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March 18, 2011

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
United States House of Representatives

Dear Senator Grassley and Chairman Issa:

This will respond to your letter of March 4, 2011. That letter concerns my participation in advising the Securities and Exchange Commission about the appropriate position to take on a legal issue that arose in the liquidation proceeding of Bernard L. Madoff Investment Securities under the Securities Investor Protection Act. My participation also consisted in preparing briefs amicus curiae that were filed in the United States Bankruptcy Court and the United States Court of Appeals for the Second Circuit and that set forth the position the Commission voted to take on the issue.

At all times, 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 sole animating principle behind my actions.

With respect to the potential conflict arising out of my late mother's investment in BMIS, I believe I did precisely what I was supposed to do: I spotted an issue, raised it with the Ethics Office, and followed the advice I was given. That advice was that 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.

Please note that this response is based solely on my recollection today of events that occurred from two to seven years ago. Since my departure from the SEC, I no longer have access to documents that might help me recall the relevant events.

Background

Shortly before or after I rejoined the SEC, in February 2009, I told Chairman Schapiro that, at her death in 2004, my mother held an account at Bernard L. Madoff Investment Securities. While I do not have the original records, I believe that account must have been opened at least 11 years ago, since my understanding is that my mother did not invest, and my father died in 2000.

Although I do not recall all of the details of my conversation with Chairman Schapiro two years ago, I believe that I told her that I had inherited a portion of my mother's estate. Before any money was distributed to me, the account had been liquidated by my mother's estate, of which I was one of the executors, sometime in 2005.

I also believe that I told the Commission's Ethics Counsel, William Lenox, about the inheritance shortly after my arrival at the SEC. I recall that in that conversation I discussed with Mr. Lenox a range of subjects that might possibly bear on my ethical obligations. While I do not remember the particulars of the conversation, I recall that Mr. Lenox advised me that the inheritance was not a cause for me to recuse myself from any matter of which he or I were then aware.

When I rejoined the Commission, the Madoff bankruptcy had just begun. It appeared that the Ponzi scheme was extraordinarily massive, both in duration and in the tens of billions of dollars in customer losses. I believed it possible that the proceeds from the liquidation of my mother's account four years earlier were greater than the amount invested, simply because Ponzi schemes generally stay afloat by using money from new investors to pay an apparent return to existing investors. But I did not know the amount of my mother's original investment and had no idea how much apparent "gain" had been in my mother's account. I did not (and still do not) know when the account had been opened. Moreover, I believed that it would be some time before these facts became known. I recall having read that the Trustee believed it would be a laborious process to reconstruct the relevant records and that he was pursuing the larger claims for recovery of assets – the multi-billion dollar ones – first. I believe that the first time that I learned how much money was originally invested was in February 2011, when I received the Trustee's clawback complaint and saw the Trustee's assertions in the complaint.

In approximately May 2009, I did become aware of a matter that I believed counseled consideration of whether I should participate. As I recall, I received a letter from several law firms taking issue with the Madoff Trustee's stated view that, under the Securities Investor Protection Act, 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 believe 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.

After receiving this letter, I checked with the Ethics Office about whether it would be appropriate for me to participate in responding to the letter. At the time, the Madoff bankruptcy was still just a few months old. It was not clear to me the relationship between the "net equity" issue and any potential "clawback" liability I might have for fictitious profits that might have accumulated in my mother's account. Indeed, it was not clear to me that, given the age of the Ponzi scheme and questions about the accuracy of the Madoff records, that the amount of any potential liability even could be calculated.

I did believe that, at some point in the future, if it in fact turned out that there were fictitious profits in my mother's account, representatives of the Trustee would be in touch with my family about the fictitious profits we had actually received, and we would pay them to the Trustee.

I asked Mr. Lenox for advice because it was his responsibility to advise all Commissioners and Commission employees on ethics issues and 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.

As noted above, the advice that I received then was 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. 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.

My recollection is that, in advising the Commission as to the position it should advance in the bankruptcy court and before the Second Circuit, staff of various divisions of the Commission, including representatives of the Office of the General Counsel, met with lawyers representing different views on the "net equity" issue. We also met with the Trustee and members of the SIPC staff. I remember the meetings as vigorous explorations of the legal issues. I did not disclose to any of these parties that I inherited money that came from an investment in a BLMIS Account, nor was I advised that I should do. I do not remember considering whether to disclose. I am not aware of any doctrine that requires public officials to disclose facts that they have been advised do not affect their judgment on the matters before them or do not other rise to the level of requiring recusal.

Response to Questions

My answers to your questions follow:

1. For the reasons mentioned above, I believe the information that would have been disclosed was of no moment to the matter under consideration.

2. I do not think that any such disclosure would have made me more or less effective in representing the SEC.

3. I respectfully disagree with the premise of the question. There was no undisclosed conflict.

4. My comments at the interview concerned the view I expressed in consulting Mr. Lenox. Mr. Lenox disagreed and noted that the size of the interest had no bearing on the analysis. The word "direct" appears in the relevant statute.

5. I do not expect Madoff victims to consider $1.5 million small. The word "indirect" refers to the statutory analysis that was done in 2009.

6. I have not looked at the report referred to in this question in some time. The quoted excerpt reflects an extra-legal use of the word "appearance." I do not remember considering whether I should recuse myself from the "net equity" issue in the absence of a legal requirement that I do so.

7. I do not recall thinking about whether I should inform the Trustee. As noted above, I knew that the Trustee had the records for BMIS and believed that it would take the Trustee some time to work through the bankrupt estate's records before coming to a view whether some of the proceeds of my mother's account should be returned. I always expected that, if the Trustee came to believe that fictitious profits were distributed to my mother's estate, he would contact me or my brothers.

8. See previous response.

9. I do not believe the SEC has policies that specifically cover "employees' potential clawback liability." I do not believe there has been an appearance of impropriety here.

10. I believe that in the future it is likely that employees who are not required to be recused from particular matters will be more attentive to the personal risks to them if they participate.

Thank you for the opportunity to respond to your questions.

Sincerely,

David M. Becker

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