Judiciary Committee Hearing: Illegal Insider Trading: How Widespread is the
Problem and is there Adequate Criminal Enforcement?
Questions for the Hearing Record
Questions from Senator Grassley:

For Mr. Mark Kreitman
Assistant Director, Enforcement Division
U.S Securities and Exchange Commission

(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. Hanson (at the request of Mr. Berger).

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

ANSWER: Mr. Aguirre was in my group for the seven months from late January through August 2005. I, together with his other supervisors, had a number of meetings with Mr. Aguirre to discuss with him problems related to his performance and conduct. Since he was a new member of my group, I was reluctant to formally document those problems until late in his probationary year, in the hope that he would adjust to the Commission's supervisory structure and collegial working environment and that his behavioral difficulties would abate, particularly in light of the fact that, since a hiring freeze was in place, it was unlikely that I would be able to replace him if he were terminated before the end of his probation, which, in fact, is the current status.

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

ANSWER: These documents have been produced to your staff, including but not limited to my August 24, 2005 email to Paul Berger, two August 24, 2005 emails from Mr. Aguirre to Mr. Hanson and myself complaining about his colleague Mr. Eichner, email traffic between Mr. Aguirre and Mr. O'Rourke, and Mr. Aguirre's supplemental evaluation, and written termination notice. In addition, many of Mr. Aguirre's emails which have been produced evidence his single-minded determination to examine Mr. Mack on his own time schedule without regard to standard investigative procedures, the absence of sufficient evidentiary basis for invocation of compulsory process, or – despite his inexperience working with the federal securities laws and lack of any background whatever in government or public service --the considered judgment of his supervisors based on 40 years of combined Commission and more than 50 years of combined government service and experience.

(2) During your time as an Assistant Director at the SEC, how many supplemental re-evaluations have you prepared?

ANSWER: Two.

(3) How many additional negative re-evaluations are you aware of outside of those that you prepared for Mr. Aguirre and Mr. Swanson?

ANSWER: My knowledge of the evaluation process is limited to my personal participation in the three ratings cycles during which I have been an Assistant Director – one prior to the cycle in which I evaluated Mr. Aguirre, that cycle, and one subsequent. I prepared negative supplemental evaluations for two employees during that time.

(4) 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?

ANSWER: None. The decision to take Mr. Mack’s testimony was taken (a) to ensure that, after all proper prerequisite document collection and examination had been completed and other appropriate testimony taken, all possible leads had been explored prior to closing the investigation, and (b) to allay at least to some degree what was perceived to be potential adverse impact on public confidence in the Commission’s oversight of the markets as a result of Mr. Aguirre’s false and misguided allegations.

Questions from Senator Specter:

1. Mr. Kreitman, I've asked Mr. Hanson about the supervisory statement he signed concerning Mr. Aguirre. My staff informs me that you have seen that narrative as well. My question to you is, did you concur with Mr. Hanson's evaluation of Mr. Aguirre and the recommendation that Mr. Aguirre receive a merit increase?

ANSWER: I concurred with Mr. Hanson's evaluation of Mr. Aguirre as augmented by the supplemental evaluation. And, for the reasons I mentioned during my testimony and interviews with your and Senator Grassley's staff, I concurred in the decision to award Mr. Aguirre the merit increase for his energetic work from late January through the end of April 2005 and to encourage him as a new employee after his troubled beginning in another group. The accumulation of behavior that required Mr. Aguirre's termination occurred subsequent to April.

2. Mr. Kreitman, I understand you were Mr. Aguirre's thesis advisor at Georgetown University Law School. Based upon that experience and his work at the SEC, did you have confidence in his writing abilities and legal acumen?

ANSWER: Supervising Mr. Aguirre's preparation of a law school paper did not afford me sufficient basis to assess his judgment (legal or otherwise), willingness to accept supervision within a structured institutional environment, ability to work constructively with colleagues, or emotional stability, all of which, rather than his legal writing ability, were the bases for the difficulties he encountered at the Commission. I did, however, form the belief that Mr. Aguirre was a smart lawyer.

3. What, if anything, went wrong in the investigation of this very large hedge fund?

ANSWER: The Pequot investigation was conducted in the regular way. Only Mr. Aguirre's behavior went wrong.

4. On page 15 of Mr. Aguirre's December 5, 2006, testimony he sets forth the standard employed for issuance of other subpoenas he generated while at the SEC:

   "Until Mack, I merely informed my superiors who I intended to subpoena and invited their feedback. For example, on February 18, 2005, I emailed Hanson and Kreitman informing them of my intention to subpoena twenty-seven individuals. Of those twenty-seven, seventeen were employed by PCM, five were officers of public companies (including the CEO and CFO of one company), and another five were investment bankers. In general, the person subpoenaed was suspected of giving or receiving material nonpublic information. Neither Kreitman nor Hanson asked why I had decided to issue any of the subpoenas. Neither requested that I make any factual showing why the witness was believed to have received or provided material nonpublic information. Indeed, neither Hanson nor Kreitman even responded to my email."

If this was the typical response to Mr. Aguirre's request to issue subpoenas, why was the subpoena request to John Mack any different?

ANSWER: The proposed subpoena to Mr. Mack was different from the typical request to issue subpoenas because in that instance the investigation had not developed sufficient evidence to justify the invocation of compulsory process. But my decision to decline to authorize issuance of a subpoena to Mr. Mack was far from unique; to the contrary, I had on a number of previous occasions declined to approve staff requests to issue subpoenas when the evidence did not, in my judgment, so warrant. Of the five individuals referenced in Mr. Aguirre's February 18, 2005 email whose testimony was in fact taken, three were Pequot traders, two the CEO and CFO respectively of an issuer that Mr. Aguirre believed passed material nonpublic information to Pequot and on the basis of which it traded. Thus, all five were persons who, unlike Mr. Mack, either possessed inside information or were thought to have possibly traded on it. Issuing subpoenas to persons in these circumstances is not unusual. Moreover, Mr. Aguirre had not, by this date, exhibited the behavior that required closer supervision over his conduct.