel? Neither Kreitman, nor Hanson, nor I followed up with Morgan Stanley's compliance officer after the Berger call. Berger testified that he handled the matter. That raises issues: Did Berger hint in any way what evidence the SEC held or did not hold? Did Berger hint in any way that the SEC's evidence was not sufficient to proceed against Mack? For some reason, Morgan Stanley felt comfortable in moving ahead with Mack on June 30, despite the fact its compliance officer told me a week earlier that a serious investigation could affect Morgan Stanley's decision to hire Mack as its CEO. It also seems odd that the Morgan Stanley board, knowing that Mack was the subject of an

SEC insider trading investigation, would roll the dice by asking him back. It could face a potential shareholders derivative action if it hired Mack without some assurance that the risk was minimal or nonexistent. What would be the board's defense six months later if Mack was forced to resign and, consequently, the Morgan Stanley stock plunged costing shareholders billions?

But Berger's entire answer is in its essence a straw man. The key point of my testimony is that Berger cut off Kreitman in mid-sentence just as Kreitman was saying that we would likely file a case against Mack. Berger does not address my testimony. Instead, he creates a straw man by attributing his words to me: "To the extent Mr. Aguirre testified that I indicated a view on the merits and that the view was that the evidence indicated that Mack could not be complicit in any wrongdoing…"[31] Having set up the straw man, Berger then knocks it down: "that testimony is false."[32]

I have never contented or even hinted that Berger "indicated a view on the merits." Indeed, I testified before your committee on June 28, 2006, that Berger likely knew nothing about the facts pointing to Mack as the possible tipper.[33] It was his lack of knowledge about the Mack case combined with his abrupt directive to Kreitman—that no case would likely be filed against Mack—that was stunning. Again, the key Kreitman-Berger conversation unfolded:

> Kreitman: I think we will likely file against Mack and…
>
> Berger (cutting in): I don't think we are going to file and nothing should be said to Morgan Stanley.

Why did Berger think that no case would be filed against Mack without knowing any of the evidence? The answer is simple: the evidence did not matter; the decision was made on other grounds.

4. There have been a number of things said about your performance and conduct while working at the SEC. Would you like to respond to these characterizations of your work?

Senator Grassley asked me to respond to twenty-three separate allegations by the Four regarding my performance. In reviewing Hanson's testimony, I found three additional allegations that were not included in Senator Grassley's questions: [1] "Mr. Aguirre became angry and abrasive whenever an investigative decision was made that he did not agree with, [2] yet on at least one occasion the same idea he rejected dismissively when made by another attorney became an idea Mr. Aguirre later presented as his own. [3] In early July 2005, he told me that he could no longer even talk to Mark Kreitman, our group's Assistant Director."

[31] Berger's written testimony.

[32] *Id.*

[33] The Lexis version of my June 28 testimony on this point reads: "Well, the information that I passed along customarily when--when Mr. Berger was apprised, I would be asked to -- to prepare something. Mr. Berger had not participated in any meetings. I had not -- most of the conversations I had were verbal, and I think he said something during the phone conversation that implied that he was not that familiar with the facts of the case, and the facts that I'm talking about had been developed in the last, oh, three or four weeks."

Hanson's statement that I was "angry and abrasive whenever an investigative decision was made that he did not agree" is nonsense. As with his other accusations, he offers no concrete example, much less any evidence, to support this charge. There were relatively few occasions when I disagreed with my supervisors. I did, however, have one such disagreement on March 11 regarding the content of a letter that would be sent to opposing counsel following a telephone conference on March 10. Two drafts of the letter were circulated. I circulated an email on March 14 explaining why I thought my draft more thoroughly and concretely addressed the issues resolved during the call. My email opened with this comment:

> Overview
>
> First, I recognize that it is your responsibility to make the decisions in this case. I also know both of you are very busy and this is a new matter for you. However you decide to proceed, I will accept your guidance. In this spirit, for the reasons below, I believe the current draft confirming last Thursday's call should not be sent in its current form.[34]

I then gave an overview of my reasons and then returned back to the opening theme:

> For these reasons, I think the language in my proposed draft of March 11 better addresses the issues than the current one. *But if you guys disagree with me, I will carry out your instructions with alacrity* (emphasis added).[35]

This was my approach in dealing with my supervisors on all issues, except the occasion where Cain told me to misstate facts in the Formal Order Memorandum. I politely told him in a face-to-face meeting and by email that I could not follow that directive.[36] The reason Hanson cites no examples—despite his proclivity to take notes—is quite simple: there were none.

Hanson's statement that I rejected another staff member's idea and then claimed it as my own never happened. Once again, Hanson offers nothing concrete much less any supporting documents. I actively sought out other staff's ideas and made a special effort to recognize their work when it helped advance the investigation.[37] In his evaluation of my performance, Hanson himself recognized that I had worked effectively with staff from the Office of Compliance, Inspections and Examinations and staff from various SRO's in advancing the investigation.[38]

Finally, Hanson's statement that I told him in early July that I could no longer even talk to Mark Kreitman again distorts the truth. I told Hanson that I had tried to discuss the evidence supporting the issuance of the subpoena to Mack on June 28 and June 29, but he refused to discuss the matter with me. I testified to one of those conversations during my June 28, 2006, testimony before your committee. In terms of communicating with Kreitman, I met with him on

[34] See March 14, 2005, email from Aguirre to Kreitman and Hanson, Ex. A.

[35] *Id.*

[36] See October 8, 2004, email from Aguirre to Richard Grime and Cain, Ex. 5.

[37] See for example December 29, 2004, email from Aguirre to Scott Plimpton, Ex. B, after he created a valuable Excel spreadsheet from data obtained late from the opposing attorney shortly before important testimony

[38] Robert Hanson's June 2005 evaluation of Gary Aguirre's performance and transmittal sheet, Ex. 2.

July 5 on the PCM investigation,[39] followed through on an assignment he gave me on July 12,[40] and went to his summer "bash" with my wife on July 17.[41] I also updated him on recent developments on the investigation on July 5,[42] July 7,[43] and July 14.[44]

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[39] See June 30, 2005, email from Kreitman to Hanson, Eichner, Jama, and, Aguirre, Ex. C.

[40] See July 12, 2005, email from Aguirre to Kreitman and Hanson, Ex. D.

[41] See July 7, 2005, email from Kreitman to Charles Davis, Jacqueline Eggert, Jim Eichner, Dave Fielder, Robert Hanson, Liban Jama, Herbert Martin, Amy Miller, Janene Smith, Robert Swanson, Jason Tankel, Stephen Van Meter, Constance Williams, David Witherspoon, Paul Berger, Nancy Miller Jessica Lo, and Gary Aguirre, Ex. E.

[42] See July 5, 2005, email from Aguirre to Hanson, Kreitman, Eichner, and Jama, Ex. F.

[43] July 7, 2005, email from Aguirre to Hanson and Kreitman, Ex. G.

[44] See July 14, 2005, email from Kreitman to Hanson, Eichner, O'Rourke, Ribelin, Jama and Aguirre, Ex. H.