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REPORT OF INVESTIGATION

**UNITED STATES SECURITIES AND EXCHANGE COMMISSION
OFFICE OF INSPECTOR GENERAL**

Case No. OIG-534

**Allegations of Improper Coordination Between the SEC
and Other Governmental Entities Concerning
the SEC's Enforcement Action Against Goldman Sachs & Co.**

September 30, 2010

REDACTION KEY

LE = Law Enforcement Privilege/Potentially
Harmful to Ongoing Litigation

PII = Personal Identifying Information

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Table of Contents

INTRODUCTION AND BACKGROUND	1
SCOPE OF THE OIG INVESTIGATION	1
I. E-MAIL SEARCHES AND REVIEW OF E-MAILS.....	1
II. DOCUMENT REQUESTS AND REVIEW OF RECORDS.....	2
III. TESTIMONY AND INTERVIEWS	2
RELEVANT STATUTES, RULES AND REGULATIONS	6
I. DISCLOSURE OF NON-PUBLIC INFORMATION.....	6
II. DUTY TO MAINTAIN INDEPENDENCE	11
III. DUTY TO GIVE ADVANCE NOTICE OF ENFORCEMENT ACTIONS TO DEFENDANTS	12
EXECUTIVE SUMMARY	12
RESULTS OF THE INVESTIGATION	23
I. THERE IS NO EVIDENCE INDICATING THAT THE GOLDMAN SACHS ACTION OR SETTLEMENT WAS INTENDED TO INFLUENCE, OR WAS INFLUENCED BY, FINANCIAL REGULATORY REFORM LEGISLATION.....	23
II. THERE IS NO EVIDENCE OF COORDINATION BETWEEN THE SEC AND OTHER GOVERNMENTAL OR POLITICAL ENTITIES IN ITS GOLDMAN SACHS ACTION	27
III. THE OIG HAS NOT FOUND EVIDENCE DEMONSTRATING THAT THE SEC SHARED INFORMATION ABOUT ITS GOLDMAN SACHS INVESTIGATION OR ACTION WITH ANY NEWS ORGANIZATIONS PRIOR TO THE FILING OF THE SEC'S COMPLAINT AGAINST GOLDMAN SACHS	31
IV. THE SEC ENFORCEMENT INVESTIGATION OF GOLDMAN SACHS' SALE OF THE ABACUS COLLATERALIZED DEBT OBLIGATION.....	33
A. Internal Disagreements Arose in Fall 2009 Concerning Which Individuals Should Testify and Which Individuals Should Receive Wells Notices.....	34
B. In November 2009, the Goldman Matter was Scheduled for the December 17, 2009 Commission Meeting.....	35

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C.	On December 8, 2009, the Enforcement Staff Removed the Goldman Matter from the Commission Calendar in Order to Take the Testimony of a Goldman Manager	35
D.	Concerned About a Senate Inquiry and a News Article About Goldman's CDO Transactions, the SEC Staff Rescheduled the Goldman Matter for a January 28, 2010 Commission Meeting After Taking a Goldman Manager's Testimony	37
E.	After Removing the Goldman Matter From the January Commission Calendar in Order to Conduct Further Investigatory Work, the Enforcement Staff Rescheduled the Matter for the April 14, 2010 Commission Calendar	43
1.	On January 27, 2010, the Enforcement Staff Removed the Matter from the Commission Calendar.....	43
2.	The Enforcement Staff Took Further Investigative Steps and Analyzed a Goldman Manager's Potential Liability.....	45
3.	After Concluding its Investigative Steps, the Enforcement Staff Rescheduled the Goldman Matter for the April 14, 2010 Commission Calendar.....	46
4.	The SEC Staff Took Steps to Ensure that Pauline Calande, on a Detail to the Senate Permanent Subcommittee on Investigations from the SEC, Did Not Reveal Information Regarding the SEC's Investigation to the Senate	47
V.	ON FRIDAY APRIL 16, 2010, THE COMMISSION FILED ITS COMPLAINT AGAINST GOLDMAN SACHS	48
A.	The Commission Delayed its Filing Date from Thursday April 15 to Friday April 16.....	48
B.	The SEC's Action Was Released on the Same Day as the OIG's Report Concerning the SEC's Response to Concerns Regarding Robert Allen Stanford's Alleged Ponzi Scheme.....	53
C.	The Enforcement Staff Did Not Notify Goldman Sachs of Commission Approval or Impending Action Until After Filing the Complaint in Court	57
D.	The SEC's Decision to File the Action Against Goldman Sachs During Trading Hours With No Advance Notice to Goldman Sachs or NYSE Regulation Resulted in Market Volatility and Concerned the NYSE Empl NYSE Regulation	65

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VI. ON JULY 15, 2010, THE COMMISSION FILED AND ANNOUNCED A
PROPOSED SETTLEMENT WITH GOLDMAN SACHS 71

CONCLUSION..... 76

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REPORT OF INVESTIGATION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION OFFICE OF INSPECTOR GENERAL

Allegations of Coordination Between the SEC and Other Governmental Entities Concerning the SEC's Enforcement Action Against Goldman Sachs & Co.

Case No. OIG-534

INTRODUCTION AND BACKGROUND

On April 23, 2010, the Securities and Exchange Commission ("SEC" or "Commission") Office of Inspector General ("OIG"), in response to a written request from United States Representative Darrell Issa and other members of the House of Representatives, opened an investigation into allegations by Representative Issa and other members of the House of Representatives that SEC employees communicated or coordinated with the White House, Members of Congress, or Democratic political committees concerning the bringing, or the timing of bringing, an action against Goldman Sachs & Co. ("Goldman"), prior to the April 16, 2010 filing by the SEC Division of Enforcement of the SEC's complaint against Goldman, in order to affect debate of the financial regulatory reform legislation pending before the United States Senate. Congressman Issa and other members of Congress also alleged that SEC employees may have had communications with the *New York Times* concerning the SEC complaint against Goldman prior to the filing of the complaint.

On July 22, 2010, Congressman Issa requested that the OIG broaden its investigation to examine whether the timing of the Commission's proposed settlement with Goldman related to either the financial regulatory reform legislation passed by the United States Senate the same day or to the minimization of leaks of information to the media concerning the proposed settlement. The OIG expanded its investigation to examine these issues as well.

SCOPE OF THE OIG INVESTIGATION

I. E-MAIL SEARCHES AND REVIEW OF E-MAILS

On April 26, 2010, the OIG issued an agency-wide document retention notice, instructing employees to preserve all documents related to the complaint filed against Goldman on April 16, 2010, and the Division of Enforcement's related investigation of Goldman.

The OIG made numerous requests to the SEC's Office of Information Technology ("OIT") for the e-mails of current and former SEC employees for various periods of time pertinent to the investigation. The e-mails were received, loaded onto computers with

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specialized search tools and searched on a continuous basis throughout the course of the investigation.

In all, the OIG received from OIT e-mails for a total of 64 current or former SEC employees for the time period pertinent to the investigation. These included: 11 employees of the Office of the Chairman, 17 employees of the Offices of the Commissioners, 14 Headquarters Division of Enforcement ("Enforcement") employees, four Headquarters Office of Legislative Affairs employees, eight Headquarters Office of Public Affairs employees, four Office of the General Counsel employees, one Office of the Secretary employee, four Fort Worth Regional Office employees, and one New York Regional Office employee. The OIG estimates that it obtained and searched over 3.4 million e-mails during the course of its investigation.

II. DOCUMENT REQUESTS AND REVIEW OF RECORDS

The OIG requested information from The New York Times Company and Bloomberg Media concerning whether, when, and how these organizations first learned about the SEC's action against Goldman.

In addition, the OIG reviewed the following items: (1) the April 1, 2010 Action Memorandum seeking authority to file a civil action against Goldman and Fabrice Tourre, a Goldman Vice President; (2) drafts of this Action Memorandum; (3) the HUB Case Report for the Abacus CDO 2007-AC1 investigation (HO-10911); (4) the SEC's Name Relationship Search Index ("NRSI")¹ Report for the Abacus CDO 2007-AC1 investigation; (5) the minutes and audio recording of the April 14, 2010 Closed Commission Meeting at which the Commission authorized the Goldman action; (6) the civil complaint filed by the SEC against Goldman on April 16, 2010; (7) the SDNY's Electronic Case Filing System for the SEC's action against Goldman; and (8) telephone records for Goldman's counsel, Sullivan & Cromwell LLP.

III. TESTIMONY AND INTERVIEWS

The OIG took the sworn testimony of 32 witnesses and interviewed five other individuals with knowledge of facts or circumstances surrounding the SEC's investigation of Goldman, the SEC's filing of its complaint against Goldman, and/or the SEC's settlement with Goldman.

SEC Inspector General H. David Kotz personally led the questioning in all of the sworn testimony of witnesses in the investigation. Kotz also led the investigative team for this ROI, which include PII [redacted] OIG Staff 1, Senior Investigator OIG Staff 2, Senior Investigator OIG Staff 3, and Attorney OIG Staff 4.

¹ NRSI is used by the SEC's Enforcement staff to research whether a person or entity is involved in an open investigation.

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The OIG conducted testimony on-the-record and under oath of the following 32 individuals:

1. Asst Ch Lit Cnsl 1 Assistant Chief Litigation Counsel, Division of Enforcement, Securities and Exchange Commission; taken on July 6, 2010 (Asst Ch Lit Cnsl 1 Testimony Tr.). Excerpts of Testimony Transcript attached as Exhibit 1.
2. Cheryl Scarboro, Chief, Foreign Corrupt Practices Act Unit, Division of Enforcement, Securities and Exchange Commission; taken on July 7, 2010 ("Scarboro Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 2.
3. Sr Cnsl 1 Senior Counsel, Division of Enforcement, Securities and Exchange Commission; taken on July 13, 2010 (Sr Cnsl 1 Testimony Tr.). Excerpts of Testimony Transcript attached as Exhibit 3.
4. Unidentified Senior Counsel, Division of Enforcement, Securities and Exchange Commission; taken on July 14, 2010 ("Unidentified Senior Counsel Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 4.
5. Sr Cnsl 2 Senior Counsel, Division of Enforcement, Securities and Exchange Commission; taken on July 15, 2010 (Sr Cnsl 2 Testimony Tr.). Excerpts of Testimony Transcript attached as Exhibit 5.
6. Reid Muoio, Deputy Chief, Structured and New Products Unit, Division of Enforcement, Securities and Exchange Commission; taken on July 20, 2010 ("Muoio Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 6.
7. Pauline Calande, Counsel to the Director and Deputy Director of the Division of Enforcement, Division of Enforcement, Securities and Exchange Commission; taken on July 23, 2010 ("Calande Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 7.
8. Joan McKown, former Chief Counsel, Division of Enforcement, Securities and Exchange Commission; taken on July 26, 2010 ("McKown Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 8.
9. OGC Atty PII Securities and Exchange Commission; taken on July 26, 2010 (OGC Atty Testimony Tr.). Excerpts of Testimony Transcript attached as Exhibit 9.
10. Timothy Henseler, Deputy Director, Office of Legislative and Intergovernmental Affairs, Securities and Exchange Commission; taken on July 27, 2010 ("Henseler Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 10.

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11. Julie Davis, Deputy Director, Office of Legislative and Intergovernmental Affairs, Securities and Exchange Commission; taken on July 27, 2010 ("David Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 11.
12. Anne-Marie Kelley, Deputy Director, Office of Legislative and Intergovernmental Affairs, Securities and Exchange Commission; taken on July 27, 2010 ("Kelley Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 12.
13. ENF Supv 1 PII [REDACTED] Division of Enforcement, Securities and Exchange Commission; taken on July 29, 2010 ("ENF Supv 1 Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 13.
14. John Nester, Director, Office of Public Affairs, Securities and Exchange Commission; taken on July 30, 2010 ("Nester Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 14.
15. OPA Empl PII [REDACTED] Office of Public Affairs, Securities and Exchange Commission; taken on July 30, 2010 ("OPA Empl Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 15.
16. Eric Spitler, Director, Office of Legislative and Intergovernmental Affairs, Securities and Exchange Commission; taken on August 3, 2010 ("Spitler Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 16.
17. Ricardo Delfin, Special Counsel to the Chairman, Securities and Exchange Commission; taken on August 3, 2010 ("Delfin Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 17.
18. Kayla Gillan, Deputy Chief of Staff, Office of the Chairman, Securities and Exchange Commission; taken on August 4, 2010 ("Gillan Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 18.
19. Didem Nisanci, Chief of Staff, Office of the Chairman, Securities and Exchange Commission; taken on August 4, 2010 ("Nisanci Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 19.
20. Richard Klapper, Partner, Sullivan & Cromwell LLP; taken on August 6, 2010 ("Klapper Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 20.
21. Kathleen Casey, Commissioner, Securities and Exchange Commission; taken on August 9, 2010 ("Casey Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 21.

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22. Lorin Reisner, Deputy Director, Division of Enforcement, Securities and Exchange Commission; taken on August 10, 2010 ("Reisner Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 22.
23. Mary Schapiro, Chairman, Securities and Exchange Commission; taken on August 11, 2010 ("Schapiro Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 23.
24. Stephen Cohen, Senior Advisor to the Chairman, Securities and Exchange Commission; taken on August 11, 2010 ("Cohen Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 24.
25. Myron Marlin, Director of Communications, Securities and Exchange Commission; taken on August 12, 2010 ("Marlin Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 25.
26. ENF Empl 1 Senior Communications Adviser, Division of Enforcement, Securities and Exchange Commission; taken on August 12, 2010 ("ENF Empl 1 Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 26.
27. Robert Khuzami, Director, Division of Enforcement, Securities and Exchange Commission; taken on August 13, 2010 ("Khuzami Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 27.
28. Scott Friestad, Associate Director, Division of Enforcement, Securities and Exchange Commission; taken on August 13, 2010 ("Friestad Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 28.
29. Luis Aguilar, Commissioner, Securities and Exchange Commission; taken on August 17, 2010 ("Aguilar Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 29.
30. Kenneth Lench, Chief, Structured and New Products Unit, Division of Enforcement, Securities and Exchange Commission; taken on August 19, 2010 ("Lench Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 30.
31. Troy Paredes, Commissioner, Securities and Exchange Commission; taken on August 19, 2010 ("Paredes Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 31.
32. Elisse Walter, Commissioner, Securities and Exchange Commission; taken on August 27, 2010 ("Walter Testimony Tr."). Excerpts of Testimony Transcript attached as Exhibit 32.

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The OIG also conducted interviews of the following five individuals with relevant expertise and/or knowledge of information pertinent to the investigation:

1. Clerk [REDACTED] Financial Clerk at the United States District Court for the Southern District of New York ("SDNY"); conducted on April 27, 2010 ("SDNY Interview Memorandum"). Memorandum of Interview attached as Exhibit 33.
2. SDNY Empl 1 [REDACTED] PII [REDACTED] Docket Services, SDNY; conducted on April 27, 2010 ("SDNY Interview Memorandum"). Memorandum of Interview attached as Exhibit 33.
3. SDNY Empl 2 [REDACTED], Financial Administrator, SDNY; conducted on April 27, 2010 ("SDNY Interview Memorandum"). Memorandum of Interview attached as Exhibit 33.
4. NYSE Empl [REDACTED] PII [REDACTED] NYSE Regulation; conducted on June 21, 2010 ("NYSE Empl [REDACTED] Interview Memorandum"). Memorandum of Interview attached as Exhibit 34.
5. CBO Faculty [REDACTED] a member of the faculty of the Chicago Board of Options Exchange's Options Institute; conducted on August 26, 2010 ("CBO Faculty [REDACTED] Interview Memorandum"). Memorandum of Interview attached as Exhibit 35.

RELEVANT STATUTES, RULES AND REGULATIONS

I. DISCLOSURE OF NON-PUBLIC INFORMATION

The Securities Exchange Act of 1934 states:

(a) For purpose of section 552 of title 5 the term "records" includes all applications, statements, reports, contracts, correspondence, notices, and other documents filed with or otherwise obtained by the Commission pursuant to this chapter or otherwise.

(b) It shall be unlawful for any member, officer, or employee of the Commission to disclose to any person other than a member, officer, or employee of the Commission, or to use for personal benefit, any information contained in any application, statement, report, contract, correspondence, notice, or other document filed with or otherwise obtained by the Commission (1) in contravention of the rules and regulations of the Commission under section 552 of title 5, or (2) in circumstances where the

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Commission has determined pursuant to such rules to accord confidential treatment to such information.

(c) The Commission may, in its discretion and upon a showing that such information is needed, provide all "records" (as defined in subsection (a) of this section) and other information in its possession to such persons, both domestic and foreign, as the Commission by rule deems appropriate if the person receiving such records or information provides such assurances of confidentiality as the Commission deems appropriate.

15 U.S.C. § 78x.

The Commission's Regulation Concerning Conduct of Members and Employees and Former Members and Employees of the Commission (hereinafter "Conduct Regulation"), at 17 C.F.R. § 200.735-1 *et seq.*, sets forth the standards of ethical conduct required of Commission members (*i.e.*, Commissioners) and employees (hereinafter referred to collectively as employees). The Conduct Regulation states that an employee of the Commission shall not:

Divulge to any unauthorized person or release in advance of authorization for its release any nonpublic Commission document, or any information contained in any such document or any confidential information: (A) in contravention of the rules and regulations of the Commission promulgated under 5 U.S.C. 552, 552a and 552b; or (B) in circumstances where the Commission has determined to accord such information confidential treatment.

17 C.F.R. § 200.735-3(b)(2)(i). The Conduct Regulation further states:

Information or documents obtained by the Commission in the course of any investigation or examination, unless made a matter of public record, shall be deemed non-public, but the Commission approves the practice whereby officials of the Divisions of Enforcement, Corporation Finance, Market Regulation and Investment Management and the Office of International Affairs at the level of Assistant Director or higher, and officials in Regional Offices at the level of Assistant Regional Director or higher, may engage in and may authorize members of the Commission's staff to engage in discussions with persons identified in § 240.24c-1(b) of this chapter concerning information obtained in

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individual investigations or examinations, including formal investigations conducted pursuant to Commission order.

17 C.F.R. § 203.2. The Conduct Regulation states: "Unless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public." 17 C.F.R. § 203.5.

The Conduct Regulation also states:

Information or documents obtained by officers or employees of the Commission in the course of any examination or investigation pursuant to section 17(a) (48 Stat. 897, section 4, 49 Stat. 1379; 15 U.S.C. 78q(a)) or 21(a) (48 Stat. 899; 15 U.S.C. 78u(a)) shall, unless made a matter of public record, be deemed confidential. Except as provided by 17 CFR 203.2, officers and employees are hereby prohibited from making such confidential information or documents or any other non-public records of the Commission available to anyone other than a member, officer or employee of the Commission, unless the Commission or the General Counsel, pursuant to delegated authority, authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest.

17 C.F.R. § 240.0-4. The Conduct Regulation also states:

(a) For purposes of this section, the term "nonpublic information" means records, as defined in Section 24(a) of the Act, and other information in the Commission's possession, which are not available for public inspection and copying.

(b) The Commission may, in its discretion and upon a showing that such information is needed, provide nonpublic information in its possession to any of the following persons if the person receiving such nonpublic information provides such assurances of confidentiality as the Commission deems appropriate:

(1) A federal, state, local or foreign government or any political subdivision, authority, agency or instrumentality of such government . . .

17 C.F.R. § 240.24c-1.

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Securities and Exchange Commission Rule 19-1 states:

This regulation sets forth the Securities and Exchange Commission's (SEC) policy on disclosing non-public information developed in the course of its investigations, inspections and examinations (or otherwise) either to conduct those activities or to assist a person to whom disclosure may be made under Rule 24c-1 [17 CFR 240.24c-1]. This regulation is promulgated to assist in the effective and efficient discharge of the SEC's administrative, examination, enforcement, and oversight responsibilities, and is intended to facilitate the SEC's investigations and examinations and its cooperation with those persons to whom access may be granted, including State, Federal and Foreign Governmental authorities. It is not intended to benefit, nor does it confer any rights upon any individual or organization. This regulation is based on Section 24(c) of the Securities Exchange Act of 1934 [15 U.S.C. 78x(c)]; Rule 24c-1; Rule 2 of the SEC's Rules Relating to Investigations [17 CFR 203.2]; and the SEC's general rulemaking authority under the statutes it administers.

1. Policy.

a. Various SEC rules prohibit disclosure by its officers and employees of information and documents or other non-public records of the SEC obtained in the course of any examinations or investigations, unless the SEC authorizes or approves the disclosure of such information or documents. In certain cases, however, the SEC has authorized its staff to discuss, and grant access to, materials in its examination and enforcement files and other non-public records.

b. The prohibitions against use of non-public information or documents without specific authorization or approval by the SEC does not apply to the use of such materials as necessary or appropriate by members of the staff in pursuing SEC investigations or examinations, or in the discharge of other official responsibilities. For example, documents obtained from a registered entity during an examination or from a witness may be used in the examination of other witnesses or submitted for document analysis. Similarly, testimony of a witness may be used in

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examining other witnesses. That is, such information may be used to facilitate the development of SEC matters.

c. When the SEC authorizes the institution of actions, the staff is authorized to use such non-public materials in the action. When the SEC refers matters to the Department of Justice, or when access is granted to non-public information or documents to any person identified in Rule 24c-1, the staff also is authorized to render such assistance as may be required for the use of the information or documents by those to whom access is granted. When requests for non-public materials are made during litigation by respondents or defendants, or under other circumstances, and the staff is in doubt as to the propriety of disclosing such material, it may present such matters to the SEC for appropriate advice and authorization.

2. Responsibility and Authorization.

a. Officials in the Divisions of Enforcement, Corporation Finance, Market Regulation and Investment Management and the Offices of International Affairs and Compliance Inspections and Examinations at or above the level of Assistant Director; officials in Regional Offices at or above the level of Assistant Regional Director; and officials in District Offices at or above the level of Assistant District Administrator are authorized to act in matters covered in this regulation.

b. For the purpose of this regulation, the term "SEC officials" means those staff members designated in paragraph 2a.

3. Confidential Nature of Information.

If public disclosure of information given to a person under Rule 2 or Rule 24c-1 may interfere with enforcement or other activities of the SEC, the SEC official involved will inform the recipient that the information must be treated as confidential, and cannot be disclosed to the public without authorization by the SEC or by an appropriate SEC official. The SEC official will obtain appropriate representations of confidentiality.

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The Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, states, "Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest." 5 C.F.R. § 2635.101(b)(3). These regulations also state:

(a) Prohibition. An employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.

(b) Definition of nonpublic information. For purposes of this section, nonpublic information is information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public. It includes information that he knows or reasonably should know:

(1) Is routinely exempt from disclosure under 5 U.S.C. 552 or otherwise protected from disclosure by statute, Executive order or regulation;

(2) Is designated as confidential by an agency; or

(3) Has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

5 C.F.R. § 2635.703.

II. DUTY TO MAINTAIN INDEPENDENCE

The Commission's regulations require its employees to perform their duties impartially and independently, without regard to partisan or popular demands. 17 C.F.R. § 200.58 states:

[T]his is an independent Agency, and in performing their duties, members should exhibit a spirit of firm independence and reject any effort by representatives of the executive or legislative branches of the government to affect their independent determination of any matter being considered by this Commission. A member should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety.

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In addition, a criminal statute prohibits the use of appropriated monies to influence Congress to adopt legislation:

No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal services, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation.

18 U.S.C. § 1913.

III. DUTY TO GIVE ADVANCE NOTICE OF ENFORCEMENT ACTIONS TO DEFENDANTS

The SEC has issued an Administrative Regulation on "Press Relations Policies and Procedures," which states in part:

Notification of Defendants. Every effort should be made to avoid the possibility that defendants in an SEC enforcement action first learn of the action when they read about it in the newspapers or when they are called by a reporter for comment about the SEC's complaint. The division, regional or district office primarily responsible for the filing of a particular complaint shall take all necessary steps to see that the defendants and/or their counsel are given timely advice concerning the action.

SECR 18-2 Section B(15)(c).

EXECUTIVE SUMMARY

On April 23, 2010, the SEC OIG, in response to a written request from United States Representative Darrell Issa and other members of the House of Representatives, opened an investigation into allegations that SEC employees communicated or coordinated with the White House, Members of Congress, or Democratic political committees concerning the bringing, or the timing of bringing, an action against Goldman, in order to affect debate of the financial regulatory reform legislation pending before the United States Senate. Congressman Issa and other members of Congress also alleged that SEC employees may have had communications with the *New York Times* concerning its complaint against Goldman prior to the filing of the complaint.

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On July 22, 2010, Congressman Issa requested that the OIG broaden its investigation to examine whether the timing of the Commission's proposed settlement with Goldman related to either the financial regulatory reform legislation passed by the United States Senate the same day, or was an effort to avoid further criticism in the press concerning the proposed settlement. The OIG expanded its investigation to examine these issues as well.

In conducting its investigation, the OIG reviewed e-mails for a total of 64 current or former SEC employees for the time period pertinent to the investigation. The OIG estimates that it obtained and searched over 3.4 million e-mails during the course of its investigation. The OIG took the sworn testimony of 32 witnesses and interviewed five other individuals with knowledge of facts or circumstances surrounding the SEC's investigation of Goldman, the SEC's filing of its complaint against Goldman, and/or the SEC's settlement with Goldman.

The broad conclusions of the OIG investigation are as follows. The OIG has not found evidence indicating that the SEC's investigation of, or its action against, Goldman was intended to influence, or was influenced by, financial regulatory reform legislation. The OIG found that the investigation's procedural path and timing was governed primarily by decisions relating to the case itself, as well as concerns about: (1) facts surrounding the investigation's subject matter being publicized prior to the SEC filing its action; (2) maintaining a relationship with the New York State Attorney General ("NYAG"); and (3) maximizing and shaping positive press coverage.

The OIG analyzed in great detail the information found relating to each major decision made by the staff in connection with the Goldman investigation, the Goldman civil action, and its timing. The OIG did not find financial regulatory reform legislation to have played a role in any of these decisions. In addition, we found no evidence that anyone at the SEC ever mentioned the financial reform legislation in connection with the Goldman investigation or in connection with the filing of its action against Goldman prior to the April 16 filing.

In addition, many SEC witnesses in this investigation, including Chairman Schapiro, testified that they were surprised or "shocked" at the extent of the media attention given to the Goldman action. This belief held by the SEC staff, which is corroborated by e-mails, that the Goldman action might not have significant public impact, much less the impact that it ultimately had, is another factor that argues against the idea that the SEC or its staff were attempting to influence financial regulatory reform legislation.

The OIG has not found evidence indicating that the SEC coordinated its investigation of, or its action against, Goldman with the Executive Office of the President, the White House, any White House employees, any Member of Congress, any Congressional employee, the Democratic National Committee, the Democratic Senate Campaign Committee, the Democratic Congressional Campaign Committee, or any of their employees. The OIG has reviewed the e-mails of all of the SEC staff who played

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any role in the Goldman action, including the Chairman, Chief of Staff, Deputy Chief of Staff, Commissioners and their counsel, Enforcement staff, and the staff of the Office of Legislative and Intergovernmental Affairs. The documents reviewed and testimony taken, as described below, indicate no information about the SEC's investigation of Goldman was shared with any outside entities or individuals prior to the SEC's April 16 action against Goldman.

The OIG investigation also found no evidence indicating that the SEC coordinated the settlement of its action against Goldman with the Executive Office of the President, the White House, any White House employees, any Member of Congress, any Congressional employee, the Democratic National Committee, the Democratic Senate Campaign Committee, the Democratic Congressional Campaign Committee, or any of their employees. The OIG found that settlement negotiations and approval proceeded independently of any other governmental entities, any legislation, or any political entities. The documents reviewed and testimony taken by the OIG give no indication of coordination or communications between the SEC and other governmental entities concerning the settlement before its public announcement.

An April 20, 2010 letter from several Members of Congress on the House Committee on Oversight and Government Reform to Chairman Schapiro specifically asked whether SEC Chief of Staff Didem Nisanci or Deputy Chief of Staff Kayla Gillan engaged in any communication with the Executive Office of the President, any Members of or employees of Congress, or any Democratic political committees. Our investigation found no evidence indicating that either the SEC Chief of Staff or Deputy Chief of Staff communicated with anybody outside the SEC concerning the Goldman investigation or the Goldman action prior to the SEC's complaint being filed on April 16. Our investigation also found no evidence indicating that either Nisanci or Gillan played any significant role in the SEC's investigation of Goldman or the authorization of the action against Goldman.

Further, after an extensive search of the e-mails of dozens of SEC employees who may have played a role in, or known about, the Goldman action, and taking the sworn testimony of dozens of these employees, the OIG has not found evidence demonstrating that anyone at the SEC shared information about its Goldman investigation with the media prior to the filing of its action against Goldman on April 16, 2010.

The summary details of the OIG investigation's findings are as follows. On August 25, 2008, the Headquarters Division of Enforcement staff opened an investigation into potential misrepresentations by Goldman in connection with the structuring and marketing of a collateralized debt obligation known as ABACUS 2007-AC1. On September 2, 2009, one of the senior Enforcement officials assigned to the investigation wrote in an e-mail to others in the Enforcement Division that "the very quickest" he expected the Goldman investigation to be on the Commission Calendar was that November, and suggested that the target date for bringing an action against Goldman and one individual be moved from September 2009 to December 2009.

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The OIG investigation found that

On November 13, 2009, Enforcement reserved a spot on the Commission Calendar for December 17, 2009 for the Commission to consider the Enforcement staff's recommendation to sue Goldman and Goldman vice president Fabrice Tourre. On November 24, 2009, Enforcement circulated the Action Memorandum for this recommendation to other offices and divisions for comment and confirmed that the Goldman matter would be on the Commission Calendar for December 17, 2009.

On December 8, 2009, the Division of Enforcement decided to withdraw the Goldman matter from the calendar. The OIG found that the decision to withdraw the Goldman case from the Commission Calendar was based upon a determination by the Enforcement staff working on the investigation that they should take testimony from an additional Goldman witness.

After the testimony of the Goldman witness was taken, on January 4, 2010, Enforcement wrote to the Office of the Secretary, "We will be re-sending this recommendation up to the Commission on Friday, January 8. ENF's Front Office has asked that the matter be calendared for the second or third week in January." Enforcement also wrote in this e-mail, "This is a high-profile enforcement case that recently became time sensitive."

The OIG investigation found that the Goldman case had become time-sensitive because SEC staff had learned that the Senate Permanent Subcommittee on Investigations ("PSI") was considering holding a hearing about Goldman in late January, and SEC staff was concerned that public information would be aired relating to the Goldman investigation. There was also evidence that the SEC preferred that the facts about Goldman's conduct be publicly aired first by the SEC in a press release announcing the action, after it completed its investigation.

The OIG investigation also found that on March 15, 2010, a Counsel to the Director and Deputy Director of the Division of Enforcement began a detail at PSI. Prior to beginning this detail, this official sought advice from SEC Ethics Counsel regarding the detail and was instructed that, "To the extent you have any non-public info about SEC investigations, I would think you would not be permitted to share that with them."

Later in her detail, the Enforcement Counsel e-mailed SEC staff that she would like to disclose the SEC's Goldman investigation to PSI. She was again instructed that all non-public information she obtained while at the SEC must remain non-public and that she could not disclose the fact of the SEC's Goldman investigation. We did not find evidence that any information about the Goldman investigation were disclosed by this individual to PSI.

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On January 19, 2010, Enforcement wrote to the Office of the Secretary, "We met again this afternoon with the Front Office to discuss [the Goldman investigation]. We would like to have our recommendation against Goldman and Tourre considered at the January 28 closed commission meeting and will get you a final action memo within the next day. . . ." On January 22, 2010, an Enforcement manager suggested in an e-mail to senior Enforcement staff that the SEC file its complaint against Goldman on Friday, January 29, arguing that the "24-7 news cycle" makes irrelevant the SEC's traditional approach of avoiding filing significant Enforcement matters on Fridays. Others disagreed with this argument, noting the historical practice in Enforcement not to file cases on Fridays, because it was assumed that the Saturday newspapers were not going to be as widely read.

On January 24, 2010, Chairman Schapiro conveyed her interest in "get[ting] the GS case out" to her Enforcement liaison in the Chairman's office. On January 26, 2010, members of the Enforcement staff met with Commissioner Troy Paredes to discuss the Goldman matter. On January 27, 2010, the day before the Commission meeting in which the Goldman recommendation was to be heard, the decision was made to pull the recommendation from the Commission Calendar.

The OIG investigation found that the Goldman case was pulled a second time from the Commission Calendar for two reasons: (1) concerns expressed by Commissioners and further analysis of the case by Enforcement staff regarding whether or not to charge an additional individual; and (2) a decision by Enforcement staff to obtain more evidence from Abacus purchasers to strengthen the SEC's case against Goldman.

The Enforcement staff took further investigatory steps in the Goldman case over the next several months and marshaled additional evidence. On April 1, 2010, the Enforcement staff submitted another Action Memorandum to the Commission recommending that the Commission file a civil action against Goldman and Tourre. On April 8, in an e-mail circulating a draft complaint against Goldman, Enforcement wrote that they planned to send the Goldman complaint to New York to be filed "either the afternoon of Wednesday April 14 or morning of Thursday April 15."

The OIG investigation found that the Commission approved the filing of the Goldman action on Wednesday afternoon, April 14, 2010. On April 12, 2010, the SEC had learned that the NYAG planned to announce on April 15, 2010 a \$7 million settlement with Quadrangle Group LLC ("Quadrangle") for its alleged involvement in kickbacks relating to pension fund investments. The SEC was in a position to file its own proposed settlement with Quadrangle for similar alleged violations on the same day that the NYAG would announce its settlement. Later on April 12, the SEC learned that the NYAG intended to announce its settlement with Quadrangle on Wednesday, April 14, instead of Thursday, April 15.

The Director of Enforcement informed Chairman Schapiro that the SEC staff planned to file its settlement with Quadrangle on Wednesday, April 14 at the same time

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that the NYAG announced its settlement with Quadrangle. Chairman Schapiro responded, "Let's make sure we don't announce Goldman same day" and testified that the Quadrangle case was a really important case for the NYAG, and an important case for the SEC as well. She stated that she did not want to detract from the announcement of the Quadrangle case by announcing the Goldman case at the same time, and stated, "I was a little worried that the Attorney General would be very upset if we announced multiple cases the same day."

Another reason advanced by SEC staff that it would not be advisable to announce the Goldman action on the same day as Quadrangle was that "our goal is always to get our enforcement message out widely," and bringing two cases on the same day would lessen that and confuse the media's focus. The Director of Enforcement also noted that the SEC did not want both Goldman and Quadrangle announced on the same day because of the overwhelming amount of briefing and other work involved for each matter. He added that the SEC's Office of Public Affairs did not want the SEC to announce two significant cases on the same day because the press would be diluted, and because of the logistics involved in coordinating the publicity of the SEC's actions.

In the Enforcement Director's response to Chairman Schapiro's April 12 e-mail about making sure that the SEC did not announce the Goldman action on the same day as Quadrangle, he wrote that the SEC would announce the Quadrangle settlement on Wednesday and file the Goldman action "likely" on Thursday. On the afternoon of Tuesday, April 13, the SEC learned that the NYAG had changed its schedule again, and that it now planned to announce the Quadrangle settlement on Thursday, April 15. There was testimony that, once the NYAG moved the Quadrangle announcement date to Thursday, April 15, the SEC decided to delay the Goldman action until Friday, April 16.

On the morning of Wednesday, April 14, the Director of Communications wrote in an e-mail to the Director of the SEC's Office of Public Affairs, that the Goldman action would be filed on Friday, April 16. On Thursday morning, April 15, at 2:38 a.m., the Director of Communications e-mailed a detailed timeline to a variety of senior SEC officials in Enforcement, Public Affairs and the Chairman's office of the anticipated events for the remainder of that week. Events on this timeline included the SEC's announcement of the Quadrangle settlement Thursday morning, filing of the Goldman complaint Friday morning at 9:30 a.m., announcement of the Goldman filing at 9:45 a.m., and public release of the OIG Stanford Report Friday afternoon. The Enforcement staff continued to review and edit the complaint against Goldman on Thursday, April 15.

The SEC filed the Goldman complaint with the U.S. District Court for the Southern District of New York at 10:29 a.m. on Friday, April 16, 2010. At 10:33 a.m. on April 16, the SEC issued its press release concerning its filing of the complaint against Goldman.

At 1:57 p.m. on April 16, 2010, a few hours after the SEC filed its action against Goldman, the SEC publicly released a redacted version of the OIG Stanford Report, which contained criticisms of the SEC's response to concerns and allegations that Robert

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Allen Stanford's companies were conducting a fraudulent scheme. In part because of coverage of the SEC's Goldman action, press coverage of the OIG Stanford Report was limited.

Individuals both within and outside the SEC have noted the suspicious timing of the SEC's announcement of the Goldman action and release of the Stanford report on the same day. A senior Enforcement official wrote in an April 19, 2010 e-mail:

I'm hearing that the Chairman's office is denying that there was any connection between the decision to file the case on Friday and the decision to release the Stanford IG report the same day. They had better be careful, because they may get asked for e-mail, etc. from Congress or pursuant to a FOIA request.

This senior official testified that he "assumed that it was not coincidental" that the OIG Stanford Report and the Goldman action were made public on the same day, but that he was not involved in decisions for either matter, and did not have knowledge that the timing of the two events on the same day was intentional.

In addition, ^{OGC Atty} [REDACTED] sent an e-mail to a personal friend on the day that the Goldman action was announced and the OIG Stanford Report was released, stating, "What a coincidence that those two stories came out today. ;-)." He testified that his e-mail about the timing of the two being a "coincidence" was based on purely his own speculation that the timing of the two releases "would be positive damage control for the Commission" in that the Goldman action and Stanford report were put out on the same day in order for the Goldman action to drown out media coverage of the Stanford report.

These suspicions were likely fueled by the recent history of the SEC releasing OIG reports that criticized it on "slow" news days. The SEC released the OIG's 457-page Report of Investigation ("ROI") concerning the failure of the SEC to uncover Bernard Madoff's Ponzi Scheme after 5:00 p.m. on September 4, 2009, the Friday before a three-day holiday weekend. The SEC then released the hundreds of exhibits supporting the OIG's ROI concerning Madoff late on Friday, October 30, 2009. In addition, the OIG ROI concerning the SEC's failure to vigorously pursue Enforcement action against W. Holding Company, Inc., and Bear Sterns & Co., Inc., was made public on Friday, October 10, 2008. Consistent with this pattern, on the same Friday that the OIG Stanford Report was publicly released and the Goldman action was announced, April 16, 2010, the SEC also publicly released the OIG's ROI concerning the SEC's failure to timely investigate allegations of financial fraud at Metromedia International Group, Inc., which had been submitted to the SEC by the OIG almost two months earlier.

Although as noted above, we have found that the decision on the timing of the release of the Goldman report was based at least partially upon maximizing press coverage, and that ensuring positive press coverage was a consideration in deciding when

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to file and announce cases, the OIG did not locate any concrete and tangible evidence in e-mails or in testimony that the filing of the Goldman report was specifically delayed to coincide with the issuance of the OIG Stanford Report. After the OIG submitted the OIG Stanford Report to the Chairman on April 1, 2010, the SEC staff undertook the process of redacting portions of the report before its public release, a task that appeared to proceed independently of the timing of the SEC's Goldman action. On April 9, 2010, the Office of the General Counsel sent an e-mail to all of the counsels to the Commissioners, informing them that it planned to circulate a seriatim Action Memorandum on Monday, April 12, seeking Commission authority by April 14 to release the OIG Stanford Report. On that Monday, however, Office of the General Counsel notified all of the counsels to the Commissioners via e-mail that, due to further consideration of certain redactions, the Action Memorandum would not be ready to circulate until Tuesday, April 13. There was testimony that, by April 13, a decision had been made to postpone release of the OIG Stanford Report from April 14 to April 16 due to issues concerning the redaction of the report, and that after that point, the date of release for the OIG Stanford Report was "fixed" for Friday, April 16. The Action Memorandum seeking Commission authority to release the OIG Stanford Report was ultimately circulated to the Commissioners' counsels on April 14, and was not signed by all five Commissioners until Friday morning, April 16.

Accordingly, the OIG has concluded that the SEC's decision to file the action against Goldman on April 16 was driven primarily by its desire to avoid filing the action on the same day that it announced the Quadrangle settlement.

The OIG investigation also found that the Enforcement staff did not notify Goldman of the impending filing of the complaint against them prior to its filing. We found that a senior Enforcement staffer on the Goldman case left a message with the secretary for Goldman's counsel on Friday, April 16, 2010 to give notice that the SEC had brought charges against Goldman and Tourre. Telephone records for Goldman's counsel indicate that the first call received from the SEC on April 16 came at 10:39 a.m., ten minutes after the SEC filed its complaint against Goldman and seven minutes after the SEC issued its press release for the Goldman action.

Goldman's counsel testified that "it was unprecedented, in my view it was contrary to decades of SEC experience that they would file without calling and giving an opportunity for the respondent to put a proposal on the table." Several senior Enforcement officials testified that it was the practice of many people at the SEC to notify a defendant that the Commission had authorized the staff to file an action against the defendants in order to potentially obtain a "settlement at the 11th hour." There was also testimony that one concern in notifying Goldman of Commission authorization in advance of filing was that:

Goldman is a pretty sophisticated player. ... [T]hey're good at the public relations game, and that ... if you know that something is coming from the SEC, you can maybe take certain actions to ... precondition the reporters about

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the case, and maybe the coverage would not be as favorable, from the SEC's perspective.

The Director of Enforcement testified that Goldman's counsel called him a day or two after the filing of the Goldman complaint and "expressed displeasure about really not having a chance to settle the case." He testified that he responded to Goldman's counsel that Goldman had many opportunities to settle the case and that the SEC had no reason to believe that Goldman was interested in settling, noting the lack of settlement discussions with Goldman prior to the filing of the SEC's action against Goldman. He also testified that he did not necessarily think it was a good idea for it to become a standard practice of the SEC to notify an entity when the Commission has authorized filing an action against the entity.

The OIG found that Section B(15)(c) of Administrative Regulation SECR 18-2, Press Relations Policies and Procedures, states, in part:

Every effort should be made to avoid the possibility that defendants in an SEC enforcement action first learn of the action when they read about it in the newspapers or when they are called by a reporter for comment about the SEC's complaint. The division, regional or district office primarily responsible for the filing of a particular complaint shall take all necessary steps to see that the defendants and/or their counsel are given timely advice concerning the action.

While we found that the Office of Public Affairs circulated its press policy, including SECR 18-2, to the Division of Enforcement staff on at least an annual basis, two members of the Enforcement staff responsible for bringing the Goldman action testified that they were not aware of the provision quoted above.

Accordingly, the OIG found that the SEC staff did not fully comply with Administrative Regulation SECR 18-2, because they did not make "every effort" to notify Goldman of the SEC's action prior to filing the action. In light of the differing views expressed by Division of Enforcement management as to whether notice should be given to a defendant in advance of an SEC enforcement action, the OIG recommends that the staff consider whether this regulation should be revised.

The OIG investigation also found that the SEC's decision to file its action against Goldman during trading hours with no advance notice to Goldman or the New York Stock Exchange resulted in market volatility, which concerned the NYSE Empl New York Stock Exchange Regulation ("NYSE Regulation"). However, the OIG did not find anything improper in this decision. The OIG is recommending that the Division of Enforcement give further consideration to whether, under certain circumstances, filing an action after trading hours or giving advance notice of an action to NYSE Regulation or other self-regulatory organizations is appropriate.

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The OIG also analyzed the circumstances surrounding the timing of the SEC's July 2010 settlement with Goldman. Settlement negotiations with Goldman began almost immediately after the SEC filed its complaint against Goldman. A few weeks prior to the July 15 settlement announcement, Goldman made it clear to the SEC staff that it wanted the matter settled: (1) prior to July 19, when Goldman's answer to the SEC's complaint was due in the SEC's civil action against Goldman; and (2) prior to July 20, when Goldman's quarterly earnings would be announced and at which point Goldman would have to take and announce an accounting reserve if no final settlement had been reached. The Director of Enforcement testified that, at that point, "everybody was of the view that if we're going to get [the settlement] done it had to get done before those two dates." After settlement negotiations through June, on July 1, 2010, the Enforcement staff sent draft settlement papers to Goldman's counsel and by early July, the SEC staff had set a plan to bring Goldman's settlement offer before the Commission on Thursday, July 15. The Enforcement staff circulated the Action Memorandum recommending acceptance of Goldman's settlement offer to the Commissioners on July 12. Senior Enforcement staff held meetings with each Commissioner prior to the July 15 Commission meeting to brief them on the proposed settlement with Goldman. On July 14, the Enforcement Staff sent final versions of the settlement papers to Goldman's counsel for signature.

The OIG investigation found that the decision was made to file and announce the settlement with Goldman immediately after the Commission approved the settlement on July 15, 2010, which was also the same day that the financial regulatory reform bill passed the Senate. The Director of Enforcement testified that one of the reasons for this decision was a concern about leaks to the media. A senior Enforcement official agreed that the primary reason that the SEC decided to announce the settlement quickly was "to beat leaks. ... [T]he more time that went by between the Commission approving it and filing the settlement, the more likely it was going to get out there." A senior official in the Chairman's office stated that the SEC decided to announce the settlement quickly on Thursday, July 15, rather than wait until the next day because, "If you wait until Friday and it leaks, then Goldman gets to control the story." The Director of Public Affairs testified that there was "absolutely" concern at the SEC that Goldman would provide information to the media and spin the settlement in Goldman's favor.

The Director of Enforcement also testified that there may have been internal discussions at the SEC that the filing of the proposed Goldman settlement on the same day that financial regulatory reform was approved by the Senate might cause people to speculate that the timing between the two events was connected, even though it was not. But he testified that the SEC decided to keep to its schedule because it would have been inappropriate to delay the settlement because of this concern. Others concurred that while there was concern that the SEC would be perceived poorly by announcing the proposed Goldman settlement on the same day that financial regulatory reform legislation was passed by the Senate, it was decided to announce the settlement that day as originally planned, because if the SEC held the Goldman settlement filing and announcement another day, "people will then be able to say we held it because of reg reform."

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The Commission approved the settlement in a closed Executive Session on the afternoon of July 15, 2010. At 3:15 p.m., pursuant to a timeline previously circulated, a few minutes after the Commission approved the settlement, the SEC issued a press advisory announcing a press conference to be held at 4:45 p.m., without identifying the topic of the press conference. At 4:28 p.m., as the NYSE trading day was ending, the SEC released its public announcement of the settlement with Goldman.

The OIG investigation did not find that the SEC's investigation of, or its action against, Goldman was intended to influence, or was influenced by, financial regulatory reform legislation. The OIG also did not find that the settlement between the SEC and Goldman was intended to influence, or was influenced by, financial regulatory reform legislation. We also did not find that the SEC improperly coordinated its Goldman investigation with outside entities or shared information about its Goldman investigation with any journalists or members of the media prior to the filing of its action against Goldman on April 16, 2010.

The OIG did find that the SEC staff did not fully comply with Administrative Regulation SECR 18-2 by failing to notify Goldman of the SEC's action until after it had filed the action, and that this decision, in combination with the decision not to give notice to NYSE Regulation in advance of filing the action and the decision to file the action during market hours, resulted in an increase in volatility in the securities markets on the day of the filing.

Accordingly, the OIG is recommending that the Chairman and the Director of Enforcement:

- (1) Give consideration to, and then communicate to the Division of Enforcement staff, the circumstances, if any, under which the Division of Enforcement should give notice to NYSE Regulation or other self-regulatory organization in advance of filing an enforcement action in which the defendant has not been given notice that an action is imminent;
- (2) Give consideration to, and then communicate to the Division of Enforcement staff, the circumstances, if any, under which the Division of Enforcement should file an enforcement action, and issue any related press releases or advisories, after the close of trading hours for the exchange on which the securities of the defendant entity trades; and
- (3) Give consideration as to whether Administrative Regulation SECR 18-2 should be revised, and to then communicate to the Division of Enforcement staff whether and in what circumstances advance notice should be given to defendants in an Enforcement action.

RESULTS OF THE INVESTIGATION

I. **THERE IS NO EVIDENCE INDICATING THAT THE GOLDMAN SACHS ACTION OR SETTLEMENT WAS INTENDED TO INFLUENCE, OR WAS INFLUENCED BY, FINANCIAL REGULATORY REFORM LEGISLATION**

The OIG has not found evidence indicating that the SEC's investigation of, or its action against, Goldman was intended to influence, or was influenced by, financial regulatory reform legislation. The OIG found that the investigation's procedural path and timing was governed primarily by decisions relating to the case itself, as well as concerns about: (1) facts surrounding the investigation's subject matter being publicized prior to the SEC filing its action; (2) maintaining a relationship with the New York State Attorney General ("NYAG"); and (3) maximizing and shaping press coverage, as described in Sections IV. and V. below.

The OIG analyzed the information found relating to each major decision made by the SEC staff in connection with the Goldman investigation, the Goldman complaint, and its timing. The OIG found that the SEC's Division of Enforcement decided to remove its recommendation to authorize an action against Goldman and Tourre from the December Commission Calendar in order to take the testimony of a Goldman manager with a possible connection to the Goldman securities transactions at issue in the SEC's investigation (hereinafter, referred to as "Goldman Manager") before the Commission considered the matter. *See* Section IV. C. below. An e-mail from Reid Muoio, the Assistant Director assigned to the Goldman investigation, contemporaneous to the December 8, 2009 decision to pull the matter from the Commission Calendar, confirmed this as the reason it was removed from the Commission Calendar. This e-mail is consistent with the testimony of witnesses in the Division of Enforcement and the Office of the Chairman. This is also corroborated by the fact that the staff took the testimony of this Goldman Manager a few weeks later and rescheduled the Goldman matter on the Commission Calendar shortly after taking his testimony, as discussed in Section IV. D. below. The OIG found that^{LE}

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^{LE} before bringing the matter before the Commission culminated in the decision to pull the matter from the Calendar, as described in Sections IV. A., IV. B. and IV. C. below. The OIG did not find the proposed financial regulatory reform legislation to have played a role in this decision.

The OIG found that several factors may have played a role in the SEC's decision to remove its recommendation to authorize an action against Goldman and Tourre from the January 28, 2010 Commission Calendar, as described in Section IV. E. below. These factors related to extra investigatory steps that the staff decided should be taken, including providing a Wells notice to the Goldman Manager and seeking affidavits from entities who purchased the ABACUS collateralized debt obligations ("Abacus CDOs") from Goldman. The lack of imminence of a hearing by the Senate Permanent Subcommittee on Investigations ("PSI") relating to Goldman may also have played a role

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in the decision to delay bringing the Goldman matter up for Commission consideration, as discussed in Section IV. D. below. The OIG did not find financial regulatory reform legislation to have played a role in this decision.

The OIG found that the Commission filed its action against Goldman on April 16, 2010 after performing further investigative work, as discussed in Section IV. E. 2. below, including: (1) giving a Wells notice to the Goldman Manager; (2) deciding after lengthy consideration not to recommend charging the Goldman Manager; and (3) obtaining affidavits from German investors in the Abacus CDOs. On March 24, the day after

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to charge the Goldman Manager, the Enforcement staff reserved the next available date on the Commission Calendar in which all five Commissioners would attend, which was April 14. See Section IV. E. 2., IV. E. 3., and V. A. below. The OIG did not find financial regulatory reform legislation to have played a role in bringing the SEC's action against Goldman, or in the timing of this action.

The OIG found that the SEC's decision to file its action against Goldman on April 16, 2010 was primarily driven by the SEC's desire to avoid filing on the same day (April 15) that the SEC and the NYAG planned to announce their settlements with Quadrangle. Contemporaneous e-mails and testimony from Chairman Mary Schapiro, Senior Adviser to the Chairman Stephen Cohen, Director Khuzami, and SEC Director of Communications Myron Marlin support this finding, as discussed in Section V. A. below. Chairman Schapiro and Cohen testified that there were two reasons for wanting to avoid filing the Goldman action on the same day as the Quadrangle settlement announcements: (1) to maximize press coverage (which strengthens the deterrent effect of an SEC Enforcement action) of both the Goldman action and the Quadrangle settlement, and (2) to avoid possibly upsetting the NYAG by upstaging the Quadrangle settlement with the Goldman action. See Section V. A. below. The OIG also found that the SEC did not file the Goldman complaint on April 14, the day that the Commission authorized the action, because the SEC staff believed that it was not ready to file its complaint on that day. This finding is supported by witness testimony and by documentation of the continued work that was done on the complaint through April 15, as discussed in Section V. A. below.

The OIG found that the settlement between the SEC and Goldman was not intended to influence, nor was it influenced by, financial regulatory reform legislation. The OIG found that the timing of the announcement of the SEC's settlement with Goldman on July 15 was governed in part by an effort to resolve the matter before Goldman's July 19, 2010 deadline to answer the SEC's civil complaint, and by a scheduled July 20, 2010 earnings release that would require Goldman to announce an accounting reserve relating to the prospective settlement with the SEC. The OIG's finding that the SEC's and Goldman's efforts to settle the matter were hastened by Goldman's July 19 deadline to answer the civil complaint and by Goldman's scheduled July 20 earnings announcement is supported by the testimony of numerous witnesses in Enforcement and in the Office of the Chairman, by the testimony of Goldman's counsel, and by documents created by the SEC staff in early July. See Section VI. below.

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The OIG also found that one of the reasons that the SEC decided to file and announce the Goldman settlement almost immediately after Commission approval on July 15 was a concern about leaks in the media that might portray the settlement in an inaccurate or misleading fashion. Testimony and documentary evidence indicate that the SEC staff wanted the SEC to be able to "shape" the story before Goldman had an opportunity to do so, as discussed in Section VI. below.

The OIG has reviewed the e-mails of all of the SEC staff who have played any role in the Goldman action, including the Chairman, the Chief of Staff and Deputy Chief of Staff, the Enforcement staff, the Commissioners and their counsel, and the Office of Legislative and Intergovernmental Affairs. In addition to exhaustively searching millions of e-mails and other documents, the OIG conducted on-the record, under-oath testimony of all individuals who had any involvement in the decision to bring the Goldman case and/or the timing of the case.

The witnesses in this investigation testified that they had no reason to believe, and were not aware of any information indicating, that the SEC's action against Goldman or the timing of that action was in any way related to or specifically meant to advance financial regulatory reform legislation.²

In addition, we found no evidence that anyone at the SEC ever mentioned the financial reform legislation in connection with the Goldman investigation or in connection with the filing of an action against Goldman prior to the April 16 filing.³

Chairman Schapiro testified, "[I]t never crossed my mind that anyone would ever link our filing this case to reg reform. In a million years it wouldn't have crossed my mind and didn't." Schapiro Testimony Tr. at 22. Cohen testified that Schapiro never indicated in any meetings about the Goldman investigation that it would help financial regulatory reform if the SEC brought a significant case like Goldman. Cohen Testimony Tr. at 75.

² Reisner Testimony Tr. at 113; Unidentified Senior Counsel Testimony Tr. at 30; Sr Cnsl 1 Testimony Tr. at 65; Sr Cnsl 2 Testimony Tr. at 80-81; Muoio Testimony Tr. at 135; Calande Testimony Tr. at 39; Schapiro Testimony Tr. at 22; Cohen Testimony Tr. at 134; Aguilar Testimony Tr. at 15; Casey Testimony Tr. at 19; Paredes Testimony Tr. at 13-14; Lench Testimony Tr. at 88-89; Walter Testimony Tr. at 12; OGC Atty Testimony Tr. at 43; Marlin Testimony Tr. at 55; ENF Empl 1 Testimony Tr. at 64; McKown Testimony Tr. at 47; Friestad Testimony Tr. at 34; Delfin Testimony Tr. at 39-40; Gillan Testimony Tr. at 31; Nisanci Testimony Tr. at 45; Henseler Testimony Tr. at 67; Kelley Testimony Tr. at 30; Spittler Testimony Tr. at 63.

³ Schapiro Testimony Tr. at 21; Khuzami Testimony Tr. at 55; Muoio Testimony Tr. at 134; Sr Cnsl 2 Testimony Tr. at 80; Calande Testimony Tr. at 39; Aguilar Testimony Tr. at 15; Casey Testimony Tr. at 19; Paredes Testimony Tr. at 13; Lench Testimony Tr. at 88; Walter Testimony Tr. at 12; OGC Atty Testimony Tr. at 42; Marlin Testimony Tr. at 53; ENF Empl 1 Testimony Tr. at 63; Nester Testimony Tr. at 154; McKown Testimony Tr. at 47; Friestad Testimony Tr. at 34; Gillan Testimony Tr. at 31; Kelley Testimony Tr. at 30.

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Khuzami testified that, in all of the discussions that he participated in about the timing of the filing of the Goldman action, financial regulatory reform was never mentioned. Khuzami Testimony Tr. at 55. Cheryl Scarboro, the Associate Director assigned to the Goldman investigation, testified that, “[A]ll along the way, [the Goldman] matter was put before the [Commission], put on the calendar and pulled off for reasons that related directly to the investigation.” Scarboro Testimony Tr. at 38-39. Reid Muoio, the Assistant Director assigned to the Goldman investigation, testified:

[W]e brought a case based upon the facts and the evidence and the merits of the case. ... Throughout the process, financial regulation did not, quite honestly, once occupy a second of thought in my mind nor did I have any conversations with anybody on that subject in relation to the filing of the [Goldman] case.”

Muoio Testimony Tr. at 135.

In addition, many SEC witnesses in this investigation, including Chairman Schapiro, testified that they were surprised or “shocked” at the extent of the media attention given to the Goldman action, as discussed in Section V. C. below. This belief held by the SEC staff, which is corroborated by e-mails, that the Goldman action might not have the public impact that it ultimately had, is another factor that argues against the idea that the SEC or its staff were attempting to influence financial regulatory reform legislation.

An April 20, 2010 letter from several Members of Congress on the House Committee on Oversight and Government Reform to Chairman Schapiro specifically asked whether SEC Chief of Staff Didem Nisanci or Deputy Chief of Staff Kayla Gillan engaged in any communication with the Executive Office of the President, any Members of or employees of Congress, or any Democratic political committees. Our investigation found no evidence indicating that either Nisanci or Gillan communicated with anybody outside the SEC concerning the Goldman investigation or the Goldman action prior to the SEC's complaint being filed on April 16. Our investigation also found no evidence indicating that either Nisanci or Gillan played any significant role in the SEC's investigation of Goldman or its authorization of the action against Goldman.

Nisanci testified that, although she was aware of the Goldman investigation since late 2009, the decisions to calendar matters for Commission consideration are decided by the Division of Enforcement, and that she did not participate in decisions during the week of the SEC's Goldman complaint filing as to when to file the action. Nisanci Testimony Tr. at 12, 14-15, 36. Nisanci testified that, in her conversations with employees at the White House and members and staff of Congress prior to the filing of the Goldman action on April 16, there was no discussion about the SEC's Goldman investigation. *Id.* at 43. Nisanci also testified that there were never any internal discussions at the SEC that bringing a big case would help progress financial regulatory reform legislation. *Id.* at 45.

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Gillan testified that she did not even become aware of the SEC's Goldman investigation until a few days prior to the SEC's filing of its complaint against Goldman in April. Gillan Testimony Tr. at 10. Gillan testified that, although she received regular reports on the Division of Enforcement's National Priority Matters, she rarely read them. *Id.* at 9. Although Cohen e-mailed Gillan and others the Action Memorandum for the Goldman matter on January 24, Gillan testified that she was "quite sure" that she did not read the memorandum. *Id.* at 11; January 24, 2010 E-mail from Stephen Cohen to Didem Nisanci, attached as Exhibit 36. Gillan testified that in her conversations with Congressional members and staff about financial regulatory reform, the Goldman investigation was never mentioned. *Id.* at 29. Gillan stated that she had never heard anyone from Congress suggest that it would help the financial regulatory reform legislation if the SEC brought a big case. *Id.*

II. THERE IS NO EVIDENCE OF COORDINATION BETWEEN THE SEC AND OTHER GOVERNMENTAL OR POLITICAL ENTITIES IN ITS GOLDMAN SACHS ACTION

The OIG has not found evidence indicating that the SEC coordinated its investigation of, or its action against, Goldman with the Executive Office of the President, the White House, any White House employees, any Member of Congress, any Congressional employee, the Democratic National Committee, the Democratic Senate Campaign Committee, the Democratic Congressional Campaign Committee, or any of their employees. The OIG has reviewed the e-mails of all of the SEC staff who may have played a role in the Goldman action, including the Enforcement staff, Commissioners and their counsel, and the Office of Legislative and Intergovernmental Affairs. The documents reviewed and testimony taken, as described below, indicate no sharing of any information about the SEC's investigation of Goldman with any outside entities or individuals prior to the SEC's April 16 action against Goldman. The OIG finds that the SEC's investigation proceeded independently of any other governmental or political entities. In fact, the OIG found much testimony and documents indicating that the SEC took great care to avoid sharing information about its Goldman investigation with PSI, which was investigating Goldman for similar issues, as discussed in Sections IV. D. and IV. E. 4. below, in part because the SEC was interested in bringing its action against Goldman before PSI held any public hearings concerning the same issues. An SEC employee on detail to PSI was repeatedly instructed not to share any information about the SEC's Goldman investigation with PSI, and the SEC declined PSI's request in February 2010 to allow a Senior Policy Adviser at the SEC to assist PSI in its Goldman inquiry.

The SEC witnesses in this investigation testified that they were not aware of any information indicating that the SEC coordinated its action against Goldman with the Executive Office of the President, the White House, or any White House employees.⁴

⁴ Scarboro Testimony Tr. at 56-57; Khuzami Testimony Tr. at 94-95; Reisner Testimony Tr. at 113; Unidentified Senior Counsel Testimony Tr. at 30-31; Sr Cnsl 1 Testimony Tr. at 65; Sr Cnsl 2 Testimony Tr.

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The SEC witnesses in this investigation also testified that they were not aware of any information indicating that the SEC shared any information concerning its Goldman investigation with the Executive Office of the President, the White House, or any White House employee.⁵

Moreover, the SEC staff and Commissioners testified that they were not aware of any information indicating that the SEC coordinated its action against Goldman with any Member of Congress or any Congressional employee.⁶ The SEC witnesses in this investigation also testified that they were not aware of any information indicating that the SEC shared any information concerning its Goldman investigation with any Member of Congress or any Congressional employee prior to the filing of the SEC's complaint against Goldman.⁷

The SEC witnesses in this investigation testified under oath that they were not aware of any information indicating that the SEC coordinated its action against Goldman with the Democratic National Committee, the Democratic Senate Campaign Committee,

at 81; Muoio Testimony Tr. at 136; Calande Testimony Tr. at 39; Schapiro Testimony Tr. at 22; Cohen Testimony Tr. at 134; Aguilar Testimony Tr. at 16; Casey Testimony Tr. at 20; Paredes Testimony Tr. at 14; Lench Testimony Tr. at 89; Walter Testimony Tr. at 13; OGC Atty Testimony Tr. at 45; Marlin Testimony Tr. at 55; OPA Empl Testimony Tr. at 32; ENF Empl 1 Testimony Tr. at 64; Nester Testimony Tr. at 155; McKown Testimony Tr. at 48; Friestad Testimony Tr. at 34; Delfin Testimony Tr. at 40; Gillan Testimony Tr. at 32; Nisanci Testimony Tr. at 46; Kelley Testimony Tr. at 30; Spitler Testimony Tr. at 63.

⁵ Scarboro Testimony Tr. at 57; Khuzami Testimony Tr. at 95; Reisner Testimony Tr. at 113-114; Unidentified Senior Counsel Testimony Tr. at 31; Sr Cnsl 1 Testimony Tr. at 65-66; Sr Cnsl 2 Testimony Tr. at 81; Muoio Testimony Tr. at 136; Asst Ch Lit Cnsl 1 Testimony Tr. at 51-52; Calande Testimony Tr. at 40; Schapiro Testimony Tr. at 23; Cohen Testimony Tr. at 134; Aguilar Testimony Tr. at 16; Casey Testimony Tr. at 20; Paredes Testimony Tr. at 14; Lench Testimony Tr. at 89; Walter Testimony Tr. at 13; OGC Atty Testimony Tr. at 45; Marlin Testimony Tr. at 55; OPA Empl Testimony Tr. at 32; ENF Empl 1 Testimony Tr. at 64; Nester Testimony Tr. at 155; McKown Testimony Tr. at 48; Delfin Testimony Tr. at 41; Gillan Testimony Tr. at 32; Nisanci Testimony Tr. at 46; Kelley Testimony Tr. at 31; Spitler Testimony Tr. at 63.

⁶ Scarboro Testimony Tr. at 57; Khuzami Testimony Tr. at 95; Reisner Testimony Tr. at 114; Unidentified Senior Counsel Testimony Tr. at 31; Sr Cnsl 1 Testimony Tr. at 66; Sr Cnsl 2 Testimony Tr. at 81; Muoio Testimony Tr. at 136; Calande Testimony Tr. at 40; Schapiro Testimony Tr. at 23; Cohen Testimony Tr. at 134; Aguilar Testimony Tr. at 16; Casey Testimony Tr. at 20; Paredes Testimony Tr. at 15; Lench Testimony Tr. at 89; Walter Testimony Tr. at 13; OGC Atty Testimony Tr. at 45; Marlin Testimony Tr. at 56; OPA Empl Testimony Tr. at 32; ENF Empl 1 Testimony Tr. at 64; Nester Testimony Tr. at 155; McKown Testimony Tr. at 48; Friestad Testimony Tr. at 34; Delfin Testimony Tr. at 41; Gillan Testimony Tr. at 32; Nisanci Testimony Tr. at 47; Kelley Testimony Tr. at 31; Spitler Testimony Tr. at 64.

⁷ Scarboro Testimony Tr. at 57; Khuzami Testimony Tr. at 95; Reisner Testimony Tr. at 114; Unidentified Senior Counsel Testimony Tr. at 31; Sr Cnsl 1 Testimony Tr. at 66; Sr Cnsl 2 Testimony Tr. at 82; Muoio Testimony Tr. at 136; Asst Ch Lit Cnsl 1 Testimony Tr. at 52; Calande Testimony Tr. at 40; Schapiro Testimony Tr. at 23; Cohen Testimony Tr. at 135; Aguilar Testimony Tr. at 16; Casey Testimony Tr. at 20; Paredes Testimony Tr. at 15; Lench Testimony Tr. at 89; Walter Testimony Tr. at 13; OGC Atty Testimony Tr. at 45; Marlin Testimony Tr. at 56; OPA Empl Testimony Tr. at 32; ENF Empl 1 Testimony Tr. at 65; Nester Testimony Tr. at 155; McKown Testimony Tr. at 49; Delfin Testimony Tr. at 41; Gillan Testimony Tr. at 32; Nisanci Testimony Tr. at 47; Kelley Testimony Tr. at 31; Spitler Testimony Tr. at 64.

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the Democratic Congressional Campaign Committee, or any of their employees.⁸ The SEC staff and Commissioners in this investigation also testified that they were not aware of any information indicating that the SEC shared any information concerning its Goldman investigation with the Democratic National Committee, the Democratic Senate Campaign Committee, the Democratic Congressional Campaign Committee, or any of their employees.⁹

Khuzami testified that there was never any discussion of the Goldman investigation in any of his communications with Congress about financial regulatory reform prior to the Goldman action being filed. Khuzami Testimony Tr. at 89. Khuzami also testified that it was never suggested, either internally at the SEC or externally with Congress, that it would be good for the SEC to bring a big case in order to provide a push for financial regulatory reform. *Id.* at 91. Likewise, Kenneth Lench, Chief of the Division of Enforcement's Structured and New Products Unit, which took charge of the Goldman investigation in January 2010, testified that there was never any discussion of the Goldman investigation in any of his communications with Congress prior to the Goldman action being filed. Lench Testimony Tr. at 87.

Similarly, Senior Adviser to the Chairman Cohen testified that there was never any discussion of the Goldman investigation in any of his communications with Congressional staff about financial regulatory reform prior to the Goldman action being filed. Cohen Testimony Tr. at 130.

Eric Spitler, Director of the SEC's Office of Legislative and Intergovernmental Affairs, testified that the Goldman investigation was not raised in any of his conversations with White House employees prior to the filing of the Goldman action. Spitler Testimony Tr. at 60. Ricardo Delfin, Special Counsel to the Chairman, and Julie Davis, Deputy Director for the Office of Legislative and Intergovernmental Affairs, both testified that the Goldman investigation was not raised in any of their conversations with

⁸ Scarboro Testimony Tr. at 57-58; Khuzami Testimony Tr. at 96; Reisner Testimony Tr. at 114-115; Unidentified Senior Counsel Testimony Tr. at 31; [redacted Sr Cnsl 1] Testimony Tr. at 66; [redacted Sr Cnsl 2] Testimony Tr. at 82; Muoio Testimony Tr. at 137; [redacted Asst Ch Lit Cnsl 1] Testimony Tr. at 52; Calande Testimony Tr. at 40; Schapiro Testimony Tr. at 24; Cohen Testimony Tr. at 135; Aguilar Testimony Tr. at 17; Casey Testimony Tr. at 20; Paredes Testimony Tr. at 15; Lench Testimony Tr. at 90; Walter Testimony Tr. at 13; [redacted OGC Atty] Testimony Tr. at 46; Marlin Testimony Tr. at 56; [redacted OPA Empl] Testimony Tr. at 32; [redacted ENF Empl 1] Testimony Tr. at 65; Nester Testimony Tr. at 155; McKown Testimony Tr. at 49; Friestad Testimony Tr. at 34; Delfin Testimony Tr. at 42; Gillan Testimony Tr. at 33; Nisanci Testimony Tr. at 47; Henseler Testimony Tr. at 68; Kelley Testimony Tr. at 31; Spitler Testimony Tr. at 64.

⁹ Scarboro Testimony Tr. at 58; Khuzami Testimony Tr. at 96; Reisner Testimony Tr. at 115; Unidentified Senior Counsel Testimony Tr. at 31-32; [redacted Sr Cnsl 1] Testimony Tr. at 66; [redacted Sr Cnsl 2] Testimony Tr. at 82-83; Muoio Testimony Tr. at 137; Calande Testimony Tr. at 41; Schapiro Testimony Tr. at 24; Cohen Testimony Tr. at 135; Aguilar Testimony Tr. at 17; Casey Testimony Tr. at 20; Paredes Testimony Tr. at 15; Lench Testimony Tr. at 90; Walter Testimony Tr. at 14; [redacted OGC Atty] Testimony Tr. at 46; Marlin Testimony Tr. at 57; [redacted OPA Empl] Testimony Tr. at 32; [redacted ENF Empl 1] Testimony Tr. at 65; Nester Testimony Tr. at 155; McKown Testimony Tr. at 49; Delfin Testimony Tr. at 42; Gillan Testimony Tr. at 33; Nisanci Testimony Tr. at 48; Henseler Testimony Tr. at 68; Kelley Testimony Tr. at 32; Spitler Testimony Tr. at 65.

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Congressional members and staff prior to the filing of the Goldman action. Delfin Testimony Tr. at 38; Davis Testimony Tr. at 31-32. Delfin and Davis also testified that at no point in time did any Congressional members or staff say that it would be helpful to the financial regulatory reform legislation's passage if the SEC brought a big case. Delfin Testimony Tr. at 38; Davis Testimony Tr. at 32.

The OIG found no evidence indicating that the SEC coordinated the settlement of its action against Goldman with the Executive Office of the President, the White House, any White House employees, any Member of Congress, any Congressional employee, the Democratic National Committee, the Democratic Senate Campaign Committee, the Democratic Congressional Campaign Committee, or any of their employees. The OIG found that settlement negotiations and approval proceeded independently of any other governmental entities, any legislation, or any political entities. The documents reviewed and testimony taken by the OIG gave no indication of coordination or communications between the SEC and other governmental entities concerning the settlement before its public announcement.

Numerous witnesses in this investigation testified that they were not aware of any information indicating that the SEC coordinated its proposed settlement with Goldman, which was announced on July 15, with either the Executive Office of the President, the White House, Congress, the Democratic National Committee, the Democratic Senate Campaign Committee, the Democratic Congressional Campaign Committee, or any of their employees. Khuzami Testimony Tr. at 97; Cohen Testimony Tr. at 136; Friestad Testimony Tr. at 35; Walter Testimony Tr. at 14; Paredes Testimony Tr. at 17; Lench Testimony Tr. at 91; ENF Empl 1 Testimony Tr. at 66. When asked during her testimony whether there was any relationship at all between the timing of the Goldman settlement and the fact that financial regulatory reform legislation was passed in the Senate on the same day, Chairman Schapiro testified that there was, "None whatsoever." Schapiro Testimony Tr. at 28. Commissioner Elisse Walter, ENF Empl 1 Senior Communications Adviser for the Division of Enforcement, and Pauline Calande, Counsel to the Director and Deputy Director of the Division of Enforcement, each testified that they were not aware of any relationship between the SEC's settlement with Goldman and financial regulatory reform legislation. Walter Testimony Tr. at 15; ENF Empl 1 Testimony Tr. at 67; Calande Testimony Tr. at 49. Cohen testified that when the SEC staff initially decided to announce the Goldman settlement on July 15, his understanding was that the Senate vote on financial regulatory reform legislation was probably going to take place at some point after July 15. Cohen Testimony Tr. at 127-129. Moreover, numerous SEC witnesses testified that when the SEC staff realized on July 15 that the Senate vote would be taking place on the same day that they were announcing the Goldman settlement, the staff decided to adhere to their plan to announce the settlement that day despite the potential for the coincidence drawing criticism, because a decision to delay the Goldman settlement announcement due to legislative action would itself have been the result of an inappropriate influence by external circumstances. Khuzami Testimony Tr. at 93; Marlin Testimony Tr. at 51-52; Nester Testimony Tr. at 141-142; Gillan Testimony Tr. at 36-37; Davis Testimony Tr. at 40; Kelley Testimony Tr. at 36.

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III. THE OIG HAS NOT FOUND EVIDENCE DEMONSTRATING THAT THE SEC SHARED INFORMATION ABOUT ITS GOLDMAN SACHS INVESTIGATION OR ACTION WITH ANY NEWS ORGANIZATIONS PRIOR TO THE FILING OF THE SEC'S COMPLAINT AGAINST GOLDMAN SACHS

After an extensive search of e-mails for dozens of SEC employees who may have played a role or known about the Goldman action, and taking the sworn testimony of dozens of these employees, the OIG has not found evidence demonstrating that anyone at the SEC shared information about its Goldman investigation with the media prior to the filing of its action against Goldman on April 16, 2010.

The New York Times Company represented to the OIG that its article about the SEC's action against Goldman first appeared at 10:38 a.m., at which point the SEC had already filed its complaint against Goldman and issued its press release about the matter. August 31, 2010 Letter from David McCraw to [OIG Staff 2] attached as Exhibit 37. As discussed in Section V. A. below, the SEC's complaint against Goldman was filed with the SDNY Clerk at 10:29 a.m. on April 16, and the SEC issued its press release at 10:33 a.m. SDNY Interview Memorandum at 1; April 30, 2010 SEC.gov Press Release webpage, attached as Exhibit 38.¹⁰

Cohen, Joan McKown (the Chief Counsel in the Division of Enforcement at the time), Marlin and [OPA Empl] [Fil] SEC's Office of Public Affairs) all testified that they were not aware of any information indicating that anyone at the SEC shared any information with the news media or journalists concerning either the Goldman investigation before it was filed or the Goldman settlement before it was filed. Cohen Testimony Tr. at 137; McKown Testimony Tr. at 49-50; Marlin Testimony Tr. at 57; [OPA Empl] Testimony Tr. at 32. Marlin testified that, in his experience, the SEC has never given advance notice to a journalist or media outlet about a particular SEC complaint filing. Marlin Testimony Tr. at 32-33. Lench, Davis, Anne-Marie Kelley (a Deputy Director of the SEC's Office of Legislative and Intergovernmental Affairs) and [ENF Empl 1] testified that they were not aware of anyone who disclosed non-public information about the Goldman investigation to any reporters. Lench Testimony Tr. at 45; Davis Testimony Tr. at 34; Kelley Testimony Tr. at 23; [ENF Empl 1] Testimony Tr. at 66.

On April 14, 2010, Scott Friestad, an Associate Director in the Division of Enforcement, sent an e-mail to Khuzami, Enforcement Division Deputy Director Lorin

¹⁰ The New York Times Company represented that it was unable to retrieve the version of its article about the SEC's action against Goldman as it was first published at 10:38 a.m. Exhibit 37. As a result, the level of detail concerning the SEC's action contained in this first iteration of the article could not be reviewed by the OIG. The New York Times Company declined to inform OIG whether it was aware of the Goldman action prior to its public announcement, stating that this declination was consistent with their long-standing policy not to respond to requests seeking information about unpublished information or newsgathering. *Id.*

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Reisner and others that stated, "[T]here's at least one reporter who knows this recommendation is on the calendar today. It's not clear to me how they found out, but I wanted you to be aware of that fact, in case there's going to be any delay in filing the case after it's authorized." April 14, 2010 E-mail from Scott Friestad to Robert Khuzami, attached as Exhibit 39. This e-mail was forwarded to Marlin, Cohen, and others. *Id.* Friestad testified that he did not "recall for sure, but it was I believe a reporter from Bloomberg ... either Josh [Gallu] or David [Scheer]." Friestad Testimony Tr. at 14. Friestad testified that the reporter called him on April 14, and that the reporter did not indicate how they knew this information. *Id.* During his OIG testimony, however, Friestad testified that the reporter did not specifically tell Friestad that he knew that Goldman was on the calendar, but only that there was "an interesting or important [collateralized debt obligation] case on the calendar today." *Id.* at 15. An attorney representing Bloomberg News stated to the OIG that Bloomberg News did not have advance notice of the SEC's action against Goldman prior to the complaint being filed. August 26, 2010 Golden Telephone Call Memorandum, attached as Exhibit 40. The OIG also found that Bloomberg News did not publish any articles prior to the Commission's filing of its Goldman action about the SEC's investigation of Goldman.

The OIG did find that, after the Goldman action was filed, at least one individual at the SEC divulged outside the Commission the fact that the vote authorizing the action against Goldman was 3 to 2, and that this fact became published in the news media. April 19, 2010 E-mail from Scott Friestad to Joan McKown, attached as Exhibit 41. The documents reviewed in this investigation do not indicate the source of this leak, and none of the witnesses in this investigation testified that they were aware of who might have leaked the fact that the Commission vote authorizing the Goldman action was 3 to 2. *See, e.g.,* Cohen Testimony Tr. at 96; Henseler Testimony Tr. at 72; Davis Testimony Tr. at 33; Nisanici Testimony Tr. at 49-50.

The OIG also found that, after the proposed Goldman settlement was approved by the Commission, at least one individual at the SEC divulged outside the Commission the fact that the vote approving the settlement with Goldman was 3 to 2, and this fact became published in the news media. July 16, 2010 E-mail from Louise Story to John Nester, attached as Exhibit 42. The documents reviewed in this investigation do not indicate the source of this leak, and none of the witnesses in this investigation testified that they were aware of who might have leaked the fact that the Commission vote accepting the Goldman settlement offer was 3 to 2. *See, e.g.,* Lench Testimony Tr. at 52, 79; Kelley Testimony Tr. at 39-40; Delfin Testimony Tr. at 43; Aguilar Testimony Tr. at 17-18; Casey Testimony Tr. at 17; Paredes Testimony Tr. at 16.

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IV. THE SEC ENFORCEMENT INVESTIGATION OF GOLDMAN SACHS' SALE OF THE ABACUS COLLATERALIZED DEBT OBLIGATION

On August 25, 2008, the Headquarters Division of Enforcement staff opened an investigation into potential misrepresentations by Goldman in connection with the structuring and marketing of a collateralized debt obligation ("CDO") known as ABACUS 2007-AC1 ("Abacus"). See April 29, 2010 HUB Report, attached as Exhibit 43, at 2. LE

LE Sr Cnsl 1 Testimony Tr. at 12-14. The Goldman investigation focused on the apparent lack of disclosure by Goldman to investors that a hedge fund played a significant role in selecting the Abacus portfolio. Exhibit 43 at 2. The Enforcement staff also focused on the potential violations of the securities laws by Fabrice Tourre, the Goldman vice president responsible for the structuring and marketing the Abacus CDO. April 1, 2010 Action Memorandum, attached as Exhibit 44, at 1.

In 2008, the Enforcement staff requested documents from Goldman and other entities pursuant to this investigation, HO-10911. Exhibit 43 at 4. On February 23, 2009, the Commission issued a Formal Order of Investigation for this matter. Exhibit 44, at ii. After obtaining this Formal Order of Investigation, the staff took investigative testimony in the matter throughout 2009. Exhibit 43 at 4. LE

LE On July 28, 2009, the Enforcement staff gave a Wells notice to Goldman. Exhibit 44 at ii.¹¹

Chairman Schapiro was aware of the Goldman matter by fall 2009. Schapiro Testimony Tr. at 10. The case was designated a National Priority Case by the Division of Enforcement, along with approximately sixty other investigations. Khuzami Testimony Tr. at 9-10; November 24, 2009 E-mail from Reid Muoio to IM Sp Cnsl attached as Exhibit 45. In addition, Enforcement Director Robert Khuzami briefed Chairman Schapiro on the Goldman matter at several of their weekly senior staff meetings. Khuzami Testimony Tr. at 10.

A September 17, 2009 e-mail from Stephen Cohen, a Senior Advisor to the Chairman, to Reid Muoio, the Assistant Director assigned to the investigation, stated: "The Chairman actually asked about [the Goldman] investigation specifically yesterday." September 17, 2009 E-mail from Stephen Cohen to Reid Muoio, attached as Exhibit 46. Asst Ch Lit Cnsl 1 the Assistant Chief Litigation Counsel originally assigned to the Goldman matter, wrote in an October 1 e-mail: "The Chairman apparently asked Cheryl [Scarboro,

¹¹ A Wells notice provides notice to a person or entity that the staff plans to recommend that the Commission authorize an action against the person or entity for violations of the securities laws and provides an opportunity for the person or entity to submit a statement to the staff concerning this anticipated recommendation. 17 C.F.R. § 202.5(c).

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the Associate Director assigned to the Goldman investigation] a couple days ago 'How is the Goldman case coming?' which prompts a desire for speed." October 1, 2009 E-mail from [Asst Ch Lit Cnsl 1] to Lou Mejia, attached as Exhibit 47. Khuzami testified that Chairman Schapiro asked about the status of the matter from time to time, but never dictated the direction of the investigation. Khuzami Testimony Tr. at 10-11. Khuzami testified that Chairman Schapiro has never intervened inappropriately in an investigation, such as asking to bring a case before it was ready. *Id.* at 40.

A. Internal Disagreements Arose in Fall 2009 Concerning Which Individuals Should Testify and Which Individuals Should Receive Wells Notices

On September 2, 2009, Muoio wrote in an e-mail to others in the Enforcement Division that "the very quickest" he expected the Goldman investigation to be on the Commission Calendar was in November, and suggested that the target date for bringing an action be moved from September 2009 to December 2009. September 2, 2009 E-mail from Reid Muoio to [PII] attached as Exhibit 48.

Muoio testified that [LE]

[LE] Muoio Testimony Tr. at 34. [Asst Ch Lit Cnsl 1] testified that he believed in fall of 2009 that the Enforcement staff should take the testimony of the Goldman Manager and of a manager ("Hedge Fund Manager") at the hedge fund that played a role in selecting the Abacus CDO portfolio, but that Muoio was reluctant to do so. [Asst Ch Lit Cnsl 1] Testimony Tr. at 12-13. This testimony is supported by Muoio's September 2 e-mail in which he wrote that there were "a number of wild cards that could cause further delay" in bringing an action in the investigation, including "the interest of [Asst Ch Lit Cnsl 1] to expand the scope of the proposed charges significantly to include additional individual and entity defendants." Exhibit 48. [LE] [Asst Ch Lit Cnsl 1] Testimony Tr. at 18. Scarboro described the differences between [Asst Ch Lit Cnsl 1] and the investigative staff as mostly a personality clash. Scarboro Testimony Tr. at 15.

Goldman provided written Wells submissions to the Enforcement staff on September 10 and September 25, 2009, and met with the Enforcement staff on September 15, 2009. Exhibit 44 at ii. The Enforcement staff gave a Wells notice to Toure on September 28, 2009. *Id.* Toure made a written Wells submission on October 26, 2009, and met with the staff on October 29, 2009. *Id.*

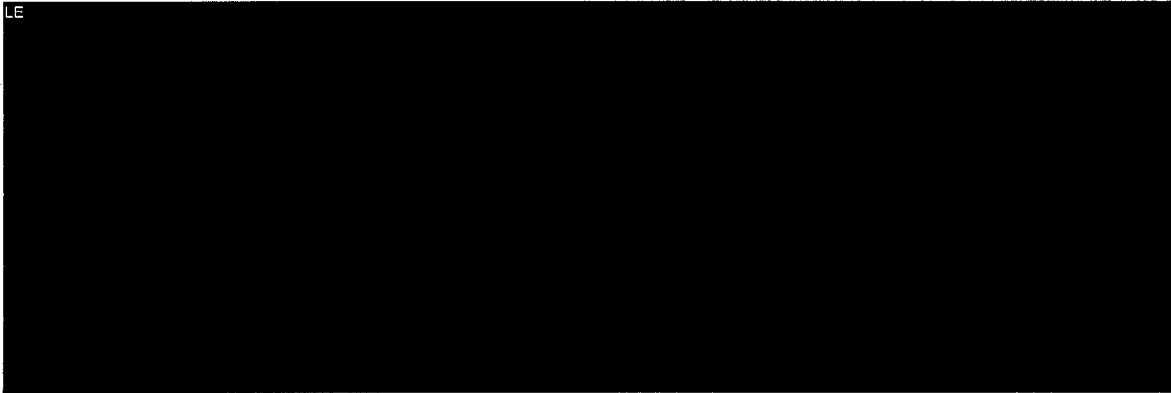
The Enforcement staff took the testimony of the Hedge Fund Manager on October 30, 2009. November 2, 2009 E-mail from Reid Muoio to [PII] attached as Exhibit 49; Exhibit 44. [LE]

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B. In November 2009, the Goldman Matter was Scheduled for the December 17, 2009 Commission Meeting

On November 13, 2009, Muoio reserved a spot on the Commission Calendar for December 17, 2009 for the Commission to consider the Enforcement staff's recommendation to sue Goldman and Tourre. November 13, 2009 E-mail from Elizabeth Murphy to Reid Muoio, attached as Exhibit 50. On November 24, 2009, Muoio circulated the Action Memorandum for this recommendation to other offices and divisions for comment. November 24, 2009 E-mail from Reid Muoio to Enforcement Action Memos, attached as Exhibit 51. On December 4, 2009, Muoio sent this Action Memorandum to the Office of the Secretary and confirmed that the Goldman matter would be on the Commission Calendar for December 17, 2009. December 7, 2009 E-mail from Reid Muoio to ^{ENF Staff} [REDACTED], attached as Exhibit 52.

The Enforcement staff had sent a subpoena for the Goldman Manager's testimony on November 2. See December 7, 2009 E-mail from ^{Sr Cnsl 2} [REDACTED] to Reid Muoio, attached as Exhibit 53. On December 4, after numerous attempts to schedule testimony, the Goldman Manager's attorney represented to the Enforcement staff that, because of the difficulties of the case, testimony in December was impossible. *Id.* Thus, the investigative staff decided that it was not necessary to take the Goldman Manager's testimony before going to the Commission with its recommendation to sue Goldman and Tourre. *Id.*; Cohen Testimony Tr. at 32-33.



C. On December 8, 2009, the Enforcement Staff Removed the Goldman Matter from the Commission Calendar in Order to Take the Testimony of a Goldman Manager

On December 8, 2009, the Division of Enforcement decided to withdraw the Goldman matter from the Commission Calendar. See December 8, 2009 E-mail from Joan McKown to Cheryl Scarboro, attached as Exhibit 55; December 8, 2009 E-mail from Joan McKown to ^{Cnsl 1} [REDACTED] and ^{ENF Supv 2} [REDACTED] attached as Exhibit 56; Exhibit 52. Muoio wrote in an e-mail to the Office of the Secretary: "In consultation with the Trial Unit, it was determined that we should take testimony from [the Goldman Manager] prior to making our recommendation. We had subpoenaed [the Goldman Manager]'s testimony back in early November but were getting stonewalled." December

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8, 2009 E-mail from Reid Muoio to OS Staff 1 attached as Exhibit 57. Muoio also wrote in an e-mail to others in the Division of Enforcement: "At [Scarboro's] request we pulled this recommendation from [the Commission Calendar] and scheduled [the Goldman Manager]'s testimony for January 7." December 8, 2009 E-mail from Reid Muoio to Mark Adler and Asst Ch Lit Cnsl 2 attached as Exhibit 58.

The testimony of the witnesses in this investigation is consistent with Muoio's December 8, 2009 e-mail to the Office of the Secretary, which stated the reason for pulling the Goldman matter from the Commission Calendar in December was so that the Goldman Manager's testimony could be taken. Khuzami also confirmed in testimony that the primary reason for pulling the matter from the calendar in December was to take the Goldman Manager's testimony. Khuzami Testimony Tr. at 14. Lorin Reisner, Deputy Director of the Division of Enforcement, testified that his view in December was that the Enforcement staff should take the Goldman Manager's testimony before making a recommendation to the Commission. Reisner Testimony Tr. at 15. Reisner also testified that, to his recollection, the decision to take the matter off the Commission Calendar in December related to internal issues within the Division of Enforcement and did not have anything to do with any feedback from Commissioners or the Chairman. *Id.* at 32. Scarboro testified:

This [Goldman] matter was pulled the first time solely based on conversations that the staff members had with each other about the best approach as it related to [the Goldman Manager], whether to resolve it completely with him at the same time or go forward with a recommendation that might result in amending the complaint down the road to add him. That's all this was. I'm aware of no conversations with Commissioners about whether this was a good or bad idea or how to manage that process.

Scarboro Testimony Tr. at 39. Sr Cnsl 2 a staff attorney assigned to the Goldman matter, testified that the matter was taken off the Commission Calendar in December because it was decided to first take the Goldman Manager's testimony. Sr Cnsl 2 Testimony Tr. at 25.

Cohen testified that either Muoio or Khuzami informed him that, based on internal deliberations within the Division of Enforcement, it was determined that the Goldman matter would be pulled off of the Commission calendar in order to take Toure's testimony. Cohen Testimony Tr. at 26.

The day after the matter was pulled from the Commission Calendar and the Goldman Manager's testimony was scheduled, Asst Ch Lit Cnsl 1 was reassigned to be the trial counsel for the Goldman matter. December 9, 2009 E-mail from Asst Ch Lit Cnsl 1 to Stephen Cohen, attached as Exhibit 59. LE



D. Concerned About a Senate Inquiry and a News Article About Goldman's CDO Transactions, the SEC Staff Rescheduled the Goldman Matter for a January 28, 2010 Commission Meeting After Taking a Goldman Manager's Testimony

On December 22, 2010, the SEC received an inquiry from Louise Story, a journalist for *The New York Times*, concerning the SEC's investigation of synthetic CDOs. December 22, 2009 E-mail from [Sr Cnsl 1] to Reid Muoio and [Sr Cnsl 2] attached as Exhibit 60. Muoio cautioned [Sr Cnsl 1] the branch chief assigned to the Goldman matter, and staff attorney [Sr Cnsl 2] to be careful not to externally disclose any information concerning the investigation. *Id.* Two days later, the *New York Times* published an article by Story and Morgenson discussing Goldman's sale of Abacus CDOs, which Goldman had bet against financially. December 25, 2009 E-mail from Mary Schapiro to Robert Khuzami, attached as Exhibit 61. Khuzami forwarded the article to Chairman Schapiro, noting in his e-mail, "ABACUS is the synthetic CDO deal we are targeting to calendar in January." *Id.*

Scarboro testified that with respect to the newspaper articles that had been written about the matter, "it would have been nice to get our case done ... sooner rather than later. ... I think the staff would have liked to be able to show the world that they were on top of this." Scarboro Testimony Tr. At 29. Calande testified:

In general on the SEC side, and in the enforcement division, we do want to manage the press attention to our cases, because that is part of deterring securities law violations. ... [I]f we bring a good case we certainly want to get good publicity for it, and we're careful about how we announce them, and where and when, and so forth.

Calande Testimony Tr. at 32.

Khuzami, however, expressed concern about the media coverage of an ongoing investigation, and stated in his testimony, "[P]ublicity in general isn't a good thing. You want to keep your investigations private and confidential. You don't want witnesses, potential defendants, third parties, reading things that can then color their testimony." Khuzami Testimony Tr. at 16-17. [Sr Cnsl 2] testified that once a matter under investigation receives media attention, "witnesses become more cagey, you don't tend to have cooperating witnesses as easily." [Sr Cnsl 2] Testimony Tr. at 32-33.

On January 4, 2010, Muoio wrote to the Office of the Secretary, "We will be re-sending this recommendation up to the Commission on Friday, January 8. ENF's Front Office has asked that the matter be calendared for the second or third week in January."

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January 4, 2010 E-mail from Reid Muoio to OS Staff 1 attached as Exhibit 62.¹² In this e-mail, Muoio then asked the Office of the Secretary if the Goldman matter could be submitted for the scheduled January 14th Closed Commission Meeting. *Id.* Muoio also wrote in this e-mail, "This is a high-profile enforcement case that recently became time sensitive." *Id.*

Muoio testified that he did not recall why he wrote that the matter had recently become time-sensitive. Muoio Testimony Tr. at 60-61. Scarboro similarly testified that she did not know what Muoio was referring to when he wrote that the matter had recently become time-sensitive, and that there was no point in time at which the Goldman matter became time-sensitive to her. Scarboro Testimony Tr. at 27. Khuzami and Reisner each testified that they did not know why Muoio wrote that the matter had recently become time-sensitive. Khuzami Testimony Tr. at 24; Reisner Testimony Tr. at 27.

Cohen, however, when asked in testimony why the Goldman matter had recently become time-sensitive at the time of Muoio's e-mail, stated that the SEC staff had learned that the Senate Permanent Subcommittee on Investigations ("PSI") was considering holding a hearing about Goldman in late January, and that the SEC staff was concerned that more public information would be aired relating to the investigation of the Abacus CDOs. Cohen Testimony Tr. at 38-39. Cohen testified that the SEC was concerned about a "public airing" of the same facts and witnesses as those in its own investigation, and that the SEC would prefer that the facts be aired publicly "in an organized fashion" in its own press release after a full investigation. *Id.* at 40-42. Cohen testified that, in addition, the SEC was also concerned that there would be "a lot of questions about where's the SEC on this." *Id.* at 40-41.

Cohen's testimony that a potential PSI hearing regarding Goldman had increased the SEC staff's desire to file the Goldman action quickly is supported by e-mails from this time period. On January 4, Khuzami e-mailed Chairman Schapiro and others:

I've heard that Sen. Levin and the Permanent Subcommittee on Investigations is preparing to haul Goldman and other banks to a hearing where they will be chastised for simultaneously selling mortgage products, including CDOs and other structured products, at the same time they were going short mortgages on a prop or other basis. Late January/February is what I am hearing. Any intell we can get on timing would be helpful, as we would certainly want to file our Goldman case (which addresses

¹² Although Goldman Manager's testimony was scheduled for January 7, 2010 and had not yet been taken at this time, Muoio LE as Muoio had expressed earlier in a December 24, 2009 e-mail to Khuzami: "Quite frankly my preference is to send the memo up Monday for calendaring in early January. LE Plus we can always do a supplemental memo LE" December 24, 2009 E-mail from Reid Muoio to Robert Khuzami, attached as Exhibit 63.

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some of these same issues) before the hearing, which will put us on the offensive on this issue.

January 4, 2010 E-mail from Robert Khuzami to Mary Schapiro, attached as Exhibit 64, at 2. Khuzami testified that he may have learned that the PSI hearings were to be held in late January or February from defense lawyers or ex-prosecutor friends. Khuzami Testimony Tr. at 25. When asked what he meant by this e-mail, Khuzami testified:

[Y]ou always want to file your case before your evidence gets splayed out publicly. It's bad for the integrity of the case, bad for witnesses who hear other testimony, bad for evidence that you may hold back and not include in your complaint that gets played out, bad for third parties, bad for settlement. ... And second of all, structured products, mortgage-related cases, were a high priority of ours. I also didn't want, you know, the case to be viewed as one we only brought in reaction to what somebody else did.

Id. at 25-26.

Julie Davis, Deputy Director for the Office of Legislative and Intergovernmental Affairs, replied to Khuzami's e-mail:

I'm happy to check with PSI staff to see what they'll tell us. This is somewhat delicate because they likely don't want us to beat them to the punch either. Do we know if they know anything about our case? Would we or they benefit from talking to each other? I'm happy to probe very softly (i.e. not mention our case at all – just informally inquire about their hearing schedule) but wanted to make sure we wouldn't prefer something more.

Exhibit 64 at 2. Khuzami wrote in response:

I doubt they know anything about our case. I don't think I would want to have a chat with them about our respective matters, since I don't trust them not to try to preempt us in some way. The way it looks now, we are shooting for Jan. 21 to present our case to the Commission, so that is early enough that I am hopeful we will beat them to the punch. So, for now, just get a sense if you can of when they are scheduled to hold their own hearing.

Id. at 1-2.

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Cohen suggested in a responding e-mail that the Goldman matter be calendared for January 14, "to be safe, unless you think that is too soon?" *Id.* at 1. Khuzami replied, "Too soon, and no real threat at this point that PSI is moving that fast. Plus, I will get the heads up when it is scheduled from an outside source." *Id.*

On January 5, 2010, Eric Spitler, Director of the SEC's Office of Legislative and Intergovernmental Affairs, wrote in response to this series of e-mails, "Just for information, the Senate will be in recess until January 19 so that week would be the earliest they would likely schedule a hearing." *Id.* That same day, Cohen, Khuzami, and Reisner agreed to calendar the Goldman matter for the January 28 Commission meeting. January 5, 2010 E-mail from Stephen Cohen to Lorin Reisner and Robert Khuzami, attached as Exhibit 65.

On January 7, 2010, the Enforcement Staff took the testimony of the Goldman Manager. HUB Report Excerpt for HO-10911, attached as Exhibit 66. Later that day, Muoio wrote in an e-mail, "Current pland [sic] is to calendar Abacus 2007-AC1 for January 28 with a view towards filing on Friday January 29 or Monday February 1, 2010." January 7, 2010 E-mail from Reid Muoio to [REDACTED], attached as Exhibit 67.

Muoio explained to Khuzami in a January 9, 2010 e-mail that the Enforcement staff had been receiving copies of documents produced to the Senate in connection with the Senate's upcoming hearings. January 9, 2010 E-mail from Reid Muoio to Robert Khuzami, attached as Exhibit 68. Muoio also informed Khuzami in this e-mail that Goldman's outside counsel was scheduled to meet with Senate staffers the week of January 25 to brief the Senate staffers. *Id.*

On January 15, 2010, Muoio informed Cohen, Khuzami, Reisner, and others in an e-mail: "According to outside counsel ..., Goldman has provided copies to the Senate of all documents provided to the SEC pursuant to a me-too request. Today we learned that Goldman is considering providing copies of our investigative transcripts." January 15, 2010 E-mail from Reid Muoio to Robert Khuzami, attached as Exhibit 69. Muoio confirmed that the particular Senate subcommittee receiving these documents was PSI. January 15, 2010 E-mail from [REDACTED] Sr Cnsl 2 to Reid Muoio and [REDACTED] Sr Cnsl 1 attached as Exhibit 70.

Khuzami responded to Muoio via e-mail, "I thought about this after our meeting last night, and the [Senate] inquiry may be one add'l reason to proceed with the case and Wells [the Goldman Manager] on parallel tracks, assuming that is the result we reach with [the Goldman Manager]." Exhibit 69.

Cohen responded to Muoio's e-mail, "We really need to bring this case on the 28th..." January 15, 2010 E-mail from Stephen Cohen to Reid Muoio, attached as Exhibit 71. Cohen testified that it is likely that he wrote this e-mail because of a possible upcoming PSI hearing, and also possibly because, if the Commission were unable to address the Goldman matter on January 28, there may have been very few meetings in the near future where there would be a full Commission. Cohen Testimony Tr. at 46-49.

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Muoio responded to Cohen's e-mail, "Agreed. We are meeting again to discuss the matter again on Tuesday 1/19 at 4:30 pm with Rob and Lorin and members of the Trial Unit." *Id.*¹³

Chief of Staff Nisanci responded to Muoio's e-mail about Goldman providing documents to the Senate by writing: "Right, so all the more important to bring the case." January 15, 2010 E-mail from Didem Nisanci to Stephen Cohen, attached as Exhibit 72. Cohen wrote in response to Nisanci, "We're pressing them to bring it at the next closed meeting on the 28th. There are some internal issues about which individuals to charge that they are working through. I'll let you know if that does NOT happen." *Id.* (emphasis in original). Davis then wrote in response, "For what it's worth, the soft touch intel we're getting from PSI is that they are not doing a hearing on this anytime soon." *Id.* Timothy Henseler, another Deputy Director in the Office of Legislative and Intergovernmental Affairs, concurred in an e-mail, "Which knowing PSI is almost certainly accurate given that they are just getting large volume of docs (they almost certainly wouldn't hold the hearing w/o going through them in some level of detail)." *Id.*

Later that day, Cohen wrote Muoio, "Feel free to share with ENF folks that the very soft intelligence our folks are getting is that PSI does not intend to do a hearing but rather an investigation and PSI is probably the most conscientious committee about safeguarding nonpublic information. That being said, we should still operate as if our 'stuff' may get out to the public before we want it to." January 15, 2010 E-mail from Stephen Cohen to Reid Muoio, attached as Exhibit 73.

On January 19, 2010, Muoio wrote to the Office of the Secretary: "We met again this afternoon with the Front Office to discuss [the Goldman investigation]. We would like to have our recommendation against Goldman and Tourre considered at the January 28 closed commission meeting and will get you a final action memo within the next day or to [sic]. We will then place Wells calls to [the Goldman Manager] and perhaps one additional individual defendant." January 19, 2010 E-mail from Reid Muoio to OS Staff 1 and Cheryl Scarboro, attached as Exhibit 74.

On January 22, Muoio suggested in an e-mail to senior Enforcement staff that the SEC file its complaint against Goldman on Friday, January 29, arguing that the "24-7 news cycle" makes irrelevant the SEC's traditional approach of avoiding filing significant Enforcement matters on a Fridays. January 22, 2010 E-mail from Reid Muoio to Cheryl Scarboro, attached as Exhibit 75; January 22, 2010 E-mail from Reid Muoio to Kenneth Lench, attached as Exhibit 76. Scarboro and Lench disagreed with this argument. In testimony, Scarboro denied that the SEC would "typically file our cases on

¹³ In contrast to the documents and the testimony described above, Muoio testified that he did not believe that the PSI inquiry would impact the SEC's Abacus investigation, and that it was "ridiculous" to suggest that his view of the timing of filing the Goldman action related to the PSI inquiry. Muoio Testimony Tr. at 68-69, 72. Muoio testified that he believed that the case against Goldman was ready to file in December 2009, and that he was interested in filing the case as soon as the SEC could do so. *Id.* at 67, 72-73.

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Fridays just because those aren't the best news days." Scarboro Testimony Tr. at 31. Scarboro clarified, "[T]here's a deterrent value in what we do ... there are certain days of the week that you're likely to get more coverage than others. So, that's all." *Id.* Lench testified that his own practice, historically, was not to file cases on Fridays, because he assumed that the Saturday newspapers were not going to be as widely read. Lench Testimony Tr. at 21. Asst Ch Lit Cnsl 1 testified that the SEC had a practice of not filing major actions on a Friday, because "you get more bang for the buck" in the news media by filing earlier in the week. Asst Ch Lit Cnsl 1 Testimony Tr. at 33-34.¹⁴

On Sunday, January 24, 2010, Cohen e-mailed Chairman Schapiro, "We have some good cases coming down the pike in the next couple of weeks. Goldman/cdo this week." January 24, 2010 E-mail from Stephen Cohen to Mary Schapiro, attached as Exhibit 77. Chairman Schapiro replied, "I am very anxious to get the GS case out." *Id.* Cohen then explained to Chairman Schapiro, "There is still a question about suing [the Goldman Manager]. I think the staff intends to wells him, but they will not wait to move forward." *Id.* Cohen testified that, based upon his conversations with Chairman Schapiro in January, Chairman Schapiro had been very disappointed the *New York Times* article made public the issues being investigated by the SEC, and that Schapiro "was anxious for us to bring a case, if we had one, so that our actions were part of the public discourse on it." Cohen Testimony Tr. at 58-59.

Later that Sunday night, Cohen asked Muoio via e-mail, "When would you file Goldman if approved?" January 25, 2010 E-mail from Stephen Cohen to Reid Muoio, attached as Exhibit 78. Muoio responded, "My preference is for this Friday morning. But others on the team prefer the following Monday." *Id.* Muoio further explained in a follow-up e-mail his preference for Friday, "[M]y view is based upon 1) a general sense that our age old preference for avoiding Friday filing dates does not make much sense in the Internet age where our audience at least is on a 24-7 news feed and 2) a more specific desire to file in advance of the annual conference of the American Securitization Forum which kicks off next Monday morning." *Id.* Cohen responded, "Thanks. I'll poll folks and let you know our thoughts." *Id.* Cohen then sent a follow-up e-mail to Muoio, "Any chance we can file Thursday afternoon?" January 25, 2010 E-mail from Stephen Cohen to Reid Muoio, attached as Exhibit 79. Muoio responded, "Works for me. You might want to check with Lorin." *Id.*

Cohen then e-mailed Reisner to ask if he wanted to file the Goldman matter on Thursday, January 28. January 26, 2010 E-mail from Stephen Cohen to Lorin Reisner, attached as Exhibit 80. Reisner responded that he preferred to file Monday, February 1, because he was not sure that the complaint against Goldman Sachs was ready to be filed. *Id.*; January 26, 2010 E-mail from Stephen Cohen to Myron Marlin, attached as Exhibit 81. Cohen wrote in a January 26, 2010 e-mail to Myron Marlin, the SEC's Director of Communications, that Cohen "flagged [for Lorin] the issue we discussed, and [Lorin] will discuss with Rob [Khuzami]." Exhibit 81. Cohen testified that he suspected that this "issue" was a belief by Marlin that, if the SEC waited until Monday, February 1, to file

¹⁴ As discussed below, the SEC ultimately did file its action against Goldman on a Friday (April 16).

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against Goldman, "the story would get out, and we wouldn't have control of the story ... with our press release and complaint. The press would get hold of it." Cohen Testimony Tr. at 56-57. Marlin denied recollection of what the "issue" referenced in Cohen's e-mail was, but testified that it was common for him to talk about not waiting to issue "big cases" over the weekend. Marlin Testimony Tr. at 17-18.

On January 26, 2010, ^{Asst Ch Lit Cnsl} [REDACTED] wrote in an e-mail to Muoio, "I hear the chairman wants to file [the Goldman action] Thursday [January 28], so you'll need to have someone standing by at the courthouse, I guess." January 26, 2010 E-mail from ^{Asst Ch Lit Cnsl 1} [REDACTED] ^{PII} [REDACTED] to Reid Muoio, attached as Exhibit 82.

On January 26, 2010, members of the Enforcement staff met with Commissioner Troy Paredes to discuss the matter. See January 25, 2010 E-mail from Reid Muoio to Cheryl Scarboro, attached as Exhibit 83. ^{LE} [REDACTED] discussed ^{LE} [REDACTED] of the case against Goldman, and expressed a desire ^{LE} [REDACTED] by Tourre and Goldman. ^{Sr Cnsl 1} [REDACTED] Testimony Tr. at 42-44; Scarboro Testimony Tr. at 35; ^{Sr Cnsl 2} [REDACTED] Testimony Tr. at 46-48; ^{Asst Ch Lit Cnsl 1} [REDACTED] Testimony Tr. at 38-39. As discussed below, ^{LE} [REDACTED] played a role in the staff's decision to postpone bringing to the Commission a recommendation to sue Goldman and Tourre.

E. After Removing the Goldman Matter From the January Commission Calendar in Order to Conduct Further Investigatory Work, the Enforcement Staff Rescheduled the Matter for the April 14, 2010 Commission Calendar

1. On January 27, 2010, the Enforcement Staff Removed the Matter from the Commission Calendar

On January 27, 2010, the day before the Commission meeting in which the Goldman recommendation was to be heard, Muoio sent an e-mail to Scarboro and Lench labeled as "urgent" stating, "Lorin is available right now through 12:00 noon to discuss whether or not to pull the recommendation from tomorrow's calendar, which he is inclined to do." January 27, 2010 E-mail from Reid Muoio to Cheryl Scarboro and Kenneth Lench, attached as Exhibit 84. A few minutes after Muoio's e-mail, Cohen sent an e-mail to the Office of the Secretary directing that the Goldman matter be pulled from the Commission Calendar, "at the request of the enf division. It will be rescheduled shortly." January 27, 2010 E-mail from Stephen Cohen to ^{OS Staff 1} [REDACTED] attached as Exhibit 85.

When asked by a colleague in the Division of Trading and Markets why the matter was pulled, Muoio wrote in an e-mail, ^{LE} [REDACTED] and then bring the case all at once." January 27, 2010 E-mail from Reid Muoio to ^{TM Supv} [REDACTED] and ^{Sr Cnsl 2} [REDACTED], attached as Exhibit 86. Similarly, when ^{Sr Cnsl 1} [REDACTED] was asked by a colleague why the matter was pulled, ^{Sr Cnsl 1} [REDACTED] replied, "We pulled to give time to ^{LE} [REDACTED]" January 28, 2010 E-mail from ^{Sr Cnsl 1} [REDACTED] to ^{DRO Atty} [REDACTED], attached as Exhibit 87.

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Khuzami testified that there were two reasons that the staff pulled the matter from the Commission Calendar in January: "first and foremost," to get a sworn statement from

Company 1

[REDACTED] in order to strengthen the SEC's case against Goldman; and secondly, to decide whether or not to charge the Goldman Manager. Khuzami Testimony Tr. at 21-22, 33-34; Exhibit 44 at 11. Khuzami testified that Commissioner [REDACTED] expressed [REDACTED] about the SEC staff's [REDACTED] theory against Goldman. *Id.* at 34. The Enforcement staff thought that greater consideration should be given to charging the Goldman Manager, [REDACTED]

[REDACTED]

[REDACTED]

LE [REDACTED] Lench testified that he recalled [REDACTED]

[REDACTED]

[REDACTED] Lench Testimony Tr. at 23. Lench also recalled there being discussions in January about whether to file the case against Goldman and Toure immediately [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 24. Lench testified that he did not recall feedback from the Commissioners concerning the Goldman Manager at this time, but that he may not have been privy to discussions that other people in the Division of Enforcement had with the Commissioners. *Id.* at 23-24.

Scarboro testified, "Although I don't remember specifically why we decided to pull [the Goldman matter] the second time, it's my recollection that there were again, issues relating to aspects of the recommendation having nothing to do with timing; and that's all I can tell you about that." Scarboro Testimony Tr. at 39. Scarboro also testified that both decisions to pull the Goldman matter related to whether [REDACTED]

[REDACTED]

Chairman Schapiro testified that she believed that the matter was taken off of the calendar in January because there was interest among other Commissioners not to bring the action in a piecemeal matter, but rather to bring the action against Goldman and all chargeable individuals at once. Schapiro Testimony Tr. at 12-13. As discussed above, Commissioner [REDACTED]

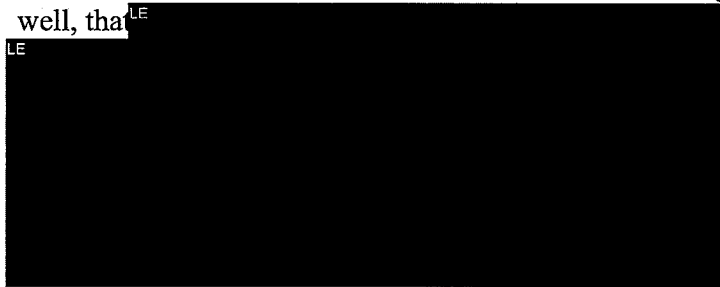
[REDACTED]

[REDACTED] shortly before the January 28 Commission meeting at which the Goldman matter was to have been formally considered.

Cohen testified that, although the Enforcement Division made the decision in January to pull the Goldman matter from the Commission Calendar, this decision was attributable to feedback from the Commissioners and their counsels. Cohen Testimony Tr. at 62-63. Cohen testified that there was a lot of discussion on January 26 and 27 among the Commissioners, Commissioners' counsel, and the Enforcement staff about the Goldman matter. *Id.* at 60. Cohen testified:

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I think each office had some questions, issues, or concerns that they were grappling with. And I think there developed a consensus by Wednesday morning, the 27th, that the Commission would benefit in putting this off until a later time. ... I think, to my recollection, ... what pushed us to agree to take it off the calendar was a view that there was a lot of questions about [the Goldman Manager] and whether there were going to be any other individuals. ... And a number of Commissioners believed, given that this was going to be a case receiving a lot of public scrutiny, we should go forward with our full or best foot ... I think there was some discussion about whether to Wells [the Goldman Manager]. ... And I think the conclusion – ultimately perhaps unanimous; if not, a majority view – was that we should really wait until we have the full case that we may bring. ... I remember at least two Commissioners – I don't remember which ones – thinking, well, that^{LE}



Id. at 60-62. Cohen testified that Chairman Schapiro shared with him a conversation she had with Commissioner^{LE} [redacted] which Commissioner^{LE} [redacted] the view that the SEC should not bring the case piecemeal, but rather, all together. *Id.* at 62. Cohen testified that he had conversations on this issue with counsels to other Commissioners as well. *Id.* Cohen testified that obtaining affidavits from^{Company} [redacted] was also an issue for the investigation at that time, but that the driving force behind the pulling of the Goldman matter from the Commission calendar in January was the feedback from the Commissioners^{LE} [redacted] *Id.* at 63-64.

2. The Enforcement Staff Took Further Investigative Steps and Analyzed a Goldman Manager's Potential Liability

The staff gave a Wells notice to the Goldman Manager on January 29, 2010. *See* February 16, 2010 E-mail from Reid Muoio to^{PII} [redacted] attached as Exhibit 88. The Goldman Manager made a Wells submission on February 24, 2010 and met with the staff on March 4, 2010. *See* Exhibit 44 at ii. The day after this Wells meeting, Khuzami and Reisner asked the Enforcement staff assigned to the investigation to prepare a memorandum analyzing the Goldman Manager's possible liability. March 5, 2010 E-mail from Lorin Reisner to Reid Muoio, attached as Exhibit 89. ^{Sr Cnsl 2} [redacted] testified that

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there were subsequent meetings among Khuzami, Reisner, and the Enforcement investigative team on this topic, and that there "was a phenomenal amount of thought and care put into the decision" whether to charge the Goldman Manager. ^{Sr Cnsl 2} Testimony Tr. at 62; *see also* ^{Asst Ch Lit Cnsl} Testimony Tr. at 39-40. Muoio testified that "the Front Office personally reviewed the evidence" as to whether or not to charge the Goldman Manager, and that it was clear that, "both Rob Khuzami and Lorin Reisner had spent quality time with the record." Muoio Testimony Tr. at 90-92.

In addition to the staff's work concerning the Goldman Manager, the staff also traveled to Germany in February 2010 to secure affidavits from ^{Company 1} and another entity that invested in the Abacus CDO. March 8, 2010 E-mail from Reid Muoio to ^{PII} and ^{ENF Atty 2} attached as Exhibit 90; Khuzami Testimony Tr. at 35-36. ^{LE}

3. After Concluding its Investigative Steps, the Enforcement Staff Rescheduled the Goldman Matter for the April 14, 2010 Commission Calendar

On March 23, ^{LE} informed the Enforcement staff assigned to the matter ^{LE} an action against the Goldman Manager. March 23, 2010 E-mail from ^{LE} to Reid Muoio, attached as Exhibit 92. The next day, Muoio asked the Office of the Secretary to reserve a spot on the Commission Calendar for April 14 to consider the Goldman matter. March 24, 2010 E-mail from Reid Muoio to ^{OS Staff 1} attached as Exhibit 93. On March 26, Muoio circulated, for review by other SEC divisions and offices, the Action Memorandum recommending that the Commission file an action against Goldman and Tourre. March 26, 2010 E-mail from Reid Muoio to Enforcement Action Memos, attached as Exhibit 94.

On April 1, the Enforcement staff submitted the Action Memorandum to the Commission recommending that the Commission file a civil action against Goldman and Tourre. Exhibit 44 at i. On April 8, in an e-mail circulating a draft complaint against Goldman, Muoio wrote that his group planned to send it to ^{Sr Cnsl 1} in New York to be filed "either the afternoon of Wednesday April 14 or morning of Thursday April 15." April 8, 2010 E-mail from Reid Muoio to Lorin Reisner, attached as Exhibit 95.

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4. **The SEC Staff Took Steps to Ensure that Pauline Calande, on a Detail to the Senate Permanent Subcommittee on Investigations from the SEC, Did Not Reveal Information Regarding the SEC's Investigation to the Senate**

On March 15, Pauline Calande, Counsel to the Director and Deputy Director of the Division of Enforcement, began a detail at PSI. Calande Testimony Tr. at 10. Prior to beginning this detail, on February 25, 2010, Calande sought advice from PII [redacted] regarding a potential detail for herself at PSI as to "any limits there may be on sharing info about completed and ongoing SEC investigations into the same subject matters." February 25, 2010 E-mail from Pauline Calande to Ethics Atty [redacted] attached as Exhibit 96. Henseler advised Calande in an e-mail later that day, "To the extent you have any non-public info about SEC investigations, I would think you would not be permitted to share that with them." February 25, 2010 E-mail from PII [redacted] Timothy Henseler to Pauline Calande and Ethics Atty [redacted] attached as Exhibit 97. Ethics Atty [redacted] also advised Calande that, as an SEC employee, she was subject to the nondisclosure provisions of the Securities Act. *Id.* Calande testified that it was made clear to her that she could not convey to PSI information she had about SEC investigations. Calande Testimony Tr. at 24-25.

On April 7, Calande wrote an e-mail to Muoio and Henseler stating that PSI was holding an April 27 hearing on Goldman's role in the financial crisis, would start interviewing Goldman witnesses on April 9, and was presently unaware of the SEC's Goldman investigation. April 7, 2010 E-mail from Pauline Calande to Timothy Henseler and Reid Muoio, attached as Exhibit 98. Calande also stated in this e-mail that she would like to disclose the SEC's Goldman investigation to PSI, because "PSI will learn of the SEC investigation on Friday anyway when the first witness comes in, but since time is short I wanted to see what you think." *Id.* Calande testified that she learned of the SEC's Goldman investigation prior to her beginning her detail at PSI. Calande Testimony Tr. at 12, 17-19.

Muoio forwarded Calande's April 7 e-mail to Lench, Scarboro, and Reisner, and wrote that, "we are shooting to file out[sic] litigated action against Goldman and Toure relating to ABACUS 2007-AC1 on or about April 14." Exhibit 98. Henseler forwarded Calande's e-mail to Khuzami, Cohen, SEC General Counsel David Becker, and others, stating that he planned to call Calande and tell her that, as was discussed prior to her taking the detail to PSI, all non-public information she obtained while at the SEC must remain non-public and that she could not disclose the fact of the SEC's Goldman investigation. April 7, 2010 E-mail from Timothy Henseler to Robert Khuzami, attached as Exhibit 99. Cohen expressed agreement with Henseler and stated that only the Commission has the authority to allow Calande to disclose non-public information to the PSI. *Id.* Reisner also expressed agreement with Henseler and stated that any such request from PSI had to come through formal channels. April 7, 2010 E-mail from Lorin Reisner to Timothy Henseler, attached as Exhibit 100. Henseler and Calande both testified that Henseler called Calande and told her that she could not tell PSI about the SEC's investigation. Henseler Testimony Tr. at 39-40; Calande Testimony Tr. at 35.

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Calande testified that she did not disclose any information to PSI about the SEC's Goldman investigation. *Id.* at 35-36. Calande also testified that she did not reveal any information about PSI's substantive investigation of Goldman to the SEC. *Id.* at 26-27.¹⁵

V. ON FRIDAY APRIL 16, 2010, THE COMMISSION FILED ITS COMPLAINT AGAINST GOLDMAN SACHS

A. The Commission Delayed its Filing Date from Thursday April 15 to Friday April 16

The Commission approved the filing of the Goldman action on Wednesday afternoon, April 14, in a 3 to 2 vote. April 14, 2010 Closed Commission Meeting Minutes, attached as Exhibit 105, at 5. As discussed below, the staff postponed its anticipated filing date of the Goldman action from April 15 to April 16, in order to avoid filing the action on the same day as another Enforcement action the Commission was bringing in tandem with the NYAG.

On April 12, 2010, the SEC learned that the NYAG planned to announce on April 15 a \$7 million settlement with Quadrangle for its alleged involvement in kickbacks relating to pension fund investments. April 12, 2010 E-mail from David Rosenfeld to Robert Khuzami, attached as Exhibit 106. An Associate Regional Director in the New York Regional Office informed Khuzami that the SEC staff could be ready to file its own proposed settlement with Quadrangle for similar alleged violations on the same day that the NYAG would announce its settlement. *Id.* Later on April 12, the SEC learned that the NYAG intended to announce its settlement with Quadrangle on Wednesday, April 14, instead of Thursday, April 15. April 12, 2010 E-mail from David Rosenfeld to Robert Khuzami, attached as Exhibit 107.

¹⁵ On other occasions during the Goldman investigation in 2010, the SEC staff took care not to share information about its investigation with PSI. On February 22, 2010, Senator Carl Levin, chairman of PSI, requested assistance from Rick Bookstaber, Senior Policy Adviser in the SEC's Risk, Strategy and Financial Innovation, in connection with PSI's inquiry of Goldman. February 22, 2010 E-mail from Timothy Henseler to [Ethics Atty], attached as Exhibit 101. Henseler testified that after discussing the issue with [Ethics Atty] Henseler informed PSI that Bookstaber would not be able to assist with PSI's inquiry of Goldman. Henseler Testimony Tr. at 28-29.

On March 18, Muoio informed senior Enforcement staff that PSI had contacted one of the purchasers of the Abacus CDOs concerning the purchase from Goldman. March 18, 2010 E-mail from Reid Muoio to Lorin Reisner and Kenneth Lench, attached as Exhibit 102. Muoio and Lench expressed an inclination not to contact PSI concerning Goldman until the SEC filed its complaint against Goldman. *Id.*

Shortly after the Goldman action was announced, Henseler wrote in an e-mail that he had received voicemails from PSI seeking a briefing as soon as possible concerning anything the SEC could say publicly about the Goldman investigation. April 16, 2010 E-mail from Timothy Henseler to Didem Nisanci, attached as Exhibit 103. The next day, Muoio wrote in an e-mail on this topic, "We've known about the PSI investigation for some time. But we have had no contact with them to date." April 17, 2010 E-mail from Timothy Henseler to Kenneth Lench, attached as Exhibit 104.

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Khuzami informed Chairman Schapiro that the SEC staff planned to file its settlement with Quadrangle on Wednesday at the same time that the NYAG announced its settlement with Quadrangle. April 12, 2010 E-mail from Robert Khuzami to Mary Schapiro, attached as Exhibit 108. The Chairman responded, "Let's make sure we don't announce Goldman same day." *Id.* Chairman Schapiro testified that the Quadrangle case was an important case for the NYAG, and an important case for the SEC as well. Schapiro Testimony Tr. at 17. Chairman Schapiro testified that she did not want to detract from the announcement of a Quadrangle case by announcing the Goldman case at the same time, and stated, "I was a little worried that the Attorney General would be very upset if we announced multiple cases in the same day." *Id.* at 17.

Cohen similarly testified that Chairman Schapiro did not want to file the Goldman complaint on the same day as the announcement of the Quadrangle settlement because: (1) "our goal is always to get our enforcement message out widely," and bringing two cases on the same day would lessen that and confuse the media's focus; and (2) Chairman Schapiro was concerned "that [New York Attorney General Andrew] Cuomo would take it that we brought Goldman on the same day, even though it wouldn't be true, to beat out his Quadrangle case," and that Cuomo "would be offended and angry." Cohen Testimony Tr. at 84-85. Cohen also testified that the staff was not ready to file the complaint on Wednesday, April 14, and that Reisner worked on the complaint throughout the rest of the week. *Id.* at 86, 88.

Khuzami testified that the SEC did not want both Goldman and Quadrangle announced on the same day because, from his perspective, of the overwhelming amount of briefing and other work involved for each matter. Khuzami Testimony Tr. at 45. Khuzami testified that, additionally, the SEC's Office of Public Affairs did not want the SEC to announce two significant cases on the same day because the press would be diluted, and because of the logistics involved in coordinating the publicity of the SEC's actions. *Id.* Khuzami did not recall being concerned that announcing Goldman on the same day as Quadrangle would upset the NYAG by Goldman upstaging Quadrangle. *Id.* at 45-46.

Khuzami acknowledged in testimony that there is a deterrent effect when the SEC announces an enforcement action and the action receives press coverage, and that, "the public taxpayers view it as ... their tax dollars are being used for the purposes for which they were intended." Khuzami Testimony Tr. at 86. [ENF Empl 1] also testified that the SEC has an interest in having their enforcement cases get press attention for the purpose of deterrence. [ENF Empl 1] Testimony Tr. at 12-13. [ENF Empl 1] stated that there is a benefit to the Enforcement Division for the SEC's public reputation to be a good one, and thus, it is important for the SEC to publicize its significant actions. *Id.* at 13-14, 23. [ENF Empl 1] testified that there was a particular interest on the part of the Enforcement Division to show that the SEC is working on and bringing matters related to the financial crisis. *Id.* at 21.

In Khuzami's response to Chairman Schapiro's April 12 e-mail about making sure that the SEC does not announce the Goldman action on the same day as Quadrangle,

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he wrote that the SEC would bring the Quadrangle action on Wednesday, and the Goldman action "likely" on Thursday. Exhibit 108. This anticipated schedule is confirmed by an e-mail sent by Cohen to Chairman Schapiro on the morning of April 13, in which he wrote that the SEC would file the Quadrangle action on Wednesday and the Goldman action on Thursday. April 13, 2010 E-mail from Stephen Cohen to Mary Schapiro, attached as Exhibit 109.

In the evening of April 13, Sr Cnsl 2 wrote in an e-mail to a trial attorney in the Division of Enforcement that Sr Cnsl 2 Muoio, and the other staff attorney assigned to the investigation preferred to file the Goldman action Thursday morning, but that he had not received word whether the action would be filed on Wednesday afternoon after the Commission meeting regarding Goldman, or on Thursday. April 13, 2010 E-mail from Sr Cnsl 2 to Asst Ch Lit Cnsl 3, attached as Exhibit 110. Late on April 13, Reisner, who had already provided comments on the draft complaint that day, informed Muoio via e-mail that he would have additional comments on the draft complaint, but would not be able to get the comments to Muoio until late at night on April 14. April 13, 2010 E-mail from Lorin Reisner to Reid Muoio, attached as Exhibit 111.

On the afternoon of April 13, the SEC learned that the NYAG had changed its schedule again, and that it now planned to announce the Quadrangle settlement on Thursday, April 15. April 13, 2010 E-mail from David Rosenfeld to Robert Khuzami, attached as Exhibit 112. Cohen testified that, once the NYAG moved the Quadrangle announcement date to Thursday, April 15, the SEC decided to delay the Goldman announcement until Friday, April 16. Cohen Testimony Tr. at 88. Cohen testified that he was "crystal clear" that the Goldman filing was delayed from Thursday until Friday because of the NYAG's decision to postpone its announcement of the Quadrangle settlement until Thursday. *Id.* at 90.

On the morning of Wednesday, April 14, Marlin wrote in an e-mail to John Nester, the Director of the SEC's Office of Public Affairs, that the Goldman action would be filed on Friday, April 16. April 14, 2010 E-mail from Myron Marlin to John Nester, attached as Exhibit 113. Marlin testified that, after a series of discussions, it was Chairman Schapiro who made the ultimate decision to file the Goldman action on April 16. Marlin Testimony Tr. at 22, 25, 29. Marlin testified that Chairman Schapiro thought that April 16 would be a better day for the SEC to file the Goldman action because the Quadrangle action was being announced on April 15, and Chairman Schapiro believed that announcing Goldman on the same day as Quadrangle would "ruin the relationship with Cuomo." *Id.* at 22. Marlin testified that, in his own view, announcing the Goldman action on the same day as the Quadrangle action and another SEC press conference would be "too much for the press to cover anything." *Id.* at 22-23.

Marlin recalled that "the only person I remember pushing back a little [against the decision to move the Goldman filing from April 15 to April 16] was Rob [Khuzami], because he thought that the [OIG] Stanford report would overshadow the Goldman case." *Id.* at 25. Marlin testified that his own concern regarding that issue was that the SEC would be criticized for bringing the Goldman action on the same day that the OIG's

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Report of Investigation No. 526, "Investigation of the SEC's Response to Concerns Regarding Robert Allen Stanford's Alleged Ponzi Scheme," ("OIG Stanford Report") was released. *Id.* at 27-28.

Khuzami testified that once the SEC learned that the NYAG had moved its Quadrangle announcement to Thursday, the SEC decided to file the Goldman matter on Friday. Khuzami Testimony Tr. at 49-50. Khuzami further testified that he believed the actual decision to file Goldman on Friday was made by the Office of Public Affairs, but with input from the Division of Enforcement. *Id.* at 53-54.

[ENF Empl 1] testified that it was his view to not wait until Monday, April 19, to file the Goldman action because of the risk of a leak to the media about the Goldman action. [ENF Empl 1] Testimony Tr. at 34. [Sr Cnsl 2] similarly testified that he was interested in filing as soon as possible to minimize the risk of leaks and resulting insider trading. [Sr Cnsl 2] Testimony Tr. at 66-67.

On Wednesday night, April 14, a few hours after the Commission had authorized the action, [Sr Cnsl 2] wrote in an e-mail to Muoio, Reisner, Lench, and others, "[F]yi – I understand the current plan is to file the [Goldman] complaint on Friday morning." April 14, 2010 E-mail from [Sr Cnsl 2] to Reid Muoio, attached as Exhibit 114. Lench forwarded this e-mail to [ENF Empl 1] and wrote: "Are you concerned we will lose press by filing Friday?" [LE] I don't know whose idea it was to file Friday, but I know we usually don't." *Id.* Lench testified that when he wrote that [LE]

[LE] a somewhat high-profile matter ... There is a risk when you go out in a very public way, where everyone is paying attention to a case you're filing. ... [LE] but if it's a real high profile case, [LE] and it's not good for the enforcement program.

Lench Testimony Tr. at 42.

Cohen expressed a similar concern in an April 11 e-mail to Chairman Schapiro, in which Cohen wrote that he and Marlin believed that holding a press conference for the Goldman action was a "double-edged sword." April 11, 2010 E-mail from Stephen Cohen to Mary Schapiro, attached as Exhibit 115. Cohen testified that they believed a press conference for the Goldman action could be a double-edged sword in that: on one hand, this could be viewed as a significant case arising out of the credit crisis that would warrant the wide audience of a press conference; on the other hand, however, some at the SEC believed that the public might view the SEC's case against Goldman as "not that big of a deal," because of the relatively small size of the transaction in comparison with the size of Goldman. Cohen Testimony Tr. at 81. Marlin testified that some people at the SEC believed that "this was a narrow case, that we could be criticized for bringing such a

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narrow case after a two-year investigation and that we could be accused of hyping it if we did a press conference.” Marlin Testimony Tr. at 21.

Upon learning on Wednesday night, April 14, that the SEC had decided to file the Goldman action on Friday instead of Thursday, Lench also asked [Sr Cnsl 2] and Muoio in an e-mail whose idea it was to file the complaint on Friday. April 14, 2010 E-mail from Kenneth Lench to [Sr Cnsl 2] attached as Exhibit 116. Muoio responded, “Front office. Just don’t know their thinking.” *Id.* Muoio testified that his recollection was that the SEC filed its action against Goldman on Friday, April 16, because the complaint against Goldman was not ready to file on Thursday. Muoio Testimony Tr. at 119-125. Muoio testified that he did not recall why he would not have known the Front Office’s thinking as to why the complaint was to be filed on Friday instead of Thursday. *Id.* at 128.

On Thursday morning, April 15, at 2:38 a.m., Marlin e-mailed a detailed timeline to Nester, Cohen, Khuzami, and [ENF Emp 1] of the anticipated events for the remainder of that week. April 15, 2010 E-mail from Myron Marlin to John Nester, attached as Exhibit 117. Events on this timeline included the SEC’s filing and announcement of the Quadrangle settlement Thursday morning, filing of the Goldman complaint Friday morning at 9:30 a.m., announcement of the Goldman filing at 9:45 a.m., and release of the OIG Stanford Report on Friday afternoon. *Id.* The Enforcement staff, including Reisner, continued to review and edit the complaint against Goldman Sachs on Thursday, April 15. See April 15, 2010 E-mail from [Sr Cnsl 2] to [Sr Cnsl 1] attached as Exhibit 118; [Sr Cnsl 2] Testimony Tr. at 68.

When [Sr Cnsl 1] went to the SDNY courthouse to file the SEC’s complaint against Goldman at 9:30 a.m. on Friday morning, April 16, he was told by the clerk at SDNY that he could not file the complaint because it was not [Sr Cnsl 1] name on the complaint, but that of another SEC attorney. [Sr Cnsl 1] Testimony Tr. at 60-62. This resulted in an approximately one-hour delay in the filing of the complaint, as Enforcement located another SEC staff member in the SEC’s New York Regional Office whose name was put on the complaint and who signed and submitted the complaint with SDNY. *Id.* at 62-63; Reisner Testimony Tr. at 75-76. A Financial Clerk at SDNY stated that SDNY’s electronic case assignment system indicates that the SEC’s complaint against Goldman was filed at the courthouse at 10:29 a.m. on April 16. SDNY Interview Memorandum at 1.

At 10:33 a.m. on April 16, the SEC issued its press release concerning its filing of the complaint against Goldman Sachs. April 30, 2010 SEC.gov Press Release webpage, attached as Exhibit 38.

After the Goldman action was publicly announced, Davis wrote in an e-mail to a Senator’s chief of staff, “Do you know how hard I was biting my tongue yesterday?” April 16, 2010 E-mail from Julie Davis to [PII] attached as Exhibit 119. The chief of staff responded, “You are the Sphinx!” *Id.* Davis testified that this referred to a conversation she had had with the Senator’s chief of staff on April 15 in which the

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chief of staff wanted to complain to Khuzami and Reisner that the SEC had not brought any big cases, yet Davis did not divulge the SEC's imminent action against Goldman. Davis Testimony Tr. at 25-26.

On April 17, in reaction to a press inquiry concerning suspicions that the timing of the Goldman action was coordinated with the White House, Khuzami e-mailed Nester, Reisner, Marlin and Cohen:

For the record, the timing was based on when we were ready to go (having previously pulled the case from the calendar a day or two before a closed meeting for further investigation) and when we had 5 commissioners – we learned a month ago that 4/14 was the only date around a few week span that that was the case.

April 17, 2010 E-mail from Robert Khuzami to John Nester and Lorin Reisner, attached as Exhibit 120.¹⁶ Cohen responded to this e-mail, "As the person responsible for the calendaring, that is not only true but documented. So, someone can feel very comfortable that there is literally evidence to demonstrate the timing of this was not politically motivated." *Id.*

B. The SEC's Action Was Released on the Same Day as the OIG's Report Concerning the SEC's Response to Concerns Regarding Robert Allen Stanford's Alleged Ponzi Scheme

At 1:57 p.m. on April 16, a few hours after the SEC filed its action against Goldman, the SEC publicly released a redacted version of the OIG Stanford Report, which contained criticisms of the SEC's response to concerns and allegations that Robert Allen Stanford's companies were conducting a fraudulent scheme. April 16, 2010 E-Mail from SEC NEWS, attached as Exhibit 121. In part because of coverage of the SEC's Goldman action, press coverage of the OIG Stanford Report was limited. *See, e.g., The SEC's Impeccable Timing*, The Wall Street Journal, April 20, 2010, attached as Exhibit 122.

Individuals both within and outside of the SEC have noted the suspicious timing of the SEC's announcement of the Goldman action and the Stanford matter on the same day. Friestad wrote in an April 19, 2010 e-mail:

I'm hearing that the Chairman's office is denying that there was any connection between the decision to file the case on Friday and the decision to release the Stanford IG report the same day. They had better be careful, because they may

¹⁶ Muoio testified that it was his understanding that, although it was not necessary to have all five Commissioners present to vote on routine matters, it was preferable to have all five Commissioners present to vote on Priority Cases. Muoio Testimony Tr. at 111.

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get asked for e-mail, etc. from Congress or pursuant to a FOIA request.

Exhibit 41. Friestad testified that he "assumed that it was not coincidental" that the OIG Stanford Report and the Goldman action were made public on the same day, but that he was not involved in decisions for either matter, and did not have knowledge that the timing of the two events on the same day was intentional. Friestad Testimony Tr. at 22-24.

OGC Atty [redacted] sent an e-mail to a personal friend on the day that the Goldman action was announced and the OIG Stanford Report was released, stating about these two matters, "What a coincidence that those two stories came out today. ;-)" April 16, 2010 E-mail from OGC Atty [redacted] to Friend [redacted] attached as Exhibit 123. OGC Atty [redacted] testified that his e-mail about the timing of the Stanford report and the Goldman action being a "coincidence" was based on purely his own speculation that the timing of the two releases "would be positive damage control for the Commission" in that the Goldman action and Stanford report were put out on the same day in order for the Goldman action to drown out media coverage of the Stanford report. OGC Atty [redacted] Testimony Tr. at 41-42.

These suspicions were likely fueled by the recent history of the SEC releasing OIG reports that criticized the agency on "slow" news days. As discussed in greater detail in Section IV. D. above, the SEC has long held the opinion that Friday is a traditionally slow news day and thus, did not file significant Enforcement actions on Friday, to ensure that it would receive maximum news coverage. The SEC released the OIG's 457-page Report of Investigation ("ROI") concerning the failure of the SEC to uncover Bernard Madoff's Ponzi Scheme after 5:00 p.m. on September 4, 2009, the Friday before a three-day holiday weekend. David Scheer and Joshua Gallu, *Madoff Scam Reached Family of SEC Official Whose Unit Got Tip*, Bloomberg, September 7, 2009, attached as Exhibit 124, at 1. The SEC then released the hundreds of exhibits supporting the OIG's ROI concerning Madoff late on Friday, October 30, 2009. Sarah N. Lynch, *Madoff: SEC Agent was a "Blowhard,"* The Wall Street Journal, October 31, 2009, attached as Exhibit 125, at 1.

In addition, the OIG ROI concerning the SEC's failure to vigorously pursue Enforcement action against W. Holding Company, Inc., and Bear Sterns & Co., Inc., was made public on Friday, October 10, 2008. *SEC Faulted Over Bear Probe*, The Washington Post, October 11, 2008, attached as Exhibit 126. Consistent with this pattern, on the same Friday that the OIG Stanford Report was publicly released and the Goldman action was announced, April 16, 2010, the SEC also publicly released the OIG's ROI concerning the SEC's failure to timely investigate allegations of financial fraud at Metromedia International Group, Inc., which had been submitted to the SEC by the OIG almost two months earlier. Peter Barnes, *SEC Inspector General Slams Agency, Again*, Foxbusiness.com, May 3, 2010, attached as Exhibit 127, at 1.

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The SEC has been criticized in the media for releasing OIG reports late in the day on Friday, and Gillan, who was involved in the SEC's redaction of the OIG Stanford Report prior to its public release, testified that she tried to get the OIG Stanford Report "out as soon as possible, but not on a Friday afternoon ... [b]ecause [Inspector General David Kotz] and I had a conversation about the fact that it's perceived very negatively in the public, that if we release things on Friday afternoons, that we're trying to hide them." *See, e.g.,* Exhibit 124; Exhibit 127; Gillan Testimony Tr. at 17-18. On April 16, when Marlin notified Gillan and others that the SEC's release of the OIG Stanford Report would be delayed from 1:30 p.m. to 2:30 p.m. that afternoon, Gillan responded in an e-mail: "Really? Are you comfortable w/how that's going to be portrayed (i.e., they had it ready but [held] it so it wouldn't make much news)? [Inspector General David] Kotz knows that the redacted version is prepared and ready to go out." April 16, 2010 E-mail from Kayla Gillan to Myron Marlin, attached as Exhibit 128.

In addition, as discussed in Sections IV. D. and V. A. above, and Section V. C. below, we have found that the decision on the timing of the press release concerning the filing of Goldman complaint was based at least partially upon maximizing press coverage and that ensuring positive press coverage was a consideration in deciding when to file and announce cases. *See* Calande Testimony Tr. at 32 ("[W]e do want to manage the press attention to our cases, because that is part of deterring securities law violations. ... [I]f we bring a good case we certainly want to get good publicity for it, and we're careful about how we announce them, and where and when ..."); Cohen Testimony Tr. at 84-85 "[O]ur goal is always to get our enforcement message out widely."); Scarboro Testimony Tr. at 31 ("[T]here's a deterrent value in what we do ... there are certain days of the week that you're likely to get more coverage than others."); Lench Testimony Tr. at 60 ("[W]e have to make the [enforcement actions] that we do pursue and then decide to file count. And I think that the public message is an important part of what the Commission does."); ENF Empl 1 Testimony Tr. at 12-13; Khuzami Testimony Tr. at 86.

Moreover, as discussed in Section V. A. above, at least some of the SEC staff was aware of the possible public impact of bringing the Goldman action and releasing the OIG Stanford Report on the same day, as Marlin testified that he was concerned that the SEC would be criticized for announcing both items on the same day. Marlin Testimony Tr. at 27-28.

Notwithstanding these suspicions, the OIG did not locate any concrete and tangible evidence in e-mails or in testimony that the filing of the Goldman report was specifically delayed to coincide with the issuance of the OIG Stanford Report.¹⁷ After the OIG submitted the OIG Stanford Report to the Chairman on April 1, 2010, the SEC staff undertook the process of redacting portions of the report before its public release, a task that appeared to proceed independently of the timing of the SEC's Goldman action.

¹⁷ Because the allegations prompting this OIG inquiry concerned the timing of the filing of the SEC's action against Goldman, this OIG investigation focused on decisions related to the timing of the release of the OIG Stanford Report to the degree that they impacted the timing of the filing of the action against Goldman.

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April 1, 2010 E-mail from Kayla Gillan to Mary Schapiro, attached as Exhibit 129. Gillan recommended in a March 26, 2010 e-mail to "promptly work to redact as necessary and publicly release," and on April 7, she reiterated that "Mary [Schapiro] is quite anxious to get this report released as soon as possible," and "no later than next Wed, April 14 (sooner would even be better)." March 26, 2010 E-mail from Kayla Gillan to Mary Schapiro, attached as Exhibit 130; April 7, 2010 E-mail from Kayla Gillan to OGC Atty [REDACTED] attached as Exhibit 131. OGC Atty [REDACTED] responded in an e-mail, "It will be tight, but I believe that we can accommodate this goal or come very close (i.e., Thursday, April 15th or Friday, April 16th)." *Id.*

On April 9, OGC Atty [REDACTED] sent an e-mail to all of the counsels to the Commissioners informing them that the Office of the General Counsel planned to circulate a seriatim Action Memorandum on Monday, April 12, seeking Commission authority by April 14 to release the OIG Stanford Report. April 9, 2010 E-mail from OGC Atty [REDACTED] to COMMISSION COUNSELS, attached as Exhibit 132. On Monday, however, OGC Atty [REDACTED] notified all of the counsels to the Commissioners via e-mail that, due to further consideration of certain redactions, the Action Memorandum would not be ready to circulate until Tuesday, April 13. April 12, 2010 E-mail from OGC Atty [REDACTED] to COMMISSION COUNSELS, attached as Exhibit 133. Marlin testified that, by April 13, a decision had been made to postpone the release of the OIG Stanford Report from April 14 to April 16 due to issues concerning the redaction of the report, and that after that point, the date of release for the OIG Stanford Report was "fixed" for Friday, April 16. Marlin Testimony Tr. at 27-28. The Action Memorandum seeking Commission authority to release the OIG Stanford Report was ultimately circulated to the Commissioners' counsels on April 14, and was not signed by all five Commissioners until Friday morning, April 16. April 14, 2010 E-mail from OGC Atty [REDACTED] to Barry Walters, attached as Exhibit 134; April 15, 2010 E-mail from OGC Atty [REDACTED] to Kayla Gillan and Stephen Cohen, attached as Exhibit 135; April 16, 2010 E-mail from Stephen Cohen to Myron Marlin, attached as Exhibit 136.

Khuzami testified that he was not aware of any discussion of the OIG Stanford Report in connection with reasons why the Goldman action was filed on Friday, April 16. Khuzami Testimony Tr. at 55. Cohen similarly testified that he never heard any discussion about the OIG Stanford Report in relation to the timing of the filing of the Goldman action. Cohen Testimony Tr. at 92. Lench testified that he did not recall anybody telling him that there was an interest in having the Goldman case filed the same day that the OIG Stanford Report was released. Lench Testimony Tr. at 40.

Furthermore, as discussed in Section V. A. above, there was testimony that SEC officials were not sure what the press impact would be of the filing of the Goldman case, and some actually feared it would be partially negative. Lench Testimony Tr. at 42. OGC Atty [REDACTED] but if it's a real high profile case, OGC Atty [REDACTED] and it's not good for the enforcement program."); Marlin Testimony Tr. at 21 ("we could be criticized for bringing such a narrow case after a two-year investigation"); Cohen Testimony Tr. at 81. In addition, as discussed in Section V. D. below, we found that there was nearly unanimous staff

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surprise at how much press coverage the filing of the Goldman case received, and there was testimony that Khuzami was actually afraid the Stanford report would overshadow the Goldman case. Schapiro Testimony Tr. at 20-21; Cohen Testimony Tr. at 82; Sr Cnsl 1 Testimony Tr. at 52; Sr Cnsl 2 Testimony Tr. at 79; Lench Testimony Tr. at 49, 69-70; Nisanci Testimony Tr. at 45; Spitler Testimony Tr. at 77; Henseler Testimony Tr. at 51; Kelley Testimony Tr. at 33; Marlin Testimony Tr. at 25, 52.

Accordingly, and as discussed in section V.A. above, the OIG has concluded that the SEC's decision to file the action against Goldman on April 16 was driven primarily by its desire to maximize press coverage by avoiding filing the action on the same day that it announced its settlement of the Quadrangle matter. In addition, although we found that the SEC has a history of releasing OIG reports critical of the agency on days that could potentially result in less press coverage, we did not find evidence in this case sufficient to establish that the SEC timed the Goldman filing intentionally or specifically to overshadow press coverage of the Stanford report.

C. The Enforcement Staff Did Not Notify Goldman Sachs of Commission Approval or Impending Action Until After Filing the Complaint in Court

Section B(15)(c) of Administrative Regulation SECR 18-2, Press Relations Policies and Procedures, states, in part:

Every effort should be made to avoid the possibility that defendants in an SEC enforcement action first learn of the action when they read about it in the newspapers or when they are called by a reporter for comment about the SEC's complaint. The division, regional or district office primarily responsible for the filing of a particular complaint shall take all necessary steps to see that the defendants and/or their counsel are given timely advice concerning the action.

While Nester testified that the Office of Public Affairs circulates its press policy, including SECR 18-2, to the Division of Enforcement staff on at least an annual basis, two members of the Enforcement staff responsible for bringing the Goldman action testified that they were not aware of the provision quoted above. Nester Testimony Tr. at 110-111; Sr Cnsl 1 Testimony Tr. at 70-71; Muoio Testimony Tr. at 151-152.

Muoio testified that on April 16, he left a message with the secretary for Goldman's outside counsel, Richard Klapper of Sullivan & Cromwell LLC, to give notice that the SEC had brought charges against Goldman and Toure and that the SEC had declined to charge the Goldman Manager. Muoio Testimony Tr. at 139. Muoio testified that he left this message, "around the time we filed, on the morning of Friday, April 16. ... I can't recall as I sit here whether or not it was a little before or a little after [the SEC filed its action against Goldman]." *Id.* at 138.

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Klapper testified that he was not notified by the SEC staff that the complaint was going to be filed prior to the filing of its complaint against Goldman. Klapper Testimony Tr. at 15. Telephone records for Klapper's telephone line at Sullivan & Cromwell LLC indicate that the first call Klapper received from the SEC on April 16 came at 10:39 a.m., ten minutes after the SEC filed its complaint against Goldman and seven minutes after the SEC issued its press release for the Goldman action. See August 9, 2010 Letter from Sharon Nelles to DIG Staff 2, attached as Exhibit 137.

Klapper testified that, after learning of the SEC's action against Goldman, he called Muoio and told him that "it was unprecedented, in my view it was contrary to decades of SEC experience that they would file without calling and giving an opportunity for the respondent to put a proposal on the table." Klapper Testimony Tr. at 28. Klapper testified that Muoio responded in this telephone call that "he had been told to call my office as soon as the action had been filed." *Id.* at 28-29.

Lench testified that, prior to filing the SEC's action against Goldman, he had a discussion with Muoio about whether to give Goldman notice that the staff was authorized to file an action against Goldman. Lench Testimony Tr. at 55-56. Lench testified that he was a proponent of giving notice to Goldman, because:

I had had a recent high-profile case where something similar had happened, where we thought we were most likely going to have to litigate a significant portion of the case. And, after we got authority from the Commission, we went back to the people who we were authorized [to file] against, and we ended up ... settling the entire case.

Id. at 56. Lench testified that he thought it was "extremely unlikely that there would be any settlement [with Goldman] ... But I do think, after you get authority, and they know it's going to be filed, that sometimes can change a party's thinking." *Id.* Lench testified that Muoio did not favor giving any advance notice to Goldman. *Id.* at 56-58. Lench testified that, as a result of this disagreement, Lench and Muoio spoke with Reisner on this issue, and the decision was made in that discussion with Reisner to notify Goldman simultaneously with the filing of the complaint. *Id.* at 57-58. Lench testified:

I feel like the decision was that ... we would be filed at the point when we let Goldman know. I don't want to say absolutely, because the instructions maybe were a bit vague as to exactly when we were going to notify counsel for Goldman of this. I know it was going to be around the time. But ... my impression coming out of [the discussion with Reisner] was that we weren't going to be giving Goldman a chance to put the brakes on filing.

Id. at 58-59.

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Reisner, in contrast, testified that he specifically told Muoio that it was important to give Goldman's counsel notice about the filing before it occurred, and that Muoio should give Goldman's counsel this notice a short time before the filing. Reisner Testimony Tr. at 82-85.

Lench testified that it was his practice, and that of many people at the SEC, to notify a defendant that the Commission had authorized the staff to file an action against the defendant. Lench Testimony Tr. at 53. Lench testified that "the main reason why you might want to do it is if you think there can be a settlement at the 11th hour." *Id.* Lench testified that, "from a programmatic standpoint, we need to enter into a certain number ... of settlements, because you don't want to be litigating everything, assuming that you can achieve the deterrence goals of the case. ... Generally, you always look for opportunities to settle." *Id.* at 54. Lench testified:

I have had matters where the people you're considering bringing the case against ... want to ... pursue every available avenue to get the case totally not authorized. So they don't want to give any hint that there is any weakness ... at that point. But after the Commission authorizes the case, there is sometimes an opportunity, even with somebody who has told you no, that [a settlement] could happen.

Id. at 55.

Friestad testified that it was a "general practice" of the SEC to inform defendants that they're going to be charged before filing an action. Friestad Testimony Tr. at 17. Friestad testified that, for cases that are not being coordinated with criminal authorities:

[W]here you've gone through the Wells process, someone's put in a Wells submission, you're generally going to provide the party with notice that the Commission has essentially rejected their arguments in the Wells submission and has approved the staff's recommendation, and that we're planning to go ahead and bring the case. So sometime between when the Commission authorizes the case and when you would file the case you would call the lawyers for the parties and let them know that.

Id. When asked what the purpose of giving such notice is, Friestad testified:

[I]t depends. Some cases you know are going to be litigated. Sometimes it's just a courtesy. In other cases, there are close factual or legal issues involved, and the party who made the Wells submission was hoping that their arguments would prevail. But, you know, from experience,

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that if those arguments, haven't been persuasive that they might be interested in settling the case. And so it's a chance to give them an opportunity to send those kinds of signals ... before having a contested case filed against them.

Id. at 17-18.

In an April 17 e-mail from McKown to Khuzami, McKown wrote, "[N]ormally we do give counsel a heads up that we are filing because we usually want to settle. ... I would note that if [Goldman] had wanted the meeting their counsel darn well knew how to ask for it and would have received it." April 17, 2010 E-mail from Joan McKown to Robert Khuzami, attached as Exhibit 138. Asst Ch Lit Cnsl 1 the Assistant Chief Litigation Counsel originally assigned to the Goldman investigation, testified that it was "pretty common" for the SEC to inform companies prior to filing an action, and that "I was surprised and I felt a little bad myself that maybe somebody including me should have perhaps raised the issue of giving Goldman a little notice that we were going to file."

Asst Ch Lit Cnsl 1 Testimony Tr. at 48.

Scarboro testified that, in most instances, entities are aware that the SEC is planning on bringing a filed action against them. Scarboro Testimony Tr. at 51-52. Scarboro also testified that, although she was not involved in the decision to not give notice to Goldman, she did not know anything about the facts of the Goldman matter that would lead her to conclude that she would not have provided notice to Goldman. *Id.* at 50-51.

Commissioner Casey testified that, prior to the SEC's filing of its action against Goldman, she was not aware that the SEC had not informed Goldman in advance that it intended to file an action against it. Casey Testimony Tr. at 10. Commissioner Casey testified that the notification of defendants by the staff that the Commission had authorized the staff to file an action "definitely had been the policy and practice historically with respect to trying to resolve cases," and that the lack of notification to Goldman "did appear to be a departure with how we have traditionally reached back out to a company when those decisions have been taken." *Id.* at 12-13.

Klapper testified:

[I]n my experience there is always a point, usually at the very tail end of the investigation, where a point is made to the respondent you should put something on the table because we're about to move forward. ... It was completely contrary to my experience as to how the staff handles these matters for them to file an action without first calling and indicating that a decision had been made.

Klapper Testimony Tr. at 19, 25-26.

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Cohen testified that it was "common practice" for the Enforcement staff to notify a defendant after the Commission authorized the staff to file an action against the defendant, but that "[i]t's certainly not a rule, and I've certainly been part of other cases ... where we didn't do that." Cohen Testimony Tr. at 97-98.¹⁸

Lench testified that one concern in notifying Goldman of Commission authorization in advance of filing was that:

Goldman is a pretty sophisticated player. ... [T]hey're good at the public relations game, and that ... [i]f you know that something is coming from the SEC, you can maybe take certain actions to ... precondition the reporters about the case, and maybe the coverage would not be as favorable, from the SEC's standpoint.

Id. at 59-60.

When asked why the SEC would be concerned about whether Goldman would have an opportunity to shape the story about the SEC's action before it was filed, Lench testified:

We are a relatively small group of attorneys conducting these investigations over a massive market, and that we need, when we bring an enforcement action, for there to be this general aura of deterrence regarding our actions, because there is no way we're going to identify all the violations occurring out there. ... So we have to make the ones that we do pursue and then decide to file count. And I think that the public message is an important part of what the Commission does.

Lench Testimony Tr. at 60. McKown testified that the benefit of the SEC being the first entity to announce a settlement is that:

[Y]ou can control the message that comes out with the case. If a case is – or settlement is, pre-announced, basically through a leak of some sort, either from defense counsel or some other source, the press is not as interested

¹⁸ Muoio, in contrast to the other Enforcement witnesses who testified to having a past practice on this topic, testified that his practice has always been, in an unsettled case in which there had been no settlement negotiations, to notify counsel for the defendant around the time that the SEC filed the case. Muoio Testimony Tr. at 140-141.

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in the story because it's not as newsworthy, and so you can't control how the message of the case is portrayed.

McKown Testimony Tr. at 39-40.

Similarly, ^{OPA} ~~Empl~~ testified that the SEC's Office of Public Affairs prefers that the first word about a new filing of an enforcement action by the SEC come from the SEC itself, "[p]rimarily so that we kind of shape the way that the action is covered. ... [W]e consider ourselves to be the best source of information about the action we're filing. ... [T]here's sometimes rumors out in the marketplace and sometimes they're wildly off the target." ^{OPA} ~~Empl~~ Testimony Tr. at 17-18. Nester testified that, from a press perspective, if the SEC is prepared to announce it and all other things being equal, he recommends that SEC actions be filed and announced as soon as possible after Commission approval, to preempt possible leaks of inaccurate information concerning the action. Nester Testimony Tr. at 45-47. Nester further testified that the prevention of leaks is "one of the considerations in the filing of any high-profile action," and that the more information that is leaked prior to the SEC's announcement of its action, "the more diluted the Commission's message is going to be." *Id.* at 146-147.

The day after the filing, reacting to the media raising the issue of notice to Goldman, Reisner wrote in an e-mail to Nester and Khuzami:

The "blindsided" whining is baseless. There were multiple opportunities for Goldman to pursue settlement. After the Wells notice (oral and written) was sent, there was a formal written Wells submission by Goldman – no mention of pursuing settlement. Goldman's counsel had numerous discussions with staff and a senior-level meeting in DC with Rob and me. No mention of pursuing settlement by Goldman. It was obvious that we were serious and planned to pursue charges. We gave them prompt (virtually simultaneous) notice of the filing of the complaint.

April 17, 2010 E-mail from Lorin Reisner to John Nester and Robert Khuzami, attached as Exhibit 139.

Khuzami wrote in another e-mail that day to Nester and Reisner concerning a similar press inquiry: "We don't solicit settlements; they had every opportunity to raise settlement from the point of the Wells notice until yesterday." April 17, 2010 E-mail from Robert Khuzami to John Nester and Lorin Reisner, attached as Exhibit 140.

On April 18, Khuzami wrote in an e-mail to Nester, Reisner and others:

They had every opportunity to raise settlement and chose not to. They attended a March mtg on [the Goldman Manager] and the seriousness of the matter was quite

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apparent. Every other counsel we have been involved with in a Wells process knows it is serious and conveys an intent to recommend charges and thus lets us know that settlement is an option, or asks for that heads-up if charges are imminent. ... I also don't like the internal dynamic that is created when, at the end of every Wells process, we reach out and say "do you want to settle?"

April 18, 2010 E-mail from Robert Khuzami to John Nester, attached as Exhibit 141.

Khuzami testified that Goldman's counsel called him a day or two after the filing of the Goldman complaint and "expressed displeasure about really not having a chance to settle the case." Khuzami Testimony Tr. at 57. Khuzami testified that he responded to Goldman's counsel that Goldman had many opportunities to settle the case. *Id.* Khuzami testified that the SEC had no reason to believe that Goldman was interested in settling. *Id.* at 59. Muoio testified that there had been no settlement discussions with Goldman prior to the filing of the SEC's action against Goldman, and that, "given the way the Wells Process went, it was clear that Goldman had no interest in settling the case." Muoio Testimony Tr. at 141-142. Klapper acknowledged in testimony that there were not any settlement discussions between Goldman and the SEC throughout the investigation, and that the possibility of settlement was not discussed at any of the Wells meetings relating to the Goldman investigation. Klapper Testimony Tr. at 8, 10-12. As discussed in Section IV. below, however, Goldman initiated serious settlement discussions with the SEC staff only a few days after the SEC filed its action against Goldman.

Khuzami testified that he did not think it was a good idea for it to become a standard practice for the SEC to notify an entity when the Commission has authorized filing an action against the entity, because:

[T]hen every defendant kind of knows they have a last chance. ... [T]hey can fight like hell and oppose, oppose, and they're always going to have one last clear chance to settle the case. I think appearance-wise it makes you appear like you're maybe a little weak, don't believe in your case. That's not to say that it's not appropriate in a lot of cases, maybe most cases. But I would want the opportunity not to have to do that.

Khuzami Testimony Tr. at 58-59. Similarly, Reisner testified that the decision whether to give notice to an entity that the Commission had authorized an action should be evaluated on a case-by-case basis, because, "[I]f practitioners assumed that there was always going to be an opportunity after Commission approval to come in and discuss and negotiate the terms of a possible resolution, there would be a disincentive by counsel to negotiate and reach settlements, resolutions, in advance of Commission authorization." Reisner Testimony Tr. at 79.

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Khuzami testified that he was not involved in or aware of any instructions given to Muoio about when to notify Goldman. Khuzami Testimony Tr. at 64-66. Khuzami testified that he assumed that the notification provision of SECR 18-2 had been complied with in connection with the Goldman matter. *Id.* When asked if it would concern him if in fact the Enforcement staff did not notify Goldman until after the action had been filed, Khuzami testified, "Yeah. Look, it should happen. I suppose if someone got it five minutes after rather than fifteen minutes before, I'm not sure that's of particular consequence. But as a general matter, we should be adhering to the policy." *Id.* at 64-65. The testimony continued:

- Q. Do you think generally it's a good idea in an enforcement case to notify a defendant prior to the case being filed, even if it's only a minute or two prior?
- A. Yeah. Yeah. I do.
- Q. Because of the courtesy?
- A. Just a courtesy. ... [W]e're not in the business of kind of gotcha, so I think that's right.

Id.

Reisner testified that, apart from emergency actions and actions in which there are a concern about the dissipation of assets, "I think it is good policy and should be the policy of the enforcement division, absent other countervailing reasons, to provide notice [to a defendant] in advance of the filing of an action." Reisner Testimony Tr. at 88.

Cohen testified that, in his opinion:

I actually don't think it's a good idea to have a practice that parties get an opportunity to settle after the Commission approves an action because I think that undermines the Enforcement Division's ability to have honest discussions about possible settlement in many instances beforehand. ... [I]t's like a second bite at the apple. If they know that they get to first see if the Commission approves the action and then they get a chance to settle, my personal opinion is that doesn't send a particularly good message because it undermines the ability of the Enforcement staff to have any impetus to settle. ... I think it's a discretionary issue. If the staff believes that it would be fruitful to engage in settlement discussions, I think it's a very good idea because it's always ... better to settle and not use the litigation

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resources if you can come to a good settlement. But as a general policy matter, to have a rule that you always call a company after and see if they want to settle, my personal view is that that would be a bad policy.

Cohen Testimony Tr. at 99-100.

The OIG found that the SEC staff did not comply with Administrative Regulation SECR 18-2, because it did not make "every effort" to notify Goldman of the SEC's action prior to filing the action. In light of the differing views expressed by Division of Enforcement management as to whether notice should be given to a defendant in advance of an SEC enforcement action, the OIG recommends that the staff consider whether this regulation should be revised.

D. The SEC's Decision to File the Action Against Goldman Sachs During Trading Hours With No Advance Notice to Goldman Sachs or NYSE Regulation Resulted in Market Volatility and Concerned the NYSE Employee NYSE Regulation

After the SEC filed its complaint against Goldman on April 16, Goldman's stock price dropped 13 percent from the prior day's close, the biggest one-day decline in its stock in over a year. Joshua Gallu & Christine Harper, *Goldman Shares Tumble on SEC Fraud Allegations*, Bloomberg News, April 16, 2010, attached as Exhibit 142, at 1. Implied volatility, a statistical measure that tends to rise along with uncertainty about the direction of a stock's share price, rose above 54% after the SEC's announcement, the highest it had been since July 2009. Deborah Levine, *Goldman Sachs Bonds Suffer Again on Fraud Fears*, MarketWatch, April 19, 2010, attached as Exhibit 143, at 2. In addition, the Dow Jones industrial average dropped more than 100 points after the announcement, and the Chicago Board Options Exchange Volatility Index spiked 18.6%. Miriam Marcus, *Market Crumbles After Goldman Fraud Charges*, Forbes.com, April 16, 2010, attached as Exhibit 144. Stocks of other financial companies declined as well. Exhibit 142 at 3.¹⁹

Khuzami testified that the SEC staff was surprised by the significant market impact upon the filing of the Goldman action. Khuzami Testimony Tr. at 66. Muoio testified, "[N]obody on the staff level predicted the impact the filing of the [Goldman] complaint would have on the market ... It was a shock I think to us all." Muoio Testimony Tr. at 148. Asst Ch Lit Cnsl 1 testified that "everyone, including Khuzami, was quite shocked at the stock market's reaction ... that [the Goldman action] had an impact as great as it did." Asst Ch Lit Cnsl 1 Testimony Tr. at 46-47.

Chairman Schapiro testified that she was "quite surprised" at how much media coverage the Goldman action received. Schapiro Testimony Tr. at 20-21. Cohen

¹⁹ For example, the stock of Bank of America Corp. and JPMorgan Chase & Co. each lost over four percent. Exhibit 142 at 3.

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testified that he and others at the SEC were surprised at the attention given to the Goldman case once it was announced. Cohen Testimony Tr. at 82. Many other witnesses in this investigation testified that they were surprised or "shocked" at the extent of the media attention given to the Goldman action. Sr Cnsl 1 Testimony Tr. at 52; Sr Cnsl 2 Testimony Tr. at 79; Lench Testimony Tr. at 49, 69-70; Nisanci Testimony Tr. at 45; Spittler Testimony Tr. at 77; Henseler Testimony Tr. at 51; Kelley Testimony Tr. at 33; Marlin Testimony Tr. at 52.

NYSE Empl PII of NYSE Regulation, Inc. ("NYSE Reg"), stated in an interview with OIG that on April 16 at approximately 10:45 a.m., he learned from a colleague at NYSE Reg that the SEC had filed an action against Goldman. NYSE Empl Interview Memorandum at 2. NYSE Empl stated that NYSE Reg called Goldman to find out more details, and Goldman informed NYSE Reg that Goldman had received no advance notice that a complaint filing was imminent. *Id.* NYSE Empl stated that he attempted to call Reisner at this time, because Reisner was listed as a contact on the SEC's press release for this action. *Id.* NYSE Empl stated that he was unable to reach Reisner, and that he either left a message with Reisner's administrative assistant or a voicemail for Reisner to call him. *Id.*

A few hours after the SEC's complaint against Goldman was filed, NYSE Empl wrote to ENF Supv 1 PII:

I know you spoke earlier to PII, but I just wanted to follow up to get your thoughts on whether it might be useful for the Exchange to have any follow up conversations with either Enforcement or the Office of Public Affairs at the SEC about how we can minimize the impact of announcements on market volatility.

April 16, 2010 E-mail from NYSE Empl to ENF Supv 1 attached as Exhibit 145.

ENF Supv 1 testified that he then had a telephone conversation with NYSE Empl in which NYSE Empl expressed, "concerns about the intra-day release by the Commission of the Goldman matter because, in his opinion -- which I didn't disagree with -- [the SEC action against Goldman] caused or may have added to excess volatility in the marketplace by doing an intra-day release of an enforcement case of this magnitude." ENF Supv 1 Testimony Tr. at 16. ENF Supv 1 testified that NYSE Empl was concerned both about the volatility effect on the price of Goldman's stock and about the broader market impact from an SEC action against a major company in the financial industry. *Id.* at 17. ENF Supv 1 testified that he agreed with NYSE Empl concerns. *Id.* NYSE Empl stated that ENF Supv 1 indicated in this phone call that NYSE Empl should speak to someone more senior at the SEC about this issue. NYSE Empl Interview Memorandum at 2.

After his telephone conversation with NYSE Empl, ENF Supv 1 then wrote in an e-mail to Reisner: "I just got off the phone with NYSE Empl, PII of the New York Stock Exchange. He was seeking someone to discuss the SEC policies of press releases and the

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impact of these on U.S. Marketplaces. I provided him with your contact information.” Exhibit 145. Reisner forwarded this e-mail to Khuzami and Cohen, and Cohen then forwarded these e-mails to Nisanci, Delfin, and Marlin, with the message, “Let’s discuss.” *Id.* Nester testified that he recalled Reisner expressing to Cohen that the SEC should discuss the issue raised by NYSE Empl with the NYSE. Nester Testimony Tr. at 114-115.

NYSE Empl also called OPA Empl PII of the SEC’s Office of Public Affairs, that day. NYSE Empl Interview Memorandum at 2. OPA Empl then sent an e-mail to Reisner stating that he spoke with NYSE Empl

NYSE Empl wants to talk with you and whoever else might be appropriate about the fact that the Goldman case has demonstrated that our enforcement actions can sometimes be market-moving. He and his staff were taken by surprise when they heard on the TV that there was a conference call going on about a major action against Goldman. ... He would like to discuss ways the SEC can work with NYSE to ensure that market-moving news involving SEC enforcement actions might be handled more along the lines that the NYSE handles this sort of thing in other contexts.

April 16, 2010 E-mail from OPA Empl to Lorin Reisner, attached as Exhibit 146. See also OPA Empl Testimony Tr. at 26.

NYSE Empl stated that Reisner never returned NYSE Empl telephone call from the morning of April 16, and that neither Reisner nor anyone else at the SEC got back to him concerning the matters he raised with ENF Supv 1 and OPA Empl NYSE Empl Interview Memorandum at 2-3.

Khuzami testified that he recalled NYSE Reg’s contact with the SEC on this issue and some subsequent internal discussion at the SEC about whether the SEC could give advance notice to the NYSE before filing an action. Khuzami Testimony Tr. at 66-67. Khuzami testified that there was potentially a confidentiality concern in notifying NYSE Reg, and that:

[W]e thought that this kind of market impact was sufficiently rare that I didn’t know that we needed necessarily to adopt a broad policy in this approach. So I think it just kind of -- I don’t remember it actually going anywhere. I don’t think any commitments were made or policies passed.

Id. at 67.

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Khuzami testified that he consulted with an individual in the Division of Trading and Markets concerning whether to notify the NYSE before announcing the proposed settlement with Goldman in July. *Id.* at 68. Khuzami testified that he and the individual in the Division of Trading and Markets decided not to provide advance notice to the NYSE, because they had no reason to believe that the settlement would have an impact on the securities market, and they believed that notice should be limited to other regulators who had an interest in the matter. *Id.* at 68-69.²⁰ Khuzami testified that he informed Chairman Schapiro that the SEC staff was not going to notify the NYSE in advance of announcing the proposed Goldman settlement. *Id.* at 69.

NYSE Empl stated that NYSE Reg considers whether to halt trading in the securities of a listed company when material news concerning that company is being disseminated. NYSE Empl Interview Memorandum at 1. NYSE Empl stated that NYSE Reg does not want trading in a company's securities to occur as the news is being disseminated for that company. *Id.* NYSE Empl stated that NYSE Reg likes to have trading in a company's stock halt from the point in time when nobody knows the news about the company, to a point when everybody knows the news, so that people who get the news early are not able to sell their stock earlier than those who did not get the news early. *Id.* He stated that a halt would typically last as long as it takes for the news about the company to be disseminated and absorbed. *Id.* He stated this process often takes less than fifteen minutes. *Id.* He stated that once it is clear that the media has put out the entirety of the press release containing the news about the company, NYSE Reg will allow trading to resume in the company's securities. *Id.* If there is an imbalance in the amount of buyers in comparison to the amount of sellers for the company's securities, NYSE Reg will wait until there is an equilibrium to start trading again. *Id.*

NYSE Empl stated that NYSE Reg tells listed companies that they should try their best to announce material news outside of the trading day. *Id.* NYSE Empl stated that, if the company needs to announce material news during the trading day, NYSE Reg asks for advance notice of the news from the company so that NYSE Reg can determine if the news is material and, thus, to halt trading at the appropriate time. *Id.* NYSE Rule 202.06(B) obligates companies listed on the NYSE to give advance notice of material news concerning the company. New York Stock Exchange Manual Section 2, attached as Exhibit 147, at 7. NYSE Empl stated that, to his understanding, the SEC did not typically give NYSE Reg advance notice of its actions. NYSE Empl Interview Memorandum at 2.

Lench testified that, after the SEC filed against Goldman, a senior officer in the Office of Compliance Inspections and Examinations called Lench and "sensitized" Lench to the issue of filing during trading hours. Lench Testimony Tr. at 71. Lench testified that this senior officer wanted "consideration to be given in high-profile market-moving types of cases, potentially to file it outside of trading hours because of the impact [the Goldman action] had on the market that day." *Id.* Lench testified that the SEC has an

²⁰ Although Muoio testified that he understood the SEC to have given advance notice to the NYSE prior to announcing the settlement with Goldman, this was not consistent with any of the other testimony in this investigation. Muoio Testimony Tr. at 148-150.

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interest in not getting information out in a disruptive fashion. *Id.* Lench testified that, in the future, to the extent he can, and all other things being equal, he will avoid filing a high-profile matter during trading hours. *Id.* at 72.

Friestad testified that he has informed the NYSE in advance of filing other Enforcement actions:

[I]t's important ... so that they're not caught flat-footed. ... It's something that I've done many times before. ... [I]f it's something that I think is going to get a fair amount of attention and scrutiny, that tends to be the types of factors I would consider in deciding to make that type of a call.

Friestad Testimony Tr. at 29-30.

Chairman Schapiro testified that, going forward, the SEC should think through, while considering the need for confidentiality, whether to inform the NYSE in advance of filing an action in certain circumstances and allow the NYSE to use the trading halt mechanism to maintain an orderly market. Schapiro Testimony Tr. at 25. Cohen testified that it made good sense to think about notifying the NYSE in advance of an action that might have significant market impact, but that he did not know all the implications, so he would not say definitively that the SEC should do so in all instances. Cohen Testimony Tr. at 108.

Reisner testified that, looking back, "maybe we should have given more consideration [to giving advance notice to NYSE] here, particularly in light of the press reaction and the market reaction." Reisner Testimony Tr. at 96. Reisner testified that the idea of notifying the NYSE in advance of filing an action should be considered, and that he would want input from the Division of Trading and Markets in considering this issue. *Id.* at 96-97. Reisner testified that confidentiality could be a countervailing consideration in whether the SEC should give advance notice to the NYSE before filing an action. *Id.* at 97. Muoio testified, "I think in hindsight we probably should have given [the NYSE] a heads-up [prior to filing the complaint against Goldman.]" Muoio Testimony Tr. at 148.

^{ENF Supv 1} testified that a halt in trading would give time for information about an SEC action to disseminate, limiting volatility. ^{ENF Supv 1} Testimony Tr. at 22. When asked if he was concerned about the volatility in the securities market that could be caused by the announcement of an SEC action or settlement, Khuzami testified:

[T]hose are things I'd rather not take into account. ... [T]hese decisions should be made based upon ... the merits. But on the other hand you can't really ignore that. You don't want to cause unnecessary harm or volatility. So

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I guess I don't really have an answer as to a general approach. I would look at it in particular circumstances.

Khuzami Testimony Tr. at 70.

Several individuals, within and outside the SEC, testified that, when possible, the SEC should take effort to file significant actions outside trading hours. [ENF Supv 1] testified that he himself was a "huge proponent of off-hours announcements" for major SEC action announcements. [ENF Supv 1] Testimony Tr. at 17-18. [ENF Supv 1] testified that "it should definitely be a consideration of Enforcement" whether to file during trading hours, stating that, in his opinion, "I just don't think we need to throw the excess noise in the marketplace unless that's your goal." *Id.* at 34.

[CBO Faculty] a member of the faculty of the Chicago Board Options Exchange's Options Institute who has written several books about trading options, stated in an interview with the OIG that announcing material information about a publicly traded company during market hours could lead to an "instantaneous overreaction" in the markets. [CBO Faculty] Interview Memorandum. [CBO Faculty] stated that announcing material information after the close of market hours allows time for the market to absorb the information and "establish a new equilibrium." *Id.*

[NYSE Empl] stated that he personally thinks that it would be better for the SEC to file its lawsuits against companies listed on the NYSE outside NYSE trading hours, and that others outside the NYSE would agree with him. [NYSE Empl] Interview Memorandum at 3. [NYSE Empl] stated that there is "after-hours" trading from 4:00 a.m. to 8:30 a.m. and from 4:00 p.m. to 8:00 p.m. on weekdays, but that there are fewer participants in the market during these hours, the market can be more volatile then, and people who trade during these hours appreciate that there are bigger risks in trading at these times. *Id.* [NYSE Empl] opined that "the real solution to this" is to get a trading halt set up in advance. *Id.* [NYSE Empl] stated that not all SEC actions are necessarily material, and that it can be a judgment call as to which actions are material, although the SEC's action against Goldman clearly was material. *Id.*

When asked whether he thought that the effect on the market or Goldman's stock should have been considered when the SEC decided to file the Goldman action during trading hours, Reisner testified, "[L]ooking back on the press reaction and the market reaction, I think that ... had we known [then] what we know now about the level of interest and reaction, additional consultation with trading and markets and others with market expertise couldn't have been a bad thing." Reisner Testimony Tr. at 99.

Cohen testified that it is worth thinking about the SEC filing actions outside trading hours, but that he does not know if it would be a good or feasible blanket policy, since courts are sometimes only open during market hours. Cohen Testimony Tr. at 138. Cohen testified:

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[I]n a way, we don't think classically about the effect on markets when we file actions because we're not looking to influence ... we were intentionally neutral about that; they were filed when they were filed. I think [the Goldman action] is a unique circumstance that showed there can be an effect on the market, and ... it's worth thinking about the question of whether, in certain circumstances, we ought to consider ... when it's appropriate to file an action.

Id. at 139.

Although the OIG found nothing improper in the SEC staff's decision to file its Goldman action during trading hours and to not give advance notice to NYSE Reg, the OIG is recommending that the Division of Enforcement give further consideration to whether, under certain circumstances, filing an action after trading hours or giving advance notice of an action to NYSE Reg or another self-regulatory organization is appropriate.

VI. ON JULY 15, 2010, THE COMMISSION FILED AND ANNOUNCED A PROPOSED SETTLEMENT WITH GOLDMAN SACHS

Settlement negotiations with Goldman began almost immediately after the SEC filed its complaint against Goldman. On April 19, 2010, Khuzami wrote in an e-mail to the Enforcement team: "Settlement possibilities have been raised; pls come prepared to think about terms." April 19, 2010 E-mail from Robert Khuzami to Asst. Ch. Lit. Cnsl. 1 attached as Exhibit 148.

Khuzami testified that, a few weeks prior to the July 15 settlement announcement, Goldman made it clear to the SEC staff that it wanted the matter settled: (1) prior to July 19, when Goldman's answer to the SEC's complaint was due in the SEC's civil action against Goldman; and (2) prior to July 20, when Goldman's quarterly earnings would be announced and at which point Goldman would have to take and announce an accounting reserve if no final settlement had been reached. Khuzami Testimony Tr. at 74-75. Khuzami testified that, at that point, "everybody was of the view that if we're going to get [the settlement] done it had to get done before those two dates." *Id.* at 74. Muoio testified that there was an effort to reach a settlement with Goldman before Goldman's earnings release date, at which point Goldman may have had to take an accounting reserve and make a disclosure relating to the possible settlement. Muoio Testimony Tr. at 145-146, 154-155. Lench similarly testified that the SEC wanted to have the settlement with Goldman by mid-July because of Goldman's upcoming earnings call from which "the reporters and the public would be able to glean what our settlement number was," and because of Goldman's deadline to answer the complaint. Lench Testimony Tr. at 78-79.

Chairman Schapiro testified that that the timing of the settlement filing was governed "a little bit" by Goldman's court deadline to answer the complaint and their

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scheduled quarterly earnings announcement. Schapiro Testimony Tr. at 27-28. Cohen similarly testified that the Enforcement staff wanted to file the proposed Goldman settlement prior to Goldman's answer deadline and prior to Goldman's announcement of its quarterly earnings, in which they would disclose that they needed to reserve \$550 million for a potential settlement with the SEC. Cohen Testimony Tr. at 118-119. Likewise, Nisanci testified that there was a concern expressed by Goldman in reaching a settlement before their earnings announcement on July 20. Nisanci Testimony Tr. at 60. Klapper also testified that Goldman wanted to reach a resolution of this SEC matter prior to Goldman's July 20 earnings release. Klapper Testimony Tr. at 31.

After continued settlement negotiations, on July 1, 2010, the Enforcement staff sent draft settlement papers to Goldman's counsel. July 1, 2010 E-mail from Karen Seymour to Kenneth Lench, attached as Exhibit 149. An early draft, circulated within the Enforcement Division by Muoio on July 2, of an Action Memorandum recommending acceptance of Goldman's settlement offer indicated that the Commission should consider the matter "on or before July 19, 2010, when [Goldman] must file a response to the Commission's complaint and/or July 20, 2010, when [Goldman] is scheduled to release [earnings]." Attachment to July 2, 2010 E-mail from Reid Muoio to Kenneth Lench and ENF Staff Ally [REDACTED] attached as Exhibit 150, at ii.

By early July, the SEC staff had set a plan to bring Goldman's settlement offer before the Commission on Thursday, July 15. A July 8 e-mail from Lench to Reisner and others, concerning issues to raise with Goldman's counsel in a telephone call that day, stated: "Timing - agree on final papers by Monday, board approval before Commission considers matter next Thursday." July 8, 2010 E-mail from Kenneth Lench to Lorin Reisner, attached as Exhibit 151. Nester testified that on July 9 he learned that it was "very likely" that a settlement offer from Goldman would be presented to the Commission the following week. Nester Testimony Tr. at 122-123.

The Enforcement staff circulated the Action Memorandum recommending acceptance of Goldman's settlement offer to the Commissioners on July 12. July 12, 2010 E-mail from OS Staff 2 [REDACTED] to Commission Counsels, attached as Exhibit 152. The final Action Memorandum, like earlier drafts, made clear that the staff sought a Commission Meeting on this matter "on or before July 19, when [Goldman] must file a response to the Commission's complaint and the day before [Goldman] is scheduled to release earnings, which likely will trigger a disclosure by the Company of the settlement amount." Attachment to July 12, 2010 Reid Muoio E-mail to Robert Khuzami, attached as Exhibit 153, at iii. Senior Enforcement staff held meetings with each Commissioner prior to the July 15 Commission meeting to brief them on the proposed settlement with Goldman. See July 12, 2010 E-mail from Cnsl 2 [REDACTED] to Luis Aguilar and Cnsl 3 [REDACTED] PII [REDACTED] attached as Exhibit 154; Reisner Testimony Tr. at 117; Cohen Testimony Tr. at 121. Cohen testified that it was not unusual to bring a matter before the Commission this quickly and that at least every week or two, a matter needs to be put on the Commission Calendar in a very short time frame. Cohen Testimony Tr. at 118. Commissioners Luis Aguilar, Walter and Paredes testified that they believed that they had an adequate amount of time to review Goldman's settlement offer prior to voting on

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whether to accept the settlement offer or not. Aguilar Testimony Tr. at 14; Walter Testimony Tr. at 11; Paredes Testimony Tr. at 13.

On July 14, the Enforcement Staff sent final versions of the settlement papers to Goldman's counsel for signature. July 14, 2010 E-mail from ENF Staff Atty to Karen Seymour, attached as Exhibit 155.

Also on July 14, *The Wall Street Journal* published an article on its website describing "discussions about a possible settlement to simultaneously resolve the fraud lawsuit against Goldman and some of the agency's lower-profile probes of the Wall Street firm's mortgage department." July 14, 2010 E-mail from Stephen Cohen to Myron Marlin, attached as Exhibit 156. Cohen remarked via e-mail to Marlin concerning this article, "Guess they got first crack at framing the story..." *Id.* Khuzami testified that he saw this article as coming from Goldman, and that he called Goldman's counsel to express that he was unhappy about the article because it inaccurately gave the impression that this settlement was also a settlement of several other SEC investigations of Goldman. Khuzami Testimony Tr. at 80-83.

Khuzami testified that one of the reasons that the SEC decided to file and announce the Goldman settlement almost immediately after Commission approval was a concern about leaks to the media such as those resulting in *The Wall Street Journal* article. Khuzami Testimony Tr. at 84. Khuzami testified that it was critical that the information being publicly released about an SEC action be accurate. *Id.* at 85. Lench testified that the primary reason that the SEC decided to announce the settlement quickly was "to beat leaks. ... [T]he more time that went by between the Commission approving it and filing the settlement, the more likely it was going to get out there." Lench Testimony Tr. at 82. Calande testified that the SEC wants "to file an action very quickly after significant [internal Commission] action is taken, so that there cannot be leaks and uneven information distribution." Calande Testimony Tr. at 51. Calande testified that the SEC wants to first reveal the information about a settlement rather than the information first being leaked in the news media, because the SEC wants the public information about the settlement to be accurate. *Id.* at 51.

Cohen similarly testified that one of the reasons that the SEC decided to announce the settlement quickly on Thursday, July 15, rather than wait until the next day, was, "If you wait until Friday and it leaks, then Goldman gets to control the story." Cohen Testimony Tr. at 125-126. Nester testified that there was "absolutely" concern at the SEC that Goldman would provide information to the media and spin the settlement in Goldman's favor. Nester Testimony Tr. at 130-132.

The Goldman settlement announcement coincided with the passage of the financial regulatory reform bill in the Senate. Khuzami testified that there may have been internal discussion at the SEC that the filing of the proposed Goldman settlement on the same day that financial regulatory reform was approved by the Senate might cause people to speculate that the timing between the two events was connected, even though it was not. Khuzami Testimony Tr. at 93. Khuzami testified that the SEC decided to keep to its schedule because it would have been inappropriate to delay the settlement because of this

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concern. *Id.* Marlin testified that, shortly before the SEC was to announce the proposed settlement with Goldman, he went to Chairman Schapiro's office to raise his concern that the SEC would be perceived poorly by announcing the proposed Goldman settlement on the same day that financial regulatory reform legislation passes in the Senate. Marlin Testimony Tr. at 51.

It was decided, however, to announce the settlement that day as originally planned, because if the SEC held the Goldman settlement filing and announcement another day, "people will then be able to say we held it because of reg reform." *Id.* at 51-52. Nester testified that on July 14, he, Marlin, and Cohen discussed the likelihood of criticism for announcing the Goldman settlement around the same time as the Senate vote on financial regulatory reform legislation, but that "we can't not do what we have to do because of something – and particularly when we can't control the events on the other side." Nester Testimony Tr. at 141-142. Similarly, Gillan testified that there was discussion that the timing of the proposed settlement filing would be criticized because of the financial regulatory reform vote that same week, but that Chairman Schapiro stated, "We don't time our cases or our settlements for anything external to our cases," and that, in order to be consistent with the principle of not timing cases or settlements due to external factors, the SEC could not move the date of the settlement filing. Gillan Testimony Tr. at 36-37.

Davis testified that she had a conversation with Spitler in which she noted that it appeared that the Goldman settlement would be announced around the same time as the Senate vote on financial regulatory reform legislation, and that Spitler responded that the SEC would not change the timing of the settlement "simply to avoid appearances, because then that would actually be changing because of political reasons." Davis Testimony Tr. at 40. Kelley testified that she had a conversation with Spitler in which, "I said we're going to get yelled at by Congress for this, and [Spitler] said that we can't stop it, speed it up, or slow it down because that would be then wrong." Kelley Testimony Tr. at 36.

Khuzami and Klapper testified that, prior to the announcement of the proposed Goldman settlement, Goldman expressed a desire to the SEC staff to not have the settlement announced during trading hours. Khuzami Testimony Tr. at 69; Klapper Testimony Tr. at 35. Khuzami testified that the SEC staff did not see a problem with accommodating that concern. Khuzami Testimony Tr. at 69. Cohen testified that the SEC decided to announce the proposed Goldman settlement after trading hours because:

[of] what we had observed with Goldman in April, and quite frankly, the markets were watching Goldman, including the litigation, closely. ... So there was a concern that bringing [the proposed settlement] after the close of the markets would allow the information to be equally distributed into the marketplace so that nobody would be advantaged by the information.

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Cohen Testimony Tr. at 112-113. Lench testified that the SEC staff decided to announce the settlement after market hours because it would be "less disruptive" to the securities market. Lench Testimony Tr. at 72, 85; *see also* ENF Empl 1 Testimony Tr. at 59. Marlin testified that Khuzami and Reisner informed him that the SEC would announce the proposed settlement with Goldman after market hours because "we feel like we should do that in this case." Marlin Testimony Tr. at 44-45.

The Commission approved the settlement in a closed Executive Session on the afternoon of July 15. Nester Testimony Tr. at 145; July 15, 2010 E-mail from Robert Khuzami to PII attached as Exhibit 157. Pursuant to a timeline circulated by Nester, at 3:15 p.m., a few minutes after the Commission approved the settlement, the SEC issued a press advisory announcing a press conference to be held at 4:45 p.m., without identifying the topic of the press conference. *See* July 15, 2010 E-mail from John Nester to Stephen Cohen, attached as Exhibit 158; July 15, 2010 E-mail from PII to OPA Empl attached as Exhibit 159. News articles noted an effect on the market from this press advisory, which was released before NYSE trading hours closed at 4:30 p.m.. An Associated Press article that afternoon noted: "Stocks have had a late-day turnaround on expectations that Goldman Sachs is settling civil fraud charges. The Securities and Exchange Commission has scheduled a late-afternoon announcement. The belief on trading desks was that the government and Goldman are settling charges." July 15, 2010 E-mail from John McCoy to ENF-ALL TRIAL ATTORNEYS, attached as Exhibit 160.

At 4:28 p.m., as the NYSE trading day was ending, the SEC released its public announcement of the settlement with Goldman. July 15, 2010 E-mail from SEC NEWS, attached as Exhibit 161. Muoio, in response to an e-mail forwarding an article about the "amazing late day surge" in Goldman stock, wrote: "Goldman's stock price moved in response to our press office announcing a 'significant event' after the close of trading today." July 15, 2010 E-mail from Reid Muoio to ENF Atty 1 attached as Exhibit 162. Another attorney wrote in response to Muoio's e-mail: "They announced that prior to the end of trading? Not too clever." *Id.*

Spitler testified:

I was aware that they were timing ... the announcement of the settlement after the market closed which did not make sense to me because the press advisory I believe went out before the market closed. ... [A]s soon as the press advisory went out, the conclusion that everybody on TV jumped to was that it would be a Goldman announcement.

Spitler Testimony Tr. at 74-75. Cohen testified:

Q. And so, do you think, in hindsight, maybe that was a mistake, and that even the announcement of the press

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conference should be after the market if you were going to try to deal with that issue of the effect on the stock?

A. Yes, apparently. I think it was done – the announcement of the press release was done very close to the end-of-the-market close. My recollection is that people didn't foresee that would have the effect that it did.

Cohen Testimony Tr. at 114.

Although the OIG found nothing improper in the SEC staff's decision to issue a press advisory prior to the closing of trading hours for the NYSE, the OIG is recommending that the Division of Enforcement consider issuing any related press advisories after trading hours close if the Division of Enforcement has decided to file and announce an enforcement action after the closing of trading hours to minimize the effect on the securities markets.

CONCLUSION

The OIG investigation did not find that the SEC's investigation of, or its action against, Goldman was intended to influence, or was influenced by, financial regulatory reform legislation. The OIG found that the investigation's procedural path and timing was governed primarily by decisions relating to the case itself, as well as concern about facts about the investigation's subject matter being publicized prior to the SEC filing an action and concerns about press coverage and maintaining a relationship with the NYAG.

The OIG also did not find that the settlement between the SEC and Goldman was intended to influence, or was influenced by, financial regulatory reform legislation. The settlement's timing was driven primarily by factors relating to the civil action against Goldman and Goldman's quarterly earnings release.

The OIG did not find that anyone at the SEC shared information about its Goldman investigation with any journalists or members of the media prior to the filing of its action against Goldman on April 16, 2010.

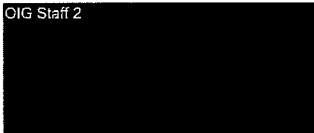
The OIG found that the SEC staff did not fully comply with Administrative Regulation SECR 18-2 by failing to notify Goldman of the SEC's action until after it had filed the action.

The OIG also found that this failure to give notice to Goldman in advance of filing its action against Goldman, in combination with the failure to give notice to NYSE Reg in advance of filing the action and the decision to file the action during market hours, resulted in an increase in volatility in the securities markets on the day of the filing.

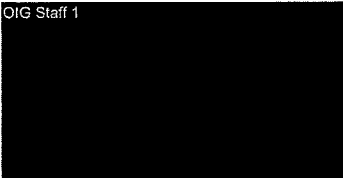
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The OIG is recommending that the Chairman and the Director of Enforcement:

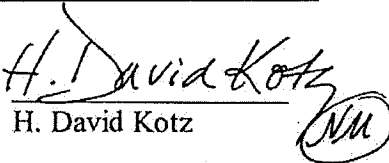

- (1) Give consideration to, and then communicate to the Division of Enforcement staff, the circumstances, if any, under which the Division of Enforcement should give notice to NYSE Reg or other self-regulatory organizations in advance of filing an enforcement action in which the defendant has not been given notice that an action is imminent;
- (2) Give consideration to, and then communicate to the Division of Enforcement staff, the circumstances, if any, under which the Division of Enforcement should file an enforcement action, and issue any related press releases or advisories, after the close of trading hours for the exchange on which the securities of the defendant entity trades; and
- (3) Give consideration as to whether Administrative Regulation SECR 18-2 should be revised, and to then communicate to the Division of Enforcement staff whether and in what circumstances advance notice should be given to defendants in an Enforcement action.

Submitted: 

Date: 

Concur: 

Date: 

Approved: 
H. David Kotz 

Date: 9/30/2010