

United States Senate

WASHINGTON, DC 20510

February 8, 2011

Via Electronic Transmission

The Honorable Mary L. Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Dear Chairman Schapiro:

I would like to learn more about how the Securities and Exchange Commission (SEC) communicates and coordinates with the Justice Department on securities fraud cases. Specifically, I am interested in how these agencies decide whether to bring civil charges, criminal charges, or both.

Speaking at a recent conference, SEC Director of Enforcement Robert Khuzami discussed how the SEC works with the Justice Department on parallel matters. He said the agencies are “writing on a blank slate” in that area. He said lawyers “may well pause before signing up their clients to [cooperate with] the SEC without knowing what the Justice Department is doing... [so] there is going to be earlier and more frequent collaboration between us and Justice....”¹ Director Khuzami seemed to describe a process in which the SEC would gather information from DOJ for attorneys representing potential targets of an investigation. He said, “we are going to try to get those individuals answers whether or not there is criminal interest in the case so defense counsel can have as much information as possible....”²

However, the SEC’s Enforcement Manual describes a policy very different from Director Khuzami’s practice:

If asked by counsel or any individual whether there is a parallel criminal investigation, staff should direct counsel or the individual to the section of Form 1662 dealing with “Routine Uses of Information,” and state that it is the general policy of the Commission not to comment on investigations conducted by law enforcement authorities responsible with enforcing criminal laws. Staff should also invite any person who raises such issues to contact criminal authorities if they wish to pursue the question of whether there is a parallel criminal investigation. Should counsel or the individual ask which criminal authorities they should contact, staff should decline to answer unless authorized by the relevant criminal authorities.³

¹ Robert Khuzami, “The Government Enforcement Agenda and Practical Handling of Enforcement Issues,” Remarks before the Practicing Law Institute Conference (Nov 12, 2010).

² *Id.*

³ The Securities and Exchange Commission, *Enforcement Manual* at 111 (Jan 13, 2010).

It looks like there may be a big divide between the stated policy and the actual practice on this issue. So, which is it? Should the SEC provide information about the DOJ's criminal inquiries, or not? Does the SEC actually do so, or not?

What about in the context of a potential settlement agreement? Assistant Attorney General Lanny Breuer recently testified before the Judiciary Committee. I asked him about why the Justice Department failed to bring criminal charges related to the SEC's investigation of Pequot Capital Management. In that case, the SEC settled insider trading allegations for \$28 million, and SEC attorneys argued that Pequot paid over \$1 million in "hush money" to a former employee.⁴ Mr. Breuer alluded to the differing standards in criminal and civil matters in his answer. However, the evidence presented by the SEC was quite compelling. It included an email in which the former employee admits he was paid because Pequot's founder, "realizes I know enough about how he operates to undo him...."⁵

I also asked Mr. Breuer about coordination with the SEC regarding its \$550 million settlement with Goldman Sachs. He said, "we collaborate with the SEC but they do not seek our guidance when they resolve their cases, they do that independently."⁶ This suggests much less coordination than implied by Director Khuzami. Therefore, please provide:

- (1) Copies of any written guidance on collaboration and communication between DOJ and the SEC;
- (2) A detailed description of the nature and extent of communications between SEC and DOJ officials about:
 - a. the Justice Department's intentions to pursue any criminal charges in the Goldman Sachs or the Pequot matter;
 - b. the SEC's decision to settle the Goldman Sachs or the Pequot matter;
- (3) Detailed written responses to my questions above about the conflict between Director Khuzami's statements, the SEC Enforcement Manual, and Mr. Breuer's testimony.

⁴ Administrative Proceeding before the Securities and Exchange Commission, *In the Matter of David E. Zilkha*, No. 3-13913, at 18 (Nov 1, 2010).

⁵ *Id.* at 302.

⁶ Hearing Before the Committee on the Judiciary, "Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud," (Jan 26, 2011).

Please provide a response by no later than February 22, 2011. If you have any questions, please do not hesitate to contact Jason Foster at (202) 224-5225. All formal correspondence should be sent electronically in PDF format to Brian_Downey@judiciary-rep.senate.gov or via facsimile to (202) 224-3799.

Sincerely,

A handwritten signature in blue ink that reads "Chuck Grassley". The signature is written in a cursive, flowing style.

Charles E. Grassley
Ranking Member